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Legal Fictions

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THESIS.

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In the development of the law one of the most important and interesting agencies has been the use of legal fictions, and it also may be said that no part of the English law has been so severely criticised or so greatly praised by eminent men. Bentham is probably the most severe in his denunciation of the use of fictions of law while such men as Blackstone, and Sir, Henry Maine are equally sincere in upholding and praising them.

Perhaps the idea that legal fictions are of no great practical importance to the lawyer, accounts for the little that is to be found on the subject in legal literature. Although there are very frequent allusions to them in the cases and text-books yet on investigation into the subject a chapter or a few paragraphs here and there will be found to be about all that has been devoted to the subject by any one writer.

Mr. Best in his book on Evidence and Presumptions, defines a fiction as " A rule of law which assumes as true, and will not allow to be disproved, something which is false

but not impossible." Most of the definitions given in the books are substantially like that of Mr. Best's. Fictions are of many different kinds and although this definition probably takes in the greater number of them, yet there are various devices which do not come under that definition which must nevertheless be called fiction.

Sir.Henry Maine employs the expression " Legal Fiction" to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified; but probably the best definition that has been given is that " A legal fiction is a devise for attaining a desired legal consequence, or avoiding an undesired legal consequence". A good definition of this as of nearly every other subject of the law, is well nigh impossible, and when it comes to a classification it is even more difficult. Mr.Best and a few other writers have attempted to classify these devices, but because of their number and their great dissimilarity, it is almost impossible to make a satisfactory classification, and if it could be done it is hard to see of what practical

value it would be,.

It is impossible to discover how long legal fictions have been in use, but probably they have been used ever since the conduct of man has been regulated by positive law . The oldest code of laws extant, provides that an ox should be stoned for goring a man or woman to death. Exodus, Ch.XXI. verse,28. This law against an offending thing is the legal fiction of the primary responsibility of property, which is the basis of all proceedings in rem.

We find many fictions which have been used by the Greeks and Romans, but no system of laws has so abounded in their use as has the English. This may seem strang because it is quite generally believed, and it would seem to be almost a natural law, that fictions abound most in primitive civilization, and as civilization advances new laws are enacted which do away with fictions, and thus they seem to diminish in number; hence it would be a natural supposition that as the world's sceptre passed from Persia to Greece, from Greece to Italy, and from Italy to Great Britain, each nation copying the good and leaving out the bad usages and laws of its pred-

ecessor, that these " Excrescences of the law" as they have been called, would be very few in English law compared with the other legal systems of the world. But the English system of jurisprudence has ever been a fruitful soil for the weeds of fiction. Where these weeds have grown up and hindered the growth of the cultivated plants, and where they could be uprooted without destroying the other plants, they have been uprooted; but some weeds by cultivation become as beautiful and as useful as the plants themselves and where this has been the case they have been preserved. Thus some fictions grew up and flourished which afterwards died out because new laws were enacted to supply their place, while others have come into use and still form an important part of thelaw .

In looking at the reasons why the law is so permeated with fictions perhaps we will be able to see whether they have hindered the development of the law or aided it.

The introduction of the feudal system into England has been the primary cause of the fictions in regard to real property which are many, but a discussion of any particular part of the subject is not the purpose of this article, but

rather to treat of fictions generally without enumerating them; indeed, to discuss the origin and history of all the fictions of law, would require a treatise of great length.

The English people have always been noted for their conservatism, their reverance for old and established usages, customs and laws. As society advances theese stationery laws and customs are left at variance with the needs and requirements of such society. The gulf thus cut between custom and the wants of society, has always been necessarily a fertile cause for the origin of legal fictions, and indeed Mr.Maine has assumed that this is their only cause.

It has been said that " There are two causes that have ever given rise to legal fiction, and they may be both found in the constitution of man. The first is his disposition to be conservative, the other his disposition to be just." While the law remains stable society is progressive and thus social necessities and customs are always in advance of the law, and some of the laws become inapplicable to the wants of society. Judges are licensed by well established principles, to so construe the law that it will serve the ends of justice and

yet conceal the fact that the law has undergone a change .

Blackstone says that there are three points to be considered in the construction of all remedial statutes : The old law, the mischief, and the remedy: that is, how the common law stood at the making of the act : what the mischief was for which the common law did not provide; and what remedy the Parliament has provided to cure the mischief, " and it is the busin ss of the court to so construe the act as to suppress the mischief and advance theremedy." 1 Blackstone Comm., 87.

If a law was passed which would work injustice in any case The court generally put such a construction on it as would do justice in the case, and this practice necessarily resulted in many fictions.

