

WALSH v LONSDALE: EIGHTIES STYLE?

By

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Students of equity learn early in their education about the supervening effect of the Judicature Acts and the so termed “fusion fallacy”.¹ The fallacy alleged is that the Judicature Acts fused the substantive as opposed to the procedural rules of law and equity. Most common law jurisdictions are in agreement that the Judicature Acts fused procedure only.² To some, the judgment of Jessel M.R. in *Walsh v Lonsdale*³ represents the epitome of fusion fallacy.⁴ For others,⁵ the reasoning of Jessel M.R. does not contradict Ashburner’s fluvial metaphor that the result of the fusion of law and equity by the Judicature Acts is that “the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters.”⁶ The writer’s aim in the following pages is to traverse some recent approaches to *Walsh v Lonsdale* with the purpose of:

- (a) determining the true basis of a *Walsh v Lonsdale* type of case and;
- (b) deciding whether *Walsh v Lonsdale* (or cases decided in a similar manner) correctly belong under the epithet “fusion fallacy”.

New Approaches to *Walsh v Lonsdale*

For over one hundred years the reasoning of Jessel M.R. in *Walsh v Lonsdale* has caused judges and academic writers a multitude of problems. Recently, further discussion of the infamous ‘lease case’ has attempted to finally resolve the disputes.

(i) Peter Sparkes: The First Instalment

Peter Sparkes, one of the new brigade, provides a new insight by suggesting that the notion of ‘rent in advance’ was not incompatible with a yearly tenancy in the pre-Judicature Acts age.⁷ He reasons from this stand point that *Walsh v Lonsdale* could have been decided in

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1. For general discussion of this concept see: Meagher, Gummow and Lehane *Equity Doctrines and Remedies* (2nd ed.) Chapter 2; Sir Frederick Jordan’s *Chapters On Equity in New South Wales* (6th ed.) (by F.C. Stephen) at 7; Hanbury, Maudsley and Martin *Modern Equity* (12th Ed.) at 22-26; R.V. Baker and P. St. J. Langan *Snell’s Principles of Equity* (28th ed.) at 17; W.S. Holdsworth, “Equity” (1935) 51 LQR 142; R. Evershed, “Reflections on the Fusion of Law and Equity after 75 Years” (1954) 70 LQR 326; D. Browne *Ashburner’s Principles of Equity* (2nd ed.) at 17-19; F.W. Maitland *Equity* (1st ed.) at 151-161; cf. T. Watkins “The Spirit of the Seventies” (1977) 6 Anglo-American Law Review 119.
2. For a discussion of the Australian position see: Meagher, Gummow and Lehane, *supra* n.1 at 46; for a discussion of the English approach see: D. Browne, *supra* n.1 at 17-19; cf. *United Scientific v. Burnley Council* [1978] A.C. 904 at 924-925, 943, 957. For a discussion of the U.S.A. approach see: J.N. Pomeroy and S. Symons *Pomeroy’s Equity Jurisprudence* (5th ed.) (Volume 1) at 792-797; but cf. the uncertainty in Canada as expressed by P. Perell in “A Legal History of the Fusion of Law and Equity in the Supreme Court of Ontario” (1988) 9 Advocates Quarterly 472.
3. (1882) 21 Ch.9. On the enigma that was Sir George Jessel see: D. O’Keefe “Sir George Jessel and the Union of the Judicature” (1982) 26 The American Journal of Legal History 227.
4. See Meagher, Gummow and Lehane, *supra* n.1 at 54 ff.; but cf. Hanbury, Maudsley and Martin, *supra* n.1 at 16-17, G. Keeton and L.A. Sheridan *Equity* (3rd ed.) at 69, P. Petit, *Equity and the Laws of Trusts* (6th ed.) at 10.
5. Mason C.J. Brennan, Deane and McHugh JJ. in *Chan v. Cresdon Pty Ltd* (1989) 64 ALJR 111 at 116.
6. D. Browne, *supra* n.1 at 18.
7. P. Sparkes, “*Walsh v. Lonsdale*: The Non Fusion Fallacy” (1988) 8 Oxford Journal of Legal Studies 350 at 353-355. A tenancy at will could also support a distress (for rent in advance), says Sparkes at 354.

