Equitable Claims or Demands — Queensland District and Magistrates Courts, and the Western Australian Local Courts

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In Queensland the District Courts and the Magistrates Courts have jurisdiction to determine an equitable claim or demand against another person where the only relief sought is the recovery of a sum of money or damages, whether liquidated or unliquidated.[1] In Western Australia the Local Courts also have jurisdiction to determine an equitable claim or demand for the recovery of a sum of money or damages, whether liquidated or unliquidated.[2] The jurisdiction that these courts have to determine an equitable claim or demand is limited in accordance with the respective monetary limits of the courts.[3] The origin of the jurisdiction is not always fully appreciated. Some commentators have described the jurisdiction as "curious".[4] The significance of this jurisdiction has really only become apparent since some recent cases have been decided.[5] The continuing relevance of the jurisdiction has been recognised in recent reports of law reform agencies. The jurisdiction of the District Courts of Queensland to determine an equitable claim or demand has recently been restated.[6] The Law Reform Commission of Queensland had recommended the retention of this jurisdiction despite the uncertainty about the scope of this jurisdiction.[7] The Law Reform Commission of Western Australia has also recommended that the Local Courts continue to possess jurisdiction to determine an equitable claim or demand.[8]

1 See, *District Courts Act* 1967-1989 (No.42 or 1967) (Qld.), s.66(1)(a)(i) (see, Appendix A); *Magistrates Courts Act* 1921-1989 (12 Geo. V No.22) (Qld.), s.4(1)(a) (see, Appendix B).

2 See, *Local Courts Act* 1904 (No.51 of 1904) (W.A.), s.32 (see, Appendix C). See also D.R. Williams, 'Equitable Remedies in the Inferior Courts' (1977 Law Summer School, University of Western Australia); S. Owen-Conway, "The Equitable Jurisdiction of the Inferior Courts in Western Australia" (1979) 14 *University of Western Australia Law Review* 150.

3 *Queensland:* District Courts, $200,000; Magistrates Courts, $20,000. *Western Australia:* Local Courts, $10,000. The Law Reform Commission of Western Australia has recommended that the general jurisdiction of the court be increased to $15,000: see, *Report on the Jurisdiction, Procedures and Administration of the Local Courts* (1988), pp.54-55.

4 See, S. Owen-Conway, "The Equitable Jurisdiction of the Inferior Courts in Western Australia" (1979) 14 *University of Western Australia Law Review* 150 at 163; R.P. Meagher, W.M.C. Gummow & J.R.F. Lehane, *Equity-Doctrines and Remedies* (2nd ed., 1984), p. 62.

5 See, *Barbagallo* v. *J. & F. Catelan Pty. Ltd.* [1986] 1 Qd. R.245; *Dunlop Olympic Ltd.* v. *Ellis* [1986] W.A.R. 8.

6 See, *District Courts and Other Acts Amendment Act* 1989 (No. 40 of 1989) (Qld.), s.19. This provision commenced operation on November 1, 1989: see, proc., Vol. 292 *Q.G.G.* 1249 (October 21, 1989).

7 See, *Civil Jurisdiction of the District Courts of Queensland* (Q.L.R.C. R. 36, 1985), p. 12.

8 See, Law Reform Commission of Western Australia, *Report on the Jurisdiction, Procedures and Administration of the Local Courts* (1988), p. 36-38.

The Equity Procedure Act of 1873 (Qld.)

In *Barbagallo* v. *J. & F. Catelan Pty. Ltd.*[9] McPherson J. observed that the expression "equitable claim or demand" originated in s.1 of the *Equity Procedure Act of 1873*.[10] His Honour later remarked in *Re Blue Pines Pty. Ltd.*[11] that "the *Equity Procedure Act* was passed because of dissatisfaction at the cumbersome procedure which then prevailed in equity proceedings in Queensland".[12] This dissatisfaction is certainly evident from an examination of the relatively long preamble to the *Equity Procedure Act*.[13] The *Equity Procedure Act* is testimony to the learning and industry of Sir Samuel Walker Griffith, who was the draftsman and sponsor of this statute which was introduced whilst he was a private member.[14] A.D. Graham in his lecture on the life of Griffith remarked: "Should anyone desire to learn what he did in the way of Law Reform, he may look up any of the Acts in that behalf appearing between 1872 and 1892 inclusive, and correctly ascribe their merits to his care, knowledge and industry".[15] These remarks have particular relevance to the complex provisions of the *Equity Procedure Act* which reformed various aspects of equity practice. It has been remarked that "*The Equity Procedure Act of* 1873 was a rare instance in nineteenth century Australia of local innovation in the field of practice and procedure."[16]

Evidentiary reform

On June 12, 1873 Griffith moved the second reading of the Bill of the *Equity Procedure Act*. He regarded the "most important portion"[17] of the Bill as that which related to the taking of evidence in equity. In his second reading speech Griffith discussed the then existing practice of taking evidence before an examiner. He remarked:

> "Cross-examination of witnesses was another perfectly useless proceeding. The examination was conducted in a private room; the witness had as long as he pleased to answer; and any person acquainted with the administration of justice in other courts, must know how utterly impossible it was to get out the truth under such circumstances."[18]

This form of secret examination had ecclesiastical origins, and was derived from Chancery practice which existed at the time when Lord

9 [1986] 1 Qd.R.245 at 254.
10 37 Vict. No. 3 (Qld.). For a discussion of the *Equity Procedure Act of 1873*: see, The Hon. Mr. Justice B.H. McPherson, *The Supreme Court of Queensland 1859-1960* (1989), pp. 135-136.
11 [1988] 1 Qd.R. 13.
12 [1988] 1 Qd.R. 13 at 17.
13 See, Vol. III *Statutes in force in the Colony of Queensland* (ed., F.A. Cooper) (1881) p. 2955.
14 See, R.B. Joyce, *Samuel Walker Griffith* (1984), pp. 31-32, p. 369 (n.42). See also, Vol. 9 *Australian Dictionary of Biography* (1983), p. 113 (R.B. Joyce).
15 See, A. Douglas Graham, *The Life of the Rt. Hon. Sir Samuel Griffith* (1939), p. 48 (John Murtagh Macrossan Lecture, 1938).
16 See, McPherson, op. cit. (n. 10), p. 136.
17 See, Vol. 15 *Qld. Parl. Deb.*, p. 200 (June 12, 1873).
18 Ibid., p. 199.

Nottingham had custody of the Great Seal of England.[19] The practice had been condemned by Blackstone who observed that the "open examination of witnesses, *viva voce*, in the presence of all mankind, is more conducive to the clearing up of truth, than the private and secret examination taken down before an officer or his clerk".[20] Lord Cairns had described the practice as "absurd".[21] Under this procedure the judge who heard a cause did not have the advantage of observing the witnesses.[22]

Prior to Separation some reform to the equity practice of the Supreme Court of New South Wales had been achieved by the *Equity (Procedure Amendment) Act* 1853[23] which provided for a deponent to be subject to cross-examination and for the making of orders that deponents be examined before the court (ss. 28, 29). In 1861 General Orders had been made in England which made extensive provision for the cross-examination of deponents.[24] These General Orders had not been adopted when the Rules of the Supreme Court of Queensland were made in 1863. As Griffith remarked: "The rules here were established in 1863, but instead of adopting the new rules passed at home, the old practice was adopted and still remained."[25] The *Equity Procedure Act* made provision for a deponent or witness to be cross-examined before the court, and to require a party who proposed to read an affidavit to produce a witness at a hearing (s.85). The *Equity Procedure Act* also made provision for the parties to consent to oral evidence to be taken before an examiner; so that this procedure would be effective it was provided that the cross-examination of a witness would "immediately follow his examination in chief and his re-examination shall immediately follow his cross-examination" (s.83). The *Equity Procedure Act* also effected other improvements to the procedure of the Supreme Court in Equity. One important reform, which continues to have relevance, was in respect of equitable claims or demands for the recovery of a sum of money or damages.

Equitable claims or demands

The preamble to the *Equity Procedure Act* recited that the statute was passed to reform the procedure in respect of "equitable claims and demands sounding in debt or damages"[26] as well as giving "equitable jurisdiction to district courts in certain cases".[27] This was achieved by s.1 of the *Equity Procedure Act* which provided:-

19 See, D.E.C. Yale (ed.), *Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancer and Equity'* (1965), pp. 58-61.
20 See, 3 *Bl. Comm.* (1766), p. 373.
21 See, Vol.149, *Hansard's Parl. Deb. (3rd series)*, col. 1163 (April 15, 1858) per Sir Hugh Cairns (Solicitor-General).
22 See, J.M. Bennett, *A History of the Supreme Court of New South Wales* (1974), p. 100. As to the procedure for the examination of witnesses in Chancery: see, J.M. Bennett, *Equity Law in Colonial New South Wales 1788-1902* (University of Sydney, 1962), pp. 65-66.
23 17 Vict. No.7 (N.S.W.).
24 See, H. Jarman, *The Practice of the High Court of Chancery* (3rd ed., 1864), p. 147.
25 See, Vol. 15 *Qld. Parl. Deb.* p. 199 (June 12, 1873).
26 See, n.13 (ante.).
27 Ibid.

> "*Equitable claims for debt or damages may be sued for at law.* In all cases of which any person has an equitable claim or demand against any other person in respect whereof the only relief sought is the recovery of a sum of money or damages whether liquidated or unliquidated and which cannot now be enforced and prosecuted except in a court of equity the person seeking to enforce such claim or demand may sue for and recover the same by action in the Supreme Court or any District Court which if such claim or demand were enforceable in a court of common law would have jurisdiction in respect thereof and such courts respectively are hereby empowered to entertain and determine such actions."[28]

Section 1 of the *Equity Procedure Act* enabled the Supreme Court on the common law side, and a District Court to entertain and determine an action for an equitable claim or demand for a sum of money (and not merely a "debt" as recited in the preamble) or damages.[29] In such an action the common law rules of procedure, process, remedies and appeal were to apply.[30] The *Equity Procedure Act* also enabled an equitable claim or demand to be pleaded by way of set-off (s.3). A similar reform to that effected by s.1 of the *Equity Procedure Act* was in force in Ontario and later adopted in Manitoba before the introduction of the English Judicature system in those Provinces.[31] The Canadian legislation originated from s.2 of the Ontario *Administration of Justice Act of* 1873 which provided that "any person having a purely money demand may proceed for the recovery thereof by an action at law, although the plaintiff's right to recovery may be an equitable one only". This Ontario statute, it seems quite coincidentally, was enacted just prior to the passage of the *Equity Procedure Act* in Queensland. The Ontario reform, however, differed from the *Equity Procedure Act* by enabling the transfer of a suit to the Court of Chancery for Upper Canada.[32]

The Queensland and Ontario reforms were obviously intended to obviate difficulties caused by the fact that in some instances a suitor had to initiate separate proceedings in equity and then at law in order to obtain monetary relief. This is illustrated in *Kelly* v. *Isolated Risk and Farmers' Fire Insurance Co.*[33] in which it was held that s.2 of the Ontario *Administration of Justice Act of* 1873 enabled an action at law to be maintained on an interim receipt for a policy of insurance.[34] It was quite apparent that the reform enabled a court of law to grant monetary relief in a case in which a

28 See, Vol. *III Statutes in force in the Colony of Queensland* (ed. F.A. Cooper) (1881), pp. 2955-2956.

29 See, *Noagues* v. *Hope* (1874) 4 Q.S.C.R. 57; *Barbagallo* v. *J. & F. Catelan Pty. Ltd.* [1986] 1 Qd.R. 245 at 255-256 per McPherson J.; 265 per Thomas J.

30 See, McPherson, op.cit. (n.10), p. 135.

31 See, Ontario: Administration of Justice Act of 1873 (36 Vict. c.8), s.2; *Administration of Justice Act* R.S.O. 1877 c.49, s.4 (repealed by the *Ontario Judicature Act* 1881 (44 Vict. c.5). *Manitoba: Queen's Bench Act* S.M. 1886, c.14, s.1. See also, *Soules* v. *Soules* (1874) 35 Q.B. 334; *Bank of Hamilton* v. *Western Assurance Co.* (1876) 38 Q.B. 609; *Cole* v. *Bank of Montreal* (1876) 39 Q.B. 54; *Kavanagh* v. *Corporation of the City of Kingston* (1876) 39 Q.B. 415; *Kelly* v. *Isolated Risk and Farmers' Fire Insurance Co.* (1876) 26 C.P. 299; *Parkinson* v. *Clendinning* (1878) 29 C.P. 13.

32 See, *Leys* v. *Withrow* (1876) 38 Q.B. 601.

33 (1876) 26 C.P. 299.

34 In the particular case the declaration did not show facts that a binding contract was in existence as the statute of incorporation of the company provided that the company could only contract under seal.

plaintiff possessed an equity to the grant of equitable relief. The court rejected the submission of the defendant that the reform only enabled the court to decree specific performance and order the execution of a policy on which the plaintiff might afterwards sue at law. Harrison C.J. remarked:

> "If the Court of Equity on a bill for relief would do no more than direct the issue of the policy, there would be some weight in the argument. But now that the power of the Court directly to order the payment of the money on a bill for equitable relief is firmly established, there would be little use in the retention of the shadow where the substance itself is changed".[35]

Griffith in his second reading speech remarked that he "did not claim originality for that feature of the Bill"[36] which related to equitable claims and demands. He remarked that the provision was based upon the report of the Judicature Commissioners who recommended that a writ for a monetary demand, whether founded "upon a legal or equitable right", should be capable of being specially indorsed.[37] It is therefore clear from this speech that the jurisdiction conferred by s.1 of the *Equity Procedure Act* was not intended to be restricted to where a plaintiff had a claim in respect of a purely equitable obligation.[38] The report of the speech which is written in the third person contains the following passage: "He was not at all certain, however, that portion of it was not too much restricted."[39] Griffith read out the actual terms of s.1 of the *Equity Procedure Act*, and then remarked that it "would be in some respects a serious restriction".[40] Presumably, the restriction that Griffith adverted to was the fact that the jurisdiction conferred under s.1 of the *Equity Procedure Act* was limited to "the recovery of a sum of money or damages". The provision did not enable a court to directly grant an equitable remedy such as specific performance, an injunction, a declaration, or rescission.[41]

The distinction between a common law remedy and an equitable remedy was highlighted by Griffith in the following passage in his speech:

> "In a court of common law a man recovered so much money, or he did not. But in equity, complicated relief might be given, such as the adjustment of accounts between parties, injunctions, and similar orders."[42]

Griffith did not mention how the jurisdiction conferred under s.1 of the *Equity Procedure Act* might be exercised. He did not advert to the type of equitable relief that a plaintiff had to obtain in a court of equity before he could proceed at law to recover a monetary sum or damages. One thing is clear, the provision did not, in any respect, qualify or provide any limitation upon the equitable relief which had to be notionally decreed before

35 (1876) 26 C.P. 299 at 303.
36 See, Vol. 15 *Qld. Parl. Deb.* p. 200 (June 12, 1873).
37 See, *Judicature Commission — First Report of the Commissioners* (Command 4130, 1869), p. 11, cited by S.W. Griffith M.L.A., Vol.15 *Qld. Parl. Deb.* p. 200 (June 12, 1873).
38 Cf., S. Owen-Conway, "The Equitable Jurisdiction of the Inferior Courts in Western Australia" (1979) 14 *University of Western Australia Law Review* 150, at 165.
39 Vol. 15 *Qld. Parl. Debb.*, p. 200 (June 12, 1873).
40 Ibid.
41 Cf., *Opinion of J. Wickham Q.C. to the Stipendiary Magistrates' Institute of W.A.* (April 30, 1969) (I am indebted to D.R. Williams Q.C. for drawing my attention to this opinion).
42 Ibid.

such a monetary claim could succeed. This is apparent from the terms of s.1 of the *Equity Procedure Act* which referred to a claim for a sum of money "which cannot now be enforced and prosecuted except in a court of equity". This provision obviously conferred jurisdiction in respect of every equitable remedy which a court could notionally decree before a claim for a monetary sum or damages would succeed, e.g., account, delivery up and rectification of contracts, specific performance, declaration of trust, relief against forfeiture.

