Lecture Two: Legal Fictions

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Abstract and Keywords

This chapter focuses on the legal fiction which involves a deliberate separation, with judicial approval, of the two kinds of law — the case and statute law. It argues that the object of fiction is allowing the operation of the law to change while avoiding any outward alteration in the rules. It distinguishes the different varieties of legal fictions such as implications, deeming and legal metaphors, and conventions. The chapter also enumerated several problems with legal fictions.

Keywords: legal fictions, object of fiction, legal metaphors

In this lecture we will concentrate on the legal fiction. It is a convenient focus for our purpose because it involves a deliberate separation—with judicial approval—of the two kinds of law which I am seeking to distinguish. The books of the law, the judgments, and the outward forms, appear to say one thing, while everyone knows that the law works differently in reality.

It is of the essence of a fiction that it leaves no explicit evidence of its existence. Of course, we can use common sense in detecting some of the more obvious clues on the face of the record: for example, when we find exotic places such as Tenerife relocated (together with the Canary Islands) in the city of London, when we learn of a battery of guns or large stocks of furniture accidentally lost and found, when we see the benefit of clergy routinely allowed to defendants indicted as gentlemen or tradesmen,
There were, of course, real people called John Doe, though I doubt whether there were ever real people called Goodtitle, Notitle, Shamtitle, or Thrustout. The fictions in the cases in which they played their roles are historically visible because the underlying objectives and techniques became commonplace, and so we know what was going on. But they are not legally visible. As a matter of law there could have been a place called Tenerife, or islands called the Canary Islands, in the city of London; debtors were as capable of committing a trespass to land in Middlesex as those who paid their bills on time. The tell-tale signs of fiction in well-known procedures and devices should not encourage us to think that all fictions are visible, even to an alert and sceptical eye. If the plaintiff's lessor in ejectment were called John Baker or Peter Birks rather than John Doe we would not be put on our guard; and it now seems there were collusive recoveries to bar entail before there were common vouchees whose names we can recognize. The non-standard varieties of fiction, or the experiments which preceded the familiar forms, are in some ways the most interesting to the historian, and yet they shade off into the invisible. What is worse, the formal invisibility of fictions on the face of the record also generally kept them out of the law reports. Fictions only surface in the books once they have become widely known and well established. The precise origin of a fictional device is therefore almost always beyond recovery.

The object of fictions is that they allow the operation of the law to change while avoiding any outward alteration in the rules. Before 1852, they were an everyday part of legal practice. You had to learn the formal law first, but you then had to learn how far the forms could depart from reality. Their use has often been represented since Victorian times, since Bentham indeed, as an underhand and deceitful way of avoiding the democratic procedure for making changes in the law. We are now supposed to have given up such monstrous perversions of the legal process and allocated the role of law reform to Parliament. In truth, however, fictions are by no means extinct.

Modern Forms of Fiction

Not so very long ago everyone knew about the curious phenomenon of the arranged divorce, where a kind of ceremony performed in Brighton
could supply the place of real adultery. Divorce by consent alone was not permitted by law, since it was necessary to petition on grounds of adultery, and so an appearance of adultery (if lacking in fact) was stage-managed. Indeed, it was widely believed to be the duty of a gentleman to provide such fictitious evidence if a guilty wife sought a divorce. The fiction was morally preferable to real adultery, which would work just as well. Popular folklore—assisted by Evelyn Waugh and A. P. Herbert—went so far as to invest the procedure with more ceremonial than was actually required, as if it were a customary routine. For example, it was popularly supposed that the evidence of a chamber-maid was a vital part of the magic. This all goes to show how easily ordinary people can enter into the spirit of fictional rigmaroles, provided they have some sympathy with the result.

This particular fiction shocked some judicial and lay consciences, thereby paving the way for legislative change which made its continuation less necessary. But fictional devices may be officially tolerated when the judiciary approve of the changes which they serve to conceal. Some judges have actually held it a positive virtue to change the law by stealth. Only thirty years ago Lord Radcliffe said, in a public lecture at Harvard Law School, that ‘judges will serve the public interest better if they keep quiet about their legislative function’. The judge who ‘shows his hand’ risks damaging general confidence in the law as a ‘constant’. And one way of doing justice by stealth was the age-old practice of winking at benevolent fictions. In 1976 Lord Denning MR reminisced from the bench, with evident satisfaction, about the widespread practical evasion of the House of Lords decision in Heilbut v. Buckleton by means of a pleading device:

In order to escape from that rule, the pleader used to allege—I often did it myself—that the misrepresentation was fraudulent, or alternatively a collateral warranty. At the trial we nearly always succeeded on collateral warranty. We had to reckon, of course, with the dictum of Lord Moulton, at p. 47, that ‘such collateral contracts must from their very nature be rare’. But more often that not the court elevated the innocent misrepresentation into a collateral warranty: and thereby did justice—in advance of the Misrepresentation Act 1967. I remember scores of cases of that kind, especially on the sale of a business.

It is difficult to check such a statement historically, even though it relates to the recent past, for the same reason that fictions elude scrutiny in earlier centuries: neither the law reports nor the textbooks, prior to this piece of
veil-lifting, give us any clue that *Heilbut v. Buckleton* had so little effect. That was a true fiction in the classical sense. But there are (p.38) other and better known varieties still alive. Only last year I executed a deed assigning copyright in consideration of the sum of five pounds which, in accordance with standard practice (but quite contrary to the truth), I ‘acknowledged’ that I had received. That acknowledgement would doubtless stand scrutiny in a court of law, even if I sought to deny its veracity under oath, because the fiction is sanctified by the doctrine of estoppel by deed. Estoppels by deed or representation are, by definition, a category of fiction, since they operate by preventing averment of the true facts. And what about irrebuttable presumptions, implications, and all that ‘damned deeming’? 17 It has become fashionable to regard these as living and healthy examples of the fiction. 18 They are also the kinds of fiction most discussed by Civil lawyers, 19 and—no doubt through academic influence—they are the main phenomena expressly identified as ‘fictions of law’ (*fictiones juris*) by early-modern common lawyers. 20 Then again there are the more disreputable forms of fiction, such as sham transactions, 21 or those complex congeries of artificial paper dealings which, while not exactly false, have no total effect or purpose other than the avoidance of revenue. 22

(p.39) The Different Varieties of Fiction

For the purposes of English legal history, however, we need to distinguish carefully between the different varieties. The arranged divorce did not belong to the commonest types of fiction, since issue was joined on adultery and formal proof of adultery was required. There was no presumption of adultery; nor was the commission of adultery a purely formal and non-issuable allegation. Here it was the evidence that was partly fictionalized, though the petitioner had to offer a semblance of proof from a real eyewitness; and the fiction worked only because the proceedings were collusive and the evidence uncontested.

An earlier example of the same kind of thing, with the court joining in the collusion, was the reading test for benefit of clergy as it developed in the fifteenth and sixteenth centuries. 23 The defendant claimed to be a clerk, and then a test was administered which was largely ceremonial, since it seems to have become usual to assign a familiar text in the Psalter; 24 but some semblance of a test had to be gone through until 1706, 25 when Parliament perfected the fiction by abolishing the reading requirement altogether (as being ‘of little of use’). 26 Everyone, women included, could now (p.40) be
clergymen for the asking, in order to avoid the gallows—but not, of course, for any other purpose.

Likewise the use of professional compurgators in wager of law. They were doubtless a disreputable cross-section of lowly humanity, rounded up by the porter from their drinking dens in the purlieus of Westminster Hall, but they were not fictitious people. There had to be eleven real bodies, with real hands raised and real talking heads in court, though no one took any notice of who they were or what they said. The fiction lay in the content of their oath, which could not be contested.

If anyone wonders how sane people could possibly have preserved such farces for so many centuries, they should go to a congregation of the Regent House in Cambridge, where they will find more or less sane praelectors—I am told the local term here is ‘deans of degrees’—solemnly intoning in a set Latin formula the suitability for graduation of persons they have probably never met. The cynic may say that it is more dignified to be economical with the truth in Latin. But the more philosophical may justify the procedure on the grounds that suitability in this context has become a technical concept, to be judged only by examiners and bursars’ clerks; and to this philosophy we shall return. So these are not examples of absolute fiction. Compurgators—and praelectors, come to that—differed from the ‘suit’, the plaintiff’s supporters, who by 1350 did not have to appear in human form at all. The suit were truly fictitious, in that they were non-existent people and yet it was a fatal error if the record did not state that they were produced.

These fictions all differ somewhat from the classic type of litigation-fiction, which might better be denominated a factual fiction. The essence of the classic English fiction is that proof of a certain fact asserted in a lawsuit was completely dispensed with by the simple expedient of denying any means of disputing it. The false allegation in such cases was of some fact which had once been required to be proved, in an earlier stage of history, but which was no longer regarded as material. Here no false testimony was needed, nor any ceremonial appearance of proof. In the mildest forms, the device was used to enable writ formulae to encompass cases which fell within the spirit behind the remedy. But in other case the original policy behind the remedy could be overtaken or set aside. A familiar example is provided by the action of trespass. In the thirteenth century it was a general rule that only forcible trespasses against the king's peace could be heard by the central courts, and therefore an original writ from the Chancery had to assert a trespass with force and arms against the king's peace (‘vi et armis
et contra pacem regis’). But no one had to swear an affidavit as to the facts before the Chancery clerk would issue a writ, and so it was possible to obtain a writ even if the evidence of force was shaky or non-existent. That would become a problem at the trial; but if the jury thought the plaintiff ought to win anyway, the formal defect would not necessarily get (p.42) in the way. Professor Milsom has shown persuasively that, by such means, remedies for non-forcible wrongs were being smuggled into the central courts before the action on the case enabled the remedy to be obtained openly in the mid-fourteenth century. 32 Again we need the veil to be lifted, or dropped. Sometimes it was raised deliberately; 33 but it could slip inadvertently, as in a group of actions against smiths for savagely hammering nails into the wrong part of a horse's hoof. 34

Implication

It could be said that fictions of this kind enabled new remedies to be developed by allowing that some of the factors mentioned in the writ or count could be ‘implied’ by law. Yet the language of implication is ambiguous. It can be a way of expressing the truth, on the basis that some things are so obvious that they go without saying: for example, no one would characterize as fictitious the implied promise by a seller of food that the food is edible. It can also serve to conceal fiction, which to the modern legal mind is an abhorrent lie. However, the line between a fiction and the expansion of a legal concept or term of art may be a fine one. Is a contractual debt, for example, the same thing as an implied promise to pay money? 35

(p.43) We balk at an implicative contract, or promise, or request, as something patently untrue. But that is only because we think of a contract, a promise, or a request, as something primarily factual. On the other hand, when lawyers extend the reach of a concept such as debt, we do not so readily accuse them of fiction, because a debt exists primarily in the mind and is invisible. What, then, about the phrase vi et armis, when used in a general writ of trespass for something which does not look very forcible to a layman? The ‘arms’ are obviously fictitious when particularised in the count as non-existent swords and staves. On the other hand, breach of the king's peace must surely be a purely legal concept, especially if it can include stepping accidentally over a boundary, or a cow placidly munching the wrong grass. Is it so different to think of the ‘force’ in such cases as a legal abstraction, or an implication? And what about trusts? 36 Is a trust a fact—that is, a confidence actually placed in a trusted person—or a legal construction placed upon other facts so as to impose fiduciary duties? If the
latter, and if resulting, implied or constructive trusts are not fictions so much as abstract doctrines, why should we attach such odium to a constructive contract, or constructive force, or a request implied in law?

