Your first assignment is to read this packet of materials. In reading them, please think about the following questions. I also encourage you to discuss them with classmates. These are the questions I hope we will discuss at our first class.

1) Why are legal fictions interesting? What questions do you hope to answer by learning more about legal fictions?

2) What did you find interesting in the readings?

3) What did you find persuasive in the readings? What did you find not persuasive?

4) What did you find puzzling or confusing in the readings?

5) What is a legal fiction? What legal fictions have you encountered so far in law school, summer jobs, or other contexts? What do these legal fictions have in common? How are they different? How are they similar to or different from the ancient Roman, pre-modern English, and early twentieth-century American fictions discussed in today’s readings?

6) Are legal fictions problematic? Are they false, misleading, or deceitful? Are they problematic in other ways?

7) Do Fuller and Maine provide persuasive accounts of legal fictions? What questions are they trying to answer? Do their answers fit the examples of legal fictions you have encountered or read about in today’s readings?

8) What do Fuller and Maine agree on? On what do they disagree?

9) Why are there legal fictions? What do Maine and Fuller think? What do you think? Is there a single answer for all fictions in all periods and places?
Fictive Citizenship in Roman Law

_Institutes of Gaius, IV.37_

Again, there is a fiction of Roman citizenship for a foreigner who sues or is sued in an action established by our statutes, provided that it is just for that action to be extended to a foreigner. For example, if a foreigner sues or is sued in an action for theft, the formula runs as follows:

Let __ be the iudex. If it appears that the theft of a gold dish from Lucius Titius was carried out by Dio son of Hermaeus, or with the aid or counsel of Dio son of Hermaeus, for which, if he were a Roman citizen, he ought as a thief to pay damages, etc.

Again, if a foreigner brings an action of theft, there is a fiction of Roman citizenship for him. Likewise, if a foreigner sues or is sued in an action for wrongful loss under the Lex Aquilia, the court gives judgment on the fiction of Roman citizenship.

Translation by Daniel Klerman, based on translation of W.M. Gordon & O.F. Robinson, pp. 431-33, (1988)

Notes

Gaius was a Roman jurist. Very little is known about him, except that he wrote several influential legal works, including the _Institutes_, an introduction to Roman law that was completed around the year 160. The _Institutes_ was unknown for many centuries until rediscovered in the early nineteenth century. Nevertheless, Gaius’s _Institutes_ influenced Justinian’s _Institutes_, and, through that work, influenced much of medieval and early modern legal thought, including Blackstone’s _Commentaries_.

“Foreigner” means someone who is not a Roman citizen. Most subjects of the Roman Empire were _not_ Roman citizens. Citizen status was reserved for a privileged few, including free men who lived in Italy, those descended from free men living in Italy, and important men in other parts of the empire. Only Roman citizens were technically subject to Roman civil law. Foreigners were supposed to be governed by local custom and special legislation. That means that the Lex Aquilia and actions relating to theft that are discussed in the above excerpt from Gaius were _not_ supposed to apply to foreigners. In 212, long after Gaius wrote, the Edict of Caracalla granted Roman citizenship to all free men in the Roman Empire.

A formula was the rough Roman equivalent of a jury instruction. During the period from roughly 200 B.C.E to roughly 200 C.E., litigation had two principal stages: a hearing before the praetor and a trial before a lay person, called the iudex. The main point of the hearing was to agree on the formula to be given to the iudex at trial. The formula instructed the iudex about how to decide the case.
Iudex is usually translated as “judge,” but that can be misleading, because the iudex was, like a modern juror, a non-lawyer chosen to adjudicate a single case.

The praetor was a Roman official, whose primary responsibility was to administer the judicial system. One might think that the praetor was the Roman equivalent of a modern judge, but, although he was a major legal decisionmaker, he was not usually formally trained in law. So, on difficult legal issues, the praetor consulted jurists (legal experts).

The last part of the formula was not included in Gaius’s text, because it would have been known to his readers. It would have said something like, “Then Dio son of Hermaeus shall pay twice the value of the stolen dish in damages to Lucius Titius.”

Damages in actions for theft were usually two or more times the value of the stolen object.

The excerpt from Gaius is discussing what today we would consider a civil action for theft, not a criminal action. It is civil in the sense that it was brought by the aggrieved party (not a state prosecutor) and, if the plaintiff prevailed, the remedy was money damages. Of course, the distinction between civil and criminal law was different in Roman law.

Lucius Titius and Dio son of Hermaeus were names used for illustrative purposes only. In an actual formula, the real names of the parties would be used. Similarly, the reference in the formula to a gold dish is purely illustrative. In an actual formula, the allegedly stolen goods would be described.

The Lex Aquilia was legislation relating to compensation for intentional or negligent injury to property, including the death of slaves and animals. It was passed more than three hundred years before Gaius wrote the Institutes. The Roman actions for theft were similarly hundreds of year old by the time Gaius wrote.
A Pre-Modern English Fiction: Trover

Trover was a common law writ used for about four hundred years before the abolition of the writ system in England and America in the nineteenth century. In a trover case, the plaintiff alleged that he had lost an object, that the defendant had found it, and that the defendant refused to give it back to the plaintiff. The word “trover” comes from the French “trouver,” which means “to find.” For reasons discussed below, trover was used for a wide variety of cases such as conversion by a thief or refusal by a bailee to deliver goods to the bailor. In these cases, the plaintiff had not lost the object, nor had the defendant found the object, and everyone involved in the case understood that there had been neither loss nor finding. Instead, in a case involving conversion by a thief, the plaintiff believed that the defendant took the object from the plaintiff. In a bailment case, the plaintiff believed that he gave the object to the defendant voluntarily, but then the defendant refused to return it. In trover, the defendant was barred from arguing that the object had not been lost or had not been found. That is, even though the plaintiff’s pleading alleged that the plaintiff lost the object and that the defendant found it, the defendant was not allowed to introduce evidence that these allegations were false or to argue their falsity to the judge or jury. Such allegations were called “non-traversable,” because when a defendant challenged a factual allegation at the pleading stage, that challenge was called a “traverse.” Since the allegations of loss and finding were false and known to be false, they are referred to as legal fictions.

There were three reasons why both plaintiffs and judges preferred pleading the fictitious loss and finding rather than pleading what actually happened.

First, in cases of conversion, the plaintiff often did not know what actually happened. If the plaintiff was forced to plead what actually happened, he would have to guess, and the defendant might be able to prove that the guess was wrong and therefore be found not liable.

Second, in many bailment situations, if the true facts were pleaded, the appropriate writ would be detinue. Under the writ system, each writ had a different procedure. The procedure under detinue was much less favorable to plaintiffs than the procedure under trover. In particular, in detinue, proof was by wager of law. Under wager of law, the defendant would prevail if he found eleven people who would swear that he was right. Thus, a defendant who could find or pay eleven people to perjure themselves could win. In contrast, trover was a form of trespass writ, and all trespass cases were tried to a jury. Plaintiffs generally preferred jury trial to wager of law.

Third, there were three main courts that could hear common law cases: Common Pleas, King’s Bench, and Exchequer. Under Magna Carta, detinue could be heard only by Common Pleas, but trespass cases, including trover, could be heard by King’s Bench. Proceedings in King’s Bench were generally cheaper than proceedings in Common Pleas, so plaintiffs preferred trover to detinue because it allowed them to proceed in King’s Bench. King’s Bench judges were generally willing to allow such cases to proceed, because of the prestige that expanded jurisdiction brought them. In addition, in the pre-modern period, some of the court
fees that litigants paid went to the judges directly, so judges had a financial incentive to hear more cases.
Henry Sumner Maine

Henry Sumner Maine was a professor at Oxford in the nineteenth century. His most influential work was *Ancient Law*, excerpts of which are printed below. This work is a classic in legal history, comparative law, and legal sociology. Its most famous thesis was the law has evolved from status to contract. That is, pre-modern law assigned rights and duties based on a person’s status, such as whether he or she was free or slave, male or female, or citizen or non-citizen. In contrast, he asserted, in modern law, most rights and obligations are acquired or assumed voluntarily.

*Henry Maine, Ancient Law (1861)*

http://www.thelatinlibrary.com/law/maine.html

**Preface**

The chief object of the following pages is to indicate some of the earliest ideas of mankind, as they are reflected in Ancient Law, and to point out the relation of those ideas to modern thought. Much of the inquiry attempted could not have been prosecuted with the slightest hope of a useful result if there had not existed a body of law, like that of the Romans, bearing in its earliest portions the traces of the most remote antiquity and supplying from its later rules the staple of the civil institutions by which modern society is even now controlled. The necessity of taking the Roman law as a typical system has compelled the author to draw from it what may appear a disproportionate number of his illustrations; but it has not been his intention to write a treatise on Roman jurisprudence, and he has as much as possible avoided all discussions which might give that appearance to his work….

**Chapter 1: Ancient Codes**

…..From the period of Customary Law we come to another sharply defined epoch in the history of jurisprudence. We arrive at the era of Codes, those ancient codes of which the Twelve Tables of Rome were the most famous specimen. In Greece, in Italy, on the Hellenized sea-board of Western Asia, these codes all made their appearance at periods much the same everywhere, not, I mean, at periods identical in point of time, but similar in point of the relative progress of each community. Everywhere, in the countries I have named, laws engraven on tablets and published to the people take the place of usages deposited with the recollection of a privileged oligarchy. It must not for a moment be supposed that the refined considerations now urged in favor of what is called codification had any part or place in the change I have described. The ancient codes were doubtless originally suggested by the discovery and diffusion of the art of writing. It is true that the aristocracies seem to have abused their monopoly of legal knowledge;
and at all events their exclusive possession of the law was a formidable impediment to the
success of those popular movements which began to be universal in the western world. But,
though democratic sentiment may have added to their popularity, the codes were certainly in the
main a direct result of the invention of writing. Inscribed tablets were seen to be a better
depository of law, and a better security for its accurate preservation, than the memory of a
number of persons however strengthened by habitual exercise…..

Chapter 2: Legal Fictions

When primitive law has once been embodied in a Code, there is an end to what may be called
its spontaneous development. Henceforward the changes effected in it, if effected at all, are
effected deliberately and from without. It is impossible to suppose that the customs of any race
or tribe remained unaltered during the whole of the long -- in some instances the immense --
interval between their declaration by a patriarchal monarch and their publication in writing. It
would be unsafe too to affirm that no part of the alteration was effected deliberately. But from
the little we know of the progress of law during this period, we are justified in assuming that set
purpose had the very smallest share in producing change. Such innovations on the earliest usages
as disclose themselves appear to have been dictated by feelings and modes of thought which,
under our present mental conditions, we are unable to comprehend. A new era begins, however,
with the Codes. Wherever, after this epoch, we trace the course of legal modification we are able
to attribute it to the conscious desire of improvement, or at all events of compassing objects other
than those which were aimed at in the primitive times.

It may seem at first sight that no general propositions worth trusting can be elicited from the
history of legal systems subsequent to the codes. The field is too vast. We cannot be sure that we
have included a sufficient number of phenomena in our observations, or that we accurately
understand those which we have observed. But the undertaking will be seen to be more feasible,
if we consider that after the epoch of codes the distinction between stationary and progressive
societies begins to make itself felt. It is only with the progressive that we are concerned, and
nothing is more remarkable than their extreme fewness. In spite of overwhelming evidence, it is
most difficult for a citizen of western Europe to bring thoroughly home to himself the truth that
the civilization which surrounds him is a rare exception in the history of the world. The tone of
thought common among us, all our hopes, fears, and speculations, would be materially affected,
if we had vividly before us the relation of the progressive races to the totality of human life. It is
indisputable that much the greatest part of mankind has never shown a particle of desire that its
civil institutions should be improved since the moment when external completeness was first
given to them by their embodiment in some permanent record. One set of usages has
occasionally been violently overthrown and superseded by another; here and there a primitive
code, pretending to a supernatural origin, has been greatly extended, and distorted into the most
surprising forms, by the perversity of sacerdotal commentators; but, except in a small section of
the world, there has been nothing like the gradual amelioration of a legal system. There has been
material civilization, but, instead of the civilization expanding the law, the law has limited the
civilization. The study of races in their primitive condition affords us some clue to the point at
which the development of certain societies has stopped. We can see that Brahminical India has
not passed beyond a stage which occurs in the history of all the families of mankind, the stage at
which a rule of law is not yet discriminated from a rule of religion. The members of such a
society consider that the transgression of a religious ordinance should be punished by civil
penalties, and that the violation of a civil duty exposes the delinquent to divine correction. In
China this point has been passed, but progress seems to have been there arrested, because the
civil laws are coextensive with all the ideas of which the race is capable. The difference between
the stationary and progressive societies is, however, one of the great secrets which inquiry has
yet to penetrate. Among partial explanations of it I venture to place the considerations urged at
the end of the last chapter. It may further be remarked that no one is likely to succeed in the
investigation who does not clearly realize that the stationary condition of the human race is the
rule, the progressive the exception. And another indispensable condition of success is an accurate
knowledge of Roman law in all its principal stages. The Roman jurisprudence has the longest
known history of any set of human institutions. The character of all the changes which it
underwent is tolerably well ascertained. From its commencement to its close, it was
progressively modified for the better, or for what the author of the modification conceived to be
the better, and the course of improvement was continued through periods at which all the rest of
human thought and action materially slackened its pace, and repeatedly threatened to settle down
into stagnation.

