SURVIVING FICTIONS

It is sometimes asserted that the use of fiction in law is now practically obsolete; a thing of the past. Thus, Mr. Odgers says: "Legal fictions have well-nigh disappeared."[1] But this strong statement is erroneous. Instances of old fictions which are still in common use will be given in a later part of this paper.

Moreover, the law is not only encumbered by old fictions, but is in danger of having new ones foisted upon it. Mr. Bentham, who died in 1832, did not believe that the crime of inventing a new fiction was likely ever again to be committeed.[2] But he was mistaken. Twenty-five years after his death the English courts invented and applied what Sir Frederick Pollock calls "one of the most brilliant and successful fictions of the common law," *viz.*, "the implied warranty of authority which is attached to the acts of a professed agent."[3] And Sir Frederick Pollock, in calling attention to this instance, expresses his dissent from Maine's view that there is now "left no room for fictions."[4]

In the past there have been two principal reasons for employment of fictions in law.

First. To cure deficiencies in the law of procedure.

Second. To conceal the fact that judges, by their decisions, are making or changing the substantive law.

As to the first reason. Under the old law, in its literal and rigid form, there was, in many just cases, no remedy whatever.[5] The law of procedure needed amendment. But legislation was "exceptional and occasional,"[6] and the desirable amendments had to be made by the judges, or not at all.[7] The judges, however, did not openly and directly assert their right to invent or change law as to procedure.[8]

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[1] W. B. Odgers, in A. D. 1900: *"A Century of Law Reform,"* 40.

[2] See 1 Bentham, *Works* (ed. 1843) 268-269.

[3] *Collen v. Wright* (1857) 8 El. & Bl. 647; since affirmed in the House of Lords, *Starkey v. Bank of England,* L. R. [1903] App. Cas. 114.

[4] Pollock, *The Expansion of the Common Law* (1904) 135-136.

[5] See 30 HARV. L. REV. 244-245.

[6] Pollock, *op. cit.* 49.

[7] 2 Austin, *Jurisp.* (3d ed.) 632.

[8] A broader ground as to judicial power and duty has, in late years, been taken by one court at least. It is asserted that there is a "judicial duty of subordinating legal machinery to legal rights"; that it is the duty of the court to invent and use convenient procedure for ascertaining and establishing rights and obtaining remedies; that "parties are entitled to the most just and convenient procedure that can be invented"; and that courts should distinctly recognize "the judicial duty of allowing a convenient procedure, as a necessary incident of the administration of the law of rights."

See the opinions of Doe, C. J. in *Metcalf v. Gilmore* (1879) 59 N. H. 417, 431-435; *Walker v. Walker* (1885) 63 N. H. 321, 326; *Owen v. Weston* (1885) 63 N. H. 599, 600-604; *Boody v. Watson* (1886) 64 N. H. 162, 171-172. See also *Memoir of Judge Doe* by Professor Hening in 8 *Great American Lawyers,* 247-257, and 317.

Instead, they resorted to the aid of fiction to bring about practical changes. While not professedly altering the old forms of action, or adding new forms, the old forms "were adapted to new cases by means of fictions."[9] Fictions as to procedure

> "often proved, in the hands of Judges, instruments for accomplishing useful reforms, long before direct sanction could be obtained for such reforms from the Legislature."[10]
>
> "But while the legal fiction may, for the time being, have served a useful function, we agree with Professor Hepburn that 'the price paid for it was very high.' "[11]

The first reason for employment of fiction has no longer great influence. In very recent times the defects in the law of procedure have been largely remedied by legislation. There is now, in most jurisdictions, a comparatively simplified system, either regulated in its details by express legislative enactment, or regulated by rules of court framed by judges under the express authority of the legislature.[12] There is now comparatively little need for judges to employ fiction as to that subject. But the fiction phrases and fiction reasons formerly employed are not entirely banished from the law books.[13]

As to the second reason for the use of fiction, *viz.*, to conceal the fact that the judges, by their decisions, are making or changing the substantive law.[14]

"There are, at least, three different theories as to judicial lawmaking."[15]

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[9] See Hepburn, *Historical Development of Code Pleading* (1897) ss. 24, 25.

[10] W D. Lewis, 1 JURID. SOC. PAPERS, 374.

[11] See Hepburn, *op. cit.* ss. 24, 25, 27. As to the evils accompanying the use of fiction, see *post* in the present paper.

[12] See Prof. Roscoe Pound, *Regulation of Judicial Procedure by Rules of Court* (1916) 10 ILL. L. REV. 163.

[13] "The simplification of pleading in modern times has tended to diminish the operation of fiction strictly so called, although the effect of its former prevalence is probably ineradicable." Broom, *Legal Maxims* (8th ed.) 107.

"The forms of action we have buried, but they still rule us from their graves" Prof. Maitland, *Equity and Forms of Action*, 296.

"Forms of action are dead, but their ghosts still haunt the precincts of the law." Prof. John W. Salmond, *Observations on Trover and Conversion* (1905) 21 LAW QUART. REV. 43.

[14] Upon the question whether judges "make" law, some important conflicting authorities are collected in Prof. E. Wambaugh, *Study of Cases* (2d ed.) s. 78, n 2.

For a recent and very interesting discussion of the subject, see the article by Judge John E. Young on *The Law as an Expression of Community Ideals and the Lawmaking Functions of Courts* (November, 1917) 27 YALE LAW JOURNAL, 1, 22-31

[15] This summary is taken from a paper by the present writer in 27 HARV. L. REV 365-366. And see the present writer's paper, *Jones v. Hulton: Three Conflicting Judicial Views as to a Question of Defamation* (1912) 60 U. OF PA. L. REV 461, 467.

1. That judges cannot "make" law; that they merely discover and apply law which has always existed.[16]

2. That judges can and do make new law on subjects not covered by previous decisions, but that judges cannot unmake old law—cannot even change an existing rule of judge-made law.[17].

3. That judges can and do make new law; and also can and do unmake old law, *i. e.,* the law previously laid down by themselves or by their judicial predecessors.[18].

We adopt the third view. But for present purposes, it is not absolutely essential to consider whether the third view is to be preferred to the second, for those who adopt the second view generally concede that a large part of the law now administered by the courts consists of additions made—and rightly made—by judges in the way of supplementing and enlarging the law as originally stated.[19] And candid advocates of the second view must concede that judges, in general, do not frankly admit that the law is thus being changed by their decision, but that, on the contrary, judges frequently use fiction phrases to conceal the fact of such changes, making the fictitious assumption that no change has been made, by addition or in any other manner, in the law as formerly laid down.