The Supreme Court of Queensland at the time of passage of the *Equity Procedure Act* had adopted the New South Wales practice of having a separate equity jurisdiction. The Supreme Court of New South Wales, as it was initially constituted, possessed jurisdiction to concurrently grant both legl and equitable remedies.[43] As the colony of New South Wales became more sophisticated the jurisdiction of the Supreme Court was reformed to reflect English practice. The creation of a separate equity jurisdiction of the Supreme Court was achieved by s.20 of the *Administration of Justice Act* 1840[44] which provided for the equity jurisdiction of the court to be vested in a judge who was referred to in later colonial statutes as the "Primary Judge in Equity".[45] In Queensland, there was legislative recognition that the New South Wales tradition of a separate equity jurisdiction was to continue after Separation. This was evident from s.68 of the *Supreme Court Constitution Act* 1861[46] which enabled general rules to be made in respect of the "common law, equitable, ecclesiastical or insolvency jurisdiction" of the Supreme Court of Queensland. Prior to Separation the Resident Judge at Moreton Bay had a special jurisdiction in an action where a sum or matter in dispute did not exceed £50; a colonial statute provided that : "in every such action every defence which would be good in Equity shall be available although not ordinarily cognizable at law and every demand properly cognizable in Equity only may be proceeded for in any such action".[47]

It has been observed that s.23 of the *Supreme Court Constitution Act* 1861 made provision for the appointment of a judge to deal with equity matters in Queensland.[48] However, an appointment could only be made under that provision "whenever there shall be more than one judge". At the time that the *Supreme Court Constitution Act* was passed Lutwyche J. was the only Judge of the Supreme Court of Queensland. An appointment of an Equity Judge could only be made after Sir James Cockle was appointed as the first Chief Justice of Queensland on February 21, 1863. The Chief Justice was soon after appointed as the Equity Judge on April 1, 1863.[49] A few years earlier C.W. Blakeney had informed a Parliamentary

43 See, K.S. Jacobs, "Law and Equity in New South Wales" (1959) 3 *Sydney Law Review* 83; J.M. Bennett, *A History of the Supreme Court of New South Wales* (1974), p.94. Cf., *Larios* v. *Bonany Y. Gurety* (1873), L.R. 5 P.C. 346, 356.

44 4 Vict. No.22 (N.S.W.).

45 See, e.g., 11 Vict. No.22, 11 Vict. No.27 (1847) (N.S.W.). For a discussion of the office of the Primary Judge in Equity: see, J.M. Bennett, *A History of the Supreme Court of New South Wales* (1974), pp. 96-99.

46 25 Vict. No.22 (N.S.W.)

47 20 Vic. No.25 (25 April, 1863). See also, McPherson, op. cit. (n.10), p.130.

48 See, A.C. Castles, *An Australian Legal History* (1982), p. 347.

49 Vol. 4 *Q.G.G.* No. 25 (25 April, 1863). See also, McPherson, op. cit. (n.10), p. 130.

select committee that it would be appropriate for a future Chief Justice to exercise jurisdiction in equity.[50] Section 23 of the *Supreme Court Constitution Act* was later repealed by s.7 of the *Supreme Court Act of 1863*[51] which expressly enabled the Chief Justice or a puisne judge to sit alone in equity. For some reason the Chief Justice's commission as the judge in equity was later preserved by s.38 of the *Supreme Court Act of 1867*.[52] The Chief Justice generally sat in the equity jurisdiction of the Court.[53]

The *Equity Procedure Act* was introduced during the passage in England of the *Judicature Act* 1873[54] which Griffith remarked "was not likely to pass this year".[55] As events later transpired the *Judicature Act* was enacted at the end of 1873, although the statute only commenced operation in 1875.[56] The English Judicature system was introduced into Queensland a year later upon the commencement of the *Judicature Act* 1876[57] which was passed upon the recommendation of the Civil Procedure Reform Committee.[58] The Queensland *Judicature Act* deviated in one essential respect from the English *Judicature Act*. The English *Judicature Act* constituted the High Court of Justice which acquired the jurisdiction of those courts, such as the Court of Chancery, which were thereon abolished. The Queensland *Judicature Act* enabled the Supreme Court of Queensland to concurrently administer legal and equitable remedies, the statute did not constitute a new court. Prior to the introduction of the Judicature system in England a reform analogous to s.1 of the *Equity Procedure Act* had been effected by s.83 of the *Common Law Procedure Act* 1854[59] whereby a common law court was empowered to give effect to an equitable defence.[60] From a comparative point of view it might be mentioned that in the United States reform was achieved in New York in 1848 by legislation abolishing the distinction between actions at law and suits in equity. This legislation was progressively adopted in other American States and Territories.[61] Also, the American courts of equity would not confine relief to the specific performance of an agreement, but would, in order to avoid delay and expense, proceed to grant a suitor final relief without requiring that party to proceed at law.[62]

50 See, *Report from the Select Committee on the Judicial Establishment* (1860), Minutes of Evidence, p. 13 (12 July, 1860), *V. & P. (Leg. Ass.)* (1860), p.499.

51 27 Vict. No. 14 (Qld.).

52 31 Vic. No. 23 (Qld.).

53 In 1869 Lutwyche J. informed a Parliamentary select committee that he sat in equity only in the absence of the Chief Justice from Brisbane or on circuit. See, *Progress Report from the Select Committee on the Administration of Justice in the Supreme Court* (1869), Minutes of Evidence, p. 11, *V. & P. (Leg. Ass.)* (1869, Vol.1), p.585. See also, McPherson, op. cit. (n.10), p. 130.

54 *Supreme Court of Judicature Act* 1873 (36 & 37 Vict. c.66) (Imp.).

55 See, Vol. 15 *Qld. Parl. Deb.*, p. 199 (June 12, 1873).

56 See, *Supreme Court of Judicature Act* 1875 (38 & 39 Vict. c.77) (Imp.), s.2.

57 40 Vict. No.6 (Qld.).

58 See, *Report of the Civil Procedure Reform Commission* (1876), *V. & P. (Leg. Ass.)* (1876, Vol.1), p. 775. See also, *The Civil Reform Act of 1872* (36 Vict. No.23) (Qld.).

59 17 & 18 Vict. c.125 (Imp.).

60 As to an equitable defence: see, *Mines Royal Societies* v. *Magnay* (1854) 10 Ex. 489, 493 (156 E.R. 531 at 533) per Parke B.

61 See, *Pomeroy's Equity Jurisprudence* (3rd ed., 1905), p. 42. Delaware retains a seperate Court of Chancery: see, H.A.J. Ford and W.A. Lee, *Principles of the Law of Trusts* (2nd ed., 1990), p. 15 (n.37).

62 See, e.g. *Tayloe* v. *Merchants Insurance Co.* (1850) 9 Howard U.S. 390, 404.

It is not entirely apparent from where the expression "equitable claim or demand" originated. Section 24 of the English *Judicature Act* contained various provisions which enabled "law and equity to be concurrently administered". Subsection (1), as is apparent from the marginal note to the provision, related to "equitable claims". It may have been from this provision that the term "equitable claim" was derived. That subsection provided:

> "If any plaintiff or petitioner claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim whatsoever asserted by any defendant or respondent in such cause or matter, or to any relief founded upon a legal right, which heretofore could only have been given by a Court of Equity, the said Courts respectively, [i.e., the High Court and the Court of Appeal] and every Judge thereof, shall give to such plaintiff or petitioner such and the same relief as ought to have been given by the Court of Chancery in a suit or proceeding for the same or the like purpose, properly instituted before the passing of this Act".

This subsection recognised that there may be circumstances in which a claim of a plaintiff would be dependant upon the grant of equitable relief, and hence be an "equitable claim". A plaintiff who sought rectification of a contract in an action would seek "relief upon any equitable ground against any . . . contract" within the meaning of subsection (1). Under the Judicature system a plaintiff may, in the one proceeding, claim damages for breach of a contract and also rectification of the contract which must be granted before a claim for damages would succeed.[63] Subsection (1) also provides that a plaintiff can obtain "relief founded upon a legal right, which heretofore could only have been given by a Court of Equity". In *Antrim County Land Building and Investment Co. Ltd.* v. *Stewart*[64] it was held that a corresponding provision in s.27(1) of the *Supreme Court of Judicature Act (Ireland)* 1877[65] enabled a second mortgagee to take ejectment proceedings against the mortgagor of land, although the first mortgagee, in whom the legal estate was vested, was not brought before the court. Palles C.B. remarked: "I hold that on the plain construction of the *Judicature Act* the plaintiff here is, by virtue of his equitable title, entitled to judgment in this action of ejectment, and is so entitled although the Land Commission, in whom the legal estate is, is not before the Court".[66]

The expressions "equitable demand" or "equitable debt" were used in the context of the jurisdiction of the Court of Chancery to grant a *ne exeat regno*.[67] The writ *ne exeat regno* is of some antiquity.[68] In *Genet* v. *Tallmadge*[69] Chancellor Kent remarked:

63 See, *Craddock Brothers* v. *Hunt* [1923] 2 Ch.136; *United States of America* v. *Motor Trucks Ltd.* [1924] A.C. 196; *Mason* v. *Island Air Pty. Ltd.* (1983) Q. Conv. R. 54-071, p.56, 431 per Macrossan J.

64 [1904] 2 Ir.R. 357.

65 40 & 41 Vict. c.57 (Imp.).

66 [1904] 2 Ir.R. 357 at 364.

67 See, *King* v. *Smith* (1741) Dick. 82 (21 E.R. 199); *Anonymous* (1741) 2 Atk. 210 (26 E.R. 530); *Cock* v. *Ravie* (1801) 6 Ves. 283 (31 E.R. 1053); *Jackson* v. *Petrie* (1804) 10 Ves. 16 at 165 (32 E.R. 807).

68 The history of the writ *ne exeat regno* was reviewed by Megarry J. in *Felton* v. *Callis* [1969] 1 Q.B. 200.

69 (1814) 1 Johns. Ch. 1.

> "The writ of *ne exeat* cannot be granted for a debt due and recoverable at law. As a general rule it is applicable only to equitable demands".[70]

Similarly, in *Glover* v. *Walters*[71], Sir Owen Dixon remarked in his discussion of the writ *ne exeat colonia*:

> "It is a prerogative writ used for the purpose of preventing a subject quitting the country without giving bail or security to answer a money claim of an equitable nature".[72]

This jurisdiction would only be exercised where there were circumstances present which would constitute an equity such as fraud or the liability to account.[73] The Court of Chancery would decline to issue a *ne exeat regno* where there was a "legal demand" for a sum for which the defendant would be held to bail.[74]

In one respect the reform introduced by s.1 of the *Equity Procedure Act* was at the time a revolutionary step to take; indeed, this provision has been described as the "most radical"[75] provision of the Act. The *Equity Procedure Act* enabled the Supreme Court in its common law jurisdiction, and a District Court to award monetary relief where such relief was dependent upon a plaintiff being granted a discretionary remedy which could formerly have only been granted by the Supreme Court in Equity. Equitable remedies are of their very nature discretionary remedies. As Sir Robin Cooke P. remarked in *Day* v. *Mead*.[76] "Equitable relief was said to be always discretionary".[77] A common law court in exercising jurisdiction under the *Equity Procedure Act* was, therefore, placed in the position where it had to make a preliminary decision as to whether a plaintiff was entitled to equitable relief before deciding whether there could be the award of a sum of money or damages. Until the enactment of the *Equity Procedure Act* such a question had not been within the province of a District Court. In *Noagues* v. *Hope*[78], Cockle C.J. rejected a submission from G.R. Harding[79] that the *Equity Procedure Act* should be narrowly construed because "the defendant loses the benefit of the discretion of the Judge".[80] This argument was rejected by Cockle C.J. who remarked: "I do not think that we should strain the words of the Act, because a benefit of a shadowy character might accrue to the defendant".[81] It is also somewhat anomalous that Griffith based his reform upon the recommendation of the Judicature Commissioners that enabled the entry of judgment by

70 (1814) 1 Johns. Ch. 1-2.
71 (1950) 80 C.L.R. 172.
72 Ibid.
73 See, *Jones* v. *Sampson* (1803) 8 Ves. 593 (32 E.R. 485); *Jackson* v. *Petrie* (1804) 10 Ves. 163 at 166 (32 E.R. 807). See also, *Ex p. Duncombe* (1774) Dick. 503 (21 E.R. 365) (writ declined where a party would not join with the plaintiff in an action).
74 See, *Pearne* v. *Lisle* (1749) Amb. 75, at 76 (27 E.R. 47 at 48); *Crosley* v. *Marriot* (1783) Dick, 609 (21 E.R. 408).
75 See, McPherson, op. cit. (n.10), p. 135.
76 [1987] 2 N.Z.L.R. 433.
77 [1987] 2 N.Z.L.R. 443 at 451.
78 (1874) 4 Q.S.C.R. 57.
79 G.R. Harding (later Harding J.), was at the time regarded as the foremost equity lawyer in the Colony of Queensland: see, McPherson, op. cit. (n.10) at 185.
80 (1874) 4 Q.S.C.R. 57 at 60.
81 Ibid.

default. The rules of court of the various jurisdictions which have adopted this reform do not enable judgment by default to be entered for a claim for equitable relief. The court still retains control over whether a plaintiff will be awarded an equitable remedy.[82]

Potential extent of jurisdiction

There are a number of instances where the *Equity Procedure Act* may have enabled the recovery of a monetary sum or damages in circumstances where the entitlement of a plaintiff to recover such a sum was dependent upon some equitable ground. The *Equity Procedure Act* would have had relevance in respect of the jurisdiction of a court of equity to grant an account.[83] In *Watson* v. *Holiday*[84], Kay J. described an account of profits as "an equitable claim for money had and received",[85] rather than damages. Another area was in the assignment of *choses in action*. At the time when the *Equity Procedure Act* was passed the assignee of a *chose in action*, though able to sue in equity in his own name, could only institute proceedings at law in the name of the assignor. The practice was for an assignee to have initially taken proceedings in a court of equity to obtain a decree that the assignee should be at liberty, on giving a proper indemnity, to use the assignor's name for the purpose of suing the debtor. The assignee would then, in the name of the assignor, have taken proceedings in a court of law to recover damages.[86] The English *Judicature Act* reformed this practice by, in s. 25(6) of the Act, enabling a debt or other legal thing in action to be assigned so as to vest in the assignee a legal right to such a debt or thing in action, and all legal and other remedies for the same. The corresponding provision which is now in force in Queensland is s. 199 of the *Property Law Act* 1974[87] which superseded s. 5(6) of the Queensland *Judicature Act*.[88] In *King* v. *Victoria Insurance Co.*[89] the Privy Council, in a Queensland appeal, did not dissent from the views expressed in the Full Court of Queensland as to what kinds of actions could be assigned under the *Judicature Act*.[90] In *Victoria Insurance Co.* v. *King*[91] Griffith C.J. had remarked that the reform effected by the *Judicature Act* "removes all formal difficulties which formerly stood in the way of the assignee, preventing him from asserting his substantive rights by action in his own name".[92]

In England, prior to the enactment of the *Judicature Act*, an assignee of an insurance policy was empowered under various statutes to directly sue upon the policy in the name of the assignee. The position under the general

82 See, B.C. Cairns, *Australian Civil Procedure* (2nd ed., 1985), p. 318.
83 See, *Jones* v. *Sampson* (1803) 8 Ves. 593 (32 E.R. 485); *Jackson* v. *Petrie* (1804) 10 Ves. 163 (32 E.R. 807).
84 (1882) 20 Ch. D. 780.
85 (1882) 20 Ch. D. 780, at 784.
86 See, *Torkington* v. *Magee* [1902] 2 K.B. 427, at 432-433 per Channell J.
87 No. 76 of 1974 (Qld.).
88 40 Vic. No. 6 (Qld.).
89 [1896] A.C. 250.
90 See also, *Torkington* v. *Magee* [1902] 2 K.B. 427, at 433 per Channell J.
91 (1895) 6 Q.L.J.R. 202.
92 (1895) 6 Q.L.J.R. 202 at 303.

law, as held in *Powles* v. *Innes*[93] was that a person who assigned an interest in a ship or goods after effecting a policy of insurance upon them, and before loss, could not sue upon the policy except as a trustee for the assignee. Later, the *Policies of Assurance Act* 1861[94] provided that an assignment of a policy of assurance to a person entitled in equity to receive and give a discharge for the moneys assured, gave the assignee a right to sue in his own name on the policy provided that due notice of the assignment was given to the assurance office (ss. 1, 3). In respect of marine insurance similar legislation enabled the assignee under a marine policy to sue in his own name.[95]

The reform achieved by the *Equity Procedure Act* would have enabled an assignee of a *chose in action* to maintain a suit in the name of the assignee provided that the subject matter of the assignment was properly assignable. An assignee under a policy of insurance would have been able to maintain an action at law by virtue of the *Equity Procedure Act* as such a claim could be properly characterised as an "equitable claim or demand". Similarly, a person in whose name a policy was taken out would also have been able to maintain a suit. There is some Canadian authority directly on this point. In *Bank of Hamilton* v. *Western Assurance Co.*[96] it was held that a person interested in the subject-matter of an insurance policy, to whom the insurance money on the face of the policy is made payable, and to whom the policy is delivered by the insurers could sue upon the policy under s.2 of the Ontario *Administration of Justice Act of* 1873. Harrison C.J. remarked: "It seems to me that such a demand may be rightly said to be purely a money demand, and the authorities show that it is such a demand as a Court of equity would enforce at the suit of the plaintiffs against the defendants".[97]

The *Equity Procedure Act* may also have had relevance in the area of legacies and residues. Section 23 of the *Supreme Court Act of* 1867, which conferred ecclesiastical jurisdiction upon the Supreme Court of Queensland, contained the following proviso:

> "Provided that no suits for legacies or suits for the distribution of residues shall be entertained save by the Supreme Court in equity".

