

## Legal Fictions as Strategic Instruments

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### Abstract

Legal Fictions were one of the most distinctive and reviled features of the common law. Until the mid-nineteenth century, nearly every civil case required the plaintiff to make a multitude of false allegations which judges would not allow the defendant to contest. Why did the common law resort to fictions so often? Prior scholarship attributes legal fictions to a "superstitious disrelish for change" (Maine) or to a deceitful attempt to steal legislative power (Bentham). This paper provides a new explanation. Legal fictions were developed strategically by litigants and judges in order to evade appellate review. Before 1800, judicial compensation came, in part, from fees paid by litigants. Because plaintiffs chose the forum, judges had an incentive to expand their jurisdictions and create new causes of action. Judicial innovations, however, could be thwarted by appellate review. Nevertheless, appellate review was ordinarily restricted to the official legal record, which consisted primarily of the plaintiff's allegations and the jury's findings. Legal fictions effectively insulated innovation from appellate review, because the legal record concealed the change. The plaintiff's allegations were in accord with prior doctrine, and the defendant's attempt to contest fictitious facts was not included in the record.

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*[I]n English law, fiction is a syphilis, which runs in every vein, and carries into every part of the system the principle of rottenness. (Jeremy Bentham)<sup>2</sup>*

*In fiction, there is always equity. (Edward Coke)<sup>3</sup>*

Legal fictions were among the most bizarre and controversial features of English law before the reforms of the nineteenth century. In nearly every case, the plaintiff made false allegations of fact, which the judges then prevented the defendant from contesting. For example, most property cases involved allegations of fictitious leases, and most contract cases alleged promises which were never made. Why were fictions so pervasive? Distinguished scholars have suggested a variety of reasons. Henry Maine opined that fictions reflected a “superstitious disrelish for change,”<sup>4</sup> while Bentham characterized them as deceitful attempts to steal legislative power.<sup>5</sup> While these and other explanations have substantial validity in explaining the use of legal fictions in a wide range of legal systems, they cannot explain the uniquely pervasive character of legal fictions in the early modern common law.

This article proposes a new explanation. Legal fictions were a strategic response by judges to two features of pre-modern English law—the fee system and the limited nature of appellate review.<sup>6</sup> Before 1800, judicial compensation came, in part, from fees paid by litigants. As a result, judges had an incentive to expand their jurisdictions so they could hear more cases. In addition, appellate review was ordinarily restricted to the legal correctness of the official legal record. By doctoring the record through legal fictions, judges could make jurisdictional expansion appear consistent with established doctrine. The factual falseness of the record could not be challenged on appeal, because appellate review was restricted to legal issues, not factual ones. The use of legal fictions thus effectively insulated innovation and jurisdictional expansion from appellate review.

### **An example**

In a case from 1442, the plaintiff brought a suit for failure to repay a debt contracted in Paris. In doing so, the plaintiff alleged that “Paris is in the Kingdom of England.” Defendant responded, “Paris is in the Kingdom of France, not the Kingdom of England.” Nevertheless, after counterarguments by the defendant and the Chief Judge of

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<sup>2</sup> Jeremy Bentham, *The Works of Jeremy Bentham*, John Bowring ed. (Edinburgh: William Tait, 1863), 5.92.

<sup>3</sup> *Richard Liford’s Case*, 11 Coke Reports 46b, 51b (1614)

<sup>4</sup> Henry Maine, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* (London: John Murray, 1861), p. —.

<sup>5</sup> Jeremy Bentham, *The Works of Jeremy Bentham*, John Bowring ed. (Edinburgh: William Tait, 1838), 1.243.

<sup>6</sup> This article uses the terms “appellate review,” “appellate court,” and “appeal” in a broad way that encompasses review by writ of error, court of error, and proceeding in error. While some legal historians distinguish sharply between appeals and proceedings on writs of error, this article uses these terms in a broader way to encompass any mechanism by which one set of judges reviews the decisions of other judges. This use facilitates comprehension by non-specialists and accords with the usage of some pre-modern writers, such as Blackstone.

Common Pleas, the defendant decided he was unwilling to stake his defense on the location of Paris and asked for more time.<sup>7</sup>

The plaintiff probably wanted to litigate in Common Pleas, one of the three principal common law courts, because that was the usual English court for debt disputes. Suing in France would have been very inconvenient, and it is unclear whether other courts in England would have heard the claim. English courts also required more stringent written proof of payment than French courts, so suing in Common Pleas may have been attractive for evidentiary reasons as well. Unfortunately, it was generally understood that Common Pleas did not have jurisdiction over debts incurred overseas. To avoid this problem, the plaintiff alleged (falsely) that the debt was incurred in England. The defendant tried to challenge that, but the plaintiff and judge made it clear that such a challenge was unlikely to succeed. If the defendant made a legal challenge to the sufficiency of the plaintiff's claim, the court would probably have ruled that the claim was legally sound, because, on such a challenge, the factual allegations made by the defendant (including the "fact" that Paris is in England) would be accepted as true, and only their legal implications would be at issue. On the other hand, if the defendant stated that he wanted the jury to decide whether Paris was in England, the judges would probably have denied the request for jury trial altogether. Alternatively, if the case went to jury trial, the judge would probably have instructed the jurors that the only issue for them to decide was whether the debt had been repaid, not the location of Paris. The judges' motives for blocking the defendant's defense would be, in part, their desire for the fee income attendant on hearing the case and similar cases. In addition, they were also probably motivated by the fact that, if the case were not heard in Common Pleas, the plaintiff might have had to sue in France, which, as a practical matter, might have denied the plaintiff any remedy.

