Are legal fictions still useful? Legal fiction in English common law

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Introduction

There appears to have been a lot written on the matter of legal fictions. At first blush the topic recalls the title of Shakespeare's 'Much Ado about Nothing'. However, the use, and alleged abuse, of legal fictions comes closer to Albert Camus who said, "Fiction is the lie through which we tell the truth." There are champions of the uses of fiction in law, and those who see it as the antithesis of law's claim to certainty and truth. There are also different theories about such fictions, and its use as a linguistic device. This article will emphasise its legal use, and its attempts to clarify or simplify the law

The American legal philosopher Lon Fuller observed, "[t]here is scarcely a field of law in which one does not encounter [legal fictions]."[1] One may ask, what is 'legal fiction', outside of course popular novels with a legal theme, or literary devices such as metaphors? There are many views on this issue going through the centuries past, citing obvious untruths to facilitate the operation of the common law, or "posed propositions" which offer a premise to achieve a result. They are said to "lack the "generative potential of metaphors" as "metaphors spur on the imagination to make further connections".[2] yet many are. The advantages and disadvantages of such fictions in law were wryly stated by Morris Cohen when he observed that:

> [l]egal fiction is the mask that progress must wear to pass the faithful but blear-eyed watchers of our ancient legal treasure. But though legal fictions are useful in thus mitigating or absorbing the shock of innovation, they work havoc in the form of intellectual confusion.[3]

Cohen observes the necessity of legal fictions, at the same time noting such contradictions strain its utility. On the question is "[f]iction of use to justice?" there have been many views on both sides. One perspective is that it is, as Bentham opined, "[e]xactly as swindling is to trade".[4] The idea of using fiction at first glance appears to be antithetical to the idea of law, as law relies on facts.[5] Yet even mathematics is familiar with the notion of fiction.[6] This article explores the historical origins of the creation of this fiction, the varieties of its application across a number of jurisdictions, and the contemporary difficulties of students and practitioners of law of the application of a fiction, the existence of which is problematical, but its utility undeniable.

What then is a legal fiction?

A legal fiction is a device that is created by a court to create legal rules or aid in making decisions and is often, but not exclusively, used in common law jurisdictions. They have the benefit of allowing a principle to be understood without variations invalidating that principle. Such a fiction has been defined as:

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[1] Lon Fuller, *Legal Fictions* (1967).

[2] Simon Stern, 'Legal Fictions and Exclusionary Rules' in Maksymilian Del Mar and William Twining (eds.), *Legal Fictions in Theory and Practice, Law and Philosophy* (Springer 2016).

[3] Morris R. Cohen, *Law and the Social Order: Essays in Legal Philosophy* (New York: Harcourt, Brace, 1933),126

[4] Jeremy Bentham, *Works* 283 (Bowring ed. 1843).

[5] Dennis Patterson, *Law and Truth* (OUP 1996).

[6] Michael Liston, 'Taking mathematical fictions seriously' (1993) 95 *Synthese* 433. I remember fondly studying complex numbers in high school, including the notion of the square root of minus one, an 'imaginary number'.

> [b]y fiction, in the sense in which it is used by lawyers, understand a false assertion of a privileged kind, and which, though acknowledged to be false, is at the same time argued from, and acted upon, as if true.[7]

Another has offered, "fictions are means of changing the application of the law by relying on a tension between two classifications of fact."[8] The nature of this tool is as a linguistic device:

> Anyone who has thought about the legal fiction must be aware that it presents an illumination of the all-pervading power of the word ... [W]e are here in contact with the mysterious influence exercised by names and symbols. In that sense, the fiction is: a linguistic phenomenon ... [T]he inaccuracy of a statement must be judged with reference to the standards of language usage. Simple as this truth is, nothing has so obscured the subject of legal fictions as the persistent failure to recognize it.[9]

Sir Henry Maine has suggested that legal fictions are a means of incremental or interstitial legislation, some form of abstract or archetypal legislation.[10] The fictions allow the courts to address similar facts and contexts. In this sense, they address some of Bentham's critiques in following some form of rule structure, short of formal legislation, in the customary practices of the English common law. Maine explains that while law may remain static, society does not and progresses, leaving legal fictions, Equity and legislation to bridge the gap. He considered fictions to be "invaluable expedients for overcoming the rigidity of law."[11]

