

## General Introduction

A legal fiction, for present purposes, is a false assumption a court knowingly relies on. The maxim ‘Everybody knows the law’ is an example of a legal fiction.<sup>1</sup> As a statement of fact, the maxim is evidently false. Not even lawyers or judges know all the law. And yet courts apply it, as if it were true, with the result that ignorance of the law is no defence.<sup>2</sup> We therefore say that the maxim is a legal fiction.

The griffin dominating the cover of this book is an illustration in both senses of the word. This mythic beast – half lion and half eagle – is neither a mistake nor a lie. It is a *fiction*. It is a known untruth that we accept for certain purposes, such as literature or art. Legendary creatures are more familiar than legal fictions, but legal fictions are more important.

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To better understand our subject, let us consider the case of one Richard Bailey, who, in the year 1800, learned about legal fictions the hard way.<sup>3</sup> His case is particularly illustrative of the maxim that ‘Everybody knows the law’, for Mr Bailey was not merely ignorant of the law: he could not *possibly* know it. The facts were as follows. In May 1799, Parliament passed an Act that created a new offence.<sup>4</sup> In

<sup>1</sup> 1 Hale PC, ch 6, 42; 4 Bl Comm, ch 2, V, 27; *Carter v McLaren & Co* (1870–75) LR 2 Sc 120 (HL) 125 (Lord Chelmsford); *Cooper v Simmons* (1862) 7 Hurl & N 707, 158 ER 654 (Exchequer) 658 (Pollock CB).

<sup>2</sup> Today the maxim applies only when a person is accused of wrongdoing. A mistake of law does not bar recovery by a mistaken claimant: *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 (HL) 371, 375 (Lord Goff), 405ff (Lord Hope); *Pankhania v Hackney LBC* [2002] EWHC 2441 (Ch), [2002] NPC 123 [57] (Rex Tedd QC).

<sup>3</sup> *R v Bailey* (1800) Russ & Ry 1, 168 ER 651 (Crown Cases Reserved).

<sup>4</sup> The offence was ‘maliciously shooting’. It had originally been enacted by 9 Geo I c 22 (1723) (‘Black Act’), s 1. The Act referred to in the main text extended this offence to the high seas: 39 Geo III c 37 (1799).

June 1799, Mr Bailey committed this offence. It so happened that during this period Bailey was on a ship sailing the high seas. It was practically impossible for news of the change in the law to have reached him. That was his defence at trial. But his protestations of ignorance fell on deaf ears. Ignorance was no defence. Everybody knew the law and so did Bailey, who was duly convicted. The punishment for the offence was death.<sup>5</sup>

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Bailey's mortal experience with fictions shows that the subject of our inquiry is not theoretical. Legal fictions decide real cases and affect real people. The fiction may not be real, but the result is as real as life and death. What if the reader should find himself or herself, like Bailey, the victim of a legal fiction?

Even where life and limb are not at risk, the use of fictions in the law raises serious questions. Can legal fictions be justified? Why do we have them? What is to be done about them? These are the questions that animate this work.

Important though they are, these questions are not the only reasons to study legal fictions. After all, these questions are not new. Legal fictions are as old as ancient Rome, where one fiction killed a Roman citizen a moment before he was taken prisoner and another fiction abolished his captivity upon release.<sup>6</sup> Fictions have provoked thinkers throughout the ages – some to fury; others to approbation; none, it seems, to indifference. Hale, Bentham, Fuller, to name a few, weighed into this controversy, each in his time: the Restoration, the Industrial Revolution, the Great Depression. So why indeed, after two millennia, do we ask the same questions?

This brings us to the state of the scholarship. Fictions are seldom treated as a topic in its own right. Just as fictions are incidental to the law, so are they incidental to legal commentary – with few notable exceptions.<sup>7</sup> Fiction scholarship, such as it is, is beset by three challenges. First, scholars have widely divergent definitions of legal fiction. While they appear to discuss the same thing, in truth each refers to a somewhat different device, though by the common label of 'fiction'. These different conceptions of legal fiction, which

<sup>5</sup> Black Act (n 4) s 1.