I confine myself in what follows to the progressive societies. With respect to them it may be
laid down that social necessities and social opinion are always more or less in advance of Law.
We may come indefinitely near to the closing of the gap between them, but it has a perpetual
tendency to reopen. Law is stable; the societies we are speaking of are progressive. The greater
or less happiness of a people depends on the degree of promptitude with which the gulf is
narrowed.

A general proposition of some value may be advanced with respect to the agencies by which
Law is brought into harmony with society These instrumentalities seem to me to be three in
number, Legal Fictions, Equity, and Legislation. Their historical order is that in which I have
placed them. Sometimes two of them will be seen operating together, and there are legal systems
which have escaped the influence of one or other of them. But I know of no instance in which the
order of their appearance has been changed or inverted. The early history of one of them, Equity,
is universally obscure, and hence it may be thought by some that certain isolated statutes,
reformatory of the civil law, are older than any equitable jurisdiction. My own belief is that
remedial Equity is everywhere older than remedial Legislation; but, should this be not strictly
true, it would only be necessary to limit the proposition respecting their order of sequence to the
periods at which they exercise a sustained and substantial influence in transforming the original
law.

I employ the word "fiction" in a sense considerably wider than that in which English lawyer
are accustomed to use it, and with a meaning much more extensive than that which belonged to
the Roman "fictiones." Fictio, in old Roman law, is properly a term of pleading, and signifies a false averment on the part of the plaintiff which the defendant was not allowed to traverse; such, for example, as an averment that the plaintiff was a Roman citizen, when in truth he was a foreigner. The object of these "fictiones" was, of course, to give jurisdiction, and they therefore strongly resembled the allegations in the writs of the English Queen's Bench, and Exchequer, by which those Courts contrived to usurp the jurisdiction of the Common Pleas: -- the allegation that the defendant was in custody of the king's marshal, or that the plaintiff was the king's debtor, and could not pay his debt by reason of the defendant's default. But I now employ the expression "Legal Fiction" to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified. The words, therefore, include the instances of fictions which I have cited from the English and Roman law, but they embrace much more, for I should speak both of the English Case-law and of the Roman Responsa Prudentum as resting on fictions. Both these examples will be examined presently. The fact is in both cases that the law has been wholly changed; the fiction is that it remains what it always was. It is not difficult to understand why fictions in all their forms are particularly congenial to the infancy of society. They satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present. At a particular stage of social progress they are invaluable expedients for overcoming the rigidity of law, and, indeed, without one of them, the Fiction of Adoption which permits the family tie to be artificially created, it is difficult to understand how society would ever have escaped from its swaddling clothes, and taken its first steps towards civilization. We must, therefore, not suffer ourselves to be affected by the ridicule which Bentham pours on legal fictions wherever he meets them. To revile them as merely fraudulent is to betray ignorance of their peculiar office in the historical development of law. But at the same time it would be equally foolish to agree with those theorists, who, discerning that fictions have had their uses, argue that they ought to be stereotyped in our system. They have had their day, but it has long since gone by. It is unworthy of us to effect an admittedly beneficial object by so rude a device as a legal fiction. I cannot admit any anomaly to be innocent, which makes the law either more difficult to understand or harder to arrange in harmonious order. Now legal fictions are the greatest of obstacles to symmetrical classification. The rule of law remains sticking in the system, but it is a mere shell. It has been long ago undermined, and a new rule hides itself under its cover. Hence there is at once a difficulty in knowing whether the rule which is actually operative should be classed in its true or in its apparent place, and minds of different casts will differ as to the branch of the alternative which ought to be selected. If the English law is ever to assume an orderly distribution, it will be necessary to prune away the legal fictions which, in spite of some recent legislative improvements, are still abundant in it.

The next instrumentality by which the adaptation of law to social wants is carried on I call Equity, meaning by that word any body of rules existing by the side of the original civil law, founded on distinct principles and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles. The Equity whether of the Roman Praetors or of
the English Chancellors, differs from the Fictions which in each case preceded it, in that the interference with law is open and avowed. On the other hand, it differs from Legislation, the agent of legal improvement which comes after it, in that its claim to authority is grounded, not on the prerogative of any external person or body, not even on that of the magistrate who enunciates it, but on the special nature of its principles, to which it is alleged that all law ought to conform. The very conception of a set of principles, invested with a higher sacredness than those of the original law and demanding application independently of the consent of any external body belongs to a much more advanced stage of thought than that to which legal fictions originally suggested themselves.

Legislation, the enactments of a legislature which, whether it take the form of an autocratic prince or of a parliamentary assembly, is the assumed organ of the entire society, is the last of the ameliorating instrumentalities. It differs from Legal Fictions just as Equity differs from them, and it is also distinguished from Equity, as deriving its authority from an external body or person. Its obligatory force is independent of its principles. The legislature, whatever be the actual restraints imposed on it by public opinion, is in theory empowered to impose what obligations it pleases on the members of the community. There is nothing to prevent its legislating in the wantonness of caprice. Legislation may be dictated by equity, if that last word be used to indicate some standard of right and wrong to which its enactments happen to be adjusted; but then these enactments are indebted for their binding force to the authority of the legislature and not to that of the principles on which the legislature acted; and thus they differ from rules of Equity, in the technical sense of the word, which pretend to a paramount sacredness entitling them at once to the recognition of the courts even without the concurrence of prince or parliamentary assembly. It is the more necessary to note these differences, because a student of Bentham would be apt to confound Fictions, Equity, and Statute law under the single head of legislation. They all, he would say, involve law-making; they differ only in respect of the machinery by which the new law is produced. That is perfectly true, and we must never forget it; but it furnishes no reason why we should deprive ourselves of so convenient a term as Legislation in the special sense. Legislation and Equity are disjoined in the popular mind and in the minds of most lawyers; and it will never do to neglect the distinction between them, however conventional, when important practical consequences follow from it.

It would be easy to select from almost any regularly developed body of rules examples of legal fictions, which at once betray their true character to the modern observer. In the two instances which I proceed to consider, the nature of the expedient employed is not so readily detected. The first authors of these fictions did not perhaps intend to innovate, certainly did not wish to be suspected of innovating. There are, moreover, and always have been, persons who refuse to see any fiction in the process, and conventional language bear out their refusal. No examples, therefore, can be better calculated to illustrate the wide diffusion of legal fictions, and the efficiency with which they perform their two-fold office of transforming a system of laws and of concealing the transformation.
We in England are well accustomed to the extension, modification, and improvement of law by a machinery which, in theory, is incapable of altering one jot or one line of existing jurisprudence. The process by which this virtual legislation is effected is not so much insensible as unacknowledged. With respect to that great portion of our legal system which is enshrined in cases and recorded in law reports, we habitually employ a double language and entertain, as it would appear, a double and inconsistent set of ideas. When a group of facts come before an English Court for adjudication, the whole course of the discussion between the judge and the advocate assumes that no question is, or can be, raised which will call for the application of any principles but old ones, or any distinctions but such as have long since been allowed. It is taken absolutely for granted that there is somewhere a rule of known law which will cover the facts of the dispute now litigated, and that, if such a rule be not discovered, it is only that the necessary patience, knowledge, or acumen is not forthcoming to detect it. Yet the moment the judgment has been rendered and reported, we slide unconsciously or unavowedly into a new language and a new train of thought. We now admit that the new decision has modified the law. The rules applicable have, to use the very inaccurate expression sometimes employed, become more elastic. In fact they have been changed. A clear addition has been made to the precedents, and the canon of law elicited by comparing the precedents is not the same with that which would have been obtained if the series of cases had been curtailed by a single example. The fact that the old rule has been repealed, and that a new one has replaced it, eludes us, because we are not in the habit of throwing into precise language the legal formulas which we derive from the precedents, so that a change in their tenor is not easily detected unless it is violent and glaring. I shall not now pause to consider at length the causes which have led English lawyers to acquiesce in these curious anomalies. Probably it will be found that originally it was the received doctrine that somewhere, *in nubibus* [in the clouds] or *in gremio magistratum* [in the bosom of the magistrates], there existed a complete, coherent, symmetrical body of English law, of n amplitude sufficient to furnish principles which would apply to any conceivable combination of circumstances. The theory was at first much more thoroughly believed in than it is now, and indeed it may have had a better foundation. The judges of the thirteenth century may have really had at their command a mine of law unrevealed to the bar and to the lay-public, for there is some reason for suspecting that in secret they borrowed freely, though not always wisely, from current compendia of the Roman and Canon laws. But that storehouse was closed so soon as the points decided at Westminster Hall became numerous enough to supply a basis for a substantive system of jurisprudence; and now for centuries English practitioner have so expressed themselves as to convey the paradoxical proposition that, except by Equity and Statute law, nothing has been added to the basis since it was first constituted. We do not admit that our tribunals legislate; we imply that they have never legislated; and yet we maintain that the rules of the English common law, with some assistance from the Court of Chancery and from Parliament, are coextensive with the complicated interests of modern society.
A body of law bearing a very close and very instructive resemblance to our case-law in those particulars which I have noticed, was known to the Romans under the name of the Responsa Prudentum, the "answers of the learned in the law." ....
Lon Fuller

Lon Fuller was a professor at Harvard Law School in the mid-twentieth century. He is most famous for his work in legal philosophy and contract law. In the early 1930s, he published three articles in the *Illinois Law Review* on legal fictions. In 1967, with minimal editing and revision, these articles were reprinted in book form as *Legal Fictions*. The only new section of the book was the introduction, excerpts of which are reproduced below:

[M]y concern for [legal fictions] arose from a more serious and more consciously oriented kind of interest. I can best express the nature of this interest by suggesting that the fiction represents the pathology of the law. When all goes well and established legal rules encompass neatly the social life they are intended to regulate, there is little occasion for fictions. There is also little occasion for philosophizing, for the law then proceeds with a transparent simplicity suggesting no need for reflective scrutiny. Only in illness, we are told, does the body reveal its complexity. Only when legal reasoning falters and reaches out clumsily for help do we realize what a complex undertaking the law is.

Changing the figure, we may liken the fiction to an awkward patch applied to a rent in the law’s fabric of theory. Lifting the patch we may trace out the patterns of tension that tore the fabric and at the same time discern elements in the fabric itself which were previously obscured from view. In this way, we may gain a new insight into the problems involved in subjecting the recalcitrant realities of human life to the constraints of a legal order striving toward unity and systematic structure….

The fiction, in other words, forces upon our attention the relation between theory and fact, between concept and reality, and reminds us of the complexity of that relation. Curiously enough, the fiction finds its most pervasive application in two subjects that seem in other respects at opposite poles from one another: physics and jurisprudence…. Thus the physicist may say, “For this purpose, we regard light as corpuscular; for this other purpose we must regard it as wavelike.” The judge, in turn, may find himself forced to declare, “For purposes x we must deem the marriage between A and B to be valid; for purpose y it is to be deemed null and void.” …

What is the difference? What characteristic sets law and physics apart from other branches of human study? I suggest it is their commitment to comprehensive system….

In preparing the text for its present publication I have concentrated chiefly on deveryfication, that is, pruning out needless adjectives and superlatives. I have made little attempt to bring the work up to date. Much of the physics in the third chapter is now archaic. But I think it is safe to say that as the frontiers of science have advanced, fictions and other like intellectual dodges have followed closely behind.

For today’s class we will read all of Chapter 1 and part of Chapter 3. We will read Chapter 2 later. We will not read the rest of Chapter 3, because it is based on out-dated philosophy.
LEGAL FICTIONS*

BY L. L. FULLERT

INTRODUCTION

Probably no lawyer would deny that judges and writers on legal topics frequently make statements which they know to be false. These statements are called "fictions." There is scarcely a field of the law in which one does not encounter one after another of these conceits of the legal imagination. Sometimes they take the form of pretenses as obvious and guileless as the "let's play" of children. At other times they assume a more subtle character and effect their entrance into the law under the cover of such grammatical disguises as, "the law presumes," "it must be implied," "the plaintiff must be deemed," etc. Nor is it true, as is sometimes tacitly assumed, that fictions are to be found only in court decisions, where they are the product of the peculiar situation of the judge, who must, or feels that he must, to some extent conceal the true nature of his activities. Fictions are to be found not only in the opinions of judges, but in critical treatises written by men free from any of the influences which supposedly restrain the judge and warp his expression. Even the austere science of Jurisprudence has not found it possible to dispense with fiction. The influence of the fiction extends to every department of the jurist's activities.

Yet it cannot be said that this circumstance has ever caused the legal profession much embarrassment. Laymen frequently complain of the law; they very seldom complain that it is founded upon fictions. They are more apt to express discontent when the

*Further installments of this article will appear in subsequent issues of this Review.
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1. Cf. Pound "Interpretations of Legal History" p. 4. "From time to time they make the inevitable readjustments . . . by fictions often comparable to the 'let's play' this and that of children . . . ."
law has refused to adopt what they regard as an expedient and desirable fiction. Perhaps, too, the fiction has played its part in making the law "uncognoscible" to the layman. The very strangeness and boldness of the legal fiction has tended to stifle his criticisms, and has no doubt often led him to agree modestly with the writer of Sheppard's Touchstone, that "the subject matter of law is somewhat transcendant, and too high for ordinary capacities."