Despite this proviso it would seem, however, that the *Equity Procedure Act*, a later statute than the *Supreme Court Act*, would have enabled a legatee to proceed at law in the Supreme Court to recover a legacy,[98] or for a person entitled under the *Statute of Distributions* to similarly sue at law for portion of the residue.[99] The *Equity Procedure Act* would also have enabled a District Court to entertain minor claims for a legacy or for portion

93 (1843) 11 M.&W. 10(152 E.R. 695).
94 30 & 31 Vict. c.144 (Imp.).
95 See, *Policies of Marine Insurance Act* 1868 (31 & 32 Vict. c.86) (Imp.), s.1. See also, *Lloyd* v. *Fleming* (1872) L.R. 7 Q.B. 299; *North of England Pure Oil-Cake Co.* v. *Archangel Maritime Insurance Co.* (1875) L.R. 10 Q.B. 249.
96 (1876) 38 Q.B. 609.
97 (1876) 38 Q.B. 609, at 613.
98 Cf., *Soules* v. *Soules* (1874) 35 Q.B. 334, 342.
99 The courts of equity took the view that an executor held personalty undisposed of upon trust for those entitled as upon intestacy under the *Statute of Distributions* where it was the intention of the testator to exclude him from benefit. See, W.A. Lee, *Manual of Queensland Succession Law* (1975), p. 174.

of the residue. There is also Canadian authority that the reform would have enabled a plaintiff to recover unpaid purchase money which in truth was not paid despite the existence of a deed of the plaintiff containing an acknowledgment of the receipt of the purchase money.[100] Another reform of relevance which was been mentioned is s.24(1) of the *Judicature Act* whereby equitable relief could be granted where such relief was founded on a legal right. It would seem that the *Equity Procedure Act* would have enabled such an action to be instituted provided that a plaintiff was seeking a monetary sum or damages.

It is clear that s.1 of the *Equity Procedure Act* was not restricted to where a plaintiff possessed what could be regarded as a "vested" equitable entitlement. In *Noagues* v. *Hope*[101], Cockle C.J. emphasised "that the words used are 'claim or demand', not 'right or title' ".[102] The Chief Justice later commented: "If it had been the intention of the legislature to restrict the operations of this clause to such cases as suits for the recovery of a legacy or an assigned deed, or an assigned bond for a penal sum[103] or a policy of insurance, the word "sought" would probably have been left out".[104] In *Noagues* v. *Hope*[105], it was considered that s.1 of the *Equity Procedure Act* should be given a beneficial construction. Cockle C.J. remarked that "it appears to be the intention of this Act to render equitable injuries cognisable as far as practicable in the District Courts".[106] The Chief Justice, therefore, appeared to accede to the submission of Griffith who appeared for the plaintiff, and who was in a somewhat unique position to speak on the intention of the Legislature in passing the *Equity Procedure Act*. Griffith had remarked *arguendo:* "The intention was to abolish the distinction in money cases between law and equity".[107]

The jurisdiction conferred upon the Supreme Court by the *Equity Procedure Act* was short-lived and had no operation upon the commencement of the Queensland *Judicature Act*. Consequently, there is scant authority from that era concerning the extent of the jurisdiction of the Supreme Court to determine an "equitable claim or demand". *Noagues* v. *Hope*[108] appears to be the only reported case in which the jurisdiction under s.1 of the *Equity Procedure Act* was invoked in the Supreme Court.[109] The material events in this case occurred before the passage of the *Equity Procedure Act* which was sponsored by Griffith. It has been observed that in reforming Queensland practice in equity "Griffith, who was not above reforming the law to meet his current problems in practice, may have had

100 See, *Parkinson* v. *Clendinning* (1878) 29 C.P. 13, at 18.
101 (1874) 4 Q.S.C.R. 57.
102 (1874) 4 Q.S.C.R. 57 at 60.
103 As to the jurisdiction of the Court of Chancery in relieving defaulting obligors from forfeiture of penalties due under bonds: see, A.W.B. Simpon, *A History of the Common Law of Contract* (1975), pp. 118-122.
104 Ibid.
105 (1874) 4 Q.S.C.R. 57.
106 (1874) 4 Q.S.C.R. 57 at 60.
107 (1874) 4 Q.S.C.R. 57, 59.
108 (1874) 4 Q.S.C.R. 57. For the background to this *cause célèbre*: see, C.T. Wood, "Hope, Buhot, Whish-Pioneers of the Queensland Sugar Industry" (1964) Vol. 54 (No.7) *Producers' Review* 23, p. 25; C.T. Wood, *Sugar Country* (1965), p. 5.
109 See also, *O'Keefe* v. *O'Keefe* (1875) *B.C.R.* Sept. 3, Sept. 6.

in mind the needs of particular litigation in which he was currently briefed".[110] This may be confirmed by the fact that the provisions in the *Equity Procedure Act* that related to equitable claims or demands were the first provisions in the Act.

Noagues v. Hope

The case of *Noagues* v. *Hope*[111] concerned the recruitment by an agent of Captain Louis Hope of Victor Nogues, a cane farmer from the French island of Bourbon in the West Indies, to cultivate sugar cane at Ormiston. The headnote to the report of *Noagues* v. *Hope*[112] states that the plaintiff made a claim for "damages for the non-performance of an agreement for the crushing of sugar cane cultivated by the plaintiff on land leased by the defendant to plaintiff".[113] The claim of the plaintiff was essentially a claim for damages for the breach of an unexecuted agreement of lease. The defendant had not formally executed a lease to the plaintiff in accordance with an agreement for a lease which was in the French language, and which had been executed by the plaintiff and the agent of the defendant. This was emphasised by G.R. Harding, counsel for the defendant, who remarked *arguendo*: "The foundation of this action is the refusal to grant a lease".[114] Although the plaintiff had taken possession of the relevant land, the absence of an executed memorandum of lease would have precluded the plaintiff from recovering damages in a court of law. Also, at this time it was clear that it would not have been open to the plaintiff to have recovered damages for a breach of the agreement to lease because such an action may only be maintained where all the essential terms of the lease are to be found in the agreement.[115] In this case it would almost certainly have been the case that the actual portion of Ormistion was not identifiable from the agreement, but was afterwards shown to the plaintiff by Captain Hope. Therefore, in these circumstances, the only recourse available to the plaintiff, if at all, was equitable relief.

In *Noagues* v. *Hope*[116], the plaintiff placed reliance upon the doctrine of part performance. Indeed the jury found as a question of fact that the agreement was partly performed by the plaintiff to the knowledge of the defendant.[117] This doctrine which is mainly associated with obtaining relief by way of specific performance was relevant in this case because equitable damages may be awarded in substitution for a decree of specific performance.[118] It should be mentioned that ever since the decision of Pollock C.B. in *Massey* v. *Johnson*[119] it has been settled that the doctrine

110 See, McPherson, op. cit. (n.10), p. 131.
111 (1874) 4 Q.S.C.R. 57.
112 (1874) 4 Q.S.C.R. 57.
113 Ibid.
114 (1874) 4 Q.S.C.R. 57, at 59.
115 See, *Chapman* v. *Towner* (1840) 6 M. & W. 100, 104 (151 E.R. 338, 340) per Parke B.
116 (1874) 4 Q.S.C.R. 57.
117 See, *Nogues* v. *Hope* (no.3), *Questions put to jury and answers thereto.* Q. 2 ("Was it partly performed by Plaintiff Noughes to the Knowledge of Dept. Hope — Yes"); May 14, 1874 (Q.S.A.). (In the papers the name of the plaintiff is spelt variously).
118 For a discussion of the relevance of the doctrine of part performance in regard to the award of equitable damages: see, P.M. McDermott, "Equitable Damages in Nova Scotia" (1989) 12 *Dalhousie Law Journal* 131, at 140-142.
119 (1847) Ex. 241 (154 E.R. 102).

of part performance does not enable a plaintiff to recover damages in an action upon a parol contract which is required to be in writing.[120] However, it is accepted that a plaintiff may be awarded equitable damages where a plaintiff possesses an equity to specific performance by virtue of the operation of the doctrine of part performance. Section 62 of the *Equity Act of* 1867,[121] which was derived from s.2 of the *Chancery Amendment Act* 1858 (*Lord Cairns' Act*),[122] conferred jurisdiction upon the Supreme Court in Equity to award equitable damages "in substitution" for the specific performance of an agreement. The relevance of this provision was recognised by Cockle C.J. who remarked that the case "was partially connected with s. 62 of the *Equity Act of* 1867".[123] It was held on demurrer that s. 1 of the *Equity Procedure Act* conferred jurisdiction to award damages in these circumstances. This case may have been one of the first reported decisions from the British Empire in which it was recognised that equitable damages under *Lord Cairns' Act* may be awarded in a case of part performance. This aspect of the jurisdiction to award equitable damages has been recognised in later decisions.[124]

Legislation derived from s.1 of the Equity Procedure Act

With the advent of the English Judicature system in Queensland, the jurisdiction conferred upon the Supreme Court of Queensland by the *Equity Procedure Act* to determine an equitable claim or demand no longer had any significance as the court could concurrently award legal and equitable remedies in the one suit.[125] The jurisdiction that was conferred upon the District Courts under the *Equity Procedure Act* was later restated as s.58 of the *District Courts Act* 1891.[126] The latter provision, however, differed from s.1 of the *Equity Procedure Act* in a minor respect by not containing the words "and which cannot now be enforced and prosecuted except in a court of equity". After the commencement of the Queensland *Judicature Act* these words were obviously surplusage as there was no longer a court exercising separate equity jurisdiction. Consequently, those words are not to be found in later enactments. In any event the omitted words would hardly have given s.1 of the *Equity Procedure Act* a more extensive jurisdiction.[127] Section 1 of the *Equity Procedure Act* was repealed by s.4 of the *District Courts Act* 1891.

120 There is a comparatively recent trend in the United States whereby damages have been awarded in actions of part performance where there is reliance on estoppel (*Wolfe* v. *Wallingford Bank & Trust Co.* (1938) 124 Conn. 507), or where there is a high standard of proof of the existence of a contract and where relief should be granted to discourage fraud (*Miller* v. *McCamish* (1971) 78 Wash. 2d 821).

121 31 Vic. No. 18 (Qld.). The full text of s. 62 of the *Equity Act of* 1867 (Qld.), which although repealed is still operative by virtue of the operation of a savings clause, is set out in the judgment of McPherson J. in *Barbagallo* v. *J. & F. Catelan Pty. Ltd.* [1986] 1 Qd. R. 245, at 251.

122 21 & 22 Vict. c. 27 (Imp.).

123 (1874) 4 Q.S.C.R. 57, at 59.

124 See, e.g. *Lavery* v. *Pursell* (1888) 39 Ch. D. 508, 518; *Price* v. *Strange* [1978] Ch. 337, 359.

125 Harding J. did not include the text of s.1 of the *Equity Procedure Act* in his *Acts and Orders of the Supreme Court of Queensland* (1885).

126 55 Vict. No.33 (Qld.).

127 See, Barbagallo v. J. & F. Catelan Pty. Ltd. [1986] 1 Qd.R. 245 at 265-266 per Thomas J.

The Magistrates' Courts of Queensland were created by the *Magistrates Courts Act* of 1921.[128] Section 4(1)(c) of the *Magistrates Courts Act* vested the Magistrates' Courts with jurisdiction to determine equitable claims or demands. At this time the District Courts were abolished and the District Courts' jurisdiction on the civil side in matters up to £200 was transferred to the newly created Magistrates' Courts.[129] This explains why the Magistrates Courts acquired jurisdiction to determine an equitable claim or demand. Upon the restoration of District Courts in 1959 the jursidiction of the courts to determine an equitable claim or demand was initially conferred under s.59 of the *District Courts Act* 1958[130], and was later conferred under s.68 of the *District Courts Act* 1967[131]. This latter provision was repealed by the *District Courts Act and Other Acts Amendment Act* 1989[132] which also conferred jurisdiction upon the District Courts to determine an equitable claim or demand. At present the District Courts have jurisdiction to determine an equitable claim or demand by virtue of s.66(1)(a)(i) of the *District Courts Act* 1967-1989.

In Western Australia the Local Courts were also vested with jurisdiction to determine an equitable claim or demand for a sum of money or damages under s.32 of the *Local Courts Act* 1904.[133] It is not entirely clear why the Local Courts were vested with jurisdiction to determine equitable claims or demands. The Parliamentary debates contain little discussion as to why this jurisdiction was vested in the Local Court. The Minister who was responsible for the passage of the Bill of the *Local Courts Act* through the Legislative Assembly remarked: "We have also given the court an equitable jurisdiction up to the £100 when the relief sought is the recovery of money or damages".[134] However, a few years prior to the enactment of the *Local Court Act* it had been held that a Local Court had no jurisdiction to award damages in respect of an oral agreement for lease where part performance was in issue.[135] This may have prompted the conferral of jurisdiction on the Local Courts to determine an equitable claim or demand for a sum of money or damages.

While not appearing to be derived from the *Equity Procedure Act* it might be mentioned that Wardens Courts in Queensland have for some time possessed jurisdiction to determine claims of an equitable nature. Section 103 of the *Mining Act of 1898*[136] provided that "every warden's court shall be a court of record, and shall have jurisdiction to hear and determine all actions, suits, claims, demands, disputes and questions which may arise in relation to mining". Section 80 of the *Mining Act* 1968[137] provided:

128 12 Geo. V No. 22 (Qld.).
129 See, McPherson, op.cit. (n.10), p. 313.
130 7 Eliz.II No.66 (Qld.).
131 No.42 of 1967 (Qld.).
132 No.40 of 1989 (Qld.). See also, *Civil Jurisdiction of the District Court* (Q.L.R.C. R. 36, 1985), Appendix, p.1.
133 No.51 of 1904 (W.A.).
134 See, Vol. XXV *W.A. Parl. Deb.*, p. 315 (Hon. R. Hastie, Minister for Mines and Justice) (September 14, 1904).
135 See, *Gummon* v. *Barter* (1899) 1 W.A.R. 58.
136 62 Vic. No.24 (Qld.).
137 No.5 of 1968 (Qld.).

"The jurisdiction of a Wardens Court includes jurisdiction to take cognizance of and determine with respect to all claims and interests both legal and equitable and in the exercise of its jurisdiction a Wardens Court shall have power to grant equitable remedies".

Section 10.20 (4) of the *Mining Resources Act* 1989[138] provides:

"The jurisdiction of a Wardens Court includes jurisdiction to take cognisance of and determine all claims and interests arising in any proceeding before it, both legal and equitable, and in the exercise of its jurisdiction a Wardens Court shall have power to grant equitable remedies".

Until the enactment of the *Mining Resources Act* it had been held that Parliament intended that complex questions of equity be determined in a warden's court, and that the jurisdiction of a Warden's Court to grant an equitable remedy, such as specific performance, was exclusive of the jurisdiction of the Supreme Court.[139] Under the *Mining Resources Act* a matter may be removed from a Wardens Court to the Supreme Court or a District Court.[140]

Restrictive interpretation of jurisdiction

There are a number of Queensland decisions which have taken a narrow view of the jurisdiction that a court possesses to determine an equitable claim or demand. One case concerns when the District Courts in Queensland did not possess jurisdiction to make an order for the rectification of a contract.[141] The Magistrates Courts of Queensland and the Local Courts of Western Australia do not have any jurisdiction to rectify agreements. In *Daly* v. *White*[142] it was assumed that a District Court would not have jurisdiction to entertain a claim for damages which was dependent upon the rectification of a contract. Macnaughton D.C.J. observed:

"In a Court possessing full equitable jurisdiction, the plaintiff might, under these circumstances, have been entitled to have the written contract, the sale note, rectified so as to express this, and to damages for its breach when rectified. See *Gordon* v. *Macgregor* (8 C.L.R. *per* Isaacs J., at p.324). But no such claim was made, nor if it had been made, could it have been entertained in this Court. A demand for a rectification of a written contract is a purely equitable claim, and so is outside the provisions of s.58 of *The District Courts Act of* 1891, which is confined to equitable claims or demands, whether liquidated or unliquidated."[143]

There are other Queensland decisions in which it was assumed that a court could not determine an equitable claim or demand which was dependent on the grant of equitable relief that could only be given by a superior court. One example is where a beneficiary claims a sum held by a trustee

138 No.110 of 1989 (Qld.).

139 See, *George Comanos & Associates Pty. Ltd.* v. *Fingold Resources Pty. Ltd. (No.1)* [1988] 2 Qd. R.631; *Graham* v. *Sulmin Co. (Australia) Pty. Ltd.* [1989] 1 Qd. R. 291; *Central Queensland Speleological Society Incorporated* v. *Central Queensland Cement Pty. Ltd. (No.1)* [1989] 2 Qd. R. 512, at 515-516, 533.

