

The Reasons for Some Legal Fictions
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THE REASONS FOR SOME LEGAL FICTIONS.

IN this age of fact, fancy is at a discount. Consequently legal fictions, which required the play of some fancy in their beginning, have fallen not only into disuse but also into disfavor. Many of them, however, have done good work in the past, and some are doing it now. Therefore it may not prove uninstructive to consider some in a discursive way.

A legal fiction is probably best defined as "a legal assumption that something is true which is, or may be, false—being an assumption of an innocent and beneficial character, made to advance the interests of justice."[1] From the definition it would seem that such fictions would always merit praise, never blame; but while their past use is now commended by most, no development of Law has had more condemnation from others.

Sir Henry MAINE[2] calls attention to the fact that while law is stable, society is progressive, and the greater or less happiness of a people depends on the degree of promptitude with which the gulf between the two is narrowed. He further says that the agencies by which law is brought into harmony with society are three—Legal Fictions, Equity and Legislation. Fictions, at a particular stage of social progress, "are invaluable expedients for overcoming the rigidity of law." On the other hand the same eminent writer says "it is unworthy of us to effect an admittedly beneficial object by so rude a device as a legal fiction. I cannot admit any anomaly to be innocent, which makes the law either more difficult to understand, or harder to arrange in harmonious order. * * * Legal fictions are the greatest of obstacles to symmetrical classification. The rule of law remains sticking in the system, but it is a mere shell."

BLACKSTONE[3] says "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 prevent a mischief, or remedy an inconvenience, that might result from the general rule of law." BOUVIER calls them "singular illustrations of the stability and justice of the

[1] Anderson Dic. of Law. The definition given in an article in the 7 Harv. L. Rev., p. 262, is plain-spoken, "A legal fiction is a device which attempts to conceal the fact that a judicial decision is not in harmony with the existing law. The only use and purpose, upon the last analysis, of any legal fiction is to nominally conceal this fact that the law has undergone a change at the hands of the judges."

[2] Maine, Ancient Law, pp. 24, 25, 26.

[3] 3 Bl. Comm. 43.

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common law, which did not hesitate to deny plain matters of fact, if that were the only way to avoid either violating the law or using the law against justice."[4]

A writer in the Monthly Law Magazine[5] says "it is always a matter of extreme delight and refreshment to turn to those exquisite fictions which both adorn and simplify our law, mingling utility with sweetness," and another pamphleteer[6] calls fictions "those especially pampered children of the law."

So much for favorable criticisms. On the other hand we have BENTHAM'S[7] fierce statement: "Fictions are falsehoods and the judge who invents a fiction ought to be sent to jail"; again, "lying and nonsense compose the groundwork of English judicature. In Rome-bred law in general, in the Scotch edition of it in particular, fiction is a wart which here and there deforms the face of justice. In English law, fiction is a syphilis which runs in every vein, and carries into every part of the system the principle of rottenness." In another paper[8] he says, "in the domain of Common Law everything is fiction but the power exercised by the judge." But while BENTHAM argued that fictions retard the development of Law along the line of the "greatest happiness to the greatest number," BLACKSTONE as forcibly urged[9] that most of the clumsiness charged to fictions was the result of refinements introduced by the Norman practitioners which had become 'so interwoven in the body of legal polity that they could not be taken out without a manifest injury to the substance * * * and the liberality of our modern courts of justice is frequently obliged to have recourse to unaccountable fictions and circuities in order to recover that equitable and substantial justice' long buried under Norman Jurisprudence.

We cannot hope to harmonize these opinions—let us now examine briefly some of the various fictions and their present standing with the law.

CLASSIFICATION AND GENERAL RULES

Generally fictions may be classed as of three kinds: first,—positive, when a fact which does not exist is assumed; second,—negative, when a fact which does exist is ignored; third,—by rela-

[4] Bouvier says, also, "Courts, confined to the administration of existing rules, and lacking power to change them, have frequently avoided injustice by assuming in behalf of justice, that the actual facts are different from what they really are."

[5] 9 Monthly Law Magazine 172.

[6] Spectator, Aug. 1888.

[7] 4 Bentham, p. 232.

[8] Pannomial Fragments, Ch. III, § 6; of Smith v. Furbish, 68 N. H. 123.