accordance with the procedural fusion theory.⁸ Mindful of the true basis of the decision i.e. equity's supremacy, Sparkes continues on and attempts to rationalise the reasoning of Jessel M.R. He concludes that due to the premises that rent is recoverable at law only, and that distress is a legal remedy conditional upon a legal right, the decision in *Walsh v Lonsdale* can only be supported if one admits that the Judicature Acts effected the fusion of the substantive principles of law and equity.⁹ Peter Sparkes in this article does not bring a new interpretation to *Walsh v Lonsdale* but he does suggest an interesting new rationale for that decision. His intimation that the terms of the agreement (specifically the term relating to rent) be given more prominence when one determines the nature of the implied tenancy is the key.¹⁰ For with that philosophy in mind, one can suggest that Jessel M.R. could have reached the same decision by saying that the implied tenancy created at law (so far as possible¹¹) was held on the same terms as the agreement.

(ii) Peter Sparkes: The Second Instalment

Peter Sparkes has written a second article concerning the enigma of *Walsh v Lonsdale*.¹² The conclusion he reaches in that article is as follows:

To summarise, the common law appears to have been opposed to back-dating. In Chancery, specific performance normally operated prospectively. There is limited authority for back-dating specific performance to determine the validity of a forfeiture. Equally there is one case in which retrospective specific performance was obtained after the end of the term of the proposed lease to permit action on the covenants. But these few hints scarcely add up to a general doctrine that specific performance operated retrospectively. Quite the reverse, the special attention devoted to the issue suggests that when back-dating did occur, it was anomalous. Whether or not the decision in *Walsh v Lonsdale* can be supported on other grounds, it has been argued that it cannot be justified historically by the retrospective operation of Chancery's specific performance jurisdiction.

A specifically enforceable contract effected a conversion in equity. So realty was converted to personalty and *vice versa*. It was the grant of specific performance which, from the execution of the decree forwards, conferred the legal estate. The legal estate was necessary to support legal remedies. On this view the decision in *Walsh v Lonsdale* that a specifically performable contract effected a conversion that supported legal remedies was historically doubtful.¹³

Once again Peter Sparkes provides an interesting foray into *Walsh v. Lonsdale* rhetoric. However, (and this point shall be developed at a later stage) the significance of back-dating specific performance to the resolution of the *Walsh v Lonsdale* situation is minimal.¹⁴ The writings of Peter Sparkes present incisive commentary on *Walsh v Lonsdale* but they do not attempt any major restructuring of the fundamental legal basis of the decision i.e. the specific enforceability of the agreement for lease. On the contrary, the recent article by Simon Gardner presents a revolutionary analysis.¹⁵

8. *Ibid* 15 354-355. It should be noted that the reasoning of Jessel M.R. is based primarily on the supremacy of the rules of equity per s. 25(11) of the Judicature Act 1873. Sparkes acknowledges this at 355. Thus the writer's emphasis of the word "could".

9. Sparkes saw the decision as providing that equitable rent (a new equity) could be enforced by a legal remedy.

10. *Ibid*, at 353.

11. Remembering that Sparkes does suggest rent in advance can be recovered under an implied tenancy.

12. P. Sparkes, "Backdating Specific Performance", (1989) 10 *The Journal of Legal History* at 34.

13. *Ibid*.

14. Cf. *Chan v. Cresdon Pty Ltd* (1990) 64 ALJR 111 at 116.

15. S. Gardner, "Equity Estate Contracts and the Judicature Acts: *Walsh v. Lonsdale* Revisited" (1987) 7 *Oxford Journal of Legal Studies* 60.