Within the profession itself there has been for a long time a consciousness of the importance of the legal fiction, and some attempt has been made to evaluate it critically. The prevailing opinion has been that suggested in Ihering's statement, "It is easy to say, 'Fictions are makeshifts, crutches to which science ought not to resort.' So soon as science can get along without them, certainly not! But it is better that science should go on crutches than to slip without them, or not to venture to move at all." The fiction has generally been regarded as something of which the law ought to be ashamed, and yet with which the law cannot, as yet, dispense.

Bentham was almost unremitting in his attacks. He detected everywhere "the pestilential breath of fiction." "In English law, fiction is a syphilis, which runs in every vein, and carries into every part of the system the principle of rottenness." "Fictions of use to justice? Exactly as swindling is to trade." "The most pernicious and basest sort of lying." "It affords presumptive and conclusive evidence of moral turpitude in those by whom it was invented and first employed." "It has never been used but with bad effect." These quotations will serve to show his temper. And yet even Bentham could not escape making the cautious admission that, "With respect to . . . fictions, there was once a time, perhaps, when they had their use."

Blackstone might be expected to stand at the opposite pole. He does refer to fictions as being "highly beneficial and useful."

2. Preface, xviii.
3. "Geist des römischen Rechts" III, p. 297. [In this and all subsequent quotations from German and French treatises (except where the citation is to a published English translation) the translations are my own, and in some cases are rather free.]
5. Ibid, v, p. 92.
7. Ibid, vi, p. 582.
8. Ibid, ix, p. 77.
10. Ibid, i, p. 268. It should be said that Bentham was here speaking of the fiction of the Social Compact, and not of legal fictions in the stricter sense.
And yet even he is not blind to the other side of the picture. In one place in particular he is inclined to be apologetic. In speaking of the fictions and pretenses involved in the common recovery he says, "To such awkward shifts, such subtile refinements, and such strange reasoning were our ancestors obliged to have recourse . . . while we may applaud the end, we cannot admire the means." At another place the only defense he can find is the doubtful one of recrimination, when he points out that the common-law fictions were no worse than the numerous fictions of the Roman law.

One finds frequently the criticism that a certain doctrine of the courts is based on a fiction. This is assumed, without demonstration, to furnish an argument against the doctrine. And yet frequently we find the same critics passing over one fiction after another without the slightest animadversion; occasionally with commendatory remarks. What is even more significant, it is seldom that the authors of such criticisms are able to avoid occasional resort to fiction in the formulation of their own views. I take as an example one of our best writers; I choose him simply because he is one of our best. This writer rejects the notion that "implied conditions" in contract rest upon the intent of the parties, on the ground that "it is an obvious fiction" and adds the warning, "It is better to state the law in terms of reality, for misapprehension is sure to be caused by fiction." Yet the same writer in another place in the same work, in commenting on the rule that a judgment in favor of the principal when he is sued by the creditor in certain cases bars the creditor from proceeding against the surety—a rule which involves a departure from the ordinary principles of res adjudicata—does not hesitate to make the suggestion, "The solution for the difficulty is this . . . the creditor must be deemed at fault for having suffered judgment to go against him, and . . . like a creditor who has released the principal, he will lose his right against the surety." Truly, "the bogey of the fiction revenges itself often bitterly on those who would track it down!"

14. 2 Williston on "Contracts" p. 825.
15. 2 Williston on "Contracts" p. 1255. Professor Williston includes certain qualifications in his statement which modify, but do not destroy, its fictitious character. For example, he would make the inference of "fault" on the part of the creditor only when the principal debtor "did not have on the actual facts a defense to the action against him." But does absence of a defense on the part of the principal debtor conclusively show "fault" on the part of the creditor who loses the suit?
What should we do about the fiction? Should we attempt to restate the law "in terms of reality?" Could we succeed in such an attempt? Are there good and bad fictions? If so, how are we to tell the one from the other? These are the questions which I shall attempt to answer. I propose that this skeleton in the family of the law be taken from its closet and examined thoroughly. After that examination we may decide what we ought to do with it. At any event I am convinced that keeping it in the closet is both dangerous and unbecoming.

What Is a Legal Fiction?

It is obvious that a critical evaluation of the fiction as a device of legal thought and expression cannot be undertaken until one has at least attempted an answer to the question: What is a fiction? It scarcely need be said that this question is not an easy one. To anyone who has thought about the matter questions like the following must at sometime have occurred. "This doctrine which I have criticized as a fiction, is it not simply a figurative expression of a truth? If I recast the expression of it, and emasculate it by removing the metaphorical elements from it, have I really accomplished anything of importance? I have called this other statement a fiction. Do I not simply mean that it is a plain falsehood, rendered harmless by its utter incapacity to deceive? At other times when I use the word 'fiction' do I mean anything more than 'bad reasoning'?" The possibility of questions such as these suggests that the word "fiction," like most words, may not always mean the same thing.

And yet, however difficult it may be at times to draw the line, a fiction (if the word is to retain any utility) is neither a truthful statement, nor a lie, nor an erroneous conclusion. In attempting to draw the line a little more clearly, it will be convenient to start with a discussion of the problem.17

A Fiction Distinguished from a Lie

Ihering once called fictions the "white lies" of the law.18 This statement is probably more clever than accurate, unless we inter-

17. It would perhaps be well to remind the reader that I am concerned not merely with what we may call the typical legal fiction, i. e., the procedural pretense by means of which rules of law are changed, (e. g., the bill of Middlesex; the fictions involved in ejectment, trover, and the other actions). I am also dealing with the more subtle and less obvious kinds of fictions. If the discussion were confined to procedural pretenses, the distinctions about to be discussed would be so obvious as to render extended discussion of them unnecessary.
pret "white lies" to mean falsehoods which are not meant to be believed. For a fiction is distinguished from a lie by the fact that it is not intended to deceive.

It may be objected that as to that large class of fictions which we call historical fictions this generalization does not hold. Maine's classical definition of the historical fiction as "any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified," seems to leave room for the intent to deceive. The English courts were in the habit of pretending that a chattel, which might in fact have been taken from the plaintiff by force, had been found by the defendant. Why? In order to allow an action which otherwise would not have lain. If this fiction does not deceive, of what purpose is it?

The answer is that the fiction, as such, was not intended to deceive and did not deceive anyone. No one believed that the chattel had been found by the defendant simply because the pleadings said so; the fact was known to be otherwise. The deceit, if any, consisted in the concealment by the court of the exercise of legislative power under the guise of this pretense. Or, perhaps more accurately stated—since it is hardly conceivable that those living contemporaneously with the development of this fiction could have been unaware that the law was changing—the deceit consisted in the representation that an expansion of the action of trover under this pretense was legitimate. This representation, however, was probably as heartily believed by the authors of the fiction as anyone else. It is easy to conclude uncharitably that the judge who enlarges his jurisdiction or who changes a rule of law under cover of a fiction is very coolly and calculatingly choosing to hide from the public the fact that he is legislating. What is usually overlooked is that he himself is often acting under the influence of some half-articulate philosophy of law which seems to him to justify the change if it takes place under the apparent sanction of old formulas, when it would not be justified otherwise.

Conceding, however, that this may not always be the case, and that the fiction may at times have been implicated in a process of deceit that was not simply self-deceit, the fact remains that the pretense or assumption involved in the fiction itself (e.g., that the

19. Maine "Ancient Law" ch. II. Cf. "the authorities ... distinctly admit that fiction is frequently resorted to in the attempt to conceal the fact that the law is undergoing alteration in the hands of the judges." Smith "Surviving Fictions" (1917) 27 Yale L. Jour. 147, 150.
defendant found the plaintiff’s chattel) has never been made with the intention of producing belief in its truth. The fiction, as such, is not intended to deceive. It may, perhaps, be held accountable as accomplice in a process of deception, but not as principal.

**A Fiction Distinguished from an Erroneous Conclusion**

A fiction is generally distinguished from an erroneous conclusion (or in scientific fields, from a false hypothesis) by the fact that it is adopted by its author with knowledge of its falsity. A fiction is an “expedient, but consciously false assumption.”

Taking this as a criterion, if a statement is believed by its author it is not a fiction. But what is “believing”? How many of us, in discussing a legal problem, have had the experience of making a statement with a vague feeling in the back of our minds that our expression was in some unexplained way inadequate, inaccurate—even fictitious—without being able at the time to formulate the precise nature of this inadequacy? On such occasions, lacking the time or the mental energy for a more complete analysis, we are apt to rush on with the devout hope that the half-consciously-felt defect in our expression could be shown not to affect the validity of the statement in its context. We trust that our statement is at least metaphorically true. When we do this, however, we must be prepared to have someone else attach the epithet “fiction” to our statement.

The line between belief and disbelief is frequently blurred. The use of the word “fiction” does not always imply that the author of the statement positively disbelieved it. It may rather imply the opinion that the author of the statement in question was (or would have been had he seen its full implication) aware of its inadequacy or partial untruth, although he may have believed it in the sense that he could think of no better way of expressing the idea he had in mind. We have a fiction, then, when the author of the statement either positively disbelieves it, or is partially conscious of its untruth or inadequacy.

21. Vaihinger “Die Philosophie des Als Ob” p. 130. Cf. Kornfeld “Allgemeine Rechtslehre und Jurisprudenz” p. 54. “It is incorrect to call only those conceptions fictions which are propounded by their authors with consciousness of their unreality. That an erroneous belief is mistakenly held to be true does not alter in the slightest its objective unreality or fictitiousness.” Of course it is true that a false statement remains false even when it is believed by its author. But the real question is, what is the most profitable delimitation of the concept “fiction”? If “fiction” means simple “false assumption” the word ceases to have any special utility.
But even with this qualification it may be questioned whether current usage confines the concept "fiction" within the limits suggested. Reference has already been made to the question of "implied conditions" in contract. The earlier view was that these conditions were dependent upon the actual intent of the parties, and that courts in laying down these conditions were really interpreting and construing the contract.\[^{22}\] This view has been criticized as a fiction.\[^{23}\] What we are at present interested in is, why is the word "fiction" used here? Does it imply the opinion that the statement was not believed by those who made it? This is questionable. Sergeant Williams, who gave the "intent theory" currency, may have been at least partially aware that he was dealing with an imputed or fictitious intent; but those who apply the term "fiction" to his theory do not give any indication that they are led to a choice of that word because of any conjecture concerning the subjective mental processes of the learned Sergeant. They call his theory a fiction because it is false; what he thought of it is not regarded as material.

Then why is the word "fiction" used here? Why not "erroneous reasoning," or "false assumption"? The most probable explanation is that the choice of the word "fiction" here implies a recognition that the statement under discussion, although erroneous, had a certain utility. A court by proceeding as if it were determining the intent of the parties will normally reach a result which is in accord with the "good sense of the case." The word "fiction," then, may sometimes mean simply a false statement having a certain utility, whether it was believed by its author or not. A fiction may be an expedient but false assumption.

To sum up the results of our discussion, and to attempt a definition of the fiction which will at least approximate current usage, we may say: A fiction is either, (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility.

This definition seems on the face of things to embrace two entirely discordant elements. In the first alternative the criterion is "consciousness of falsity"; in the second, "utility." Yet current usage probably permits of this alternative definition. What is the explanation for this apparently unreasonable linguistic development?

\[^{22}\] Sergeant Williams' note to the case of Pordage v. Cole (1669), 1 Williams' "Saunders" p. 319; Harriman on "Contracts" (2d ed.) p. 315.
\[^{23}\] Costigan "Performance of Contracts" p. 8; 2 Williston on "Contracts" p. 825.
There is often underlying the seemingly illogical usages of language a penetrating comprehension which does not find expression in any other way. That is the case here. In practice, it is precisely those false statements which are realized as being false which have utility. A fiction taken seriously, i.e., "believed", becomes dangerous and loses its utility. It ceases to be a fiction under either alternative of the definition given above.

The "half-conscious" insight into the falsity of an assumption, which is discussed above, will normally be a sufficient guard against a harmful application of it. The now-discarded theory which conceived of conditions in contract as dependent upon the intent of the parties was workable probably because there existed this partial awareness of the untruth of its fundamental postulate. But the danger of the fiction varies inversely with the acuteness of this awareness. A fiction becomes wholly safe only when it is used with a complete consciousness of its falsity. 24

A Fiction Distinguished from the Truth

Everyone who has dealt with legal problems must, at one time or another, have had the experience of feeling that a certain doctrine of the law was expressed in terms of fiction, and yet have found himself, to his complete dismay, unable to restate the doctrine without resort to fiction. At such moments one is apt to succumb to the feeling that, "A fiction that we needs must feign is somehow or another very like the simple truth." 25

A fiction is frequently a metaphorical way of expressing a truth. The truth of any given statement is only a question of its adequacy. No statement is an entirely adequate expression of reality, but we reserve the label "false" for those statements involving an inadequacy which is outstanding or unusual. The truth of a statement is, then, a question of degree. But we do not solve a problem by saying that it is a question of degree; what we want to know is, what factors affect this "degree" upon which the question depends? More particularly, stating the thing in a form ap-

24. Cf. "Seeking the intention of the parties as the sole governing principle led Sergeant Williams to declare a promise independent if one performance or part of it might by the terms of the contract under some circumstances precede the performance of the counter promise; and a few unjust decisions have been made in consequence," 2 Williston on "Contracts" p. 826.