[9] 4 Blackstone Comm., p. 417. See criticism of Blackstone's optimism in Dicey's 'Law and Opinion in England," p. 93.

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tion, when the act of one person is taken as that of another; or when an act at one time or place is treated as if performed at a different time or place; or where an act in relation to a certain thing is treated as if in relation to another thing.

Or we may take another three-fold division suggested some years ago by a writer in the HARVARD LAW REVIEW,[10] that fictions are naturally: first,—the use of one or more of the existing laws in a way unforeseen and unintended at the outset; second,—the assertion that certain facts do or do not exist, contrary to the truth of the matter; third,—fictions of relation.

The rules controlling them (as agreed by the old writers) are also three, viz., (a) that which is impossible shall not be feigned;[11] (b) no fiction shall be allowed to work an injury;[12] (c) a fiction shall not be carried further than the reasons for its introduction require.[13]

This article, however, does not pretend to be a comprehensive analysis or summary of these odd judicial creations, but is merely suggestive of the peculiarities of a few. It will deal with them, therefore, rather as they present themselves to the eye of the every-day practitioner, taking examples first of those whose fictional character is apt to escape notice because of our familiarity with them; next of those already misty and nearly forgotten, fast fading from view through archaism or disuse; then of some that have recently passed from life and might be styled the late-lamented, except that their loss caused no complaint; lastly of a few which are still quaintly active.

I.—FICTIONS WHOSE ORIGIN WE OVERLOOK.

When we stop to examine some of our every-day acquaintances of the common law, it is surprising to see how many carry the bar-sinister of fiction. Take for instance the grant of land to a man and his heirs forever.[14] The underlying idea is of absolute property forever in a particular owner, which is, of course, a fiction; the heirs take nothing in the estate granted, and the grant therefore is to the grantee as if he might live forever, which is plainly impossible, so far as this life is concerned. The first use of this language in the English Law (or its Latin equivalent, *et suis haeredibus*) came just after the Conquest, when feudal tenures were trans-

[10] 7 Harv. L. R., p. 253.
[11] 2 Rolle Abr., 502.
[12] 3 Bl. Comm. 43.
[13] 2 Hawk. Pl. Cr. 320.
[14] For an interesting discussion of this grant see an article by Professor Bigelow in 11 Harv. L. Rev. 69.

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planted to England.[15] The first grants after the Conquest, by the feudal lords to their retainers, were for life only, the land reverting to the lord upon a vacancy by death; the grantee naturally wanted to transmit his holdings to his children, and his heirs were mentioned for that purpose, but the courts soon extended the language to include collateral heirs by a fictitious presumption that all who claimed collaterally were of the blood of the grantee. This fiction practically cut off any reversionary rights which the grantor might otherwise have claimed.

In close relation to the foregoing, another branch of the English law which we do not usually think of as based on fiction, is the law of Wills. In England, after the Norman Conquest, there was little power to dispose directly of real property by will.[16] Such a disposition would have defeated the most valuable rights of the lord—relief, wardship and marriage. Consequently it was done away with so far as possible. It is evident that there was (among the common folk) an aching for the old Anglo-Saxon right to will lands,[17] however, and as soon as the ecclesiastics had invented or adopted *uses*—near the close of the Fourteenth Century, as a means of evading the law of mortmain—the courts reached the result of a testamentary disposition by recognizing as valid a conveyance made by a tenant in fee, during his life, to such uses as he might appoint by his will.

Another example, connected with this in thought, is the fiction that the heir, administrator or executor of a decedent stands in his shoes as to all rights and duties which spring from the estate, or the action of the decedent in his life time.

Corporations,[18] too, while universally recognized by our statutes today as having the attributes of legal personality, were assumed to be pure fictions in the early stages of development of the common law. In fact they are not found at all until the reign of Edward IV (1366-1413), and even in 1429 A. D. there was doubt of the corporate liability of a town. The Roman law idea of the *universitas* (the organization possessing an entity although composed of many individuals and their successors) had not taken hold. Before Edward we find convents, chapters and communities, but no corporations.[19]

While our existing statutes recognize corporations as entities, our

[15] See Digby, Law of Real Property, p. 134. 1 Leake, Law of the Land, p. 32.

