



FACT & FICTION IN THE LAW OF PROPERTY

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TO MODERN AMERICANS “legal fiction” brings to mind the novels of John Grisham or Scott Turow, but to an earlier generation of lawyers the phrase meant a different kind of make-believe. Essentially, legal fiction (in the old sense) meant an irrebuttable allegation of a fact without regard to its truth or falsity. The object could be to secure access to a form of procedure that was speedier, cheaper, or simply more likely to produce the desired result. The old action of trover, to recover the value of personal property wrongfully withheld, began with an allegation that the property at issue had been lost by the plaintiff and found (*trouvé* in Law French) by the defendant who converted it to his own use.¹ Of course, it was really immaterial how the defendant came to possess the item in question; it could have been purchased, or received as a gift, or actually found. The dispute concerned

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¹ 3 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 151-52 (1768) (facsimile 1979) (hereinafter BL. COM.).

whether the plaintiff was entitled to recover its value from the defendant. And the action of trover was the simplest way to get a legal resolution of that dispute.

Likewise, disputes concerning title to real property could be determined by the ancient and cumbersome procedure initiated by the writ of right, but the right to present possession – what really mattered – could be tried much more expeditiously by the action of ejectment. The problem was that ejectment had been designed to resolve questions of a *tenant's* right to possession, not an owner's. So, a plaintiff involved in a dispute over title to Blackacre alleged that he had leased the land to a tenant, John Doe, who was ejected by someone claiming authority from the defendant. The caption of the case read “Doe on the Demise [lease] of Plaintiff v. Defendant,” usually shortened to “Doe on the Dem. Of ...,” or even “Doe d” Before the defendant's answer could be heard, he had to admit the lease and ejectment, which everyone knew was pure fiction; then the court could proceed to the real issue, whether Plaintiff or Defendant had the better title.² These usages were carried over to the British colonies in North America and continued in the newly independent country. In a few states such as New Jersey and North Carolina the name of the fictitious tenant mutated to Den, so the caption became “Den on the Dem. Of”³ It became settled doctrine in America, that “trover is to personalty what ejectment is to realty.”⁴

Fictions made available some convenient forms of action; they also unlocked the doors to the common law courts. For six hundred years, the common law was administered by three courts: Common Pleas, King's Bench, and the Exchequer. Originally their jurisdiction was distinct. In general terms, Common Pleas handled – as its

² 3 BL. COM. 199-206.

³ See, e.g., *Den on the Dem. of Bayard v. Singleton*, 1 N.C. 5 (1787), a landmark case on judicial review, briefly discussed in John V. Orth, *THE NORTH CAROLINA STATE CONSTITUTION: A REFERENCE GUIDE* 7, 67-68 (1993).

⁴ *Russell v. Hill*, 34 S.E. 640, 640 (N.C. 1899). For a discussion of this case, see John V. Orth, *Russell v. Hill* (N.C. 1899): Misunderstood Lessons, 73 N.C. L. REV. 2031-61 (1995).

Fact & Fiction in the Law of Property

name implied – ordinary disputes; King’s Bench, more serious controversies; and the Exchequer, disputes concerning the royal revenue. Over time, the various courts enlarged their jurisdiction by allowing fictitious allegations. Although medieval lawsuits usually commenced with an initial filing called a writ, it had early been established that proceedings could be commenced by a bill if the defendant was already within the court’s jurisdiction, and King’s Bench had jurisdiction over all disputes of whatever kind arising in the County of Middlesex, which encompassed Westminster where the court sat. All that was required to gain access to King’s Bench, then, was to file a bill, known as a “Bill of Middlesex,” alleging a trespass in Middlesex by the defendant, who was lurking (*latitat*) in another county, and the court had jurisdiction to hear any real cause of action against him. In time, the Bill and its fictitious allegations came to be dispensed with altogether.

Common Pleas responded to this threat to its jurisdiction by allowing a fictional allegation that a defendant who had been summoned had failed to appear and required capture (*testatum capias*) before going on to the real cause in controversy. Not to be left out, the Exchequer expanded its reach by allowing an allegation that the defendant had failed to do justice to the plaintiff by which he was rendered less able (*quo minus*) to pay his dues to the King, again allowing access to the court for the resolution of the real dispute.⁵ By the mid-eighteenth century it was possible for Sir William Blackstone to summarize the situation by saying that the first process in the three courts was a *latitat* in King’s Bench, a *testatum capias* in Common Pleas, and a *quo minus* in the Exchequer.⁶

⁵ The judges’ uncharacteristic eagerness to enlarge their jurisdiction – and thereby increase their workload – is explained by the fact that the judges and their officers were compensated largely out of the fees collected from litigants. For a facetious summary with a serious intent, see John V. Orth, *A Reverie on Medieval Judges*, Milton Friedman, and the Supreme Court’s Workload, 69 A.B.A.J. 1454 (1983).