(iii) Simon Gardner's Revolutionary Thought

Simon Gardner argues that specific performance should no longer be regarded as the touchstone of the creation of an equitable interest under a contract. He suggests the role of specific performance in creating estates is illogical and breeds uncertainty¹⁶ — in the sense that the estate creating power of specific performance means we must first determine if we have a remedy before we find out if we have an estate.¹⁷ With his dislike for the creative powers of specific performance known, Gardner sets about restructuring legal thought on estate contracts. He reasons that equitable interests in land should pass the same way as interests in personal property pass, i.e. upon bargain and sale.¹⁸ Gardner then goes on to explain that specific performance holds such an important position in determining the existence of equitable rights because historically equity would not restrain proceedings at law unless it could fully determine the dispute.¹⁹ Gardner replaces the role of specific performance by introducing a new approach to the common injunction. Through historical analysis he determines that the common injunction has an “active” capacity and thus is capable of fully determining many disputes.²⁰ Gardner concludes that an equitable interest passes on bargain and sale and that equity will eagerly protect that right because through the common injunction it can fully determine the dispute. In modern terms, the “active” common injunction is subdued by the Judicature Acts and in effect creates a fusion of the substantive rules of law and equity.²¹

The crux of Gardner's thesis is the common injunction which he submits had both a passive and active operation.²² In the days before the Judicature Acts the passive common injunction was utilised so as to in effect²³ plead equity in defence to an action at law.²⁴ As has been intimated, Gardner is adamant that an active common injunction existed (pre 1876), which in effect used equity to prevent an inequitable defence at law.²⁵ In other words Gardner would suggest that in an action by a landlord for rent pursuant to an agreement, and in a situation where there is no formal lease at law, a tenant would be restrained from pleading the implied tenancy as a defence.²⁶ Gardner seeks to substantiate his claim regarding the active common injunction by referring to a handful of cases, which with respect appear to be no more than examples of the fusion fallacy.²⁷ He also attempts to substantiate his claim by referring to the *format* and substance of Mitford's *Pleadings in Chancery* which was originally compiled by John Mitford (Lord Redesdale).²⁸ Looking at Mitford's *Pleadings in Chancery* one sees that equity jurisdiction is mapped out by looking at the principal grounds of objection to an original bill.²⁹ One of those grounds, viz. the jurisdiction of a court of equity, is then broken

16. *Ibid* at 74 ff.

17. *Ibid* at 76.

18. *Ibid* at 75-76. On this topic generally see: K.C.T. Sutton, *Sales and Consumer Law* (3rd ed.) 249 ff.

19. *Ibid*, at 64 ff.

20. *Ibid*, at 88-89.

21. *Ibid*, at 89 and 99.

22. *Ibid*, at 81-87.

23. In fact the common injunction worked not as a defence pleading, but as an injunction issued to bar the taking out of judgment or the further prosecution of the action at law. See Gardner *Ibid*, at 81-87; Meagher Gummow and Lehane, *supra* n.1 at 510.

24. A relevant example is the situation where a lessor attempts to evict a tenant pursuant to an implied tenancy. The tenant could seek the assistance of equity and plead the agreement for lease as a defence.

25. S. Gardner, *supra* n.15 at 87 ff.; cf. Meagher, Gummow and Lehane, *supra* n.1 at 511.

26. S. Gardner, *supra* n.15 at 90.

27. S. Gardner, *Ibid*, at 90-91. It is to be noted that all the cases cited are post Judicature Acts cases.

28. *Ibid*, at 88-89.

29. J. Mitford and J. Smith, *Pleadings in Chancery* (5th ed.) at 131-132.

down into ten heads.³⁰ Simon Gardner seizes on two of these heads to support his argument. The heads (with Mitford's numbering) which he relies on are as follows:

2. Where the courts of ordinary jurisdiction are made instruments of injustice.
4. To remove impediments to the fair decision of a question in other courts.³¹

The second head is explained in more detail by Mitford in this way:

Sometimes a party, by fraud, or accident, or otherwise, has an advantage in proceeding in a court of ordinary jurisdiction which must necessarily make that court an instrument of injustice; and it is therefore against conscience that he should use the advantage (1). In such cases, to prevent a manifest wrong, courts of equity have interposed, by restraining the party whose conscience is thus bound from using the advantage he had improperly gained.³²