The authorities cited below distinctly admit that fiction is frequently resorted to in the attempt to conceal the fact that the law is undergoing alteration at the hands of the judges.

> "A legal fiction is a device which attempts to conceal the fact that a judicial decision is not in harmony with the existing law. The only use and purpose, upon the last analysis, of any

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[16] See the posthumously published work of Mr. James C. Carter, one of the greatest lawyers of his day, on *Law, Its Origin, Growth and Function* (1908).

[17] See Prof. A. V. Dicey in *The Relation between Law and Public Opinion in England,* Chap. XI: and more fully in the Appendix, 481-493.

"The courts cannot contradict what has already been settled as law, but the power of taking up fresh material is still alive. . . ." Pollock, *Expansion of the Common Law,* 15.

"Judges may supplement and enlarge the law as they find it. . . . but they must not reverse what has been settled." Pollock, *ibid,* 49. *Cf.* Salmond, *Jurisp.* (ed. 1902) 108, 170, 171.

[18] See Prof. John C. Gray, *The Nature and Sources of the Law* (1909) ss. 215-231, 465-512, 545-550, 628-636.

[19] Thus, Prof. Dicey, a prominent advocate of the second view, says that a large part of the law under which we live

"consists of rules to be collected from the judgments of the court. This portion of the law has not been created by Act of Parliament, and is not recorded in the statute book. It is the work of the courts; it is recorded in the Reports; it is, in short, the fruit of judicial legislation. . . . Nine-tenths, at least, of the law of contract, and the whole, or nearly the whole, of the law of torts are not to be discovered in any volume of the statutes." Dicey, *The Relation between Law and Public Opinion in England,* 359, 360. And see also pp. 484, 490, 492.

legal fiction is to nominally conceal this fact that the law has undergone a change at the hands of the judges." [20]

"But I now employ the expression 'Legal Fiction' to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified."

(Then, after referring to the English case-law, and the Roman *responsa prudentum* as resting on fictions):

"The *fact* is in both cases that the law has been wholly changed; the *fiction* is that it remains what it always was." [21]

"For though it is . . . a duty imposed upon English judges, within certain limits, to make new laws, it is against the tradition of their office ever to avow it. By saying, therefore, that there is malice in law, or fraud in law, they pretend that there is malice, or fraud, or whatever else they think unnecessary, when there is really none at all." [22]

Fictions include

"any assumption which conceals a change of law by retaining the old formula after the change has been made." [23]

The result

"is the expansion of law, whilst leaving it formally intact." [24]

"The expedient of fictions . . . occasionally employed to introduce by stealth real innovations, . . ." [25]

"It is true that at many times the Courts have been over-anxious to avoid the appearance of novelty; and the shifts to which they resorted to avoid it have encumbered the Common Law with several of the fictions which Maine denounces (p. 28) as almost hopeless obstacles to an orderly distribution of its contents." [26]

As to why a judge, in innovating on existing law, has so often sought to accomplish his object through the medium of fiction, Austin suggests as one reason:

"A wish to conciliate (as far as possible) the friends or lovers of the law which [he] really annulled . . . By covering the innovation with a decent lie, he treated the abrogated law with all seemly respect, whilst he knocked in on the head." [27]

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[20] Mr O. R. Mitchell, *The Fictions of the Law: Have They Proved Useful or Detrimental to its Growth?* (1893) 7 HARV. L. REV. 249, 262.

[21] Maine, *Ancient Law* (1st ed.) 26.

[22] Markby, *Elements of Law* (3d ed.) s. 688. And compare 2 Chamberlayne, *Mod. Law of Evid.* s. 1164, n. 4.

[23] 10 Ency. Brit. (11th ed.) 319.

[24] Pulszky, *Theory of Law and Civil Liberty*, 431.

[25] Phelps, *Judicial Equity Abridged*, s. 149.

[26] Sir F. Pollock, *Notes on Maine's 'Ancient Law'* (1905) 21 LAW QUART. REV. 165, 172.

[27] 2 Austin, *Jurisp.* (3d ed.) 630.

The assertion that law is *not* changed by decisions of judges, is now the most effective and the most frequently applied of all legal fictions, and much harm results from its use.

Some eminent jurists are very far from advocating the abolition of *all* existing fictions. On the contrary, they use language implying that the use of fiction is not necessarily and invariably objectionable, and giving the impression that, if the introduction of fictions in law were now urged for the first time, it might sometimes be expedient to employ them. The language of such high authorities as Bishop, Pollock and Gray can be so understood.[28]

These great lawyers grew up under a system where the use of fiction was frequent. They were habituated to its employment. They saw that its use at an earlier day had in some respect been beneficial, and, indeed, was often said to have been indispensable. They did not always realize the accompanying disadvantages: that "the price paid was very high," [29] involving confusion of thought, and a long period subsequently required for clearing the air. If the introduction of fiction in law were now urged for the first time, it is difficult to conceive how much eminent jurists would answer some of Mr. Bentham's anti-fiction arguments. It is not easy to escape from some of his dilemmas.

If the fiction is not founded on truth, its use is unjustifiable. If it is founded on truth its use is foolish:

> "What you are thus doing with the lie in your mouth—had you power to do it without the lie?—your lie is a foolish one. Have you no such power?—it is a flagitious one." [30]

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[28] "One of the most interesting features of our law is its fictions. Not quite all of them are useful and wise, but most are, and some of them are so essential that they could be dispensed with only at great inconvenience. Bishop, *Contracts* (2d ed.) s. 182.

As to Pollock's views, see *Expansion of the Common Law,* 135-136, and *op. cit.* 21 LAW QUART. REV. 165, 173.

Professor Gray, following Ihering, divides fictions into two classes, "historic fictions" and "dogmatic fictions." He regards the former class as objectionable, but the latter as sometimes laudable. But it is, however, interesting to observe that Professor Gray, after saying that the dogmatic fictions "are to be praised when skilfully and wisely used," adds—"Yet though handy, they are dangerous tools. They should never be used, as the historic fictions were used, to change the Law, but only for the purpose of classifying established rules, and one should always be ready to recognize that the fictions are fictions, and be able to state the real doctrine for which they stand." Gray, *Nature and Sources of the Law* (1909) s. 89.

