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From Coke to Maine: The Formation of Concept of "Legal Fiction" at English Law

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Abstract

From Edward Coke to Henry Maine, the discussions on the "legal fiction" gradually rose from the practical level to the intellectual level, and the discussants themselves have changed their positions, from users or makers of legal fictions to pure observers, with different view-points. The nature of a fiction is always falsehood according to its definition, but scholars made different judgments on its role in English legal history. William Blackstone praised legal fictions, but Jeremy Bentham denounced them as tools by which the judges and lawyers stole legislative power. Henry Maine gave his definition of legal fictions and emphasized their historical role.

Key words: Legal fiction; English jurisprudence; Intellectual history; Historical role

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INTRODUCTION

In western legal traditions, the term "legal fiction" seems to have some kind of magic, and the notion behind it is unique in the history of western laws.[1] The word "fiction", derived from the Latin verb fingere, refers to the act of feigning, and the product of that act. In its common sense, a fiction is just a "lie" or a "falsehood". The "legal fiction" in English law has also been expressed as fictio legis or fictio iuris, and fictio legis is commonly found in classical Roman literature. In Roman law, a "fictio" always means inventing or making a fact which is not true. Fictio iuris is rare in classical Roman law, but common in works of Medieval scholars on Roman law. The earlier English examples mentioned below suggest that the English legis fictio or iuris fictio refers to a fiction established in the judicial process, the validity of which the law recognizes, although it is not true.

In England, jurists between the 16th and 19th century often focused upon legal fictions—from St. Germain Christopher to Sir Henry Maine, writers presented numerous works and law reports concerning the topic of legal fiction. Those jurists often held different attitudes to this topic; they have great differences and even open conflicts upon legal fictions. Since all of their sayings have the same historical background and material basis, it seems that a brief analysis of the intellectual history will be logical and reasonable. After Henry Maine, scholars in the common law world in the 20th century—especially in American jurists, have written numerous works on legal fictions, specifically or incidentally,[2] among which L.L. Fuller's long paper with the title "Legal Fictions" is most famous and useful.

This paper, based on those authorities, will focus on the materials and scholars' interpretations to them, then try to profile the intellectual history upon this topic.

1. LEGAL FICTIONS IN ENGLISH LAWS

Legal fictions have existed in English laws for centuries,

[1] Today, "legal fiction" is still an important topic, not only in jurisprudence, but also in those expanded fields of linguistics, psychology and philosophy, where various tools are used in researches.

[2] We can find a lot of shiny names in the list: Roscoe Pound, Benjamin Nathan Cardozo, Guido Calabresi, S. F. C. Milsom, J. H. Baker, and so on.

and persons studying legal knowledge face them at every turn. The King's Bench wanted to extend its jurisdiction to old personal actions, mainly debt/detinue, which had been within the jurisdiction of the Common Pleas, and the King's Bench developed a procedure by the Bill of *Middlesex*, "the use of violence and weapons" in actions of trespass vi et armis, John Doe and Richard Roe in Ejectment, Common Recovery which is similar to iure cessio at the Roman law, loss and finding goods in Trover, and so on. Professor Fuller classified these fictions into "historical fictions" and "non-historical fictions".[3]

Generally speaking, there are three kinds of fictions in English law, the first one is fabricating facts which are essential to the causes of actions, and it is closely related to analogy; the second one involves jurisdiction matters such as the criminal charges against the defendant in the bill of Middlesex, and those charges often were made up with no factual basis. The last one existed in the abuse of procedures, where the acts or facts were not false, but were used for other purposes, just as in Common Recovery.

Since most fictions in procedural matters did not directly affect the substantial rights of the litigants, in the period of general pleading, these fictions might establish calm and well, and rarely affect the substantial rules. The fictions concerning the essential facts were created by the litigants, especially by plaintiffs. When special pleading became common, this kind of fictions often received denials by defendants and by juries of their special verdicts. So these fictions' validity was concerned with the model of pleading the litigants had chosen, and when the special pleading model prevailed, the legitimacy of these fictions would be discussed. In common law, this seemed to begin no later than the first half of the 15th century; and the paragraphs of a book generally called "Dialogues between a Doctor and a Student" or "Doctor and Student" show that in the early 16th century the rationality of some fictions already has been fully discussed.