The utility of a legal fiction is that it is an enabler. It allows the law to be applied to novel questions, "through analogy, arguments of equivalence, and what only can be described as leaps of faith.[12] Some, as outlined below, are clearly untrue. Most are just metaphors, such as a company being treated as if it were a person for legal purposes.[13] These fictions have been characterised as "the growing pains of legal language."[14] Such language is provided by "analogies, metaphors, and categories to help us find meaning in—and hopefully understand—the language of the law."[15]

Alf Ross has observed that there is a "creative legal fiction" which extends by analogy existing legal rules, asserting some form of equivalence through fiction. He uses the example:[16]

> To say that a barbarian is a Roman citizen amounts to extending for foreigners the application of the procedural rules that have hitherto been confined to Roman citizens. To say that Bordeaux is in Middlesex amounts to saying that the rules … hitherto … confined to claims originating in England, are now … extended … [to] claims originating in other countries.

Legal fictions are by no means a recent tool. In Roman Law, "to efface the unfavourable consequences of an emancipation, it was declared not to have happened - a daughter was proclaimed a son, a stranger was declared to be a citizen so that he might be given the right of inheritance, and children were

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[7] Jeremy Bentham, "Constitutional Code," Works, Vol. JX, Bowring, ed., at. 77-8, reprinted in C.K. Ogden, *Bentham' Theory of Fictions* (New York: Kegan Paul, 1932), cxvi.
[8] Kenneth Campbell, 'Fuller on Legal Fictions', (1983) 2(3) *Law and Philosophy* 339, 339 (attributed to Lon Fuller).
[9] Lon L. Fuller (1930) 'Legal Fictions,' (1930) 25 *Illinois Law Review* 363, 371.
[10] Henry Maine, *Ancient Law* (1917 ed.), 16-18
[11] Henry Maine, *Ancient Law* (1917 ed.), 24-26.
[12] Lon Fuller, *Legal Fictions* (1967), 21-22.
[13] Nancy J. Knauer, 'Legal Fictions and Juristic Truth,' (2010) 23 *St Thomas Law Review* 70, 79.
[14] Lon Fuller, *Legal Fictions* (1967), 21-22.
[15] Alina Ng Boyte, 'The conceits of our legal imagination: Legal fictions and the concept of deemed authorship', (2014) (17 (7) *Legislation and Public Policy* 707, 709.
[16] Alf Ross 1969.'Legal fictions' in Graham Hughes, *Law, Reason, and Justice*, 222. (New York: New York University Press, 222

attributed even to the chaste Diana."[17] Praetors were said to set aside wills that disinherited their children, or did not sufficiently provide for them, on the basis that their fathers must be insane.[18]

The English Common law is replete with such curiosities. One such is the Writ of Quominus, which was a fiction designed to allow the Court of Exchequer jurisdiction over cases usually the business of the Court of Common Pleas. Plaintiffs in debt cases were encouraged to claim that they were in debt to the King, and that the defendant's failure to pay the plaintiff prevented the plaintiff repaying the King. By this mechanism, the defendant could be arrested and the case would be heard by the Court of Exchequer. This was similar to the Bill of Middlesex used by the Court of King's Bench. This device was used between the thirteenth and late nineteenth centuries, removed only by the new Civil Procedure Rules of the Supreme Court of Judicature in 1883.[19] More clearly fictional examples are "when the island of Minorca is said to be located within the parish of Mary-le-Bow in the ward of Cheap in the city of London".[20]

Debates on the utility of legal fictions

Although they have utility in many circumstances (as shall be discussed below), not all find fiction in law valuable. One of the earliest critics of the principle was Jeremy Bentham. He was not shy in expressing his disdain, using phrases such as that legal fiction " … affords presumptive and conclusive evidence of moral turpitude in those by whom it was invented and first employed," that "Fiction, tautology, technicality, circuity, irregularity, inconsistency remain. But above all, the pestilential breath of Fiction poisons the sense of every instrument it comes near", and if his readers were not in any doubt, that "Unlicensed thieves use pick-lock keys; licensed thieves use fictions."[21] This is by no means all of his views on the matter. These views do however tend to clash with his more moderate observations, creating what has been described as the "Two Benthams".[22] Bentham was in a minority in his views, however.