25. 3 Maitland "Collected Papers" p. 316. Cf. Saleilles "De la personnalité juridique" (2d ed.) p. 613, "Indeed, what is a fiction which becomes indispensable if not a reality?"
applicable to our present problem, we are interested in an analysis of the different reasons why, in a given case, doubt may arise whether a statement is fictitious or true.

THE FICTION AS A LINGUISTIC PHENOMENON

Ihering once said that the History of the Law could write as a motto over her first chapter the sentence, "In the beginning was the Word." Students of the legal fiction might also take this motto to heart. For certainly it is a truth commonly overlooked that the fiction is "a disease or affection of language."

Anyone who has thought about the legal fiction must be aware that it presents an illustration of the all-pervading power of the word. That a statement which is disbelieved by both its author and his audience can have any significance at all is evidence enough that we are here in contact with the mysterious influence exercised by names and symbols. In that sense the fiction is a linguistic phenomenon.

But we are interested in another aspect of the thing. The fiction is further a phenomenon of language in the sense that the question whether a given statement is a fiction is always, when examined critically, a question of the proprieties of language. A statement must be false before it can be a fiction. Its falsity depends upon whether the language used is inaccurate as an expression of reality. But the inaccuracy of a statement must be judged with reference to the standards of language usage. Simple as this truth is, nothing has so obscured the subject of legal fictions as the persistent failure to recognize it.

In the law we speak of the merger of estates, of the breaking of contracts, of the ripening of obligations. Vivid and inappropriate are the literal connotations of these expressions—yet they are usually not even felt as metaphors. These words, and many others like them, have become naturalized in the language of the law. They have acquired a special legal significance which comes to the mind of the lawyer when they are used, so instinctively, indeed, that he is usually unaware that they have a more vivid sensual connotation.

In the action of trover the defendant is alleged to have found a chattel he may really have taken by force. In actions arising

26. Ihering expresses in this fashion the exaggerated respect shown by early law for the written and spoken word. "Among all primitive peoples the word appears as something mysterious; a naïve faith ascribes to the word a supernatural power." "Geist des römischen Rechts" II, p. 441.
27. Blackstone "Commentaries" iii, p. 152.
under the “attractive nuisance doctrine” the defendant is alleged to have invited children (of whose very existence he may have been ignorant) to visit his premises. These statements are felt as fictions. Is this because there is any inherent reason why the words used could not acquire a special sense which would make them true? Could not “finding” mean, in a technical legal sense, “taking”? Could not “inviting” be extended to include “attracting”? Neither of these things is impossible. But the fact simply is that these possible changes in meaning have not occurred. Since they have not, the statements remain fictions.

Most of what has been written about the supposedly profound question of corporate personality has ignored the possibility that the question discussed might be one of terminology merely. No one can deny that the group of persons forming a corporation is treated, legally and extralegally, as a “unit.” “Unity” is always a matter of subjective convenience. I may treat all the hams hanging in a butcher shop as a “unit”—their “unity” consists in the fact that they are hanging in the same butcher shop. Certainly there is a more easily explained “unity” in a corporation than there is in such everyday concepts as “the 9:10 train for Chicago.” It is also clear that the corporation, taken as a unit, must be treated by the courts and legislatures in that somewhat complex fashion which we epitomize by saying that legal rights and duties are attributed to the corporation. It is further clear that this treatment of the corporation bears a striking (though not complete) resemblance to that accorded “natural persons.” It then follows that natural persons and corporations are to some extent treated in the same way in the law; they form a “class.” There are only two questions left for discussion. The first is, is it worth while having

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29. Of course the word “finding” has not escaped metaphorical extension. For example, we speak of a jury “finding” the facts of the case.

30. I do not mean to imply in this discussion that the proper basis of liability in the “attractive nuisance cases” is to be found in the notion of “attracting.” My attention is directed solely toward the linguistic question.


32. Bülow, in an article on the procedural fictions of German law (“Civilprozessualische Fiktionen und Wahrheiten” 62 Archiv, f. d. Civilistische Praxis, 1, 10) says that a proper understanding of fictions ought to bring us to realize “that the incorporeal center of legal interests which we designate as a ‘legal person’ possesses a substantiality and independence which cannot, and need not, be created for it by an act of imagination.” This “substantiality,” however, need not include any such supernatural elements as a “common will.”
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a name for this class? It should be remembered that many classes remain nameless. The class of left-handed Irishmen still suffers from the lack of an appropriate term to separate it from the world of the right-handed, the ambidextrous, the non-Irish. Assuming, however, that it is worthwhile having a name for this common class formed by natural persons and corporations, the other question is, is the word “person” the most desirable name? Would “legal subject” be better? Or “right-and-duty-bearing-unit”?  

LIVE AND DEAD FICTIONS

There are live and dead fictions. A fiction dies when a compensatory change takes place in the meaning of the words or phrases involved, which operates to bridge the gap which previously existed between the fiction and reality.

This is a process which is going on all the time. A striking example is to be found in Roman constitutional law. The _comitia_ (assembly of citizens) had, originally, only a power of authorizing constitutional changes proposed to them by the king. Their legislative function was originally essentially negative—a power of veto. Gradually, however, they gained the power of initiating and commanding. With this constitutional development came an interesting change in language:

“The evolution which led from the right of approval in the comitia to their right to command is reflected in the parallel evolution in the sense of the word _jubere_ (in the formula _velitis jubeatis quirites_) which has equally passed from the sense of accepting to that of ordaining.”

The statement that the _comitia_ merely accepted proposals was originally true; it became a fiction through a change in practice. But this fiction was in turn cured—or to change the figure, became dead—through a change in language usage.

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33. “We do not often have occasion to speak, as of an indivisible whole, of the group of phenomena involved or connected in the transit of a negro over a rail-fence with a melon under his arm while the moon is just passing behind a cloud. But if this collocation of phenomena were of frequent occurrence, and if we did have occasion to speak of it often, and if its happening were likely to affect the money market, we should have some name as ‘wousin’ to denote it by. People would in time be disputing whether the existence of a wousin involved necessarily a rail-fence and whether the term could be applied when a white man was similarly related to a stone wall.” _A. Ingrah-ain, “Swain School Lectures”_ (1903) p. 121, quoted from _Ogden and Richards “The Meaning of Meaning”_ p. 46.

34. The article on “Legal Personality” by Bryant Smith in (1928) 37 Yale L. Jour. 283 offers a penetrating analysis of the problem.


36. The clearest recognition of this process which I have been able to find in the literature of jurisprudence is in the following passage. “It is
The same thing is happening in our own law. Words like "delivery" (= giving over), "conversion" and "estate" (= condition or status) have gone through like developments. There was a time, probably, when these words were applied legally in their literal sense. Then a period of extension set in, during which the continued use of these words was probably felt as fictional. But the inevitable compensatory change in word meaning took place; the expressions acquired a new, non-fictional meaning. This development is, however, not yet ended. Even today the first of these terms still carries a part of its history with it; it is not a completely dead fiction. Courts are still wont to speak of "symbolic" or "constructive" delivery when the act in question is too far removed in character from the kind of thing contemplated by the original sense of the word. But that the fiction is dying is shown by the fact that there is no definite standard for determining when these qualifying terms are needed; it is a matter of individual discretion.

Of course this process is not confined to the law—it takes place in the whole of our language. "All words expressive of immaterial conceptions are derived from words expressive of sensible ideas." The birth of a new concept is inevitably foreshadowed by a more or less strained or extended use of old linguistic material. All the language of abstract thought is metaphorical; true that so soon as, with the passage of time, normal conceptions have changed, that which was a fiction at the beginning will have become a reality, since there will be, from that time on, a normal adaptation between the effects produced and the legal system . . . to which those effects are attributed. After all, what is a fiction which becomes indispensable if not a reality? Saleilles "De la personnalité juridique" (2d ed.) p. 613. See also Tourtoulon "Philosophy in the Development of Law" p. 388: " . . . very old fictions are no longer considered as such."

38. Sapir "Language" p. 16.
Cf. Mallachow "Rechtserkenntnistheorie und Fiktionslehre" p. 41: " . . . concepts (both the ordinary and the scientific sort) are accepted by the linguistic sense of the ordinary man as well as by science (with the exception of epistemology) rather blindly and without preliminary examination as something given. The question of their reality is raised only when one may live contemporaneously with, and is conscious of, the creation of a concept, as for example, in the formation of the general designation 'energy' or of the . . . concept of the legal person."

It should be added that this question of the "reality" of a concept is also likely to arise in one's mind when one encounters a concept which has been discarded in the course of history and which is therefore unfamiliar. "Seisin" seems a very unreal thing to us; we have no hesitation in concluding that it was something which existed only in the heads of medieval lawyers. Yet "title" and "possession" are apt to seem very real to us; we say, "Possession passed from A to B." or, "X cannot have title because Y has it," just as the lawyer of the year 1400 talked of seisin passing, or, perhaps more often, refusing to pass. But in a system of law in which important legal consequences are "attributed to" seisin, or stated in another way, where the
but, fortunately, the metaphors involved are for the most part dead metaphors. I quote at length from a popular book on language usage:

"In all discussion of metaphors it must be borne in mind that some metaphors are living, i.e., are offered and accepted with a consciousness of their nature as substitutes for their literal equivalents, while others are dead, i.e., have been so often used that speaker and hearer have ceased to be aware that the words used are not literal; but the line of distinction between the live and the dead is a shifting one, the dead being sometimes liable, under the stimulus of an affinity or a repulsion, to galvanic stirrings indistinguishable from life. Thus, in *The men were sifting meal* we have a literal use of *sift*; in *Satan hath desired to have you, that he may sift you as wheat*, *sift* is a live metaphor; in *the sifting of evidence*, the metaphor is so familiar that it is about equal chances whether *sifting* or *examination* will be used, and that a sieve is not present to the thought—unless indeed someone conjures it up by saying *All the evidence must first be sifted with acid tests, or with the microscope*—; under such a stimulus our metaphor turns out to have not been dead but dormant; the other word, *examine*, will do well enough as an example of the real stone-dead metaphor; the Latin *examinino* being from *examen* the tongue of a balance, meant originally to weigh; but, though weighing is not done with acid tests or microscopes any more than sifting, *examine* gives no convulsive twitches, like *sift*, at finding itself in their company; *examine*, then, is dead metaphor, and *sift* is only half dead, or three-quarters."

Eliminating the "fiction" from law often means only substituting dead metaphors for live ones. One sees an example of this in the following quotation:

"'Consensual' contracts, or some better term, should be used to designate those contracts where there is a real 'meeting,' i.e., coincidence, of the minds of the parties."

"Meeting" was felt as a metaphor, and required quotation marks accordingly. "Coincidence" (*falling on*) was a dead metaphor and could stand unadorned.

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word "seisin" is a way of lumping together the effects of certain legal doctrines, seisin is as real a thing as "title" or "possession."

Cf. *Maitland “Equity”* p. 33: "The use came to be considered as a sort of metaphysical entity." (Italics mine.) A use was a "metaphysical entity" in exactly the same sense that "legal title" is a "metaphysical entity" today.


40. *Costigan “Constructive Contracts”* (1907) 19 Green Bag, 512, 514.

41. The special utility of Latin terms consists in the fact that they are generally fictions which have never lived—in our language—at all; they are, as it were, still born into the language of the law. That is why we seldom see Latin expressions qualified by such apologetic adjectives as "constructive" and "implied." We speak frequently of "constructive" and "implied" intent because we have a feeling for the boundaries of this thoroughly naturalized word. On the other hand, although it would be just as
Nor is this sort of change in language meaning confined to single words—whole phrases may be involved. Just as the expression "sowing his wild oats" is more apt to call to mind a cabaret than a field, so it seems probable that the expression, "Fact A is conclusively presumed" carries to the well-trained legal mind the simple connotation, "Fact A is legally immaterial."

The assumptions involved in the typical fiction of the English common law, i.e., the procedural pretense, were usually so violent that there was little likelihood that the adoption of the fiction would usher in a change in language usage which would cure the fiction. When the English court pretended that the Island of Minorca was a part of the city of London, as it once did, there was little probability that this isolated pretense would lead to a change in the meaning of the word "London" which would extend it to embrace a spot of land in the Mediterranean. But even procedural pretenses may lead to the development of word meanings. The "possession" which gave the right to bring the action of trespass to a plaintiff who had bailed his chattel under a bailment terminable at his will was originally simply a pretense through which a man out of possession was given a possessory action. But this pretense, and others like it, became so common that the word "possession" began to take on new meaning and we end up with two kinds of possession, "constructive" and "actual." When we had this condition of affairs, that inveterate tendency of the human mind, to suppose that where two things have a common name they must have something in common beside the name, began to assert itself. Legal theorists felt the need of what the Continental jurists call a "construction." That is, it was felt that we ought to develop some "concept" which would include, and reconcile, all the conflicting elements to be found in actual and constructive possession. Needless to say the concept has not yet been discovered; the "construction" remains a matter of difficulty.