The existence of fictions is no doubt evidence that the law is defective, but it is also evidence that the law with the help of human ingenuity, might be bent to fill up the wants.

It is true that in one sense fictions may be said to hinder in the development of the law because of the fact that

a new law is less wanted after the invention of a fiction than before. If there is a class of rights which there is no law to direct their control it is easy to see that by the invention of a fiction to cover those rights the pressure which would otherwise be brought to bear on the legislature to have the law changed to satisfy those wants, would be removed, and so the fiction becomes established in the law where a statute would give the same relief and render the law more systemetic and easy of comprehension. But it has been said by a writer in the London Law Magazine And Review, that " In some cases it is quite possible that the machinery of the fiction may be as easy of use as any that could be established by statute; in such cases it is always better to keep a method proved and well understood, than to adopt one which however seemingly more elegant, may bring difficulties into some other part of the law; and it is often impossible to be sure that any new enactment may not do so. If a strong case cannot be made against the means used in the fiction either because they are difficult to use or are to expensive or the like, we should say, hold to the fiction rather than bring in

a new law only for the sake of affecting the same ends by other means; but if it is wished to enlarge powers or in fact to do more than could be done by the fiction, than do not tinker up the fiction but do straightforwardly what is wanted to be done."

An example of the development of the law without positive statutes may be seen in English Constitutional law, which is of course honeycombed with fictions.. Although the rules and laws in this branch of the English law have been the same for centuries, yet there has been constant change going on in construing them, and it has been said that the entire series of formal propositions called the English Constitution is merely a series of fiction.

Fictions were doubtless of great value in creating remedies for wrongs which could not otherwise be obtained until the legislature had been brought to see that new laws were needed; but when this has been done, and the fictions one after another have ceased to exist, great advance has been made in the reconstruction of the legal system, which, although impossible of ultimate perfection, yet is steadily

being improved, and brought nearer to that end.

But while the greater part of the old remedial fictions have been banished by legislation from the procedure of the courts,yet there are many still remaining in our procedure to-day, such as the action for the recovery of damages for seduction, which is still nominally an action by the father for the loss of his daughter's services, and also quasi contract actions as for instance the action where any one, who, in the commission of a tort has enriched himself at the expense of another, the latter may waive the tort and sue in assumpsit for goods sold and delivered, for money had and received.

Quasi.contracts are a very important class of legal fictions and it will perhaps be well to devote the rest of this article to their consideration, dwelling more particularly on the case noted above, of waiver of tort and sued on contract.

An express contract is one entered into by agreement of the parties, and upon which, if broken an action for damages will lie for breach; or the contract may be implied where

the intention of the parties, though not expressed in words, may be inferred or gathered from the circumstances of the case. Both must result from a free exercise of the will and a meeting of minds. There is another class of cases where persons have not strictly entered into any contract at all, but between whom there are circumstances which make it just that one should have a right and the other be subject to a liability similar to the rights and liabilities in express contracts . This latter class of cases come under the head of quasi contracts where there is no consent of the parties and no intention to make a contract, but where the law, for the sake of giving a remedy, creates an obligation, or, as has often been said, implies a contract.

But before going further into this subject a brief allusion to the confusion which has arisen by the use of the term " Implied Contracts" to denote several different meanings, may not be out of place. If the term implied contract be used indifferently to denote one (1), ficticious creations of law, where there is no meeting of mind and no intention to contract; (2), a true or actual but tacit contract, that is,

one where a meeting of minds or a mutual understanding is inferred as matter of fact from circumstances, no verbal or written words having been used; and, (3). that state of things where one is estopped by his conduct to deny a contract although in fact he has not made or intended to make one, it is not strange that confusion should result and disputes arise where there is no difference of opinion as to the substance of the matter in controversy; whereas, were a different term applied to each, as, for example, that of legal duty or constructive contracts to designate the first, contracts simply to designate the second, and contracts by estoppel the third, this difficulty would be avoided. It would of course be the same thing in substance, if the first were always called an implied contract, while the other two were otherwise designated in such a manner as to show distinctly what is meant.

Blackstone says " Implied contracts are such as reason and justice dictate, and which, therefore the law presumes every man undertakes to perform." 2 Blackstone, 443. This definition is a good definition of a quasi contract, but all

the illustrations he gives under it are contracts implied in fact or which may be inferred from the acts of the parties.