I have already shown how praelectors can be comforted by this approach, since the idoneity of candidates for degrees—like the idoneity of parsons to fill benefices, or the ability of convicted felons to read as clerks—may be treated as a matter at least partly of law. Indeed, on closer examination, all these questions are found to be mixed questions of law and fact. And a matter of law cannot, in its nature, be fictitious.

Deeming and Legal Metaphors

For the same reason, a fiction in the common-law sense must also be distinguished from a rule of law which seems to (p.44) conflict with natural reality, as in the process known as 'deeming', which is sometimes referred to as a statutory fiction. 37 Rules of law cannot be true or false in the factual sense, and lawyers are entitled to make ordinary words bear special senses—not only for the avoidance of circumlocution but because that is how all legal terminology has evolved. 38 In evolving legal concepts, lawyers have often used metaphorical language to describe abstract concepts. For example, husband and wife were deemed to be one person in law, a monk was treated as becoming civilly dead on profession, 39 an abbot and his monks had a corporate legal personality distinct from that of the individuals (who were legally dead), 40 acts of parliament were deemed to have been made on the first day of the session, 41 and so forth.

These are often said to be fictions. 42 But they are not really so. 43 They are rules of law. When the law said husband and (p.45) wife were as one person, it obviously did not mean that they were factually one person, but that for certain legal purposes they were treated as having a joint legal personality, like a little corporation with the husband as head. The wife was not allowed by law to make contracts or own property during the marriage without her husband; but for other purposes she was a separate person—for instance, if she committed a crime, the husband was not punished; 44 and if the husband killed her it was murder, not suicide. 45 Likewise the monk was disabled by law from owning land or making contracts; but he could still commit wrongs, 46 and be the victim of crimes against the person. It was convenient to attribute to the monk some of the characteristics of being dead for some legal purposes; kill a monk, however, and you would find on your way to the gallows that the law was perfectly capable of acknowledging his factual
existence. The attributes of corporate status, in the same way, are merely legal doctrine. It is convenient to use anthropomorphic language—a body having a head and members—and this is sometimes said to be a fiction. But it is not fictitious in the sense that anyone for a moment supposes a college or a limited company to be a fictional human being in the same way that John Doe, or Cinderella, is a fictional human being.

Much the same holds true of seemingly counter-factual presumptions. Let me take as an example the common-law rule which, until 1989, required a deed to be sealed. A deed was, by definition, an instrument under seal which had been delivered as a deed; and for many centuries a seal usually meant a piece of wax with an impression which served as a form of authentication. However, over the years the practice developed of executing deeds which bore a little circle with the letters L. S. (for locum sigilli), without attaching any wax or other thing upon the circle, and this was good enough: not merely, it seems, as evidence of a lost seal, but as a ‘seal’ in itself. This could be regarded as coming very close to fiction. Then, in 1989, Parliament decreed that we may make deeds without seals at all. It was not done by deeming; but whether or not it was a statutory fiction depends less on the vocabulary than on whether we regard a deed as being in its very nature an instrument under seal, or merely as being a formal instrument as defined by law from time to time. If the former, then the statute of 1989 is in effect a deeming provision, like deeming a dog to be a cat, or, rather, defining a cat to include a dog. Whether a dog is deemed to be a cat or declared to be a cat, there is obviously no intention of defying or subverting nature. It is a shorthand way of saying that, for some particular purpose, a dog will be treated in law in the same way as a cat. But if a deed, unlike a dog, is purely a creature of the legal mind, then it may be redefined without the need for fiction or deeming. And the same could be said of seals. If we think of a seal as a piece of wax, then a bare locum sigilli or a thumbprint is a fictitious seal; but once accept as a valid deed any document which purports on its face to have been sealed and delivered as a deed, provided there is some indication of an act which could be treated as a sealing, and it becomes impossible to formulate a physical definition of a seal. There is nothing fictitious, in the strict sense of the term, about changing the legal meaning of a word which has legal as well as factual content—that is, a word which cannot be understood for legal purposes without the benefit of a legal definition. We would only enter the realm of fiction if an invisible thumbprint alone were held to work the required magic, for then one of the essential requirements of a deed would have been reduced to nothing at all. Even then, however, the fiction would
be predicated upon continuing notionally to require a seal for a valid deed while dispensing with the need for evidence of a seal. The same result in law could be achieved by redefining a deed, so as not to require a seal, which is what Parliament did in 1989.

**Conventions**

We come closer to the working of the classic fiction with the concept of a conventional usage which modifies the way in which the law operates. Here the rules of law command or permit one thing, but convention permits or requires another. This is how our constitution works. The crown itself is a fiction, which has replaced that of the queen's two bodies which I mentioned at the start of these lectures. At the state opening of Parliament we witness the most glorious of all our legal fictions, with the judges (summoned for their advice) sitting on the woolsacks before a monarch in whose name all statutes are still passed, who still signifies her assent to bills in Anglo-French, and who may still lawfully refuse her assent to anything proposed by the Lords and Commons; a monarch with the power not only to make law but to make war and peace with other nations. Somewhere among the commoners crowding in at the bar of the Lords is the queen's prime minister, who holds office at her will and has virtually no legal powers at all. And then there is the Queen's Privy Council, which never meets in its entirety, never sits down, never deliberates, yet manages to issue a great many orders. The real council of state is a conventional body dating from the eighteenth century which probably has no legal existence at all.

There is nothing wrong with these fictions, which work perfectly well. Experience has shown that it is more convenient, more fitting, and perhaps more comforting, to preserve the traditional forms over the centuries while modifying—sometimes drastically changing—their operation. To change the forms themselves would smack of revolution. People in general value a sense of continuity.

**The Problem with Fictions**

Fictions in litigation have generally been considered more objectionable than conventions, and to the arts of presuming and deeming, and speaking in metaphors, presumably because they involve the solemn assertion in legal proceedings of something known to be untrue. Bentham grew quite cross about them, though his kind of response was nothing new. In defending the Admiralty jurisdiction in 1669, William Prynne inveighed against the
geographical fictions whereby cities, countries and whole kingdoms in foreign parts were transported into Cheapside or Islington, ‘which’, he wrote, ‘no miracle or omnipotency itself can do, because a direct contradiction repugnant to nature, experience, scripture and God's own constitution, who hath inviolably and immutably severed them by distinct bounds and large distances from each other’. 53 Such fictions, he wrote, would ‘introduce a chaos of confusion into all courts of judicature’. 54 The more usual view within the profession was voiced by Hale, 55 responding to Prynne, when he argued that ‘though fictions be a shew of something that is not, yet there is scarce any well-ordered law, nay not the Civil law, but hath its fictions. For they are but expedients without injuring anybody to bring men to their rights.’

I am not concerned on this occasion with the moral issue. It is enough for the sake of my argument to treat fictional assertions as forms which have to be gone through to achieve a legal result—like the *scio tam moribus quam doctrina* formula which our praelectors have to declaim in public because the university ordinances make it a prerequisite to graduation in person. Our concern today is with the problem which classic common-law fictions create for the legal historian. The problem does not arise to the same extent with the linguistic fictions, the presuming and deeming, because they are by definition overt. The use of words such as ‘presume’, ‘imply’ or ‘deem’ is an open indication of how the speaker is using words and extending principles, and when those words are found in the law reports they furnish historical evidence of what is happening. Indeed, when a pleading fiction in the classic sense is described in such terms, for instance when we read of promises being implied by law, the language of presumption actually helps to lift the veil.

The historical problem raised by the classic factual fiction is that it does not necessarily leave visible traces at all. It worked precisely because it could not appear on the face of the record to be false. The courts in banc could only be fed on parchment, 56 not on true facts or actual testimony, 57 and therefore could not take judicial notice that fictions were untrue. 58 (This was a judicial application of the parol evidence rule.) The result was that fictions as such could not be the subject of discussion in the central courts, a circumstance which makes records rather dangerous sources for the legal historian. The underlying reality might have been disclosed at the trial, but the law reports are of little avail in connection with what happened on circuit because they were almost wholly confined to the courts sitting in banc in West-minster Hall. And since there was no procedure before the...
eighteenth century for reviewing in Westminster Hall a trial judge's ruling on circuit, the reports are almost as innocent of fictions as is the formal record. Indeed, there is something inescapably exasperating about a logic which so effectively defeats the historian at every turn.

How then did fictions work? Obviously parties to litigation could not just lie at their pleasure and get away with it. A fiction used for purposes not approved by the judges would be frowned upon and stopped, and the parties punished, as where a collusive suit prejudiced a third party. It was also possible in theory to bring attainst against the jury, though this seems rarely to have been canvassed, no doubt because it would have been difficult to persuade a grand jury to convict. There was a good deal of learning on the subjects of covin, (p.51) feint actions, and feint pleader, mostly about the protection of third parties. If the judges smelt jiggery-pokery they could easily bypass the jury and investigate it directly by receiving ‘credible information’ or putting the parties upon the voire dire. Sometimes they objected although the party had right on her side, if it was the wrong way to vindicate it. They might object even if the fiction suited both parties and harmed no-one else. In Mildmay's Case (1600) a real dispute was framed as a fictitious case of Corbet v. Corbet, with fictitious facts raising a real-life legal question. When the fiction came to the notice of the court, Anderson CJ ‘in a fury ... flung out of the Hall, saying he came not thither to argue any counterfeit cases’ and later the court said that any opinion given in that case was not binding. Yet the same generation of judges actively encouraged, or at least gladly connived at, bills of Middlesex, collusive common recoveries, collusive leases to try title in ejectment, and countless other standard practices grounded on fiction. By 1640 the courts themselves would sometimes direct feigned actions, framed upon fictitious wagers between the parties, to enable genuine issues of fact to be tried more conveniently at the assizes. Even the use of fictitious parties was sanctioned, in high quarters, in the great constitutional case of the post-nati in 1608. The test-case there was framed as an assize of novel disseisin brought by one Calvin, a fictional name for Robert Colville, the three-year old grandson of Lord Colville of Culross, to whom property had been conveyed for the sole purpose of having him collusively disseised.