140 See, *Mining Resources Act* 1989, s. 10.23.

141 Queensland District Courts now possess a limited jurisdiction to rectify agreements: see, *District Courts Act* 1967-1989, s.66(1)(b)(iv).

142 [1911] Q.W.N. 1.

143 [1911] Q.W.N. 1, at 4.

on behalf of the beneficiary. In *Taylor* v. *Holmes*[144] It was held that a District Court could not grant relief to a beneficiary in respect of a minor sum that was held by a trustee.[145] O'Sullivan D.C.J. remarked:

> "The fact that this Court can give no relief as to the £30 in respect of which the defendant is a trustee for the plaintiff is an illustration of how limited is the equitable jurisdiction which is conferred on this Court by ss. 57 and 58 [of the *District Courts Act of* 1891]".[146]

In *Marsh* v. *Mackay*[147] the Full Court of Queensland held that a Magistrates' Court could not by virtue of the doctrine of part performance award damages for breach of an oral contract for the sale of land. Macrossan C.J. remarked:

> "The Magistrates Court has no jurisdiction to grant specific performance of a contract and therefore the present plaintiff was not entitled in the Magistrates Court to rely upon part performance of a parol agreement for the sale of land as a substitute for a signed note or memorandum in writing of the agreement."[148]

Similarly, Philp J. remarked:

> "In a court having appropriate equity jurisdiction to grant specific performance the plea of the Statute[149] may for certain purposes be met by proving operative part performance of the contract, and the magistrate in this case found that there was such a part performance which he apparently thought nullified the plea of the Statute.
>
> He failed to realise that the Magistrates Court is not such a court of equity as I have described, so that the equitable doctrine of part performance cannot be entertained in it."[150]

Macrossan C.J. and Philp J. relied upon *Foster* v. *Reeves*[151] in which it was held that the doctrine of part performance could not be invoked in the English County Court which did not have jurisdiction to decree specific performance. The English County Court did not possess any jurisdiction which is comparable to that conferred upon a Magistrates Court by s. 4(1)(c) of the *Magistrates Court Act* which, in any event, did not appear to have been relied upon by the plaintiff in *Marsh* v. *Mackay*, or any of the earlier Queensland decisions.[152]

There are a number of Australasian decisions concerning courts of limited jurisdiction in which it has been held that monetary claims which are dependent upon the grant of equitable relief could not be entertained in those courts. It has been held that a New Zealand District Court which had no jurisdiction to enforce specific performance of an executory agreement for a lease followed by possession could not entertain an action to recover rent.[153] In another New Zealand case it was held that a Magistrates Court

144 [1919] Q.W.N. 25.

145 Queensland District Courts now possess a limited jurisdiction to grant relief for the execution of a trust or make a declaration that a trust subsists: see, *District Courts Act* 1967-1989 (Qld.), s.66(1)(b)(viii).

146 1919 Q.W.N. 25 (p.32).

147 [1948] St.R. Qd. 113 42 Q.J.P.R. 126.

148 [1948] St.R.Qd. 113 at 124; 42 Q.J.P.R. 126 at 132-133.

149 i.e., *Statute of Frauds*. For the Queensland legislation: see, n.155 (supra).

150 [1948] St.R.Qd. 113 at 127; 42 Q.J.P.R. 126 at 136.

151 [1892] 2 Q.B. 255.

152 [1948] St.R.Qd. 113; 42 Q.J.P.R. 126.

153 *The New Zealand Express Co.* v. *Kettle* (1903) 6 G.L.R. 160.

did not have jurisdiction in respect of an action for damages that necessarily involved the rectification of an agreement.[154] It has been held that a Local Court of South Australia could not rely upon the doctrine of part performance in an action for rent where there was an agreement for lease.[155] These Australasian decisions are of limited value as precedents as they were decided in jurisdictions in which there was no legislation conferring jurisdiction in respect of equitable claims and demands sounding in a sum of money or damages.

Section 69 of the District Courts Act 1967 (Qld.)

Until recently the jurisdiction of the District Courts of Queensland to determine an equitable claim or demand was supplemented by s.69 of the *District Courts Act* 1967 which provided:

> *"Court to be deemed to have power to grant specific performance and rectification*
> 69. For the purposes of the last preceding section and for the purpose of applying the doctrine of part performance where a defence under the *"Statute of Frauds and Limitations of 1867"*[156] is relied on, a District Court shall be deemed to have jurisdiction to grant specific performance and rectification of a contract and all other powers and authorities of the Supreme Court in its equitable jurisdiction."

This provision originated from s.60 of the *District Courts Act* 1958 which was drafted by a committee which included Messrs. F.T. Cross and T.J. Lehane.[157] These gentlemen were barristers of some seniority and writers on Queensland practice. These practitioners would have included s.60 in the 1958 Act to ensure that the precedents in which there was a restrictive interpretation of the jurisdiction to determine an equitable claim or demand would no longer be of any relevance.[158] In *Barbagallo* v. *J. & F. Catelan Pty. Ltd.*[159] Thomas J. observed "that the series of cases which held that a District Court could not entertain a money claim if the application of equitable principles such as part performance, specific performance, or rectification were necessary before the plaintiff could succeed, bears upon the present point".[160] His Honour later remarked: "Seemingly it was to correct this undesirable situation that s.60 was included in the 1958 *District Courts Act* and s.69 in the present Act".[161]

Section 69 of the *District Court Act* 1967 was repealed by the *District Court Act and Other Acts Amendment Act* 1989 which conferred a limited equitable jurisdiction upon the District Courts in accordance with recommendations of the Law Reform Commission. The equitable

154 *Taranaki Hospital Board* v. *Brown* [1941] N.Z.L.R. 586.
155 *Moore* v. *Dimond* [1929] S.A.S.R. 274. Cf., *Douglas* v. *Hill* [1909] S.A.S.R. 28.
156 31 Vict. No.22 (Qld.). See now, *Property Law Act* 1974-1990 (No.76 of 1974) (Qld.), ss.3(4), 6(d), 59.
157 See, Vol.222 *Qld. Parl. Deb.*, p. 1688 (Hon. A.W. Munro M.L.A., Minister for Justice and Attorney-General) (November 27, 1958).
158 See, F.T. Cross & S.D.R. Cook, *Queensland District and Magistrates Court Practice* (1961), p.58; I. McG. Wylie, *The Law and Practice of the District Courts of Queensland* (2nd ed., 1983), p.36.
159 [1986] 1 Qd.R.245.
160 [1986] 1 Qd.R.245 at 266.
161 Ibid.

jurisdiction of the District Courts is limited by the general monetary limit of the courts. For example, the District Courts under s.66(1)(b)(iii) of the *District Courts Act* 1967-1989 possess jurisdiction:

> "for specific performance of an agreement for the sale or other disposition of land or an interest in land or any other property, where the value of the land or interest or property does not exceed the monetary limit; or in lieu of or in addition to specific performance, damages; but not so as to exceed the monetary limit".

The latter part of this paragraph confers jurisdiction to award equitable damages. The question may at some time arise whether a District Court may entertain an equitable claim or demand in respect of property which has a value in excess of the monetary limit, even though the amount of the claim does not exceed the monetary limit. The writer believes that such a question must be answered in the affirmative. The jurisdiction conferred upon the District Courts to determine an equitable claim or demand is quite independent of the jurisdiction to make an order for the specific performance of an agreement, or for an award of equitable damages in lieu of specific performance.

In the case of the District Courts, s.67 of the *District Courts Act* 1967-1989 now enables the District Courts in a proceeding to "grant such relief or remedy" that a Judge of the Supreme Court might order in an appropriate case. However, the Magistrates' Courts of Queensland and the Local Courts of Western Australia do not possess any such general ancillary jurisdiction. Recently, the Law Reform Commission of Western Australia recommended the adoption of a provision derived from s.69 of the *District Courts Act* 1967 (Qld.),[162] and that the *Local Courts Act* be amended "to make it clear that, for the purpose of determining equitable money claims, Local Courts are deemed to have the equitable jurisdiction of the Supreme Court".[163] This recommendation would certainly assist the administration of the *Local Courts Act*, and remove any arguments as to the extent of the jurisdiction. Consideration should also be given to a similar amendment to the Queensland *Magistrates Court Act*.

A restrictive view of the jurisdiction conferred by s.69 of the *District Courts Act* 1967 has been taken by Meagher, Gummow and Lehane who have commented:

> "But the words of limitation in s.69 would deny jurisdiction . . . in a clear case where the defendant would not raise the *Statute of Frauds* and part performance was not an issue. Absent jurisdiction under these eccentric provisions to decree specific performance, it follows that *Walsh* v. *Lonsdale* cannot be relied upon in proceedings in a Queensland District Court".[164]

After this passage was written it has been held that s.69 of the *District Courts Act* 1967 may be invoked in a case where the *Statute of Frauds*[165] or part performance is not in issue. The word "and", where it first appears in s.69 of the *District Courts Act* 1967, has been held to have a disjunctive

162 See, Law Reform Commission of Western Australia, *Report on the Jurisdiction, Procedures and Administration of the Local Courts* (1988), p.44.

163 Ibid.

164 See, R.P. Meagher, W.M.C. Gummow & J.R.F. Lehane, *Equity-Doctrines and Remedies* (2nd ed., 1984), p.62.

165 See n.155 (ante).

meaning. The concluding words of the provision, which provided that a District Court shall be deemed to have "all other powers and authorities of the Supreme Court in its equitable jurisdiction", applied where an equitable claim or demand was the subject of an action pursuant to s.68 of the 1967 Act. In *Barbagallo* v. *J. & F. Catelan Pty. Ltd.*[166] McPherson J. observed: "Jurisdiction to award damages in substitution for an injunction under s.62 of the *Equity Act* is certainly a "power" of the Supreme Court in its equitable jurisdiction within the meaning of s.69 of the *District Courts Act*."[167] The provision therefore provided an additional jurisdictional basis for the award of equitable damages in that case. In any event, s.69 is not now contained in the *District Court Act*, and now reliance must be placed on the ancillary jurisdiction conferred by s.67 of the Act.

Recent decisions

It has already been mentioned that it is only in some recent cases that the significance of the jurisdiction has been appreciated. In *Dunlop Olympic Ltd.* v. *Ellis*[168] the plaintiff sued in a Local Court for arrears of rent claimed due under an oral agreement for a lease. The magistrate dismissed the action on the jurisdictional ground that "the relief sought by the plaintiff is equitable relief outside the jurisdiction of the Court and is not simply a claim for arrears of rental".[169] Also, the magistrate considered that a question of title was involved "were the Court to find that the defendant had any such leasehold title to the land".[170] The District Court held that the Local Court had jurisdiction in the matter, and remitted the matter to the magistrate for determination. An appeal to the Full Court of Western Australia could not be determined as some exhibits, which were material parts of the record, could not be found. Upon one view of the facts no term of the lease had been agreed so that there also may not have been any certainty as to the term of the lease. The Full Court considered that it was appropriate in these circumstances to order a new trial.

Some members of the Full Court in *Dunlop Olympic Ltd.* v. *Ellis*[171] discussed the jurisdiction conferred by s.32 of the *Land Courts Act*. Brinsden J. remarked that s.67 of the English *County Court Act* 1891,[172] which is noted in the margin of s.32 of the *Local Courts Act*, conferred a limited jurisdiction in equity "by expressly stating the specific actions which may be brought".[173] Brinsden J. observed that s.32 of the *Local Courts Act* "is not thus limited except as to amount and covers an equitable claim or demand against another in respect of which the only relief sought is the recovery of a sum of money or of damages".[174] His Honour concluded: "In my view, a claim for rent under a void lease of which equity would grant specific performance is a claim for an equitable debt arising under an equitable lease and is therefore an equitable claim within the meaning

166 [1986] 1 Qd.R.245.
167 [1986] 1 Qd.R.245 at 254.
168 [1986] W.A.R. 8.
169 [1986] W.A.R. 8 at 9.
170 Ibid.
171 [1986] W.A.R. 8.
172 52 Vict. c.43 (Imp.).
173 [1986] W.A.R. 8 at 15.
174 Ibid.

of s.32. And it is to be so regarded even in a court which has limited equitable jurisdiction but not extended to power to grant specific performance of the particular agreement for lease."[175] However, a majority of the Full Court declined to express a concluded view on this jurisdictional question.[176] Kennedy J. observed that there was no English or South Australian legislation which was equivalent to s.32 of the *Local Courts Act*. His Honour remarked that he had not been able to trace the origin of s.32, although he noted that an almost identical provision was to be found in s.58 of the Queensland *District Courts Act* 1891.[177] In *Barbagallo* v. *J. & F. Catelan Pty. Ltd.*[178] McPherson J. explained that the provision originated from s.1 of the *Equity Procedure Act*.

In *Barbagallo* v. *J. & F. Catelan Pty. Ltd.*[179] the defendant had excavated their land near its boundary with the plaintiff's land. The excavation did not encroach on the respondent's land but would do so in the future. The plaintiff was awarded common law damages at trial, but the award of common law damages was not justifiable on this basis in the absence of actual injury.[180] A District Court did not then possess jurisdiction to grant an injunction or specific performance, nor was it invested with jurisdiction under *Lord Cairns' Act*.[181] Although a District Court possessed jurisdiction in respect of an equitable claim for a debt or damages.[182] The action had been remitted to the District Court from the Supreme Court.[183] The statement of claim of the plaintiff did not contain a prayer for an injunction. McPherson J. remarked, in respect of a claim under the Queensland equivalent of *Lord Cairns' Act*:[184] "Even the fact that no injunction is sought may not be fatal to an award of damages under the section if the matters relied on show circumstances in respect of which an injunction might have been claimed".[185] The Full Court of Queensland held that s.68 of the *District Courts Act*[186] conferred jurisdiction upon a District Court to award equitable damages under s.62 of the *Equity Act of* 1867 in respect of a threatened encroachment. McPherson J. remarked, after referring to *Noagues* v. *Hope*:[187]

175 Ibid.

176 Later in *Abjornson* v. *Urban Newspapers Pty. Ltd.* [1989] W.A.R. 191 Kennedy J. concluded that a claim for rent was an equitable claim where a lessee took possession under an agreement for a lease of which specific performance would be granted.

177 [1986] W.A.R. 8 at 18.

178 [1986] 1 Qd.R. 245 at 254.

179 [1986] 1 Qd.R. 245.

180 [1986] 1 Qd.R. 245 at 248-250 per McPherson J.; 262-264 per Thomas J.

181 The Law Reform Commission recommended that a limited jurisdiction be conferred upon a District Court to grant an injunction or specific performance, and award equitable damages in addition to or in substitution for such relief: see, *The Civil Jurisdiction of the District Court of Queensland* Appendix, pp. 2-3 (Q.L.R.C., R. 36, 1985). See now, *District Courts Act* 1967-1989, s.66.

182 See *District Court Act* 1967-1982 (Qld.), ss. 68, 69.

183 For some purposes a remitted action is regarded as a Supreme Court action: see *Sam Long* v. *McArthur* (1901) 11 Q.L.J. 15; *Fleming* v. *Brown's Toowoomba Transport Ltd.* v. *Nokakovic* (unreported, Sup.Ct. (Qld.), Appeal No. 102 of 1982, 2 Nov., 1984, per Carter J.); *Barbagallo* v. *J. & F. Catelan Pty. Ltd.* [1986] 1 Qd.R. 245, 257 per McPherson J.

184 *Equity Act*, 1867 (31 Vic. No. 18) (Qld.), s.62 (see, n.121 ante).

185 [1986] 1 Qd.R. 245 at 251. See, *Dixson* v. *Tange* (1891) 12 N.S.W.R. (Eq.) 204.

186 See now, *District Courts Act* 1967-1989, s.66.

187 (1874) 4 Q.S.C.R. 57.

> "I do not think that there can be any doubt that the plaintiffs' claim in the present action is, within the meaning of s.68 of the *District Courts Act*, an equitable claim for the recovery of damages. Damages for prospective losses arising out of an apprehended future withdrawal of support are recoverable only in equity and not at common law. Even after the *Judicature Act* such damages have, as I have said, been treated as a form of equitable relief: see *Chapman Morsons & Co.* v. *Guardians of Auckland Union*;[188] c.f., *Wentworth* v. *Woollahra Municipal Council*.[189]"[190]

Thomas J. was in agreement with this analysis remarking that "a plaintiff is entitled to bring a money claim in the District Court seeking an assessment of equitable damages on the principle upon which courts of equity act in granting such damages in lieu of an injunction".[191]

Res judicata

The plaintiff in *Noagues* v. *Hope*[192] did not seek specific performance of the agreement to grant the lease. The plaintiff only sought monetary compensation for his endeavours. The decision of the court was not only of benefit for the plaintiff, for the defendant could rely upon the judgment as holding that an agreement for a lease existed between the parties. Cockle C.J. commented:

> "our judgment in this case will give the defendant an equitable claim which he otherwise would not have had. He will have his bill in equity, because the record in this action will contain an admission that there is subsisting between the parties an equitable agreement for a lease".[193]

The Chief Justice added: "It would be even possible that such an agreement could be used by way of plea".[194] This case therefore illustrates how a plea of *res judicata* may be relied upon in subsequent proceedings.

