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FICTION

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The fiction which is the subject of this article is bar sinister to any "book of the month" list, and far removed from the interest and charm of an Arthur Train story. It relates solely to *Legal Fiction* in its strict technical sense.

Contemplating the symbolic blindfolded figure of Justice, it would appear singularly incongruous that such an apparently questionable instrumentality as a legal fiction should be sanctioned and employed in the orderly and impartial administration of justice. The very definition of the term is startling. According to the accepted definition *a fiction of law assumes as true that which is either false or at least is as probably false as true.* At the outset a fiction is not to be confused with a presumption. A presumption arises from the matured experience of man, and therefore possesses some basis of truth. Contradistinguished from fictions, some presumptions may be rebutted, while others, upon the ground of public policy, may not be traversed. For example, by statute, after six years, a debt is presumed to have been satisfied. This presumption falls away upon proof of the debtor's acknowledgment and promise to pay within such period. However, a minor is presumed to be incompetent, and no amount of proof as to his acumen, capacity or understanding may overcome the presumption of incapacity.

In modern times, with more flexible legislative facilities available, legal fictions are met with far less frequency than in the past. Yet it must not be supposed that fictions are wholly relegated to the interest of antiquarians. As late as the present year, the Pennsylvania Supreme Court [1] considered the application of a legal fiction as it affected state inheritance tax laws.

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[1] Paul's Estate, 303 Pa. 330, 154 Atl. 503 (1931).

Curiously enough neither the Supreme Court justices nor the judges in the Orphans' Court [2] were unanimous. Despite Mr. Brewster's statement in his book on Practice [3] that "a fiction is absurd and puerile, the history of which is not worthy to trace", it may prove of interest, and perhaps instructive, to saunter through a portion of the still partially verdurous field of legal fictions. With lingering fragments of memory concerning ancient and modern history, we smile as we read: *Rex non potest fallere nec falli.* We question that a king cannot deceive or be deceived. A protest arises against the unrebuttable fiction: *Rex non potest peccare,* as we are persuaded that under varying circumstances it is quite possible that even a king may do wrong.

Lay writers have struck at ludicrous legal fictions. Charles Dickens takes a mild fling in *Nicholas Nickleby,* where he describes the "Rules" of the King's Bench Prison. The "Rules" constituted certain liberty accorded debtors imprisoned for debt, which enabled the "affluent" to reside adjoining the prison, whereas, the impecunious debtors were imprisoned and did not secure the comforts provided for the most despicable felon. Writes Dickens:

> "There are many pleasant fictions of the law in constant operation, but there is not one so pleasant or practically humourous as that which supposes every man to be of equal value in its impartial eye, and the benefits of all laws to be equally attainable by all men, without the smallest reference to the furniture of their pockets."

Samuel Warren, in his legal classic *Ten Thousand a Year* describes very accurately the English procedure in an action in ejectment wherein a legal fiction plays a prominent role. The vehicle is the celebrated case of *Doe on the demise of Titmouse v. Jolter.* He writes: [4]

> "If Jones claims a debt or goods, or gamades from Smith, one would think that, if he went to law, the action would be entitled 'Jones versus Smith'; and so it is. But behold, if it be land which is claimed by Jones from Smith, the style and name of the cause stand thus:— 'DOE, on the demise of Jones, versus ROE.' Instead, therefore, of Jones and Smith fighting out the matter in their own proper names, they set up a couple of puppets, (called 'John Doe' and 'Richard Roe') who fall upon one another in a very quaint fashion, after the manner of Punch and Judy. John Doe pretends to be the real plaintiff, and Richard Roe the real defendant. John Doe says that the land which Richard Roe has is his, (the said John Doe's) because Jones (the real plaintiff) gave him a lease on it; and Jones is then called 'the lessor of the plaintiff.' John Doe further says that one Richard Roe, (who calls himself by the very significant and expressive name of a 'Casual

[2] *Id.* 14 D. & C. 251 (Pa. 1928).
[3] BREWSTER, PRACTICE IN PENNSYLVANIA (2d ed., 1896).
[4] WARREN, TEN THOUSAND A YEAR (1854) 189.

