

THE EQUITABLE JURISDICTION OF THE INFERIOR COURTS IN WESTERN AUSTRALIA

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This paper considers whether equitable remedies are available in the District and Local Courts in Western Australia. As far as the District Court is concerned, the civil jurisdiction is set out in sections 50-63 of the *District Court of Western Australia Act* 1969.¹ The prevailing view² is that section 55 of the *District Court Act* vests in the Court the power to grant equitable remedies where a plaintiff establishes a claim for primary relief that is that an equitable remedy is available where the remedy sought is in aid of, or ancillary to, an action for the recovery of money or property. There are certainly authorities which clearly support such a view.³

The civil jurisdiction of the local court is set out in sections 30-35, 94, 99-100 and 103 of the *Local Courts Act* 1904.⁴ Again the prevailing view is that 'the local courts may grant the same kind of ancillary remedies in respect of those claims at law within its jurisdiction as the District Court may grant in actions within its jurisdiction.'⁵ On this view there is no reason why either court should not have power to grant equitable remedies both in interlocutory proceedings where the remedy sought is ancillary to the claim for primary relief and in respect of a counterclaim which is itself within the jurisdictional limits.⁶

I suggest that a re-examination of the issue is required in the light of two decisions that the view outlined above does not explain: *Foster v.*

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¹ District Court of Western Australia Act 1969 (Act No. 84 of 1969) (hereinafter referred to as the District Court Act).

² Williams, 'Equitable Remedies in the Inferior Courts', an unpublished paper delivered at W.A. Law Summer School in 1977.

³ See inter alia, *R. v. Cheshire County Court Judge and United Society of Boilermakers* [1921] 2 K.B. 694, *Smith v. Smith* [1925] 2 K.B. 144, *De Vries v. Smallridge* [1928] 1 K.B. 482.

⁴ Local Courts Act 1904 (Act No. 51 of 1904) (hereinafter cited as Local Courts Act).

⁵ Williams, *supra* n. 2, at 13.

⁶ *Id.* at 14.

*Reeves*⁷ and *Kingswood Estate Co. Ltd. v. Anderson*.⁸ When these decisions are taken into account, it cannot be argued with any certainty that the inferior courts in Western Australia have equitable jurisdiction to the extent claimed. This is an issue of some importance given that the prevailing view appears to have found support among some of the District Court Judges in Western Australia.

The District and Local Courts are the creatures of statute and are vested with only such statutory jurisdiction as is conferred by the express words of the relevant statutes. It seems to be generally accepted that ambiguities should be construed against the inferior courts having jurisdiction.⁹

The first Civil Court of Judicature in Western Australia was established under legislation enacted in 1832 (2 Will. IV No. 1). This court was abolished in 1861 with the coming into being of the *Administration of Justice (Civil) Ordinance* 1861 (14 Vict. No. 15) which established a new Supreme Court. To this court was transferred all the jurisdiction of the Civil Court,¹⁰ the common law jurisdiction of the English courts of common law,¹¹ the ecclesiastical jurisdiction of the English courts of probate¹² and the equitable jurisdiction of the Lord Chancellor in England.¹³ This one court administered both law and equity but on different sides. In 1880 by the *Supreme Court Act* 1880 (44 Vict. No. 10) the separation of law and equity was put to an end and the English Legislation of 1973 copied. Sections 7 and 8 of the Western Australian Act were the local counterparts of the English sections 24 and 25 of the *Supreme Court of Judicature Act* 1873. (hereinafter referred to as the *Judicature Act* 1873). In 1935 the Act was consolidated by the *Supreme Court Act* 1935, which is still the governing statute although it has been amended on many occasions. The 1935 legislation substantially re-enacted the 1880 legislation. Part III of the 1935 Act deals with the jurisdiction of the courts. In their monograph on Equity Meagher, Gummow and Lehane note that 'it is not easy to see that it conferred any novel powers on the Supreme Court or really altered its jurisdiction.'¹⁴

As far as the pre-judicature relationship between law and equity is

⁷ [1892] 2 Q.B. 255.

⁸ [1963] 1 Q.B. 169.

⁹ *Supra* n. 2, at 2 and n. 5 therein.

¹⁰ s.26

¹¹ s.4

¹² s.5

¹³ s.6

¹⁴ Meagher, Gummow & Lehane, *Equity: Doctrines and Remedies* (1975) 18.