If the defendant tried to challenge these decisions by appealing the case, his efforts would have been unsuccessful. The appeal procedure required a "writ of error." Writs of error from the court of Common Pleas were decided by the court of King's Bench, one of the other common law courts. In deciding the appeal, according to well-settled rules, King's Bench had to assume the factual correctness of the official record. It could only consider whether the record revealed proceedings which were legally correct. Because the record would state that the debt was incurred in England, unless there was some other problem with the record, the decision of the Court of Common Pleas would have to be affirmed.<sup>8</sup>

Of course, instead of resting the case on false allegations, the plaintiff might have alleged that Paris was in France and hoped that the court would have allowed the case to proceed anyway. This would have been a very risky strategy, because accepted legal principles required debts incurred in France to be litigated in French courts. Even if the Court of Common Pleas decided to accept the plaintiff's claim and explicitly took jurisdiction over the case, the decision could have been overturned on appeal. The record would have reflected the plaintiff's assertion that the debt was incurred in France, and, in proceedings on a writ of error, King's Bench could have reversed the decision because it was not in accord with accepted legal principles. Even if the King's Bench did not reverse, King's Bench's decision could have been further appealed to the House of Lords,

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<sup>7</sup> Yearbook 20 Henry VI 28b pl. 21 (1442) (Seipp # 1442.020)

<sup>8</sup> J.H. Baker, *An Introduction to English Legal History* (London Butterworths: 4<sup>th</sup> ed. 2002), pp. 136-37.

and that body might have reversed. As a result, the plaintiff's best strategy was ordinarily to make the false allegation that Paris was in England, and for the court of Common Pleas to support the legal fiction by barring the defendant from challenging it.

### **A working definition of legal fictions**

Legal philosophers have extensively debated the precise definition of a legal fiction. Fortunately, it is not necessary to take a position in that debate here. For the purposes of this paper, a legal fiction is a false statement of fact which judges will not allow the opposing party to contest. In the more technical language of pre-modern pleading, a legal fiction was a "non-traversable" allegation.<sup>9</sup>

Legal fictions are somewhat similar to modern "irrebuttable presumptions." An example of an irrebuttable presumption is that the husband is the father of a child born to his wife. Courts will not ordinarily allow fathers to contest paternity of such children. Although such presumptions bear some resemblance to pre-modern English fictions, two differences should be noted. First, a modern irrebuttable presumption does not require anyone to state something which is false. A child trying to enforce paternity does not have to baldly allege that the husband was his father. Rather, it is sufficient for the child to allege that the husband was married to his mother and therefore should be treated by the law as if he were the father. Modern presumptions are therefore more transparent and less openly false. Second, modern presumptions usually have some factual basis. Husbands usually are the fathers of children born to their wives. The irrebuttable presumption bars some husbands from proving an exception to the generalization. In contrast, early modern English legal fictions were almost always false.

### **The importance and pervasiveness of legal fictions**

Legal fictions were at the core of the pre-modern common law. Nearly every lawsuit involved one, and most involved two or more. Legal fictions provided the foundation for the jurisdiction of the three principal common law courts, and they were essential to the most common property, contract, and tort suits. (Legal historians familiar with the range of legal fictions can skip this section.)

Nearly every case began with a fictional allegation relating to jurisdiction. In the middle ages, each of the three common law courts had distinct jurisdictions. Common Pleas had jurisdiction over ordinary disputes concerning property and contract. King's Bench had jurisdiction over issues particularly related to the king and his prerogative, including breaches of the king's peace and other trespasses (torts), although the latter was shared with Common Pleas. Exchequer had jurisdiction over cases relating to royal revenue.<sup>10</sup> This allocation of jurisdiction was highly unequal. Common Pleas had jurisdiction over the most common and most lucrative cases, those involving land and debt. Judges on the other courts wanted a share of that jurisdiction, in large part because cases brought fee income.

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<sup>9</sup> *Id.* at 201 ("The more usual sense of the term [legal fiction] is that of the Roman  *fictio* , a false averment of fact by a party which could not be traversed and so could not be shown to be false."); J.H. Baker, *The Law's Two Bodies: Some Evidential Problems in English Legal History* (Oxford: Oxford University Press, 2001), p. 41 ("The essence of the classic legal fiction is that proof of a certain fact was dispensed with by the simple expedient of denying any means of disputing it.")

<sup>10</sup> *Id.* at 38-39, 47-48.

*Bill of Middlesex.* King's Bench invented a particularly ingenious (if complicated) way of expanding its jurisdiction. One relatively minor aspect of the accepted jurisdiction of King's Bench was that if a person was already in custody of the court (e.g. in a prison maintained by the court), the court could hear all manner of suits against such persons. That jurisdiction was relatively unimportant, because relatively few people were held in the court's custody. Starting in the fifteenth century, however, lawyers and judges in King's Bench realized that they could substantially expand the court's jurisdiction in the following manner. The plaintiff alleged a fictitious trespass (tort) in the county of Middlesex. The suit, as was typical of trespass suits in the pre-modern period, would lead to an order for the sheriff to arrest the defendant. The sheriff of Middlesex would not actually try to arrest the defendant, but instead the court would record a fictitious arrest and bail of the defendant. The court then construed being on bail as equivalent to being in custody and allowed the plaintiff to bring the real suit against the defendant. Because the defendant was, at least according to the official record, in the custody of King's Bench, the plaintiff could bring any kind of suit against the defendant, even suits which would otherwise have been outside the jurisdiction of King's Bench. When the defendant was actually summoned and appeared, he was not allowed to contest the "fact" that he had committed a trespass and had subsequently been arrested and bailed. Instead, the judges allowed him only to respond to the allegations in the second suit.<sup>11</sup>

In addition to expanding the jurisdiction of King's Bench, this procedure had an added advantage. It was cheaper than ordinary proceedings in Common Pleas (or King's Bench), because it did not require an expensive writ from Chancery. Instead, the plaintiff could proceed by a bill, a document drafted by the plaintiff's attorney. This method of starting a case in King's Bench came to be known as the Bill of Middlesex, because it started with a bill alleging a trespass in the county of Middlesex.