<sup>6</sup> A captured citizen was considered a slave (of the enemy) and could not own or bequeath property. If he died a captive, his inheritance was saved by *lex Cornelia*, which presumed he had died before capture: Digest 35.2.1.1. If he returned, *postliminium* reinstated him in citizenship and property as if he had not been captured (except property owned by possession): Digest 49.15.5.1; Rules of Ulpian 23.5.

<sup>7</sup> See, for example, Lon L Fuller, *Legal Fictions* (Stanford University Press 1967); Pierre JJ Olivier, *Legal Fictions in Practice and Legal Science* (Rotterdam University Press 1975); and Maksymilian Del Mar and William Twining (eds), *LFTP*; all of which feature prominently hereunder.

are sometimes implicit, part overlap and part contradict. This breeds confusion and impedes debate (which requires agreement on premises). This work will propose a way out of this house of mirrors.

The second problem with the scholarship is the resolution. It is either too high or too low: a particular fiction under the microscope or philosophical disputations about truth, fact and fiction. There is scarcely anything in between. An analysis of the role of fictions in an area of law is what we need. This work will supply this want.

The third problem is that the literature is strong on theory and weak on practical advice. It is too, dare we say, *academic*. Fiction scholarship is varied, insightful and, for those so-inclined, rewarding in intellectual satisfaction. It has certainly enriched the ensuing pages. But, for all its wealth, it does not answer the real-world questions of what to do about the fictions that exist, and under what circumstances to create new ones. This work will answer these questions.

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This monograph is a study of legal fictions in English private law. The field of inquiry is thus confined to one, albeit broad, area. It is so confined for reasons of practicality, namely time, space and the author's competence.

The aim of this book is to answer a single practical question. Answering this question naturally involves answering many preliminary questions. Yet everything in these pages is directed towards answering the following core question: *Which fictions should we accept and which should we reject?* The answer to this question – the 'Acceptance Test' for fictions – is the thesis of this book.

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I will seek an answer to this core question by doctrinal legal analysis. Unlike many doctrinal projects, my mission is not to come up with a model that *explains existing law*.<sup>8</sup> My approach does not assume an underlying consistency waiting to be discovered. At present, let it be said, there is no set of principles governing fictions. For fiction is the *abandonment* of principle. I wish hereby to offer a *new system* for dealing with legal fictions. This system is designed to be as compatible as possible with existing law, but is emphatically not a reflection of it. I will describe the law, evaluate it and propose reform. The reform is encapsulated in the answer to the core question highlighted above: which fictions to keep and which discard.

<sup>8</sup> Christopher McCrudden, 'Legal Research and the Social Sciences' [2006] LQR 632, 632–4.

The monograph which follows is divided into four substantive chapters in chronological order. Chapter 1 summarises the extraordinary history of legal fictions in English law. Chapter 2 recounts the history of *thought* concerning legal fictions and, arriving at the present, tackles the problem of definition. Chapter 3 analyses contemporary fictions in the light of the preceding chapters. Chapter 4 answers the core question by proposing a test for which fictions to retain and which to abolish.

In the course of this journey, traversed in just over 100,000 words, we will encounter 25 legal fictions, visit several jurisdictions, meet many scholars and take our part in intellectual battles. We will heed the anonymous call to arms in the *Harvard Law Review* that ‘the nearly dormant debate over the legal fiction should be reawakened’.<sup>9</sup>

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Incidentally, Mr Bailey was pardoned by George III, on the advice of the judges who had tried him.<sup>10</sup> The law works in mysterious ways.

<sup>9</sup> Anonymous, ‘Lessons from Abroad: Mathematical, Poetic, and Literary Fictions in the Law’ (2002) 115 *Harvard LR* 2228.