Bentham's views on legal fictions were most likely an indication of his dissatisfaction with the common law, where he felt that it common law was inaccessible to the people who were subject to it, and that codification would render the law comprehensible and internally consistent. Legal fictions worked against that ideal.[23] For Bentham, legal fiction acted against the certainty of legislation, "having for its object the stealing legislative power,"[24] and enhancing in his view a partnership between the monarch and the judiciary.[25]

Sir William Blackstone was aligned entirely differently, defending the idea of legal fictions in his Commentaries.[26] He felt that they were a "troublesome, but not dangerous" evil. He supported their use by reference to legal precedent, citing a fiction that contracts that had been made at the Royal Exchange in London, despite the exchange of promises having been made at sea. Such fiction removed the

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[17] Raphael Demos, 'Legal Fictions', (1923) 34 *International Journal of Ethics* 37, 38.
[18] Raphael Demos, 'Legal Fictions', (1923) 34 *International Journal of Ethics* 37, 39, citing Austin (*Jurisprudence*, II, 637)
[19] Now the "Senior Courts of England and Wales".
[20] *Fabrigas v Mostyn* 1 Cowp. 161, 164 (1774)), cited in Eben Moglen, *Legal Fictions and Common Law Legal Theory: Some Historical Reflections* < Legal Fictions and Common Law Legal Theory (columbia.edu) > (accessed 4 July 2021).
[21] *Theory of Fictions*, supra note 2 at cxvii, xvii, 146.
[22] Nomi Maya Stolzenberg, 'Bentham's Theory of Fictions – A "Curious Double Language" ', (1999) 11 *Cardozo Studies in Law and Literature* 223, 226.
[23] Louise Harmon, 'Falling off the vine: Legal fictions and the doctrine of substituted judgment', (1990) 100 (1) *The Yale Law Journal* 1, 4.
[24] Jeremy Bentham, Preface for The Second Edition to (1838) *A Comment on the Commentaries and a Fragment on Government* 509.
[25] Louise Harmon, 'Falling off the vine: Legal fictions and the doctrine of substituted judgment', (1990) 100(1) *The Yale Law Journal* 1, 4.
[26] William Blackstone, *Commentaries on the Laws of England* (1768).

jurisdiction of the case from the Court of the Lord High Admiral. When an individual argued that such a fiction was "inequitable and absurd", Blackstone advised that "[T]hat learned civilian himself seems to have forgotten how much such fictions are adopted and encouraged in the Roman law .... "[27] Yet Blackstone's defence of such fictions has been seen as questionable: using a legal fiction, not to enhance a judgment or to give clarity to the law, but simply to give jurisdiction to one court at the expense of another.[28]

Bentham showed his disdain for Blackstone's approach when he argued that:

> If there be one purpose for which a book of Institutes is wanted more than another, it is to draw aside that curtain of mystery which fiction and formality have spread so extensively over Law. Our Author [Blackstone] thinks he does his part when he embroiders it with flowers. Law shews itself in a mask. This mask our Author instead of pulling off has varnished.[29]

Blackstone, for his part, felt that legal fictions were "highly beneficial and useful", and if a "mischief" or an "inconvenience" might be the outcome of a case without them, then its use was warranted, limited only by the maxim "no fiction shall extend to work an injury".[30]

Other legal philosophers also weighed in on the debate. John Austin disagreed with Bentham that legal fictions delude judges. On his views on their use in Roman times, Austin criticised him that, "It is ridiculous to suppose that such fictions could deceive or were intended to deceive: or that the authors of such innovations had the purpose of introducing them covertly."[31]

In the twentieth century the debate continued. Roscoe Pound stated that:

> Law grows subconsciously at first. Afterwards it grows more or less consciously but as it were surreptitiously under the cloak of fictions. Next it grows consciously but shamefacedly through general fictions. Finally it may grow consciously, deliberatively and avowedly through juristic science and legislation tested by judicial empiricism.[32]