*Quominus.* The Court of Exchequer developed a similarly broad method of expanding its jurisdiction. Its jurisdiction was supposed to be confined to matters relating to royal revenue. Sometimes, matters relating to royal revenue would require investigation into disputes between ordinary people. For example, if someone owing taxes to the king was indebted to a third party and could not pay his taxes without first collecting from that third party, Exchequer had the power to resolve the dispute between the taxpayer and the third party. Lawyers and judges in the late middle ages realized that this originally minor aspect of Exchequer's jurisdiction could be used to dramatically expand the range of cases that could be tried in Exchequer. The plaintiff need only allege that he was indebted to the king and unable to pay his debts unless he recovered from the defendant, and the court would have jurisdiction.<sup>12</sup>

Of course, if the defendant were allowed to challenge the indebtedness of the plaintiff to the king or the plaintiff's inability to pay without collecting from the defendant, this strategy might fail. But, of course, the judges would not allow such challenges. The plaintiff's indebtedness and inability to pay were legal fictions, non-traversable allegations, which the court would not allow the defendant to contest. This method of starting a case in Exchequer was known as *quominus*, because the plaintiff

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<sup>11</sup> *Id.* at 41-43.

<sup>12</sup> *Id.* at 47-49.

alleged that, on account of the money the defendant owed the plaintiff, the plaintiff was so much the less (in Latin *quominus*) able to pay the king.

*Ac etiam.* Although Common Pleas did not need to use fictions to increase its jurisdiction, it had difficulty competing with King's Bench, because the Bill of Middlesex procedure was substantially cheaper. So it too resorted to a fiction called *ac etiam* to regain competitiveness. That procedure is too complicated to explain here, but the result is important. Nearly every case brought in any of the three principal common law courts started with a procedure which established jurisdiction through the use of legal fictions – the Bill of Middlesex, *quominus*, or *ac etiam*.<sup>13</sup>

*Ejectment.* Legal fictions were also important for substantive law. For example, King's Bench was able to develop an advantage over Common Pleas in land litigation through the use of legal fictions. Actions relating to land title were the oldest part of the common law. Partly as a result, they allowed the defendant many opportunities to delay. Actions relating leases were newer and swifter. Sometimes resolution of a lease case required investigation into land titles. For example, if a plaintiff was leasing the land and was ejected by someone claiming to be the owner of the land, the court would have to decide whether the defendant or the person leasing the land to the plaintiff was the true owner of the property. Starting in the late sixteenth century, lawyers and judges in King's Bench realized that they could use this procedure to make suits relating to title over land faster and cheaper. If the plaintiff leased the land to a third party, and the third party entered the land and was ejected (evicted) by the defendant (or an agent of the defendant), the court would have to decide whether the plaintiff or defendant had title to the land. In the late seventeenth century, it became unnecessary for the plaintiff to actually lease the land to a third party or for any entry and eviction actually to occur. It was sufficient for the plaintiff to allege that these things had happened. The court would not allow the defendant to challenge the fact the plaintiff had leased the land, that the lessee had entered the land, or that the defendant or one of his agents had ejected the plaintiff. In fact, the court wouldn't even allow the defendant's lawyer to litigate the case unless the defendant conceded that there had been a lease, entry and eviction. This procedure for litigating title to land was called ejectment.<sup>14</sup>

The fictitious nature of ejectment suits was sometimes even reflected in the names of the cases. For complex reasons, the plaintiff usually alleged that his lessee had been evicted by a fictitious agent of the defendant, rather than by the defendant himself. In such cases, the plaintiff was technically the fictitious lessee and the defendant was technically the fictitious agent who evicted the fictitious lessee. Since both parties were fictitious, the real plaintiff could give them fictitious names. Often he called them Doe and Roe (hence the tradition which gave us John Doe and *Roe v. Wade*). Some lawyers were more creative and gave the parties names such as Fairclaim and Shamtitle, or Thrustout and Troublesome.<sup>15</sup>

*Other substantive fictions.* Similar fictions lay at the heart of most contract cases (fictitious allegations of subsequent promises in *assumpsit*), litigation over non-land property (fictitious allegations of loss and recovery in trover), many tort cases (fictitious

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<sup>13</sup> *Id.* at 46-47.

<sup>14</sup> *Id.* at 301-2.

<sup>15</sup> *Fair-Claim v. Sham-Title*, 3 Burrow 1290 (1762); *Thrustout v. Troublesome*, Andrews 297 (1738).

allegations of “force and arms” in trespass cases), and many other less common proceedings.<sup>16</sup>

*Other procedural fictions.* Other fictions attended various procedural stages. For example, in twelfth century, plaintiffs were required to bring supporters to initiate a claim. Such persons were called “suit” (*secta*) hence the modern expression “to bring suit” against someone. After a century or two, judges stopped requiring that the plaintiff actually produce such persons, but the plaintiff was still required to allege that he had procured such persons, and the legal record continued to state that such persons had been procured. Defendants who tried to challenge the lack of suit were rebuffed.<sup>17</sup>

### **Prior literature**

Jeremy Bentham was probably the first person to devote sustained attention to legal fictions. He hated them. His view was that legal fictions were usurpations of legislative power by fee seeking judges. In his own words, a “fiction of law may be defined as a willful falsehood, having for its object the stealing of legislative power.”<sup>18</sup>

Sir Henry Maine, the great mid-nineteenth century legal historian, devoted the second chapter of his classic *Ancient Law* to legal fictions. He opined:

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.... It is not difficult to understand why fictions in all their forms are particularly congenial to 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.<sup>19</sup>

Maine’s idea that legal fictions reflect a “supersititious disrelish for change” has been endorsed (and quoted) by the John Baker, probably the most prolific and respected living historian of English law.<sup>20</sup>

In the mid-twentieth century, Lon Fuller took a more sympathetic view of fictions. To him, they are metaphors and mental shortcuts, not unlike mathematical and scientific terms such as infinity and the fourth dimension. They are not meant to deceive others. Rather, they are often used by their own authors to help determine and justify the correct outcome. In Fuller’s words:

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<sup>16</sup> Baker, *Introduction to English Legal History*, pp. 341-44, 397-99. J.H. Baker, *The Law’s Two Bodies: Some Evidential Problems in English Legal History* (Oxford: Oxford University Press, 2001), p. 41.