<sup>10</sup> *R v Bailey* (n 3) 653.

## 1

## Old Fictions

As readers of plea rolls, we will have long since learned to be skeptical of the facts contained in our documents. Jurisdictional ruses, fictional procedural devices, and other non-traversable tricks are familiar. . . . Sometimes we can find comfort in thinking that the clerk who entered them did not know precisely what they meant either; or we may occasionally seek solace in the possibility – sometimes the sure knowledge – that they meant nothing at all.

Morris Arnold<sup>1</sup>

## 1.1 INTRODUCTION

The common law is a building whose foundations were laid in the High Middle Ages. Legal fictions may not have been solid or stable enough to be called foundations, but they were certainly building blocks – or at least, as commentators like to say, scaffolding.<sup>2</sup> In hindsight, it seems the law would not have been able to answer the changing needs of society without them.

So great a role did fictions play in the development of the common law<sup>3</sup> that any study of fictions in English law must perforce include a historical dimension. As one historian noted, ‘understanding . . . the abuses which Dickens and others decried in the early nineteenth century is impossible without some cognizance of mediaeval forms and the elaborate fictions which came to be

<sup>1</sup> Morris S Arnold, ‘Law and Fact in the Medieval Jury Trial: Out of Sight, Out of Mind’ (1974) 18 *American Journal of Legal History* 267, 267.

<sup>2</sup> For example, John Chipman Gray, *The Nature and Sources of the Law* (2nd edn, Macmillan 1921) 35; Lon L Fuller, *Legal Fictions* (Stanford University Press 1967) 70; Michael Lobban, ‘Legal Fictions before the Age of Reform’ in LFTP, 215.

<sup>3</sup> FW Maitland, *The Forms of Action at Common Law* (AH Chaytor and WJ Whittaker eds, CUP 1965) 79.

based upon them'.<sup>4</sup> This chapter tells the fascinating, and at times strange, story of these fictions.

For our purposes, legal history begins in the twelfth century with the emergence of the common law and ends in the mid-nineteenth century with the abolition of the forms of action. For ease of reference, I will call this period the 'Old System' and fictions that developed under it 'Old Fictions'. The system established by the nineteenth-century reforms is the 'New System', our system. Fictions existing under it are 'New Fictions'.

At the outset, I will set the scene by explaining the procedural conditions that prevailed under the Old System. The most important of these, as far as fictions are concerned, were the writ system, formal pleading and civil juries. I will then look at a selection of Old Fictions, one by one, against the background of these three conditions. I will describe the development of each fiction, how it functioned and how far it effaced the rule that came under its attack. Finally, I will ask how the abolition of the forms of action affected Old Fictions: did they die, survive or metamorphose?

Specifically, this chapter will consider eleven Old Fictions: (1) *dominus remisit curiam*, (2) *vi et armis*, (3) geographical fictions, (4) the bill of Middlesex, (5) the writ of *quominus*, (6) the benefit of clergy, (7) pleading the belly, (8) the common recovery, (9) trover, (10) ejectment and (11) quasi-contract. This is by no means an exhaustive list – such an undertaking would require an entire book. The fictions discussed here are a sample and have been chosen for their diversity. They illuminate different facets of the Old Fiction and help us answer the questions I have posed regarding the development, operation, effect and abolition of Old Fictions.

As we will see, Old Fictions do not submit easily to systematic classification; we attempt a taxonomy at our peril. Nevertheless, it is instructive for our purposes to distinguish between three broad types. The first type is the 'Jurisdictional Fiction'. This fiction does not affect the substance of any action but simply which court the action may be brought in. It is normally used because a litigant wants to avail himself of a procedure which that court offers. The second type is the 'Auxiliary Fiction'. This type of fiction affects the substance of the law but without disturbing its conceptual basis. Auxiliary Fictions are thus mere incantations, legal lip-service, that no lawyer takes seriously as reasons for the result of a case. The third type is the 'Essential Fiction'. This title I bestow on fictions which affect the substance of the law

<sup>4</sup> Margaret Hastings, *The Court of Common Pleas in Fifteenth Century England* (Cornell University Press 1947) 157.

