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## Surviving Fictions II

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## SURVIVING FICTIONS II\*

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EXAMPLE SIX: *As to the alleged presumption that everyone knows the law.*

"Everyone is presumed to know the law."

This, on its face, is a rule of evidence.

"Ignorance of law excuses no one" (for breaking the law); or, more fully, ignorance of law affords no excuse for crime, breach of contract, or tort.

This is a rule of substantive law whose precise limits or application need not now be considered.

The alleged presumption is sometimes treated (spoken of) as if it were either

(1) identical with the rule of substantive law (a paraphrase or free translation of the rule); or

(2) as giving us a correct reason for the rule of substantive law.

Neither view is correct.

As to the first view.

It has been said:

"The presumption is a rhetorical paraphrase for the statement that ignorance of law is no defense to legal liability."<sup>107</sup>

"Often these maxims and ground principles get expressed in this form of a presumption perversely and inaccurately, as when the rule that ignorance of the law excuses no one, is put in the form that everyone is presumed to know the law. . . ."<sup>108</sup>

"When we say that men are conclusively presumed to know the Criminal Law, we mean that men are to be punished for certain acts without regard to whether they know them to be against the law or not."<sup>109</sup>

As to the second view—that the alleged presumption gives the correct reason for the rule of substantive law.

This again is erroneous, though more plausible than the first view.

To this second view there are two answers:

(a) There is no such presumption.

(b) There is another, and a sufficient, reason for the rule of substantive law.

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\* Continued from the March, 1918, issue—Vol. II St. Louis Law Rev. 214.

<sup>107</sup> Best, *Evid.* (3d Am. ed. by Chamberlayne) 310 b.

<sup>108</sup> Thayer, *Prel. Treatise on Evid.* 335.

<sup>109</sup> Gray, *Nature and Sources of the Law*, s. 228.

(a) There is no such presumption. It is not well founded on fact. It is a fiction.<sup>110</sup>

"There is a rule of law that in certain cases ignorance of law excuses no one; but there is no presumption that everyone knows the law."<sup>111</sup>

"If this presumption can be taken to mean that most persons know the law, it is on its face absurd."<sup>112</sup>

That any actual system of law is knowable by those who are bound to obey it

"is so notoriously and ridiculously false that I shall not occupy your time with proof to the contrary."<sup>113</sup>

"There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so."<sup>114</sup>

"Now to affirm 'that every person *may* know the law,' is to affirm the thing which is not. And to say 'that his ignorance should not excuse him *because* he is *bound* to know,' is simply to assign the rule as a reason for itself."<sup>115</sup>

"Its identity with the recognized maxim *ignorantia juris non excusat* being disproved, the proposition that a man is presumed to know the law is proved to be of decidedly questionable character."<sup>116</sup>

"As regards knowledge of law the rule is that ignorance of the law is no excuse for breaking it, a doctrine which is sometimes stated under the form of a maxim that everyone is conclusively presumed to know the law—a statement which to my mind resembles a forged release to a forged bond."<sup>117</sup>

(b) There is another, and a sufficient, reason for the rule of substantive law, and there is no need to resort to the fiction of a presumption of knowledge.

The rule is an arbitrary one, founded not in mere expediency, but on necessity.<sup>118</sup> The real reason is fully stated by Austin in substance as follows: If ignorance of law were admitted as a ground of exemption, the court would be compelled to enter upon interminable questions of fact. They would have to try not only the question whether the party was ignorant of the law, but also whether his ignorance was

<sup>110</sup> It might not be unreasonable to presume that most men know that theft is a crime, but the alleged presumption, as usually stated is not limited to the most common instances of unlawfulness.

<sup>111</sup> Keener, *Quasi-Contracts*, 87.

<sup>112</sup> Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law* (1908) 22 Harv. L. Rev. 91.

<sup>113</sup> 1 Austin, *Jurispr.* (3d ed.) 497.

<sup>114</sup> Maule, J., *Martindale v. Falkner* (1846) 2 C. B. 706, 719. See also Lord Mansfield, *Jones v. Randall* (1774) Cowp. 37, 40; Abbott, C. J., *Monriou v. Jefferys* (1825) 2 Car. & P., 113, 116.

<sup>115</sup> 1 Austin, *Jurispr.* (3d ed.) 498.

<sup>116</sup> Woodward, *Quasi-Contracts*, s. 36.

<sup>117</sup> 2 Stephen, *Hist. of Crim. Law of Eng.* 114.