⁶ 3 BL. COM. 286.

In after years, the most notorious example of the use of fiction to extend jurisdiction was probably *Mostyn v. Fabrigas* (1774),⁷ in which the Mediterranean island of Minorca was alleged to be located in central London so that a dispute that arose there could be resolved in the Court of King's Bench. Of course, no one was fooled by this geographical tomfoolery or by any of the other legal fictions. Lord Mansfield, who participated in the decision of *Mostyn*, had observed in another case a few years earlier that "fictions of law hold only in respect of the ends and purposes for which they were invented; when they are urged to an intent and purpose not within the reason and policy of the fiction, the other party may shew the truth."⁸ Nonetheless, legal fiction carried to such an extent attracted increasing criticism in the Age of Enlightenment, and drew the particular ire of that tireless critic of the common law, Jeremy Bentham.⁹ Not only did Bentham object to the obscurantism – a charge that is hard to deny – but he was outraged by the idea of "a willful falsehood having for its object the stealing of legislative power by and for hands which could not, or durst not, openly claim it."¹⁰ Stripped of the fictions, what was going on – as Bentham rightly saw – was law making, not by the legislature, but by the courts.

Not only could convenient fictions overcome jurisdictional obstacles, they could also assist the court in doing justice in individual cases. To create an express easement, a deed was required, but when one person made long-continued use of the land of another in a manner that would normally indicate an easement, the absence of a deed could be excused by alleging that it had been lost. If the landowner had acquiesced in the use for long enough (usually the

⁷ 1 Cowp. 161, 98 Eng. Rep. 1021 (K.B. 1774). See J.C. Gray, *THE NATURE AND SOURCES OF THE LAW* 35 (2d ed. by Roland Gray, 1927) (1st ed. 1909) (describing *Mostyn* as "the most grotesque of these fictions"); Charles Allan Wright & Mary Kay Kane, *LAW OF FEDERAL COURTS* § 42, n. 2, p. 258 (6th ed. 2002).

⁸ *Morris v. Pugh*, 2 Burr. 1241, 1243, 97 Eng. Rep. 811, 811 (K.B. 1761).

⁹ For a brief biographical sketch see John V. Orth, *Jeremy Bentham: The Common Law's Severest Critic*, 68 A.B.A.J. 710-15 (1982).

¹⁰ Quoted in James Coolidge Carter, *LAW: ITS ORIGIN, GROWTH, AND FUNCTION* 181 (1907).

Fact & Fiction in the Law of Property

period set by the statute of limitations for the acquisition of an estate in fee simple by adverse possession), the allegation of the “lost grant” became irrebuttable – the origin of the modern law of easements acquired by prescription (literally, “previously written”).¹¹

A similar technical problem in the law of easements arose if a grantor attempted simultaneously to grant a fee simple and retain an easement in the granted land. Because at common law no one could have an easement in his own land – “so long as there is unity of ownership, there can be no easement”¹² – to effectuate intention, the court had to pretend that the grant of the fee by the grantor to the grantee included a simultaneous grant of the easement by the grantee to the grantor, leading to the baffling distinction in the law of conveyancing between an exception, which excepts (that is, excludes) an interest from a grant, and a reservation, which reserves (that is, in this sense, creates) an entirely new interest.¹³

¹¹ See Jon W. Bruce & James W. Ely, Jr., *THE LAW OF EASEMENTS & LICENSES IN LAND* § 5:1 (2001). See also Jerome J. Curtis, *Reviving the Lost Grant*, 23 *REAL PROP., PROB. & TRUST J.* 535 (1988); Mark A. Clawson, Note, *Prescription Adrift in a Sea of Servitudes: Postmodernism and the Lost Grant*, 43 *DUKE L.J.* 845 (1994). *Pace* Lord Mansfield, the ghost of the lost grant continued to haunt the law of easements by prescription since “adverse” use by the claimant was inconsistent with “acquiescence” in the use by the landowner.