"Constructive fraud" has had a somewhat similar history. It started, innocently enough, as a pretense by means of which English courts of equity acquired jurisdiction over cases which logical to do so, we do not speak of "constructive" or "implied" mens rea.

Once in a while a knowledge of Latin coupled with an ignorance of the process of language growth can produce some remarkable results. In Regina v. Clarence (1888) 22 Q. B. Div. 23 Stephen J. held the defendant, who had affected his wife with gonorrhea, not guilty under a statute punishing every one who "inflicts any grievous bodily harm upon any other person" partly on the ground that the Latin infligere meant "to strike."

42. Gray "Nature and Sources of the Law" (1st ed.) p. 34.
would otherwise have been outside their province. But the term lived beyond the causes which gave rise to it, and survives today into a period when the distinction between legal and equitable jurisdiction is generally done away with. What "constructive fraud" is today, no one knows exactly; but it is still with us.

Those who contend that "corporate personality" is and must be a fiction should be reminded that the word "person" originally meant "mask"; that its application to human beings was at first metaphorical. They would not contend that it is a fiction to say that Bill Smith is a person; their contention that "corporate personality" must necessarily involve a fiction must be based ultimately on the notion that the word "person" has reached the legitimate end of its evolution and that it ought to be pinned down where it now is.

One may test the question whether a fiction is dead or alive by the inquiry, does the statement involve a pretense? Probably the maxim "Qui facit per alium facit per se" was originally a fiction because it was understood as an invitation to the reader to pretend that the act in question had actually been done by the principal in person. But the statement has been so often repeated that it now conveys its meaning (that the principal is legally bound by the acts of the agent) directly: the pretense which formerly intervened between the statement and this meaning has been dropped out as a superfluous and wasteful intellectual operation. The death of a fiction may indeed be characterized as a result of the operation of the law of economy of effort in the field of mental processes.

Rejection v. Redefinition

It is apparent from what has been said that there are two distinct methods of eliminating fiction from the law: rejection and redefinition. By rejection is meant simply the discarding of those statements which are felt as fictional. Thus, a statute or judicial decision may declare that henceforth the action of ejectment shall be allowed without the allegations of lease, entry and ouster. By redefinition is meant a change in word meaning which eliminates the element of pretense; to preserve the figure used before, redefinition results in the death of the fiction. Through rejection a fiction disappears entirely; through redefinition it becomes a part of the technical vocabulary of the law.

43. Smith "Surviving Fictions" (1928) 27 Yale L. Jour. 317, 319.
Both of these processes have taken place in the past. Although the legal language of today is in part, at least, composed of the dead shells of former pretenses ("possession," "conversion," delivery," "estate," "person," "constructive fraud," "constructive trust"), there are, on the other hand, many fictions of former days which have disappeared completely, which have left no vestigial traces in the language of the law. This fact suggests the inquiry: why, in the course of history, are some fictions discarded entirely, while others are redefined and retained as terms of description? And the fact that the alternative fates of rejection and redefinition rest in the balance for many of our present-day fictions suggests the question, which of these processes—rejection or redefinition—ought we to encourage?

Would it, for example, be desirable to attempt a complete elimination of fiction from the law by a wholesale process of redefinition? Conceivably we might eliminate the pretense from all of our fictions; we might cease to say, "A is legally treated as if it were B," and simply say, "In a technical legal sense, A is B." We might say, "There is no pretense in actions arising under the 'attractive nuisance doctrine,' the word 'inviting,' as used in those decisions, is to be understood in a technical legal sense." We could do this with the boldest of our fictions. The English court which asserted the Island of Minorca to be a part of London might have defended itself by saying, "We only meant that for the special purpose at hand the island was a part of London, and we defy anyone to prove that that is not so." In short, we might join Humpty Dumpty in saying, "When I use a word, it means just what I choose it to mean, neither more nor less." We might erect a legal world in which silence is consent, taking is finding, attracting is inviting, to bring a suit is to achieve Roman citizenship; a world in which even the commonest expressions were to be understood in a Pickwickian sense. This attitude has, indeed, been dignified by a name—"the theory of the juristic truth of fictions."  

But it is clear enough that such a wholesale process of redefinition could not be carried out. One cannot introduce sweeping changes in linguistic usage by an arbitrary fiat; in general,

44. The "theory of juristic truth" is discussed by Franz Bernhöft in his book "Zur Lehre von den Fiktionen" and by Bülow in an article in 62 Arch. f. d. C. Praxis. Cf. Saleilles "De la personnalité juridique" (2d ed.) 612: "We see then clearly that, from the moment when one introduces into the sphere of law an element of intellectual conceptualism, a portion of conventionalism, one is tempted to say that there are no fictions at all, and that, in every legal relation, from the moment it is accepted as such, there is a reality of law."
new meanings grow only in places where they are needed. And even if it were possible, the proposal ought not to be carried out because it would only result in encumbering the language of the law with a grotesque assemblage of technical concepts lacking the slightest utility.

Is the alternative, then, a wholesale rejection of fictions? This is also impossible, and inadvisable if it were possible. It is inadvisable because to reject all of our fictions would be to put legal terminology in a straight jacket—fictions are, to a certain extent, simply the growing pains of the language of the law. It is impossible because fiction, in the sense of a "strained use of old linguistic material," is an inevitable accompaniment of progress in the law itself and this progress can scarcely be expected to wait out of deference toward the tastes of those who experience an unpleasant sensation at the sight of words browsing beyond their traditional pastures.

The solution lies between the extremes. Some fictions should be rejected; some should be redefined. Redefinition is proper where it results in the creation of a useful concept—where the dead (redefined) fiction fills a real linguistic need. Where this is not so, rejection is the proper course to pursue. But what are "useful concepts"? How does it come about that redefinition in some cases results in a needed addition to the terminology of the law; in other cases serves only to preserve a bizarre reminder of a discarded pretense? A discussion of these problems must be postponed until later when an attempt will be made to analyse the fiction from the standpoint of motives. When we have discovered why courts and legal writers resort to fiction we shall be in a better position to deal with the problem of the utility of particular fictions.

For our present purposes it is enough to notice that the evolution of our legal language has, for the most part, proceeded along the lines suggested. In general, only those fictions which, when redefined, give useful concepts have been retained. The linguistic sense of generations of lawyers has been, in the main, adequate to sift the chaff from the wheat and to keep the language of the law safe from the opposing disasters of linguistic stagnation and a grotesque fecundity.

The development has—in general—been sound. But there are important exceptions—exceptions which ought sufficiently to demonstrate the possibility that the linguistic sense of a profession can run amuck. "Constructive fraud," "constructive trust," "construc-
tive possession,"45 "constructive intent," "implied malice"—these ex-
pressions stand out like ugly scars in the language of the law—the
linguistic wounds of discarded make-believes. Is it not significant
that each carries still the badge of its shame—the apologetic "con-
structive" or "implied"?

REACTIONARY TENDENCIES RETARDING THE GROWTH OF TECHNICAL
LEGAL MEANINGS

It has just been said that the need of the law for an adequate
technical vocabulary makes it desirable that certain of our fictions
—picked with discretion—be converted into "juristic truth." Speak-
ing in general terms, it is desirable to speed the growth of technical
legal meanings. But it would not be well to be optimistic of sudden
success in this direction. For every legal word which has been able
to disencumber itself of its burden of extra-legal connotation there
are ten words which carry with them into the law a mass of non-
juristic associations—frequently with the result that their legal
use continues to be felt as fictitious. There are important reaction-
ary forces which operate to hamper and restrict the natural process
of language development which I have sketched above.

One thing which works against the development of technical
legal meanings is, of course, simply ignorance. It is precisely
those who are misled and injured by the extra-legal connotations of
law words who are unconscious of the danger involved.46 They
cannot be expected to see the need for redefinition and reform.

But much more important than this, in my opinion, is the
tendency which I may call the desire to keep the form of the law
persuasive. Metaphor is the traditional device of persuasion. Elim-
inate metaphor from the law and you have reduced its power to
convince and convert.

"Constructive notice" will do as an illustration here. This
expression has been striving for a long time to achieve a purely
technical meaning, through which it would be completely divorced
from the notion of a pretense of actual notice. So understood, the

45. I am speaking here of constructive possession in the remedial sense.
I do not include in this condemnation the "constructive possession" which is
attributed to one who enters upon a part of a tract of land under color of
title to the whole.

46. Tourtoulon ("Philosophy in the Development of Law" p. 391) says
rather bluntly but with some truth, "If a jurist were found for whom it was
difficult to grasp the exact import of fictions, one who was incapable of
understanding what the artifice may legitimately give and what it may not,
he would do well to renounce law, as well as every other abstract science."
expression would offer a convenient way of grouping together a somewhat complex set of cases, in which a person who has no actual notice of an interest or event receives the same treatment at the hands of the law as the person who has actual notice. But such a conception, being a matter of analysis and classification entirely, offers—in contrast to "actual notice"—no "reason" for the result at all. It is much easier to see why a man should be affected adversely by "actual notice," than it is to discover the reasons which underlie the treatment he receives in cases of "constructive notice." Frequently the considerations which are determinative here are rather remote "reasons of policy." How remote they may be in a given case is shown by the fact that in some jurisdictions one may, through the operation of the recording statute, be charged with constructive notice of a deed which in fact never got on the record. 47 "Actual notice" is, then, a persuasive term; "constructive notice" is not. But we can make "constructive notice" more appealing if we preserve the notion that it has something in common with "actual notice" beside a name. If we can create the impression of a similarity (in fact and not simply in legal effect) between "actual" and "constructive" notice we will have established for the latter term a kind of vicarious persuasive force.

One way to do this is to state "constructive notice" in the form of "actual notice" proved inferentially, and to speak of "implied notice." 48 But the trouble with this expression is that it has been used in this way for so long that it begins to lose its persuasive power. The word "implied" is itself becoming a dead fiction. It is now generally understood (except when qualified by the words, "in fact") as being substantially the equivalent of "constructive," i. e., as having the function of indicating that the word it modifies is to be understood in a technical legal sense. It no longer serves to create in the hearer's mind the suggestion of an actual fact proved inferentially; the insinuation contained in the word fails to take effect.

The only method left of preserving for constructive notice the superior persuasive quality of actual notice is the rather naïve device of a pretense of actual notice. The obviousness of this expedient makes it rather uncommon, but occasionally we find courts saying things like the following:

47. Tiffany on "Real Property" (2d ed.) sec. 567j.
48. One American judge went a step farther and spoke of "implied actual notice," which he defines as "that which one . . . is in duty bound to seek to know." (Hopkins v. McCarthy [1921] 121 Me. 27, 115 Atl. 513, 515). May we expect "constructive actual notice" next?
"The deed was on record, and the defendant . . . must be presumed to have searched the record and come to a knowledge of the contents of the deed."49

Sometimes more ingenuity is employed in obfuscating the distinction between actual and constructive notice, as the following quotation will show:

"Constructive notice I take to be in its nature no more than evidence of notice, the presumptions of which are so violent that the court will not allow even of its being controverted."50

What can be the motive of this obscurantism, which talks of "evidence" that cannot be controverted? Is it not plainly an inordinate desire to preserve the appearance of a likeness between "actual" and "constructive" notice, even at the cost of good sense? Instances like this show how far the human mind is willing to go to preserve a comforting and persuasive analogy.

The whole field of vicarious liability is a branch of the law which, from its infancy, has been honeycombed with fictions, and—what is more significant—with fictions which seem to resist the linguistic process of redefinition, with fictions which stubbornly refuse to die. Does not the explanation for this lie in the fact that the notion of vicarious liability is itself a bitter pill to swallow? The social foundations of vicarious liability are never of the self-apparent type. The harshness involved in visiting the consequences of one man's misdeeds upon another has seemed to call for repeated explanation and apology.

One further point deserves special emphasis. I have spoken of "the desire to keep the form of the law persuasive." This should not be understood as implying the existence of a studied and premeditated attitude directed toward third persons. The judge who resorts to an artificial form of statement which insinuates the existence of actual notice in a case where it is clear no actual notice exists has not consciously weighed the advantages of clarity against those of rhetoric. If he chooses metaphor to dry legal fact, it is because the former mode of expression suits his personal taste and has been successful in winning over his own conscience.

It should be recalled, too, that rhetoric is frequently an intellectual short-cut. It is often a matter of the greatest difficulty to

49. _Digman v. McCollom_ (1871) 47 Mo. 372. We have an expression of a similar tendency in those cases where the constructive notice of the principal (through actual notice to the agent) is based upon a presumption that the agent has in fact communicated the fact in question to his principal. See _2 Mechen on "Agency"_ (2d ed.) sec. 1806(b).

50. Eyre, Chief Baron, in _Plumb v. Fluitt_ (1791) 2 Anst. 432.
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frame a satisfactory exposition of reasons which one feels—inarticulately—are sound. At such times metaphor offers a tempting expedient. The desire to keep the form of the law persuasive is frequently the impulse to preserve a form of statement which will make the law acceptable to those who do not have the time or the capacity for understanding reasons which are not obvious—and this class sometimes includes the author of the statement himself.