<sup>17</sup> Yearbook 17 & 18 Edward III, Rolls Series, p. 73 (Common Pleas 1343) (Baker & Milsom, *Sources of English Legal History: Private Law to 1750*, p. 212); J.H. Baker, *The Law’s Two Bodies: Some Evidential Problems in English Legal History* (Oxford: Oxford University Press, 2001), pp. 40-41.

<sup>18</sup> Jeremy Bentham, *The Works of Jeremy Bentham*, John Bowring ed. (Edinburgh: William Tait, 1838), 1.243.

<sup>19</sup> Henry Maine, *Ancient Law: Its Connection with the Early History of Society, and its Relation to Modern Ideas* (London: John Murray, 1861), p. —.

<sup>20</sup> Baker, *Introduction to English Legal History*,

The age of legal fiction is not over ... We are in contact with a fundamental trait of human reason. To understand the function of legal fiction, we must undertake an examination of the processes of human thought generally...<sup>21</sup>

Each of these explanations for legal fictions has some validity, but none can explain why legal fictions were particularly pervasive in the early modern common law. In fact, Maine and Fuller apply their theories to Roman law, and Fuller's real goal was to explain the use of legal fictions, presumptions, and similar devices in modern law.

In addition, some problems with these theories should be noted. Bentham's view that legal fictions involved the theft of legislative authority is problematic, because Parliament was fully aware of what was happening and could have stopped legal fictions, if it had wanted to. Every legal practitioner was aware of the extensive use of legal fictions, and lawyers were well represented in Parliament. Although the legal record was fictitious, lawyers and judges did not try to conceal the use of fictions. In fact, the use of legal fictions and the problems they raised were discussed in open court. Coke's dictum, quoted at the beginning of this article, "in every fiction, there is equity," is contained in his published law reports. Blackstone and other legal writers commented openly on the use of legal fictions. No one disputed Parliament's ability to alter common law remedies and procedures, except perhaps in certain narrow circumstance. In fact, Parliament did occasionally legislate to curb particular fictions, but it left the most important ones untouched.

Maine's view that legal fictions belong to the "infancy of society," is flatly inconsistent with the chronology of English legal history. The most important legal fictions were invented between the fifteenth and seventeenth centuries. This was several centuries after the establishment of the English legal system, which dates back at least to the Henry II in the twelfth century. Legal fictions continued to be used well into modern times until they were abolished by legal reforms in the mid and late nineteenth century. Legal fictions also did not precede equity and legislation as methods of legal change. Chancery started asserting regular equitable jurisdiction in the late fourteenth century, a century or more before the creation of the Bill of Middlesex, ejectment, and other important fictions. There is a substantial body of English legislation dating back at least to the reign of Edward I at the turn of the fourteenth century. More fundamentally, English lawyers, judges, and legislators did not have a "superstitious derelish for change." With a few notable exceptions, they acknowledged and even celebrated the improvement of English law over time.

Fuller's view that fictions are mental shortcuts also has little force when it comes to classic English legal fictions. It is not a mental shortcut to allege an elaborate sequence of fictitious leases and evictions. Most pre-modern legal fictions are complex detours, not shortcuts. As will be discussed further below, their goal was not to enhance reasoning, but rather to protect decisions from judicial review.

The most recent sustained analysis of legal fictions comes from John Baker's *The Law's Two Bodies*, which devotes a whole chapter to the subject. Nevertheless, Baker's goal is not primarily to explain why legal fictions were used, but rather to use legal fictions to illustrate "the problem which classic common law fictions create for the legal

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<sup>21</sup> Lon L. Fuller, *Legal Fictions* (Stanford: Stanford University Press, 1967), p. 94.



historian.”<sup>22</sup> Baker’s aim is to show how legal fictions make it difficult for modern scholars to use official legal sources to understand how the law worked and changed.

### **Legal fictions as strategic instruments**

In an influential 1999 article, Emerson Tiller and Pablo Spiller argued that modern administrative agencies and courts choose not only policy outcomes, but also policy instruments.<sup>23</sup> For example, administrative agencies can choose to make general rules or to develop principles through case-by-case adjudication. Similarly, lower courts reviewing administrative action can base their decisions either on statutory interpretation or scrutiny of administrative decision making processes. Each choice has implications for appellate review. General rules and statutory interpretation are reviewed with great scrutiny by appellate bodies. Case-by-case adjudication and decisions based on procedural grounds are more likely to be reviewed deferentially. Agencies and courts therefore choose their instruments strategically, using instruments which attract less scrutiny when reversal by appellate bodies is more likely.

This article argues that pre-modern courts were similarly strategic in their use of legal fictions. They used legal fictions to increase their jurisdictions in ways that were insulated from appellate review. To understand this strategic use of legal fictions, it is necessary first understand the pre-modern English legal system and especially the limited nature of appellate review.

There were many different courts in pre-modern England. This article focuses on the courts which used fictions most pervasively--the three superior common law courts: King’s Bench, Common Pleas and Exchequer. In a later section, I will discuss non-common law courts, such as Chancery and Admiralty. Each of the three common law courts was composed of four judges. The plaintiff ordinarily chose the court which would hear his case. At each stage of the proceedings, the parties paid fees to the judges and their staff. In contrast to fees paid to modern courts, which go into the general fund, pre-modern fees were kept by the judges and clerks who collected them. Judges therefore had incentives to increase the number of cases in their court so as to increase their fee income. Since the plaintiff chose the forum, judges competed for business by shaping the law to favor the plaintiff. In a 2007 article, I modeled this jurisdictional competition and empirically confirmed a pro-plaintiff bias in judicially-created legal doctrine.<sup>24</sup> That article analyzed relatively small, case-by-case changes in doctrine which had incremental effects on caseloads. Legal fictions generally involved much larger potential impacts on caseloads. Whereas relatively small legal changes could be effected by explicit judicial reasoning potentially subject to appellate review, judges would have had much more reason to fear appellate review of decisions which enlarged their jurisdiction in significant ways, for example by giving King’s Bench jurisdiction over property cases or giving Exchequer jurisdiction over ordinary litigation.