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through doctrine. Unlike Auxiliary Fictions, Essential Fictions are seen as a conceptual basis for the result of a case.

It is contended in this chapter that this typology of Old Fictions is the key to understanding how the downfall of the forms of action affected Old Fictions. It is argued that Jurisdictional and Auxiliary Fictions disappeared seamlessly, whereas Essential Fictions survived, even festered. Released from the strait-jacket of the Old System, these Essential Fictions, which had been harmless (if unprincipled) instruments of justice, became obstacles to justice.

### 1.2 THE PROCEDURAL FRAMEWORK OF THE OLD SYSTEM

#### 1.2.1 *The Writ System*

Henry II is credited by legal historians with the foundation of the common law.<sup>5</sup> But unlike the giants of the legal pantheon – Justinian, Suleiman, Napoleon – the first Plantagenet king was no lawgiver. FW Maitland said of his contribution that ‘we may even doubt whether he published any one new rule which we should call a rule of substantive law’.<sup>6</sup> He certainly left posterity no code or treatise.<sup>7</sup> His legacy, which is rightly revered, was administrative: the centralisation of justice in England. Previously, law had depended on local custom and been administered in local assemblies or manor courts.<sup>8</sup> Centralisation was achieved not by laying down the law as such, but by establishing a uniform and effective *procedural* framework for the resolution of disputes.<sup>9</sup> Hence *common* law. This common procedural framework was the writ system.

An original writ was a document, written in Latin, on a strap of parchment, about eleven inches long, folded and sealed with the tip of the great seal of the realm.<sup>10</sup> It was issued by the Chancery in the name of the king and addressed to the sheriff of the relevant county.<sup>11</sup> The writ was a mark of authority and

<sup>5</sup> Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I*, vol 1 (2nd edn, CUP 1968) 136; GDG Hall (ed), *The Treatise on the Laws and Customs of England Commonly Called Glanvill* (Nelson 1965) xii; William Holdsworth, *A History of English Law*, vol 1 (AL Goodhart and HG Hanbury eds, 7th edn, Methuen, Sweet & Maxwell 1969) 4; IELH, 16.

<sup>6</sup> Pollock and Maitland (n 5) 136.

<sup>7</sup> The treatise known as *Glanvill* was written during Henry’s reign, but it was the work of an unidentified scholar and not attributed to the king; Hall (n 5) xxx–xxxiii, 3.

<sup>8</sup> John Hudson, *The Oxford History of the Laws of England*, vol 2 (1st edn, OUP 2012) 276–89.

<sup>9</sup> Holdsworth (n 5) 47–53.

<sup>10</sup> Hastings (n 4) 158; IELH, 64.

<sup>11</sup> The writ of right patent, exceptionally, was addressed to a feudal lord rather than the sheriff.

a symbol of jurisdiction – hence the expression that one’s writ does or does not run somewhere.

Certain writs were called ‘original’, not in the sense of not being copies but because they *originated* an action. The original writ was the claimant’s ticket, obtained for a fee, to the royal justice system and had the effect of commencing proceedings. Generally speaking, the writ described the substance of the claim and demanded either compliance or a defence.<sup>12</sup> As such, the writs were the claim forms of medieval England.