He expanded on this point in his textbook *Jurisprudence,*[33] where he divided fictions into three classes: 'particular fictions' which are procedural in nature and usually limited to one case ('employed to meet a particular type of case or to change or avoid a particular rule or effect a particular isolated result'); 'general fictions' which ('a more sweeping operation to alter or create whole departments of the law, introducing principles and methods rather than isolated rules' and which apply to whole genres of law such as Equity; and 'dogmatic fictions', which are 'fictions worked out after the event by juristic thinking in order to give or appear to give a rational explanation of existing precepts', such as constructive trusts.[34]

S.F.C Milsom, author of *Historical Foundations of the Common Law*,[35] emphasised the practical aspect of legal fictions, dismissing the criticisms of Bentham. Where Bentham had argued that such fictions

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[27] William Blackstone, *Commentaries on the Laws of England* (1768), 107.
[28] Louise Harmon, 'Falling off the vine: Legal fictions and the doctrine of substituted judgment', (1990) 100(1) The Yale Law Journal 1, 6.
[29] Jeremy Bentham, *A Comment on the Commentaries and A Fragment on Government* (J.H. Burns and H.L.A. Hart eds. 1977), 124.
[30] William Blackstone, *Commentaries on the Laws of England in Four Books, vol. 2* ((Philadelphia: J.B. Lippincott Co., 1893).
[31] John Austin, *Lecture on Jurisprudence or The Philosophy of Positive Law* (1874), 308.
[32] Roscoe Pound, *The Spirit of the Common Law* (1999 Transaction Publishers).
[33] Roscoe Pound, *Jurisprudence* (1959 West Publishing Co.)
[34] Maksymilian Del Mar, 'Legal Fictions and Legal Change', (2013) 9(4) *International Journal of Law in Context* 442.
[35] Butterworths 1969.

were used by judges who were 'stealing legislative power',[36] Milsom argued that the fictions came not so much from the judges but from lawyers, the "countless individual lawyers through the centuries, each concerned not with 'the law' as such but with a small immediate predicament of his client". The role of judges was passive in the creation of legal fictions, as '[t]hey might facilitate the later stages of a fictional development, but in the important early stages they just accepted results reached by others' [37] Del Mar is critical of this position though, suggesting that judges were likely to want to maintain the legitimacy of the law, and so moved the law on incrementally so as not to cause unforeseen outcomes. The role of fictions in the law, he argues, more likely "are a way of slowing down change - of treading carefully - creating resources for future courts, but ones which they are not compelled to respect".[38]

The work of the American Lon Fuller is the most prominent in this area. Fuller, well known for his Natural Law theory,[39] and his criticism of proponents of Legal Positivism such as H.LA. Hart,[40] is also known for a series of articles in the *Illinois Law Review* in 1930 on legal fictions, later published in 1967. He distinguished legal fictions from "'truthful statement[s],... lie[s], ... [and] erroneous conclusion[s],'"[41] and offered the definition that such fictions are "'either, (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility.'"[42] Fuller made clear, therefore, that such fictions were constructs that were not intended to deceive, and that the user of the fiction did not himself believe the fictional statement, and used the statement knowing it to be false. As Fuller pointed out, the creator of the fiction "either positively disbelieves it or is partially conscious of its untruth or inadequacy,"[43] and therefore is only dangerous when it is believed.[44]

In recent years, academics have sought to move on from Fuller's original thoughts. Although Fuller had identified some classes of legal fictions such as the above, Smith has argued that his list is incomplete, and a 'taxonomy' of new legal fictions is necessary. Knauer has argued that taxonomy is not necessary, but rather an emphasis on definition.[45] Petroski tends to agree, noting that since Fuller's writings in the 1930s, students have added examples since. However, she does not limit Fuller's work to just this, emphasising that his work identified legal fiction as a "linguistic phenomenon", extending its utility into other areas of thought.[46]

In more recently years, David Ibbetson has been more circumspect. He argues that "Legal change occurs through filling in gaps between rules" by a convenient twisting of existing rules or reapplication of old ones in order to create a different impression. Rather than the law having been changed through fiction, the change is portrayed as merely the application of existing law, by:

> reformulating claims into a different conceptual category, normally one less encumbered by restrictive rules; through inventing new rules that get tacked onto the existing ones; through borrowing rules from outside the Common law; through injecting shifting ideas of fairness or justice; and, very occasionally, through adopting wholescale procrustean theoretical frameworks into which the existing law can be squeezed.[47]

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[36] SFC Milsom, *A Natural History of the Common Law* (New York: Columbia University Press 2003), 27.
[37] SFC Milsom, *A Natural History of the Common Law* (New York: Columbia University Press 2003), 27.
[38] Maksymilian Del Mar, 'Legal Fictions and Legal Change', (2013) 9(4) *International Journal of Law in Context* 442, 457.
[39] Lon Fuller, *The Morality of Law* (Yale University Press 1964).
[40] H.L.A. Hart, 'Positivism and the Separation of Law and Morals', (1958) 71(4) *Harvard Law Review* 593.
[41] Lon L. Fuller (1930) 'Legal Fictions,' (1930) *25 Illinois Law Review* 363, 366.
[42] Ibid.
[43] Lon Fuller, *Legal Fictions* (1967), 9.
[44] Lon Fuller, *Legal Fictions* (1967), 9.
[45] Nancy J. Knauer, 'Legal Fictions and Juristic Truth,' (2010) 23 *St Thomas Law Review* 70.
[46] Karen Petroski, 'Legal fictions and the limits of legal language', (2013) 9(4) *International Journal of Law in Context* 485, 485.
[47] David Ibbetson, *A Historical Introduction to the Law of Obligations* (1999 OUP), 294.

This thereby changes through the 'initiative' of the 'litigants' incrementally providing justification for the remedy.[48] The debate on the nature and purpose of legal fictions continues. The applications of such fictions are as various as their critics.

Application of legal fictions

In contemporary law, there are many familiar uses and applications. We begin with the fiction that everyone is presumed to know the law and that ignorance of the law is no defence.[49]

In contract law, some consider the consent doctrine to be legal fiction. With technological advances with e-commerce presumptions and law based on the assumption of face-to-face meetings, in more recent times, clicking on 'Accept' on an online purchase comes with the assumption that the consumer has read the terms of the contract. This assumption is often considered to be a legal fiction.[50] Just the same, such contracts are enforced, as to do otherwise "contracts would not be worth the paper on which they are written."[51] The danger here in using such fictions is that such consent " … as used in contract law does not come with a linguistic label to remind us of its falsity. What is more, this fiction does not rest on complete factual falsity; instead, it reduces the evidentiary proof burden for judges."[52]

From there we are familiar with useful fictions such as the 'reasonable man' in explaining the duty of care in negligence in tort law, well known over much of the common law world.[53] We are also familiar with vicarious viability in tort, whereby an employer is responsible for the actions of their employees, the fiction being "what is done by one being taken as done by another."[54] A well know example is the House of Lords' decision in *McGhee v National Coal Board*.[55] In this case, McGhee had been employed by the National Coal Board. In his job of cleaning out brick kilns he was subjected to large amounts of brick dust. The court found that the employer had caused McGhee's dermatitis because it had prolonged his contact with the dust, and had not provided washing facilities. There are critics who argue that there is a legal fiction created here when the court linked the creation of a possible risk from harmful activity to an injury. By increasing McGhee's contact to the brick dust, Martin Hogg has argued, "[a]s a result of this decision, mere risk creation became sufficient in certain cases to satisfy a causal connection to actual physical harm. Yet it is hard to see how risk creation can equate to causation."[56] An increase in risk of harm, being equated with causation, therefore creating a legal fiction.