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<sup>22</sup> J.H. Baker, *The Law’s Two Bodies: Some Evidential Problems in English Legal History* (Oxford: Oxford University Press, 2001), p. 49.

<sup>23</sup> Emerson H. Tiller & Pablo T. Spiller, “Strategic Instruments: Legal Structure and Political Games in Administrative Law,” *Journal of Law, Economics & Organization* 15: 349-77 (1999).

<sup>24</sup> Daniel Klerman, “Jurisdictional Competition and the Evolution of the Common Law,” *University of Chicago Law Review* 74: (2007) 1179. That article also discussed legal fictions briefly. *Id.* at 1218. See also, Daniel Klerman, “Jurisdictional Competition and the Evolution of the Common Law: A Hypothesis,” *Australian Journal of Legal History* 8: (2004), 1, 5.

A unique feature of English law was the very narrow scope of appellate review of common law decisions. Common law decisions were generally reviewed only by writ of error. This form of judicial review was so narrow that some writers even deny it the term “appellate review,” although I use that term to make this article more accessible to non-specialist and because other respected writers, including William Blackstone, did the same.<sup>25</sup> Proceedings on a writ of error were restricted to legal scrutiny of the official record. The official record was composed by clerks of the court whose decision was being reviewed and generally contained a very brief summary of the case – the plaintiff’s key allegations, the defendant’s primary defense, the jury verdict, the judgment, and some notes on various procedural stages. The court deciding the writ of error was called the court of error, and its proceedings were called proceedings in error. The court in error could reverse the decision made by the lower court only if the official record disclosed a legal error. The court of error could not challenge facts in the record, nor could it question legal decisions not contained in the record. These limitations on proceedings in error may help explain the parsimonious nature of the legal record itself. The less was included in the legal record, the fewer potential grounds for reversal by courts of error.

For legal fictions, two aspects of the writ of error are of particular importance. The falsity of legal fictions could not be challenged, because facts themselves could not be contested. In addition, the fact that judges barred defendants from challenging legal fictions (for example the fact that judges wouldn’t let juries adjudicate their truth) was also excluded from the record, because the judges and their clerks could (and did) simply omit such challenges from the record. Because such challenges were not in the record, they could not be considered on appeal. Unlike the modern legal record, which usually contains a full transcript of everything said in court, the pre-modern legal record was highly selective and thus subject to manipulation by the court.

It should be noted that the limited nature of appellate review was peculiar to England. Continental legal procedure generally allowed for full appellate review. In theory, appellate judges could recall witnesses and retry the entire case.<sup>26</sup> In practice, they often relied heavily on the lower court’s notes of witness interrogations. Nevertheless, in France and other countries using the romano-canonical procedure, appellate judges retained the right to reexamine facts and call witnesses. This power put a substantial check on the use and development of legal fictions.

An additional unique feature of the English legal system made fictions sometimes even more attractive. Courts in error were often staffed not by a separate body of judges, but by judges of a competing court. For example, decisions by the Court of Common Pleas were reviewed on writ of error by the judges of King’s Bench. Similarly, after 1585, decisions of the Court of King’s Bench were reviewed by Exchequer Chamber, which was composed of the judges of Common Pleas and Exchequer.<sup>27</sup> Thus, for example, when the seventeenth century King’s Bench sought to increase its share of cases involving title to land, it needed to do so in an environment in which its decisions would be reviewed by judges of Common Pleas, the very court from which King’s Bench was trying to attract cases. It is therefore hardly surprising that it developed a procedure

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<sup>25</sup> William Blackstone, *Commentaries on the Laws of England* (1768), 3. 402ff (writ of error discussed in Chapter 27, entitled “Of Proceedings, in the Nature of Appeals.”).

<sup>26</sup> John Dawson, *A History of Lay Judges* (Cambridge: Harvard University Press, 1960), pp. 274ff.

<sup>27</sup> Baker, *Introduction to English Legal History*, 137-38.

(ejectment) which relied heavily on fictions which insulated this innovation from appellate review.

All the background is now in place to understand the role of legal fictions as strategic instruments. Pre-modern English judges earned substantial income from fees paid by litigants. They therefore had material incentives to increase their jurisdictions. Explicit assertions of such enlarged jurisdiction would be risky, because they could be reversed on writ of error. Innovation through legal fiction was much safer, because it was insulated from appellate review by the uniquely restrictive nature of proceedings in error. Such proceedings were restricted to the legal accuracy of the official record. They could not question the veracity of facts nor the propriety of legal decisions which the judges themselves chose not to record (such as their decision to bar factual challenges to legal fictions).

The theory of legal fictions as strategic instruments has a substantial advantage over other theories in that it explains why legal fictions were uniquely pervasive and blatant in pre-modern England. Only England had a system of appellate review which was restricted to the official record and which thus barred review of facts and off-the-record legal decisions.

The theory of legal fictions as strategic instrument also helps explain why English legal fictions were uniquely blatant. Whereas English legal fictions required parties to baldly lie and made the legal record an extremely unreliable guide to the truth, both Roman and modern legal fictions are usually more transparent. When Roman law used legal fictions, it usually signaled their use by words like “as if.” As Peter Birks has observed, Roman fictions “did not involve any intellectual dishonesty or covertness. On the contrary, the fiction declared itself openly in the formula or in the statute.”<sup>28</sup> Similarly, as discussed above, modern presumptions and related devices usually treat one set of facts as if they were another, but do not require judges or parties to actual state what is not the case.

Finally, this theory of legal fictions helps explain why nearly all legal fictions were advantageous to the plaintiff. As noted above, judges received fees from litigants and plaintiffs chose the forum, so judges had an incentive to make their courts attractive to plaintiffs. Expanding jurisdiction was a key prerequisite to doing so. A plaintiff won’t choose a court which doesn’t have the power to resolve the case. In addition, plaintiffs prefer courts with cheaper procedures, such as the Bill of Middlesex, which didn’t require an expensive writ from Chancery. Plaintiffs also preferred swifter procedures, such as ejectment which avoided the delays inherent in the older actions used by Common Pleas. This is not to say that fictions only benefited plaintiffs. Many fictions also benefited defendants. Defendants also prefer less expensive lawsuits. Sometimes, but not always, defendants prefer swifter justice.