Unlike today’s claim form – and this is crucial for our purposes – these writs had set wording. The claimant only filled in the blanks: names, places, times, quantities, particulars. Each action had its fixed formula.<sup>13</sup> Thus, if A sought to recover a debt of £20 from B, A would commence proceedings by causing a ‘writ of debt’ to be issued. It is a testament to the stability of the writ system that the writ of debt was in constant use throughout England for six centuries. During this time, its operative wording barely changed.<sup>14</sup> The following is a sample from 1318:

Edward, by the grace of God, King of England, Lord of Ireland and Duke of Aquitaine to the sheriff of X, greeting. Command B that justly and without delay he render to A twenty pounds which he owes him and unjustly detains, as he says. And if he does not do so, summon the aforesaid B by good summoners to be before me or my justices at Westminster on the third Sunday after Easter to show why he has not done so. And have there the summoners and this writ. Witness myself at Westminster the eighth day of October in the twelfth year of our reign.<sup>15</sup>

Note that in this entire – somewhat august – statement, the claimant only ‘contributed’ the names, the place and the amount; the rest was template or administrative detail. Even though other writs (notably the writ known as ‘trespass on the case’) allowed the claimant greater liberty in framing his case, the writ system was essentially about fixed forms of words that represented actions in law.

And so the law grew around the writs. Each writ was a distinct procedure with its own rules, pre-trial process, mode of trial and defences. Thus emerged the formulary system that has come down to us as ‘the forms of action’. As late as 1824, a barrister described the role of writs as follows:

<sup>12</sup> The writ of right patent was again exceptional in that it demanded compliance without the option of a defence, but in practice a defence could still be mounted.

<sup>13</sup> Trespass on the case was a notable exception: *Bernardston v Heighlynge* (1344) Baker & Milsom (2nd edn) 381 (KB) 383.

<sup>14</sup> For the evolution of the writ of debt, see HCLC, 54–9.

<sup>15</sup> Elsa de Haas and GDG Hall (eds), *Selden Society: Early Register of Writs* (Bernard Quaritch 1970) 108, 221.



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An original writ ... is essential to the due institution of the suit. These instruments have consequently had the effect of limiting and defining the right of action itself; and no cases are considered as within the scope of judicial remedy, in the English law, but those to which the language of some known writ is found to apply... The enumeration of writs, and that of actions, have become, in this manner, identical.<sup>16</sup>

Many a worthy plaintiff lost a case due to choosing the wrong writ – and in borderline or novel cases, the choice was something of a gamble.<sup>17</sup> Such was the nature of a formulary system. As one Chief Justice said, ‘We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion.’<sup>18</sup> Professor Milsom commented that ‘law itself was seen as based, not upon elementary ideas, but upon the common law writs ... a range of remedies which had as it were come down from the skies’.<sup>19</sup>

This writ system was partly abolished in the 1830s,<sup>20</sup> finally meeting its quietus in 1852.<sup>21</sup> It gave way to the system we have today, where an action is a concept rather than a form of words or procedure. The period I have herein called the Old System is demarcated by the life of the writ system: from the twelfth century to the mid-nineteenth century.

In a system so dependent on form, legal development often meant deviation from form; or more precisely, turning a blind eye to deviation from form. This is where legal fictions came in. But before we turn to the Old Fictions themselves, I need to describe the two other procedural conditions of the Old System.

### 1.2.2 *Civil Juries and Formal Pleading*

One of the problems facing any legal system is how to decide questions of fact. In the twelfth century, when the writs made their appearance, several primitive

<sup>16</sup> Henry John Stephen, *A Treatise on the Principles of Pleading in Civil Actions* (Joseph Butterworth & Son 1824) 8 (footnotes omitted).

<sup>17</sup> The elusive boundary between trespass and case in the eighteenth century was a particular frustration: HFCL, 397–8. Arguably the most famous case in English legal history, *Slade’s Case* (1598) 4 Co Rep 92b, 76 ER 1074, was technically about which writ to use: David Ibbetson, ‘Sixteenth Century Contract Law: Slade’s Case in Context’ (1984) 4 OJLS 295, 295.

<sup>18</sup> *Reynolds v Clarke* (1724) 1 Strange 634, 93 ER 747, 748 (KB) (Raymond CJKB).