¹² George Thompson, *COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY* § 352, p. 305 (1980).

¹³ “A *reservation* is a clause in a deed, whereby the grantor reserves some new thing to himself issuing out of the thing granted, and not *in esse* before; but an *exception* is always of a part of the thing granted, or out of the general words and description in the grant.” 4 James Kent, *COMMENTARIES ON AMERICAN LAW* 468 (12th ed. by Oliver Wendell Holmes, 1873) (hereinafter *KENT’S COM.*). The legal imagination was apparently exhausted by the effort of imagining the grant of an easement from the grantee to the grantor. It could not imagine a reservation in favor of a third party, one not in privity with the grantor and grantee. According to a rule at least as old as Lord Coke, “the reservation must be to the grantors, or some, or one of them, and not to any stranger to the deed.” 2 *BL. COM.* 299 (1766). See Edward Coke, *COMMENTARY UPON LYTTLETON* § 58, p. 47a (1628). The *RESTATEMENT (3D) OF PROP.: SERVITUDES* § 2.6 (2) (2000) rejects the old rule: “The benefit of a servitude may be granted to a person who is not a party to the transaction that creates the servitude.”



Separation of powers is one of the cardinal principles of American Constitutionalism, implicit in the structure of the Federal Constitution and explicit in many state constitutions. The North Carolina Constitution of 1776, for example, echoing the Maryland Constitution of earlier the same year, declared “that the legislative, executive, and supreme judicial powers of government ought to be forever separate and distinct from each other.”¹⁴ But the verbal triumph of separation of powers in America did not mean the end of lawmaking by legal fiction. As we have seen, the old common law causes of action, such as trover and ejectment, continued in use in the New World. So too did the fiction of the lost grant (easement by prescription) and the strained concept of easement by reservation.

While the precise jurisdictional gambits of the old common law courts found no home in the newly organized American court system, a remarkable new fiction quickly developed in the federal courts to confer jurisdiction where it would otherwise have been lacking. By presuming that all the stockholders in a corporation are citizens of its state of incorporation, federal courts were able to assume jurisdiction over many suits involving the rapidly proliferating new form of business association on the ground of diversity of citizenship. Harvard Law Professor John Chipman Gray early in the twentieth century denounced this fiction as “remarkable for the late date of its origin and for its absurd results.”¹⁵

Bentham and his followers had so blackened the name of legal fiction that the name had to go. But a very similar reality remained un-

¹⁴ N.C. Const. of 1776, Dec'l of Rights § 4, carried forward substantially unchanged in N.C. Const. art. I, § 6. See Orth, *THE NORTH CAROLINA STATE CONSTITUTION* 41-44. For a modern case involving this provision, see John V. Orth, “Forever Separate and Distinct”: Separation of Powers in North Carolina, 62 N.C. L. REV. 1 (1983). See also Md. Const. of 1776, Dec'l of Rights § 6. To the same effect, see Va. Const. of 1776, Bill of Rights § 5; Mass. Const. of 1780, Dec'l of Rights § XXX.

¹⁵ Gray, *THE NATURE AND SOURCES OF THE LAW* 35. See also *id.*, 183-86.

Fact & Fiction in the Law of Property

der the label of “constructive this-and-that.” The common law had a sorry history of expanding the reach of the medieval Treason Act¹⁶ by the doctrine of “constructive treasons,” which Chief Justice John Marshall firmly excluded from federal law in the treason trial of Aaron Burr.¹⁷ And Lord Mansfield denounced an expansive doctrine of constructive revocations in the law of wills: “some over-strained resolutions of that sort had brought a scandal upon the law.”¹⁸ Nonetheless, Chancellor Kent reluctantly admitted that this doctrine had crossed the Atlantic and flourished in America.¹⁹

Still, legal construction (if not legal fiction) served useful purposes. The law concerning gifts of personal property had long ago settled into a rigid pattern: actual delivery of the donated item was required, and delivery meant the complete surrender of dominion and control.²⁰ But attempted gifts of items that were remote or too large to deliver could be upheld on a theory of constructive delivery, if something that gave access to the thing, such as a key, or if some symbol of it, such as a writing, was actually delivered.²¹ The law of landlord and tenant gave the tenant the option of rescinding the lease in case of eviction, and eviction meant ouster by the landlord. But actions short of actual ouster that made continued occupancy very undesirable, and in some cases similar actions by persons

¹⁶ 25 Edw. 3, st. 5, c. 2 (1350).