Most of these three kinds of fictions mentioned above were originally based upon certain situations which were real, but more and more fictitious facts were made up in order to make existing rules applicable to novel cases, and this may be called "putting new wine in old bottles". But there also were some fictions set up directly by judges, as in cases decided by Sir Edward Coke and his peers. Contemporary scholars pay more attention to the latter, but most issue points of the "legal fiction" arose out of the former.

2. LITERATURE ANALYSIS

In the term "legal fiction", the meaning of "law (legal)" has changed on the case since the word "law" in English law is different from "lex" in Roman law, while the meaning of "fictions" in materials of English legal history has always been "falsehood" or "fabrication". The medieval Roman law students have pointed out that the legal field of the fiction is "falsi pro vero, aequitate Suadente, facta assumptio".[4] This definition has the key elements of "falsehood vs. truth" and "fiction vs. equity" already, which were reserved in writings by authors down to Henry Maine.[5] These two factors constitute the clue of the following parts.

2.1 The Roman-Canon Law Source of the Concept "Legal Fiction"

St. Germain Christopher's "Doctor and Student", published in the early 16th century, has a chapter to discuss the use of "color" (fucus),[6] one kind of fictions. The Doctor asks that, whether the feigned and untrue colors at the common law in various actions stand with "conscience"? The Student gives an example to answer him that if the defendant gave the plaintiff a color of action, the judge will not violate his "conscience", because if any default lies, "it is in the tenant, and not in the court". The Doctor then narrates the nature of the "color", of course using the theological rhetoric and logic. Accepting medieval theology's classification of lies, his logic is as follows: People should love neighbors instead of hurting them. If a lie is of malice and to hurt a neighbor, it is called "mendacium perniciosum", a deadly sin; if a lie is only in sport and does not hurt others, it is called "mendacium jocosum", a venial sin; and of a lie is for the interests of neighbors and to hurt no one, it is called "mendacium officiosum", also a venial sin; although it is a slight evil which should be avoided, but the slightest of the three.[7]

Under the subject of "legal fiction", the importance

[3] See L. L. Fuller, "Legal Fictions", 25 *Ill. L. Rev*. 367 et seq., 518 et seq., 1930-1931.

[4] Quoted in I. Maclean, I. (1992). *Interpretation and meaning in the renaissance: The case of law* (p.138). Cambridge: Cambridge University Press; cf Nancy E. Wright, "Legal Fictions and Interpretation in Attorney General v Pickeringe (1605) and Ben Jonson's Masque of Queenes (1609)", 1 *Newcastle L. Rev*. 55-72, 1995-1996 at 56.

[5] These two groups of concepts had kept their importance until Germany jurisprudence changed the definition of "legal ficiton". The relationship between falsehood and truth is critical to the definition of fiction. It is self-evident that when they have the same value and function, the truth is always higher than falsehood; if applying rules according to the truth could provide enough relief, the fiction is not allowed to use. It can be seen in a lexicon in the middle of the 19th century, under the item of "legal fiction", as follows: "Fictio cedit veritati. Fictio juris non est ubi veritas." See J. J. S. Wharton, *The Law Lexicon or Dictionary of Jurisprudence*, I. G. M'Kinley & J. M. G. Lescure, 1848, p.386.

[6] It is from the Latin verb fucare, the original meaning of which is "to paint", and it may refer to a fiction which gives a litigant "a color of right", such as the recognition of a non-existent covenant under seal, in order to make the suit go on.

[7] See St. Germain Christopher, St G. (1874). *Dialogues between a doctor of divinity and a student in the laws of England (*p.269 et seq.). Cincinnati: Robert Clarke & Co.

of the chapter concerning legal fictions in "Doctor and Student" is that it communicates the Roman-Canon law with the English Equity and the common law, which happens in three levels: Firstly, the discussion was based upon actions which were real at the common law; secondly, the introduction of "conscience" and "goodwill" at Equity into the common law as the basis of fictions; thirdly, a fiction's validity is to be determined by the answer whether or not it is to harm the neighbors, and this standard is an important source of legal maxim "fictio legis inique operatur alicui damnum vel injuriam".