¹⁵ *Id.* at 26

concerned it is clear that the common law courts had no powers to award specific performance, declarations or injunctions.¹⁵ Section 24 of the *Judicature Act* 1873, provided for a new joint procedure between law and equity which made for a final determination of all matters in issue between the parties in one court. Section 25 of the *Judicature Act* 1873, provided for the resolution in instances of possible conflict, between law and equity. The provisions of sections 24 and 25 of the *Judicature Act* 1873, have been reproduced in similar form in sections 24 and 25 of the present *Supreme Court Act of Western Australia*.

The provisions of section 24 of the *Judicature Act* 1873 are explained by Meagher, Gummow and Lehane:

The significance of the provisions of section 24 should briefly be noted.

Sub-clause (1) gave all branches of the court power to administer equitable remedies;

Sub-clause (2) and (3) enabled equitable defences to be pleaded and relief given thereupon;

Sub-clause (4) required all branches of the court to recognise equitable titles;

Sub-clause (5) prohibited the issue of common injunctions within the court;

Sub-clause (6) gave general power of determination of legal titles; and the final sub-clause was designed to catch up anything missed by an expression of general benevolent intent.¹⁶

It is worth noting that sub-clause (1) of section 24 which gave all branches of the court power to administer equitable remedies is nowhere to be found in either the *District or Local Courts Acts*. It is arguable that if the legislature had intended to give power to the District and Local Courts to administer equitable remedies either generally, or as ancillary to the power of the respective courts to administer primary relief, the obvious way to have achieved that end would have been to reproduce section 24 in the *District and Local Courts Acts* respectively, subject only to the exercise of the equitable power being restricted to an action or matter within the respective courts jurisdiction for the time being.

Perhaps the most important segment of the jurisdiction of both the District and Local Courts is in relation to personal actions. 'An "action" according to the legal meaning of the term, is a proceeding by which one party seeks in a court of justice to enforce some right against, or to restrain the commission of some wrong by, another party.'¹⁷ The term

¹⁶ Id. at 38.

¹⁷ *Halsbury's Laws of England* 3rd ed., v. 1, at 2.

implies the existence of parties, a right and an infringement thereof and of a court having power to enforce such a right.¹⁸ The term originally referred to both civil and criminal proceedings but it is now generally understood in its more restricted sense as denoting a civil action commenced by writ or plaint.¹⁹ The statutory definitions given to the term 'action' in the *District and Local Courts Acts* are similar. In the District Court, the term means 'a civil proceeding commenced by writ or in such other manner as is prescribed by rules of court and includes suit but does not include any criminal proceeding by the Crown'.²⁰ In the Local Court, the term 'action' includes suit, and means a civil proceeding commenced as prescribed by plaint.²¹ The relevance of 'action' including 'suit' in both statutory definitions is that it has rendered obsolete the old technical distinctions between actions at law and suits in equity.²² In the *District Court Act* both 'action' and 'suit' are included in the wider term 'cause' which 'includes any action, suit or other original proceeding between a plaintiff and a defendant and any criminal proceeding by the Crown'.²³ It is therefore no longer possible to argue that the term 'suit' is an appropriate reference for a proceeding in equity. Both the term 'action' and 'suit' mean no more or less than a civil proceeding commenced as prescribed by plaint in the Local Court or by writ or in such other manner as prescribed by rules of court in the District Court.

A *personal action* is one in which a plaintiff claims the recovery of liquidated or unliquidated damages or the recovery of a chattel or damages in lieu thereof at law.²⁴ 'Personal actions are such whereby a man claims a debt, or personal duty, or damages in lieu thereof; and likewise where a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon torts or wrongs.'²⁵ Williams notes that 'the categories of actions set out in section 50 do not distinguish between claims in law and equity.'²⁶ A personal action was one at common law which contemplated a claim for money founded on contract or tort.

The idea of something which was not a claim for money founded on contract, or a claim for money founded on tort, but was a de-

¹⁸ Id.

¹⁹ Id.

²⁰ District Court Act 1969, s.6.

²¹ Local Courts Act 1904, s.3.

²² *Halsbury*, supra n. 17, at 3.

²³ Supra n. 20.

²⁴ *Halsbury*, supra n. 17, at 21.