Fictions were necessarily under the control of trial judges and juries from case to case. For instance, the plaintiff whose case did not fit an existing writ might use the nearest writ and hope no one would object. There could be no objection to the writ itself, if it was in a well-known form. Any objection to the attempt to extend its scope would have to be that the facts of the
particular case did not correspond with all the assertions in the writ; and, since an objection of that kind went not to the form of the writ but to the evidence proffered before the jury, it would have to be taken at the trial rather than at the pleading stage. It would be disposed of, under later common-law procedure, by the trial judge's ruling as to what facts the plaintiff had to prove to establish his case; and if the judge relieved the plaintiff from proof of certain facts which had to be alleged, that amounted to the formal sanction of a legal fiction. Yet the judicial approval was given off the record, at the assizes, and the verdict was returned in common form. There was therefore little or no opportunity for the courts in banc to develop principles of law in the context of fictions. In speaking here of the judicial role, I am relying on what little we know of the last phases of the pleading fiction. It may well be that in earlier ages, when there was probably less judicial control of the jury, fictions were primarily a means of avoiding the judges altogether and throwing a case to the discretion of the laymen. In a fifteenth-century action of trespass it mattered little what the judges thought *vi et armis* meant if the jurors could be persuaded to find the defendant guilty on the merits. The use of fictions obscures this institutional aspect of legal history as well as the doctrinal: we cannot always see whether the real decisions were for the judge or the jury.

All this uncertainty makes it difficult to imagine how particular fictions were first introduced. How could a lawyer know whether a new trick which had occurred to him would be successful or would land him and his client in the Fleet? The answer may be that most fictional devices were, in origin, collusive. They could therefore slip into practice without challenge, and if repeated often enough could become so rooted that a future challenge would be unlikely to succeed. When they became familiar in practice, they might be extended into more contentious situations, provided that they were seen to have a just objective. Once established, fictions were well enough understood in practice, and generally benevolent in their effects—indeed, there was a maxim that legal fictions ought not to hurt anyone. They were for the 'furtherance of justice'. In reality they facilitated a kind of common-law equity, in which the jurors acted in effect as judges in conscience. But the mode of operation was hidden from Westminster eyes, and therefore from the law reports. In such a legal world—as likewise, indeed, in nascent courts of conscience more properly so called—practice was necessarily in advance of settled law, and legal solutions to particular problems became established in advance of speculative explanations for them. It is a natural tendency for lawyers looking backwards to try to reverse this order by seeking the seeds of later theory in earlier practice; but this
can easily distort our picture of what was actually happening. As far as we can tell from the admittedly thin sources, when counsel sought to persuade judges or juries to allow remedies to be extended by fiction, arguments were rarely if ever addressed to any identifiable abstract doctrine. As in an early court of equity, the plaintiff's case had to be made on the factual merits. Each new remedy therefore preceded its theoretical justification.

Thus the main objection to the fiction, from the point of view of jurisprudence, is not so much that it is untrue—after all, it deceives nobody and has no dishonest purpose—but that it works off the record, without overt legal reasoning, and therefore suppresses principle. Take vicarious liability in tort. No one has been able to trace its origin satisfactorily, because there was no action on the case for vicarious liability. The pleading practice was simply to allege that the master was there committing the tort in person, and the plaintiff relied on the judge to tell the jury that they should find for him if the servant's act was done in the course of employment (or whatever the appropriate test was). Since the direction was off the record, legal questions about the scope of vicarious liability could not normally be raised in banc, and can seldom be seen in the plea rolls or the law reports. Exactly the same problem bedevils the history of agency.

Likewise with the fictitious uses of *indebitatus assumpsit*. By the end of the seventeenth century there was a wide range of situations where the standard remedy was to claim damages for breach of a promise to do something, although in fact no such promise had been made. For instance, if I overpaid you by mistake, your remedy was to sue me on an imaginary promise to repay you the difference. The law even raised imaginary promises to pay taxes and satisfy foreign judgment debts. These were hardly promises implied in fact, in the *Moorcock* sense; there was no contract of any kind for them to be implied into. But a practical lawyer of the seventeenth and eighteenth centuries was content to say that in certain factual situations the law ‘implied’ a promise on which assumpsit could be brought, without asking the deeper question of why the law should imply promises to fulfil some moral obligations and not others. It was enough to provide the court with a plausible excuse for doing the right thing in the case in hand. The remedy then ‘crept in by degrees’. This conceptual short-sightedness prevented clear principles of restitution from becoming established in England until comparatively recent times. The remedies were in place earlier, and they seem to reflect basic notions of justice which have become familiar under the heading of unjust enrichment; but there were no coherent theoretical principles. The historian must therefore be
careful not to read into his sources a legal sophistication which is not there. That would be a fiction indeed, and of a more pernicious kind.

I have concentrated in this lecture on the legal fiction as a particular, and well-known, illustration of the problem which faces the legal historian by reason of the coexistence of two bodies of law, one formal and the other informal. As I indicated in the previous lecture, it is not the only manifestation of the problem. Legal fictions are striking because of the incongruity of allowing legal consequences which are at odds with the law found in the books. Yet, if we step back into a time when principles of substantive law are less evident in the law reports, we find the world of informal law much larger and more pervasive. The relationship between the two bodies of law was then more usually one of mutual support than of conflict. The nature of this supplementary body of informal law, which existed outside the books of authority, will be the subject of the next lecture.

(p.58)

Notes:


(2) Bevin v. Chapman (1664) 1 Sid. 228. For earlier precedents, see Hale on the Admiralty, ed. M. J. Prichard and D. E. C. Yale (108 Selden Soc., 1993), 47–8. Foreign places were most commonly alleged to be in London, so that commercial cases could be tried by a city jury. But see Pole's Case (1375) YB Hil. 48 Edw. III, fo. 3, pl. 6 (Harfleur in Kent); Anon. (Hil. 1558) Brit. Lib. MS. Harley 1624, fo. 78v (Antwerp in the county of Northampton); 108 Selden Soc. 51 (East Indies in Islington). See also Prynne and Hale, below, pp. 48–9.

(3) In the action on the case for conversion of chattels, the plaintiff did not have to trace the passing of possession from himself to the defendant, but was allowed to resort to the fiction that he had casually lost them and the defendant had come into possession by finding (trover). In Arundell v. Carye
Note that, by convention, judges names are in CAPITALS and lawyers names are in *italics*.

**B1. Anon. (1304)**


Fictitious force and arms in trespass for felling timber

One R. brought a writ of trespass against J. and others etc., and said that they came wrongfully with force and arms and cut his wood and carried it away etc. The defendants said that they were not guilty.

The inquest came and said that they cut his trees, but not with force and arms.

Therefore it was adjudged by BEREFORD CJ that he should recover his damages etc., and that the defendants should be taken, even though they did not come with force or with arms etc.

**B4. Anon. (1353)**

YB 27 Edw. III, Lib. Ass., pl. 56. King's Bench sitting at Wells, Somerset

Contra pacem allegation treated as immaterial

In a bill of trespass which J. of B. sued in the King's Bench at Wells against W. at D. for trampling on and despoiling his grass, the defendant pleaded Not guilty; and it was found by verdict that the defendant's beasts had depastured upon the plaintiff’s grass by escaping, to his damages of five shillings, but not against the peace.

*Taunk. We pray judgment of the bill, which says contra pacem etc., for in such a case the plaintiff should have a bill without saying contra pacem.*

But notwithstanding this, because it was found that this was for want of good care (*bon garde*), it was awarded that the plaintiff should recover; and the defendant was taken, because it was for want of good care etc.
An action of trespass was brought by a husband and wife, and the writ was, ‘why with force and arms he broke the close of the husband and wife, and took their goods and chattels found at A.’; and the count was that the defendant took the goods and committed the trespass to the woman while she was single. The defendant pleaded Not guilty, and was found guilty, and judgment was given accordingly. And the defendant sued a writ of error.

The opinion of the court was that the writ of trespass was not good, and therefore that the judgment was erroneous. For it was agreed that where one has no writ corresponding with his facts, but a general writ of form, and there was no other writ in the Chancery in accordance with his facts, then even if the writ does not maintain his count (so that the count does not correspond) still the writ shall not abate...

But where one may have a writ corresponding to his facts, and does not take that writ accordingly, so that the writ is not warranted by the count, or the count is not warranted by the writ, then everything shall abate. As in the case here, the plaintiff could have an action of trespass to answer the husband and wife ‘in a plea why with force and arms he took the goods and chattels of the wife’, and not ‘their goods and chattels’ ... and such a writ is in the Register. (And the Register was brought before the justices, and such a writ was in the Register.)

Note that in trespass for battery the writ went on to say, ‘and laid such and so many threats upon the same A. and caused such injuries and griefs that the plaintiff was unable to go about his business’. In this case the jury found for the plaintiff with respect to the battery, and that was properly found. They also found the threatenings and other injuries for the plaintiff, but that was falsely found. Their intention was never other than to find everything for the plaintiff, with everything incident to the battery (of which the defendant was clearly guilty), but not the threatenings—which were put into the writ merely for form. Nevertheless on this point, amongst others, but principally on this point—and also for excessive damages—they brought an attaint. Then, in the attaint, this point—namely the ‘such and so many threats’—was the principal cause in which they assigned the false oath. (This was in the attaint between Gaynesford and Guldeford.)