The direct impact of the above-mentioned chapter of "Doctor and Student" on later law reports and legal writings is not uncommon. A century later, the law report of Doctor Leyfield's Case in 1611 recorded Edward Coke and his peers' discussion on color of right in the action of entry sur disseisin, where the judges directly used the words from "doctor and student" and made a well-known legal maxim— "lex figit ubi subsistit aequitas";[8] and Bentham's taking fictions as lies is likely influenced by the "doctor and student's" classification of lies. It is evident that from the beginning, the formation of the English concept of legal fiction has received the influence of the Roman-Canon law.

2.2 Edward Coke's "Legal Fictions"

In Bulter and Baker's Case in 1592, a husband set up a "jointure" estate with his wife during his lifetime, on which, for his heir and collateral relatives, he also set up complex remainders in the form of Fee Tail. After his death his wife gave up in an informal way the right on jointure. The key legal issue is that can the effect of giving up her right be back to the beginning time-point of the husband's death, in order to make the remainder begin immediately? The issue involves the effect of disposing act that may occur between a husband and his wife, and has an influence on the English Estate system, especially on the rules of uses and wills. After discussions of all judges of England, a fiction was put forward, that the wife's quitting the jointure has its retroactivity, as if the husband had held the property alone until his death.

There are three interesting points in this report, the first of which constitutes the legal maxim "relatio est fictio juris, et est intenta ad unum".[9] The second point is that it presents the relationship between the legal fiction and the fact, that is, a fiction conceals the truth. The third one is that it suggests that a fiction has its own aim and limits, so the abuse of fictions beyond their purposes is not allowed.

In the Liford's Case in 1618, Coke established a fiction similar to the fiction of relation, in order to provide relief for the loss of crops on a freehold land during the disseisin. This fiction assumes that the freehold in question had been uninterrupted, in order to make the action of trespass vi et armis available in this case to recover the loss caused during disseisin. At the same time, Coke set a limit that the effect of this fiction should not be extended to apply to the buyer of crops and other third parties. Obviously this is an example of a discussion in court on the use of legal fictions, about the maxim that a fiction can do no damage or injury to others. Coke then presented another more famous legal maxim: "In fictione juris semper aequitas exisit".[10]

In both cases the fictions were not set up by statutes, but they were called "legal fictions", or "ficitones iuris" in Latin. Since the word "law" in English generally refers to the common law and excludes Equity, the early examples of fictiones iuris implied their non-statutory background, and we can define the term as "fictions at common law". This suggested that in the minds of Edward Coke and other judges, "legal fiction" does not specifically mean "statutory fiction", which were created by statutes. As mentioned above, this usage is different from that of the classical Roman law. And in both cases Coke referred to the existence of equity. He wanted to limit the abuse of the fiction, that is, a fiction must have equity in it to maintain its legitimacy, and to avoid harming the third party. Secondly, equity can be used as a basis to remedy the injured in novel cases, just like what happened in Chancery.

In addition, we should note that the cases Coke recorded reflect the formation of legal fictions. In Coke's time, a legal fiction may emerge from the procedure of special pleading, and the lawyers have been able to discuss fully the conditions for the establishment and application of fictions. Furthermore, the judges were frank in creating new fictions, without feeling guilty of stealing the legislative power. —More than a century later, Bentham made severe attacks on the fictions, taking them as the tool by which judges stole legislative power.

2.3 William Blackstone's "Legal Fictions"

In the 18th century, English legal theory came into a rapid developing period, and the "legal fiction" has become an important subject. The most influential jurist to later times is Sir William Blackstone. In his famous book there are two interesting points on the legal fictions.