### **Why was appellate review so limited?**

The English system of drastically limited appellate review is so peculiar that any theory of legal fictions must explain it. It must explain why the limitations were established in the first place, and why they were they not subsequently altered once legal

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<sup>28</sup> Peter Birks, “Fictions Ancient and Modern,” in Neil MacCormick and Peter Birks, eds, *The Legal Mind: Essays for Tony Honoré* (Oxford: Clarendon Press, 1986), p. 99.

fictions laid clear the potential for manipulation by lower courts. Answers to these questions are inherently speculative, but some plausible answers can be constructed.

The most plausible reasons for the restrictive nature of appellate review are probably the extremely small number of judges and the use of the jury as factfinder.<sup>29</sup> As noted above, the English judiciary was very thinly staffed. Each of the three principal common law courts had only four judges. The judges who adjudicated proceedings in error were similarly limited in number, and for all of these judges, appellate judging was not their primary duty. For example, writs of error from Common Pleas were heard by the four judges of King's Bench, whose primary responsibility was non-appellate cases in their own court. Before 1585, writs of error from King's Bench were heard by the House of Lords, which met infrequently and had numerous other responsibilities. After 1585, writs of error from King's Bench were heard by the court of Exchequer Chamber, which was composed of the judges from Common Pleas and Exchequer. Writs of error from Exchequer were heard by the Chancellor and Treasurer, great officers of state with numerous other responsibilities. Writs of error from the Chancellor and Treasurer (as well as from the Exchequer Chamber) were heard in the House of Lords.

English appellate judges, therefore, had no time for extensive appellate procedures. Review based on the official legal record was an effective way of ensuring that appellate judges could discharge their duty without distracting them unduly from their other pressing responsibilities.

The problem of appellate review was further compounded by the use of the jury as the principal fact finder. Reexamining facts would have required either dispensing with the jury (a route both time consuming and fraught with constitutional import) or summoning another jury, itself a time consuming task, both for the jury and the judges.

Of course, these arguments just push back the argument one stage further. Why did England rely on juries and such a small cadre of judges. Answers to those questions are even more speculative, but the most plausible explanation is that key features of English law were developed in a period when the king tried very hard to keep the size of the royal bureaucracy low to minimize both cost and corruption. In addition, England developed its legal system earlier than France or other continental powers, at about the same time as the first English University (Oxford) was established. There were simply relatively few literate people capable of staffing a larger judiciary. In addition, the English legal system developed and started using juries before Roman and Canon law scholars had developed methods of trying cases without the use of juries.<sup>30</sup>

Of course, the fact that the key features of English law were developed at a time when searching appellate review would have been impractical does not explain why the system remained relatively unchanged for over 500 years. There are two answers to that question. Parliament tried but its efforts were thwarted by the judges, and no one had a sufficient incentive to force real change.

In 1275, Parliament passed legislation which allowed parties to draft a "bill of exceptions," a statement of arguments and decisions not mentioned in the official record.

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<sup>29</sup> Dawson, *History of Law Judges*, p. 278.

<sup>30</sup> Daniel Klerman & Paul Mahoney, "Legal Origin?" *Journal of Comparative Economics* 35 (2007): 278, 286.

Judges were required to seal the bill, if it was accurate.<sup>31</sup> The bill of exceptions could have been the basis for reversal on a writ of error. If successfully implemented, this legislation would have severely limited judicial ability to manipulate the record, because the adversely affected party would have had an opportunity to supplement the record. For example, if a judge refused to allow the jury to decide whether Paris was in England or France, the defendant could have composed a bill of exceptions recording the objection (“traverse”) to the statement that Paris was in England. The bill could also mention the judges’ refusal to allow the jury to decide that factual issue. A bill of exceptions would not, of course, allow appellate judges to review the fact itself (whether Paris was in England), but it would allow appellate review of the judicial maneuvering which prevented the defendant from getting a jury decision about that fact.

Judges, however, routinely refused to certify bills of exceptions. Plucknett, in his classic book on medieval statutes and their interpretation, discusses the 1275 legislation requiring judges to certify bills of exceptions as one of four examples of statutes which judges simply refused to apply. These refusals provoked some rebukes from the Chancery and even an order for a non-compliant judge to appear before the king himself to explain his actions. Nevertheless, these rebukes do not seem to have led to consistent compliance.<sup>32</sup> The motive for defiance is relatively easy to discern. No judge likes appellate review, so strategies to restrict such review need little explanation. In addition, compliance would have severely limited courts’ ability to expand their jurisdictions and to increase fees through legal fictions and other devices.

Parliament also took at least one major step toward easing the shortage of appellate manpower. Before 1585, writs of error from King’s Bench went to the House of Lords. Because the House of Lords had such little time for appeals (and because proceedings in the House of Lords were so expensive), this meant appellate review of King’s Bench decisions was very infrequent. As mentioned above, a 1585 statute created a two tiered system of appellate review for King’s Bench – appeal first to Exchequer Chamber (a court composed of the judges of Common Pleas and Exchequer) and from Exchequer to the House of Lords. This statute had the immediate effect of facilitating challenges to legal fictions. For example, there were many cases in Exchequer Chamber challenging the use by King’s Bench of *assumpsit* to litigate debt disputes.<sup>33</sup> Of course, it was not possible on a writ of error to directly challenge the veracity of the fictional subsequent promise which formed the basis of the *assumpsit* suit. Nevertheless, litigants could challenge whether that promise (assuming it were true) was legally sufficient to provide the basis for an *assumpsit* suit rather than a more conventional debt action.

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<sup>31</sup> Statute of Westminster II, c. 31 (Statutes of the Realm 1.86-87). It should be noted that this statute came very early in the development of proceedings in error. In fact, S.F.C. Milsom argues that it was not an attempt to modify rigid rules restricting proceedings in error, but rather was, in part, their cause. At the time the statute was passed, the ability of proceedings in error to examine arguments not in the record was not clear. After the statute was passed, judges interpreted it as providing the sole method of supplementing the record, and refused to allow less formal means of doing so. S.F.C. Milsom, “The Origins and Early History of Judicial Review in England,” (Cambridge University M.A. Thesis 1948), 201-12.