Pleading

The pleadings of a party who sought at law to rely upon an equitable ground had to disclose the equitable ground relied upon. This has been the case since the enactment of the *Common Law Practice Act* 1854 which provided that a plea under s.83 of that Act should begin with the words "for defence on equitable grounds" or words to the like effect. This precedent may have been adopted by Griffith, as s.2 of the *Equity Procedure Act* provided that "the declaration or plaint if any or so much thereof as relates to such equitable claims or demands shall express that the plaintiff is suing upon equitable grounds". The proviso to s.4 of the *Equity Procedure Act* also imposed a requirement that a plea of defence in the District Court which relied upon equitable grounds and a plea of an equitable claim or demand by way of set-off "shall state that it is founded upon equitable grounds".

188 (1889) 23 Q.B.D. 294 at 298-299.
189 (1982) 149 C.L.R. 672 at 678-679.
190 [1966] 1 Qd.R. 245 at 256.
191 [1986] 1 Qd.R. 245 at 266.
192 (1874) 4 Q.S.C.R. 57.
193 (1874) 4 Q.S.C.R. 57 at 61.
194 Ibid.

In Queensland there is presently a requirement that a plaint for an equitable claim in the District Courts and Magistrates' Courts "shall express that the plaintiff is suing upon equitable grounds".[195] There does not appear to be a similar requirement in respect of the Local Courts of Western Australia. These requirements ensure that the basis of any claim is fully disclosed in the plaint so that a defendant is not taken by surprise at a trial.[196] The failure of a plaintiff to make an appropriate endorsement on a plaint would be regarded as an irregularity where there is no prejudice to a defendant that could not fairly be cured. In Queensland the mere non-compliance with the *District Court Rules* does not render a proceeding void unless the court or a judge so directs.[197]

Precedents

Some useful precedents for plaints for some equitable claims and demands are to be found in a 1961 Queensland practice text on the District Court. A precedent for a claim for the balance of the purchase money due under an oral agreement for the sale of land where there has been part performance of the agreement, and a precedent for rent due under an agreement for a lease where the defendant has entered into possession and paid rent for part of the tenancy are included in the text.[198] The latter claim is really the situation in *Walsh* v. *Lonsdale*[199] where Sir George Jessel M.R. remarked that "a tenant holding under an agreement for a lease of which specific performance would be decreed, stands in the same position as to liability as if the lease had been executed".[200] It should be noted that the precedents were drafted before the *District Court Rules* imposed a requirement that a plaint disclose the equitable ground relied upon by a plaintiff.[201]

Irrelevance of a court not being able to decree equitable relief

The jurisdiction conferred upon a court to determine an equitable claim or demand for a sum of money or damages is not dependent upon that court being able to make an order for equitable relief which must be granted before such a claim or demand can succeed. This is evident from *Noagues* v. *Hope*[202] which does not appear to have been cited in argument before the court in the cases of *Daly* v. *White*,[203] *Taylor* v. *Holmes*[204] and *Marsh* v. *Mackay*.[205] It was only when *Barbagallo* v. *J. & F. Catelan Pty. Ltd.*[206]

195 See, *District Court Rules* 1968, r.49; *Magistrates Court Act* 1921-1989, s.4(8).
196 See, *Barbagallo* v. *J. & F. Catelan Pty. Ltd.* [1986] 1 Qd.R. 245 at 257 per McPherson J.; 267 per Thomas J.
197 See, *District Court Rules* 1968, r.5. See also *Barbagallo* v. *J. & F. Catelan Pty. Ltd.* [1986] 1 Qd.R. 245 at 257 per McPherson J; 267 per Thomas J.
198 See, F.T. Cross and S.D.R. Cook, *Queensland District and Magistrate Courts Practice* (1961), p. 58.
199 (1882) 21 Ch.D. 9.
200 (1882) 21 Ch.D. 9 at 14.
201 See, *District Court Rules* 1968, r.49.
202 (1874) 4 Q.S.C.R. 57.
203 [1911] Q.W.N. 1.
204 [1919] Q.W.N. 25.
205 [1948] St.R.Qd. 113, 48 Q.J.P.R. 126.
206 [1986] 1 Qd.R.245.

was decided that this question was finally resolved in Queensland. In *Barbagallo* v. *J. & F. Catelan Pty. Ltd.*[207] McPherson J. pointed out that in *Noagues* v. *Hope*[208] the court rejected "submissions by the defendant that specific performance was a prerequisite to a claim for damages, and that discretionary bars to granting such relief were relevant".[209] In *Barbagallo* v. *J. & F. Catelan Pty. Ltd.*[210] the fact that a District Court could not then grant an injunction was not regarded as precluding that court from awarding equitable damages in lieu of an injunction under *Lord Cairns' Act*.[211] The fact that specific performance could not be decreed by a Local Court was similarly regarded by Brinsden J. in *Dunlop Olympic Ltd.* v. *Ellis*[212] as irrelevant.

The significant of the jurisdiction to determine an equitable claim or demand was appreciated in 1948 by a writer on Queensland practice, presumably T.J. Lehane, who wrote:

> "Undoubtedly it could be argued that section 4(1)(c) [of the *Magistrates' Court Act*] which gives the Magistrates' Courts jurisdiction to entertain equitable claims and demands in respect of which the only relief sought is the recovery of a sum of money or damages . . ., makes *Foster* v. *Reeves (supra)* and *Moore* v. *Dimond (supra)* inapplicable in Queensland. Although the English County Courts and the South Australian Local Courts had much wider equitable jurisdiction than the Queensland Magistrates' Courts, there seems to be no similar provision to section 4(1)(c) in their Acts".[213]

This comment was published soon after *Marsh* v. *Mackay*[214] was decided.

Conclusion

Two matters are clear in respect of the statutory jurisdiction to determine an equitable claim or demand. First, the jurisdiction is limited in that the court may only make an order for the payment of a sum of money or damages. That is why in *Morgan* v. *Macnamara*[215] Jackson D.C.J. observed that section 32 of the Western Australian *Local Courts Act* "gives to Local Courts a limited equitable jurisdiction but only in respect of money claims".[216] Consequently the court would not under this jurisdiction have power to make an order in respect of traditional *in personam* equitable remedies such as an injunction or specific performance. Although the ancillary jurisdiction of a court when properly invoked enables an equitable remedy to be awarded in aid of a valid primary claim.[217] Secondly, the statutory jurisdiction of a court to hear and determine an

207 [1986] 1 Qd.R.245.
208 (1874) 4 Q.S.C.R. 57.
209 [1986] 1 Qd.R. 245 at 255.
210 [1986] 1 Qd.R. 245.
211 Queensland District Courts now possess a limited jurisdiction to grant injunctive relief and equitable damages: see, *District Courts Act* 1967-1989 (Qld.), s.66 (1) (xii).
212 [1986] W.A.R. 8.
213 See, "Actions on agreements for leases in Magistrates' Courts" (1948) 42 *Q.J.P.* 113, p.114.
214 [1948] St.R.Qd. 113, 42 Q.J.P.R. 126.
215 Unreported, District Court of Western Australia, Perth, App. 21 of 1986, Jackson D.C.J., October 17, 1986. (I am indebted to Dr. P.R. Handford, Law Reform Commission of Western Australia for this reference).
216 Transcript of Judgment, p.10.
217 *District Courts Act* 1967-1989 (Qld.), s.67; *Local Courts Act* 1904 (W.A.), s.33.

equitable claim or demand for a sum of money or damages may be exercised in any case where a claim of a plaintiff is dependent upon the exercise of equitable relief of any kind.

On these principles instances where the jurisdiction may be invoked, within the monetary jurisdictional limit of a court, would include:-

(a) a claim for damages for the breach of a contract which is dependent upon the rectification of that contract;[218]
(b) a claim of a beneficiary for money due under a trust;[219]
(c) a claim for damages or equitable damages under a void lease of which equity would grant specific performance;[220]
(d) a claim for equitable damages in lieu of a *quia timet* injunction;[221]
(e) a claim for relief against the forfeiture of a deposit or other sum;[222]
(f) a claim for the recovery of unpaid purchase money despite the existence of a deed of the plaintiff which contains an acknowledgment of the receipt of the purchase money;[223] and
(g) *semble* an account of profits.[224]

The jurisdiction will be exercised on the basis that a plaintiff possesses an equity to equitable relief. In these circumstances a court will necessarily have regard to settled doctrines of equity. In such circumstances a court exercising jurisdiction in respect of an equitable claim or demand which is dependant upon a plaintiff possessing an equity to specific performance would necessarily consider such matters as whether there has been averment and proof of readiness and willingness by a plaintiff to perform obligations under the contract,[225] or whether a breach of covenant was fatal to a claim for specific performance.[226] Some cases may involve consideration of whether relief against forfeiture is properly available.[227] A court would deny relief to a plaintiff who is guilty of inequitable conduct which has an immediate and necessary relation to the relief sought as such a

218 Cf., *Daly* v. *White* [1911] Q.W.N. 1.

219 See, Law Reform Commission of Western Australia, *Report on the Jurisdiction, Procedures and Administration of the Local Courts* (1988), p.37. Ct., *Taylor* v. *Holmes* [1919] Q.W.N. 25.

220 See, *Noagues* v. *Hope* (1874) 4 Q.S.C.R. 57; *Dunlop Olympic Ltd.* v. *Ellis* [1986] W.A.R. 8 at 15 per Brinsden J.; *Barbagallo* v. *J. & F. Catelan Pty. Ltd.* [1986] 1 Qd.R. 245 at 251-252 per McPherson J.; *Abjornson* v. *Urban Newspapers Pty. Ltd.* [1989] W.A.R. 191, 200 per Kennedy J. Ct. *Marsh* v. *Mackay* [1948] St. R. Qd. 113; 42 Q.J.P.R. 126.

221 See, *Barbagallo* v. *J. & F. Catelan Pty. Ltd.* [1986] 1 Qd. R. 245 at 256 per McPherson J.; 265 per Thomas J. See also, *Leeds Industrial Co-operative Society* v. *Slack* [1924] A.C. 851; *Hooper* v. *Rogers* [1975] Ch. 43; *Neylon* v. *Dickens* [1987] 1 N.Z.L.R., 402 at 407.

222 Cf., *Berger* v. *Boyles* [1971] V.R. 321.

223 Cf., *Parkinson* v. *Clendinning* (1878) 29 C.P. 13.

224 See, *Watson* v. *Holliday* (1882) 20 Ch.D. 780 at 784. There would be difficulties in exercising this jurisdiction where a court could not procedurally direct an account of profits, unless there was material before the court upon which a judgment could be properly issued.

225 See, *Baird* v. *Magripillis* (1925) 37 C.L.R. 321 at 330-331; *Bishop* v. *Taylor* [1968] Qd.R. 281 at 285, (1968) 118 C.L.R. 518 at 520.

226 See, *Swain* v. *Ayres* (1888) 21 Q.B.D. 289.

227 See, *Lexane Pty. Ltd.* v. *Highfern Pty. Ltd.* [1985] 1 Qd. R. 446, 454-455 per McPherson J.; *Freedom* v. *A.H.R. Constructions Pty. Ltd.* [1987] 1 Qd.R. 59 at 66 per McPherson J. ; *Hill* v. *Terry* (Supreme Court of Queensland, Full Court, Appeal No.36 of 1990, December 12, 1990). See also, A.J. Lennon, "Relief Against Forfeiture of Real Property Interests" (1990) 10 *Queensland Lawyer* 157.

plaintiff would not come to the court with "clean hands".[228] In exercising the jurisdiction it will be necessary to determine whether a plaintiff has a notional entitlement to equitable relief. In some cases it will be clear that such relief could not be decreed, a clear case is where an agreement has been terminated. As McPherson J. remarked in *S. J. Mackie Pty. Ltd.* v. *Dalziell Medical Practice Pty. Ltd.*:[229] "To decree, even notionall, specific performance of an admittedly terminated agreement is to proceed contrary to at least the tenor of what was said in Swain v. Ayres (1888) 21 Q.B.D. 289".[230]

APPENDIX A

District Courts' Act 1967-1989 (Qld.), s.66(1)(a)(i).

As inserted by s.6 of the *District Courts and Other Acts Amendment Act* 1989 (No. 40 of 1989).

"66. *District Courts' civil jurisdiction.* (1) A District Court shall have jurisdiction to hear and determine:-

(a) all personal actions, where the amount, value or damage sought to be recovered does not exceed the monetary limit including-
   (i) any equitable claim or demand for recovery of money or damages, whether liquidated or unliquidated;"

APPENDIX B

Magistrates Courts' Act 1921-1989 (Qld.), s.4(1)(c).

As amended by s.19 of the *District Courts and Other Acts Amendment Act* 1989 (No.40 of 1989)

"4. *Jurisdiction of Magistrates Courts.* (1) Subject to this Act -

(c) Every action in which a person has an equitable claim or demand against another person in respect of which the only relief sought is the recovery of a sum of money or of damages, whether liquidated or unliquidated, and the amount claimed is not more than $20,000, may be commenced in a Magistrates Court;"

APPENDIX C

Local Courts Act 1904 (W.A.), s.32.

As amended by s.7 of the *Local Courts Amendment Act* 1987 (No.11 of 1987)

"32. In any case in which a person has an equitable claim or demand against another person in respect of which the only relief sought is the recovery of a sum of money or of damages, whether liquidated or unliquidated, and the amount claimed is not more than $10,000, the person seeking to enforce the claim or demand may sue for and recover it in a Local Court."

228 See, *FAI Insurance Ltd.* v. *Pioneer Concrete Services Ltd.* (1987), 15 N.S.W.L.R. 552 at 557-561 per Young J., See also, J.G. Starke, "Equity — General Maxims — Limited availability of maxim, "he who comes into equity must come with clean hands" (1989) 63 *Australian Law Journal* 854.

229 [1989] 2 Qd.R. 87.

230 [1989] 2 Qd.R. 87, 96.

Duty and the Beast: The Movement in Reform of Animal Welfare Law

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The views of the author do not purport to represent the views of the Department.

> *"All animals are equal but some animals are more equal than others":*
> George Orwell, *Animal Farm: A Fairy Story* (Middlesex, Penguin Books, 1945) at 114.

Inspired by the resurgence of interest in the nature of the relationship between humans and animals dating to the publication in 1975 of Victorian philosopher Peter Singer's utilitarian-based book, *Animal Liberation*[1] there have been significant developments in Australian animal welfare law within the last ten years. At the Commonwealth level, the Senate Select Committee on Animal Welfare was established in 1983, issuing its most recent report, on Intensive Livestock Production, in June 1990. The States of New South Wales, Victoria and South Australia have all recently introduced complete revisions of their animal cruelty legislation, while Queensland, Western Australia and the Australian Capital Territory are presently reviewing their existing provisions.

The late twentieth century has seen the welfare state turn its attention towards the revision of the scope of its animal cruelty legislation and even, perhaps, of the very philosophy which has formed the foundation of that legislation since its adoption more than a century and a half ago.

The English Foundation

Agitation for legislative protection of animals from cruelty in England dates from the late 18th century, although the first such legislation was not passed in England until 1822. Its adoption was then inspired by the unstable political climate of that time; merely part of the broader growth of social controls and police reforms necessitated by unprecedented urban growth and political agitation during the Industrial Revolution.

Its prohibition of the leisure activities of the lower classes was equally of service to the efficient work practices of the developing factory system. Even those opposed to the growth of animal welfare did so on humanist grounds, fearing its potential for community disorder in its divisive application peculiar only to the sports of the lower classes. In attacking these traditional leisure activities, the development of such legislation was also perceived as symptomatic of the wholesale destruction of traditional En-

1 Now in its 2nd edition: P. Singer, *Animal Liberation* (2nd ed., New York, New York Review, 1990).

glish values and culture brought about by the massive social and economic reforms of the Industrial Revolution.[2]

Dissecting the motives of the early nineteenth century protagonists and antagonists of animal cruelty legislation in this way violates both the integrity and the confusion of their ideals. However, whatever the variations in their arguments, the predominant explanations advanced were in terms of humanist utilitarian considerations of the community welfare.