<sup>19</sup> HFCL, 309.

<sup>20</sup> The forms of action were abolished as distinct procedures when one uniform writ was introduced (in which the form of action was to be named): Uniformity of Process Act 1832 (2 William IV c 39) s 1 (being the preamble); Real Property Limitation Act 1833 (3 & 4 William IV c 27) s 36.

<sup>21</sup> Now it was not even necessary to specify the form of action in the uniform writ: Common Law Procedure Act 1852 (15 & 16 Vict c 76) s 3.

modes of trial, or rather of proof,<sup>22</sup> were already well-established. The ordeals of fire and water, as well as wager of law,<sup>23</sup> had been in use since Anglo-Saxon times. Trial by battle had been introduced by the invading Normans.<sup>24</sup> All of these appealed to the supernatural – for it was God who determined the outcome.

The jury began as an administrative inquest rather than a mode of trial. With strong roots in Anglo-Saxon England, Norman kings continued to use the jury, then a self-informing investigative body, to collect information about their subjects. A notable example was the Domesday survey of the 1080s – a countrywide census conducted by investigative juries.<sup>25</sup> As Professor Baker explained, when seeking to collect information as opposed to answering a binary question about guilt, an appeal to Providence would not serve. God could not be asked to count oxen.<sup>26</sup>

In time, the jury came to be prescribed as the mode of trial in original writs, the earliest examples being the writs of *iuris utrum*, *novel disseisin* and *mort d'ancestor*,<sup>27</sup> promulgated by Henry II in 1164, 1166 and 1176, respectively.<sup>28</sup> The jury proved a more effective mode of trial than its superstitious alternatives and by 1300 eclipsed the ordeals<sup>29</sup> and judicial combat.<sup>30</sup> Wager of law remained in use for the writs of debt and detinue, albeit in ceremonial form, until the seventeenth century.<sup>31</sup> It then became practically extinct as debt was supplanted by trespass on the case, in which the defendant could not wage

<sup>22</sup> 'Trial' suggests formal evaluation of evidence: IELH, 79.

<sup>23</sup> In a wager of law, also known as *compurgation*, the defendant would conclusively prove his innocence by swearing to it himself and producing eleven other men who swore to his integrity: Hudson (n 8) 81.

<sup>24</sup> Ibid. 81, 84, 303, for fire and water, wager and battle, respectively.

<sup>25</sup> IELH, 80.

<sup>26</sup> Ibid. 79.

<sup>27</sup> Respectively, the writs called a jury to be summoned to decide whether land was held by lay or spiritual tenure, whether the claimant was recently ejected from land, and whether the claimant was the son of the person seised of land on the last day of his life. Ibid. 129, 233, 234. For an example of a writ prescribing trial by jury, see Glanvill, XIII, 33.

<sup>28</sup> IELH, 80 fn 10; 1166 is an approximate date.

<sup>29</sup> The ordeals were dealt a fatal blow in 1215 when Pope Innocent III forbade the (required) clerical participation in them: Canon 18 of the Fourth Lateran Council.

<sup>30</sup> Trial by battle went out of use due to the availability of trial by jury, but was not officially abolished as an alternative to jury trial until 1819 by 59 Geo III c 47, s 2. In 1985, two intrepid Scotsmen unsuccessfully challenged the Lord Advocate to battle, arguing the abolition applied only in England: JH Baker, *Introduction to English Legal History* (4th edn, Butterworths 2002) 74 fn 12.

<sup>31</sup> Wager of law became 'an indispensable ceremony, but no more' when the eleven compurgators (those swearing to the integrity of the defendant) were simply strangers hired for a fee by the court porters: JH Baker, 'New Light on Slade's Case' [1971] CLJ 213, 230. As Professor Ibbetson showed, wager of law had fallen into such disrepute that 'a gentleman would not, dared not, wage his law': Ibbetson (n 17) 313.