¹⁷ *United States v. Burr*, 25 F. Cas. 55, 59-80 (C.C.D. Va. 1807) (No. 14,693) (distinguishing *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 126 (1807)).

¹⁸ *Swift d. Neale v. Roberts*, 3 Burr. 1488, 1491, 97 Eng. Rep. 941, 942-43 (K.B. 1764). Beginning with the reasonable principle that subsequent marriage and the birth of issue impliedly revoked a prior will, the courts had come to find that almost any change in circumstances caused a constructive revocation.

¹⁹ 4 KENT’S COM. 530.

²⁰ Modern U.S. Treasury Regulations concerning the effectiveness of gifts for tax purposes restate the common law requirement of complete surrender of dominion and control. Reg. § 25-2511-2(b).

²¹ Some commentators distinguish symbolic from constructive delivery, see, e.g., Dukeminier et al., *WILLS, TRUSTS, AND ESTATES* 503-04 (7th ed. 2005), but symbolic delivery is really only a subset of constructive delivery. Constructive delivery is anything other than actual delivery that is treated as if it were actual delivery.

other than the landlord, came to be accepted by courts as giving rise to the same remedy on a theory of constructive eviction.²² At common law, fraud required the intentional misrepresentation of a material fact, but constructive fraud could be found on a representation of a fact as of one's own knowledge when such knowledge was actually lacking.²³

Constructive delivery, constructive eviction, and constructive fraud were all recognized by common law courts to lessen the rigors of common law rules and produce a just result, but a constructive something can also be produced by statute. The operation of the recording acts means that a purchaser is charged with notice of whatever is revealed on the face of the record even if he did not cause the record to be examined; he has constructive notice.²⁴ And apart from the statute, a court can find constructive notice from facts on the ground that would cause a reasonable person to make inquiries, sometimes called "inquiry notice."²⁵ In consequence, the defense of bona fide purchase — that a good faith purchaser takes clear of defects in title unknown to him — is sometimes denied even to one who had no actual knowledge.

Although construction can be a (more or less intended) by-product of a statute, as with the recording act, it is more commonly used by courts to prevent a statute from producing an inequitable result. The statute of descent and distribution might provide that on the death of a married man survived by a wife and no descendants, the wife is to succeed to all his property. But what if she had murdered her husband? One response has been to allow the legal title to descend to the murderer as provided by the statute and then, in an appropriate proceeding, to impress a constructive trust on the

²² See, e.g., *Blackett v. Olanoff*, 358 N.E.2d 817 (Mass. 1977) (finding constructive eviction due to a disturbance created by other tenants of the same landlord).

²³ See, e.g., *Nat'l Academy of Science v. Cambridge Trust Co.*, 346 N.E.2d 879 (Mass. 1976).

²⁴ Gray, *THE NATURE AND SOURCES OF THE LAW* 36-37.

²⁵ See, e.g., *Sanborn v. McLean*, 206 N.W. 496 (Mich. 1925).

Fact & Fiction in the Law of Property

property.²⁶ In other words, the murderer is treated as a trustee, holding bare legal title for the benefit of others. The trust is, of course, pure fiction, imposed to prevent wrongful gain from bad behavior, a trust *ex malificio*.²⁷ There was no intention to create it, and the trustee is not given the usual powers of control and management. In fact, the trustee may do nothing with the property except whatever is necessary to transfer legal title to the beneficial owner.²⁸ Despite its name, the constructive trust is merely a remedial device, not properly part of trust law at all²⁹ – to the consternation of modern law students, not so inured to legal fictions as their predecessors. Of course, legislation in the form of so-called slayer statutes can reach the same destination more directly.³⁰

In addition to the historic common law courts, there was also a court of chancery or equity, with jurisdiction generally supplemental to that of the law courts. This opened the possibility of further fictions under the name of “equitable this-and-that,” a possibility made even more likely when law and equity came to be administered by the same court. Where a child is raised by persons other than her parents who did not follow the statutory procedures for legal adoption, it might be equitable (in the general sense of “fair”) to treat the child as if she had been legally adopted; thus was born the concept of equitable adoption.³¹

Equity courts had jurisdiction over disputes concerning transfers of property because the remedy at law (damages) was presumed to

²⁶ In re Estate of Mahoney, 220 A.2d 475 (Vt. 1966).