The origins of animal cruelty legislation being historically grounded in Benthamite utilitarianism, its subsequent growth has been equally circumscribed by threshold questions of humanist utilitarian necessity in determining what animal suffering is a matter of moral concern. Differential protection of animals according merely to the perceived public benefit and economic viability of their protection has resulted, obfuscating the eighteenth century foundation for the growth of animal protection in the ideal of benevolence and Bentham's own dependence on that doctrine in his humanitarian recognition of sentience alone as the proper measure of utility.[3]

The Australian Position

A genuine concern for animal welfare beyond merely protecting their value as property is clearly evident in early nineteenth century colonial Australia. *The Sydney Gazette* of that period frequently admonishes cruelty to animals as exciting "indignation in the breast of a spectator not wholly bereft of feeling".[4]

Despite a clear concern for animal welfare from an early date, a well-documented colonial allegiance to the "mother country" and uncertainty as to the application in the colonies of the English legislation,[5] the first colonial animal cruelty legislation does not appear within the life of the English legislation of 1822. The first such legislation was passed in Van Diemen's Land in 1837,[6] two years after the English legislation of 1822 had been repealed and replaced with more extensive legislation.

2 See generally on this background: A. Moss, *Valiant Crusade: The History of the R.S.P.C.A.* (London, 1961); J. Turner, *Reckoning with the Beast* (Baltimore, 1980); B. Harrison, "Animals and the State in Nineteenth Century England" (1973) 88 *English Historical Review* 786; K. Thomas, *Man and the Natural World* (London, 1983); P. Jamieson, "Animal Welfare — A Movement in Transition", paper presented at the Eighth Australian Law & History Conference, Adelaide, 1989. The tensions between individual liberty and state intervention, between central and local government and the fear of antagonizing the urban working class equally appear in the muzzling issue during the rabies scare in the latter part of the nineteenth century: J. Walton, "Mad Dogs and Englishmen: The Conflict over Rabies in Late Victorian England" (1979) 13 *Journal of Social History* 219-239.

3 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. J.H. Burns and H.L.A. Hart (1780, London, 1970) at 282-3.

4 *Sydney Gazette*, 1 January 1804. See further 31 July 1803, 17 February 1805, 23 February 1806, 2 March 1806, 14 September 1811; Letters to the Editor: 14 March 1805, 1 September 1805, 20 October 1805.

5 See *The Sydney Morning Herald*, 7 September 1850.

6 8. William IV, No.3. Prosecutions were clearly brought under the legislation: the *Hobart Town Courier* notes the imposition of fines for convictions of cruelty given against Thomas Dowling (14 September 1838) and Richard Hume (12 October 1838). Records at Richmond Gaol record six days solitary confinement for cruelty given to Charles M. in September 1838.

In the colony of New South Wales, on the other hand, no legislation appears until 1850. The 1850s marked the adoption of animal cruelty legislation in each of the then four colonies (with the excepton of South Australia), further legislation appearing in four colonies during the 1860s and in all States in both the early 1900s and 1920s. The 1950s is a period of amending legislation in all States and within the last decade there has been a further period of legislative revision throughout the country.[7]

The earliest adoption of such legislation in the colonies has its obvious foundation in the example set "at home". Legislation enacted in England in 1835 and 1849 is to be found broadly reflected in colonial legislation in 1837 (Van Diemen's Land), 1849 (Western Australia) and 1850 (New South Wales). Its similar early concentration on the traditional animal sports of the English lower classes reflects its foreign heritage in a country which had "no aristocracy . . . at least none in any way analogous to that of England."[8] In introducing the 1850 Bill, Mr. Nichols even comments that he does so "to set at rest a doubt which had existed as to whether the Imperial Acts for preventing cruelty to animals were in force" in the colony of New South Wales, the clauses of the Bill being described as "copied principally from those of the English statute".[9]

The importance of the English precedent, though, should not be overemphasized. The doubt as to its colonial application was only inspired by reason of the conditions in the colonies at the time, Mr. Nichols in 1850 indicating to the Legislative Council that he "had been pressed to introduce this motion . . . particularly by the Inspector of Nuisances".[10] Moreover, the fear of social disorder as the inspiration for this legislation went beyond mere issues of public nuisance. The fear of revolt among the "lower orders", so apparent in the growth of the English precedent, appears to figure again in the colonial development of animal cruelty legislation.

Such legislation was enacted in New South Wales only two years after the 1848 year of revolutions in Europe had revived the long-standing fear of revolt amongs the illiterate, uncontrolled lower orders. Such apprehensions appear prominently in the New South Wales Parliamentary debates on the Electoral Bill during 1851.[11] Sir James Martin, himself the inspiration for the 1850 legislation, similarly attacked universal suffrage,[12] his more youthful defences of the dignity and rights of the poor[13] hardened by the events in Europe of 1848. It had been Martin who had proposed an amendment of the 1850 animal cruelty legislation to prohibit the use of

7 A detailed treatment of the history of animal cruelty legislation in Australia appears in P. Jamieson, "Animal Welfare — A Movement in Transition", paper presented at the Eighth Australian Law & History Conference, Adelaide, 1989.

8 G. Sutherland, *Australia, or England in the South* (London, Seeley, 1886) at 98.

9 *Sydney Morning Herald*, 7 September 1850.

10 *Ibid.*

11 *New South Wales Parliamentary Debates*, 12 April 1851. See further A.W. Martin, "Australia and the Hartz 'Fragment' Thesis" (1973) 13 *Australian Economic History Review* 131-147 at 137.

12 See, e.g., *The Empire*, 26 August 1853. See further E. Grainger, *Martin of Martin Place . . . A Biography of Sir James Martin (1820-1886)* (Sydney, Alpha Books, 1970) at 67-69.

13 See, e.g., Martin, "The Rights of Man", *Sydney Free Press*, 12 March 1842.

dogs for draught,[14] ultimately rejected in view of its harsh operation on the trade of the poor.

In both Van Diemen's Land and New South Wales, debate upon the legislation involved considerable discussion of the use of dogs as beasts of burden. Before the Legislative Council in Van Diemen's Land in 1837, the Chief Justice had pressed an amendment to the Bill prohibiting the practice of using dogs for the purposes of draught, arguing that "the owners of these carts were not compelled to use dogs from poverty".[15] Nevertheless, the vote was lost by one. Martin's proposal in 1850 was similarly rejected, there being "no necessity for any such provision in this colony".[16] The considerable attention given the issue in both colonies, though appears to controvert this conclusion, the more compelling reason appearing from the parliamentary debates that "it might operate harshly against fish sellers and other persons who could not afford to keep horses".[17]

While there may have been, in such comments, some perception of the inherent class bias in the example set by the English legislation, that proclivity was no more abated than it had been in England. The proposed legislation in no way sought to abridge the more gentlemanly activities of the hunt, drawing from the English precedent in being directed solely at the leisure pursuits of the lower classes. In the same year that the New South Wales legislation was passed, the *Sydney Morning Herald* records on a number of occasions, dingo hunts with "Mr. Fitz Roy's Hounds".[18] Similarly, in Van Diemen's Land in 1837, *The Tasmanian and Austral-Asiatic Review* carries an account of such a run with Mr. Gregson's Hounds, described by the editors as "a bold, daring, healthful exercise".[19] During the passage of the 1850 legislation through the Legislative Council, Fitz Roy's hunters were in fact served "with no less than thirteen summonses charging . . . 'malicious injury' [and even] three 'notices of action' [taken] for granted . . . to be a joke".[20] However, despite the efforts of these few persons, in neither of the sister colonies was the differential application of this legislation as between a "yeoman's"[21] leisure activities and those of the upper classes (Fitz Roy was in fact Governor) given even passing consideration.

The growth of animal cruelty legislation in the colonies as a means of social control is reinforced by the early inclusion of such provisions almost exclusively in colonial police offences laws, remaining so in Victoria as late as 1966. The legislation of all four colonies active in animal welfare in the 1860s is to be found in Police Acts.[22] While it has been argued that the advent of animal cruelty legislation in England in the early nineteenth century was integrally related to the growth of police regulation in the

14 *Sydney Morning Herald*, 13 September 1851.
15 *Hobart Town Courier*, 21 July 1837.
16 *Sydney Morning Herald*, 13 September 1850.
17 *Ibid.*
18 *Sydney Morning Herald*, 12 July 1850, 13 August 1850, 23 September 1850.
19 29 September 1837.
20 *Sydney Morning Herald*, 23 September 1850.
21 *Sydney Morning Herald*, 13 August 1850.
22 *Police Act of 1863* (S.A.); *The Police Act, 1865* (Tas.); *The Police Offences Statute 1864* (Vict.); *The Police Offences Statute 1865* (Vict.);*The Police Ordinance*, 1861 (W.A.).

political climate of that time, even Sir Robert Peel himself disavowed any such parallel between the two movements. In the Australian colonies though, "the state . . . was inevitably a stronger, more intrusive, legitimately interventionist instrument than Victoria's Britain . . . not having to contend against the traditional restraints of established church, military services, and landed aristocracy".[23]

It is not surprising then that the police legislation adopted in the colonies was far more intrusive of individual liberty than its English counterpart. The *Sydney Police Act, 1833* of New South Wales, for example, was substantially concerned with matters relating to public health and hygiene,[24] more reminiscent of the expansive European notion of policing than of the philosophy acceptable in England. That animal protection is encompassed within the police laws of Victoria, South Australia, Western Australia and (in part) Van Diemen's Land in the 1860s is far from extraordinary then; nor, given the social and political disorganization arising during a period of great population growth with the gold rushes of the 1850s, is the revision in most colonies of their police offences laws in the early 1860s.

The basis of that revision only incidentally involving the concerns of animal welfare, little new development is to be found in the cruelty provisions adopted, beyond the precedent earlier established by the New South Wales legislation of 1850. Nevertheless, that early legislation, having generally recognized the offence of cruelty and having made specific provision in respect of animal fights and the carriage of animals, both Victoria (1854) and South Australia (1863) did make further provision by way of affirmative duties, rather than merely the established negative duties, to supply an animal with food and water.[25] Moreover, since no provision as to cruelty had originally been made in South Australia in *An Ordinance for regulating the Police in South Australia, 1844*,[26] its police legislation in 1863 marked the adoption of the power "at present not possessed by the police [of] the right . . . to interfere in respect of cruelty to animals".[27]

While the legislation of Western Australia, uniquely of the six Australian colonies, recognizes only the general offence of cruelty to animals (without refinement) as late as 1892, it adopts, in that year, legislation in terms essentially the same as that adopted by South Australia in 1863.[28] Similarly embodied in police legislation, its adoption though was merely

23 Hugh Collins, "Political Ideology in Australia: The Distinctiveness of a Benthamite Society" in S. Graubard (ed.), *Australia: the Daedalus Symposium* (North Ryde, N.S.W., Angus and Robertson, 1985) at 151.

24 Such a comment appears in K. Milte, *Police in Australia: Development, Functions and Procedures*, assisted by T. Weber (Sydney, Butterworths, 1977) at 23.

25 *Police Act of 1863* (S.A.); *Town and Country Police Act 1854* (Vict.). Such movement towards the imposition of affirmative duties towards certain animals also characterises reform in American anti-cruelty law of this period: B. Hall, *Animal Anti-Cruelty Laws in the Commonwealth of Massachusette: An Examination of Legal Efforts to Protect Animals from Cruel Treatment by Humane and the Persistent and Vexing Problems which Confront Present Efforts* (Harvard Law School, unpublished paper, 1986) at 30.

26 7 & 8 Victoria, No. 19.

27 Comment by the Treasurer in moving the consolidation of the police law: South Australian House of Assembly, 14 May 1863: *Official Reports of the Parliamentary Debates (Hansard)* (South Australian Parliament).

28 *The Police Act, 1892* (W.A.).

one aspect of the revision of that colony's police offences laws inspired by the discovery of gold there in 1892.[29]

The legislative activity regarding cruelty in the 1860s was part of a revision of police offences law necessitated by rapid population growth and consequent social disorganization arising out of the gold boom, a phenomenon repeated in Western Australia in its legislation of 1892. Nevertheless, it is equally part of the process of refinement of an initially "vaguely benevolent and general type of enactment" becoming "constantly more particular, more detailed and more scientifically directed as time goes on".[30]

Exemptions

While the 1860s had witnessed the development of more specific offences of cruelty in particularizing the general offence, the early 1900s marked the adoption in all States of exemptions from the otherwise broad application of the general offence. In Victoria though, "the most urbanized and economically the most powerful colony — reformism had come earliest and had proceeded furthest",[31] that colony passing such legislation twenty years before any of the other States, Western Australia again lagged behind, failing to act until 1912.

While the Victorian Bill of 1881 as originally brought forward by Alfred Deakin "did not propose anything novel",[32] Sir B. O'Loghlen anticipated the reforms not elsewhere adopted in this country until the early twentieth century, moving the addition of the following proviso to the offence of cruelty:

> Provided always that neither any act done in the process of exterminating rabbits, foxes, wild dogs, or vermin of any kind, nor any act done in the hunting, snaring, trapping, or shooting of any wild animal, shall be deemed an offence under this Act, nor shall this Act apply to any experiment or to any case of vivisection performed on any animal by any legal qualified medical practitioner.[33]

O'Loghlen's measure has since found its way in some form or another into all subsequent legislation in this field; a measure increasingly refined in more recent years. It also marked an early departure from the English precedent. The *Cruelty to Animals Act, 1876* (U.K.) having provided licensing requirements for the regulation of vivisection, the Victorian Parliament rejected this precedent providing instead merely that experiments should be "performed in accordance with any regulations which shall be passed by the Governor in Council".[34]

The Victorian legislation had initially been motivated by the need for clarification of *The Police Offences Statute 1865* "as to whether certain

29 K. Milte, *Police in Australia: Development, Functions and Procedures*, assisted by T. Weber (Sydney, Butterworths, 1977) at 27.

30 Brian Harrison, "Animals and the State in Nineteenth Century England" (1973) 88 *English Historical Review* 786-820 at 787.

31 Though A.W. Martin, "Australia and the Hartz 'Fragment' Thesis" (1973) 13 *Australian Economic History Review* 131-147 at 143.

32 *Victorian Parliamentary Debates* (1881), vol. 37 at 241.

33 *Id.* at 343.

34 *The Protection of Animals Act 1881* (Vict.), s.13(b)(i). The parliamentary discussion appears *Victorian Parliamentary Debates* (1881), vol. 37 at 343-6.

cases of alleged cruelty to animals came under the Statute or not".[35] In detailing the provisions as to cruelty with more particularly, especially as regards the specific recognition of activities exempt from the operation of the Act, there is clearly illustrated the continuing process of refinement which has characterized the legislative history of animal protection both in Australia and in England.

When these exemptions were finally brought within the legislation of the remaining States in the early 1900s, it was commented that "of recent years there had been a quickening of the public conscience on the subject" — reference being made to the formation of animal protection societies in support of that proposition.[36] However, that quickening of the public conscience was of less than recent origin. The Victorian Society for the Protection of Animals had been founded as early as 1871, branches forming in N.S.W. in 1873 and South Australia in 1875. The English precedent was by then well accepted, the "want of such [societies having] long been felt."[37] Praised in the press as deserving of "the cordial support which should be extended... by every enlightened and humane member of society",[38] *The New South Wales Agriculturist and Grazier* even describes the "proof of a people's advancement to high civilization [as being] the care and just treatment of animal life under its protection and control".[39]

The societies were active in promoting concern for animal welfare, frequent sermons to parishioners in aid of their cause during the latter part of the nineteenth century further entrenching their ideals.[40] By 1881, the philosophy of animal protection was sufficiently well accepted that Alfred Deakin, in introducing the Victorian legislation of that year, had commented that upon such a measure "there were no opponents to convince or antagonists to disarm",[41] J. Lorimer in the Legislative Council even suggesting that it "would be almost an insult to their intelligence and human feeling if [he] offered reasons"[42] for such a measure. However, the appreciation of the "cruelty" of an act has inevitably been circumscribed

35 *Victorian Parliamentary Debates* (1881), vol. 37 at 241.

36 *South Australian Parliamentary Debates* (1906) at 196 (Commissioner of Public Works).

37 *New South Wales Agriculturist and Grazier*, August 1873. In its first year alone, the N.S.W. Animal Protection Society gained 150 convictions and a further 318 cautions were issued: noted in its *25th Annual Report* 1898. Similar media sentiments accompanied the formation of the American Society for the Prevention of Cruelty to Animals in New York in 1866: *New York Times*, 11 March 1866: *New York Sun*, 7 & 10 April 1866; *New York Tribute*, 12 April 1866; *Frank Leslie's Illustrated Newspaper*, 24 & 31 March, 12 May 1866.

38 *Sydney Morning Herald*, 17 July 1873. See also *Examiner*, 17 July 1873.

39 *Supra*, n.37.

40 See, e.g., an address in aid of the Victorian S.P.C.A by Rev. C. Stuart Perry on 10 May 1874 entitled *Man's Duty towards the Lower Animals* (Melbourne, printed by request, 1874); a sermon on behalf of the N.S.W. Animal Protection Society by the Primate of Australia (Rev. Dr. Barry) noted in the *Echo*, 24 October 1885. A sermon by Ven. Archdeacon Farrar delivered on behalf of the S.P.C.A. in Westminster Abbey is extracted in the *Echo*, 8 August 1885 and a lecture by Ven. Archdeacon Gunther on "Kindness to the Animal Creation" for the Hebrew Library and Debating Society appears in the *Sydney Morning Herald*, 13 March 1896.