²⁵ *R. v. Cheshire County Court Judge and United Society of Boilermakers* [1921] 2 K.B. 694 at 709 per Scrutton L.J.

mand for a declaration, I think never occurred to Sir William Blackstone, and I do not think, when the legislature used the phrase 'personal actions' it was thinking of any such matter of declarations, which were practically unknown in the County Court.²⁷

The term was necessarily confined to the common law because equity was loathe to recognise damages as a remedy. 'Damages is a term used to describe the monetary compensation awarded for invasion of the plaintiff's common law by the defendant . . . Damages was never an equitable remedy for breach of purely equitable obligations.'²⁸ However, as far as the concurrent and auxillary jurisdiction of equity was concerned, there was uncertainty as to whether there was any power in the Court of Chancery to award damages. This uncertainty was resolved only with the passing of *Lord Cairns' Act*,²⁹ which enabled the Court of Chancery to award damages in addition to or on substitution for an injunction or specific performance. It was only with the passing of the *Common Law Procedure Act* 1854, that an injunction became available at common law, for until that time it had been exclusively an equitable remedy.³⁰

The several rules of law and equity enacted and declared by the *Supreme Court Act* of Western Australia are to be in force and take effect in the District and Local Courts respectively.³¹ This has no bearing on the question of whether or not the inferior courts have the power to exercise equitable remedies but rather deals only with the question of a possible conflict between law and equity.

The 'several rules' are those enacted to resolve the true conflicts between law and equity and thus are equivalent to section 25 of the (Imp.) *Judicature Act* 1873. But the 1969 Act does not go on to vest any other equity jurisdiction and in particular gives no power to administer the equitable remedies.³²

This is not to say that the District and Local Courts are precluded from taking into account and applying equitable rules and principles.

On the other hand, the equitable rules as to time being of the essence would apply to claims in the District Court for damages for failure to complete because such application would not depend upon the administration of remedies beyond its jurisdiction. This is

²⁶ Supra n. 2, at 4.

²⁷ See supra n. 25

²⁸ Meagher et al., supra n. 14, at 515.

²⁹ 21 & 22 Vict. c27, s.2.

³⁰ Supra n. 17, at 30.

³¹ District Court Act 1969, s.57(1) and Local Courts Act 1904.

³² Meagher et al., supra n. 14, at 56.

consistent with the closing words of section 57(1) which limit the force and effect of the subject rules of law and equity to those matters which are cognizable by the District Court under its jurisdiction as conferred by other provisions of the Act.³³

However, section 57(2) of the *District Court Act* should be noted. It provides, inter alia:

in every action of matter commenced in the court, law and equity shall be administered according to the provisions of section 25 of the *Supreme Court Act* 1935 as though that Section were enacted in this Act and in terms made applicable to the court.

Section 25(9) of the *Supreme Court Act* 1935 provides, inter alia:

A mandamus or an injunction may be granted, or a receiver appointed, by an interlocutory order of the court or a Judge in all cases in which it shall appear to the Court or a Judge to be just and convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the court or Judge shall think fit.

It seems clear therefore that the District Court or a Judge thereof has power to grant a mandamus or an injunction or to appoint a receiver *by way of an interlocutory order but not in the form of a final order*. There appears to be no power in the District Court to grant any of the other equitable remedies by way of an interlocutory order or at all.

Section 53(1) of the *District Court Act*, does not take the matter any further. The additional powers and authorities conferred upon a District Court Judge under the section must be ex necessitate within the jurisdiction of the Court. The section does not extend the court's jurisdiction and in particular it does not vest jurisdiction in the court to exercise the equitable remedies.

It is section 55 of the *District Court Act*, and section 33 of the *Local Courts Act*, which are at the centre of the issue of whether the inferior courts in Western Australia have jurisdiction to entertain equitable remedies and it is the direct ancestors of these sections which have been the subject of some unsatisfactory judicial pronouncements. Despite minor differences in wording between the two sections, it would appear that section 55 of the *District Court Act*, and section 33 of the *Local Courts Act*, are probably identical in scope and effect.³⁴

In *Foster v. Reeves*,³⁵ the defendant entered on premises under an executory agreement for a lease. He subsequently gave six months'

³³ Id.

³⁴ Williams, *supra* n. 2, at 13.

³⁵ [1892] 2 Q.B. 255.

notice to quit and left the premises. An action was brought in the County Court for a quarter's rent accruing after the defendant had given up possession. The plaintiff sought to rely on equity in support of his *claim*. The Court of Appeal held that a claim which depended upon the application of the equitable doctrine or *Wals v. Lonsdale*³⁶ that a person who enters under an executory agreement for a lease is to be treated as under the terms of that agreement, was outside the jurisdiction of the County Court where the value of the property exceeded £500. It was made clear that the County Court had no general equitable jurisdiction.