[16] Carter "Law, Its Origin, Growth and Function," p. 260. Digby, pp. 39, 41, 333.

[17] This had survived in some boroughs,—Digby, p. 333.

[18] Corporation,—a fictitious person invested by law with the attribute of perpetuity. 1 Bl., p. 469.

[19] Pollock & Maitland, 2 Hist. of English Law, p. 497.

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courts even now often refer to their fictitional character and dispense justice accordingly. As an instance, we may note the case of *Horne* v. *Boston & Maine Railroad,* 18 Fed. 50, in which the opinion states that "where a railroad runs through several states, it is, by a useful fiction, considered for purposes of jurisdiction as a citizen of each of the states," and says further "this fiction is established to give each state its legitimate control over charters granted." And in the Ohio case against the Standard Oil Company[20] we find: "The general proposition that a corporation is to be regarded as a legal entity existing separate and apart from the natural persons composing it, is not disputed, but that the statement is a mere fiction, existing only in idea, is well understood. It has been introduced for the convenience of the corporation in making contracts, * * * in suing and being sued, and to preserve the limited liability of the stockholders; * * * all fictions of the law have been introduced * * * to subserve the ends of justice. It is in this sense that the maxim *in fictione juris subsistit aequitas,* is used and the doctrine of fictions applied * * * So that the idea that a corporation may be a separate entity, in the sense that it can act independently of the natural persons composing it * * * where it is their will that it shall, is contrary to the fact, and to base an argument upon it, when the question is whether a certain act is the act of the corporation or of its stockholders, cannot be decisive of the question, and is therefore illogical."

The rule which makes the master responsible for the acts of his servants comes directly under the class of a fiction by relation—what is done by one being taken as done by another. And to the same order belongs that rule of the law merchant under which a delivery of part of goods is taken as the delivery of the whole.

There is no need of multiplying examples of this kind, showing how we tread each day on trails made easier by fictions. But mention of those little-recognized fictions we meet, cannot be closed properly without directing attention to the greatest of all in this class, viz., those relating originally to the Crown and by us adopted as appertaining to the state; these may be summed up in the maxims[21] "The King never dies," "The King can do no wrong," "Lapse of time does not bar the right of the Crown," and the presumption that the King is everywhere, so that he is never considered "out of court." To our administration of justice these are necessities, yet they are obviously all fictions.

[20] State ex rel Watson v. Standard Oil Co., 49 Oh. St. 137; Minshall, J. (1892).

[21] Broom's Legal Maxims, p. 22.

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II.—FICTIONS NEARLY FORGOTTEN

Passing from those which are met so often face to face that we seldom recognize that they have the taint (if taint it be) of fiction, we come to those which have nearly faded from our view.

Among the quaint writs which have dropped out of use is that of *Latitat,*[22] which was used to commence personal actions against persons seeking to evade service of process. It issued out of the Court of King's Bench, after an actual or imaginary bill of Middlesex, to which it was supposed the sheriff had returned *non est inventus;* it ran to the sheriff of some other county and recited the hypothetical return as real, further stating that it was shown that the defendant *latitat et discurrit* (lurks and wanders) about such other county, commanding the sheriff to bring his body in court on a day certain. It seems that these sheriffs of other counties were not always anxious to execute this writ; there were so many returns of *rescous in comitate,* etc., that it is probable that there was connivance and the "rescue" of the defendant arranged.[23] The writ once issued had to be executed in the county and by the officer of the sheriff to whom it was directed, and so where a *Latitat* issued to the Surrey sheriff and was served on the defendant while in a London coffee-house the service was declared irregular and set aside.[24] The defendant was legally "lurking," only in Surrey, and could not be reached in London by a writ issued on the supposition that he was wandering.

Another obsolete writ is that of *Quo Minus,*[25] which was extinguished by the same statute that ended the writ of *Latitat.* This writ was adopted by the lawyers of the time in order that suit might be brought in the Court of the King's Bench. Originally the jurisdiction of this court did not in ordinary civil actions reach defendants unless they were officers, or ministers of this court, or in the custody of its marshal, or other officer. This gave rise to the practice of alleging that any defendant, whom it was desired to sue here, was under arrest for a supposed trespass which he never had really committed. The officers and ministers of the court had the right to bring suit in it always, and so had the King's farmers or debtors; therefore would-be plaintiffs took to calling themselves King's debtors as a matter of course, and the court permitted the fiction, the original writ reciting that the defendant had done the plaintiff a wrong *quo*

[22] Latitat was abolished by 2 Wm. IV, c 39.
[23] Wolfreston's Case, Yelverton 52.
[24] Chase v. Joyce, 4 M. & S. 412 (1815).
[25] 3 Bl. Comm. 42, 45, 286. Append. § 4.