Firstly, after describing the way in which the civil jurisdiction of the King's Bench expanded from trespass actions to old personal actions, Blackstone points out that the plea of trespass against the defendant is a fiction and the defendant, once being in the custody of the marshal of this court, could not be at liberty to dispute. Blackstone then puts forward that,

> these fictions of law, though at first they may startle the student, he will find upon farther consideration to be highly beneficial and useful: Especially as this maxim is ever invariably

[8] Coke, E., et al. (1826). *The reports of sir Edward Coke* (Vol. V, part X, p.409). London: Joseph Butterworth and Son.
[9] Ibid., vol. II, part III, pp.76-7.
[10] Ibid., vol. VI, part XI, 51, p.98.

> observed, that no fiction shall extend to work an injury; it's proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law. So true is it, that in fictione juris semper subsistit aequitas. (Blackstone, 1765, p.43)

Here Blackstone quotes a medieval Roman law student's words to show that no proof should be made against the fiction—"Contra fictionem non admittitur probatio: quid enimgyeret probatio veritatis, ubi fictio adversus veritatem fingit? Nam fictio nihil aliud est, quamant adversus veritatem In the re possibili ex justa causa dispositio." (Ibid.) This prohibition directly constitutes the "fictions are not to be traversed" element of the definition of "statutory fiction" in some modern writings.[11]

Secondly, Blackstone mentions that many civil law scholars have strongly criticized the absurdity of the fictions that contracts which were made at sea had been made at the Royal Exchange or other inland place, and Sir Thomas Ridley demonstrated that it would be impossible for the ship in which such cause of action arises to be really at the Royal Exchange. Blackstone objects that Sir Thomas Ridley himself is a learned civilian, so he seems to have forgotten there are many fictions in the Roman law. He then lists several famous Roman legal fictions (Blackstone, 1765, p.107).

It should be noted that Blackstone vividly describes the controversy arising from the legal fictions. There are two points in his description. One is that the fictions were at first used in practice in jurisdictional matters, and then suffered civilians' attacks. This once again shows that each legal fiction was not necessarily to be established without dispute, and debates about whether or not a fiction is valid have been always in the legal history.

Obviously Blackstone made a modest positive comment on legal fictions. He did not hesitate to quote Coke and reminded his students that English fictions were helpful if the maxims were kept. The reason why Blackstone held this position may be that, the purpose of his book is to systematize the existing laws, and since English laws have their historical continuity, of the British law, to embrace the tradition is almost inevitable. Blackstone was influenced by the Roman law and some parts of his writings (especially the theoretical analysis part) has the color of the natural law. So his holding a positive evaluation is natural.

2.4 Jeremy Bentham's "Legal Fictions"

As Blackstone's praise of the legal fiction is widely known, Jeremy Bentham's criticism is also very striking. In different periods and different works he repeatedly denounced the fictions. Fuller's "Legal Fictions" has discussed Bentham's views in detail, but paid less attention to the logic of his argument. In fact, Bentham's argument is consistent and coherent, and has great influence on the development of the theory of legal fiction in Anglo-American law, albeit indirectly. So a brief description of Bentham's ideas is necessary.

2.4.1 Definition of "Legal Fiction"

In the preface of his famous pamphlet "A Fragment on Government", Jeremy Bentham, after pointing out the problems of the existing judicial system, derives his definition of a legal fiction: Bentham argues that the social contract put forward by John Locke and Whig's thinkers is a fictitious contract, which is derived from the legal language, and a fiction of law can be defined as "a willful falsehood, having for its object the stealing legislative power, by and for hands which could not, or durst not, openly claim it, —and, but for the delusion thus produced, could not exercise it." (Bowring, 1843, pp.242-3) Thus according to Bentham, legal fictions are tools used to steal legislative power by persons who do not have that power, that is, by judges.

The "A Fragment on Government" was written to refute Blackstone. As mentioned above, Blackstone has a very positive attitude to legal fictions; while Bentham's definition is opposite to him. This definition includes the intention of stealing the legislative power, and this charge must be in the context of separation of powers of governance, which may meet Bentham's reforming claim but against the real English constitutions. Obviously, the legal fictions Bentham wrote about were all in the judicial sphere.