In this case the plaintiff brought an action against the defendant of the County Court, to recover £17-10-0 rent, due under an agreement. When the agreement is looked at, it is found that it assumes to create a tenancy for three years, to begin at a subsequent date. Such a tenancy can at common law only be created by deed, and the agreement cannot be used to enforce a claim for rent said to be payable by virtue of it, although the person who is required to pay is not in possession. If, therefore, we look to the common law alone, this claim cannot be supported. It is said, however, that equity would decree specific performance and that if so the case is to be treated in every court as if specific performance had been decreed and a lease granted. If that argument is sound, the agreement is effective and the rent due. The answer given to this contention is that a County Court has no jurisdiction in such an equitable matter, and cannot take notice of this equitable doctrine.³⁷

The other two judges in the case, Fry L.J. and Lopes L.J. were similarly of the view that the County Court had no jurisdiction to decree specific performance in support of the plaintiff's claim. However, the attention of the Court was never directed to what might have been a defendant's right to invoke the doctrine of *Walsh v. Lonsdale*³⁸ by way of defence. At the time of the decision the right of a defendant to invoke an equitable doctrine by way of defence or counterclaim was governed by sections 89 and 90 of the *Judicature Act* 1873. It is to be observed that neither of the sections was referred to in the course of argument in *Foster v. Reeves*,³⁹ but in *Kingswood Estate Co. Ltd. v. Anderson*⁴⁰ the Court of Appeal gave them full consideration.

In *Kingswood Estate Co. Ltd. v. Anderson* a property development company was anxious to obtain possession of premises controlled by the

³⁶ 21 Ch.D.9.

³⁷ *Supra* n. 35, at 257-8.

³⁸ *Supra* n. 36.

³⁹ *Supra* n. 35.

⁴⁰ [1963] 2 Q.B. 169.

Rent Restrictions Acts and in which resided an elderly statutory tenant. The company purchased another house and offered the statutory tenant accommodation therein. The Managing Director of the Company represented to the statutory tenant that in the event of her moving to the new premises there would be no need for a tenancy agreement as she and her invalid son who was residing with her, would be free to occupy the new premises for the rest of their lives. On the faith of the representations, the statutory tenant and her son took up possession of the new premises. The company served the tenant with a notice to quit and claimed possession of the property in the County Court, contending that the tenant was occupying on the basis of a weekly contractual tenancy and was therefore entitled to no more than four weeks' notice. It was held, *inter alia*, that the effect of section 74 of the *County Courts Act* 1959 was to require the County Court to give effect to an equitable defence in as full and ample manner as the High Court and that accordingly the landlords had no right to obtain an order for possession against the tenant.

Russell L.J. examined the ancestry of sections 74 and 65 of the *County Courts Act*:

Section 74 descends from section 89 of the *Judicature Act* 1873, via section 71 of the *County Courts Act* 1934, and section 202 of the *Judicature Act* 1925. Section 65 descends from section 90 of the *Judicature Act* 1873 via section 63 of the *County Courts Act*, 1934, section 11 of the *County Courts (Amendment) Act* 1934, and section 203 of the *Judicature Act* 1925.⁴¹

Sections 89 and 90 of the *Judicature Act* 1873 were considered by each of the judges and, apart from some minor differences noted by Russell L.J.,⁴² all agreed that sections 74 and 65 of the *County Courts Act* 1959, were the modern counter-parts of sections 89 and 90 of the *Judicature Act* 1873 respectively, and that they left the position substantially as it was before. It has been noted that sections 55 of the *District Court Act* and 33 of the *Local Court Act* are probably identical with each other in scope and effect,^{43a} and the operative words of these sections appear to be the same as the operative words of section 89 of the *Judicature Act* 1873.

Wilmer L.J. considered the effect of *Foster v. Reeves*:

Foster v. Reeves was a case where the equitable right was sought to be set up by the plaintiff in support of his claim. The actual decision was that a claim which depended upon the application of the

⁴¹ *Id.* at 195.