²⁷ See James Barr Ames, Can a Murderer Acquire Title by His Crime and Keep It?, in LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS 310 (1913) (originally published in American Law Register, 1897) (developing theory that legal title passes to a murderer subject to a trust *ex malificio*).

²⁸ George T. Bogert, TRUSTS § 77, p. 287 (6th ed. 1987) (constructive trustee’s “sole duty is to transfer title and possession to the beneficiary”).

²⁹ See Benjamin N. Cardozo, THE NATURE OF THE JUDICIAL PROCESS 42 (1921).

³⁰ See, e.g., N.C. Gen. Stat. § 31A-1ff. See also Uniform Probate Code § 2-803 (1990).

³¹ See, e.g., Lankford v. Wright, 489 S.E.2d 604 (N.C. 1997), noted in 76 N.C. L. REV. 2446 (1998).

be inadequate, since any given parcel of land is unique. Equitable conversion, so-called, confers equitable title on a purchaser from the moment an enforceable contract for the sale of land is executed. In other words, the purchaser under a still executory contract is treated in equity as if the transaction had actually closed because the contract was specifically enforceable.³² Not only can equitable conversion allow a contract to be treated as a grant, it can also allow personal property to be treated as real property. When condemnation replaces land with money, the money is held by the same title as the realty, which can have significant consequences when the land was held in tenancy by the entirety. Just as the land could not have been sold or otherwise dealt with by one spouse alone, so the money is held *in solido*, inseverable by the act of either spouse and with an indefeasible right of survivorship.

Mortgage law, too, is marked by the equity court's special role in real estate transactions. Although originally structured as a defeasible transfer – in many states it still bears the marks of its origin – the mortgage has been hedged about over the years with an elaborate series of protections for the borrowing landowner. But a distressed borrower might succumb to a lender's demand that he waive these protections, or that he allow the transaction's true nature to be disguised as an outright sale. Equity will pierce the veil and look through to the reality – doing justice by means of a fiction, the equitable mortgage.



Legal fiction began as a means to add flexibility to the law in an age when statutes were few and far between.³³ Grown accus-

³² Cardozo, JUDICIAL PROCESS 38-39.

³³ See Henry Sumner Maine, ANCIENT LAW 15 (1861) (“A general proposition of some value may be advanced with respect to the agencies by which Law is brought into harmony with society. These instrumentalities seem to me to be three in number, Legal Fictions, Equity, and Legislation. Their historical order is that in which I have placed them. Sometimes two of them will be seen operating together . . .”).

Fact & Fiction in the Law of Property

tomed to the practice, the judges continued to use it to address the problems inevitably generated by the clash between the operations of a rule-based system and the demands of individual justice. A rule is settled, whether by precedent or statute, that comes to seem unduly restrictive. A gift is intended, but the item to be given is not (or cannot be) actually delivered. A tenant leaves premises that have been made functionally, if not actually, untenable by the landlord. A person in a position to know misstates a fact on which another reasonably relies. A person who acts as a parent fails to comply with the terms of the adoption statute. A person with the opportunity to inform himself from the record fails to examine it and claims the protections accorded a good faith purchaser without notice. An heir takes title to property that rightfully should pass to another. A person obligated to purchase real property has not yet actually been tendered the deed. A borrower has tried to surrender legal protections incident to a mortgage.

Legal development by precedent is of no help in these cases. The law has already reached its outermost limit. There was really no delivery, eviction, fraud, or notice. The child was not legally adopted. Legal title has not yet passed; no mortgage was actually given. It is no longer possible to say that these cases are like the others in all essential details, the necessary predicate for the application of precedent or a statute. But justice demands a similar result. So, fictions in the form of legal or equitable constructions are pressed into service. If the cases are not really alike, then a court will simply pretend that they are.

Of course, legal fiction is not the only device to handle the clash between inflexible rules and just results. The ancient law of waste prohibits a person with only a limited interest in real property such as a life estate from altering the physical condition of the land. But what if the change is beneficial and restoring the property would actually be destructive of value? To escape the consequences of waste by indulging the fiction that there had been no alteration at all goes too far, so the effect of the rule must be nullified by a different device. Waste it is and waste it remains, but a new form of waste is recognized: meliorating waste, waste that does not waste (that is,

diminish) the property, but actually improves it, and so does not merit the consequences of real waste.³⁴ Thus, the rule is preserved and justice is done.