[29] See Prof. Hepburn quoted in the article by the present writer, *Tort and Absolute Liability—Suggested Changes in Classification* (1917) 30 HARV. L. REV. 241, 245.

[30] 2 Bentham, *Works* (ed. 1843) 466, n.

> "What you have been doing by the fiction—could you, or could you not, have done it without the fiction? If not, your fiction is a wicked lie. If yes, a foolish one."
>
> "Such is the dilemma. Lawyer! escape from it if you can." [31]

If a fiction does not, in any degree or to any extent, represent a legal truth, it would seem that its continued use can result only in evil. If, on the other hand, it does represent some clumsily conceded legal truth, then it belongs to a class of fictions which Mr. Bentham had in mind when he said:

> "Not a fiction but is capable of being translated, and occasionally is translated, into the language of truth. Burn the original, . . . and employ the translation in its stead. Fiction is no more necessary to justice than poison is to sustenance." [32]

We may remark, in passing, that Mr. Bentham's vigorous attack on fictions, like his onslaught on other abuses,[33] is marred by "unnecessary violence of diction," and by the imputation of improper motives in his opponents.[34]

But it may be asked: Why banish from the law *all* old fictions? Why not retain two classes? First. Those which are merely exaggerated forms of statement, which would never be understood or applied in their full literal sense. Second. Where the result reached by the use of fictions is substantially correct, although the method of reaching it is objectionable, involving erroneous reasoning or confusing statements.

As to the first class. There are undoubtedly some so-called fictions, which are practically harmless. They are a kind of "legal shorthand"; intentional overstatements for the purpose of attracting attention;[35] obvious exaggerations not likely to mislead; "a figure of speech designed to set a rule of law in a striking light." Sometimes they are merely the "condensed expression of a rule of law," [36] and it has been asserted that fiction "too barefaced to deceive anyone may fairly be called innocent." [37] But a large proportion of existing fictions cannot be explained, or their use justified, on these grounds.

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[31] 7 Bentham, *Works* (ed. 1843) 283.
[32] 6 Bentham, *Works* (ed. 1843) 582.
[33] See Atkinson, *Life of Bentham*, 225.
[34] For example, he calls "legal fiction" "the most pernicious and the basest sort of lying," 6 Bentham, *Works* (ed. 1843) 582. And he further says:
"It affords presumptive and conclusive evidence of moral turpitude in those by whom it was invented and first employed." 9 Bentham, *Works* (ed. 1843) 77.
[35] See as to maxims the present writer's article on *The Use of Maxims in Jurisprudence* (1895) 9 HARV. L. REV. 13, 22-23.
[36] 10 Ency. Brit. (11th ed.) 319.
[37] Pollock, *Expansion of the Law*, 51.

As to the second class. Professor Williston has said that

> "the result reached by means of fictitious statement must not be discarded with the fiction when, as has commonly been the case with fictions in the law, the result reached is desirable though the mode of statement is confusing." [38]

But it does not follow that the fiction phraselogy and fiction reasons should be retained.[39]

Two prominent disadvantages result from the use of fictions. They "are the greatest of obstacles to symmetrical classification." [40] They tend to prevent investigation as to the fundamental principle underlying a rule of law, and to retard the framing of a statement of the rule in strictly accurate terms. By giving an erroneous reason for the rule, they make it difficult thoroughly to understand and apply the rule. Indeed, the adoption of an erroneous reason for a doctrine inevitably leads to misapplication of the doctrine.[41]

> "Fiction was simply the avoiding of difficulties instead of the solution of them . . ." It becomes "its purpose merely to save the trouble of elucidating legal principles . . . Further it has the baneful effect of paralyzing and crippling legal reasoning from sheer considerations of comfort . . ." [42]

The use of fiction tends not only to impair, in a general way, reverence for truth; but also to diminish the respect which would otherwise be felt for the courts and for the law itself. These objections, in substance, have been urged, not by mere theorists, but by experienced lawyers and judges.

> "The expedient of fictions . . . occasionally employed to introduce by stealth real innovations, proves only that courts were more willing to sacrifice truth than form . . . although said to be invented to 'promote justice,' they were conspicuous object-lessons in high places of the utility of falsehood and

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[38] *Liability for Honest Misrepresentation* (1911) 24 HARV. L. REV. 414, 434. Compare Lord Blackburn in *Dalton v. Angus* (1881) L. R. 6 App. Cas. 740, 812. And see Holmes, *Common Law* (1881) 375.

[39] One does not wish to see re-introduced "an ingenious but highly artificial method of arriving at just results . . . now buried in the foundations of more simple and direct ones." Pollock, *Law of Fraud in British India*, 41.

[40] Maine, *Ancient Law* (1st ed.) 27-28.

[41] "To speak of constructive presence is to use the language of fiction, and so to hinder precise analysis." Holmes, J., in *Hyde v. United States* (1912) 225 U. S. 347, 386.

Undoubtedly, the giving of an incorrect reason for a correct doctrine is very common. Indeed, John Stuart Mill goes so far as to say: "Nine-tenths of all the true opinions which are held by mankind are held for wrong reasons." *2 Letters of J. S. Mill*, Appendix, 372. And Judge Holmes has said that judges know which way to decide a good deal sooner than they know how to give the reason why. But a clear perception of the underlying reason is essential to the beneficial working of a correct doctrine, and experienced judges have taken pains to expose "the negation of error upon erroneous grounds."

[42] Pulszky, *Theory of Law and Civil Liberty*, 435, 436.

craft. Their influence was sinister. Their example was contrary to public policy because hostile to the cultivation of good faith among men." [43]

In opposing the continuing use of fictions, we have not been "slaying the slain." The question of the expediency of employing fictions is still a living issue in important branches of the law; and is defended by authorities entitled to respect.

It is now proposed to give some examples of old fictions which are still in use. The list is not complete. Nor do we claim the merit of originality in pointing out the fictions or in stating the objections to their use. Indeed, the criticisms here given are largely in the form of quotations. In some instances, the use of the fiction has obstinately persisted. In others, it is gradually diminishing; and, for these last cases, "decadent fictions" might be a better term than "surviving fictions." Within the limits of this paper we can do little more than briefly call attention to the fallacies and mistakes involved in the use of fiction in the various instances. We cannot now enter upon a thorough discussion of any particular doctrine or of the ground of it. We believe that, at the present day, the use of fiction in law should be entirely abandoned. As was intimated earlier, if a fiction does not, in any degree or to any extent, represent a legal truth, then its continued use can result only in evil. If, on the other hand, it represents—in part at least—some clumsily concealed legal truth, then it is capable of being translated into the language of truth, and we should adopt Mr. Bentham's remedy—"Burn the original, and employ the translation in its stead.." [44] In short, we would entirely discard the use of fiction phrases and fiction reasons.