<sup>118</sup> 1 Bishop, *New Crim. Law*, s. 294 ¶ 1.

inevitable, whether he might have known the law if he had tried to know it. And for the purpose of determining whether he was to blame for his ignorance,

"it were incumbent upon the tribunal to unravel his previous history, and to search his whole life for the elements of a just solution."<sup>119</sup>

By the great weight of judicial decision, money paid under a mistake of law cannot be recovered back; in an early leading case the reason given was: "Every man must be taken to be cognizant of the law." Two recent writers have strenuously contended that the decisions denying recovery are erroneous; the rule *ignorantia juris non excusat* applying only to cases of delinquency.<sup>120</sup> Into the discussion of this question we do not enter. For present purposes it is enough to say that if the alleged presumption as to knowledge of law is not recognized in cases of delinquency, there is no good ground for recognizing it in cases of money paid under mistake.

EXAMPLE SEVEN: *Constructive Fraud*.<sup>121</sup>

"Looking to the common sense of the question, it seems that constructive fraud is, or was, so called just because it was not actual fraud."<sup>122</sup>

It is used only "in an artificial sense of the word." Fraud, actual fraud, involves the element of moral delinquency, such as conscious dishonesty, or conscious disregard of truth.

How came the term "constructive fraud" to be used? Is there any good reason for continuing to use it?

Equity originally was a system intended to allow parties relief which could not be obtained under the stiff and unbending rules and procedure of the common law. It involved a more elastic procedure and new rights. But in time, equity itself began to harden into a rigid system. There was a tendency to refuse to entertain a case unless the particular case could be brought under some already recognized head of equity jurisdiction. Fraud was one of those heads. Hence, in

<sup>119</sup> 1 Austin, *Jurisp.* (3d ed.) 498-499. See also reason stated in Holmes, *Common Law*, 48. The difficulty of investigation is not rated so high in Holmes, nor in one passage in Salmond, *Jurisp.* (ed. 1902) 460; but in an earlier passage on p. 458-9, Salmond seems to agree substantially with Austin.

<sup>120</sup> Keener, *Quasi-Contracts*, 85-90; Woodward, *Quasi-Contracts*, ss. 35-37.

<sup>121</sup> "Among the regular though not invariable marks of fictions in modern English law is the use of the word 'constructive' or the word 'implied,' as any careful student may note for himself." Sir F. Pollock, *Notes on Maine's 'Ancient Law'* (1905) 21 *Law Quart. Rev.* 165, 173. See the same learned writer as to constructive notice, constructive possession, and constructive delivery, in 31 *Law Quart. Rev.* 94.

<sup>122</sup> Sir F. Pollock, *Nocton v. Lord Ashburton* (1915) 31 *Law Quart. Rev.* 93-94.

cases where there was no actual fraud, but where justice required the granting of relief, there was an attempt to discover some analogy or resemblance to fraud which might plausibly justify the court in applying the epithet "constructive" fraud and in regarding the case as falling under the general head of fraud. The result was that "constructive fraud" became a prominent title in equity, occupying a large space in Judge Story's work on *Equity Jurisprudence*, covering more than 160 pages in the first edition of that work, published in 1835.<sup>123</sup> Jurisdiction was taken as to certain classes of persons, or upon certain states of fact, where there was no actual dishonesty, but which were classed under the general head of constructive fraud.

Judge Story, at the beginning of his long chapter on Constructive Fraud, has sometimes been regarded as almost apologizing for doctrines which (as he says) "may seem to be of an artificial, if not of an arbitrary, character."<sup>124</sup> But Mr. Bower has recently said that the apology should have been made.

"not for the doctrines, which are admirable, but for the nomenclature, which is vile. . . . The 'arbitrariness' is in describing these acts by a name in popular use to which they do not answer . . . instead of simply laying down that certain acts and omissions are prohibited, irrespective of fraud or honesty, on the ground of the tendency and temptation to evil which would otherwise result."<sup>125</sup>

At the present time, however, there is no longer any need to resort to subterfuges or to employ fiction phraseology. "At this day we have learnt a bolder and simpler method."<sup>126</sup> Courts of equity as well as courts of law do not now hesitate to declare distinctly that certain duties are incumbent upon specific classes of persons, or in certain situations of fact. And they hold persons liable for violations of these duties utterly irrespective of dishonesty or of conscious wrong doing. Liability is imposed where there is no tinge of actual fraud nor any ground for applying the epithet of constructive fraud.