The major difficulty with the use of this head arises from Mitford's denotation of the word 'advantage'. Mitford often uses the words 'mistake', 'fraud', or 'accident' in the same breath as the word 'advantage'.³³ This is not to say he ignores other types of advantages but it highlights the emphasis he places on mistake, fraud and accident.³⁴ It is submitted that if a tenant, when sued at law for rent in advance on the basis of the agreement, says that he only holds at law under an implied tenancy with rent payable in arrears there can be no 'unfair advantage'. He is simply replying to a challenge at law by asserting the right he holds at law. The tenant's rights are bona fide³⁵ and, without more, equity could not label them an 'unfair advantage', especially in light of the fact that the landlord holds no equitable right to rent.

What of the fourth head? *Armitage v Wadsworth*³⁶ is one of the cases Mitford cites to support this head of jurisdiction.³⁷ The case involved the laying of a bill to allow an action for ejectment. Land devolved to the plaintiff through an intestate estate but the defendant had managed to obtain title deeds (fraudulently) and, so the bill alleged, grant leases. These outstanding leases were alleged to prevent the plaintiff from bringing a successful action of ejectment at law. The defendant in his plea to the Bill denied the existence of any outstanding leases. The plea was held to be good and thus equity jurisdiction was not enlivened. The main concern the writer has with the fourth head is that it is hard to reason that an 'impediment to a fair decision' exists if a defendant is allowed to assert his implied tenancy in defence to an action for rent pursuant to an agreement for lease. No 'impediment' could exist as the lessor has no right at law to rent upon the terms of the agreement.³⁸ On the other hand the ejector in *Armitage* could have suffered an 'impediment' as he had a right at law which could have been frustrated by a (mala fides) defence at law. In summary, both heads of jurisdiction appear to be activated where some sort of misconduct is evident.³⁹ The mere plea in defence that the lessor has no right to sue for rent in advance could not be described as anything but honest.⁴⁰

30. *Ibid*, at 133.

31. *Ibid*, at 133.

32. *Ibid*, at 149-150.

33. *Ibid*, at 149-155.

34. *Ibid*, at 155. The author lists oppression, policy and public inconvenience as factors which could make an advantage unfair.

35. Note in respect to this aspect, Mitford's use (at 150) of the words 'improperly gained'.

36. (1815) 56 ER 71.

37. *Ibid*, at 157.

38. *Cox v. Bishop* (1857) 44 ER 604 at 608; *Walters v. Northern Coal Mining Company* (1855) 43 ER 1015 at 1019; *Chan v. Cresdon Pty. Ltd.* (1990) 64 ALJ 111 at 116.

39. Meagher, Gummow and Lehane, *supra* n.1 at 511.

40. *Chan v. Cresdon Pty. Ltd.* (1990) 64 ALJR 111 at 116.

Another criticism the writer has concerns the statement Gardner makes to the effect that an equitable right should be able to found a legal action.⁴¹ This statement is horrendous enough in itself but the primary criticism of it in relation to leases is that it fails to acknowledge that rent has never been recoverable in equity⁴² and thus there is no equitable right to found a legal action for rent in advance. And this is precisely why the actual decision in *Walsh v Lonsdale* is flawed. In that case the plaintiff (tenant) sued for wrongful distress while the defendant (landlord) replied in defence to the action that he had an equitable right to rent in advance and thus could distrain. The problem is that no equitable right to rent existed, therefore the defence should have been rejected and the fusion fallacy avoided. Note the distinction between *Walsh v Lonsdale* and the case where the tenant successfully defends a landlord's attempt to evict him pursuant to the implied tenancy. In that case the defendant (tenant) pleads equity and says, "I have an agreement to lease which can be specifically enforced (an equitable right) and which will be totally ignored unless I can restrain the landlord's action at law." In the *Walsh v Lonsdale* situation the landlord could not rely on his right to specific performance (whether retrospective or not) as a defence, for to be sued for wrongful distress does not hinder that right, and is not incompatible with that right i.e. equity will not modify the legal action where there is no need to do so. The present writer considers also that a great deal of confusion has arisen from the lack of interest displayed in distinguishing the remedies available for breach of the agreement to lease as opposed to the actual lease. A lease which is void at law can have effect both at law and in equity as a contract.⁴³ Thus, in the event of a breach, damages can be recovered at law or in the alternative, in equity, performance can be decreed.⁴⁴ An actual lease is remedied (so far as rent recovery is concerned) by an action for a sum certain or an action for damages at law.⁴⁵ The question which arises is whether Simon Gardner has paid attention to this correlation of actions and remedies. Rent can only ever be recovered at law pursuant to a formal lease or implied tenancy, while the agreement for lease is in equity remedied by specific performance. To get a right to rent in advance you must first obtain specific performance. Equity was willing to allow an avenue (specific performance) by which the intentions of the parties could be fulfilled but it did not allow anything more. Finally, a point worth making is that we are not dealing here with the instance of primary equitable rights.⁴⁶ In fact there is no right (to rent) in equity, but if it were argued that there was, that right would have to be enforced by an equitable remedy.⁴⁷ Thus, Simon Gardner's theory not being as cogent as he suggests, resort will be had to the recent decision of the High Court of Australia for guidance.