If it be granted that fictions were, "at a certain stage of human development," useful aids in the formation of law, it does not follow that they should not now be discarded. At most, "they are merely the scaffolding behind which the house was built, and now that the house is convenient, and proximately complete, the scaffold may be taken down." [45] The scaffolding, even if useful in construction, yet, after the building is erected, serves only "to obscure it." [46]

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[43] Phelps, *Judicial Equity Abridged*, ss. 149, 150.
[44] 6 Bentham, *Works* (ed. 1843) 582.
[45] J. F. Stephen, *Dig. of Crim. Law* (Am. ed. of 1878) 404, n. xvi, Chap. XXXII
[46] Gray, *Nature and Sources of the Law* (1909) s. 85.

EXAMPLES OF SURVIVING FICTION

EXAMPLE ONE: *As to Conclusive Presumption.*

The expression "conclusive presumption" might be taken to be a term used solely in the statement of a rule (a statement of a principle) in the law of evidence, and not concerned with rules of substantive law. Even if, however, its application is thus limited, its use would be open to criticism.[47] But the expression "conclusive presumption" is used today as a clumsy and roundabout method of stating a rule of substantive law; or rather, as giving a fiction reason for a rule of substantive law.

> "All conclusive presumptions pertain in form to procedure, but in effect to substantive law." [48]
>
> "Such rules, though in form connected with the law of Proof, are in truth rules of substantive law disguised in the language of mere adjective rules." [49]
>
> "However the conclusive presumption may be defined or explained, it is, in reality, a rule of substantive law . . ." [50]

A conclusive presumption is

> "a rule of substantive law masquerading as a rule of evidence." [51]
>
> "Conclusive evidence is not evidence at all; it is something which takes the place of evidence and of the thing to be proved as well." [52]

To say that a certain element is implied or presumed

> "is only helping out a false theory by a fiction . . . Whenever it is said that a certain thing is essential to liability, but that it is conclusively presumed from something else, there is always ground for suspicion that the essential element is to be found in that something else, and not in what is said to be presumed from it." [53]

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[47] "In strictness, there cannot be such a thing as a 'conclusive presumption.'" 4 Wigmore, *Evid.* s. 2492.

Conclusive presumptions are

"almost necessarily more or less false, for it is seldom possible in the subject-matter of judicial procedure to lay down with truth a general principle that any one thing is conclusive proof of the existence of any other." Salmond, *Jurisp.* (ed. 1902) 589.

"For, all that is meant by a conclusive proof, is a proof which the law has made so. Independently of predetermination that it *shall* be conclusive, no inference from one fact to another can be more than probable: Although, in loose language, we style the proof *conclusive*, wherever the probability appears to be great." 1 Austin, *Jurisp.* (3d ed.) 508-509.

[48] Salmond, *Jurisp.* (ed. 1902) 580.

[49] Kenny, *Outlines of Crim. Law* (5th ed.) 325.

[50] 2 Chamberlayne, *Mod. Law of Evid.* s. 1160.

[51] Prof. Williston, *op. cit.*, 24 HARV. L. REV. 414, 425.

[52] Gray, *The Nature and Sources of the Law*, s. 228, p. 99.

[53] Holmes, *The Common Law* (1881) 134.

> "In strictness there cannot be such a thing as a 'conclusive presumption.' Wherever from one fact another is conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule really provides that, where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case;[54] and to provide this is to make a rule of substantive law, and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence. The term has no place in the principles of evidence (although the history of a 'conclusive presumption' often includes a genuine presumption as its earlier stage), and should be discarded."[55]

The foregoing views are well illustrated by the prevailing fiction respecting "malice" in the law of defamation, where malice is often enumerated among the requisites to a *prima facie* action; but it is said that malice need not be proved, because its existence is conclusively presumed. This, of course, means that malice is *not* a requisite.[56]

Judges often fail to admit frankly that the substantive law is being changed by their decisions, and they sometimes use "fiction phrases" to conceal the fact of such change. In the instances just discussed, there is a "tendency to veil the reality under the fiction that they are merely laying down a rule of evidence."[57]

EXAMPLE TWO: *As to the alleged legal presumption that every man intends the natural and probable consequences of his acts.*

It is sometimes said that a person is presumed in law to intend the natural and probable consequences of his acts. For such a universal presumption there is no foundation save in fiction.

Professor George L. Clark says of this "unfortunate maxim":

> "If this were taken literally, it is obvious that it would wipe out the sound and well-settled distinction between intentional and negligent torts."[58]

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[54] Willard, J., in *State v. Platt* (1870) 2 S. C. 150, 154.
"Where several independent acts are required to be performed in order to accomplish a given result, to say that proof of the performance of one of them shall be submitted as conclusive proof of the performance of the other, is to say in effect that one alone is really requisite."

[55] 4 Wigmore, *Evid.* s. 2492.

[56] As to the old law of defamation regarding malice, the changes in the law, and the use of fiction phrases to conceal the changes, see citations and comments in article by the present writer (cited in note 15, *supra*) in 60 U. OF PA. L. REV. 365, 370-372, and 461-466. See also 2 Chamberlayne, *Mod. Law of Evid.* 1452-1456. See, especially, N. St. John Green, 6 AM. LAW REV. 597, 609-610; 1 Street, *Foundations of Legal Liability*, 317; Gaynor, J., in *Prince v. Brooklyn Daily Eagle* (1896) 16 N. Y. Misc. 186, 188.

[57] See the present writer (in article cited in note 15, *supra*) 60 U. OF PA. L. REV. 461, 465-466.

[58] 17 U. OF MO. BUL. No. 13, p. 30, n. 73; Law Series 12.

> "It is not sufficient to indicate an intentional injury that the party causing it had reasonable ground to expect that such a result was within reasonable probabilities, otherwise a violation of the duty to exercise ordinary care would, of itself, be sufficient to indicate such injury." [59]

The so-called presumption "that every man intends the probable consequences of his acts" is not a rule of law "further or otherwise than as it is a rule of common-sense." [60]

> "In fact there is no such legal presumption. It is merely a presumption of fact which the law sometimes sanctions, or approves, or allows a jury to act upon. And the admission that it is an inference of fact and not of law proves that its application depends on varying circumstances." [61]
>
> "It is not universally true that a man intends the probable consequences of his act . . . Probable consequences may result from acts as to which the law, by pronouncing them to be negligent, expressly negatives intent."