The modern method of dealing with cases which might formerly have been classed under "constructive fraud" is illustrated by the recent decision of the House of Lords in *Nocton v. Lord Ashburton*.<sup>127</sup> In that case a solicitor advised his client to release part of a mortgage

<sup>123</sup> "Some of you may remember the terribly multifarious contents of the heading 'Constructive Fraud' in the old-fashioned books on equity. Logically, nothing could be less defensible than such a catalogue, or more bewildering to young students." Pollock, *Expansion of the Law*, 115.

<sup>124</sup> 1 Story, *Eq. Jurisp.* (1st ed.) sec. 258.

<sup>125</sup> Bower, *Actionable Misrepresentation*, App. s. 455, p. 387.

<sup>126</sup> Pollock, *Law of Fraud in British India*, 15, 16, 41, 42.

<sup>127</sup> L. R. [1914] App. Cas. 932. See 40 *Law Mag. & Rev.* (5th Ser., 1915) 223-226.

security in which the solicitor himself was interested. The result of following this advice was that the security became insufficient and part of the mortgage money was lost. The client sued the solicitor in the Chancery Division to recover for the loss. Fraud was prominently averred as a ground for relief. Upon a hearing, it appeared that the solicitor had negligently failed to ascertain the truth of the representations which he made to his client. The judge of first instance, Neville, J., while holding that the solicitor stated what was not true in fact, and in advising as he did fell far short of his duty as solicitor, nevertheless found there was no actual fraud proved, and dismissed the action. The Court of Appeal reversed the decision on the ground that actual fraud was proved. The House of Lords held that the Court of Appeal was not justified in reversing the finding of fact by Neville, J., as to there being no actual fraud. But they decided in favor of plaintiff upon the ground (1) that there was a duty upon the solicitor, arising from the fiduciary relation, to use care in ascertaining and imparting information; (2) that there had been a breach of this duty; and (3) that the breach of this duty gave the client a right to relief without proving conscious dishonesty, or conscious disregard of truth, or actual fraud of any kind, on the part of the solicitor. They distinguished *Derry v. Peek*<sup>128</sup> on the ground that that was "an action wholly and solely of deceit, founded wholly and solely on fraud;" and that deceit being "a necessary factor, actual dishonesty, involving *mens rea*, must be proved." They say that the decision in *Derry v. Peek* "has no bearing whatever on actions founded on a breach of duty in which dishonesty is not a necessary fact."<sup>129</sup>

Sir F. Pollock, in commenting on *Nocton v. Lord Ashburton*, concurs in the view that this case is not affected by the decision in *Derry v. Peek*:

"and this is not the less so because the breach of these special fiduciary duties was called 'constructive fraud' in the days when equity practitioners used the word Fraud as *nomen generalissimum*."

He also says that

"a rule of law making wilful falsehood or at least conscious disregard of truth a necessary element in actual fraud is not, on the face of it, applicable to the various breaches of duty

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<sup>128</sup> (1889) L. R. 14 App. Cas. 337.

<sup>129</sup> Lord Shaw, p. 970; Lord Parmoor, p. 978. As to alleged inconsistencies in the law now applied to misrepresentation in its various aspects, see the valuable article by Prof. Williston, *Liability for Honest Misrepresentation* (1911) 24 Harv. L. Rev. 415-440.

which for historical reasons have been gathered under the catchword of 'constructive fraud.'"<sup>130</sup>

There is no more justification for using the term "constructive fraud" in courts of law than in courts of equity.

In both courts there has been a tendency to confuse negligence and fraud.

"Negligence and fraud are in truth mutually exclusive conceptions; although the same facts may (sometimes) be evidence either of one or of the other."<sup>131</sup>

But it is a mistake to assume that evidence which proves negligence must necessarily prove fraud. It is an error to treat

"facts which on no reasonable interpretation could be evidence of more than negligence as in themselves evidence of fraud."<sup>132</sup> It is an error to say that gross negligence "implies fraud,"<sup>133</sup> or that gross negligence is fraud.

The objections to the term "constructive fraud" (including the confusion resulting from its use) have been strongly stated by authorities entitled to great respect.<sup>134</sup> The reasonable conclusion is that the term should be dropped from the law.<sup>135</sup>

#### EXAMPLE EIGHT: *Constructive Trust.*

In the cases generally described by the term "constructive trust," that expression is confessedly a fiction phrase.<sup>136</sup> The so-called constructive trusts recognized and enforced by chancery "are neither express trusts nor resulting trusts."<sup>137</sup> Cases classed under this head are largely, if not wholly, cases where a defendant has wrongfully acquired possession of, or legal title to, property in violation of the rights of the beneficial owner, generally by fraud, actual or "constructive."<sup>138</sup> A court of equity in order to give the sufferer an efficacious remedy permits him to employ the same "machinery" applied by such

<sup>130</sup> 31 Law Quart. Rev. 93, 94. Compare Lord Dunedin, L. R. (1914) App. Cas. 963, and Lord Haldane, 953.