⁴² *Id.*

⁴³ Text *supra*.

doctrine in *Walsh v. Lonsdale*⁴⁴ was outside the jurisdiction of the County Court where the value of the property exceeded £500. It does not follow, as it seems to me, that the same considerations necessarily apply where the doctrine is invoked by a defendant by way of defence to a claim which is within the County Court jurisdiction, as the plaintiff's claim here undoubtedly is.⁴⁵ . . . I think it is clear that in *Foster v. Reeves*⁴⁶ the attention of the Courts was never directed to what might be a defendant's right to invoke the doctrine of *Walsh v. Lonsdale*⁴⁷ by way of defence. At the date of that decision, the right of a defendant to invoke an equitable doctrine by way of defence or counterclaim was governed by sections 89 and 90 of the *Supreme Court of Judicature Act 1873*. It is to be observed that neither of these sections appears to have been referred to in the course of argument in that case.⁴⁸ . . . It seems, therefore, that the position at that date was that where the cause of action was within the jurisdiction of the County Court the Judge was bound to give the like effect to any equitable defence as would be given in the High Court. If, however, the defendant himself sought relief by way of counterclaim, then such counterclaim would be subject to the right to apply for transfer to the High Court.⁴⁹ . . . section 89 of the Act of 1873 has now been replaced by section 74 of the *County Courts Act 1959*, . . . the result, as I see it, is to leave the position substantially as it was before. It seems to me that in the County Court a defendant is entitled to take full advantage of any equitable defence open to him to the same extent as in the High Court, provided always that the plaintiff's claim is within the County Court limit. The right to put forward a counterclaim, however, is subject now, as it was before, to the right of any party to apply for the proceedings to be transferred to the High Court.⁵⁰

Lord Upjohn took the view that sections 89 and 90 of the *Judicature Act 1873* dealt only with questions of defence and counterclaim.

This brings me at once to the apparent difficulty created by *Foster v. Reeves*.⁵¹ It is quite true that if the language used by Lord Esher M.R. in that case be treated as of general application to claims and counterclaims, it would seem to cover this case, but it must be remembered that the Court there was dealing entirely with the question of a claim; it was not concerned with a counterclaim, still

⁴⁴ *Supra* n. 36.

⁴⁵ [1963] 2 Q.B. 169.

⁴⁶ [1892] 2 Q.B. 255.

⁴⁷ 21 Ch.D. 9.

⁴⁸ [1963] 2 Q.B. 169, at 183.

⁴⁹ *Id.* at 184.

⁵⁰ *Id.* at 186.

⁵¹ [1892] 2 Q.B. 255.

less a defence. Sections 89 and 90 of the *Judicature Act* 1873, were not cited to the Court and it was of course, unnecessary that they should be, for they dealt only with questions of defence and counterclaim. In my judgment, the judgments in *Foster v. Reeves*⁵² must be taken in this court as correct when applying to a claim, but cannot be treated as correct if applied to matters of defence and counterclaim.⁵³

If Lord Upjohn is correct in this view, then it is apparent that sections 89 and 90 of the *Judicature Act* 1873 do not deal with claims whether legal or equitable, so that equitable remedies based on whether a legal or equitable claim would be unavailable both generally and as ancillary where a plaintiff establishes a claim for primary relief.

Russell L.J. was of the same view:

This brings me to *Foster v. Reeves*.⁵⁴ On any footing the generality of the language used in that case and reflected in the summary already quoted from the County Court practice, cannot be supported insofar as it extends to a defence: for on any footing one or the other of the then living ancestral sections (those in the Act of 1873) conferred power to entertain an excessive defence subject to the possibility that on application duly made the High Court might order transfer of the case.⁵⁵

Upjohn L.J. further noted that when the Courts of Chancery and Common Law were fused by the *Judicature Act* 1873 it was necessary to make provision for the jurisdiction of the inferior courts including the County Courts. The relevant sections vesting that jurisdiction were sections 89 and 90 of the Act. In his view, had the action been brought in the County Court immediately after the coming into force of the *Judicature Act*, then by virtue of section 89, the defence set up by the defendant could have been pleaded subject only to the terms of section 90.⁵⁶

The sum effect of section 55 of the *District Court Act* and 33 of the *Local Courts Act* would therefore appear to be to enable a defendant to take full advantage of any defence or counterclaim whether equitable or legal in as full and ample a manner as might be done in the Supreme Court, provided always that the plaintiff's claim is within the respective Court's jurisdiction. Section 58 of the *District Court Act* confers a power of the Court to entertain any defence or counterclaim in excess of the

⁵² *Id.*

⁵³ [1963] 2 Q.B. 169, at 191-2.

⁵⁴ *Supra* n. 52.

⁵⁵ [1963] 2 Q.B. 169 at 195.