In many cases, undoubtedly, the facts are such as to justify a jury in finding intent. And, if the facts are so strong that no other finding could reasonably be made, the judge may be justified in assuming the existence of intent without submitting that issue to the jury. But whenever intent is thus inferred, "the process is one of inference from fact, not of pre-determination by law." Or, in other words, "the process is induction from fact, not deduction from arbitrary law." [62]

> "It is sometimes said that a person is presumed in law to intend the natural and probable results of his acts. See *R. v. Harvey* (1823) 2 B. & C., p. 264. Such a form of statement, however, is useless and misleading. So far as it is true at all, it is simply an improper way of saying that a person is responsible for the natural and probable consequences of his acts, whether he intended them or not. Commonly, it makes no difference whether a consequence was intended or not, provided that it was natural and probable; for the same liability exists in each case. But there are exceptional instances (many of them in criminal law, and some also in the law of torts) in which the distinction becomes important—a defendant being liable for intended consequences but not for others. In such cases the alleged presumption does not exist,[63] and in all other cases it is unnecessary."

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[59] Marshall, J., in *Bolin v. Chicago, St. P. etc. Ry.* (1900) 103 Wis. 333, 352.
[60] 2 Stephen, *Hist. of Crim. Law of Eng.* (1883) 111.
[61] Peters, C. J., in *State v. Hersom* (1897) 90 Me. 273, 275.
[62] See 2 Wharton, *Evid.* (3d ed.) ss. 1258, 1261, 1262. Also article by the present writer (cited in note 15, *supra*) 60 U. PA. L. REV. 365, 384-385.
[63] See 1 Bishop, *New Crim. Procedure*, s. 97.

"The only constructive intent really known to the law is in those branches of the criminal law in which conscious negligence amounting to reckless disregard of consequences is imputed to the defendant as an intention to produce these consequences; as in the case of murder, and malicious injury to person or property. See p. 16, n. 4 above. In other cases the probability of a consequence may be evidence that it was intended, but there is no legal presumption to that effect, either rebuttable or conclusive." [64]

"The 'presumption' now under consideration is apparently a paraphrase of the statement of a very ordinary rule of substantive law to the effect that one who does an act prohibited by law takes the risk of all the natural consequences of his act, and cannot, except where intent is an element of the liability charged, escape responsibility for the consequences of his conduct by saying that they were not embraced within the scope of his intention. So understood, the maxim is undoubtedly correct. . . . It suffers, however, from the infirmity that it has no possible connection with the law of evidence in general or the subject of presumptions in particular." [65]

"Often these maxims and ground principles get expressed in this form of a presumption perversely and inaccurately, as . . . when the doctrine that everyone is chargeable with the natural consequences of his conduct, is expressed in the form that everyone is presumed to intend these consequences. . . ." [66]

EXAMPLE THREE: *The fiction of constructive intent; considered especially with reference to the defense of plaintiff's contributory negligence.*

The use of this fiction serves the purpose of concealing the fact that the judges are now departing from the earlier decisions as to contributory negligence, and are changing the law on that subject.

Formerly, two points seemed tolerably well settled. 1. If defendant *intentionally* caused damage to plaintiff, he could not set up the defense that plaintiff's negligence was a contributing cause. 2. But if defendant *negligently* caused (was a part of the cause of) damage to plaintiff, defendant was not liable in case plaintiff's own negligence was also a part of the cause. As to the second point, the courts were at first inclined to make a rigid application of the rule in its literal terms. A plaintiff whose own negligence constituted only a small part of the compound legal cause of the damage was held barred from recovering any part of the damage, although the defendant's negligence constituted a much larger part of the damage and was of a more objection-

[64] Salmond, *Torts* (1st ed.) 104, n. 3.
[65] 2 Chamberlayne, *Mod. Law of Evid.* s. 1166.
[66] Professor J. B. Thayer, *Prel. Treatise on Evid.* 335.

able quality. Negligence of the plaintiff, however small a part of the compound cause, would always bar his action irrespective of the *quantum* or the quality of the defendant's negligence.

This rigid doctrine proved unpopular. The courts gradually came to hold that a negligent defendant might be barred from setting up the defense of plaintiff's contributory negligence in certain cases where defendant's own negligence was of a peculiarly objectionable character, *e. g.* in certain cases where defendant, though not desiring to cause damage, acted with knowledge of the danger and in conscious disregard of it.[67]

But the judges did not like to admit frankly that they were thus—partially, at least—overruling the law as previously laid down. Hence, some courts said that the defendant in such cases must be regarded, not as having negligently caused this damage, but as having intentionally caused it. And to sustain this distinction, they resorted to the fiction of constructive intent. Constructive intention to do harm was sometimes imputed to a defendant in the admitted absence of actual intent.[68]

At the present time, American courts generally hold that a defendant whose fault is part of the cause of the damage cannot set up the defense of plaintiff's contributory negligence, if the following propositions are established (made out):

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[67] If a better phrase is desired, the idea might, perhaps, be expressed by the words—"If defendant is consciously negligent." But it may be a question whether this expression is sufficiently full or accurate.

"Gross negligence" would not be a satisfactory term. It might be understood as meaning negligence somewhat greater in degree than plaintiff's negligence, but not materially differing from it in kind. This has been held an insufficient description of culpable conduct on the part of a defendant which will bar him from setting up the defense of plaintiff's contributory negligence. See Knowlton, C. J., in *Banks v. Braman* (1905) 188 Mass. 367, 370.

[68] *Aiken v. Holyoke St. R. Co.* (1903) 184 Mass. 269, 271, presents a strong instance.

The idea intended to be conveyed by the term "constructive intent" is sometimes attempted to be expressed by describing defendant's conduct as "wilful," or "wanton," or "reckless." But the use of these terms provokes controversy as to the proper definition of each. "Wilful" is an ambiguous term, liable to be used in two very opposite senses. (As to different meanings of "wilful" compare Start, C. J., in *Anderson v. Minn. St. P. etc. Ry.* (1908) 103 Minn. 224, 228; Jaggard, J., in *same case,* 230; *Black's Law Dictionary,* 1242; *Klenk v. Oregon S. L. R. R.* (1904) 27 Utah, 428; *Southern Ry. v. McNeeley* (1909) 44 Ind. App. 126; *Barrett v. Cleveland, etc. Ry.* (1911) 48 Ind. App. 668; *Tinsley v. Western Union Tel. Co.* (1905) 72 S. C. 350.) "Wanton" and "reckless" are vague, indefinite expressions. It is better to disregard these terms, and, instead, describe the specific conduct on the part of the defendant which will debar him from setting up the defense of plaintiff's contributory negligence, *e. g.* by enumerating the four propositions given immediately hereafter in the text.