<sup>131</sup> Ashburner, *Equity*, 87.

<sup>132</sup> See Ashburner, *Equity*, 88.

<sup>133</sup> See 1 Story, *Eq. Jurisp.* (8th ed.) s. 391.

<sup>134</sup> See, for example, Lord Romilly, M. R., *In re Agriculturists' Cattle Ins. Co.* (1867) L. R. 3 Eq. 769, 771-772; and Mr. Ewart in his work on *Estoppel*, 160, 232, 286, 259-261, 87, 98.

<sup>135</sup> The high authority of Mr. Pomeroy is opposed to this conclusion, although that very able writer recognizes the objections to the term. See 2 Pomeroy, *Eq. Jurisp.* (ed. 1881-1882) s. 874, n. 2; and see also s. 922.

<sup>136</sup> See 1 Perry, *Trusts* (6th ed.) s. 166, p. 262; Prof. Pound, *The Decadence of Equity* (1905) 5 Col. L. Rev. 20, 29.

<sup>137</sup> See Professor Costigan, *The Classification of Trusts as Express, Resulting, and Constructive* (1914) 27 Harv. L. Rev. 437, 448.

<sup>138</sup> 1 Pomeroy, *Eq. Jurisp.* s. 155; 2 *ibid.* s. 1044; 1 Perry, *Trusts* (6th ed.) s. 166, p. 259.

As to constructive trusts in cases other than those of fraud; see Bispham, *Principles of Equity* (9th ed.) s. 91, p. 168 *et seq.*; Adams, *Equity* (8th ed.) p. 36, n. 2.

courts to cases of violation of express trusts. But there is no "trust" in any proper sense of that term.<sup>139</sup> There is no fiduciary relation; no relation created in pursuance of the intent of the parties; no trust or confidence reposed by the beneficial owner in the so-called trustee.<sup>140</sup>

As to the meaning of the expression "constructive trust" when used in such connection, and as to the reason for so using it, there is a very clear statement by Lord Westbury in *Rolfe v. Gregory*<sup>141</sup> which may be regarded as a representative case. In that case, there had been a fraudulent abstraction of trust property by the trustee and a fraudulent receipt and appropriation of it by another party (the defendant Gregory) for his own personal benefit. The defense was set up that the plaintiff beneficiary had lost his remedy by lapse of time, it being contended that Gregory's liability "was to be considered as resulting merely from constructive trust." Lord Chancellor Westbury said<sup>142</sup> that this view

"involves a misapprehension of the true principles on which the action of this Court is founded. The relief is founded on fraud and not on constructive trust. When it is said that the person who fraudulently receives or possesses himself of trust property is converted by this Court into a trustee, the expression is used for the purpose of describing the nature and extent of the remedy against him, and it denotes that the parties entitled beneficially have the same rights and remedies against him as they would be entitled to as against an express trustee who had fraudulently committed a breach of trust."

So Professor Scott says of "constructive trust":

"It is the name given to the remedy, not the right for which the remedy is given. There is as good reason in the case of a non-fiduciary as in the case of a fiduciary for imposing a duty to surrender property acquired by a wrongful act; it should make no difference whether it is acquired by breach of trust or other fiduciary obligation, or by fraud or theft."<sup>143</sup>

<sup>139</sup> See 2 Pomeroy, *Eq. Jurisp.* s. 1044, 1 Perry, *Trusts* (6th ed.) p. 262.

<sup>140</sup> See Professor Scott (1913) 27 *Harv. L. Rev.* 126, n. 4. Professor Costigan, *op. cit.* 27 *Harv. L. Rev.* 437, 439, n. 6.

<sup>141</sup> (1865) 4 *De G. J. & S.* 576.

<sup>142</sup> *Ibid.* 579.

<sup>143</sup> *The Right to Follow Money Wrongly Mingled with Other Money* (1913) 27 *Harv. L. Rev.* 125, 126, n. 4. Mr. Bispham says:

"Equity . . . makes use of the machinery of a trust for the purpose of affording redress in case of fraud . . . But in such cases, the interference of courts of equity is called into play by fraud as a distinct head of jurisdiction; and the complainant's right to relief is based upon that ground, the defendant being treated as a trustee merely for the purpose of working out the equity of the complainant." Bispham, *Principles of Equity* (9th ed.) s. 91, p. 168.