Regarding children, as Boyte so well expresses", a child is treated as an adult when he reaches the age of majority; this is a legal fiction that creates a bright line rule because in reality, "children do not magically become adults when they turn eighteen."[57] When adopting children the fiction is even more clearly acknowledged, whereby following legal adoption,[58] a biological parent becomes a legal fiction,

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[48] Ibid, 299.
[49] *ignorantia legis neminem excusa* (ignorance of law excuses no one."
[50] Chunlin Leonhard, 'Dangerous or Benign legal fictions, cognitive biases, and consent in contract law', (2017) 91(2) *St. Johns Law Review* 385, 407.
[51] *Upton, Assignee v Tribilcock*, (1875) 91 U.S. 45, 50. (Hunt J)
[52] Supra, n. 51, 425.
[53] Legal humourist A.P. Herbert parodied this fiction by speculating in the fictional case of *Fardell v Potts* by observing that there was not a corresponding 'reasonable woman' standard in the common law (A.P. Herbert, *Uncommon Law*, 645 < https://jollycontrarian.com/index.php?title=Fardell_v_Potts >. This parody was returned with interest by Caroline Forell, 'Reasonable Woman Standard of Care', (1992) 11 *University of Tasmania Law Review* 1, arguing that 'reasonable woman' is an oxymoron.
[54] Sidney F. Miller, 'The reasons for Some Legal Fictions', (1910) 8(8) *Michigan Law Review* 623, 627.
[55] [1972] 3 All ER 1008.
[56] Martin Hogg, 'Re-establishing Orthodoxy in the Realm of Causation', (2007) 11(1) *Edinburgh Law Review* 1, 12.
[57] Alina Ng Boyte, 'The conceits of our legal imagination: Legal fictions and the concept of deemed authorship', (2014) (17(7) *Legislation and Public Policy* 707, 708 (note 3).
[58] Adoption and Children Act 2002. Section 67(1) states that 'An adopted person is to be treated in law as if born as the child of the adopters or adopter.'

a legal stranger,[59] with the adoptive parent becoming the legally recognised parent, without having any biological connection, the law now conferring the status of legal parenthood. As Else notes, "[l]egal adoption meant that for the first time, it became possible to set aside birth status and the ties of bio-social kinship, and replace them with an officially sanctioned 'legal fiction' of conferred family relationships, even where no family relationship of any kind had previously existed."[60] Sir Henry Maine was even more effusive supporting the "fiction of adoption, which permits the family tie to be artificially created", without which "it is difficult to understand how society would ever have escaped from its swaddling clothes, and taken its first steps towards civilisation"[61]

A company is considered to be a person in law, separate from its members, for the convenience of allowing it to own property, sue and be sued, and to contract, and yet is a legal construct. Such legal personality as legal fiction was discussed by Walton J,[62] recalling "Viscount Haldane LC in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd,*[63] who submitted that the company as such was only a juristic figment of the imagination, lacking both a body to be kicked and a soul to be damned."

The 'Doctrine of Survival' principle is particularly interesting and is well known. In matters relating to inheritance or property, it is common that two people, usually married, will state in their will that the other will receive their estate upon their death, with the reverse the same. Section 184 of the Law of Property Act 1925 addresses the question of what would occur if both die at the same time (or it is impossible to tell otherwise). It provides that the younger of the two to have survived the elder, subject to rebuttal

Finally, the most recent and novel example is the issue in 2019 whereby the UK Prime Minister Boris Johnson was found by the Supreme Court to have unlawfully prorogued Parliament. Lacking the authority to reverse the process, it was held that the Parliament had been simply adjourned and hence the prorogation never officially happened.[64]

These are just a brief selection of well-known applications of legal fiction. However, in Equity, such fictions are essential to its application.

The special case of Equity

I begin here with the old maxim, '*In Fictione Juris Semper Aequitas Existit'* ('With legal fictions, equity always exists'). Blackstone observed that:

> And these fictions of law, though at first they may startle the student, he will find upon further consideration to be highly beneficial and useful, especially as this maxim is ever invariably observed, that no fiction shall extend to work an injury, its proper operation being to remedy a mischief, or remedy an inconvenience, that might result in the general rule of law. So true it is that *in fictione juris semper subsistit evquitas*.[65]

Sir Henry Maine saw the use of legal fiction in equity as a way to allow law to be changed, and to avoid the inflexibility of the common law, and that such fictions 'are invaluable expedients for overcoming the rigidity of law'.[66] In the law of Equity and Trusts in England and Wales, legal fictions are a large