Ejector,') came and turned him out, and so John Doe brings his action against Richard Roe. 'Tis a fact that whenever land is sought to be recovered in England, this anomalous and farcical proceeding must be adopted. It is the duty of the real plaintiff (Jones) to serve on the real defendant (Smith) a copy of the queer document. . . ."

Not so many years ago a fiction in Pennsylvania was employed to test the validity of a will. It was a "feigned issue", based upon a sheer fiction. Thus, if *A*'s will was questioned, and an issue was awarded by the Orphans' Court to the Court of Common Pleas, the suit was *in assumpsit*. The assumpsit sued upon was a mere piece of imagination. No promise was ever actually made. Plaintiff declared that a conversation had occurred between him and the defendant wherein plaintiff stated that a certain paper writing was the will of *A* while defendant denied such assertion. Plaintiff then averred that thereupon defendant promised to pay plaintiff $100 if the writing was the will of *A;* that it is the will of *A,* and defendant therefore owes plaintiff $100 on this promise to pay; that although requested defendant has not paid, wherefore he brings suit. Defendant in his answer or plea admits the conversation and the promise but denies he owes the money because it is not the will of *A*. Thus the issue was joined.

A natural query arises as to the purpose and justification of such legal fictions. Investigation readily discloses that the real purpose was the means or method employed by the judiciary in legalizing that which was demanded by the nation's growth but which had not yet been sanctioned by the legislature. Some writers justify its use under the "necessity of the nation", and others because of "public sentiment". Its use has been criticized as (*a*) the judicial *repeal* of a statute or (*b*) the "ridiculous and absurd fiction" by which a statute was *evaded*. Despite such just criticism, the justification for the employment of a fiction was that it became a means of legal growth apart from direct legislation. Its saving grace was that no one was in fact ever deceived, nor were fictions intended to deceive. The law, unlike mathematics, is not an exact science. Habits and thoughts of man constantly vary, and are altered and varied by the changes and evolutions in government, living conditions, transportation and new concepts in human relations. The law, of necessity, must follow in the wake of progress. Yet habits of thought and action insidiously, after time, become fixed and firm. It is extremely difficult, if not impossible, to abruptly change or alter them. In the law we cling to the worn and familiar legal paths. Ancient markers of bounds and sign posts of direction are not easily uprooted. Like the more or less absurd present-day fashion of setting our watches ahead one hour at a certain season of the year, and turning them back at another, we have even in modern times set up a sort of non-legal fiction as to the correct hour of the day. Nevertheless, for practical pur-

poses the device seems to add temporarily an additional hour of summer daylight (to the delight of the golfers and indignation of the farmers) without seriously disturbing the routine of industry or otherwise adversely affecting our mental reactions. It would seem that the employment of legal fictions has very much the same basis of thought. In ancient days a legal advancement was highly desirable. But there was no adequate legislative authority immediately available to secure such benefit. The judiciary thus confronted invented the legal fiction. All the ancient and familiar legal procedure and principles were retained, but advanced and improved principles were beneficially and equitably applied thereunder. There was no necessity for the destruction, replacement or abandonment of ancient and familiar principles and procedure.

Examples of legal fictions are numerically abundant and vary in character and form. No attempt will be made, except by way of illustration, to trace their origin and operation. Mr. Best in his work on Presumptions,[5] following *Westenbergius Principia Juris,*[6] divides fictions into three classes. Dodderidge, *J.*, in *Sheffield v. Radcliff,*[7] says that there are five. But our own Philadelphia Orphans' Court judge, the Honorable John Marshall Gest,[8] has divided legal fictions into three divisions according to the functions they perform:

(*a*) Fictions, remnants of realities;
(*b*) Fictions, explaining inconsistent or refined rules of law;
(*c*) Fictions, overruling harsh rules of law and establishing equitable uses in their stead; and this either relating to the *form or procedure* by which the law is administered or to the *substance* of the law itself.