<sup>32</sup> Theodore F.T. Plucknett, *Statutes and their Interpretation in the First Half of the Fourteenth Century* (Cambridge: Cambridge University Press, 1922), pp. 67-68.

<sup>33</sup> Baker, *Introduction to English Legal History*, 344.

Parliament also attempted to curb the most powerful fiction, the Bill of Middlesex, directly, although King's Bench was able to evade Parliamentary restrictions by further refinement of the bill procedure.<sup>34</sup>

One might also ask why the appellate judges did not themselves try to relax the rigid rules which constricted judicial review on a writ of error. The explanation probably reflects the fact that most appellate judges were also judges whose decisions were themselves subject to review on a writ of error. Thus, expanding the scope of appellate review involved a tradeoff between greater power as an appellate judge and lesser power as a lower-court judge. Since most judges devoted the lion's share of their time and derived most of their fees from their work as lower-court judges, it is not surprising that they chose to preserve their lower court autonomy at the expense of their power as appellate judges. For example, if the judges of Common Pleas had wanted to expand the power of the Exchequer Chamber to review decisions of King's Bench, they would have had to consider the fact that Common Pleas decisions were reviewed on writ of error in King's Bench, and thus that expansion of the scope of review on a writ of error would enable King's Bench to further constrain Common Pleas.

The House of Lords itself had little reason to expand the scope of its appellate review for three reasons. First, it had insufficient time to conduct more searching appellate review. Second, in making decisions, it usually relied on the advice of the common law judges, and, for reasons discussed above, they would not have favored more rigorous appellate review. Third, legal fictions probably had generally beneficial results. By fostering competition between the courts, legal fictions led to cheaper, swifter justice. While judges of individual courts (especially Common Pleas) might complain about the diversion of fees, on the whole, the reallocation of jurisdiction was probably beneficial. The House of Lords therefore had little reason to alter the rules of appellate procedure which produced these salutary results.

### **Legal Fictions and Collusive Lawsuits**

The definition of legal fiction used in this article – a false allegation that the court will not allow a party to contest-- distinguishes legal fictions from collusive lawsuits. Collusive lawsuits were another important feature of early modern English law. For example, entailed (non-alienable) property could be converted into fee simple (alienable) property through the collusive common recovery. Although the common recovery and similar collusive lawsuits are sometimes categorized as legal fictions, this article does not do so, because, although they involved false allegations (for example of warranties), the judges did not bar anyone from challenging those false allegations. There was no need for the judges to forbid contestation of the false facts, because all the parties to the collusive lawsuit had agreed beforehand to contribute to its success. While such suits required judicial tolerance (not objecting to the collusive nature of the suit), they did not require the active cooperation of the judges that legal fictions required (barring defendants from contesting the false facts). Therefore, unlike legal fictions, collusive lawsuits were not influenced by the limited nature of appellate review.

Although this article distinguishes between legal fictions and collusive lawsuits, there may be a deeper connection. Many legal fictions may have started as collusive

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<sup>34</sup> *Id.* at 45-46.

lawsuits.<sup>35</sup> For example, the first suits involving fictional allegations, like “Paris is in the kingdom of England,” may have been made in situations where both plaintiff and defendant wanted to litigate in a particular court. For example, both creditor and debtor might have preferred to litigate in England rather than France. In such situations judges might have tolerated fictions, because no one objected and because they would have seemed in the interest of justice. In some such situations, however, the defendant might have changed his mind as the lawsuit progressed and decided that he didn’t want to litigate in England. If the judges then barred the defendant from contesting that Paris was in England, they could easily have thought that doing so was consistent with equity (as well as their own self-interest), because they would only be requiring the defendant to do what he had previously agreed to do. After a while, if collusive suits of this nature were common, judges might easily have slipped from allowing only false allegations which were initially collusive (and thus consensual) to also allowing false allegations which were non-consensual. This movement would have been especially easy if, in situations where the defendant challenged the truth of certain facts, it was unclear whether the defendant had originally agreed with the plaintiff not to contest them.

For some fictions, such as ejectment discussed above, it is clear that collusive versions preceded mature purely fictional forms. Ejectment involved a fictional lease, a fictional entry onto land, and a fictional ouster (eviction). In the initial phase of the development of ejectment, the lease would have been collusive but not fictional. The true plaintiff actually executed a lease of the land to a friend, usually his attorney. The attorney would then enter the land and try to provoke the defendant to evict him. The defendant’s actual eviction would then trigger the lawsuit. This procedure had severe disadvantages. In addition to the cost of drafting the fictional lease and the time spent in entry and eviction, the entry and eviction could lead to violence. It is easy to see why judges would have allowed a fictional lease, entry and ouster. Doing so reduced costs and the potential for violence, while achieving the same result and thus not disadvantaging the defendant in any substantial way.

### **Problems and puzzles**

*Fictions in non-common law courts.* This article provides an explanation for legal fictions in the three superior courts of the common law— King’s Bench, Common Pleas, and Exchequer. Nevertheless, it cannot explain the use of fictions in the non-common law courts, such as Chancery and Admiralty. These courts were not “courts of record,” and appellate review (to the extent it existed at all) was not restricted to the official record. When the House of Lords or other bodies reviewed the decisions of these courts, they could, in theory, reexamine facts and question decisions not contained in the record. Legal fictions therefore did not provide complete insulation from appellate review, as they did in the common law courts.

Nevertheless, the existence of legal fictions in these other courts does not undermine the principal argument of this article for several reasons. First, even though appellate courts could review facts and arguments not in the record of these courts, doing so was much harder and more time-consuming than reviewing facts and conclusions in

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<sup>35</sup> J.H. Baker, *The Law’s Two Bodies: Some Evidential Problems in English Legal History* (Oxford: Oxford University Press, 2001), p. 54.

the record. Legal fictions thus still provided some protection from appellate review, albeit more limited protection than in common law courts.