1. Defendant was conscious of (was aware of) plaintiff's perilous position.

2. Defendant realized the substantial danger of harm to plaintiff, in case defendant should fail to use care.

3. Defendant, although not desiring to cause damage, consciously failed to use care.

4. (A requisite which would be included by some courts, though not, perhaps, by all)—Defendant, though not desiring to cause damage, was indifferent as to whether harm would result from his failure to use care.

We find no fault with the result now generally reached in cases including the above four elements.[69] But we do question the reasoning and phraseology sometimes used to sustain this result. The phrase "constructive intent," as used in reference to such a case, is a fiction. Upon the best definitions of "intent" and "negligence," the damage in the above case was not intentionally caused but negligently caused."[70]

[69] The view that the presence of these elements furnishes the *ratio decidendo* is not always distinctly taken in the opinions. But a careful analysis of the cases decided adversely to the defendant will generally disclose the presence of at least three of these elements—*viz.*, propositions 1, 2, and 3.

[70] There is some conflict of authority as to both definitions.

As to intent: Markby, Salmond and Terry hold that desire to procure a consequence is an essential element of "intent" to produce it. See Markby, *Elements of Law* (5th ed.) ss. 222, 220; Salmond, *Jurisp.* (ed. 1902) 415; Salmond, *Torts* (4th ed.) 20, 21, 22; *Terry, Leading Principles of Anglo-American Law*, 195.

On the other hand, Austin maintains that desire is not an essential element of intent, but that expectation is sufficient. He virtually says that if a person thinks that there is any chance, or any appreciable chance, of a certain consequence following his act or omission, then he "intends" that consequence. See summary of Austin's view in Terry, *op. cit.* s. 220, founded on 1 Austin, *Jurisp.* (3d ed.) 442, and see 433, 437. Compare Stroud, *Mens Rea*, 3-6.

We believe the better view is that adopted by Markby, Salmond and Terry.

As to negligence: Wharton, *Negligence* (1st ed.) s. 3 holds that inadvertence is an essential element of negligence. The contrary view is taken by Salmond and by Shearman and Redfield. They hold, in effect, that a man may be conscious that he is failing to use proper care, and conscious that this failure involves a substantial risk of harm to others, and yet that resulting harm, if it is not desired, is to be regarded as negligently caused rather than intentionally caused. See 1 Shearman and Redfield, *Negligence* (6th ed.) ss. 3, 5, 6; Salmond, *Jurisp* (ed. 1902) 432, 434, 430, 435; Salmond, *Torts* (1st ed.) 19, and see p. 33, par. 3. Compare 1 Beven, *Negligence* (2d ed.) 5.

We think that the latter view is preferable.

In a case including the four propositions *ante*, it is conceded that the decision would now be in favor of the plaintiff; the controversy is as to the reason for this result. How do the above stated conflicting definitions of intent and negligence bear on this question? Suppose that a judge adopts Markby's definition of intent and Salmond's definition of negligence. Then, if the judge gives constructive intent as the basis for his decision, he is consciously resorting to sheer fiction. Suppose that a judge adopts Austin's definition of intent and Wharton's definition of negligence. Then, if these definitions are correct, he has no need to rely upon the fiction of constructive intent, inasmuch as, under these definitions, there would in this case be actual intent (damage intentionally caused). But the difficulty is that, according to our view, these alleged fundamental definitions are erroneous.

It is not admissible to manufacture a "hybrid" tort, composed (theoretically as it were) of both intent and negligence.

> "He who causes a result intentionally cannot also have caused it negligently, and *vice versa*. . . . Negligence and wrongful intent are inconsistent and mutually exclusive states of mind." [71]
>
> "As between the two conceptions, conduct must ordinarily be one or the other. In the very nature of things the same conduct cannot be both. And the difficulty cannot be evaded by resorting to the fiction of constructive intent." [72]

It can be urged that negligence, if of a peculiarly objectionable quality, may be "as bad as intent, in point of moral deserts," [73] or that "reckless indifference to probable consequences" may be "morally as bad as an intention to produce those consequences." [74] But it does not follow that the two things are of the same legal nature, or that they ought to be called by the same name.

The same fiction reason of constructive intent is sometimes relied upon in another class of cases where its use is even less defensible than in the preceding case of the four propositions. Suppose that a defendant was *not* aware of plaintiff's perilous position, but would have discovered it if he had used reasonable care and foresight. Some courts hold that, even though defendant did not know, yet if he *ought* to have known, he is barred from defending on the ground of plaintiff's contributory negligence.[75]

To sustain this result, courts sometimes resort to the fiction reason of constructive intent. But, even if this reason should be held properly applicable in the previous case of "conscious negligence," it does not follow that it is applicable here.

The argument for plaintiff is, in substance, that defendant, who had in fact no expectation of a harmful result, *ought* to have expected or foreseen the probability of such a result, and that hence the law should treat him as if he actually had foreseen it; and that then it follows that he should be treated as having intended the result.

This argument involves not merely fiction, but double fiction—fiction twice applied. "Constructive knowledge" is brought in as a

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[71] Salmond, *Torts* (1st ed.) 18-19.

[72] See article by the present writer (cited in note 15, *supra*) 60 U. OF PA. L. REV. 365, 386.

[73] Salmond, *Jurisp.* (ed. 1902) 448.

[74] 2 Stephen, *Hist. of Crim. Law of Eng.* 360. And compare Bishop, *New Crim. Law*, s. 313.

[75] Upon this point there is a conflict of authority. See cases cited in 21 L. R. A. (N. S.) 427-442, n. It is not proposed here to discuss the main question of liability; but only to consider the soundness of one reason sometimes given to sustain a decision against the defendant.

basis for "constructive intent"; there is an inference from another inference, a presumption resting on the basis of another presumption.[76]

The fallacy of this argument becomes apparent when it is analyzed and reduced to its lowest terms, as follows:

1. Because defendant ought to have foreseen what he did not foresee, the law should hold that he "constructively" foresaw.