The last division is by far the most important. The others are largely but of historical or technical interest.

(*a*) *Remnants of Realities*

These may be largely accounted for in the reflection of past practices in modern law and procedure. For instance: In indictments for homicide, until recent years, the instrument of death and its value was found and presented to the Grand Jury. The reason was that under the old common law the instrument of death was as Deodand (*Deo Dandum*) forfeited to the King *ad pios usus.* While such law has not continued in England for nearly two centuries and never obtained in America, yet the remnant of the law so survived.

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[5] BEST, PRESUMPTIONS (1844), § 24.
[6] Lib. 22, tit. 3, n. 29.
[7] Wm. Jones 69 (1634).
[8] Unpublished treatise written for degree of M. A., University of Pennsylvania, April, 1882.

Take the writ of trespass: The words of the old writ were "*A B,* late of the County aforesaid was attached to answer *C D,* of a plea of trespass on the case". The reference is to the process of *attachment* by which the Sheriff was commanded to attach the defendant after his refusal to obey the verbal admonition of the summoners. The expression "late of the County" aforesaid refers to the supposed absconding of the defendant from the Sheriff's bailiwick.[9] Examples could be multiplied. As Judge Gest observes: Such are not the *means* of the growth of the law, but rather evidences of its change. The retention illustrates the conservativeness of the law which loves to retain all that it is not forced to part with. But gradually, in the present modern and utilitarian age, most of those ancient forms, usages and expressions, have been abolished, as they probably should be.

(*b*) *Fictions Which Explain Inconsistent or Refined Rules of Law*

An excellent illustration of fictions under this classification is apparent in the doctrine of uses. The Statute of Uses operated to transfer the use to possession. After the passage of the act it was difficult to determine the question of seisin to support the uses. As a use could not be limited upon a use, manifestly the seisin could not vest in the first cestui que use, and the subsequent uses executed out of his seisin. Another theory that the seisin was in *nubibus* or *custodio legis* ready to serve the uses as they arose, was likewise untenable. The prevailing doctrine was that a *scintilla juris* or possibility of seisin remained in the feoffee to uses to serve the shifting or contingent uses. Under this doctrine of *scintilla juris* the uses were legally supported.

If a citizen plaintiff deserts his case, he is nonsuited. Yet if the King was not present to prosecute his suit, obviously the rights of the people, whom the King represented, ought not to be prejudiced. Therefore, under the law, in such case, a non-suit could not be entered. To justify the court's action, the fiction employed was the legal *ubiquity* of the King: The King is ever in court.

Many of the principles of English land tenure cannot be explained or understood except upon the fundamental maxim and necessary principle "that the King is the universal lord and original proprietor of all lands in his kingdom".[10]

Thus it was that when occasion arose, the courts invented fictions—many times ridiculous and logically untenable—to explain or seek to justify the legal principle applicable to a given case.

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[9] 3 Bl. Com. *280.

[10] 2 *id.* *51.

(c) Fictions Employed to Overrule Harsh Rules of Law

This subdivision probably contains the more important examples of fictions illustrating judicial advancement of legal progress.

The idea was by no means new even in the early period of English law. In ancient Rome the praetorian courts overrode legal technicalities in the application of new ideas through use of the old forms. A vast majority of the people theretofore deprived of the benefit of the *Jus Civile,* were benefited by the action of the judiciary in *assuming the existence* of conditions necessary under the *Jus Civile,* whether in truth they did or did not actually exist.[11]

A large number of fictions were invented whereby the courts assumed jurisdiction. For example: The jurisdiction of a common law court could never extend to a cause of action accruing beyond the limits assigned to the serving of its writs. Therefore, irrespective of the place, some county in England was named, which fixed the place of trial. Thus, if a contract was in fact signed abroad or at sea, the place, by fiction, was a county in England, or at the Royal Exchange.[12]

Again: No civil action could be prosecuted in the King's Bench by an original writ out of Chancery unless the defendant was an officer of the court or in custody of the Marshal or prison keeper of the court for breach of peace. When for many historical reasons the time became ripe for the King's Bench to assume jurisdiction in such case, the jurisdictional difficulty was overridden by the convenient fiction that the defendant *was* actually in custody for breach of the peace.