⁵⁶ *Id.* at 190.

jurisdiction of the Court, subject always to a judge of the Supreme Court, on the application of any party, ordering a transfer of the whole action to the Supreme Court. The section makes it clear that the right to put forward an excessive legal or equitable defence is unqualified, whilst the right to put forward a legal or equitable counterclaim is further subject to the restriction that no relief shall be granted in respect thereof outside that which the Court has jurisdiction to administer. Section 34 of the *Local Courts Act*, is the counterpart of section 58 of the *District Court Act* and would appear to be identical with it in scope and effect.

The major problem with the decisions in *Foster v. Reeves*⁵⁷ and *Kingswood Estate Company Ltd. v. Anderson*⁵⁸ is that in interpreting section 89 of the *Judicature Act* 1873 as not being relevant to a claim albeit legal or equitable, such an interpretation does not accord with a literal reading of the section. However, having said that, there is no doubt that the section is badly drafted and is open to more than one 'literal' interpretation. Nevertheless, it seems to me that the words 'relief, redress or remedy' (the first limb) relate to a claim, while the words 'and shall in every such proceeding give such and like effect to every ground of defence and counterclaim equitable or legal' (the second limb) give the Court power to make any order in respect of a legal or equitable defence or counterclaim provided always that the action or matter is within the jurisdiction of the Court for the time being.⁵⁹

In *R. v. Cheshire County Court Judge*⁶⁰ the Court of Appeal had no doubt that section 89 of the *Judicature Act* 1873, was concerned with a claim. In that case a member of a trade union brought an action in the County Court for a declaration that a resolution of the trade union purporting to expel him from the union was ultra vires and void, and an injunction to restrain the union from action upon the resolution. The particulars of demand did not include any claim for damages and it was clear that having regard to the nature of the action, no damages could have been recovered. It was held that the County Court Judge had no jurisdiction to entertain the action because it was essential to the jurisdiction of the County Court in such a case that there should be a money claim not exceeding £100, but that when such a claim was established the Court could grant ancillary relief by way of declaration or injunction.

⁵⁷ [1892] 2 Q.B. 255.

⁵⁹ The words 'to make any order that could be made in regard to any action or matter' in section 55(b) of the *District Court Act* appear to be made superfluous by the words 'relief redress or remedy' in section 55(a).

⁶⁰ [1921] 2 K.B. 694.

Sterndale M.R., was of the view that the powers conferred by section 89 of the *Judicature Act* 1973 were those of giving relief and extended to the equitable remedies of declaration and injunction insofar as those equitable remedies were sought in aid of relief which the Court had power to give. He made it clear that any power that the County Court had to grant a declaration was to be found *if at all* in section 89:

Unless s.89 of the *Judicature Act* 1873 gives a power to make declarations, there is no power in the County Court to make declarations on this part of its jurisdiction.⁶¹ . . . The County Court derives its power to make declarations, if at all, under s.89 of the *Judicature Act* as one of the reliefs, remedies or combination of remedies which it can give. The question is whether the County Court had jurisdiction to do that in this case. I think it follows, if I am right in what I have said, that the declaration or the injunction can only be granted when there is an action such as is described in s.56 of the *County Courts Act* 1888, and where the plaintiff has established a right to relief in that action. If the declaration or the injunction is merely ancillary to the other relief, as I think it is, then you must have established the right to the other relief in the action.⁶²

The difficulty with this view is that the County Court never had, nor does it have, any general equitable jurisdiction. Section 89 of the *Judicature Act* 1873, was not a Section which of itself conferred equitable jurisdiction. By expressly providing that 'every inferior court which *has now* or which *may have* after the passing of this Act jurisdiction in equity' (my emphasis) it contemplated:

- (i) an inferior court exercising equitable jurisdiction before the passing of the Act;
- (ii) an inferior court exercising equitable jurisdiction after the passing of the Act by reason of the Act itself;
- (iii) an inferior court exercising equitable jurisdiction by reason of subsequent legislation vesting such equitable jurisdiction.

Section 89 does not of itself vest any equitable jurisdiction in the Court and in particular does not vest in the Court power to exercise equitable remedies. The same comments apply equally with respect to sections 55 and 33 of the *District Court and Local Courts Acts* respectively. To hold that an injunction or a declaration cannot be granted in the County Court in the absence of a claim to money or other relief within the jurisdiction of that Court, begs the question of whether the Court has jurisdiction to administer those equitable remedies.

⁶¹ Id. at 699.