Blackstone, in his "Commentaries on the Laws of England" presented his respect to the common law tradition, for this book was mainly based upon historical materials. On the contrary, Bentham denied the whole argument of Blackstone by attacking the basis of the common law. He once mentioned that there was a maxim among the judges that right and wrong were creatures of their creation, and of which the existence is at all times dependent upon their pleasure, so by a judge's encouragement or punishment, the virtue may become vice and vice may become virtue (Bentham, 1843, p.100). So in Bentham's eyes it was true that English law was judge-made law, and fictions were materials with which the judges built the structure of the whole legal system.[12]

2.4.2 Bentham's Judgment

In the book "Rationale of Judicial Evidence", Bentham gives a whole chapter to legal fictions. He at first takes

[11] It is worth noting that the words Blackstone quotes come from the Geneva scholar Jakob Gothofred's commentaries on the Roman law in the first half of the 17th century, rather than from the classical Roman law. This not only reflects the influence of Roman law on Blackstone, but also provides a way for the understanding the medieval Roman law studies.

[12] Of course, the fictions were not the whole materials. even if Bentham once regarded the common law as a purely fictitious product, he did not deny that there was some non-fictitious part.

legal fictions as one of the various tools to seize the judicial interests in English laws. From this view, he believes that the a fiction's effect is harmful and its purpose is evil. Then he enumerates the fictions created by judges and those by litigants, and fictions for seizing the jurisdiction, and then points out the nine negative effects of fictions, including the wrong statement of the parties, the court's wrong instructions and jury's false verdicts, the judges' being arbitrary, making law unclear, and so on. Bentham finally accuses that lawyers refuse to administer justice to people unless the people join with them in the fictions, and calls for further considerations on the cause (Bentham, 1843, pp.283-7). Bentham's enumerating the types of fictions shows his familiarity with English law, and that is different from the case in which Blackstone only mentioned the fictions in jurisdictional matters. Furthermore, Bentham's classification of fictions is still important in our time, but has not been paid enough attention yet.

In short, Bentham's view on legal fictions is quite coherent and consistent. Bentham's criticisms on legal fictions show his extreme dissatisfaction with English judicial system of his time; therefore, the judges' implementing legal fictions is just a target; by firing at this target he could attack the whole English judicial system. In a nutshell, the ultimate target of Bentham's attack is not legal fictions, but the judges and mechanisms through which they would appropriate legislative power.

2.5 Henry Maine's "Legal Fictions"

In the 19th century, the judicial reform in English for which Bentham had strongly advocated, began after his death. Standing at the end of an era, Henry Maine was able to look back, describe a more colorful legal history and explain it. Naturally he would face the legal fictions which were important in both Roman law and English law.

In his book "Ancient Law", Maine advanced a general proposition that there are three agencies by which law is brought into harmony with society, namely the legal fictions, Equity and legislation. Maine thought these three agencies have their historical order as here he placed them. He discussed some examples of fictions in the Roman law and the English law, then gave his definition of "legal fiction"—the expression of "legal fiction" means "any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified". Below this definition he pointed out the historical role of legal fictions, that is, in the infancy of society, "they satisfy the desire for improvement, which is not quite wanting, at the same time that they do not offend the superstitious disrelish for change which is always present. At a particular stage of social progress they are invaluable expedients for overcoming the rigidity"; but when the society develops into a higher stage and no longer needs fictions, they become the greatest obstacle to symmetrical classification (Maine, 1871, pp.24-6).

Maine's narration has a clear skeleton: firstly, his definition of legal fictions is different from the traditional definition. The premise of his definition is that there exist three agencies by which people can bring the law into harmony with society, and these three agencies emerge in a certain order. Therefore, the legal fictions' emergence is to keep the appearances of the old rules. We can say that Maine's definition of legal fictions is based on their function as an agency between law and society.[13]

Secondly, Maine, as a historical jurist, paid more attention to the historical evaluation of legal fictions. He not only took the legal fiction as one of the three agencies for the coordination of law and social development, but also pointed out that they were used to maintain the balance between stability and satisfying the desire to improve and overcome the rigid role of the law; he not only pointed out the progressive role of the fictions, but also pointed out that in his time, legal fictions were no longer needed. It is important for us to remember that although Maine criticized Bentham for his stigmatizing the legal fictions (Ibid., p.26), but his emphasis that every legal fiction has its own time is similar to Bentham—Bentham has mentioned that the fiction may have its own season, but in his time the season had passed away. It can also be seen, therefore, that the Maine's view on legal fictions contains the implication of responding to Bentham.