Sometimes, the root of the problem is a statutory requirement of form, as with the law prescribing the form of adoption. The Statute of Frauds requires a writing “signed by the party to be charged therewith” for “any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them.”³⁵ What is to be done in the case of a deed poll, signed only by the grantor and accepted by the grantee, but including covenants to be performed by the grantee? How is the grantee who never signed to be held liable for any violations of the covenants? It has been seriously suggested that perhaps the grantee can be held to have adopted the grantor’s signature as the grantee’s own.³⁶ Of course, the straightforward approach is simply to dispense with the statutory requirement of a signature in this case.³⁷

What about ill-advised or unadvised parties who enter into an oral contract for the sale of land? The equitable doctrine of part performance allows the court to enforce the contract despite the Statute of Frauds if actions such as a change in possession, payment, and the making of improvements have taken place.³⁸ The chancellor’s conscience is salved by the reasoning that these objective acts are referable only to both parties’ understanding that a binding contract

³⁴ See, e.g., *Melms v. Pabst Brewing*, 79 N.W. 738 (Wis. 1899).

³⁵ 29 Car. 2, c. 3, § 4 (1677).

³⁶ 2 AMERICAN LAW OF PROPERTY 408 (A. James Casner ed., 1952) (“[A]cceptance by the grantee . . . amounts to an adoption of the signature of the grantor as that of the grantee also, so that the requirement of the statutes of frauds as to signature is considered satisfied.”).

³⁷ See, e.g., *Harris & Gurganus v. Williams*, 246 S.E.2d 791, 794 (N.C. App. 1978) (“A grantee, by acceptance of a deed, becomes bound by conditions, etc., contained therein, even though he has not signed the deed. The delivery and acceptance of a deed takes covenants contained therein out of the operation of the statute of frauds.”). Accord RESTATEMENT (3D) OF PROP.: SERVIDITUDES § 2.7 cmt. g (2000).

³⁸ See *Zechariah Chafee, Jr. & Edward D. Re*, CASES AND MATERIALS ON EQUITY 549-50 (5th ed. 1967).

Fact & Fiction in the Law of Property

had been made – thereby satisfying the policy behind the statute, securing reliable evidence of intention. What if a person makes an unqualified conveyance in due form but subject to an oral agreement to reconvey under certain conditions? Technically void, the oral agreement can nonetheless be enforced under a theory of constructive trust in order to prevent fraud, a further instance of a trust *ex malificio*.³⁹

Similarly, an oral grant of an easement fails under the statute, but entry by the grantee is no trespass because the grant can at least function as a license, which is not subject to the requirement of a signed writing. If improvements are made by the grantee in reasonable reliance on the validity of the easement, the licensor can be estopped to revoke the license (at least so long as necessary for the grantee to recoup on the investment).⁴⁰ Of course, an irrevocable license is indistinguishable from an easement, the only difference between an easement and a license being the revocability of the latter. In consequence, although easements cannot be created orally, an oral easement coupled with reasonable reliance can become an irrevocable license – or, to make a long story short, an easement “by estoppel.”⁴¹

Again, the Statute of Frauds requires a writing for leases of more than a certain period.⁴² What is to be done in case of an innocent

³⁹ See, e.g., *Hieble v. Hieble*, 316 A.2d 777 (Conn. 1972).

⁴⁰ See, e.g., *Stoner v. Zucker*, 83 P. 808 (Cal. 1906). On the duration of the estoppel, compare 2 AMERICAN LAW OF PROPERTY 321 (“The irrevocability ... extends only so far as necessary to protect the licensee in the expenditures made by enabling him to realize upon them.”) with RESTATEMENT (THIRD) OF PROP.: SERVITUDES, ch. 4, Intro. Note, at p. 496 (“The first Restatement of Property took the position that irrevocable licenses ... have a shorter duration, based on the period of time necessary to amortize the expenditures that gave rise to creation of the easement. A similar result could be reached in a particular case under § 4.3, but only if the circumstances suggest that the parties intended or reasonably expected that result. Otherwise, the irrevocable license is treated the same as any other easement.”).

⁴¹ See Bruce & Ely, LAW OF EASEMENTS AND LICENSES § 6:1.