FICTITIOUS LEGAL RELATIONS

So far our discussion has concerned pretenses as to facts and events which are regarded as giving rise to legal consequences. But assuming the facts to be non-fictitious, may we not also have pretenses concerning the legal consequences to be attributed to those facts? May there not be feigned legal relations, fictitious legal rights and duties, supposititious titles? The difficulty which we encounter at the outset is that in dealing with words like "right," "duty," and "title" we have to do with concepts of a somewhat indefinite scope. The assertion is made that a creditor whose debt has been "barred" by the statute of limitations still has a "right."\(^{51}\) Some, perhaps, would regard this assertion as inaccurate and misleading. But can it be disproved? Can the boundaries of the concept "legal right" be so rigidly drawn as to exclude a sense of the word which would make this statement true? Or again, it is said that the possessor of a trade secret has no "property right" or "title" in his process (the protection accorded him by the law being explained as an application of contract principles).\(^{52}\) Many would regard the statement (that the possessor of the secret has no "property" in it) as a mere quibbling with words. But is the assertion demonstrably untrue?

The uncertainty and flexibility inherent in legal concepts has this consequence: It is generally more difficult to say that a given statement is false when it relates purely to legal concepts, than when it relates to extralegal fact. Consequently it is not common that a statement concerning legal relations is regarded as a fiction. For example, it is a very common thing for courts to employ expressions like the following: "Title, as between the parties, had passed to the mortgagee; as to third parties, title remained in the mortgagor."\(^{53}\) What kind of title is this which is both in, and not in, the grantor and the grantee at the same time? Does not such

\(^{51}\) 3 Williston on "Contracts" sec. 2002.
\(^{52}\) Chafee "Cases on Equitable Relief against Torts" p. 87, note.
\(^{53}\) Statements of this kind are very common in the so-called "title" states. See Ellison v. Daniels (1840) 11 N. H. 274.
a contradictory assertion deserve the disparaging epithet "fiction"? It is doubtful if the term would ordinarily be applied to this kind of statement.\(^{64}\) "Title" is itself a concept of great flexibility, serving simply as a means of grouping together certain rather complex legal results in a convenient formula. One is not apt to see any element of pretense in the statement quoted. It is regarded simply as an attempt to describe, with as little circumlocution as possible, a complex legal situation.

Legal facts, then, differ from extralegal facts (at least for those extralegal facts which concern the law) in the fact that their boundaries are generally less certain. But this is a difference of degree only. There are limits to the elasticity of even legal concepts. For example, suppose the parties to a contract stipulate that for their purposes the title to a piece of land should be treated as if it were in A, although the courts have adjudicated it to be in B. Conceivably they may do this as a convenient way of expressing the result which they seek to attain by their contract, in full awareness of the falsity of the supposition. We would not hesitate to call their statement false. We might regard it as a kind of private fiction established between the contracting parties.

But this leaves unanswered a further question: Is there any utility in speaking of fictitious legal rights and duties, or of fictitious titles, when we are speaking of statements made in court decisions? The existence of legal rights and duties depends upon how courts and their enforcement agencies act. If the judge and the sheriff act upon a "pretended" right and enforce it, is there any utility in continuing to treat it as a pretended right? If a statute declares that the courts shall treat A "as if" he had title to certain property, and the courts consistently act upon that assumption, is there any purpose in treating A's title as imaginary?\(^{55}\)

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64. Apparently many French jurists would be willing to regard a statement of this sort as a fiction. For example, sec. 1446 of their Code has frequently been regarded as establishing a fiction. (Lecocq "De la fiction comme procédé juridique" 158-162.) This is because the effect of this section is most succinctly stated by saying that, as to the creditors of the wife, the "community" (of the property of husband and wife) is regarded as dissolved, while as to all other persons it is considered as still subsisting.

One gets the impression that the French writers are rather ready to apply the term "fiction" to any sort of legal construction which involves the notion of substitution or comparison. Perhaps they are influenced by the example of their own Code. Section 739 provides "Representation [i.e., in cases of succession to the goods of an intestate] is a legal fiction of which the effect is to have the representatives take the place, the degree, and the rights of the person whom they represent." What is the fiction?

55. The contrary view is supported by Bernhöft in his treatise, "Zur Lehre von den Fiktionen" p. 19. But a careful reading of his discussion will
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A legal right reaches objectivity through court action; we have no other test of its "reality." If it meets this test it is a real right—whatever may be the protestations of the agency enforcing it.

WHEN IS A STATEMENT A STATEMENT OF FACT, AND WHEN OF LEGAL RELATIONS?

Many an intellectual battle over the question whether a given statement should be regarded as a fiction might have been avoided if the contestants had taken the trouble to inquire whether the statement in question purported to relate to extralegal facts, or referred to the legal relations of the parties. Section 1890 of the German Civil Code provides, "An illegitimate child and its father are not deemed to be related." In the original draft of the code the section read simply, "An illegitimate child and its father are unrelated." The notion of the drafters was simply that relationship was a legal matter; if the Code provided that they were unrelated, they were unrelated, and there was no need for any apologetic "deemed." It was pointed out, however, that "relationship" is also a state of fact; and that the ordinary meaning of the word comprehends this factual state, rather than the legal relation. It was therefore thought preferable to treat the thing in terms of a fiction of a lack of factual relationship. This illustration in-

show, I think, that he really has in mind cases where the description of the legal relation adopted by the courts is misleading and inaccurate, the type of case discussed in the section on "Legal Relations Described Metaphorically or Inadequately," infra, p. 387.

56. "Ein uneheliches Kind und dessen Vater gelten nicht als Verwandt."


Cf. "When the common law refused to recognize any paternity for an illegitimate son, and said he was filius nullius, it was not understood to deny the fact of physiological begetting; it was asserting that such a one did not possess the specific rights which belong to one who was filius, implying wedlock as a legal institution." John Dewey "The Historic Backgrounds of Corporate Legal Personality" (1926) 35 Yale L. Jour. 655, 656.

"In a discussion of legitimacy [and the presumption that a child born in wedlock is legitimate], Lord Campbell remarked: 'So strong is the legal presumption of legitimacy that if a white woman have a mulatto child, although the husband is white and the supposed paramour black, the child is presumed legitimate, if there were any opportunities for intercourse.' Now there might, without absurdity, be a doctrine which fixed upon a husband, even under such circumstances, the legal responsibilities of a father; according to the rough proverbial wisdom, quoted by a vigorous English judge four or five centuries ago, 'who that bulleth my cow the calf is mine.' But ... Lord Campbell had introduced into his supposition such unusual facts as dissolved and evaporated any rule of presumption." Thayer "Preliminary Treatise on Evidence" p. 346.
icates sufficiently the nature of the problem, and demonstrates that the solution is often a matter of terminology.

Suppose P tells X that he has appointed A his agent to sell his horse, with full power to fix the price. P tells A, the agent, that he must not sell the horse for less than $100. X buys the horse from A for $50. Is P bound by this act? The answer of the authorities is in the affirmative: A had an "apparent authority" to fix the price of the horse. Is this "authority" a fiction? If, by saying that A had "authority," we mean to pretend, for purposes of effecting justice, that P actually stated to A that he might sell the horse for any price he thought proper, then there is a fiction. But if we mean merely that on the facts A has the legal power to sell the horse and bind P, then there is no fiction.

The same considerations are easily seen to underlie the following questions (the list might be greatly extended): When a surety pays the debt of the principal, equity considers the debt "unpaid" in order that the surety may be subrogated to the rights of the creditor. Is this a fiction? Is a "constructive trust" a fiction? Is it a fiction to say, in cases arising under the "family automobile doctrine" that the son, or other member of the family, is the "agent" of the owner of the car? Section 50 of the German Civil Code provides, "The existence of the association (in liquidation) shall be deemed to continue to the close of the liquidation, in so far as the purpose of the liquidation requires this." Is the word "deemed" necessary here? Is it a fiction to say (in the law of divorce) that "condonation is upon condition of good behavior"? Is it a fiction to say that there is an "implied condition" in a will that the devisee shall not take if he kills the testator? Are "implied conditions" generally fictions?

It has already been shown how fictions "die" through a process of a change in word meanings. This quite frequently, perhaps typically, takes place through a shift of connotation from facts to legal relations. "Constructive fraud" started as a pretended actual fraud; to say today that a transaction is affected with "constructive fraud" is usually simply to affirm that it is voidable for reasons other than actual fraud—the expression relates not to

58. In a note in (1905) 18 Harv. L. Rev. 400 the view is taken that this authority is fictitious; Professor Cook in a rejoinder in "Agency by Estoppel: A Reply" (1906) 6 Col. L. Rev. 34, 44, emphatically denies that any fiction is involved.

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pretended facts, but to legal consequences. The "constructive trust" originally involved a pretense that the facts which create an actual trust were present. Today it is simply a way of stating that the case is a proper one for equitable relief.

But it should not be forgotten that the impulse to keep the form of the law persuasive—the effects of which have been traced above—is also active here. A statement of fact, even of pretended fact, is always—from this point of view—to be preferred. The case of the word "offer" will serve as an example here. A offers to sell his horse to B. The "offer" remains open until A withdraws it, or until the lapse of a reasonable time. No fiction is involved in this statement; it is clear that the word "offer" here is a description of the legal situation of the parties—a situation which may be described in other language by saying that B has a "power of acceptance" which continues until something happens to destroy it. But the courts have not always been content to let the matter rest here. They have occasionally added the flourish that in legal contemplation the offer "is repeated during every moment from the time it leaves the offeror until revocation or acceptance." This spoils the whole thing. An "offer" which is "repeated" must be a physical fact, not a legal relation. And its "repetition" is an obvious fabrication.

LEGAL RELATIONS DESCRIBED METAPHORICALLY OR INADEQUATELY

Some of the hoariest of our fictions are statements which have been made by courts and which plainly refer, not to facts, but to legal relations. The fiction that "husband and wife are one"—which so puzzled Austin that he could only explain it as an expression of "sheer imbecility"—is an outstanding example. But is this a fiction? It is a statement, not of fact, but of the legal situation of the parties. It is further a statement made by a court possessed of the power to create and enforce rights. If a court actually treats husband and wife as if they were one, are they not legally "one"? But it is just at this point that the fictitious element of the statement becomes apparent. The courts did not, in actuality, treat husband and wife as "one." The statement was misleading as a description of their legal situation. A legal relation, accurately

60. See the note, "Communication of Revocation," in (1904) 18 Harv. L. Rev. 139.
61. "Lectures on Jurisprudence" (5th ed.) p. 611. "I rather impute such fictions to the sheer imbecility (or, if you will, to the active and sportive fancies) of their grave and venerable authors, than to any deliberate design, good or evil."
described and actually enforced, cannot, with utility, be regarded as a fiction. But a description of an existing and enforced legal relation can be so inadequate and misleading as to deserve the term fiction.

"Equity regards that as done which ought to be done." "The law often regards money as land and land as money." Happily such "short, dark maxims" are not so common as they once were. When they are used today it is for the sake of their flavor of antiquity, rather than because of any notion that they are actually explanatory. Undeveloped systems of law have a decided penchant for such brocards. For example, in the jurisprudential language of a tribe in east Africa the statement "woman is a hyena" is intended as an expression of the notion of woman's legal incapacity.

It is important to realize, however, that statements of this kind differ in degree but not in kind from the methods we commonly employ in describing legal relations. The legal situation which results even from the simplest sort of legal transaction is always too complicated for complete and adequate expression in a single sentence or phrase. The statement, "Husband and wife are one," does not differ in essence or purpose from the statement, "A has a legal right against B to payment of $100." Both are somewhat imperfect attempts to describe a complex reality. When I am told that A has a "right" to $100 I am not informed whether A may forcibly take $100 from B's pocket, nor whether A may have B jailed if B refuses to pay the $100. For the particulars I must go elsewhere. A good deal of the education of the lawyer consists in finding out in more detail what this "right" really consists of. Nor does every "right" have the same consequences. If A's action has been barred by the statute of limitations, his legal situation has been greatly altered; but he still has a "right." If, on the other hand, A gets a judgment against B, his legal situation has been decidedly improved, yet the metaphysical core of his rela-

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62. McIntosh v. Aubrey (1902) 185 U. S. 122, 125. French jurists tend to treat what they call "real subrogation" (which seems to involve a notion similar to that involved in our "equitable conversion," i. e., the substitution of one thing for another, or, more accurately, the attribution of legal qualities usually attached to one kind of property to another kind of property) as a fiction. Lecocq "De la fiction comme procédé juridique" pp. 36-47. And see sec. 1407 of the French Civil Code.