As his "ancient law" has been widely circulated, Maine's view on "legal fiction" has far-reaching influence. In fact, in the Anglo-American law world, the most influential works on legal fictions, such as Fuller's "Legal Fictions", do not go beyond Maine in respects of the definition and functional evaluation of legal fictions. For example, Fuller did not quote Maine's positive and useful discussion on the historical role of the fictions, but in fact reaffirmed the view of Maine—Fuller came to an approximate conclusion to Maine, but he did not elaborate on the relation between his view point and Maine's. In other words, the classic expression of Maine is still a strong support for the idea that legal fictions are means to remedy the injured in judicial process.

The views of legal fictions put forward by Edward Coke, William Blackstone, Jeremy Bentham, Henry Maine and other scholars were accepted by more and more students in the later times, for the early dictionaries which were used to collecting novel views were widely circulated. For example, not long after the publication of Blackstone's great book, under the title *Fiction of Law* in a law dictionary compiled by Richard Burn and John

[13] Fuller argues that the definition by Maine omitted the non-historical fictions. See L. L. Fuller, "Legal Fictions", 25 *Ill. L. Rev*. 513-46, 1930-1931, 518.

Burn, Blackstone's narration was collected.[14] And at the end of the 19th century, in the item of "legal fiction" the views of Maine, Bentham, Stephen and other scholars were quoted (Renton, 1897, pp.335-6). These works have contributed to the improvement of contemporary scholars' understanding of fiction.

CONCLUSION

After a brief analysis of the intellectual history of "legal fiction", now we can picture the development as follows:

Firstly, in the 16th century, the basic element, that is, the falsehood, in the classical definition of "legal fiction" has become popular, but the English "legal fiction" was different from the Roman "legis fictio", because in England the fictions got their validity from the common law rather than the statutes, but this difference has not been reviewed from the beginning. Being used by Edward Coke, William Blackstone, Jeremy Bentham and others, this term has had its English implication, so its meaning in the Anglo-American law is different from that in the Roman law, and this is a key to understand these two legal systems.

Secondly, the rise of English legal fictions is mainly due to changes of models of pleadings, especially to emergence of the special pleading. The discussions in "Doctor and Student" and Edward Coke's law reports have provided clear examples. General pleadings concealed the use of the fictions, while special pleadings were necessary to confirm their validity. This is the institutional foundation of the legal fictions.

Thirdly, the reason why the change of the mechanism is accepted is the introduction of the conception of equity, which also is the basis of legal fictions. The academic works and law reports of the 16th and 17th centuries show the equity factor always has been in the definition of "legal fiction". This is the conceptual foundation of the legal fictions.

Fourthly, a legal fiction does not justify itself without necessary argument; and sometimes even fictions have established well, scholars challenged their rationality, just as in the controversy Blackstone described between common law scholars and civilians—the latter focused on the absurdity of legal fictions, rather than their equitable nature.

Fifthly, Blackstone took legal fictions as useful things while Bentham attacked them strongly, taking them as typical corruptions of the legal system. Bentham's view on legal fictions was attached to his disgust at the English law as a whole, and he succeeded in making "legal fiction" a theme to which the scholars have paid, and are paying more and more attention.

Among all the reactions to the method of Bentham, Maine's view insisted on the historical standard, and placed legal fictions, equity and legislation together as means to bring the law into harmony with society. His view was partly based upon examples in the classical Roman law, so he gave a definition slightly different from others; but its emphasis on historical characters is still useful today.

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[14] See Burn, R., & Burn, J. (1792). *A New Law Dictionary* (Vol. I, p.362), item *Fiction of Law*.