The cases of fraud do not fall within any generally approved definition of the term "resulting trust." Hence, we do not here consider whether resulting trusts should be classed, as by Maitland, under the head of trusts created by act of the law, or, as by Costigan, under the head of trusts created by act of a party. See Professor Costigan, *op. cit.* 27 *Harv. L. Rev.* 437, 461, 462.



What phrase should be substituted for "constructive trust" in order to indicate the cases heretofore improperly described by that term? Answer: cases of tortious misappropriation of property for which there is a remedy in equity as well as at law.

**EXAMPLE NINE: *As to Fiction Contracts.***

Under this head must be classed a very large number of cases which, under the old forms of action, were enforced in an action of contract, but in which there was no contract whatever, the promise alleged in the declaration being an absolute fiction.

These cases are generally described as implied contracts or quasi-contracts. There are objections to both terms.

"Implied contract" is an ambiguous term. It may be understood as denoting either a contract implied in fact or a contract implied in law. The former is a genuine contract, the latter is a fiction contract.

A genuine contract includes two varieties. It may be what is called an express contract, *i. e.*, where the consent of the parties is "expressly stated in words spoken or written." Or it may be a contract "implied in fact" (sometimes described as "a tacit contract"), *i. e.*, a contract inferred as a fact from the conduct of the parties (some sort of conduct other than the use of words).<sup>144</sup> Each of these varieties is a true contract. They differ only in "the character of the evidence" by which the existence of the contract is proved. "The source of the obligation in each case is the intention of the parties."

"The term 'contract implied in law' is used, however, to denote, not the nature of the evidence by which the claim of the plaintiff is to be established, but the source of the obligation itself. It is a term used to cover a class of obligations where the law, though the defendant did not intend to assume an obligation, imposes an obligation upon him, notwithstanding the absence of intention on his part, and in many cases in spite of his actual dissent."<sup>145</sup>

A contract implied, or created, by law "is no contract at all. Neither mutual assent nor consideration is essential to its validity. It is enforced regardless of the intention of the obligor."<sup>146</sup>

The term quasi-contract is unsatisfactory to many jurists.<sup>147</sup> It "suggests a relation and an analogy between contract and quasi-contract. The relation is distant and the analogy slight. The differences are greater than the similarities."<sup>148</sup>

<sup>144</sup> See Terry, *Leading Principles of Anglo-American Law*, s. 483.

<sup>145</sup> Keener, *Quasi-Contracts*, 5.

<sup>146</sup> Professor J. B. Ames, *Lectures on Legal History*, 160.

<sup>147</sup> See Sir F. Pollock, *Notes on Maine's "Ancient Law"* (1906), 22 *Law Quart. Rev.* 89; 1 *Halsbury* (2d ed.) *Introd.* 11. Professor Knowlton, *The Quasi-Contractual Obligations of Municipal Corporations* (1911) 9 *Mich. L. Rev.* 671.

<sup>148</sup> Professor Corbin, *Quasi-Contractual Obligations* (1912) 21 *Yale Law Journal*, 533, 544.

A happier designation "would be one that avoided altogether the use of the word 'contract.'"<sup>149</sup>

The term quasi-contract, used in a very broad sense, applies "to all non-contractual obligations which are treated, for the purpose of affording a remedy, as if they were contracts."<sup>150</sup> In Anson on *Contracts* (12th ed.) 8, it is said:

"This is a convenient term for a multifarious class of legal relations which possess this common feature, that without agreement, and without delict or breach of duty on either side, A has been compelled to pay or provide something for which X ought to have paid or made provision, or X has received something which A ought to receive. The law in such cases imposes a duty upon X to make good to B the advantage to which A is entitled."

The scope of Woodward on *Quasi-Contracts* is confined solely to "obligations arising upon the receipt of a benefit, the retention of which is unjust."<sup>151</sup>

In the two treatises which have been published on the special subject of quasi-contract, the learned authors, Keener and Woodward, both affirm that, in all the cases grouped under this head, there is no genuine agreement or assent; and that the "contract" heretofore alleged in the declaration is a pure fiction.<sup>152</sup>

Why was the fiction of a contract employed by the courts in this class of cases? "The answer to this question is to be sought, not in the substantive law, but in the law of remedies."<sup>153</sup> In modern times, until the very recent changes in the law as to forms of action, it was commonly assumed that (apart from suits to obtain possession of specific articles of property) there were only two great divisions of causes of personal action, contract and tort; and that there could be no cause of personal action unless it could be classed under one or the other of these two heads.<sup>154</sup> Hence the court, in order to allow a remedy upon what was really a non-contractual obligation, used the

<sup>149</sup> See Woodward, *Quasi-Contracts*, s. 4. As to reasons for retaining the term quasi-contract now that it is in such general use, and as to the difficulty of finding a completely satisfactory substitute, see Professor Corbin, *op. cit.*, 21 *Yale Law Journal*, 533, 545, 553. Pollock and Knowlton prefer the term constructive contract to quasi-contract. See also Lowrie, J., in *Hertzog v. Hertzog* (1857) 29 Pa. 465.