Second, these courts used legal fictions much more sparingly than common law courts. Unlike in the common law courts, legal fictions did not form the basis of jurisdiction and substantive law in most cases.

Third, when these courts did use legal fictions, they were more susceptible to challenge, and these challenges reveal the advantage that common law courts had by their control over the record and the limited nature of proceedings in error. For example, Admiralty had uncontested jurisdiction over contracts made on the high seas, but was not supposed to hear cases relating to contracts made in England. Nevertheless, like other courts, it desired to increase its jurisdiction. Like common law courts, it resorted to a fiction. It allowed plaintiffs to allege that contracts were made on the high seas, even when they were, in fact, made in England. Nevertheless, King's Bench was able to challenge this use of fictions. Defendants who did not want to litigate in Admiralty petitioned King's Bench to enjoin the proceedings in Admiralty or to fine the parties involved in such proceedings. While initially unsure of its ability to question the "fact" that the contract was made on the high seas, King's Bench eventually decided that, because Admiralty was not a court of record, litigants in King's Bench could contest the veracity of factual findings made in Admiralty.<sup>36</sup>

*King's Bench fictions before 1585.* Before 1585, decisions of King's Bench were reviewed on writ of error by the House of Lords. This presents a puzzle, because, as noted above, the House of Lords heard very few appellate cases.<sup>37</sup> Did such a low level of appellate scrutiny provide sufficient incentive for the use of legal fictions? If appellate review was very unlikely, one might have expected King's Bench to expand its jurisdiction more brazenly without recourse to fictions. The most plausible solution to this puzzle requires realization that the number of cases reviewed by the House of Lords would probably have risen if King's Bench had innovated in ways that were reversible by writ of error.

It is unclear whether the low rate of appellate cases in the House of Lords before 1585 reflects relatively few appeals by litigants or refusal by the Lords to hear most cases that were appealed. Either way, the number of appeals would most likely have increased if King's Bench had expanded its jurisdiction openly, for example by asserting jurisdiction over debts incurred in France. If it had done so, debtors found liable under such jurisdiction would probably have requested writs of error, and the House of Lords might have taken their cases so as to rebuke the court for exceeding its jurisdictional bounds.

Thus, even though the rate of appellate review was low, King's Bench would not have been confident that the low rate would continue and thus could not be sure that open expansion of jurisdiction would have been undisturbed by the House of Lords.

*The motive of the House of Lords to reverse.* It is relatively easy to understand why Exchequer Chamber, composed of judges of Common Pleas and Exchequer, might

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<sup>36</sup> J.H. Baker, *The Oxford History of the Laws of England* (Oxford: Oxford University Press, 2003) 6.214.

<sup>37</sup> J.H. Baker, *The Oxford History of the Laws of England* (Oxford: Oxford University Press, 2003) 6.404 ("The records of the House of Lords mention only five cases between 1514 and 1589, and none reached the law reports.")



have reversed King's Bench's expansions of its jurisdiction, if it could do so. King's Bench was taking cases that otherwise might have gone to them, thus reducing their power and fee income. It is thus eminently plausible that King's Bench would have chosen to innovate through legal fictions after 1585, when Exchequer Chamber was established, rather than in ways that could have been more easily overturned on writs of error. But why would King's Bench have feared reversal on writ of error before 1585, when review was in the House of Lords? Why would the House of Lords have wanted to quash jurisdictional innovation? It had no fee income directly at stake, and one might have thought that its members would have welcomed legal changes which made the law cheaper and faster. To this question, I have yet to devise a satisfactory solution. Perhaps the House of Lords would have reversed simply because King's Bench's assertions of expanded jurisdiction exceeded traditional and accepted bounds. Or perhaps the House of Lords would have reversed, because it would have accepted the advice of Common Pleas and Exchequer judges. Or perhaps, the House of Lords might not have reversed, but King's Bench wasn't sure, so King's Bench chose to innovate by legal fictions to avoid the risk.

*Comparative statics, before and after 1585.* In 1585, Parliament created the Exchequer Chamber to hear writ of error cases from King's Bench. Even if, as argued above, one thinks that review in the House of Lords before 1585 was sufficient to motivate King's Bench to use legal fictions to cloak its expansion of jurisdiction, one might have thought that the creation of Exchequer Chamber would have led to even greater reliance on legal fictions for two reasons. First, Exchequer Chamber could hear more cases. Unlike to House of Lords, it was not restricted to times when Parliament had been summoned. In addition, although the judges of Common Pleas and Exchequer had their own judicial business to take care of, it was probably easier for them to fit appellate cases into their agenda than for the House of Lords to do so. Second, the judges of Common Pleas and Exchequer had more incentive to reverse. As noted above, the incentives of these judges to curb King's Bench (protecting their own power and fee income) was much clearer than the incentives of the House of Lords. These factors suggest that King's Bench would have created even more legal fictions after 1585 than before. This does not appear to be the case. The most important legal fictions – Bill of Middlesex and *assumpsit* – were created before 1585. Important legal fictions – ejectionment and the expansion of *assumpsit* to cover quasi-contractual situations – were created after 1585, but there is no sign that the rate at which King's Bench created new legal fictions increased after 1585. In fact, it probably decreased. The most plausible solution to this puzzle is that King's Bench had been so aggressive in its use of legal fictions before 1585 that there was little room for jurisdictional expansion after that date.

## **Conclusion**

Legal fictions were a pervasive and important feature of pre-nineteenth century English Law. They are best explained as strategic instruments for the evasion of appellate review. Common law judges, motivated by power and potential fee income, wanted to increase their jurisdictions. Legal fictions enabled them to do so in ways that insulated their expansion from appellate review. Because appellate review was limited to the legal correctness of the official record, judges could use legal fictions to evade reversal. Appellate judges could not reverse based on the facts, even when they were

patently false, because review on writ of error was limited to legal issues. Similarly, appellate judges could not reverse based on the lower court's refusal to allow the adversely affected party to challenge the facts, because that refusal was omitted from the record.