⁴² 29 Car. 2, c. 3, §§ 1-3 (1677) (leases of more than three years “from the making thereof”). Some statutes preserve the three-year period, see, e.g., N.C. Gen.

failure to comply? The court can recognize the creation of a periodic tenancy instead.⁴³ While not achieving all that the parties intended to accomplish (as with part performance), this result at least gives both parties legal rights, and the tenant some security of tenure. Ironically, periodic tenancies are exempt from the statute because the longest period allowed is one year; yet, unless timely notice is given by either party, the tenancy may endure for as long as (or even longer than) the term of the unenforceable oral lease.⁴⁴

The Statute of Wills allows revocation by physical act, if done with the requisite intent, the *animus revocandi*. What if a testator who has a validly executed will revokes it and executes another instrument which is intended to replace it but which is, for one reason or another, defective? In order to effectuate intention a court may disregard the revocation and assume that it was meant to be conditional on the validity of the replacement. To avoid the name (if not the reality) of legal fiction, the device is known to generations of law students as “dependent relative revocation.”⁴⁵

Finally, the Statute of Wills prescribes a specific form for the execution of a will, usually the signature of the testator witnessed by two disinterested witnesses. What to do about innocent failures to comply? Strained constructions upholding technically defective wills have been resorted to⁴⁶ – the reverse of the “over-strained

Stat. § 22-2, but most reduce the period to one year. E.g., Va. Code Ann. § 11-2.

⁴³ William Geldart, INTRODUCTION TO ENGLISH LAW 84 (D.C.M. Yardley ed., 9th ed. 1984) (“[A]t common law a lease which ought to be made by a deed but is not will not completely fail of effect, if possession is taken and rent paid under it; the tenant will be treated as tenant from year to year upon the terms of the lease so far as they are applicable to such a tenancy.”).

⁴⁴ Latterly, as leases are increasingly conceptualized as contracts, it has been held that part performance may also be applicable in the case of leases. See, e.g., *Corder v. Idaho Farmway, Inc.*, 986 P.2d 1019 (Idaho App. 1999).

⁴⁵ See Thomas E. Atkinson, HANDBOOK OF THE LAW OF WILLS § 88, p. 452 (describing it as the “fiction of conditional revocation”).

⁴⁶ See, e.g., *In re Snide*, 418 N.E.2d 656 (N.Y. 1981) (allowing probate of will not signed by testator when error resulted from mistaken execution of mutual wills by husband and wife).

Fact & Fiction in the Law of Property

resolutions” concerning constructive revocations that Lord Mansfield long ago found so scandalous. Latterly, it has been proposed to disregard the formal requirements altogether. The Uniform Probate Code, in a section captioned “harmless error,” would allow the probate of an informally executed will if a judge is convinced by “clear and convincing evidence that the decedent intended the document ... to constitute ... the decedent’s will”⁴⁷ The vestigial requirement of a “document” may be the next to go, as videotaping and computer files become commonplace.⁴⁸ In other words, here we pass beyond the realm of rules – real, fictional, constructive, or equitable – and into the realm of discretion, the judge to do justice on the facts of each individual case.



We have seemingly wandered far from the ancient legal fictions allowing allegations of facts known to be false. But our path has actually brought us close to the heart of the matter. The Rule of Law, humanity’s best effort so far to produce justice on a regular basis, requires rules, but because of their rigidity and generality, rules can produce injustice in individual cases. Making and changing rules is the very definition of legislation, but the legislature is constrained to make rules with only prospective effect, and in any event the legislature is not in permanent session and cannot be expected to address every imaginable (and unimaginable) contingency. The judges have responded from time immemorial with fictions and constructions of one sort or another. The larger fictions, of course, are that the judges are not legislating and that the newly discovered rules had been there all along. Perhaps, as critics since the days of

⁴⁷ Uniform Probate Code § 2-503 (1990, as amended 1997). Although captioned “harmless error,” this section really grants a dispensing power. See John V. Orth, *Intention in the Law of Property: The Law of Unintended Consequences*, 8 GREEN BAG 2D 59, 64-65 (2004).

⁴⁸ See *Rioux v. Coulombe*, 19 Est. & Tr. Rep. 2d 201 (Quebec 1996) (probating electronic will under provincial statute allowing substantial compliance with Wills Act). See also Nicholas Kasirer, *From Written Record to Memory in the Law of Wills*, 29 OTTAWA L. REV. 39 (1997/1998).

John V. Orth

Bentham have maintained, it is time to abandon these pretenses and insist on candor. But it is a fact that so long as there have been rules, there have been legal fictions, allowing slightly different cases to be shoehorned into existing patterns. And legal fictions will persist – until, that is, we are ready to abandon the Rule of Law altogether and simply allow the judges to resolve every dispute “on its merits.”