<sup>150</sup> Woodward, *Quasi-Contracts*, s. 1.

<sup>151</sup> Woodward, s. 1. As to topics which might be included under quasi-contract, see Woodward, s. 1; Keener, *Quasi-Contracts*, 16-25. Cf. Corbin, *op. cit.*

<sup>152</sup> See Woodward, s. 4; Keener, pp. 5, 6; Maine, *Ancient Law* (3d Am. ed.) 332; Ames, *Lectures on Legal History*, 160; Judge Francis J. Swayze, *The Growing Law* (1915) 25 *Yale Law Journal*, 1, 4.

<sup>153</sup> Keener, *Quasi-Contracts*, 14.

<sup>154</sup> See citations in *Tort and Absolute Liability—Suggested Changes in Classification* (1917) 30 *Harv. L. Rev.* 241, 242-243.

fiction of a contract (alleged a fictitious contract).<sup>155</sup> Incidentally, it may be noted that this resort to fiction sometimes relieved the court from giving reasons for the existence of an obligation (from inquiring carefully into reasons for imposing absolute liability).

"It is easier for the courts to say that a man is bound to pay because he must be taken to have so promised, than to lay down for the first time the principle that he is bound to pay whether he has promised or not."<sup>156</sup>

"I think that there is at present, wherever the old forms of action have been abolished and pleadings are required to contain simply a statement of the actual facts, . . . no sufficient reason for persisting in the use of this fiction, but that it is for many reasons desirable to admit the existence of non-contractual obligations much more freely than we now do . . . and to confine the doctrine of contracts strictly within its legitimate bounds instead of suffering it to overspread nearly the whole area of the law of obligations."

(The author then says that he shall discard the fiction, and shall describe "the obligations commonly said to arise from quasi-contracts as non-contractual obligations.")<sup>157</sup>

"It seems clear that a rational system of law is free to get rid of the conception of quasi contractual obligation altogether. No useful purpose is served by it at the present day."<sup>158</sup>

In the cases just mentioned, there was no contract whatever between the parties; and the contract invented for the sake of the remedy was an entire fiction. But there are cases where there is a contract between the parties as to certain terms, and where the court adds other terms which were not subjects of agreement. In the latter instances

"the law adds terms to an actual contract independently of the will of the parties or puts an arbitrary construction upon particular words. In such cases the contract may be partly expressed or implied in fact, and partly implied in law."<sup>159</sup>

<sup>155</sup> See Salmond, *Jurisp.* (ed. 1902) 563; Keener, *Quasi-Contracts*, 14, 15.

<sup>160</sup> Salmond, *Jurisp.* (ed. 1902) 564.

<sup>157</sup> Terry, *Leading Principles of Anglo-American Law*, s. 483.

"In an arrangement of the law the notion of an implied contract, so far as that means a purely fictitious contract, and of a *quasi-contract*, should be dropped, and non-contractual obligations be frankly recognized as such." Professor H. T. Terry, 17 *Col. L. Rev.* (May, 1917) 378

<sup>158</sup> Salmond, *Jurisp.* (ed. 1902). 564. And see Keener, *Quasi-Contracts*, 160, 172.

<sup>159</sup> Terry, *Leading Principles of Anglo-American Law*, s. 485: "Implied Contracts of a Mixed Nature." Compare W. G. Miller, *Lectures on the Philosophy of Law*, 213.

See Terry, s. 488:

"That the implied terms which the law sometimes inserts in true contracts . . . , although they are inserted without the actual consent of the parties, are not inserted against their manifested will."

Judges do not often avowedly add to a contract terms which were never agreed to by the parties. Rather, they profess to be ascertaining (interpreting) the meaning of the language actually used by the parties. But sometimes they are, in reality, guessing as to what the parties would have agreed to upon a certain point in case that point had been present to their minds (as it was *not*).<sup>160</sup>

Assuming that the court has power to add terms to a contract, how shall such addition be designated? Shall the court, invoking the aid of fiction, describe them as contracts (contracts implied in fact)? Or shall the court speak of them as absolute obligations imposed by law? As to this there is a difference of opinion.