64. This is, at least, the opinion of Professor Kocourek. "A Comment on Moral Consideration and the Statute of Limitations" (1924) 18 Illinois Law Review 538. In Professor Kocourek's newer terminology the claim descends from the zygnomic to the mesonomic plane on the running of the Statute. "Jural Relations" p. 141.
tion—however it may be garnished with new privileges, powers and
immunities—remains only a "right." 68

The term "right" represents a rather inadequate attempt to
describe a complex reality. 68 Yet this inadequacy is not regarded
as unusual; one feels simply that in this case we have an illustration
of the inadequacy of all expression. I am no more justified in
expecting that the word "right" should tell me the detailed story
of the relation of the parties than I would be in expecting that the
word "house" should inform me whether the structure in question
was large or small, how many doors and windows it had, etc. On
the other hand the statement, "Husband and wife are one," in-
volves an unnecessary and aberrational obscurity.67

Many common statements stand in a kind of twilight zone
between adequacy and inadequacy, i.e., between striking or unusual
inadequacy and ordinary and therefore non-apparent inadequacy.
The following list might be greatly expanded: "The relation be-
tween the mortgagee and the mortgagor in possession is that of
landlord and tenant." "Subrogation is an assignment." "When the
mortgagor conveys the equity of redemption, promising to discharge
the land of the mortgage lien, the land becomes surety for the
debt." "Each joint tenant is owner of the whole." "An enforce-
able contract for the sale of land makes the vendor trustee of
the land and the vendee trustee of the purchase price."

THE FORM OF THE FICTION. ASSERTIVE AND ASSUMPTIVE FICTIONS

Gray said that the fictions of the English common law were
more "brutal" than those of the Roman law. 68 By this he did not
mean that the English fictions did more violence to the truth than
those of the Roman law—the Roman fictions were not lacking in a
certain audacity or "brutality" in that respect; he referred to the
form of the fiction.

65. Hohfeld "Fundamental Legal Conceptions" p. 108.

66. In speaking of the common reproach that the fiction does not in-
dicate the limits of its application; Demogue (in 'Les notions fondamentales
du droit privé' 243) says, "But may the same reproach not be directed
against every formula of a technical character? Is there any difference
between the formula of the fiction and any other rule of law which does not
make apparent at the first glance its armature of interests to be satisfied in a
certain order, as for example . . . the rule that possession of personal
property is equivalent to title?"

67. Should we, following Professor Underhill Moore, call this "non-
institutional obscurity"?

68. Gray "Nature and Sources of the Law" (2d ed.) p. 31.
“Fictions have played an important part in the administration of the Law in England, and it is characteristic of the two peoples that the use of fictions in England was bolder, and, if one may say so, more brutal in England than it was in Rome.

Thus, for instance, in Rome the fiction that a foreigner was to be considered as a citizen was applied in this way. It was not directly alleged that the foreigner was a citizen, but the mandate by the praetor to the judge who tried the case was put in the following form: ‘If, in case Aulus had been a Roman citizen, such a judgment ought to have been rendered, then render such a judgment.’ In England the plaintiff alleged a fact which was false, and the courts did not allow the defendant to contradict it.”

The Roman fiction, in other words, carried a grammatical acknowledgment of its falsity; the English fiction appeared as a statement of fact; its fictitious character was apparent only to the initiate. The Roman fiction was an assumptive fiction, a fiction taking an “as if” form; the English fiction was (and is) a fiction ordinarily taking an “is” or assertive form.

It might seem at first glance that we were dealing here with something very fundamental. Indeed, it might be argued that an assumptive fiction (an “as if”-fiction) is not a fiction at all. If a court only says that it is dealing with A as if it were B, it has stated nothing contrary to the fact.

Yet a closer examination will show that the distinction is one of form merely. The “supposing that” or “as if” construction in the assumptive fiction only constitutes a grammatical concession of that which is known anyway, namely, that the statement is false. When we are dealing with statements which are known to be false it is a matter of indifference whether the author adopts a grammatical construction which concedes this falsity, or makes his statement in the form of a statement of fact.

The peculiar force which the fiction has in rendering easier alterations in the law by appeasing the longing for an appearance of conservatism seems not to be lost by clothing it in the “as if”

69. Gray, op. cit. Gray here refers of course to the fiction which takes the form of a procedural pretense. The conception of the fiction underlying this article does not confine the term “fiction” to such pretenses, but would extend it to statements made by courts in their opinions which are not based on the pleadings.

70. It is interesting in this connection to consider the old practice of laying venue under a videlicet in which the pleading would take some such form as this, “on the high seas, to wit in London in the Ward of Cheap.” See Scott “Fundamentals of Procedure in Actions at Law” p. 21. Here we have a fiction which grammatically takes an assertive form, and yet which, by its very context, carries as clear an admission of falsity as any grammatical sign could give it.
form. The Roman praetor apparently felt that by framing his innovations in terms of older rules he had secured some justification for them, even though the pretenses involved carried on their face the acknowledgment of their falsity.

Gray apparently saw in this difference in the form of the fiction in Rome and in England some expression of a fundamental contrast in the characteristics of the two peoples. It seems likely, however, that there is a more prosaic explanation for the difference. The dissimilarity of the modes of trial in the two systems of law seems adequate to explain the diversity in the form of the fiction.

**LEGAL INSTITUTIONS AS FICTIONS**

“The oldest and most essential ideas are nearly all, if not all, fictitious. Marriage is a fictitious purchase and sale, the power of a father is a fictitious master's power, adoption is a fictitious fatherhood, in certain respects the last will and testament is (at least sometimes is) a fictitious adoption, legitimation assumes fictitiously a marriage which never existed, etc. It would not therefore be inaccurate to claim that our reality is simply fiction differentiated, and that at bottom all law is reduced to a series of fictions heaped one upon another in successive layers.”

Although this passage reveals a certain philosophic insight, it invites an inference which is exceedingly misleading, namely, that legal institutions may be fictitious. By legal "institutions" I mean the social effects of a legal doctrine as contrasted with the doctrine itself. Thus we may distinguish between the action of trover as an "institution" (the fact of social life that courts take certain action in certain cases) and the intellectual superstructure of this institution, the collection of legal constructions and fictions which courts developed to rationalize and explain their action. The reality of a legal institution, understood in this sense, is in no wise affected by the fact that it may be convenient to describe the institution linguistically in fictitious terms (as in the case of adoption), or by

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71. In the Roman procedure (at the time when the praetorian fiction played its rôle) the actual trial of a suit was before a judge, or judex, on the basis of a written statement of the case previously drawn up by the praetor. Had the praetor phrased the fiction in the form of a statement of fact, it would seem likely that this would have produced confusion in the trial before the judex, which took place out of the presence of the praetor. How would the judex have known that the fact alleged was fictitious and was not to be taken seriously if the fiction had not assumed a grammatical form which warned of its falsity? On the other hand, in the English system there was always present at the trial an initiate into the freemasonry of the fiction—the judge, who was able, through proper instructions, to prevent the jury's being misled by the allegations in the pleadings.

the fact that the institution may have originated historically in the application of some familiar notion to a new purpose (as in the case of the marriage ceremony). The social and legal institution of adoption is not a fiction in any ordinary sense. If there is any fiction involved in the idea of adoption it is in one of the following notions. (1) It is convenient to describe the institution by saying that the adopted child is treated as if he were a natural child. But this is a mere convenience of linguistic expression. (2) In primitive society, because of the extreme tenacity of the intellectual concepts of the primitive mind, adoption as a social institution probably would not have been possible without some pretense of blood relationship. This is illustrated in the ceremonies which accompany adoption in primitive society, as where the child is dropped through the clothing of the adopting parent in imitation of birth. (3) The original invention of the notion of adoption involved, probably, an imaginative flight, an exercise of ingenuity, similar to that which attends the birth of a legal fiction. But none of these facts means that adoption, as a social institution existing in present-day society, is a fiction.

One should also guard against the converse sort of error, that of supposing that because there is a social reality back of a fictitious statement, the statement itself is therefore non-fictitious. Professor Sturm protests that the quasi-contract is not a fiction because it represents a social institution, that in such-and-such cases recovery may be had in the courts. But this does not keep the term quasi-con-

73. Upon a somewhat deeper level of discourse, a social or legal institution may be regarded as a fiction in the philosophic sense in which the word "fiction" is used by Vaihinger. In fact (or at least "in fact" if one does not penetrate to a still deeper plane of discourse) we have only an enormous number of individual acts by individual human beings, never taking quite the same form and never having quite the same purpose. To introduce simplicity into this chaos of individual actions, we postulate certain "institutions," we group together certain recurring acts which show a thread of similarity into a conceptual entity which we call an institution. A later age may classify our actions upon an entirely different basis than that we are accustomed to, may see in our conduct an entirely different set of "institutions." Conversely, our classification of our own actions into "institutions" may seem as arbitrary and unreal to a later age, as the concept of "seisin" seems arbitrary and unreal to the modern student of law.

74. "Ancient Law" ch. II.
75. P. J. Hamilton-Grierson "An Example of Legal Make-Believe" (1908) 20 Juridical Rev. 32 and (1909) 21 id. 17. Strangely enough the ceremony of dropping the child through the clothing is performed even when the adopting person is a man.
76. Sturm "Fiktion und Vergleich in der Rechtswissenschaft" p. 47.
tract ("as if"-contract) from being fictional. If it is not felt as a fiction the reason lies in the fact that it is not regarded as containing an element of pretense; it is, in the terminology established earlier in this article, a dead fiction, a term of classification and analysis, merely.

FICTIONS AND LEGAL PRESUMPTIONS

A distinction commonly taken between the fiction and the legal presumption runs something as follows: A fiction assumes something which is known to be false; a presumption (whether conclusive or rebuttable) assumes something which may possibly be true. This distinction is regarded as being reinforced, as it were, in the case of the rebuttable presumption because such a presumption assumes a fact which probably is true.

How valid is this distinction? And, what is more important, how significant is it, assuming that it states at least a partial truth? In attempting an answer to these questions it will be convenient to start with the conclusive presumption.

Now in the first place it is fairly clear, I think, that the conclusive presumption is generally applied in precisely those cases where the fact assumed is false and is known to be false. For example, there is said to be a presumption that the grantee of a gift has accepted it. In practice the only cases in which this presumption is invoked are cases where the grantee did not know of the gift and hence could not possibly have "accepted" it. Hence, the statement that a conclusive presumption assumes a fact which may be true is at least misleading in that it ignores the circumstance that the occasion to use the conclusive presumption generally arises only in those cases where the fact is known to be false. When the fact is present it may usually be proved and there is no occasion for the presumption.

But this is not always so. Conceivably the presumed fact may be present in reality in a case where the party chooses to rely on the conclusive presumption, either because proof would be difficult or because he does not know whether the fact is present or not. In such a case does the application of the presumption involve any fiction? I think that it does.

77. Best "Presumptions of Law and Fact" sec. 20; Lecocq "De la fiction comme procédé juridique" p. 29.
78. Thompson v. Leach (1691) 2 Vent. 198.
79. The presumption of "fraudulent intent" on the part of one who has given away his property while insolvent might be invoked by a creditor in a case in which the debtor actually did make the conveyance for the purpose of evading the claims of his creditors.
A conclusive presumption is not a fiction because the fact assumed is false, because in that event it would cease to be a fiction if the fact happened to be true. The ordinary fiction simply says, "Fact A is present" and would cease to be a fiction if Fact A were in reality present in the case. But the conclusive presumption says, "The presence of Fact X is conclusive proof of Fact A." This statement is false, since we know that Fact X does not "conclusively prove" Fact A. And this statement, that Fact X proves the existence of Fact A, remains false, even though Fact A may by chance be present in a particular case. The conclusive presumption attributes to the facts "an arbitrary effect beyond their natural tendency to produce belief." It "attaches to any given possibility a degree of certainty to which it normally has no right. It knowingly gives an insufficient proof the value of a sufficient one.

But what of the rebuttable presumption? Can it clear itself of the charge of being fictitious?

In the first place it should be noted that the difference between the rebuttable presumption and the conclusive presumption may, in some cases, become a matter of degree. Some of our rebuttable presumptions have, in the course of time, gathered about them rules declaring what is sufficient to overcome them. So soon as you have begun to limit and classify those things which will rebut a presumption you are importing into the facts "an arbitrary effect" beyond their natural tendency to produce belief. No presumption can be wholly non-fictitious which is not "freely" rebuttable. To the extent that rebuttal is limited, the prima facie or rebuttable presumption has the same effect as a conclusive presumption.

In the second place, it is clear that a rebuttable presumption will be regarded as establishing a fiction if we feel that the inference

80. Lecocq "De la fiction comme procédé juridique" at page 29, contains a remarkable bit of reasoning. He says that it might seem that we ought to say that the presumption is a fiction when the fact assumed is false, and not a fiction when the assumed fact is true. But, he says, this would involve an error, because it would be "anti-juridical" to inquire whether the fact is true or not because the presumption is set up for the express purpose of avoiding that inquiry!

81. A creditor sets aside a gift made by his debtor while insolvent. Now even though the fact is that the debtor actually intended to defraud his creditor in making the conveyance, the pretense involved in the presumption—that this fact is conclusively proved by the circumstance that he was giving away his property while insolvent—remains false.

82. Best "Presumptions of Law and Fact" p. 19.

83. Tourtoulon "Philosophy in the Development of Law" p. 398. Tourtoulon would regard this statement as applying also to the rebuttable presumption.
which underlies it is not supported by common experience. Some courts have applied a prima facie presumption that where a child is injured or killed in the streets the parents must be considered as having been guilty of negligence.\textsuperscript{84} Now, even though this presumption may be rebutted by any pertinent evidence, most of us would not hesitate to say that it contains an element of fiction. We do not feel that the inference it establishes is justified by ordinary experience.