41 *Victorian Parliamentary Debates* (1881), vol. 37 at 242.

42 *Id.*, at 708.

by the community's perception of the necessity or otherwise of the animal's suffering.

"Necessity"

The content of "necessary" suffering has been in a state of progressive evolution through the course of the twentieth century, revolution within the last decade, reflecting the transition in society towards a predominantly urban community isolated from the realities of the needs of agricultural production and afflicted with the "Walt Disney Syndrome" — an anthropocentric conception of animals bred "on a diet of Mickey Mouse and other comic book characters"[43] and amplified by the intimacy of people's relationships with their domestic pets. The threefold claims of sport, medical research and the rural community have been considerations at the forefront of this ongoing redefinition of "necessity".

1. Sport

In the realm of sport, for example, neither pigeon shooting[44] nor coursing[45] were activities prohibited by the legislation as it stood at the turn of the century. Although agitation had even then existed for their abolition,[46] such concerns were at least partially sated by the erroneous view that no specific exemption having been made as to such sports, they would offend the Act wherever cruelty was involved.[47]

Nevertheless, "the time [was] not far distant when both coursing and pigeon shooting would also be among the sports of the past".[48] Western Australia, while tardy in reform in the nineteenth century, was the first State to prohibit pigeon shooting in 1920.[49] Although other States were not to act until the next round of reforms in the 1950s, agitation for its earlier abolition was not peculiar to Western Australia. A Bill prohibiting the sport had been introduced into the New South Wales Legislative Assembly in 1921, for example, but was not carried beyond the second reading.[50] Its introduction having failed again in 1927,[51] the New South Wales Legislature finally acted in 1943.[52] Queensland and Victoria prohibited the sport in the 1950's.[53]

Prohibitions on coursing are of even more recent origin. Historically

43 *Victorian Parliamentary Debates* (1986), vol. 382 at 2072-3 (Mr. B.J. Evans).
44 *Tucker* v. *Hazelhurst* (1907) 26 N.Z.L.R. 263.
45 Unreported South Australian decision of *Nesbit* v. *Mack and Williamson* (1928).
46 *South Australian Parliamentary Debates* (1906) at 359 (Mr. Vaughan); *31st Annual Report* of N.S.W. R.S.P.C.A. 1904.
47 *Queensland Parliamentary Debates* (1901), vol. 86 at 2535 (The Home Secretary & Mr. Lesina); *Western Australian Parliamentary Debates* (1912), vol. 43 at 836 (Attorney-General).
48 *South Australian Parliamentary Debates* (1908) at 137 (F.S. Wallis).
49 *Prevention of Cruelty to Animals Act, 1920* (W.A.), s. 4(1)(m).
50 *New South Wales Parliamentary Debates* (1921), vol. 85 at 752, 1294, 1847.
51 *Id.* (1927), vol. 111 at 1770.
52 *Prevention of Cruelty to Animals (Amendment) Act, 1943* (N.S.W.): Act No. 44 of 1943.
53 *Animals Protection Acts Amendment Act of 1954* (Qld.); *Police Offences (Trap Shooting) Act 1958* (Vict.).

dating to the first such event in Victoria in 1873,[54] the sport survived, unabated by legislation, for nearly a century in most jurisdictions. Although agitation for its abolition appears from the turn of the century,[55] the first such steps were only taken when New South Wales acted in 1953.[56] The prohibition of the sport had in fact been one of the proposed measures of the failed New South Wales Bill in 1921, its continuing survival being at least in part the result of divided public attitudes to the sport. When in 1928 a coursing meeting moved even "spectators to cries of 'Shame' when they saw hare after hare ruthlessly and cruelly slaughtered",[57] a subsequent attack on the sport by the President of the R.S.P.C.A. (N.S.W.)[58] evoked publication shortly after of an article vigorous in its defence.[59]

The sport was in fact given statutory recognition in New South Wales that same year,[60] as it had been in South Australia in 1921.[61] Such recognition was even given in Victoria as late as 1950,[62] although only three years later it was finally prohibited in New South Wales. Nevertheless, South Australia's abolition of the sport occurred only in 1985,[63] while Tasmania even now has no specific provision regarding it.

While the historical origins of animal cruelty legislation were directed towards the prohibition of the leisure pursuits of the lower classes, animal sports have continued to remain contentious in the on-going debate as to the definition of the threshold test of "necessity". While early legislatioin related "mainly to the treatment of economic animals", "cases of that kind [appeared to] throw very little direct light upon cases [such as pigeon shooting and coursing], where there is no economic object in view".[64] The early humanist utilitarian ethic associated with the development of animal cruelty legislation is clearly apparent in the extended survival of such animal sports where unrelated to economic activity.

2. *Experimentation*

The congruence of medical experimentation and the public benefit is more easily demonstrated than in relation to animal sports. Nevertheless, its exemption from the operation of the legislation has never been unrestricted.

When first proposed by O'Loghlen in the Victorian Legislative Assembly in 1881, he had intended that its exemption be unrestricted in respect of "any experiment or . . . any case of vivisection performed on any animal by any legally qualified medical practitioner".[65] Opposing such an indiscriminate sanction as authorizing "the most atrocious barbarity" in animal experimentation, Deakin sought its regulation "in the lines of the

54 D.E. McConnell, *Australian Etiquette: or the Rules and Usages of the Best Society in the Australasian Colonies: together with their sports, pastimes, games and amusements* (Sydney, D.E. McConnell, 1885) at 474.
55 *South Australian Parliamentary Debates* (1906) at 359 (Mr. Vaughan); *31st Annual Report* of N.S.W. R.S.P.C.A. 1904.
56 *Prevention of Cruelty to animals (Amendment) Act, 1953* (N.S.W.): Act No.35 of 1953.
57 *Daily Telegraph Pictorial*, 18 August 1928.
58 *Daily Guardian*, 29 August 1928.
59 *Maitland Daily Mercury*, 30 August 1928.
60 *Prevention of Cruelty to animals (Amendment) Act, 1928* (N.S.W.).
61 *Prevention of Cruelty to Animals Act Further Amendment Act, 1921* (S.A.).
62 *Police Offences (Animals) Act 1950* (Vict.).
63 *Prevention of Cruelty to Animals Act, 1985* (S.A.) s.13(2)(c), (d).
64 *Tucker* v. *Hazelhurst* (1907) 26 N.Z.L.R. 263 at 265-6.
65 *Victorian Parliamentary Debates* (1881), vol. 37 at 343.

English law", the *Cruelty to Animals Act, 1876* (U.K.) requiring "that every person practising vivisection should register himself, that no vivisection should take place unless an anaesthetic was used in connexion with it . . . and so on".[66] The licence system was strongly condemned by O'Loghlen as providing in the English experience such limitations and delay as "practically [amounting] to little less than prohibition".[67] The compromise finally agreed exempted vivisection from the operation of the Act, though subject to regulation by the Governor in Council and the two-fold requirements that the animal be rendered insensible by anaesthetic during any experiment and then destroyed in that state if its recovery would involve serious suffering.

By the early 1900s this form of exemption had been adopted in all jurisdictions[68] with the exception of New South Wales and Tasmania. While the exemption of "scientific research" is even now only incidentally recognized in Tasmania,[69] an exemption in similar terms appeared in the New South Wales legislation from 1928.[70]

The English experience, even in relation to the more comprehensive provision of the *Cruelty to Animals Act, 1876,* foreshadowed that there would be difficulties in the operation of this legislation. In 1914, in the only reported prosecution of a medical experimenter for animal cruelty, the charge was eventually dismissed,[71] and as early as 1898 no prosecution of two unlicenced vivisectors was undertaken, the Home Secretary refusing even to divulge their names.[72]

The complete revision of the English procedures in the *Animals (Scientific Procedures) Act 1986*[73] has been parallelled in Australia by similar revisions in New South Wales,[74] Victoria[75] and South Australia.[76] The comprehensive licensing of experiments was sought in Queensland as early as 1977.[77] However, the first such provision was not made until 1985 and then only in South Australia and New South Wales. Victoria did not introduce similar legislation until the following year. Since the middle of 1982, Victoria had required that registered animal experimenters provide details of animals used in their experiments and to abide by the provisions of the national code of practice for the care and use of animals for experimental purposes.[78]

These three jurisdictions have now extended such controls, providing a comprehensive system of licensing for scientific establishments and others engaging in animal experimentation and for the creation of Animal

66 *Ibid.*
67 *Id.* at 346.
68 *The Animals Protection Act of 1901* (Qld.); *The Prevention of Cruelty to animals Act, 1908* (S.A.); *Prevention of Cruelty to Animals Act, 1912* (W.A.).
69 *Cruelty to Animals Prevention Act, 1925* (Tas.), s.5(2)(g), (h).
70 *Prevention of Cruelty to Animals (Amendment) Act, 1928* (N.S.W.).
71 *Dee* v. *Yorke* (1914) 30 T.L.R. 552.
72 *Hansard,* (4th Series), LX, 1107-8, LXI, 472-473.
73 See recent comment on the legislation, e.g., in E. Balls, "The Moral Status of Animals and the *Animals (Scientific Procedures) Act 1986*" (1989) 16 *Alternatives to Laboratory Animals* 353-357.
74 *Animal Research Act 1985* (N.S.W.).
75 *Prevention of Cruelty to Animals Act 1986* (Vict.), Part III.
76 *Prevention of Cruelty to Animals Act, 1985* (S.A.), Part IV.
77 *Queensland Parliamentary Debates* (1977), vol. 273 at 1175 (Mrs Kyburz).
78 *Protection of Animals Regulations 1981* (Vict.), s.14.

Ethics Committees to supervise the conduct of such research.[79] The South Australian legislation even describes such committees as having the further responsibility of ensuring "that animals involved in teaching, research or experimentation are treated humanely"[80] and provides that they shall not approve the use of any such animal unless satisfied that its use is "essential in order to obtain significant scientific data".[81] In New South Wales, the legislation requires that at least one member of such a committee be a person who is neither associated with any accredited research establishment nor involved in the conduct of, or the supply of animals for, animal research.[82] Under the South Australian legislation, at least one member of an animal ethics committee must be a person "with an established commitment to the welfare of animals".[83]

Moreover, there is provision in the legislation of these three States to require compliance in the conduct of any experimentation with any relevant Codes of Practice.[84]

The most recent revision of the *Australian Code of Practice for the Care and Use of Animals for Scientific Purposes*[85] imposes the obligation to consider [the animal's] welfare as an essential factor",[86] providing, for example, confinement of the animal by means that "ensure [its] comfort and well-being", taking into account such factors as its natural environmental and behavioural requirements.[87]

Recognizing the steps which have already been taken "to promote a more ethical approach to animal experimentation and animal welfare"[88], the Senate Select Committee on Animal Welfare in its 1989 *Report on Animal Experimentation* recommended that all Australian States and Territories adopt the initiatives taken in New South Wales, Victoria and South Australia.[89] Its recommendations included the complete abolition of both the Draize and LD50 (with qualification) tests in Australia.[90] While the impact of this report has yet to be determined, Queensland[91], Western Australia and the Australian Capital Territory[92] are presently in the pro-

79 For recent Australian discussion as to ethics committees, see *Animal Experimentation: Report by the Senate Select Committee on Animal Welfare* (Australian Government Publishing Service, Canberra, 1989) ch.16; T. Kuchel (ed.), *Animal Ethics Committees: their Structure, Function and Ethnical Dimension* (Adelaide, University of Adelaide, 1988) (proceedings of ASLAS 1987 conference).

80 *Prevention of Cruelty to Animals Act, 1985* (S.A.), s. 25(1)(d).

81 *Id.*, s. 25(3). See further *Animal Experimentation: Report by the Senate Select Committee on Animal Welfare* (Australian Government Publishing Service, Canberra, 1989).

82 *Animal Research Act 1985* (NSW), s.13(5).

83 *Prevention of Cruelty to Animals Act, 1985* (S.A.), s. 23(3)(d).

84 *Animal Research Act 1985* (N.S.W.), s.4; *Prevention of Cruelty to Animals Act 1986* (Vict.), s.32; *Prevention of Cruelty to Animals Act, 1985* (S.A.), s.44.

85 N.H.M.R.C., C.S.I.R.O. and Australian Agricultural Council, *Australian Code of Practice for the Care and Use of Animals for Scientific Purposes* (5th ed., Canberra, Australian Government Publishing Service, 1990).

86 *Id.* at 1.2.

87 *Id.* at 4.5.23.

88 *Animal Experimentation: Report by the Senate Select Committee on Animal Welfare* (Australian Government Publishing Service, Canberra, 1989) at 213.

89 *Id.* at xvii.

90 *Id.* at xv.

91 Noted *id.* at para. 14.47.

92 Noted *id.* at para. 14.53.

cess of following New South Wales, Victoria and South Australia in the complete revision of their animal cruelty legislation.

While part of the continuing process of refinement of the original broadly defined general offence of cruelty created in the early nineteenth century, the recent legislation of Victoria, South Australia and New South Wales is the first revision of the exemption of animal experimentation since its introduction into animal cruelty legislation in the 1880s. Although recognizing the long accepted equation that "if one human life was saved by 500 experiments on animals, the rescue of that life justified all the pain inflicted",[93] this latest legislative reform is merely reflective of the growing moral climate of the social welfare state of the late twentieth century. Unnecessary duplication of experimentation is sought to be avoided, with further provision to ensure the better regulation of humane procedures in the conduct of such experimentation as does occur.

3. Rural Community

It is as regards the rural community, though, that the most contentious reforms are now being instituted. Australia being a country so heavily dependent even today on the activities of its rural sector, one would expect in any utilitarian humanist calculation substantial concessions to that industry from the operation of the anti-cruelty laws in recognition of its fundamental importance to the Australian economy. While historically this has characterized the nature of the rural community's obligations under the anti-cruelty legislation, it is a characterization increasingly less accurate today and, even historically, one subject to qualification.

Control of the rabbit population, introduced to the Australian mainland in 1859 and in plague proportions by the 1880's,[94] is perhaps not surprisingly within the exemption from the animal cruelty legislation proposed by Sir B. O'Loghlen in the Victorian Bill of 1881. Nor is it surprising that when in 1887 the New South Wales government offered £25,000 reward for a sure method of destruction, even bacteriological warfare was proposed.[95] While myxomatosis was not introduced by CSIRO until 1936,[96] the Englishman, Dr. Botcher was, even in the 1880s, innoculating rabbits with various contagious viruses.[97] Nevertheless, when the eminent Louis Pasteur responded to the New South Wales government's offer of the reward in travelling to Sydney to develop the use of tubercular spore propagation to kill the rabbits,[98] he was met with expressions of a general public sentiment against the introduction of such a cruel practice to end the plague.[99] Despite the seriousness of the rabbit

93 *Victorian Parliamentary Debates* (1881), vol. 37 at 346 (Sir. B. O'Loghlen).

94 M. Cannon, *Australia in the Victorian Age (2): Life in the Country* (Melbourne, Thomas Nelson (Australia) Ltd. 1973) at 231ff; F. Crowley, *A New History of Australia* (Melbourne, William Heinemann, 1974) at 182.

95 Cannon, *id.* at 234.

96 *Ibid.*

97 *Ibid.*; J. Bailey, *A Hundred Years of Pastoral Banking: A History of the Australian Mercantile Land and Finance Company 1863-1963* (Oxford, Clarendon Press, 1966) at 101.

98 Cannon, *ibid.*

99 Editorial in the *Sydney Morning Herald*, 21 August 1883; Letter to the Editor (J. Pottie), 23 August 1883 cf. (A. Willows), 25 August 1883. The *Sydney Morning Herald* of 23 August 1883 notes a meeting of the RSPCA in protest.

threat to the activities of rural industry and the economy of the Australian colonies, public concern was clearly evident in the late nineteenth century that the plague should be brought under control, but not at any cost to humanitarian ideals.