2. Because he "constructively" foresaw, he must be regarded as having "constructively" desired what he "constructively" foresaw.

Or in this form:

1. Presume that defendant foresaw what it is admitted he did not foresee; and then,

2. Because he is thus presumed to have foreseen what he did not foresee, he must further be presumed to have desired what he neither foresaw nor desired.[77]

EXAMPLE FOUR: *As to the doctrine of implied malice in criminal law.*

Its use in criminal law has been mainly confined to one department, homicide, and there it has been productive of confusion, and sometimes of unjust results.

At a very early day the presence or absence of "malice aforethought" was taken as a test to distinguish between murder and manslaughter; "but experience soon showed that the test was a rough one, and failed in many cases." [78]

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[76] See 2 Chamberlayne, *Mod. Law of Evid.* s. 1029.

[77] " . . . it cannot be conceived, in the nature of things, how a purpose to accomplish a given result can be imputed to mental conditions, the very essence of which is the absence of all thought on the particular subject. . . . to imply a purpose to do a thing from inadvertence in respect of it, is a contradiction in terms." McClellan, J., in *Georgia Pacific Ry. v. Lee* (1890) 92 Ala. 262, 270

"To say that negligence or heedlessness may run into intention, is to say that a thought may be *absent* from the mind, and yet (after a fashion) *present* to the mind." 1 Austin, *Jurisp.* (3d ed.) 442.

[78] "What is malice aforethought? Is there any malice that is after thought?" 1 Edward Livingston, *Works on Crim. Jurisp.* 309.

"The word 'aforethought' in the definition of murder, has been held to mean almost, if not quite, nothing." 2 Bishop, *New Crim. Law*, s. 677.

" . . . the word 'aforethought' is practically unmeaning." 2 Stephen, *Hist. of Crim Law of Eng.* 119.

" . . . the words 'aforethought,' 'prepense,' 'deliberate,' in the established definition have no real meaning, inasmuch as the state of mind which causes the act must of necessity precede it." 3 Stephen, *op. cit.* 70.

" . . . the word aforethought is unfortunate, . . . The word aforethought countenances the popular error that a deliberate premeditated design to kill is required in order to constitute the guilt of murder, whereas it is only one out of several states of mind which have that effect. It is, moreover, an unmeaning word, for the thought, the state of mind, whatever it is, must precede the act; and it precedes it equally, whether the interval is a second, or twenty years." Stephen, *General View of Crim. Law of Eng.* (1st ed.) 118, 119.

"In order to meet such cases without sacrificing the established definition, the doctrine of implied malice was invented." [79] "The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw. To say that he was presumed to have intended them, is merely to adopt another fiction, and to disguise the truth." [80] Some of the results reached in this way (by the application of this fiction) were intrinsically just; but this was not so as to all the results. In one or more classes of cases the result is now disapproved;[81] and in other cases the prisoner could well have been held guilty, "apart altogether from the artificial doctrine in question," and according to ordinary principles without the aid of fiction.[82]

"The modern tendency is to restrict, if not to disregard" the doctrine of implied malice. It does not furnish a basis from which to reason by analogy. A recent writer goes so far as to express the opinion that it may be regarded as now "discredited and obsolete." [83]

There is a growing tendency to discard the terms "malice," "malice aforethought," and "implied malice." This tendency is apparent in the *Draft of an English Criminal Code*, printed in 1879. (The proposed code was never enacted, but deserves great consideration from the eminence of the codifiers, who were appointed by a Royal Commission.) In that draft the expression "malice aforethought" is not used. The commissioners who prepared the draft substituted

> "a definite enumeration of the states of mind intended to be taken as constituent elements of murder for a phrase which is never used except to mislead or to be explained away." [84]

The use of the word "malice" is avoided throughout the English Draft Code, as it is in the Indian Penal Code.[85] In their *Report* the English Commissioners say:

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[79] Stephen, *General View of Crim. Law of Eng.* (1st ed.) 43, 44.
[80] Holmes, J., *Com. v. Pierce* (1884) 138 Mass. 165, 178.
[81] See 2 Bishop, *New Crim. Law*, s. 681; 3 Stephen, *Hist. of Crim. Law of Eng.* 71, 75; Stroud, *Mens Rea*, 176; Stephen, *General View of Crim. Law of Eng.* (1st ed.) 119; 2 Chamberlayne, *Mod. Law of Evid.* ss. 1138-1142, 1145-1149; Prof. Joel Parker, 72 NORTH AM. REV. 187, 188, 192, 198-202.
[82] See Stroud, *Mens Rea*, 182 *et seq.*, 185.
[83] See Stroud, *Mens Rea*, 172, 181-182.
[84] 3 Stephen, *Hist. of Crim. Law of Eng.* 83.
"It is much better, in defining murder, to state directly what acts or states of mind are forbidden than to call them malicious and then have to go on and explain that 'malice' does not really mean malice but something quite different." Terry, *Leading Principles of Anglo-American Law*, s. 220.

> "It seems to us that the law upon this subject ought to be freed from the element of fiction introduced into it by the expression 'malice aforethought,' . . ."

The word "malice" is not used in the definition of murder in the Penal Code drafted by Edward Livingston for the State of Louisiana (never enacted).[86]

EXAMPLE FIVE: *As to the fiction of conclusive presumption of intent, stated as affording the reason for the doctrine of trespass ab initio.*

That doctrine is, in substance, as follows:

He who under authority of law enters upon another's land,[87] and is subsequently guilty of an abuse of that authority by committing a wrong of misfeasance[88] against the owner, is deemed to have entered originally without authority, and is therefore liable as a trespasser *ab initio* for the original entry itself, as well as for all damaging acts subsequently done by him thereunder. By the subsequent abuse, he forfeits the protection which the law would otherwise give to the original entry. The abuse of the authority not only terminates it, but revokes it retrospectively, so that it is deemed never to have existed.[89]

But if one enters under an authority *in fact*, given by the owner, his subsequent abuse of that authority does not make him liable as a trespasser for the original entry. He is liable only for abuse or misconduct occurring after entry.