So it would be better to leave this clause out of the writ, if it is not the very truth of the matter, for many times this point is not directly answered by reason of oversight.
In the King's Bench one Jordan brought a writ on his case and recited in the writ that, whereas the plaintiff had one Tatham in execution in the Compter [a London prison] for a certain debt recovered against him, the defendant undertook to the plaintiff that if the said plaintiff would discharge the said Tatham of the execution he would pay the debt to the plaintiff at such and such a day if the said Tatham did not pay him earlier; and showed how he discharged the said Tatham from execution, and that the said Tatham did not pay before the day, and so etc. The defendant traversed the undertaking, and they were at issue thereupon. At the nisi prius in London the plaintiff gave in evidence that the defendant came to the plaintiff's wife, the plaintiff being absent, and undertook to the wife that if the plaintiff (her husband) would discharge the said Tatham from the execution he would pay the debt at a certain day to the husband if Tatham did not pay earlier; and then the plaintiff came home, and his wife told him about this, and he agreed to the undertaking and thereupon discharged the said Tatham from execution.

The defendant said that this evidence was not good, because the wife cannot be party to such an undertaking without her husband's previous command, or earlier agreement; therefore the undertaking was void, and the husband's subsequent agreement cannot make it good.

It seemed to the justices of nisi prius that the exception was not good. Therefore the defendant made a bill of exceptions, and one of the justices sealed it. Then the verdict passed for the plaintiff, and now at the day in banc the defendant alleged the aforesaid facts in arrest of judgment.

Knightley. You ought not to proceed to judgment, because this undertaking to the plaintiff's wife, while he is absent, is not good; for the wife cannot do any act which shall prejudice her husband ...

FitzJames CJ ... Now, as to whether the undertaking to the wife is a good cause for the plaintiff to bring his action, it seems clearly that it is ... The plaintiff alleges that the defendant undertook to the plaintiff, and gives in evidence that he undertook to the plaintiff's wife: this is consistent with his issue and goes in its stead. For the subsequent agreement of the plaintiff makes it an undertaking to him in law. Likewise, if my wife buys goods, and later I agree, this is my sale. If my servant sells some of my goods, and later I agree to this sale, it is now my sale; and I shall have a writ of debt, and allege that the defendant bought from me, because my agreement afterwards makes it my act ...

[Other judges gave similar judgments.]
William Edwards brought an action on the case against Edmund Burre and Margaret his wife, administratrix of the goods and chattels of John Sidwell, late her husband, and counted that the testator in consideration that the plaintiff had lent the testator forty shillings undertook to pay him forty shillings. The defendant pleaded Non assumpsit modo et forma. The plaintiff submitted evidence that he lent the forty shillings to the testator.

Wray J. said to the jury: If it be true that the plaintiff lent the said sum, you must find for the plaintiff; for the debt is an undertaking in law.

But note that it was said that this is by reason of the custom of the King's Bench, for in the Common Pleas he would have to prove the undertaking ...

An action on the case was brought, and the plaintiff declared that he lost his horse and that it came into the defendant's hands by finding, and the defendant sold it and converted the proceeds of sale to his own use. The defendant pleaded Not guilty, and the jury found these facts specially: the plaintiff lost the horse, and it came to the defendant's hands, but he did not sell it or take money for it, or convert the money to his own use. And they further found that the defendant is now in possession of the horse and ready to deliver it up.

Now Aunger moved the matter at the bar, and said that the plaintiff should not have judgment ...

But Gawdy, Southcote and Ayloffe JJ (Wray CJ being then in the Chancery) thought the contrary. For they said that the sale and conversion to the defendant's use is only a matter of form, and if for that reason they did not give judgment for the plaintiff in this case they would overturn a thousand precedents, and all actions on the case for trover.

Gawdy J., however, said that the course in the Common Bench was contrary; for Dyer CJ would have the plaintiff prove that the defendant sold the horse and converted it to his own use. So in that court it seems to be a matter of substance and not merely of form.

The following day the case was moved again, and it was held by Wray CJ as above, and that the detaining and using of the horse was in law a converting to the defendant's use.
[P. 72] If the court makes a rule in an action of trespass and ejectment that the defendant in the action shall confess the lease, entry and ouster, and yet at the trial the defendant will not do it, the plaintiff must proceed notwithstanding in his trial; but he may also proceed in this court against the defendant upon his contempt in not obeying the rule of the court. Pas. 24 Car. BR.

[Pp. 107–08] If one seal a lease of ejectment to try a title of land, it is not necessary to give notice of the sealing of this lease unto him whose title is concerned, but it is sufficient to give notice of the lease to the tenant or under-tenant of the land in question. Hill. 23 Car. BR. For the possession of the land is primarily in question in this action, and is to be recovered, and not the title of the land, though the title of the land do come in question and is tried collaterally. But now, by the new way of practice, it is not usual to seal any lease of ejectment at all in an action of trespass and ejectment, but the plaintiff that intends to try the title delivers a declaration to an ejector of his own making, and that ejector sends or delivers the declaration to the tenant in possession, who gives notice thereof to his lessor, whose title is concerned, to defend the title, and if neither the tenant in possession nor his lessor will defend the title, then the ejector will confess a judgment to the plaintiff, and so the tenant will be stripped out of possession; but if they or either of them will defend the title, then it is usual for them to move the court that they may be made ejector to defend the title, which the court will grant if they confess lease, entry and ouster at the trial, and stand merely upon the title; and if at the trial they do not, the judgment to be entered against the plaintiff's ejector.

[P. 109] He that is to try a title of land by an action of trespass and ejectment ought not to make an ejector of his own against whom he may bring his action, or to consent or agree with one to come upon the land let in the ejectment lease, with an intent to make him an ejector and to bring his action against him. Mich. 22 Car. BR. For by that means the tenant in possession of the land was often put out of possession by a writ of habere facias possessionem without any notice given either to him or his lessor of the suit. But now this is altered by the new way of practice formerly mentioned.

[P. 111] The owner of the land may consent with the party that claims the land to make an ejector to try the title of it, if it be not a plot betwixt him and the ejector, Mich. 24 Car. BR. namely to strip the tenant of the land in possession.

[P. 265] Where one desires to be made party to defend the title of the land in question in an ejectione firmae, the court will grant it, so that he will confess lease, entry and ouster. Pas. 23 Car. BR. 13 in Prince and Warren's case, 2 Maii 1648. But now that rule is enlarged, for now he must confess lease, entry, and actual ouster, and must not except against the jury for want of hundredors, but insist only upon the trial of the title; and if at the trial he do not all this, then judgment is to be entered against the lessor's own ejector.
There is little or no indication in the records of criminal cases, or in the law reports, as to when or how the test of clergy became simplified to the verge of fiction by the use of a known neck-verse. The reports for the first half of the fourteenth century suggest that the judges were strict in trying to ensure that improper claims to clergy by laymen did not succeed; but the reading test soon afterwards came to be the only test of clergy, and it seems within a century to have become fairly perfunctory. The true story can only be read between the lines, by using a wide range of sources.

C2. R[ex] v. Henry (1326)
Wilts. Record Office, Bruce MS. 11, fo. 58v. King's Bench

One Henry was arraigned of common larceny, and was asked how he would acquit himself, and said that he was a clerk.

SCROPE CJ. You are dressed in a coat of ray, with cross-stripes it and therefore you do not have the habit [clothing] of a clerk. Do you wish to say anything else?

Henry. Sir, I can say nothing without my ordinary.

SCROPE CJ. Show us your head. (He showed it, and he did not have any clerical tonsure.)

SCROPE CJ. You do not have clerical clothing or tonsure, and the ordinaries are not here to claim you as a member of Holy Church; therefore see whether you will put yourself upon the country or not. (He kept saying that he was a clerk.)

SCROPE CJ questioned him in Latin, with these words: Quomodo vetaris? And he did not know how to answer. Then he questioned him in French, and he did not know how to answer.

Then a monk arrived from the abbot of Westminster and claimed him as a clerk.

SCROPE CJ. If you claim him as a clerk, when he is not claimable, you should be aware that you will suffer the following penalty: that all the temporalities of the abbot in this bishopric shall be forfeited to the king, and that the abbot shall never again be received to claim anyone here as a clerk. So, do you claim him, or not?

THE ORDINARY. If he is a clerk we claim him; and you, sir, should make him read and test him.

SCROPE CJ. Then you will not claim him if he is not a clerk ...
SCROPE CJ again asked him if he would say anything; and he kept maintainng his clergy.

SCROPE CJ. You have been arrested in a robe of ray with cross-stripes it, and you do not have a tonsure as a clerk ought to have; nor do you know how to answer in Latin or French; therefore you cannot have the benefit of clergy. And you will not give any answer to acquit yourself, such as putting yourself on the country, or in any other way; and so by the law of the crown you shall be put to your penance if you will not say anything else. Nevertheless the law of the crown is so favourable and kind (curtoise) that one may tell you what your penance will be before you are adjudged to it. And it is this: you shall be put in a house … in your breeches and shirt, without other clothing, and shall bear as much iron as you can bear and more, and you shall have the worst bread to eat that one can find, and for drink you shall have the water which is standing closest to the gaol where you are put, and on the day when you drink you shall not eat, and vice versa. So be well advised whether you will put yourself on the country or not; for you should clearly know that if you are adjudged to your penance you will not be allowed to put yourself afterwards, since you have once refused the law.

SCROPE CJ asked him frequently whether he would put himself [on the country]; and he kept on saying that he was a clerk and would not say anything else.

SCROPE CJ recited the matter as above, and sentenced him to his penance.

C5. R[ex] v. Anon. (1469)
YB Trin. 9 Edw. IV, fo. 28, pl. 41. King's Bench
The reading test in operatio

In the King's Bench someone who had abjured the realm, for the death of a man, was brought to the bar and pleaded the king's charter [of pardon]; but it was disallowed because it did not mention the abjuration. Therefore he betook himself to his clergy; and the ordinary brought a book, and the justices opened the book and assigned a verse to him for reading. And he did not know how to read, apart from the odd word in one place and another elsewhere; but he could not read three words together.

The justices asked the ordinary whether he would have him; and he said he would.

And the justices said: Be advised how you claim him, for if it seems to us that he does not read sufficiently as a clerk you will be heavily fined and he will be hanged anyway; for we are judges of his reading ...

BILLYNG CJ. In this case he reads a little, but not ut clericus [as a cleric]; for he ought to read distinctly and openly. Therefore we will be advised. And you, sir (the ordinary), be advised what you will do, as to whether or not to claim him, until next Monday.
SULYARD J. said that before Fortescue CJ [1442-61] a felon betook himself to his clergy, and could not read well, but spelt out the letters and put them together; and he had his clergy ...