(iv) *Chan v Cresdon Pty Ltd*

The judgment of Mason CJ, Brennan, Deane and McHugh JJ. in *Chan v Cresdon Pty. Ltd.*⁴⁸ provides another interesting look at *Walsh v Lonsdale*. This judgment suggests that the

41. S. Gardner, *supra* n.15 at 91.

42. See the cases cited at *supra* n.38.

43. *Parker v. Taswell* (1858) 44 ER 1106 at 1111; Megarry and Wade *The Law of Real Property* (5th ed.) at 639; *Bond v. Rosling* (1861) 121 ER 753; *Leitz Leeholme Stud Pty. Ltd. v. Robinson* [1977] 2 NSWLR 544 at 549-551; *Progressive Mailing House Pty. Ltd. v. Tabali Pty. Ltd.* (1985) 157 CLR 17, per Brennan J. at 41, per Deane J. at 54-55.

44. K. Gray, *Elements of Land Law* (1987) at 468-9. He says, "that which should have acted in rem acts in this instance merely in personam."; see also *Leitz Leeholme Stud Pty. Ltd. v. Robinson* [1977] 2 NSWLR 544 at 551.

45. P. Sparkes "Walsh v. Lonsdale: The Non Fusion Fallacy", *supra* n.7 at 355-57; *Progressive Mailing House Pty Ltd v. Tabali Pty. Ltd.* (1985) 157 CLR 17. This explains why an ineffective lease cannot found an action for rent although the contract behind the lease can be remedied. See *Barry v. Heider* (1914) 19 CLR 197 at 207-208, 216.

46. J.N. Pomeroy, *supra* n.2 at 129 ff.; see generally W.W. Cook "Equitable Defences", (1922-23) 32 Yale Law Journal 645 especially at 646-649; cf. F.W. Mailand, *supra* n.1 at 18-19.

47. J.N. Pomeroy, *supra* n.2 at 18-19.

48. (1990) 64 ALJR 111.

proper interpretation of *Walsh v Lonsdale* is that Jessel M.R. effected nothing more than procedural fusion. Their Honours explain that Jessel M.R. merely used the jurisdiction of Chancery to back-date specific performance and thereupon facilitated recovery of rent (due under the agreement) pursuant to a remedy at law.⁴⁹ With respect, this writer fails to see the magical powers of retrospective specific performance, because even with this new found device an interim fiction is still required. On the court's current explanation there is a period of time wherein between lessor and lessee a relationship is defined in terms of remedies at law but no interest at law exists.⁵⁰ A suggestion appears in the judgment that *Walsh v Lonsdale* may have been based upon an effective lease at law being sealed in the courtroom.⁵¹ To transpose such a scenario to modern day Australia would require the Register of Titles to bring the relevant Register Book or his lap top computer to the bar table and perform registration.⁵² This seems a little far fetched and what is more the judgment does intimate that an interim fiction regarding the legal interest exists by saying:

“...obligations which, at best, as between landlord and the lessee, arise, not under the lease at law but under an equitable lease which is the equivalent of the lease at law.”⁵³

Furthermore the coherence of this new approach to *Walsh v Lonsdale* is reduced if one accepts Peter Sparkes' reasoned conclusion that retrospective specific performance when it was invoked created an anomalous occurrence.