If, therefore, we are to have any hope of escaping fiction in a discussion of presumptions we must narrow our inquiry to the case of the presumption which is freely rebuttable and which establishes an inference justified by ordinary experience. There is a presumption that a deed in the possession of the grantee has been delivered.\textsuperscript{85} The presumption is freely rebuttable; any pertinent evidence may be considered as overcoming it. Furthermore, it may be argued, the presumption establishes an inference which experience and common sense justify; it is based on the fact of social life that deeds in the hands of grantees have usually been delivered. Does such a presumption involve any fiction?

But first it will be legitimate to inquire, if the presumption is so reasonable and so much a matter of common sense, might it not be safe to assume that the judge or jury would have made exactly the same inference without the presumption? In other words, is a presumption which merely states a proposition of common sense a significant rule of law? Does it really affect the administration of justice?

It may be urged in answer to these inquiries that that which seems "reasonable" and a "mere matter of common sense" to the author of the presumption, may not seem so to the agency (the judge or the jury) which applies the presumption. It may be urged that the function of the sort of presumption we are here considering is simply to prevent the judge or jury from departing from the ordinary principles of ratiocination. The law is as much concerned that its agencies shall follow common sense in deciding disputes, as it is that they shall apply legal doctrine correctly. And the presumption may be simply a way of insuring the application of common sense.

If we regard a particular presumption in this light—and I think, incidentally, that the number of those which are entitled to

84. (1927) 75 U. P. Law Rev. 476.
85. 2 Tiffany "The Law of Real Property" (2d ed.) p. 1750.
be so regarded is extremely small—then it must be admitted that the presumption would involve no fiction were it not for the fact that we habitually treat the presumption, not as directing a disposition of the case, but as "directing an inference" or as commanding an "act of reasoning." Now the presumption may have been the product of a process of inference on the part of the one originally conceiving it. But if the presumption is treated by the judge and jury as a rule of law, it is clear that it is not an "inference" as to them. If I am merely accepting someone else's ready-made inference, I am not "inferring." There is then a fiction in the case of any rebuttable presumption in the sense that we ordinarily treat that as an "inference" which is in reality merely obedience to a command. The fiction here relates, not to the subject matter of the presumption, but to its effect in the administration of justice.

These points may perhaps be made clearer by a simile. We may treat the presumption as a lens held before the facts of reality. Now if the lens produces a distortion of reality—as in the case of the presumption of negligence where a child is injured in the streets—we do not hesitate to attribute a fictional character to the image produced. On the other hand we may be convinced that a particular lens produces a true image of nature. Now if we are willing to attribute to the judge or jury normal vision (ordinary powers of ratiocination) does it not follow that if our lens gives a true picture of reality it must in fact be of plain glass, i.e., produce no alteration at all? On the other hand, if we conceive of our lens as a corrective device—if we recognize that we are curing a defect—then there is no fiction if we recognize that we are changing the image. But our

86. Abbott, C. J., in Rex v. Burdett (1820) 4 B. & Ald. 161, "A presumption of any fact is properly an inferring of that fact from other facts which are known; it is an act of reasoning." In 5 Wigmore on "Evidence" (2d ed.) sec. 2491, the view is taken that a presumption is not an "inference" but merely a rule "attaching to one evidentiary fact certain procedural consequences as to the duty of production of other evidence by the opponent." This, as Dean Wigmore's own remarks show, is intended as a statement of how we ought to regard the presumption, rather than as a factual description of how it is commonly regarded by the profession.

It might be remarked parenthetically that a complete discussion of the presumption would have to distinguish presumptions according to the manner in which they are applied. Some presumptions simply operate to "shift the burden of proof." In some jurisdictions the same presumptions which "shift the burden of proof" are also presented to the jury as having a probative force to be considered along with the other evidence of the case. (Wigmore, op. cit., p. 452, note 5.) Some presumptions are not applied procedurally at all, but are only intended, apparently, as somewhat cryptic statements of a general principle, as the presumption that every man "intends the normal consequences of his acts." I have attempted to make my remarks sufficiently general to cover any case of the presumption, however applied.
professional linguistic habits tend to keep us in the paradoxical position of insisting that the lens does not change and at the same time of asserting that it is necessary—that without it a different result might be reached. We tend to assume, not that we have corrected the vision of the judge or jury by artificial means, but that by a kind of legal miracle we have given normal sight to the astigmatic. We tend to assume what unfortunately cannot be—that the law has a "mandamus to the logical faculty." 87

A presumption, if it is to escape the charge of "fiction" must, then, comply with at least three requirements: (1) Be based on an inference justified by common experience. (2) Be freely rebuttable. (3) Be phrased in realistic terms; order, not an "inference," but a disposition of the case in a certain contingency.

Assuming that a presumption has met all of these requirements has it established its right to be considered wholly non-fictitious? There is a presumption of death where one has been absent, unheard from, for a period of seven years. 88 It is possible to consider this presumption as meeting all three of the requirements enumerated. The presumption may be regarded as based on an inference warranted by experience. When people have been gone for seven years and have not been heard from usually they are dead. The presumption is freely rebuttable. And it may be—though usually it is not—phrased in non-fictitious terms, i. e., not as ordering an "inference" of death but as ordering the judge or jury to treat the case as they would one of death. Does it follow that the presumption establishes a proposition which is wholly non-fictitious, i. e., entirely "true"? It is apparent at once that the "truth" of this presumption is a conventionalized, formalized truth. Why should the period be set at exactly seven years? Why should one disposition of a case be made when the absence is six years and eleven months, and a different disposition be made one month later?

This formal, arbitrary element is very conspicuous in the presumption just mentioned. To some extent it is perhaps inherent in all presumptions of whatever character. A formal rule, no matter how firmly rooted its foundations may be in reality, tends to gather about itself a force not entirely justified by its foundations. It crystallizes and formalizes the truth which it expresses. If the presumption is given any weight at all by the judge or jury, there

87. Thayer "A Preliminary Treatise on Evidence" p. 314, note. "The law has no mandamus to the logical faculty; it orders nobody to draw inferences,—common as that mode of expression is."

88. 5 Wigmore on "Evidence" (2d ed.) sec. 2531 (b).
is probably a tendency to give it too much weight. In the language of the figure adopted previously, no lens is a perfect lens. In correcting a defect of sight, the lens produces its own peculiar distortions and that which was intended merely as a correction is usually an over-correction. In this sense every presumption is perhaps a distortion of reality. But this fact probably does not justify the application of the term "fiction." As has been said previously, we reserve the term "fiction" for those distortions of reality which are outstanding and unusual. And the distortion produced by the formal, imperative quality of the presumption is an inevitable incident of the process of reducing a complex truth to a simple, formal statement.

The close kinship of the ordinary fiction and the presumption is shown by the fact that the two meet upon a common grammatical field in such expressions as "deemed" and "regarded as." "The testator must be deemed to have intended to attach a condition upon his gift." Does this mean, "Conceding that the testator had no such intent in fact, we feel it advisable to treat the case as if that had been his intent"? Or does it mean, "Although the evidence is not clear, we feel justified in inferring that the testator in fact intended to attach a condition on his gift"? In truth probably the statement meant neither of these things—and both. That is to say, the mind of the author of this statement had not reached the state of clarification in which this distinction would become apparent. He probably would have agreed with either interpretation of his meaning. This example indicates, I think, that the mental process in-

89. This point may be illustrated by the following case. Two years after the death of Q, X claims Blackacre under a deed now in his possession and signed by Q. The facts show that X never made any claim to the land during the life of Q, and that after the death of Q he had access to Q's papers. X relies on the presumption that a deed in the possession of the grantee has been delivered. Do these facts "rebut" the presumption? Or, what is the same thing, do they prevent its "arising"? Now if the judge in passing on this question is simply weighing the fact of social life, that deeds in the possession of the grantee are usually delivered, against the peculiar circumstances of this case, then he is not using the presumption at all. He is using his own reasoning powers. But if the judge is attributing a special significance to the circumstance that the above-mentioned fact of social life has been incorporated into a rule of law, then the presumption is having an "artificial effect." If the judge is saying to himself, "Deeds in the hands of grantees are usually delivered, and I must remember that this fact has been specifically recognized by the law in a formal presumption," then he is dealing, to some extent, with proofs which are formal and not real. Since the question when a presumption "arises," or, what is the same thing, when it is "rebutted" always involves a certain discretion, it may be said that whenever the presumption has any effect at all, its effect is a formal and artificial one.
volved in the invention of the ordinary fiction is at least a close relation to that involved in the establishment of a presumption, and suggests the possibility that there may be a primitive undifferentiated form of thought which includes both.*

*To be continued.
LEGAL FICTIONS*

By L. L. FULLERT

"Without in the least wanting to be a philosopher, either in fact or in name, the scientist is under a strong compulsion to examine critically the processes through which his knowledge is won and extended."172

INTRODUCTION TO THIRD INSTALLMENT

In writing of the legal fiction it is easy to slip into the past tense. We have, without knowing exactly why, a feeling that the fiction belongs to a stage in the development of the law which is now safely passed.173 We tend to assume that the primary interest of the subject is historical. Yet a moment's reflection is sufficient to show that there is little basis for this feeling. We know that the fiction is being used in contemporary law. Certainly we have no reason to expect the intervention of some miracle which will change the minds of judges and legal thinkers overnight. If judges and legal writers have used the fiction in the past, and are using it now, they will probably continue to use it in the future.

What, then, is the source of this impression that the fiction is a thing of the past? I suspect that the answer is two-fold. In the first place, the fiction always seems pitifully obvious and naive—in retrospect. It seems difficult to imagine that intelligent human beings could be "deceived by the whimsical device of the fiction"—when one is viewing the thing from the perspective of history. We easily forget that the fiction is by no means so transparent to the man who resorts to it in his struggle to solve an embarrassing problem. To him the fiction often seems, not simply the easiest way out of his difficulties, but the only way out.

The other reason why we tend to relegate the fiction to the past lies in our failure to realize that the law will be faced, in the future, with essentially new situations. The fiction is generally the product of the law's struggles with new problems. Since we

*Continued from the December, 1930, and January, 1931, issues of this Review.
†Professor of Law, University of Illinois.
172. Ernst Mach "Erkenntnis und Irrtum" (2d ed. 1906), Vorwort v.
173. "They [legal fictions] are now recognized as the blundering devices of an unphilosophic age, which had not yet learned from science to value truth for its own sake." Phelps "Juridical Equity" (1894) 204.

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cannot foresee what changes are destined to take place in our social and economic structure, we tend to ignore in our calculations the probability, indeed, certainty, that changes of some sort will occur and that with them essentially new problems will be presented to the courts.

The age of the legal fiction is not over. We are not dealing with a topic of antiquarian interest merely. We are in contact with a fundamental trait of human reason. To understand the function of the legal fiction we must undertake an examination of the processes of human thought generally. Particularly will it be necessary to study the use of similar devices in other fields of science. In such a study there can be no better starting point than Vaihinger's Philosophy of "As If."

**Vaihinger's Philosophy of "As If"**

Hans Vaihinger's book ("Die Philosophie des Als Ob")

was written in the period 1876-1878 and was first published in 1911. It is a systematic study of the influence of the fiction in all the departments of human intellectual activity. The book has made a very pronounced impression in German philosophic circles, and has had an especially strong influence on German legal thinking: Some idea of the importance of Vaihinger in modern German legal thought may be gained from the appended bibliography of works discussing the application of his philosophy to legal problems.

174. The work is now in its eighth edition. References in this article are to the paging of the fourth edition of 1920, and will be indicated simply by the letter V. The book has not been altered since its original publication.

Unfortunately the English translation by C. K. Ogden, published in 1924, is very unsatisfactory. For example, on page 3 of Ogden's translation we find the phrase "mit dem objektiven Sein sich decken" translated as "clothed with objectivity"! This blunder occurs at a rather crucial point in Vaihinger's exposition, because Vaihinger is arguing that while our theories and ideas must, in a sense, "fit the facts of objective reality" (mit dem objektiven Sein sich decken), this is to be understood in the sense of furnishing us with an instrument for dealing with reality, and not in the sense of "mirroring" reality.

A popular exposition of Vaihinger's philosophy will be found in Chapter III of Havelock Ellis' "The Dance of Life."

175. The following books and articles are concerned primarily with the legal aspects of Vaihinger's philosophy: Karl Bawmhoer "Die Fiktion im Straf- und Prozessrecht" (1920) Beih. 24 to the Archiv für Rechts- und Wirtschaftsphilosophie; Fischer "Fiktionen und Bilder in der Rechtswissenschaft" (1919) Archiv für die zivilistische Praxis 143; Hofacker "Fiktionen im Recht" (1925) 4 Annalen der Philosophie 475; Hans Kelsen "Zur Theorie der Juristischen Fiktionen" (1919) 1 Annalen der Philosophie 630; Krückmann "Das juristische Kausalproblem als Problem der passendsten Fiktion" (1916) 37 Zeitschrift f. d. ges. Strafrechtswissenschaft 353; Krückmann "Einheit, Subjekt, Person" (1916) Archiv für die