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[59] Janette Logan and Carole Smith, 'Adoptive parenthood as a 'legal fiction' - its consequences for direct post-adoption contact' [2002] CFLQ 281
[60] Anne Else, 'Legal Fictions: Women and New Zealand Law on Adoption and Assisted Reproductive Technologies' (1995) 5 The Australian Feminist Law Journal 65, 66-67.
[61] Sir Henry Maine, *Ancient Law* (OUP 1931), 22.
[62] *Northern Counties Securities Ltd v Jackson & Steeple* Ltd [1974] 1 WLR 1133.
[63] [1915] AC 705.
[64] *R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland*) [2019] UKSC 41.
[65] 3 *Blackstone's Commentaries* Ch. IV, 43.
[66] Sir Henry Maine, *Ancient Law* (OUP 1931), 22.

part of the subject. The common law provides for necessary legal certainties, but when those result in absurd or unfair outcomes, Equity must provide a resolution. In doing so, the law of Equity provides for a number of legal fictions, such as "equitable interests", dividing ownership of property into legal and beneficial interests. These fictions are as much as eight hundred years old. They plague students because they must contend with realities taught early in their law degrees, with the fictions that allow fairness and justice in their final year. As was noted by the Australian Bar Association, Equity for undergraduates there "had acquired a reputation as a bogeyman subject. Successive generations of students had stumbled upon its high failure rates before they had even contemplated course content. They were beaten before they started."

Equity in English law, and by extension, the common law world, has a role in which it 'mitigates the rigour of the common law' to ensure that in individual cases too strict an application of the common law results in injustice.[67] For centuries Equity has been seen as apart from the common law, an acknowledgement perhaps of its fictional nature and noted by Lord Cowper LC, when he observed that "[e]quity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness and edge of the law".[68]

Equity uses many fictions to achieve its ideals. One such is the concept of 'beneficial occupation'. This is well illustrated by the 1970 case of *Des Salles D'Epinoix v Royal Borough of Kensington and Chelsea*.[69] In this case, the ratepayer of the property left the marital home to take up residence elsewhere following marital discord, leaving his wife and children in occupancy. He remained liable as the property owner to pay rates but refused. Lord Parker CJ argued here that a person may still be in "beneficial occupation" of that property. This is, of course a clear fiction, with the ratepayer not in physical occupation of the property. However, it was argued that the payment of the rates formed part of his maintenance to his wife and children. This fiction therefore achieves a just result.

Equitable interests as a legal fiction in the law of England and Wales are recognised in statute under s.53(1)(c) of the Law of Property Act 1925, where the law seeks to trace their ephemeral existence in order to document their movements, and if possible, tax them. The utility and flexibility of this fiction as part of the English Common Law goes beyond the UK, especially as part of remedies such as resulting and constructive trusts, and has allowed the portability of these concepts to travel to all corners of the world, and for elements of it to be used in commercial environments.

Viscount Radcliffe's denial in Livingstone's case (*Commissioner of Stamp Duties (Queensland) v Livingston*),[70] that legal fictions in Equity

> for all purposes and at every moment of time the law requires the separate existence of two different kinds of estate or interest in property, the legal and the equitable ... Equity in fact calls into existence and protects equitable rights and interests in property only where their recognition has been found to be required in order to give effect to its doctrines

shows that he struggled with the popping in and out of reality of the fiction of equitable interests, and he was not alone. Its value as a legal tool requires it to be recognised as and when necessary, and for some to deny its existence when not being applied.

Alastair Hudson has explained the nature of equitable interests as originating from the idea that centuries ago landowners would go away for long periods of time, often for war, and so left their land in the hands of trusted others. To do so, legal title might be transferred to that trusted person under the

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[67] 'to soften and modify the extremity of the law': *Earl of Oxford's Case* (1615) 1 Ch Rep1, per Lord Ellesmere LC.
[68] *Dudley v Dudley* (1705) Prec Ch 241; 24 ER 118
[69] [1970] 1 All ER 18.
[70] [1965] AC 694.

common law, but in Equity effective title was always held by the person who left. That position has always easy to understand. Just because I left something with you to look after, does not make it yours.