⁶² R. v. Cheshire County Court Judge, *supra* n. 60, at 699.

In *De Vries v. Smallridge*⁶³ the Court of Appeal upheld and approved the decision in *R. v. Cheshire County Court Judge*.⁶⁴

If there is a money claim within the jurisdiction of the Court, then no doubt the Court can give ancillary relief by way of declaration or injunction, but if there is no money claim within the jurisdiction of the Court, or if there is no money claim at all, then the Court has no jurisdiction to give that relief.⁶⁵

In *Smith v. Smith*⁶⁶ the decision in *R. v. Cheshire County Court Judge*⁶⁷ was again under consideration. Bankes, L.J. explained what he understood by the expression 'ancillary'. In his view a remedy is 'ancillary' if it is supplemental in the sense of an additional remedy which makes more effective the remedy for the one cause of action.⁶⁸

It is clear that even if the equitable remedies of injunction and declaration are available to make more effective a remedy at common law for the recovery of a debt or damages, the scope for 'tacking on' such remedies is limited.⁶⁹ Indeed, the attempts to 'tack on' the equitable remedies in *R. v. Cheshire County Court Judge*,⁷⁰ *De Vries v. Smallridge*⁷¹ and *Smith v. Smith*⁷² all failed. The question of whether specific performance was available as an ancillary equitable remedy was not considered in any of those cases and neither was the decision in *Foster v. Reeves*.⁷³ Is the principle relevant only in relation to the equitable remedies of declaration and injunction? Section 67(4) of the *County Courts Act 1888* expressly vested jurisdiction in the County Court to award specific performance of or for reforming, delivering up, or cancelling any agreement for the sale, purchase or lease of any property the value of which did not exceed £500. If specific performance was available in the same circumstances as a declaration or an injunction then section 67(4) would not have been required and would have been meaningless. On the other hand it is difficult to think of any compelling reason why an injunction or declaration should have been considered on a different footing from any of the other equitable remedies.

The Court of Appeal in *Kingswood Estate Co. Ltd. v. Anderson*⁷⁴

⁶³ [1928] 1 K.B. 482.

⁶⁴ *Supra* n. 60.

⁶⁵ *De Vries v. Smallridge*, *supra* n. 63, at 468 per Atkins L.J.

⁶⁶ [1925] 2 K.B. 144.

⁶⁷ [1921] 2 K.B. 694.

⁶⁸ *Supra* n. 66, at 149.

⁶⁹ *Williams*, *supra* n. 2, at 6-7.

⁷⁰ *Supra* n. 67.

⁷¹ [1928] 1 K.B. 482.

⁷² [1925] 2 K.B. 144.

⁷³ [1892] 2 Q.B. 255.

⁷⁴ [1963] 2 Q.B. 169.

failed to consider any of the cases which have treated section 89 of the *Judicature Act 1873* as applying to a claim, so not unnaturally, they failed to consider the question of 'tacking on' equitable remedies to a claim albeit legal or equitable within the jurisdiction of the Courts. One explanation of the failure of the Court in *Foster v. Reeves*⁷⁵ to apply section 89 of the *Judicature Act 1873*, is that it considered that the Section dealt only with defences and counterclaims—a view which was expressed by Upjohn L.J., in *Kingswood Estate Co. Ltd. v. Anderson*.⁷⁶ One further point to note about section 89 of the *Judicature Act 1873* and its descendants, is that its second limb expressly stipulates *legal or equitable* defences and counterclaims. By expressly differentiating between legal and equitable defences and counterclaims, it is arguable that in relation to the first limb of the section dealing with claims, the absence of an expressed differentiation between legal or equitable 'relief, redress or remedy', ex necessitate excludes equitable relief on a claim. If Upjohn L.J. was referring only to the equitable jurisdiction conferred by section 89 of the *Supreme Court of Judicature Act 1873* when he limited the effect of the section to defences and counterclaims, his limitation would not be such as to exclude section 89 of the *Judicature Act 1873* and its descendants from dealing with legal remedies.