It has been said that the rule of trespass *ab initio* was "primarily one of procedure," authorizing the maintenance of an action of trespass *quare clausum fregit* for the entire damage including the original entry, instead of an action on the case for the subsequent abuse only. In view of modern procedural changes, the question as to the form of action under the old system is not now of practical importance. But the rule did not merely affect the form of action under the old procedure. It created a substantive liability which would not otherwise exist. And

> "its secondary effect upon the substantive law still remains, *viz.*, that it enables the plaintiff to recover damages for the entire

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[85] See *Report* of Commissioners, 15, 23, 24.

[86] See *2 Complete Works of Edward Livingston on Criminal Jurisp.* 147, art. 537. As to the learned codifier's reasons for the omission, see Vol. 1, p. 307-310 As to the objections to the use of the term "implied malice" in the law of defamation, see quotations cited in the paper by the present writer in 60 U. OF PA. L. REV. 461-463.

[87] The doctrine does not apply merely to entry upon land.

[88] "A positive wrongful act, as opposed to a mere omission or non-feasance."

[89] See definitions in text-books; especially Salmond, *Torts* (1st ed.) 167; Cooley, *Torts* (2d ed.) 371-372.

transaction, and not merely for the wrongful portion of it" (the abuse subsequent to the entry).[90]

For this doctrine of trespass *ab initio* two prominent reasons or explanations are given.

1. The subsequent abuse of the right conferred by law gives rise to a conclusive presumption that an intent to abuse the authority existed at the time of the original entry.

2. A ground of public policy to be briefly referred to later.

Here we are concerned only with the correctness or sufficiency of the first reason, *i. e.*, the presumption as to the original intent.

An early statement of this reason is found in the leading case of *The Six Carpenters*:[91]

> ". . . in the case of a general authority or license of law, the law adjudges by the subsequent act, *quo animo*, or to what intent, he entered; for *acta exteriora indicant interiora secreta.*"

This view has been restated in various forms:

> "The presumption of law is, that he who thus abuses such an authority assumed the exercise of it in the first place for the purpose of abusing it." [92]
>
> ". . . it is presumed, from the misbehavior of the licensee, that he entered originally with the intent to do the wrong he has actually committed, and not in good faith under his license." [93]
>
> "He is said to be a trespasser *ab initio*, on the assumption that his subsequent misconduct evidences an intention from the first to commit unlawful acts under the color of a lawful authority." [94]
>
> ". . . the original intent was presumed conclusively from the subsequent conduct." [95]

This presumption has practically been regarded as a conclusive presumption, although the word "conclusive" may not have been used in stating it. It is treated as irrebuttable.

There is no ground for a conclusive presumption in cases of this nature generally. In some instances a jury might be justified in finding the fact of the existence of such an intent, *e. g.* where the abuse followed closely upon the original entry and was of an extreme nature. Subsequent misconduct may, in particular cases, be held to afford some evidence of original intent. But that is a very different thing from

[90] See 1 Salmond, *Torts* (1st ed.) 168; Bigelow, *Torts* (7th ed.) But compare Street, *Foundations of Legal Liability*, 244.
[91] (1610) 8 Coke, 146*a*, 146*b*.
[92] 1 Water, *Trespass*, s. 493.
[93] Cooley, *Torts* (2d ed.) 371.
[94] Clerk & Lindsell, *Torts* (2d ed.) 165.
[95] Holmes, J., *Com. v. Rubin* (1896) 165 Mass. 453, 455.

holding that it gives rise in all cases to a conclusive legal presumption of original intent.

Modern writers who have given attention to the question practically agree in calling the "presumption" a fiction, "an artificial assumption."

> "This artificial assumption in many cases does not accord with the real justice of the case." [96]
>
> ". . . by a fiction of law to make him a trespasser *ab initio*." [97]
>
> ". . . a legal fiction due to the misplaced ingenuity of some medieval pleader . . ." [98]
>
> ". . . an artificial presumption to the effect that the subsequent abuse was evidence of a wrongful intent from the beginning, . . ." [99]
>
> "An artificial difficulty was thus overcome by artificial means." [100]

The theory that the law will invariably infer the original wrongful intent from the subsequent act of abuse, was stated in the *Six Carpenters' Case* [101] as a ground for distinguishing the case of authority given by law from that given in fact, and for applying the rule of trespass *ab initio* to the former case but not to the latter. This ground of distinction [102] has been strongly criticised. It is said that this reason "applies equally to both cases," and that it is not easy to see why intent from the beginning to abuse authority may not be as readily inferred in the one case as in the other.[103]. In Hammond, *Nisi Prius* (Eng. ed. of 1816) it is forcibly said:

> ". . . if the *nature* of a subsequent act of trespass was indicative of a previous evil intent, it must be so not only in the instance where it has been perpetrated in executing an authority in law, but likewise when it has been committed in fulfilling an authority in fact."

Does the rejection of this fiction reason (conclusive presumption of original intent) necessitate the abandonment (the elimination from the law, the legal annihilation) of the doctrine of trespass *ab initio?*

If it does have that effect, the result will not be regretted by some leading jurists. Prof. Salmond [104] and Judge Holmes [105] have indicated their willingness to get rid of the doctrine.

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[96] Clerk & Lindsell, *Torts* (2d ed.) 165.
[97] Bigelow, *Torts* (7th ed.) s. 490.
[98] Salmond, *Torts* (1st ed.) 168.
[99] 1 Street, *Foundations of Legal Liability*, 47.
[100] *Id.* 47.
[101] (1610) 8 Coke 146*a*.
[102] "a curious and rather subtle distinction." Pollock, *Torts* (6th ed.) 379.
[103] See note in 14 Am. Dec. 365.
[104] *Torts* (1st ed.) 168.
[105] *The Path of the Law* (1897) 10 HARV. L. REV. 457, 469.

But it would not necessarily have that effect. Another reason has been given for the doctrine, and, whether entirely satisfactory or not, it is certainly a better reason than the fiction of presumed intent. It is founded upon general considerations of policy, and has been stated in substantially the following form:

> "When the law gives one man an authority to enter upon or take possession of another's property against the owner's will, it must provide ample safeguards against the abuse of the authority, since it disarms the owner of the power of protecting himself. But where the owner himself gives the authority, the means of protection are in his own hands." [106]

Where

> "an authority in law is delegated to another, the privilege is conferred upon this *implied condition*, that he does not convert it into an instrument of oppression."

(To be continued)

JEREMIAH SMITH

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[106] 14 Am. Dec. ed. n. p. 365. Compare 6 *Bac. Abr.* (6th ed.) 561, Title "Trespass B"; Hammond, *Nisi Prius* (Eng. ed. of 1816) 54, 55.