Later, on the said Monday, the ordinary said to the justices: If you tell me to refuse him, I will; but if you tell me to take him, it shall be so.

THE COURT. You must choose.

And the ordinary refused him. Before the refusal, however, the felon said he had been taken out of a sanctuary and prayed to be restored.

BILLYNG CJ. You are too late for that ...

C6. Thomas Kebell’s reading in the Inner Temple (c.1470/75)
Brit. Lib. MS. Hargrave 87, fo. 302 at ff. 303–304v
This part of the reading was on the Statute of Westminster I, c. 2, concerning benefit of clergy. Kebell’s account shows that the reading test had become thoroughly laicised, in that the judges had the last word and (notwithstanding the rules of Canon Law) it had become the only relevant factor in allowing clergy. It also shows that even the show of ‘reading’ could be fictionalised in the case of a blind defendant.

... If a clerk abjures the realm and afterwards returns, and is taken and arraigned, he shall have advantage of his clergy. The opinion in old times was that he should not have his clergy until the king pardoned him his entry in the land, but nowadays the opinion is to the contrary. Someone is imprisoned for felony, and the gaoler allows him to be instructed (érudité) so that he knows how to read well through the teaching he has had in the gaol by permission of the gaoler: he shall have advantage of his clergy, but the gaoler shall make fine. (And this is a common point of inquiry into the defaults of gaolers.) If battle is joined between an approver and the appellee, each of them may have his clergy. And a man may have his clergy after verdict, and even after judgment. The statute says, ‘if he is demanded by the ordinary he shall be delivered to him’; but, notwithstanding these words, if the ordinary demands him and the felon does not want to take advantage of his clergy, he shall not [be delivered], because he shall not have advantage if he himself will not demand it. If the ordinary claims a clerk who does not read as a clerk, it has been the opinion—and was adjudged in the time of Edward II—that he shall never again have the advantage of claiming any clerk. But that is not law, because this claiming is not given to the ordinary like other franchises, but is given him in right of Holy Church. If the ordinary claims someone as a clerk who is not a clerk, he shall not have him, and he shall make fine for this misclaimer. And if he refuses a clerk who reads as a clerk he shall make fine, and the clerk shall be reprieved continuously (tout temps) until the ordinary accepts him. If the ordinary refuses a clerk, and afterwards accepts him, he shall make fine for his first refusal ...
Whether someone is a clerk or not is by the examination of the justices, and they assign him his book. Although the common usage is to assign them a psalter (‘sawter’), it nevertheless lies in the justices’ discretion to assign whatever book they please, so long as it is legible and not blind or ill written. A mute person who is arraigned for felony, and is a clerk, shall have advantage of his clergy if he knows how to write. Also, if someone is blind, and is arraigned, he shall advantage of his clergy if he knows how to speak Latin by learning and not by natural speech (as the Italians do). And yet in these cases they do not ‘read as clerks’ (*legunt ut clerici*). But the reason [for allowing the privilege] is because the acts of speaking [and writing] Latin presuppose that they know how to read, and are nobler and worthier than mere reading etc. If a blind clerk demands his clergy, and says that he knows how to read well but does not know how to speak Latin, and if he has his eyes, this shall be tried by the country—like the non-ability of a clerk in *quare impedit* ...

If a clerk has broken out of prison and stolen goods from the church, which is sacrilege, or if he lacks tonsure or clerical vestments, it has been ruled and held by all the justices that these causes do not oust him from the privilege etc. Or if the ordinary refuses him generally or specially, this is no cause to oust him from his clergy if the justices see that he is a clerk; for the ordinary shall make fine for this refusal. Highway robbery (*depopulatores viarum*) is not a cause to oust him etc., nor to say that he is a heretic, because notwithstanding this he may abjure ...

Harvard Law School, MS. 112, 297. Gaol delivery at Newgate
Different verses assigned to be read.

One that was convict of manslaughter prayed his clergy, and had it. But because it was a case of blood, COVENTRY took the book and chose a sentence or verse himself and gave it to the ordinary, who shewed it to the prisoner and gave the book to him to read. And COVENTRY gave command to remove him from the common place where usually they stood, and to set him apart from other the standers by, to the end no man might prompt him, and commanded him to read aloud—which the prisoner did, distinctly and well. And then COVENTRY assigned him another place, which he also read very well.

Query whether this course be usual, forasmuch as the prisoner did read the first place assigned him well, whether he ought to be put to read again in another place? But clearly if it had been entered, *quod legit ut clericus* [that he reads like a cleric], he ought not then to have had another assigned him.
At the same assizes at Winchester, the clerk appointed by the bishop to give clergy to the prisoners being to give it to an old thief, I directed him to deal clearly with me, and not to say legit in case he could not read; and thereupon he delivered the book to him, and I perceived the prisoner never looked upon the book at all, and yet the bishop's clerk, upon the demand of legit or non legit, answered legit; and thereupon I wished him to consider, and told him I doubted he was mistaken, and bid the clerk of assizes ask him again, *legit or non legit* [Does he read or not read], and he answered again, somewhat angrily, *legit*: then I bid the clerk of the assizes not to record it, and I told the parson he was not the judge whether he read or no, but a ministerial officer to make a true report to the court. And so I caused the prisoner to be brought near, and delivered him the book, and then the prisoner confessed he could not read; whereupon I told the parson he had reproached his function, and unpreached more that day than he could preach up again in many days; and because it was his personal offence and misdemeanour, I fined him five marks, and did not fine the bishop (as in case he had failed to provide an ordinary).
reasoning, the door is ajar for alternative conceptions of social norms to be presented. The élites exercise power through law, but their rules are vulnerable to renegotiation, and their powers subject to resistance. The open texture of legal norms makes the legal system a focus of struggle rather than an exclusive implement of the powerful. Instead of law being imposed from above under the guise of neutrality, it is a neutral form of social organization waiting to be seized and directed by the democratic wishes of the community.  

I am indebted to Mary Stokes and Ken Simons for their criticisms of earlier drafts of this essay.

5

Fictions Ancient and Modern

PETER BIRKS

Dexterity with words is an essential characteristic of the legal mind. The popular view is that lawyers carry their verbal skill to unreasonable extremes. In lay usage the phrase ‘legal fiction’ often enough recalls this diabolic tendency. The worst excesses are brought on by the pressures of adversarial conflict, and in the past the rationality of the common law has undoubtedly suffered from its being worked out in court. However, textbooks, written for the most part by academic lawyers, have in the last hundred years become ever more important in shaping the law. This has been a gradual revolution in the English legal system, and it means that one lawmaking function, the production of textbooks, is now carried on in an atmosphere in which there is no longer any excuse for language which is other than lucid and honest.

I. FICTION AND FALSEHOOD

There are limits to the abuse of words which neither lawyers nor legislators should transgress. One such line is drawn by Gaius in his discussion of theft. Having described the consequences of manifest theft and the space of time and place within which a thief could still be described as having been caught red-handed, he observes that, even outside those limits, a ritual search for stolen property would, if successful, impose a liability as for manifest theft. That was due to a provision of the Twelve Tables. Gaius is then led to a forceful criticism of a classification engendered by the decemviral rule, some lawyers had made it the basis for saying that manifest theft was of two kinds, either natural or constructive, actual or deemed.

The habit of mind exemplified by those lawyers is instantly familiar even today. It consists in aligning under the same generic term not only facts within the ordinary meaning of that term but also others which are outside that ordinary meaning but which the law nevertheless finds it convenient to attract into the same category. When this is done, terms such as ‘constructive’ or ‘implied in law’ partially conceal the genesis of a fiction. A man can be said to have actual or constructive notice of a fact. Constructive notice is notice which he would have had if he had been reasonably alert.
We barely observe the fiction, but in truth the man who knows a fact constructively does not know it at all. Similarly, the term ‘constructive trust’ indicates at first sight a kind of trust. Only on closer inspection does the phrase concede that there is in truth no trust at all: the event of reposing trust has not happened, neither expressly nor impliedly, and not even by presumption; but another unnamed event has happened, to which important consequences must be attached just as though trust had indeed been reposed. In this example the fiction is doubly concealed, not only by the word ‘constructive’ but also by a certain ambivalence in the word ‘trust’, which properly denotes the event of reposing trust but easily slips from event to consequence, so as to denote the condition, however caused, of divided beneficial and bare title. This habit of mind creates false genera and prepares the way for divisions into species which are unsound. It thus builds error into the foundations of legal thought.

That is why Gaius responds to it with great and deliberate emphasis, making it plain that something fundamental is at stake, a methodological truth which transcends the immediate context. In the quotation which follows, the word ‘law’ in the translation is lex in Latin, and the specific reference is to the law of the Twelve Tables. Gaius’ point is put very strongly: not even statute can so abuse words as to impose false classifications:

However, the fact that the law provides that in these circumstances (sc. after ritual search) the theft should be manifest has led some writers to say that theft can be manifest either by nature or in law; in law the case of which we are speaking, by nature on the facts which we discussed earlier. But it is more true to say that theft can only be manifest by nature. For the law cannot turn someone who is not a manifest thief into a manifest thief any more than it can turn someone into a thief who is not a thief at all, or take a man who is not an adulterer or a murderer and make him an adulterer or a murderer. What the law can indeed do is to make a man liable to the same penalty just as if he had committed theft or adultery or murder, even though in fact he has committed none of these.¹

Gaius here takes it for granted that words have a proper meaning, at least to the extent that some attempted applications can be, and should be, condemned as contradictory. Red is red, and green is green. Convenience may sometimes suggest that red might be deemed green. But that would be an outright falsehood, and the temptation must be resisted. On the other hand there is no objection to attaching the consequences of green to red. You cannot say that red is green, but you can declare your intention to proceed as though red were green. This is the line between falsehood and fiction. The passage is characteristic of Gaius’ mind. Tony Honoré, in the

¹ G. 3.194

first of this pioneering biographies, introduced him as the jurist with some claim to be ‘pater ac princeps of the profession of academic lawyers’ and rightly said of him ‘in lucidity he is unrivalled’.² Gaius’ lucidity is not merely a matter of style in expression. Nor would good Latin and self-effacing moderatio suffice to account for the sympathy between the jurist and his biographer. ‘Tough, lawyerly, and independent’ and also mentally equipped with the methods of philosophy,³ he was committed to accurate legal cartography,⁴ invaluable to understanding and attainable only by patient logic and careful classification.⁵ Verbal falsehoods, rooted in confusion and likely to yield further errors, are anathema to lawyers of his cast of mind. Had Gaius been confronted with Holmes’s famous aphorism—‘The life of the law has not been logic; it has been experience.’⁶—he might not have been unduly shocked, since the jurists were well aware of the non-logical elements in legal development, which they called, compendiously, utilitas. But he would certainly have added that the life of legal science could not be long sustained if ever the search for verbal errors and fallacies was given up.