Although the power of granting equitable remedies in interlocutory proceedings is not expressly stated anywhere in the *District Court Act*, it has been suggested that the power to grant equitable remedies in interlocutory proceedings 'is implied in the various powers of the District Court and the District Court Judge'.⁷⁷ This view is open to the same objection as before. The District Court is the creature of statute and can exercise only those powers which are expressly conferred upon it, which are limited to a mandamus, injunction or to the appointment of a receiver.⁷⁸

The *Local Courts Act* contains in section 32 a curious provision dealing with equitable claims, and at least one commentator has found difficulty in reconciling sections 32 and 33 of the Act. Section 33 is apparently identical in scope and effect to section 55 of the *District Court Act* which has been viewed as enabling equitable remedies to be 'tacked on' to the claim for primary relief where the claim is within the jurisdiction of the Court.⁷⁹ However, because section 32 contemplates an identical

⁷⁵ Supra n. 73.

⁷⁶ Supra n. 74.

⁷⁷ Williams, supra n. 2 at 9.

⁷⁸ Text supra.

⁷⁹ Williams, supra n. 2 at 12.

process in relation to the recovery of a sum of money or of damages whether liquidated or unliquidated, it then becomes very difficult to give any sensible meaning to either section.

In relation to section 32 claims (that is equitable demands where the only relief sought is money or damages not exceeding \$3,000) it is difficult to see that section 33 has any operation. In order for the local courts to have jurisdiction over equitable claims under section 32, the plaintiff must limit his claim to a money claim. It would hardly make sense for the local courts to be able to grant ancillary remedies under section 33 when they were not claimed and, further, when they cannot be claimed if the Court is to have jurisdiction in the first place. There does not appear to be any justification for giving section 33 a limited interpretation in relation to section 32 which would enable it to have some effect. There is nothing in the terms of section 33, for instance, which would justify it being limited to interlocutory ancillary remedies.⁸⁰

The meaning which is then attributed to section 32 of the *Local Courts Act*, while being ingenious, is in my view a strained and probably inaccurate attempt to reconcile the two sections.

Section 32 must be given some effect. Its effect must be to limit the jurisdiction of the Local Courts in equitable claims to those where the only relief sought is the recovery of money or damages. This excludes equitable claims under section 30, and it follows that where the claim is equitable rather than legal, ancillary remedies are not available. But if the claim is in law, ancillary remedies may be given.⁸¹

If the effect of section 33 of the *Local Courts Act* is to enable equitable remedies to be 'tacked on' to legal or equitable claims for primary relief, then it is illogical to argue that a section immediately preceding it and dealing in terms with equitable claims, has the effect of limiting the scope of the equitable jurisdiction conferred by section 33. In fact the argument suggests that the power of the Local Courts under section 33 to award equitable remedies where the claim is equitable, is nullified completely by section 32, but that where the claim is legal the ancillary remedies are still available via section 33. One would expect section 32 to add to the powers of the local courts to administer equitable relief rather than to curtail them in such a drastic manner.

In my view however, section 89 of the *Judicature Act* 1873, section 55

⁸⁰ Id.

⁸¹ Id. at 13.

⁸² See for instance *Seager v. Copydex* (No. 1) [1967] 2 All E.R. 415 where damages were awarded for a breach of a purely equitable obligation.

of the *District Court Act* and section 33 of the *Local Courts Act* probably do not vest powers in the respective Courts to exercise jurisdiction over equitable claims, or to administer the equitable remedies, either generally or as ancillary where a plaintiff establishes a claim for primary relief and as far as these sections are concerned it would appear that nothing turns on the nature of the claim. The claim is unable, in correcting to my mind, that 'in an action for damages for breach of a lease, the Local Courts could grant a declaration that the Defendant's conduct constitutes a breach of the lease. But in an action for damages for breach of an agreement for a lease no declaration could be given'. This view is the result of the attempt to then reconcile sections 32 and 33 of the *Local Courts Act*. But the truth is that if the court has no power to award equitable remedies on a claim it matters not at all whether the claim is legal or equitable. It is far more likely that the effect of section 32 of the *Local Courts Act* is to enable the Local Courts to entertain purely equitable claims where the only relief sought is the recovery of a sum of money or damages. An example would be the recovery of damages for breach of a purely equitable obligation,⁸² and in my view section 32 of the *Local Courts Act* goes no further than that.

CONCLUSION

It is hoped that this paper has pinpointed some of the difficulties in this area which have arisen primarily as a result of imprecise statutory provisions which have yet to be pronounced upon satisfactorily by the Courts. The whole question of the equitable jurisdiction of the inferior courts in Western Australia should be brought to the attention of, and considered by, the Law Reform Commission of Western Australia. If it is thought desirable to vest the inferior courts with the same equitable jurisdiction as the Supreme Court, then section 24 of the *Supreme Court Act* 1935, should be extended to cover the District and Local Courts.