Akin to fictions of jurisdiction are those by which a remedy is given for a wrong otherwise without one, or a better remedy is given in place of one more tedious and antiquated. This may be illustrated by the reference hereinbefore made to the procedure in the possessory action of ejectment—*Doe on the demise of Titmouse v. Jolter.* This apparently ridiculous device of employing the mythical Messrs. John Doe and Richard Roe nevertheless evaded the delay, tediousness and large expense incident to a real action at common law in the Common Pleas.[13]

In assumpsit perhaps there may be no actual promise to pay. Yet: "Every man hath engaged to perform what his duty or justice requires".[14] It is upon the legal fiction of an actual promise, however, that assumpsit lies.

In equity jurisdiction there are multitudes of examples of legal fictions. One of the foundation stones of equity, and perhaps the most important, is the maxim: "Equity considers that as done which ought to have been

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[11] ABDY, HISTORICAL SKETCH OF CIVIL PROCEDURE AMONG THE ROMANS (1857) 45.
[12] See Judge Hare's note to Mostyn v. Fabrigas, 1 SMITH'S LEADING CASES (8th Am. ed., 1885) 1046.
[13] 3 BL. COM. *204; 5 REEVES, HISTORY OF ENGLISH LAW (1880) 236-415.
[14] 3 BL. COM. *162.

done".[15] Thus we have equitable assignments, where in fact no actual assignment has been made; also equitable conversion, where real estate is regarded as personalty, or personalty as realty, where again no actual transfers have occurred.[16]

In the exercise of a public function, for the benefit of the people as a whole, it undoubtedly is a wise and sound theory that the rights of one individual must fall where those of the public are affected. Thus, if one's house is destroyed to save a serious conflagration, or if a negligently operated fire engine, patrol or ambulance injures another, there can be no recovery against the city in damages.[17] The underlying legal reason for the exemption from liability will be found in the ancient legal maxim that the King can do no wrong. It was upon such reasoning only that the just and equitable underlying principles could be so properly applied.

These examples, taken at random, illustrate the object and operation of legal fictions. The absurdities and ridiculousness of many of them unquestionably merit rebuke. Yet as Judge Gest sagely remarks: "Our English law is not to be blamed so unsparingly for the fictions which it contains. Fiction considered in its true light is a *means* of growth, and is necessary to the development of *law* in general. It is because some writers have not regarded it as a means but as something deliberately sought for as a *result,* that they have so misinterpreted it."

In the development of the law it is markedly apparent that a fiction is always supplanted by a better method whenever such becomes available. In modern times an act of the legislature usually cures the defect and supplants the fiction.

Furthermore, a fiction is limited solely to its end. Fictions are allowed only in favor of justice and not to defeat it.[18] When the purpose of a fiction has been accomplished the rule ceases to operate.[19]

Thus it appears that legal fictions (really judicial legislation) have always held a prominent position as a *formative element* in law. Sometimes, couched in ancient and quaint language, they appear ludicrous and absurd. Yet they have served, and continue in diminishing numbers to serve, in the *development* of the law. To quote the motto on the seal of the Frankford Historical Society: "That which we now deem ancient was at one time new."

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[15] BISPHAM, EQUITY (8th ed., 1909) § 44.

[16] *Id.* § 307.

[17] Boyd v. Insurance Patrol, 113 Pa. 269, 6 Atl. 536 (1886); 13 P. & L. DIG. CAS., 21764 *et seq.*

[18] Harper v. Keely, 17 Pa. 234 (1851).

[19] Wentz Appeal, 126 Pa. 541, 17 Atl. 875 (1889); Foster's Appeal, 74 Pa. 391 (1873); Paul's Estate, *supra* note 1.