Professor Terry says:<sup>161</sup>

"In drawing the line here between contractual and non-contractual obligations, it seems to me that such implied terms cannot be separated from the contract, and that where there is an actual contract all the obligations resulting must be regarded as contract obligations even though they take their form from terms in the contract arbitrarily inserted by the law and not actually agreed to by the parties."

Professor Williston, however, says:<sup>162</sup>

"But when a seller is held liable on a warranty for making an affirmation of fact in regard to goods in order to induce their purchase, to hold that such an affirmation is a contract is to speak the language of pure fiction. . . . In truth, the obligation imposed upon the seller in such a case is imposed upon him not by virtue of his agreement to assume it, but because of a rule of law applied irrespective of agreement."<sup>163</sup>

Thus far we have been discussing examples of surviving fictions. But we wish now to consider briefly a discarded fiction whose history will repay examination. This is:

*The fiction of presuming a lost grant in order to establish an easement in case of twenty years user.*

It can hardly be said that this is a *surviving* fiction. The courts are now discarding the fiction presumption; and are substituting for it a positive rule of substantive law; "a rule of the law of property, to be applied absolutely." But it is interesting to consider briefly the origin, growth and final disuse of the fiction; and the adoption of a positive rule of law not based on the presumption, but giving practically the same results.

<sup>160</sup> See Professor Gray as to the judicial interpretation of statutes and wills, *Nature and Sources of the Law*, ss. 370, 702, 703.

<sup>161</sup> *Op. cit.* s. 485.

<sup>162</sup> *Liability for Honest Misrepresentation* (1911) 24 Harv. L. Rev. 420.

<sup>163</sup> As to Implied Warranty, see 2 Mechem, *Sales*, s. 1295; Professor Costigan, *Change of Position as a Defense in Quasi-Contracts* (1907) 20 Harv. L. Rev. 205, 207.

"The fiction of presuming a grant from twenty years' possession was invented by the English courts in the eighteenth century, to avoid the absurdities of their rule of legal memory."<sup>164</sup>

"The doctrine was originally adopted for the purpose of quieting titles, and giving effect to long-continued possession."<sup>165</sup>

At first, the presumption was not a conclusive one. Juries were allowed to find the existence of a lost grant ("were told that they might presume a lost grant") but the presumption could be rebutted.<sup>166</sup>

"In truth it was nothing but a canon of evidence. . . . This presumption of a lost grant or covenant was nothing more than a rebuttable presumption of fact. . . . It must at the same time be conceded that the courts exhibited a disinclination to treat the presumption as an ordinary one. They preferred to leave it in a logical cloud, and juries were encouraged, for the sake of quieting possession, to infer the existence of deeds in whose existence nobody did believe."<sup>167</sup>

Subsequently, juries were told that they not only might, but were bound to, presume the existence of such a lost grant.<sup>168</sup> They were not merely advised, but directed, to presume a lost grant. And they

"were directed so to find in cases in which no one had the faintest belief that any grant had ever existed, and where the presumption was known to be a mere fiction."<sup>169</sup>

Such instructions are given, said Wilde, J.,<sup>170</sup>

"not . . . because either the court or jury believes the presumed grant to have been actually made, but because public policy and convenience require that long continued possession shall not be disturbed."<sup>171</sup>

Next, the question arose whether the presumption could be displaced by showing that no grant was in fact made. Upon this question there is not unanimity. Conflicting views were expressed by

<sup>164</sup> Washburn, *Easements* (4th ed.) 125. See Lord Blackburn, in *Dalton v. Angus* (1881), L. R. 6 App. Cas. 740, 812.

<sup>165</sup> Washburn, *op. cit.* 126.

<sup>166</sup> See early cases collected in note to *Yard v. Ford* in 2 Williams' *Saunders* (ed. 1845) 175. See especially Lord Mansfield, C. J., in *Mayor of Hull v. Horner* (1774) Cowper, 102, 108, 109.

<sup>167</sup> Bowen, J., in *Dalton v. Angus* (1881) L. R. 6 App. Cas. 740, 781, 782-783.

<sup>168</sup> 11 Halsbury, s. 529.

<sup>169</sup> Cockburn, C. J., in *Angus v. Dalton* (1877) L. R. 3 Q. B. 85, 105.

<sup>170</sup> (1829) 8 Pick. 504, 508-509.