In summary *Chan v Credon Pty. Ltd.* offers an interesting interpretation but one that is premised on a fiction, i.e. that the lessor and lessee hold legal interests. Without that fiction *Walsh v Lonsdale* cannot be labelled a 'procedural fusion' case. But that fiction is too fatal a one to accept,⁵⁴ as to do so would give an equitable right a legal remedy i.e. fusion fallacy.

Conclusion: Separation or Obliteration?

From the beginning it has been this writer's aim to discover the true basis of a *Walsh v Lonsdale* style of case and to determine whether *Walsh v Lonsdale* promotes fusion fallacy. After traversing the recent writings on the subject it is concluded that *Walsh v Lonsdale* was based on an unacceptable fiction which does promote fusion fallacy. Where are we left? We must either reject the decision in *Walsh v Lonsdale* as wrong or give it a new rationale. It is suggested that that new rationale would be the Sparkes inspired view that the implied tenancy should be as far as possible reflective of the intentions of the parties.

To let *Walsh v Lonsdale* stand perpetuates fusion fallacy and denies the correct view of the unison of law and equity. Such a view John Norton Pomeroy describes in this way:

While the external distinction of form between suits in equity and actions at law have been abrogated, the essential distinctions which inhere in the very nature of equitable and legal primary or remedial rights still exist as clearly defined as before the system was adopted, and must continue to exist until the peculiar features of the common law

49. (1990) 64 ALJR 111 at 116.

50. As an interest in land under the Torrens system passes at law upon registration of the conveyancing instrument: see e.g. sections 43 and 44 Real Property Act (1861) (Q). Excluded from this discussion are leases of three years duration or less on which see: D. Whalan, *The Torrens System in Australia* (1982) at 188 ff.

51. (1990) 64 ALJR 111 at 116. In the time of *Walsh v. Lonsdale* leases requiring formality had to be under seal: Megarry and Wade, *supra* n. at 637.

52. The correctness of this suggestion is confirmed by looking at the analogous area of vesting orders. A vesting order of a court is dependant upon the Register of Titles' physical act of registration: D. Whalan, *supra* n.50 at 218 ff.

53. (1990) 64 ALJR 111 at 116-117.

54. Evatt J. in *Dimond v. Moore* (1931) 45 CLR 159 at 186; and Deane J. in *Progressive Mailing House Pty. Ltd. v. Tabali Pty. Ltd.* at 54; in *Williams v. Frayne* (1937) 58 CLR 710 Latham C.J. at 721, Dixon J. at 730. Does not this also distort the whole basis of title by registration under the Torrens system?

are destroyed, and the entire municipal jurisprudence of the state is transformed into equity. If, therefore, the facts state in the pleadings how that the primary rights, the cause of action, and the remedy to be obtained are legal, then the action is one at law, and falls within the jurisdiction at law. If on the other hand, the facts stated show that the primary rights, or the cause of action, or the remedy to be obtained are equitable, then the action itself is equitable, governed by doctrines of the equity jurisprudence, and falling within the equitable jurisdiction of the court. It should be carefully observed, however, that, under the reformed system of procedure, the same action may be both legal and equitable in this nature, since it may combine both legal and equitable primary rights, causes of action, defences and remedies.⁵⁵

Why accept this view? In short, because a denial of such a view ignores the popular view of our legislative mandate, which view is no doubt premised upon the object of preserving in their original context the fundamental principles of the Courts of Chancery.⁵⁶

55. J.N. Pomeroy, *supra* n.2 at 795 ff.

56. Lord Selbourne *Hansard* (3rd series) Volume 14 at 339; Sir A. Wilson (1875) 19 Solicitors Journal 633.