Such expressions of public sentiment, together with the historical concentration of animal cruelty legislation on domesticated animals, not surprisingly fostered its perception by the rural community as mere urban meddling, the fear that such legislation "would seriously affect country districts" having in no way diminished by the beginning of the twentieth century.[100] Agitation in South Australia in 1906 for the inclusion of a specific provision exempting from the operation of the statute the dehorning of cattle,[101] heightened by the fining of "many people" in Victoria for engaging in this practice,[102] led to the inclusion in *The Prevention of Cruelty to Animals Act, 1908* (S.A.) of a provision exempting the operation where "performed with a minimum of suffering to the animal operated upon".[103] This early exemption in favour of the rural community was extended in Western Australia in 1912 to include "the castration, spaying, ear-splitting, ear-marking, or branding of any animal, or the tailing of any lamb".[104] Similar exemptions were adopted in Queensland and Tasmania in 1925[105] and in New South Wales in 1928.[106]

No further revision of these exemptions was undertaken until the recent revival of legislative activity in the area of animal welfare during the last decade. While New South Wales acted in 1979 to specifically extend the nominated farming practices exempted from the Act to encompass the ear-tagging of stock animals and the performance of the Mules operation on lambs (a "listings approach" employed with even further refinement under the 1987 amendments to that Act),[107] other States sought to provide a more general blanket exemption of farming practices from the operation of the legislation. In 1977, Queensland extended the exemption to encompass all "acknowledged husbandry practices", although indicating its extended operation by way of example as including mulesing, shearing, lamb marking, crutching of sheep and shoeing of horses.[108]

While Victoria, its historical orientation less rural than that of other States, did not specifically exempt farming practices (either generally or even by specific reference) until 1980, it did so at that time even more definitively than had Queensland three years earlier, providing simply that no farming activity would infringe the Act when undertaken "in accordance with accepted farming practice".[109] This was, perhaps, though the high-water mark in the recognition of rural autonomy on the question of necessary suffering of domesticated animals. The following year, the Victorian legislation was amended to further exempt "any act or practice

100 *South Australian Parliamentary Debates* (1906) at 262 (Mr. Allen).
101 *Id.* at 197 (W.B. Rounsevell).
102 *Id.* (1908) at 163 (G. Riddoch).
103 Section 5.
104 Section 5.
105 *Animals Protection Act 1925* (Qld.), s.7; *Cruelty to Animals Prevention Act, 1925* (Tas.), s.5.
106 *Prevention of Cruelty to Animals (Amendment) Act, 1928* (N.S.W.).
107 *Prevention of Cruelty to Animals Act, 1979* (N.S.W.), s.24.
108 *Animals Protection Act Amendment Act 1977* (Qld.).
109 *Protection of Animals Act 1966* (Vict.), s. 12(1)(aa) inserted by Act No.9412.

with respect to the farming . . . of any farm animal which . . . is in accordance with a Code of Accepted Farming Practice".[110] Six Codes of Practice issuing in Victoria during 1981 (covering pigs, poultry, cattle, sheep, deer and the road and rail transportation of livestock) and several national codes of practice having subsequently been adopted, the general exemption of farming practices given in 1980 was removed in 1986. The *Prevention of Cruelty to Animals Act 1986* (Vict.) now provides merely that the "Act does not apply to . . . any act or practice with respect to the farming . . . of any farm animal which is carried out in accordance with a Code of Practice".[111]

The fear expressed in debate upon the Victorian Bill was that as no general exemption existed, a farmer engaging in otherwise normal farming practices might nevertheless have failed to comply with the more onerous requirements under a Code of Practice and would now fall within the cruelty provisions of the Act.[112] Such direct interference with farming practices was challenged as failing to recognise the fundamental economic importance of the rural community to the State — an importance similarly characteristic of the national economy — and its impressive history of self-regulation.[113] Our economic dependence on rural industry would clearly have been influential in the exemption of farming practices from the operation of the legislation in the early part of the twentieth century. That concern must always have been less persuasive in Victoria than in other more rural Australian states. It certainly was inadequate to prevent the Victorian Parliament sanctioning the external regulation of animal management practices within the rural community from 1986.

In that same year, regulations introduced under the South Australian legislation prescribed various Codes of Practice for the Welfare of the Pig and Domestic Fowl and for the Road and Rail Transport of Livestock.[114] These Codes recognize as the "basic requirement for the welfare" of animals a "husbandry system appropriate to their physiological and behavioural needs".[115]

While "many years ago the majority of farmers recognized that it was in their own interest to minimize cruelty in the keeping of animals because, if they were cruel to animals, that would impact on their production",[116] the advent of factory farming has often obscured the validity of this equation in recent years.[117] The failure of a Bill, in 1985, for the abolition of battery hen farming in Tasmania appears, for example, to endorse "commerce and cruelty [as] compatible bed-mates"[118] in the

110 *Id.*, s.21A inserted by Act No. 9481.

111 *Prevention of Cruelty to Animals Act 1986* (Vict.), s. 6(c).

112 *Victorian Parliamentary Debates* (1986), vol. 382 at 977 (B.P. Dunn).

113 *Id.* at 974-5 (and generally).

114 *South Australian Government Gazette*, 24 April 1986 at 1017ff, 24 July 1986 at 337ff.

115 *South Australian Government Gazette*, 24 April 1986 at 1018 (The Pig), 1027 (The Domestic Fowl).

116 *Id.* at 969 (R.I. Knowles).

117 The economic impacts are considered in J. Simpson and B. Rollin, "Economic Consequences of Animal Rights Programs" (1984) 3 *Journal of Business Ethics* 215-225. See further *Intensive Livestock Production: Report by the Senate Select Committee on Animal Welfare* (Canberra, Australian Government Publishing Service, 1990).

118 *Tasmanian Legislative Council Parliamentary Debates*, 24-26 September 1985 at 2079 (Mr. Miller).

face of contrasting European initiatives[119] and Australian public opinion.[120] Yet the economic value of battery hen farming has been challenged even from Elizabethan times with the recognition that "to cram capons . . . and to deprive them of all light is ill for them and us too [for] their flesh is not natural and wholesome".[121]

The removal of blanket exemptions of farming practices in favour of governing codes of practice in both Victoria and South Australia,[122] at one level, merely recognizes that existing farming practices may not maximize economic return in a way better achieved by more humane practices. Nevertheless, the more substantial basis for such regulation derives merely from "changing community attitudes towards animals"[123] with "an increase in the demonstrable concern for all living beings".[124]

Conclusion

While it may go too far to characterize Australia as a "Benthamite" triumph, the growth of animal cruelty legislation has long been neglected as evidence that Bentham's utilitarianism (whether consciously or otherwise) clearly took root in the country's developing political and social values.[125] The utilitarianism of the celebrated programme of "Deaknite liberalism" of "land legislation; protection; free, compulsory and secular education; payment of members of Parliament; factory acts; early closing [and] anti-sweating legislation",[126] might easily have included Alfred Deakin's early support for animal welfare, introducing animal cruelty legislation into the Victorian Parliament in 1881.

The state in colonial Australia was "a stronger, more intrusive, legitimately interventionist instrument than Victoria's Britain".[127] While

119 See references to such initiatives in the *Victorian Parliamentary Debates* (1980), vol. 352 at 1014 (Mr. Mathews); *Id.* at 2078-2104 (generally). Note, for example, the banning in Switzerland of battery cages for laying hens as the result of a 1981 referendum. On these initiatives generally, see W. Jackson, "On Farm Animal Welfare Law in Europe — Using the Law" (1988) 20 *Applied Animal Behaviour Science* 165-173; S. Wise, "Of Farm Animals and Justice" (1986) 3 *Pace Environmental Law Review* 191-227 at 211-213; D. Allen, "The Rights of Nonhuman Animals and World Public Order: A Global Assessment" (1983) 28 *New York Law School Review* 377-429 at 421; R. Moss, "Animal Welfare: Ends and Means" (1980) 136 *The British Veterinary Journal* 105-110; J. Frank, "Factory Farming: An Imminent Clash Between Animal Rights Activists and Agribusiness" (1979) 7 *Environmental Affairs* 423-461 at 447ff; J. Frank, "Factory Farming: An Imminent Clash Between Animal Rights Activists and Agribusiness" (1979) 7 *Environmental Affairs* 423-461 at 447ff. A recent example is the *Animal Protection Act* (1988: 534) (Sweden) (see esp. Article 9).

120 J. & V. Braithwaite, "Attitudes Toward Animal Suffering: An Exploratory Study" (1982) 3 *International Journal for the Study of Animal Problems* 42-49.

121 Quoted Keith Thomas, *Man and the Natural World* (London, Allen Lane, 1983) at 189.

122 *Prevention of Cruelty to Animals Act, 1985* (S.A.), s. 44(3).

123 *South Australian Parliamentary Debates* (1985), v. 2 at 1624 (J.R. Cornwall).

124 *Victorian Parliamentary Debates* (1986), vol. 382 at 968 (R.I. Knowles).

125 J. Eddy, "The Technique of Government" in R. MacLeod (ed.), *Government and Expertise: Specialists, administrators and professionals, 1860-1919* (Cambridge, Cambridge University Press, 1988) at 172. See further P. Finn, *Law and Government in Colonial Australia* (Melbourne, Oxford University Press 1987) esp. at 160; *op. cit. supra* n. 23 cf. *supra* n. 30 (esp. at 146).

126 J.A. Nauze, *Alfred Deakin: A Biography* (Melbourne, Melbourne University Press, 1965) i at 107.

127 *Op. cit. supra* n.23.

Bentham's advocation of a strong, centralized police force for England had to contend with the traditional restraints of established church, military services and landed aristocracy, nowhere in the colonial empire was the machinery of government so intimately meshed with the texture of society than in colonial Australia.[128] Its early police offences laws were in fact so expansive in content as to be more reminiscent of the broader notions of European policing than those of England. It is not surprising then that the earliest colonial animal cruelty legislation is predominantly to be found within these laws.

Received into the colonies within the broader context of a filial allegiance with "the mother country", the adoption of such legislation appears to have been similarly heavily overlain with considerations of social control reminiscent of its early English inspiration in the unstable political climate of that time. Its further development was also less influenced by theoretical considerations than by practical difficulties; "each successive statute aimed at remedying a single ascertained evil".[129]In identifying that evil though, its growth was characterized by the same underlying humanist utilitarian philosophy which had marked its English origin.

One would nevertheless expect that the traditional Australian Benthamite "sympathy for the underdog and [the] expectation that decent public provision should be made for individuals in distress"[130] would be equally apparent as regards its animals. Such sympathies are revealed in the pattern of growth of animal cruelty legislation, having occurred nationally during four broadly defined periods — the 1860s, 1900s, 1920s and 1950s. Each is a period of real or apparent economic growth and prosperity within which utility would have allowed of a broader share of the benefits in maximizing the interests of all individuals while securing the public good.[131]

While the "abstract Benthamite ideas that adhered to [the] concrete enactments and achievements of the nineteenth century endured as the dominant ideology in the twentieth century",[132] Australia is now experiencing a drift towards a new ideology. The late twentieth century has

128 Eddy, *supra* n. 125 at 169.

129 *Supra* n. 30 at 813.

130 *Op. cit. supra* n.23 at 157.

131 Consistently with this thesis, an analysis of British literature published in the field of animal welfare shows a lessened interest during periods of warfare: R. Ryder, "The Struggle Against Speciesism" in D. Paterson & R. Ryder (eds.), *Animal Rights: A Symposium* (Sussex, Centaur Press, 1979) at 11. To the same effect is a study of newspaper articles in the United States: S. Kellert & M. Westervelt, *Trends in Animal Use and Perception in 20th Century America: Phase TV* (Washington D.C., U.S. Dept. of the Inrerior, Fish and Wildlife Service, 1981) esp. at 124. This study though also identifies a heightened interest even during periods of economic downturn — the period of the 1930's Depression. However, it also included attitudes to wildlife and this may merely reflect the inexpensiveness of natural recreational activities during periods of economic stringency. See further S. Kellert and M. Westervelt, "Historical Trends in American Animal Use and Perception" (1983) 4(2) *Int. J. Stud. Anim. Prob.* 133-146.

132 *Id.* at 152.

been marked by a movement towards the more benevolent philosophies of an eighteenth century pre-industrial England, a developing commercial morality more consistent with the demands of the social welfare state.[133] This late encounter with Locke has its implications for animal welfare in the re-emerging acceptance of mankind's biblical stewardship — "that upon creation mankind has been accorded a position of special responsibility to the lesser creatures of the earth".[134] Inspired by these trends, the movement in reform of animal cruelty legislation (particularly evidenced in the recent developments as regards animal experimentation and farming) is increasingly subjugating the governance of economic utility to the demands of the conscience — a moral concern for the welfare of animals solely dependent on Bentham's original consideration of sentience.

The capacity to suffer though had never been appropriate to the demands of the Industrial Revolution, Bentham's philosophies being early contorted to provide justification for the efficient work practices of an increasingly factory-based economy. Nevertheless, the predominant consideration of public order in justification of the early animal cruelty legislation has itself been lost to history. The justification for such legislation is now traditionally advanced in terms of Kant's "escalation" thesis — that cruelty to animals brutalizes humans in their attitudes towards one another — by those fearful that, in the absence of a humanist consideration in explanation of the legislation, its existence might be used in support of "animal rights". In fact, "the demoralization of the people" only appears in the preamble to the legislation in 1835, although Kant's thesis can be dated even to the ancient Athenians.

It was evidence of mankind's basic animality which had enabled Kant, during the eighteenth century, to so readily popularise the belief that animal cruelty would escalate in turn to acts of cruelty upon humans. From how we treated animals we would learn how to treat people. This kindred relationship is popularly illustrated by the development of societies for the prevention of cruelty to children from the existence of kindred societies for the prevention of cruelty to animals. In Australia, it is equally apparent in the example of the Victorian push in 1863 for legislation prohibiting pugilism by analogy with the prohibition of animal fights[135] and, similarly, in 1881 in the inspiration provided by the Animal Protections Bill of that year for the introduction of the Employees in Shops Bill, seeking to ameliorate the conditions of shop staff.[136]

If we are to learn from our treatment of animals how we should treat

133 See, e.g., *Trade Practices Act 1974* (C'wth) and its State equivalents; *Commercial Bank of Australia Ltd* v. *Amadio* (1983) 151 C.L.R. 447; *Westpac Banking Corporation* v. *Clemesha* (unreported judgment of Cole J., Supreme Court of N.S.W., 29 July 1988); *Waltons Stores (Interstate) Ltd* v. *Maher* (1988) 76 A.L.R. 513; *Trident General Insurance Co. Ltd* v. *McNiece Bros. Pty Ltd* (1988) 80 A.L.R. 574; *Foran* v. *White* (1989) 88 A.L.R. 413. Generally, see P. Finn, "Commerce, the Common Law and Morality" (1989) 17 *Melbourne University Law Review* 87-106.

134 *Tasmanian Legislative Council Parliamentary Debates*, 24-26 September 1985 at 2078 (Mr. Miller).

135 *Victorian Parliamentary Debates* (1863) 2nd, 19th August.

136 *Id.* (1881), vol. 37 at 243 (Mr. Gardiner).

people, legislation embodying the differential classification of animals according only to the economic viability of that protection[137] must imply that we may treat people similarly. Kant's "escalation" thesis carries with it the unpalatable implication that the utilitarian ethic, historically underlying the growth of animal cruelty legislation, supports the assessment of human value solely upon economic considerations. Such an analogy is ripe for the development in the law of the recognition of proprietary interests in people. Elements of such a philosophy survived in part in the law of the United States until the position of professional baseball players was reformed barely a decade ago.[138] It continues to haunt the relationship of sports clubs and their players.[139] The utilitarian ethic underlying animal cruelty legislation supports the development in that relationship of proprietary interests, evaluating the athletes' legal status in terms solely of their economic value.

Kant's thesis establishes that the utilitarian morality which has historically underlaid the growth of animal cruelty legislation is clearly inappropriate to the values of twentieth century Australia. The present movement in favour of conscience in delineating the extent to which animal suffering is both morally and legally acceptable is a development both appropriate to and consistent with the broader humanitarian reform of the last decade in this country.

137 Criticism of our recognition of animal suffering only where it is of some direct advantage to ourselves appears in Australian writing from early this century. See, e.g., H. Christopherson, *Bossing a World* (Adelaide, H. Christopherson, 1919), especially at 31.

138 Confirmed as late as 1972 in *Flood* v. *Kuhn*, 407 U.S. 258 (though see *Kansas City Baseball Corporation* v. *Major League Baseball Players Association* (1976) 409 F. Supp. 233, aff'd. 532 F. 2d 615). See generally J. Barnes, *Sports and the Law in Canada* (2nd ed., Toronto, Butterworths, 1988) at 122ff. In *Eastham* v. *Newcastle United Football Club* [1964] 1 Ch. 413, the transfer system for football players challenged in that case was "stigmatised by the plaintiff's counsel as . . . involving the buying and selling of human beings as chattels": Wilberforce J. at 427. In finding the system (in conjunction with the retention system) to be in restraint of trade, his Honour concluded that "to anyone not hardened to acceptance of the practice it would seem inhuman" (at 427).

139 See, e.g., *Bournemouth and Boscombe Athletic Football Club Co.* v. *Manchester United Football Club. The Times*, 22 May 1980 (C.A.). D. Greig and J. Davis, *The Law of Contract* (Sydney, Law Book Co. Ltd, 1987) at 206 actually describes the transfer system within Australian Rules Football as creating a "market" in players' services cf. *Adamson* v. *West Perth Football Club (Incorporated)* (1979) 39 F.L.R. 199 (esp. though at 208). An observation of this nature appears in O. Patterson, *Slavery and Social Death: A Comparative Study* (Cambridge, Mass., Harvard University Press, 1982) at 24-27.