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minus sufficiens existit, i. e., by which he is less able to satisfy the debt to the King.

These fictional writs were both permitted in the furtherance of justice under the rigid laws and rules of practice then existing. To the same end the judges of the court of common pleas encouraged a peculiar fiction in order that their jurisdiction of the subject matter might be assured. No matter where the act complained of was really committed, the declaration, after stating the true *situs,* added the clause "to-wit, in London in the parish of St. Mary-le-Bow in the Ward of Cheap." For decades this was the cause of solemn attacks by the unimaginative laity, who could not understand how the city of Hamburg, Germany, or the deck of a ship in the South Seas, could, for legal purposes, be in the Ward of Cheap. A recent able writer[26] says that some fictions resulted in labyrinths "strange as the most fanciful dreams of Alice in Wonderland." While he was not referring to this particular "surmise" (as BLACKSTONE would term it) of the *Situs* it certainly did give rise to peculiar statements.

Probably the case most widely known because of the attacks on this fiction was that of *Fabrigas* v. *Mostyn,*[27] decided by Lord MANSFIELD. The plaintiff was a native of Minorquin, and the defendant the English Governor of the Island of Minorca—the injury complained of being arrest and banishment. Lord MANFSIELD thus touched on the fiction in the pleading, (the scene had moved into the usual "Ward of Cheap")—"Part of the complaint being for banishing him from the Island of Minorca * * * it was necessary for the plaintiff in his declaration to take notice of the real place where the cause of action arose. Had it not been for that, he might have stated it to have been in the County of Middlesex. It is a fiction of form." This was turned into verse, running thus:

Minorca lies in the Middle Sea,
Within the Ward of Cheap to wit;
Was aforetime of England's empery,
And St. Mary-le-Bow to prosper it.

John Mostyn bare rule within that land,
Within the Ward of Cheap to wit;
On such as misliked him he laid strong hand,
And St. Mary-le-Bow to prosper it.

[26] Dicey, Law and Opinion in England ,p. 93.
[27] 1 Cowp. 161,—(1774).

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On Anthony Fabrigas he hath passed
Within the Ward of Cheap to wit;
And his body in prison six days hath cast,
And St. Mary-le-Bow to prosper it.

This was a simple transcript of the declaration, then it continues, Mostyn speaking,—

I may go to England and take mine ease,
Within the Ward of Cheap to wit;
For my trespass was done beyond the seas,
And St. Mary-le-Bow to prosper it.

But mark how Fabrigas doth devise,
Within the Ward of Cheap to wit;
With pleaders and serjeants many and wise,
And St. Mary-le-Bow to prosper it.

In the common pleas they have sued their writ,
Within the Ward of Cheap to wit;
And holden Mostyn to answer it,
And St. Mary-le-Bow to prosper it.

* * * * * *

For three thousand pounds was the verdict then,
Within the Ward of Cheap to wit;
And also for costs four score and ten
And St. Mary-le-Bow to prosper it.[28]

Notwithstanding the ridicule, it does seem that this fiction of place, and the two writs spoken of just before it, answered a good purpose, for they enabled the disputants to bring their differences before the courts which could and would dispose of them earlier than if the artful lawyers for the defendants had been allowed to turn every corner otherwise available.

That it answered a good purpose can also be said of the old use of the fiction of *Abeyance,* which held *in nubibus* the fee of lands when the parson of a church died and until his successor was appointed, and held likewise the fee when the Crown renounced an estate and did not vest it in anybody.[29] Exactly how far the good office of *deodand* extended is questionable; probably it started from

[28] Quoted in the "Spectator," 1888, p. 1156.
[29] 1 Comyns' Dig. 176.