<sup>171</sup> In an article on *Legal Fictions: The Case of Angus v. Dalton*, 4 *Law Mag. and Rev.* (4th Ser., 1879) 281, 284, Sir Wm. Markby says:

"The grand error . . . is making the existence or non-existence of this fictitious grant part of the question to be submitted to the jury. Submit what? The truth of a fiction?"

In *Angus v. Dalton* (1877) L. R. 3 Q. B. 85, 94, Lush, J., speaks of "the revolting fiction of a lost grant." In the *First Report* of the English Commissioners on the Law of Real Property, the learned Commissioners call it "the clumsy fiction of a lost grant," and say that it is "well known to counsel, judge, and jury that the plea is unfounded in fact."

various judges in the leading case of *Dalton v. Angus*.<sup>172</sup> But we think that the weight of authority, both in England and America, is opposed to the admissibility of direct evidence to show that no grant was ever made.<sup>173</sup>

The practical result is that, in place of what was originally a presumption of fact, the courts have substituted a positive rule of law. Where a result was originally alleged to be founded on a presumption, the courts have discarded the presumption, and have established a positive rule of law not based on the presumption, but giving the same results. In effect,

"prescription has been advanced from the law of evidence to a place in the substantive law."<sup>174</sup>

"The familiar doctrine about prescription used to be put as an ordinary rule of presumption; in twenty years there arose a *prima facie* case of a lost grant or of some other legal origin. The judges at first laid it down that, if unanswered, twenty years of adverse possession justified the inference; then that it 'required the inference,' *i. e.*, it was the jury's duty to do what they themselves would do in settling the same question, namely, to find the fact of the lost grant; and at last this conclusion was announced as a rule of the law of property, to be applied 'absolutely.'<sup>175</sup>

In *Dalton v. Angus*,<sup>176</sup> Lindley, J., said:

"The theory of an implied grant was invented as a means to an end. It afforded a technical common-law reason for not disturbing a long continued open enjoyment. But it appears to me contrary to the reason for the theory itself to allow such an enjoyment to be disturbed simply because it can be proved that no grant was ever in fact made. If any lawful origin for such an enjoyment can be suggested, the presumption in favor of its legality ought to be made. . . . The theory of an implied grant as distinguished from a legal presumption of

<sup>172</sup> (1881) L. R. 6 App. Cas. 740.

<sup>173</sup> ". . . the presumption cannot be displaced by merely showing that no grant was in fact made; the long enjoyment either estops the servient owner from relying on such evidence or overrides it when given." Gale, *Easements* (9th ed.) 192. But, compare Goddard, *Easements* (7th ed.) 174.

English writers who seem inclined to adopt the view taken in Gale on *Easements*, state it cautiously. Thus, in Jenks' *Digest of English Civil Law*, Book 3, "Property," s. 1439: "(Probably) direct evidence may not be adduced to show that no grant . . . was in fact made." And in 11 Halsbury, s. 531: "Direct evidence that the grant was never made would appear to be inadmissible to rebut the presumption of a lost modern grant raised by the uninterrupted user."

As to American authorities: see 14 Cyc. 1146-1147. And compare 2 Chamberlayne, *Mod. Law of Evid.*, ss. 1163a, 1163b. See also *Wallace v. Fletcher* (1855) 30 N. H. 434.

<sup>174</sup> Salmond, *Jurispr.* (ed. 1902) 533.

<sup>175</sup> J. B. Thayer, *Prel. Treatise on Evid.* 317. Compare Bell, J., in *Wallace v. Fletcher* (1855) 30 N. H., 434, 447-8, 452.

<sup>176</sup> (1881) L. R. 6 App. Cas. 740, 765.

some lawful origin is in my opinion, untenable and practically misleading. . . ."<sup>177</sup>

In Markby, *Elements of Law*,<sup>178</sup> the learned author says:

'I do not think that the English law of prescription will ever be put upon a satisfactory footing until the notion is got rid of that all prescription presumes a grant, and until prescription is recognized here, as on the continent of Europe, as a means of acquiring ownership. The grant is only a fiction, and the fiction here is not a useful one. It does not indicate the principles to be applied.'

JEREMIAH SMITH

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<sup>177</sup> In Goddard, *Easements* (7th ed.) 180 it is said, in reference to the opinion of Lindley, J., in *Angus v. Dalton*:.....

" . . . his opinion is of importance, as he expressed a view that goes to the root of the whole theory of presumption of grant and tends to its destruction."

<sup>178</sup> (3d ed.) s. 588.

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