As a matter of observable history Anglo-American common law has in its development been less firmly committed to formal rationality. Indeed the sentence with which Holmes follows the famous statement which has just been quoted recognizes the role of the very forces—intuitions, feelings, and prejudices—which verbal reasoning seeks to control and which the Gaian conscientiousness, and no less the rule of law itself as opposed to the rule of judges, require to be curbed: ‘The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.’⁷

With whatever combinations of logic and experience, the substantive law of both systems developed in large measure within the context of forms of action. In simple terms this means that there was a list of claims claimable by plaintiffs and that detailed answers to legal questions built up as expositions of the texts of those claims. It was necessary to say what facts would substantiate them. The answers were not born whole but were worked out slowly, and at different times for different actions. Stripped down to essentials, the Roman vindicatio said ‘That res is mine!’ and the conductio said

³ Ibid., pp. 97 ff.
⁵ E.g. G. 2. 14; 3. 88-91; 3. 131; 3. 183.
⁶ O. W. Holmes, The Common Law (Boston, 1881) p. 2. That logic might have to be defended, Gaius would have found beyond belief. Cf. Guest, op. cit.
⁷ Holmes, loc. cit.
'You ought to give me that rest! It is not to be supposed that any but obvious substantiating facts could at first be listed. Similarly stripped down, the English action for money had and received said 'You are indebted to me in £100 for so much money had and received to my use!' We know that it was not till 1760 that the substantiating facts were listed. Innovation in a system dominated by forms of action can happen in two ways: either by extending the list of facts which will substantiate an established claim (innovation behind the form of action) or by admitting a new or modified claim (innovation in the form of action). Both types of innovation can entail recourse to fictions. But fictions behind a form of action are concealed falsehoods which offend Gaius' principle that words must be used honestly. On the other hand, fictions in a form of action are neither concealed nor dishonest. They do not offend Gaius' principle. English pleading fictions are of the former kind, Roman of the latter. In the next section one detailed English example is set out.

II. FICTIONS BEHIND 'MONEY PAID'

In the common law fictions were generated behind the forms of action whenever judges held that the propositions recited by plaintiffs in the familiar forms of claim could be substantiated by proof of facts other than those actually recited. The mechanism itself is easy to understand even if the forces and intellectual assumptions behind its use are complex: the plaintiff advances a routine claim which recites A, B, C, and D; he is allowed to win on proving only B and C, or perhaps B, C, and Z. The substance of the matter is a judicial determination that B and C, or B, C, and Z, ought in law to give rise to the same consequences already attributed to A, B, C, and D. However, because this determination is reached behind the recitation of A, B, C, and D, and because plaintiffs in subsequent cases continue to make the old recitation even when intending to advance the new facts, the form of the development is fictionalization of A and D. The contradiction between the facts as recited and the facts as proved can, if it is questioned, be resolved by 'implication in law'; that is, by deeming. Many examples could be given. Ejectment and trover are famous. Money paid is less well known, but it provides an excellent model, not only because its fictionalization is easily described but also because it has a curious civilian twist, which brings the common law and Roman law into immediate contact and, as it happens, joins the ancient and the modern part of this essay. It comes, moreover, from an area which Dr Baker has described as providing 'the most striking example of the way in which the common law could be developed, whatever the formal procedural restatements, and however devious the subterfuges needed to evade them, in order to achieve equity'. That is a compliment of which Gaius could not have approved.

The action for money paid to the use of the defendant was a species of indebitatus assumpsit. Within the category of actions on the case, assumpsit was the action on a promise, indebitatus assumpsit was the same action when brought to recover a debt, and the action for money paid was an indebitatus assumpsit brought where the particular cause of the defendant's indebtedness was that the plaintiff had paid out money to a third party on his behalf ('to his use'). It is important to grasp first its 'natural' scope: according to its wording as recited, it lay where the defendant had (a) requested the plaintiff to pay the money to the third party, and (b) promised to repay him. Late in the eighteenth century it was none the less held that a plaintiff could win on facts which included neither request nor promise.

Before going further we must set out the words under discussion. It is tempting to abbreviate, but the few moments saved are not worth the loss of authenticity. With the minimum of excisions, therefore, the plaintiff's proposition was as follows:

Thomas Eales complains of Thomas Stiles in the custody of the marshall, etc. for this, to wit, that ... whereas the said Thomas Stiles afterwards, to wit, the 29th September in the eighth year of the reign of the now Queen, at London aforesaid in the parish and ward aforesaid, was indebted to the same Thomas Eales in another £80 of lawful money of this kingdom, for so much money by the said Thomas Eales for the said Thomas Stiles, and at the special instance and request of the said Thomas Stiles, before then expended, laid out and paid; and the said Thomas Stiles being so therein indebted, the said Thomas Stiles in consideration thereof afterwards, to wit, the same 29th day of September in the year eight year aforesaid, at London aforesaid in the parish and ward aforesaid, assumed upon himself, and then and there faithfully promised, that he the said Thomas Stiles the said £80 last mentioned to the same Thomas Eales, when he should be thereto afterwards required, would well and faithfully pay and content: nevertheless the said Thomas Stiles his promise and assumption aforesaid not regarding, but contriving and fraudulently intending the same Thomas Eales in this behalf craftily and subtly to defraud, the same £80 or any penny thereof to the same Thomas Eales hath not yet paid, nor him for the same hath kitherto any ways contented, although to do it he the same Thomas Stiles afterwards, to wit, the 2nd day of October in the year aforesaid.

by the same Thomas Eeles was required; whereby the same Thomas Eeles says that he is prejudiced and has damage to the value of £8. And thereof he produces suit, etc.\textsuperscript{12}

This can be broken down into its three principal parts; (a) the plaintiff paid out money at the defendant’s express, which is what is meant by ‘special’, instance and request; (b) the defendant promised to pay; (c) the defendant wickedly refused to pay. It is convenient to take out first, because we shall not dwell on them, the fictions in the last of these three parts. The words recite a fraudulent breach, but the plaintiff actually only has to show non-payment. This is a vestige of an early exercise in fictionalization. It goes back to the fifteenth century and is common to the allegations of breach in all actions of \textit{assumpsit}. It belongs to the story by which \textit{assumpsit} came to lie for all types of breach of undertaking, both for misfeasances and non-feasances. The plaintiff’s fear was that he might be driven back to the nominate action of covenant if he could allege nothing more than a bare breach of promise, that being the very wrong for which the writ of covenant existed, and the law being that in order to sue for that wrong you had to show a covenant in writing. Hence, the plaintiff in \textit{assumpsit} had to allege a more elaborate wrong. When it was finally accepted that the younger action on the case, innominate in origin and therefore dangerously boundless but gradually settling down and acquiring names and limits,\textsuperscript{13} would lie, without dispute, even for the very wrong for which covenant lay, the allegations of deceit were not dropped but simply denatured by the courts. The allegations of fraud could not be traversed. In other words, there was no defence to the effect that one had indeed failed to pay, but not with crafty and subtle intent.\textsuperscript{14}

We can now turn to the promise and the request. Some causes of indebtedness include at least a genuine implied promise to pay, and others do not. Will you sell me this book for £10?, or ‘Will you lend me £10?’, or ‘Will you pay John Doe £10 for me?’ In all these cases, even though no word of promising may have been used, there is no fiction in saying that, if you comply, I have promised to pay you. On the other hand, if an event happens which triggers a feudal or customary imposition such that I am obliged to pay you £10, or if I intercept £10 by usurping the profits of your

\textsuperscript{12} This example is taken from Lilly, but it is compounded from two of his predecessors: John Lilly, \textit{A Collection of Modern Entries} (3rd edn. London, 1758), pp. 24 and 43.

\textsuperscript{13} The generality of the action on the case, feared by the Common Pleas as subservive of the acquired structures of the legal mind, is thus materially caused by William Fulbecke: ‘Inde as D. Stephens his water was fit for many diseases, and yet never had any special name but was generallie termed Doctor Stephens his water; so likewise an Action upon the case stretcheth as a remedy against many offences: yet hath no other name than Action upon the Case’ \textit{Parallelo}, bk. 2, p. 60. For this work see further below, at n. 31.


office, or if I receive £10 for a consideration which fails, my duty to pay you is imposed on me willy-nilly; to say that I have promised to pay in such circumstances could only be a fiction. We can therefore distinguish promissory from non-promissory causes of indebtedness.

So far as concerns the promissory causes, \textit{Slade’s Case}\textsuperscript{15} marked the triumph, in 1602, of the Queen’s Bench view that \textit{assumpsit} could be brought on such ‘contracts executory without the need to prove any promise other than the promise impliedly inherent in the transaction itself. The opposing view, of the Common Pleas, had not been that the promise implicative was unreal or fictitious but that, without some fact additional to the minimum debt facts, the action on the case could not be brought, and the plaintiff would have to use the old nominate action of Debt.\textsuperscript{16} It followed from the triumph of the Queen’s Bench view that, from the beginning of the seventeenth century, a plaintiff who could establish a promissory cause of indebtedness did not have to prove that the debtor defendant in addition \textit{assumpsit super se} to pay his debt. But the \textit{assumpsit} which such plaintiffs recited was none the less not a fiction: the promise was proven in and with the debt facts. According to its natural tenor, the action for money paid falls into that category of \textit{indebitatus assumpsit}. In requesting the plaintiff to pay on his behalf, the defendant impliedly, but genuinely, promises to reimburse him. Hence the natural scope of the action entails no fictionalization of the promise or the antecedent request.