However, the law of property in England has had difficulty in moving on from a logic based in land "because its ancient methods of understanding property as being necessarily something tangible and readily identifiable do not mesh easily with the sorts of disputes which have come before it in recent years concerning intangible property of a very different sort".[71]

Proprietorial interests were once described as 'property in thin air', where that property is comprised in large part as a term of 'illusory reference' and 'an emotive phrase in search of a meaning', arguing that the essential feature of property 'is that it does not really exist: it is mere illusion'.[72] Thus, Kevin Gray proposed the idea that proprietorial interests can be described as 'property in thin air', where that property is comprised in large part as a term of 'illusory reference' and 'an emotive phrase in search of a meaning' - arguing that the essential feature of property 'is that it does not really exist: it is mere illusion'. Equitable interests are more so, being intangible, and as a concept, the bane of law students everywhere to comprehend alongside general concepts of more tangible and better understood concepts in their studies of land law.

Conclusions: the utility of legal fictions, a thing of the past?

So, we know what it is, why it is, and where it has been. Does it have a future, or has its utility been replaced by other models or statute?

Views on the continuing utility of the legal fiction have been around for centuries. Even Bentham gave a grudging acknowledgement that they once had value, but their time was gone:

> With respect to this, and other fictions, there was once a time, perhaps, when they had their use. With instruments of this temper, I will not deny but that some political work may have been done, and that useful work, which, under the then circumstances of things, could hardly have been done with any other. But the season of Fiction is now over...[73]

Blackstone was agreed on this point with the rather colourful metaphor where he likened its demise as:

> We inherit an old Gothic castle, erected in the days of chivalry, but fitted up for a modern inhabitant. The moated ramparts, the embattled towers, and the trophied halls, are magnificent and venerable, but useless. The inferior apartments, now converted into rooms of convenience, are cheerful and commodious, though their approaches are winding and difficult.[74]

Sir Henry Maine, having acknowledged that legal fictions were valuable in overcoming the rigidity of law', also insisted that these fictions had gone past their use by date. He went on to say that legal fictions 'are the greatest obstacles to symmetrical classification. The rule of law remains sticking in the system, but it is a mere shell. It has been long ago undermined, and a new rule hides itself under its cover' and that '[i]f the English law is ever to assume an orderly distribution, it will be necessary to prune away the legal fictions' [75]

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[71] Alastair Hudson, *Equity and Trusts* (3rd edn. 2013), 922
[72] Kevin Gray, 'Property in thin air' (1991) 50 *Cambridge Law Journal* 252.
[73] Jeremy Bentham, 'A Fragment on Government', in *The Works of Jeremy Bentham* (J. Bowring ed. 1843), 268-69.
[74] William Blackstone, *Commentaries on the Laws of England* (1768), 268.
[75] Sir Henry Maine, *Ancient Law* (OUP 1931), 22-23.

A much more modern and clearer argument is made by Boyte, who observes that good legal fictions facilitate understanding about the law and are sometimes essential to legal thinking. The distinction she makes in deciding whether they are beneficial or harmful depends however "on whether they serve as support structures that make the language of the law more logical and accessible or as blindfolds that deprive the scholar, the practitioner, and the public from truly understanding the law and what it stands—or should rightfully stand—for". In this respect, she is warning us that problems arise if we forget that these fictions are not real.[76]

Del Mar asks also whether legal fictions are a thing of the past. He asks rhetorically whether the common law has reached a sort of maturity where their utility is finished, and critics of legal fictions are justified in its demise. He answers himself emphatically that this is not so, that fictions rightly continue to be used, and without them "the common law would lose one of its most treasured instruments for creating potential change."[77]

Whether one is convinced of the remaining utility of legal fictions, the words of Oliver Wendell Holmes Jr here are apt:

> The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.[78]

[76] Alina Ng Boyte, 'The conceits of our legal imagination: Legal fictions and the concept of deemed authorship', (2014) (17(7) *Legislation and Public Policy* 707, 761.
[77] Maksymilian Del Mar, 'Legal Fictions and Legal Change', (2013) 9(4) *International Journal of Law in Context* 442, 460.
[78] Oliver W. Holmes Jr, *The Common Law* [1880].