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the desire to get out of the way anything which was dangerous to human life, the fiction lying in personalizing inanimate objects.[30]

III.—FICTIONS RECENTLY GIVEN UP

Turning from these of times long past to those more recently in use, but now cast off, probably the best known example is found in actions of ejectment, which were dressed in all kinds of fiction. All students of the law of real property remember these in a general way, so a short reference will suffice here.[31]

In early times it was the practice to grant leases by deed, and where the lessee was wrongfully evicted his remedy was in an action on the covenant.[32] This was not always a sufficient remedy, so a new writ was evolved called *ejectio firmae*: it seems conceded by the authorities that this was about the beginning of the reign of Edward III. This action aimed to give the lessee back his land, but it was found that it did not cover two cases: first, not having a freehold, the lessee was liable to be ousted by the successful plaintiff in a collusive action against the lessor; second, if the lessor ejected the lessee, and then enfeoffed a third person, the lessee could not bring his writ of *ejectio firmae* against the feoffee because he was not the ejector, so the scope of the action was extended, the plaintiff being entitled by judgment to obtain both possession and damages. As it came into general use as a mode of trying the title to freeholds, the actual entry, lease and ouster necessary as a foundation for the action were found inconvenient, and accordingly Lord Chief Justice ROLLE during the Protectorate (about 1645 A. D.) substituted fictions, shaping the actions thus. The claimant to the land, A, delivered to the party in possession, B, a declaration in which John Doe was plaintiff and Richard Roe defendant. Doe states that A has leased the land to him for a term of years and that Roe has ousted him. With the declaration, a letter signed by Roe was served advising B, as possessor, to apply to be made defendant in Roe's place as he, Roe, had no title and did not wish to defend. B then gravely applied to the court for leave to defend, and admitted three fictions: (a) the lease by A to Doe, (b) the entry of Doe on the land, and (c) the ouster of Doe by Roe, who was called the casual ejector. B is then substituted for Roe and A, the real plaintiff, for Doe.

It might be interesting in this connection to trace out the mythical

[30] 1 Bl. Comm. 301.

[31] This use of fiction in ejectment was abolished in Michigan in 1857,—see 2 Comp. Laws of 1897, § 10952. In England it was abolished in 1852.

[32] Digby, p. 144, 145, 199.

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genealogy of the mysterious Doe and Roe, but the date of their first appearance is hard to fix. That their names were used in court illustrations before the time of ROLLE by lawyers, seems probable, as etymologists are of the opinion that the names come from the time of forest laws, when venison was a "sacred thing".[33] That Lord ROLLE first used these fictitious persons in ejectment seems agreed, however.

Even while this fiction still held sway our practical American courts ruled that although the alleged demise was a fiction, it was necessary to count on one, which, if real, would support plaintiff's action.[34]

Another fiction of quite a different character was that the fraction of a day didn't count, in the eye of the law.

This was abandoned because it did not stand the test that a fiction should not work injustice. Apparently it was first questioned seriously in a bankruptcy case, (*Thomas, assignee,* v. *Desanges,* 2 B. & Ald. 586) in 1818: the bankrupt was surrendered after six o'clock in the evening and his property had been taken under execution before two o'clock in the afternoon: the assignee claimed the seized goods as the court could not take cognizance of part of a day but the court sustained the priority of the execution as being the only way to do justice.[35]

Of the same class is the fiction that a term of court consists of but one day. This has not passed entirely out of use. It is only tolerated, however, where it is absolutely necessary for the interests of justice, and our United States Supreme Court has said that it would not be permitted to control insofar that a claim would become

[33] Lower,—quoted in Wheeler's "Noted Names of Fiction" and in "5000 Facts and Fancies." The use of these names was not confined to ejectment.

For a pleasing light treatment of "John Doe" in another kind of action see Moore v. Lewis, 76 Mich. 300. The plaintiff replevied a billiard table from the defendant, naming him as John Doe—the real defendant, C. B. Lewis, a journalist well known under the pseudonym of "M. Quad." Judge Campbell says in his opinion "Objection is made that as suit was commenced against John Doe, and not amended to show the real defendant, they are defective, and some comments are made on the use of the fictitious name at all. It is not necessary to dwell on the latter point. It is not very strange that a gentleman who has become so publicly and favorably known as a writer under an adopted name, should not have been so well known to everybody under his real name. He was served, appeared and defended. Counsel complained a little of the indignity of applying such a formal epithet to a well known and worthy gentleman, but John Doe is an ancient name in legal history and has represented some famous characters. The name was not unlawfully used and served its purpose and the mythical character has left the case to the real one."