In the case of Hertzog v. Hertzog, 29 Pa.St., 465, the learned judge in referring to this subject says: " There is some looseness of thought in supposing that reason and justice ever dictate any contract between the parties or impose such upon them. All true contracts grow out of the intention of the parties to the transaction, and are dictated by their mutaual and accordant wills . When this intention is expressed it may be inferred, implied, or presumed, from circumstances as really existing; and then the contract thus ascertained is called an implied one. The instances given by Blackstone are illustrations of this."

" But it appears in another place, III. Comm. 159-166, that Blackstone introduces this thought about reason and justice dictating contracts, in order to embrace under this definition of an implied contract, another large class of relations which involve no intention to contract at all although they may be treated as they did. Thus whenever not our variant notions of reason and justice, but the common sense

and common justice and therefore the common law and the statute law of the country impose upon any a duty irrespective of contract, and allow it to be enforced by a contract remedy, he calls this an implied contract. Thus out of tort grows the duty of compensation, and in many cases the tort may be waived and the action brought in assumpsit."

It is quite apparent therefore that radically different relations are classified under the same term ; and this must often give rise to indistinctness of thought , and this is not at all necessarily; for we have another well authorized technical term exactly adopted to the office of making the true distinction. The latter class are merely constructive contracts, while the former are truly implied ones. In one case the contract is a mere fiction, a form imposed in order to adapt the case to a given remedy; in the other , it is ascertained and enforced.

In the case of Rhodes v. Rhodes, 44 Ch.Div., 94, Lord Justice Lindley, referring to this unfortunate terminology of our law, says: " The expression implied contract has been used to denote, not only genuine contracts established by infer-

ence, but also obligations which do not arise from any real contract, but which can be enforced as if they had a contractual origin."

The answer to the question why this classification which produces so much confusion was ever adopted, must be sought for, not in the substantive law, but in thelaw of remedies and remedial rights.

At common law outside of equity, the only two remedies were ex contractu and ex delicto, and if a wrong was committed which would not sustain an action in tort or contract, then the aggrieved party was without redress. In order to supply a remedy for such causes of actions the judges, by means of legal fictions, had to adapt old remedies to new causes of actions. The action of assumpsit was the most available remedy, and by means of this form of action the law of quasi contract was established in our legal system.

The obligations which may be said to be quasi contractual include, judgments, which are considered contracts of record; all obligations imposed by statute which do not rest upon the consent of the parties; the liability of common carriers and

inn-keepers, and the sheriff's obligation to levy execution and to pay the proceeds to the judgment creditor.

But by far the most important class of quasi contracts are those cases where the plaintff's right to recover rests upon the doctrine that a man should not be allowed to enrich himself unjustly at the expense of another.

In this class are included the liability of infants and lunatics for necessaries. In these cases, although the parties are considered as unable to make a contract, and there can be no valid consent to a contract, yet on the doctrine of unjust enrichment they are held liable as if there was a valid and legal contract. Of the same nature also is the liability of the husband and father to pay for necessaries furnished his wife or children.

The right to recover money paid under a mistake is a quasi contractual obligation , for it is easily seen that in this case there was no intention to create an obligation.

Passing now to a consideration of the important quasi contract action, known as waiver of tort and sued on contract, it is laid down as law, and established by the decisions of

many courts , that where any one in the commission of a tort has unjustly enriched himself at the expense of another , the latter has an election of remedies. He may sue to regain possession of the property or he may waive the tort and treat the transaction as a sale and sue in assumpsit.

The action of assumpsit is based upon the contract between the parties and a promise must always be alleged, and at one time this allegation must be proved. The courts therefore, in usingthis purely contractual remedy to give relief in a class of cases possessing none of the elements of a contract, had to resort to fictions to justify such a course, and the insuperable difficulty of proving a promise where the there was none was met by the statement that " the law implies a promise". The fiction of a promise then was adopted in this class of cases solely that the remedy of assumpsit might be used to cover a class of cases where, in fact, there was no promise.

When a man's property has unjustly been taken from him, as has been said before, he has his right to elect which of two remedies he will pursue, and if he elects to sue in assumpsit

and avers a sale and recovers judgment, he cannot sue and recover back the property also; and this is so if he is unable to get his judgment satisfied. Having once elected to treat the transaction as a sale he cannot afterwards, when this remedy fails rescind the sale and sue to recover the goods. This is so on account of the doctrine res adjudicata. And likewise if he had sued to recover back the goods and this remedy failed, an action against the same defendant for goods sold and delivered or money had and received, would be barred. This is because no one can be subject to a double vexation. But where the plaintiff has an unsatisfied judgment against one of two or more tort feasors , the doctrine of double vexation does not apply if he attempts to recover against the other.