However, we have at this stage to note that, in relation to non-promissory causes of indebtedness, the courts of the Restoration period held that even plaintiffs who could prove such debts could claim them in the action of \textit{indebitatus assumpsit}. Although the facts giving rise to such indebtedness necessarily included no trace of a promise to pay, the courts accepted that nothing but the indebtedness itself had to be shown. That is, they fictionalized the allegation of a promise. Thus, in these cases of non-promissory debt, \textit{indebitatus assumpsit} began to be brought on the basis of a fictitious promise.\textsuperscript{17} However, this development, important as it was in other sectors of \textit{indebitatus assumpsit} and especially in money had and received, had, on the face of things, no relevance at all to the action for money paid, because the cause of indebtedness recited in that action was, and seemingly could only be, promissory: the indebtedness arose because the defendant expressly requested the plaintiff to pay and, at least impliedly, promised to repay.


\textsuperscript{17} e.g. Howard \textit{v. Wood} (1679) Show. K. B. 21, 2 Lev. 245, Freeman 478; Shuttleworth \textit{v. Garnett} (1688) 3 Mod. 20; City of London \textit{v. Goree} (1677) 2 Lev. 174; Martin \textit{v. Sitwell} (1691) 2 Show. K. B. 156; Lamine \textit{v. Dorrell} (1701) 2 Ld. Rasm. 1216.
However, the courts fictionalized the request in the action for money paid and thus made the action available to plaintiffs who had no communication with the defendants on whose behalf they claimed to have paid out money. That is, the fictionalization of the request made the action reach into the area of non-promissory indebtedness and thus brought with it the need to rely on the Restoration doctrine that *indebitatus assumpsit* could be brought for any debt, whether or not the defendant could be shown to have promised to pay. Fictionalization of the promise in the action for money paid thus flowed immediately from fictionalization of the request.

This type of development can be illustrated clearly and shortly from a case at the very end of the eighteenth century, *Exall v. Partridge* (1799). The true facts were that the plaintiff had left his carriage on the defendant's premises to be repaired. The defendant's landlord had then taken the carriage into his possession in exercise of his right to restrain it for arrears of rent. In order to redeem his carriage, the plaintiff had therefore had to pay to the landlord the amount of the rent owed by the defendant. There was a further complication which need not concern us, namely that there were actually three defendants, of whom two had assigned their interest to the third before the landlord levied this distress. The example can be more clearly presented if that issue is cut out and we simply say that the plaintiff had paid the defendant's rent in order to obtain the release of property lawfully seized by the defendant's landlord. He had undoubtedly paid out money to the use of the defendant, but not at the latter's 'special instance and request' and not in circumstances supporting any inference of a promise to repay.

Nevertheless the court held that the plaintiff's action for money paid was entitled to succeed. One argument was that the necessary request and promise could be implied if the plaintiff had conferred a benefit on the defendant. That failed. But a narrower proposition was upheld: the plaintiff could substantiate the allegations of request and promise by proving not only that by his payment out he had benefited the defendant but also that he had not done so voluntarily. And on these facts he could show that he had not conferred the benefit voluntarily by pointing to the lawful compulsion brought to bear on him by the landlord.

## III. HIDDEN RATIONALITY?

Isolation of a single example draws attention to the bizarre nature of this mode of legal development. It breaks the Gaian rule against falsehoods in lawyers' use of language, and there is no denying that it is not admirable. With hindsight we can see that what was done in *Exall v. Partridge* was an extension to the action for money paid of what *Moses v. Macerlan* had already consolidated in another department of *indebitatus assumpsit*, within the action for money had and received. The defendant in *Exall* had received a different kind of benefit—not money but the product of money paid to a third party—and the plaintiff had responded to a different kind of factor—negativity of voluntariness—the seizure of his carriage. But, at a higher level of generality, the principle is indeed the same. Whether the judges were aware of that analytical consistency is a difficult question. Indeed it is part of the criticism of this curious mode of law-making that it tends to conceal the answers to questions of that kind. At all events, to explain the fictionalization of money paid as an extension of what had already happened in money had and received only pushes the question one stage further back: what rationale if any did the courts have for allowing plaintiffs to pursue by the action on promises claims which had nothing to do with promises? Was the fiction merely an example of bizarre empiricism, or did it in fact have some intellectual justification?

By 1799 the courts had the support of Blackstone's published doctrine that it was right to impute promises which ought in justice to have been made. Whether Blackstone perceived this as convenient, and therefore recognized it as fictitious, or as a philosophical truth, in which case he would have resisted its being described as a fiction, is not clear and cannot be investigated here. Where did this doctrine of Blackstone's come from? It is certainly not a reflection of a special sensitivity, overt or intuitive, to the notion of benefit-based liability—that is, to the efficacy of 'benefit received' as a source of obligation—but because it extends to involuntary obligations which have nothing to do with such receipts. It seems on the contrary to have been borrowed directly from the continental civilians, many of whom interpreted the Roman category of obligations *quasi ex contractu* as a category of constructive contract, and some of whom, to be followed in this by Blackstone himself, carried those constructive contracts back to the 'social contract' on which the institution of property, and society itself, were deemed by some to rest. If there was an intellectual backing for the pragmatic extension of *assumpsit* into the field of involuntary obligations, it was this civilian doctrine that the genus 'contract' divided between 'true

19 Above, n. 11.


contracts' and "constructive contracts".24 Most of the civilians who subscribed to that doctrine exhibited another common feature of the legal mind, namely the extreme and genuine difficulty of escaping the language and the categories which have been sanctioned by earlier authority, even when change is demonstrably necessary. The most powerful force which held them in its grip was that the authority of the Institutes asserted the existence of the category of obligations quasi ex contractu and gave it that perplexing name.

IV. A LARGER FICTION EARLIER EXCLUDED

We saw that in Exall v. Partridge the court rejected the more extreme proposition that if the plaintiff had benefited the defendant that alone would justify the 'implication' of the request and promise. A contrary decision on this point would in effect have made the action for money paid do the work of the actio negotiorum gestorum contraria, by which one had voluntarily done something beneficial for another without any mandate to do it could recover the expenses of his intervention. We know, of course, that two hundred years earlier the common law decided, in Hunt v. Bate and Lampleigh v. Braithwaite, that an unrequested 'voluntary courtesy' would not be a good consideration to support a subsequent promise to pay something for it. That is the rule against past consideration. There is a fine line between the question whether one should pay the expenses of an intervention on one's behalf and the further question answered by these cases whether one should pay something for such an intervention if one subsequently promises to do so. And the line is especially fine where, as in Hunt v. Bate, the something allegedly promised is an indemnity against the expenses. It is therefore interesting to ask whether people at the time actually perceived the rule against past consideration specifically as the exclusion of the quasi-contractual actio negotiorum gestorum contraria. There are some indications that they did.

First, there is a hint in Hunt v. Bate itself. The defendant’s servant had been arrested and imprisoned for a trespass. The plaintiff and another stood bail for him. Thereafter the defendant allegedly promised to indemnify the plaintiff against any damages and costs that should be adjudged against


25 (1658) Dyer 272a, pl. 31; cf. also pl. 32, and Oneley v. Earl of Kent (1576) Dyer 356.

26 Dyer 105; 1 Brownl. & Gllds. 7; 7 Moo. K. B 866.

27 Dyer 272a, tr., "in consideration that the business of the master should not go undone".

28 1. 3. 37. 1

29 As the forensic tactics fell out, the defendant traversed the assumpit and lost before the jury (no sure indication that he actually promised); he then moved in arrest of judgment, taking the consideration point. It is not impossible that the plaintiff never intended to base himself on an express promise but only on the negotiorum gestio.


31 Published in London 'by order of Parliament', 1651, at p. 203. This edition not only translates (sometimes very poorly) but also adds governmental references to the altered times.

32 Ibid., citing Malercer v. Spinks, Dyer 36, pl. 38.

33 William Fulbecke, The Parallel or Conference of the Civil Law, the Canon Law and the Common Law of this Realm of England, in two parts (London, 1601 and 1602).
example we have identified a flimsy rationale: here the 'implications' could be justified to a certain extent because there was learned authority teaching that involuntary obligations arising without wrongdoing could be referred to a quasi-contract, understood in the sense of constructive contract or 'improper contract'. That was what the continental civilians thought. Although Theophilus was responsible for coining the substantive 'quasi-contract' in his Paraphrase of Justinian's Institutes, which he himself helped to prepare, there is no evidence that he or anyone of his time or earlier used that term or the adverbial phrase from which he coined it—quasi ex contractu—to mean 'sort of contract' or 'deemed contract'. On the contrary, it meant 'as though upon a contract' and asserted that there was none. In other words the Roman term did not affirm the deemed existence of something non-existent but simply said that the consequences of one type of event were the same as the consequences of another. Thus, there is no falsehood in saying that the consequences of a mistaken payment are the same as if a loan had been made or that the consequences of negotiorum gestio are the same as if a mandate had been acted on. It is only when the further step is taken of inferring identity of substance from symmetry of consequence that the boundary is crossed between fiction and falsehood. Roman fictions do not cross that line, exemplified as it is in the distinction between quasi ex contractu and quasi-contract.

Roman fictions are common in two contexts, in pleadings and in legislation. Their function is the same in both, namely to extend a parcel of knowledge which is fixed and safe: we know exactly what happens when X is the case; now that Y is the case, we will proceed in exactly the same way, 'as if the case were X'. This is economical, cautious, and rigorous. For the legislator it is a weapon against what we can nowadays identify as Road Traffic Act mentality, the ruthless pursuit and exploitation of verbal accidents. The style of Republican statutes attests not merely respect for words but an undefeated will to control their power—the legal mind, some might say, at its verbal best. Fictions in legislative drafting are not so eye-catching as in pleadings. They occur as convenient abbreviations, often using one or other variant of the form 'siremips iux ex que esto quasi . . . ' (let right and law be the very same as if . . . ).

V. FICTIONS WITHOUT FALSEHOOD

We have been looking at the action for money paid as a typical example of the common law's use of fiction in legal development. The characteristic feature has been willingness to press words beyond their natural limits, so that an allegation of A can be satisfied by proof of B. Behind the specific

34 Ibid., Part 2, 49ff. To confirm the presence of negotiorum gestio, it is necessary to see that from p. 43 Fulbeke is treating an appointed bailiff or receiver as a mandatory, hence the unappointed as a gestor.

35 Citing Brooke's 'Abridgement', 1573—published after his death—s.v. 'Acquitt', pl. 8.


37 Constrained strictly A's answer would even deny an English liability for mutuum, but this cannot have been intended. For the continuing link between mutuum and indebitum, Cowell, op. cit. 15, adapting J. 3: 14: 1.