[34] Lessees of Binney v. C. & O. Canal, 8 Pet. 214 (Marshall C. J.).

[35] See also, In re Stoner, 105 Fed. 752; Westbrook Co. v. Grant, 60 Me. 88; In re Petitt, 1 Ch. Div. 478.

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operative by virtue of this fiction, which otherwise would be without effect.[36]

Turning to the criminal law we find that, until comparatively recently, by a fiction a murder was said to have been committed at the time a blow was given, although death might not have resulted from it for some months. Under the strict constructions given indictments, this rule was of great importance. It was abandoned, as is said in Hawkins' Pleas of the Crown, (Vol. 2, Chap. 23, § 88), "because a person cannot be said to be murdered until he is dead."

Not far removed from criminal law was the action for seduction; the old courts sustained the action only where brought by parent or guardian and there was some allegation that loss of service ensued. This loss of service was recognized as fiction, and originally was adopted to evade the rule prohibiting a party to the action from testifying, under which the injured woman, if suing, must have stayed silent. The need of alleging loss of service is now abolished by statute in most of the states,[37] and the feeling of the courts is so strong against this fiction that the tendency is to disregard it even without a statute doing away with it. A striking instance is the decision in *Anthony* v. *Norton*,[38] 60 Kan. 341. The plaintiff's mother, a widow, sued for damages for the seduction of her daughter, who was twenty-five years old and a clerk in a store. Kansas had no statute covering such actions, and the suit was on common law right. The defense set up that the daughter was of full age, and did not, as to her mother, stand in the relation of servant to a mistress, consequently no loss of service resulted. The opinion quotes with zest POLLOCK ON TORTS, to this effect: "The capricious working of the action for seduction in modern practice has often been the subject of censure. * * * It has been truly said that the enforcement of a substantially just claim ought not to depend upon a mere fiction, over which the courts possess no control." The court wanted to rely on some legislative authority, however, and quoted a code section reading "all fictions in pleading are abolished" and said "If in fact a right of action is given to the parent as such for seduction of a daughter; if in fact the injury done is to the parent in that relation; if in law, the courts take to themselves the right to probe beneath the thin veneering of the form of action

[36] See Newhall v. Sanger, 92 U. S., 766.

[37] In Michigan by 3 Comp. L. 1897, § 10418-10419. See Stodt v. Shepard, 73 Mich. at 592,—"Our statutes have removed from such actions all the rubbish that disfigured them, from attempting to keep up an idea that their object was to collect damages for loss of service, when this was never more than a legal fiction."

[38] This case, with summary of briefs, is found in 44 L. R. A. 757. It was decided in 1899.

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* * * it cannot be that the liberal rules of the code still require conformity to the fictitious formulas of common law." A judgment for plaintiff was affirmed.

IV.—FICTIONS NOW USED.

Coming to recognized fictions now current and useful, probably the most familiar example is our ordinary *nunc pro tunc* entry, which is of course a fiction by relation. To insure justice, it is absolutely necessary to resort to this. A good illustration is the case of *Mitchell* v. *Overman, Admr., &c.,* (103 U. S. p. 65) where the real defendant to the case died after the cause had been finally submitted for decision, and the court permitted the entry of a decree *nunc pro tunc* as of the lifetime of the defendant.

The action of Trover is another convenience in common use, the fiction of finding being the essence of the action, although now not necessarily pleaded—when it was essential this allegation was never traversable. The Common Counts in Assumpsit, too, are every day expedients which are easily seen to have a fictional character. Another familiar fiction is, that a person who has been bailed is in the custody of his bail; this is necessary to fix the responsibility of the sureties.