There is a conflict of authority as to whether, where the plaintiff has elected to treat the transaction as a sale and gets a judgment which is unsatisfied against one joint tort feasor, he has the right to recover the property in an action against the other, some courts holding that having once treated the transaction as a sale he cannot afterwards say that

there was no sale, and the sale will be complete and the title will pass as soon as he has elected to so treat it.

'The most important case holding this way.is the case of Terry v. Munger, 121 N.Y., 161,. The reasoning of the court is shown by the following extract from the opinion of Peckham J.

" The contract implied is one to pay the value of property as if it had been sold to the wrong-doer by the owner. If t the transaction is thus held by the plaintiff as a sale of course the title to the property passes when the plaintiff elects so to treat it."

" The plaintiff having treated the title to the property as passed in that suit by such sale can he now maintain an action against another person, who was not a party to that action, to recover damages from him for his alleged conversion of the same property which conversion is founded upon his participation in the same act which the plaintiff, in the old suit has already treated as constituting a sale of the property? We think not.

" The fact that the plaintiff sold the property by virtue of the transaction which he now seeks to treat as a conversion

of it by the defendant, must and ought to be a perfect bar to the maintenance of this action. It is upon the principle that the plaintiff by his own free will decided to sell the property and having done so, it necessarily follows that they have no cause of action against the defendant for an alleged conversion of the property by the same acts which he has already treated as a sale. The transfer of title did not depend upon the plaintiff's recovering satisfaction in such action for the purchase price."

It is here respectfully admitted that this decision is not justified in a state like New York, where all technicalities as to form have been done away with and where courts pretend to get at the substance merely. There is an old maxim that " In fictione juris subsistet equitas", and yet here is a case where a fiction has been resorted to for the purpose of denying a right. There is another maxim that a fiction shall only be resorted to for the purpose of giving a remedy and for all other purposes the truth may be proved. Here as every one can see there is no sale and in fact the plaintiff could only recover in his former action by proving

that there was a tort and yet the court held that there was a sale and would not allow it to be disproved . This is an example of the abuse of fiction and as it is no longer necessary to resort to their use in such cases as the above their further use in such cases cannot be justified.

Of the cases opposed to Terry v. Munger, perhaps the best example is the case of Huffman v. Hughlett, 11 Lea, 549. In that case the plaintiff had sued one of the joint tort feasors for the value of certain timber and then, that action having been discontinued he sued the defendant in this case for conversion, and the latter set up the defense that the plaintiff had elected to treat the transaction as a sale in the former action and therefore the tort had been waived. But the court through Cooper J!, said: "If the action be in contract it is not strictly a waiver of the tort, for the tort is the very foundation of the action;" but, as Nicholson C.J. has expressed it, a waiver of the "damages for conversion, and suing for value of the property. It is simply an election of remedies for an act done leaving the rights of the injured party against the wrongdoer unimpaired until he has

obtained legal satisfaction. If it were otherwise, the suing of any one of a series of tort feasors, even the last, on the implied promise when there was clearly no contract, would give him a good title and relieve all the others. No authority has been produced sustaining such a conclusion and we are not inclined to make one."

As opposed to the doctrine of Terry v. Munger, it seems plain that this decision is just and fair, that it violates no legal principle and that it sustains the maxim that no fiction is justifiable to deny a right and it is therefore the best law.

There is no reason to believe but what fictions have been of great value in developing the law and when form and minuteness of detail was essential to the proceedure of the courts, a frequent resort to their use could not be avoided, but now when substance is paramount to form, there is no excuse for their use in many cases where they are now employed. Such fictions should be abolished.

Fictions which are merely condensed methods of stating established legal principles are much harder to deal with

such as for instance the fictions that the husband and wife are one person. The act of the servant is the act of the master etc.. These fictions could not be abolished without some reconstruction of the law or manner of stating law.

Then there is the fiction which is probably the greatest of all, that every one is presumed to know the law-- Without this there would result much confusion and it would be impossible to enforce the law at all.

Fictions are of so many kinds and are so different in their characters that it would be wrong to say that they should be abolished and it would be just as illogical to say that they should be preserved-- but as to certain classes we can determine whether they are a benefit or a detriment to the law. As to fictions which relate to proceedure it seems that the only just conclusion we can reach is that they are no longer of use and that they should be discontinued, but as to fictions which are merely condensed statements of law or which seek to reconcile an existing rule of law with some implied ethical standard it would be impracticable to abolish them without a reconstruction of the legal speach or until

the legal system reaches the goal of perfection toward which it is steadily advancing.

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