38 Paraphrase, 3: 27, 3: 5: 45 pr. This is noted by Nicholas, Introduction to Roman Law (Oxford, 1963), ii, p. 234, n. 2.


42 Apart from the examples in the text, instances occur in JFR, v. i, p. 83 (lex Latina tabulæ Romanae), 109 (lex Aelia repetundaria), 109 (lex agraria), 133 (lex Cornelia de XX quaestoribus), 175 (lex Rubria), 188 (lex Uresonensis), 201 (lex civitatis Narbonensis de flamonio provinciae).
The energetic and practical Frontinus, anxious to set down the legal framework for the safekeeping of the city’s water-supply, gives the full text of the lex Quintica de aquae ductibus of 8 BC. This first deals with damage to the system. On one who ‘sciens dolos malos foraverit, ruperit, foranda rampendaverit curaverit peiorave fecerit’, the lex imposes a fine of 100,000 sesterces together with an obligation to make good: ‘id omne sancire, recircire, restituisse, aedificare, ponere, et celere demolire’, all to the satisfaction of the curator aquarum or, him failing, the praetor peregrinus. The lex then deals with the case where the miscreant is a slave. It imposes the fine of 100,000 sesterces on the master, without mention of any obligation to make good, precisely the kind of doubt-engendering omission avoided where a fiction is used to keep consequences symmetrical. Presumably this omission was indeed deliberate.

The lex then turns to obstruction: ‘ne quis in eo loco post hanc legem rogatat quid opposito, molito, obsaepito, figito, statuito, ponito, conlocato, arato, serito, neve in eum quid immissit qua praeterquam eorum faciendorum, reponendorum causa, quod haec legem cibet, oportebit.’ Here we see the legislator’s mind on evasive verbal arguments. He even feels bound expressly to save the right to do repairs. In the problems he foresees with a cavilling bar, we can instantly recognize the kind of arguments which necessitated a firm generalization of the Aquilian triplet, urere, frangere, and rumpere—not without some surprise that the evertes got away with it. Out of court, reason evidently prevailed, with sufficient authority then to prevail in court as well.

Here, once the legislator has sufficiently described the obstructions against which he is aiming, he proceeds to attach the consequences by means of an economical fiction: ‘qui adversus ea quid fecerit, srimps lex, ius causaeque omnium rerum omnium esto, atque uti esset esse oportet, si is adversus hanc legem rivum, specum rupisset forasseve. The consequences, attached with perfect symmetry and without the least opportunity for last-minute cavilling, are so the same as for forare and rumpere. This is wonderfully determined craftsmanship, albeit the draftsman is on the defensive. That is to say, he knows that he himself must meet the challenge of later fierce attacks by advocates upon his work and cannot rely on the law itself to impose a standard of reasonableness upon them.

One further example, in outline, to confirm the regularity of the technique: the lex Rubria deals with a man who confesses a money debt in iure and does not pay, or who does not answer at all. The lex provides:

Let the law, right, and legal condition for all persons and in respect of all matters then be the same as it would be or ought to be if he who confessed or failed to answer to that matter, or did not defend himself by sponsio or judicium as he ought, was or had been rightly and lawfully condemned in that sum to the plaintiff suing in his own name or to the person to whom the money ought to have been paid.

Here the technique is the same as in the previous example, but less admirable because more neurotic. You can see how, in the draftsman’s mind, for each gap he closes two more open. Moreover, he cannot even quite bring himself to trust the logical economies which the technique offers.

These statutory siremps clauses are a far cry from the English fictions exemplified in ‘money paid’, so far indeed that they are barely recognizable as fictions at all. Yet the fictions in Roman formulary pleadings are of the same kind as in the siremps clauses, and no less different from the English falsehoods. They do not direct the judex to find false facts but simply arrange a symmetry of consequence between the case to be tried and other facts already understood. The minds behind the formulary fictions operate on the same assumptions and with the same skills as produced the legislative style which we have just been looking at.

So much is this true that, though the exercise would of course spoil the careful duality between civil and praetorian law, one could for every formulary fiction construct a siremps clause by which the same innovation would have been introduced had it been introduced by lex and not by argument in iure before the praetor. Take, for example, the actio Publiciana, of which Gaius says, giving a shortened example of the formula:

This action is given to a person who has not yet usucapted a res which was delivered to him ex insta causa and who, being out of possession, makes a claim for it. He cannot advance an intentio to the effect that the res is his by Quiritary title. The fiction is therefore used that he has usucapted the res, and he thus advances an intentio which proceeds as though he had become owner ex iure Quiritium, in this way: ‘Let the judge be appointed. If Aulus Agerius had possessed for a year the slave whom he bought and had delivered to him, then if that slave, the subject of this action, ought to be his by Quiritary title,’ and so on.

Gaius says that there is a fiction of usucapio—fingitur rem usucipisse—which is certainly too sweeping, since it would carry the plaintiff to immediate

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43 De Aquae Urbis Romeae, 2, 129. Frontinus, consul three times, in AD 74, 98, and 100, was praetor urbani in 70 and became curator aquarum in 97.
44 D, 9, 2, 27, 14, Ulpian 18 ad dictum: ‘Eius lex rupit, rupisse verbum fore omnes veters sic iurexercer corrupserit’.
45 Further provisions save certain rights and privileges and confer jurisdiction of the curator: De Aquae, 2, 129 fin. = FIRA, i, 154.
47 Cap. 21, 11, 10-15, FIRA, i, 173.
48 Much more extreme, cap. 20, 42-42.
49 This is especially brought home by the formulae of the Tabula Contubernialis, which see below, n. 57, also by the inclusion of model formae fictiae in the lex Rubria, cap. 20, 11, 20-40 (= FIRA, i, 171-2).
50 G, 4, 36, an abbreviated example. See Lenel, Editum, pp. 139-73.
victory. At the most there is a fiction of the period of time. But even the
notion of a fiction is a figure of speech, since nothing is deemed or con-
structed contrary to truth. This is only the praetor saying, in effect: *Si
quis hominem emit et is ei traditus est, stremps lex, tue, causaque omnium
rerum omnibusque esto atque uti esset esse oportet si est hominem
anno possedisset.* But this version is somewhat too strong, since it allows
the recipient to defeat the *dominus* in all cases and not only in the case
where the *dominus* himself delivered. It has to be limited, as for instance
in this way: *Si quis hominem emit et is ei traditus est, de eo qui emit deque eo
qui tradidit, stremps, etc.* A draftsman as anxious as the one who worked
on the *lex Rubria* would certainly go further. He would want to qualify
*omnibus* in the next line, to exclude the owner not party to the delivery
from the effect of the fiction. This exercise, the primary aim of which is to show
that the formulation of fiction is not essentially different from a statutory
*stremps* clause, shows that the Publician action matches the cast of mind
evidenced in the Republican statutes. It thus tends to support the traditional
date of 67 BC.\textsuperscript{51}

Our last example, or family of examples, includes a bold, and early,
variation. One group of fictions is used to direct the *index* to consider one
party to litigation as though he were another person or, at least, enjoyed
another personal status. The simplest case is the fiction of citizenship which
Gaius illustrates in conjunction with the *actio furti*: ‘Let the judge be
appointed. If it appears that a thief of a golden bowl was committed against
Lucius Titus by Dio son of Hermæus or with the help of Dio son of
Hermæus, on which account he ought, if he were a Roman citizen, to settle
the loss as a thief, etc.’\textsuperscript{52} There is no necessity for seeing this as an attempt
to deem *Dio* a Roman. The formula simply expresses, without the conceal-
ment characteristic of English fictions, the success of an argument to the effect
that the consequences of theft for Romans should be applied to non-Romans. It is interesting that it is not the notion of theft that has to be
transferred—*quod leges naturali prohibitoori est admittone*\textsuperscript{53}—but only the
consequential *oportet.* What is true here of the fiction of citizenship is
equally true of the cases in which the plaintiff ‘facto se herede intendit’.\textsuperscript{54}
The aim is not to make Aulus Agerius constructively the heir of Lucius
Titus but only, again, to attain a secure symmetry of consequence. The
variation on this theme was contributed by the innovative Stoic praetor of
118 BC, P. Rutilius Rufus, later to be forced unjustly into exile after con-

\textsuperscript{51} In a number of places Watson has inclined towards a much later date, the action being
\textsuperscript{52} G. 4. 37.
\textsuperscript{54} G. 4. 34.

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\textsuperscript{54} G. 4. 34.

realized that obligation recited the defendant's request and promise? Obviously, it was much easier to acquiesce in the notion of 'implied contract'.

It is well known that Bentham hated the common law's recourse to fictions: 'A fiction of law may be described as a wilful falsehood, having for its object the stealing legislative power by and for hands which could not, or durst not, openly claim it.' And again, 'What you have been doing by the fiction—could you, or could you not, have done it without the fiction? If not, your fiction is a wicked lie: if yes, a foolish one.' And a little later, 'Fiction of use to justice? Exactly as swindling to trade.' But later Fry L.J., with his eye more on the plight of the individual than the constitutional proprieties, still said of the notional assignment which in his view underlay subrogation, 'This equity is based upon a fiction, which, like all legal fictions, has been invented with a view to the furtherance of justice.' And more recently Lord Devlin, one of the greatest of the common law's jurist-judges, professed a preference for an undercover, benevolently dishonest approach to judicial law-making:

It is facile to think that it is always better to throw off disguises. The need for disguise hampers activity and so restricts power. Padding across the Rubicon by individuals in disguise who will be sent back if they proclaim themselves is very different from the bridging of the river by an army in uniform and with bands playing.

From different viewpoints Bentham and Lord Devlin seem to be agreed on this, that there is no open, honest, legal creativity which does not usurp the function of the legislature. The rational Gaius would have inclined, more temperately, to Bentham's position. He would certainly have been in sympathy with this observation of Maine,

Now among other disadvantages, legal fictions are the greatest of obstacles to symmetrical classification ... If 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.

Gaius, however, would not have accepted that the price of intellectual order was immobility.

When the action for money paid was fictionalized, why did it happen? No rule of law actually prevented counsel from devising an honest form of

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58 Thomas Wood, learned in both civil and common law, may have taken as a symbol of this tension. He evidently found it exceedingly difficult to carry the order of the Institutes into his treatment of the common law. Compare his New Institute of the Imperial or Civil Law (London, 1702) and An Institute of the Laws of England (London, 1720).
60 Baroness Wenlock v. River Dee Co. (1887) 19 QBD 155. 165.