In considering those now in use we find some dissent, however, with reference to the present application of the fiction, that a wife's domicil follows that of her husband. The case of *Loker* v. *Gerald,* 157 Mass. 42,[39] probably carries this rule as far as any. The suit was to recover dower out of the estate of William Loker, deceased, the demandant claiming to be the widow. The defendant set up a divorce which had been obtained by Loker in Colorado. The evidence showed that the parties lived in Massachusetts but the husband removed to Colorado, the wife remaining in Massachusetts. The papers were regularly served on the wife, and after the hearing, a decree was granted for desertion. The real contention in the main case was, that the wife was never domiciled in Colorado, nor served with papers in that state, and therefore, that the court had no jurisdiction to dissolve the marriage. The opinion states, that as it does not appear that the wife separated from her husband for justifiable cause, her domicil followed his, giving the court jurisdiction. An unvarying application of this rule, however, would be subject to the criticism in *Champon* v. *Champon,* 40 La. Ann. 28, to the effect that "it would do violence to the plainest principles of com-

[39] See 16 L. R. A. 497 for comprehensive notes on this case and the question involved.

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mon sense and common justice to call this residence of the guilty husband, where the wife is forbidden to come, or of which she knows nothing, the domicil of the wife. The true meaning of this aphorism touching the domicil of the wife, is that it is the domicil that the husband has at his marriage or * * * to which she may go and stay at her will."

One artifice, as it has been called, of the English law which we might well adopt in America, is the fiction by which land owned by a partnership is considered as personalty. We ordinarily deal with a firm as an entity, and the interest of each partner in it as personal property.[40] Our courts have fought shy of accepting this for the stated reason that they regarded the American rule as more simple.[41] The English practice is now sanctioned by the Partnership Act of 1890, and it seems to the writer to have the very advantage claimed for the American, i. e., to be more simple. Under the American rule it is hard to answer two questions asked by a recent critic, viz., has the wife of a partner an inchoate dower interest in firm lands, and can the surviving partner transfer either a legal or equitable title to such real estate?

It would not be right to leave this short mention of current fictions without speaking of one which has some hint of poetry in it; this is the fiction which regards a ship as a living being and as responsible for its acts. Justice HOLMES[42] in his excellent treatise on the common law suggests that this may have started with the law of *Deodand,* and cites cases showing that if a man falls from a ship in motion and is drowned, the ship is forfeited. Whether this sprang from the criminal law or not, it certainly has taken firm hold in the admiralty.

Mr. Justice BROWN in the case of *Tucker* v. *Alexandroff* (183 U. S. 424 at 438) gives an interesting summary. The opinion says "A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject only to mechanics' liens created by state law and enforcible in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her

[40] For a good discussion of this question see 22 Harv. L. Rev. 393.

[41] See Darrow v. Calkins, 154 N. Y., 514. This case permitted an attack on title 30 years after a partner had died and his interest had been found, by another court, to have passed to his surviving partner.

[42] Holmes' "Common Law," p. 26.

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own; * * * becomes liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name. Her owner's agents may not be her agents, and her agents may not be her owner's agents. * * * She is capable, too, of committing a tort, and is responsible in damages therefor. She may also become a *quasi* bankrupt; may be sold for the payment of her debts, and thereby receive a complete discharge from all prior liens, with liberty to begin a new life, contract further obligations, and perhaps be subjected to a second sale."

It is interesting to apply this statement of the personality of a ship to the case of "*The Parlement Belge.*"[43] This proceeding was *in rem* to recover for a collision between the Parlement Belge, which was a mail packet belonging to the Belgian King, and the ship "Daring". Although it was found that the Belgian ship was engaged in ordinary traffic, carrying passengers and light freight, the court held that she represented an independent sovereign and could not be reached by an action *in rem.*

That the Court of Admiralty applies other fictions of law is shown in the recent case of the *Old Dominion Steamship Company* (*The Hamilton*) v. *Gilmore,* (207 U. S. page 398), decided in 1907. The question arose in a proceeding to limit liability. The United States Supreme Court by a fiction held that the Delaware law, giving a right of action for death, applied, although the death occurred on the high seas—the two ships in collision both being owned by Delaware corporations, were constructively a part of the soil of Delaware. The court of admiralty having jurisdiction would therefore enforce the Delaware statute.

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DETROIT, MICHIGAN.

[43] 5 Prob. Div. at 203. (The English do not hesitate to use legal fictions outside of court when expedient. By an official fiction the Island of Ascension is considered a vessal of war, and as such is commanded by the Admiralty; See 1 Lowell, Government of England, p. 89).

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