



## A History of Injunctions in England Before 1700\*

DAVID W. RAACK\*\*

### INTRODUCTION

The injunction has been called the quintessential equitable remedy.<sup>1</sup> This article will examine the history of this equitable remedy before 1700. First, several of the injunction's possible forerunners, in ancient Roman law and in the equity administered by the early English common law courts, will be discussed. The article will then trace the development of injunctions in England until the end of the 1600's.

The rules of injunctions, like the rules of equity generally,<sup>2</sup> were a product of the institution of the Court of Chancery, and this account of the evolution of injunctions will necessarily entail an account of the growth of Chancery from its origin as an administrative office to its emergence as a judicial body. The period before 1700 was chosen because the events and conflicts

---

\* I want to express my appreciation to John Lindsey, Law Librarian and Professor of Law at Temple University School of Law, for his valuable comments and suggestions on this article. I also want to thank Lawrence Reilly, Reference Law Librarian at Temple University School of Law, for translating into English many of the cases used. An earlier draft of this article was submitted as the author's LL.M. thesis at Temple.

\*\* Assistant Professor of Law, Ohio Northern University, Pettit College of Law; LL.M., Temple University School of Law 1985; J.D., University of Missouri-Kansas City School of Law 1979.

1. "As the characteristic remedies of the courts of common law are the judgment awarding seisin of land and the judgment for damages, the characteristic remedy of Chancery is injunction." C. REMBAR, *THE LAW OF THE LAND: THE EVOLUTION OF OUR LEGAL SYSTEM* 275 (1980).

2. See T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 677-80 (5th ed. 1956).

of this period had perhaps the largest influence in shaping modern injunctive rules.

Although some other equitable remedies, such as specific performance, are quite similar to injunctions, this discussion will be limited to injunctions. An injunction may be defined as "[a] judicial process operating in personam, and requiring [the] person to whom it is directed to do or refrain from doing a particular thing."<sup>3</sup> The focus here will be on in personam judicial orders in cases where there has not been an agreement or contract between the parties; cases involving such agreements belong more properly to a history of contract and specific performance.

## I. FORERUNNERS OF INJUNCTIONS

It does not appear that the term injunction was used to describe a judicial remedy until after the Chancery became a judicial body, in the later part of the fourteenth century. But there were several remedies that appeared in legal history prior to that time which, because they functioned in ways similar to injunctions, suggest themselves as forerunners or ancestors of injunctions. These remedies were the Interdict of ancient Roman law, the writs of the English Kings in the period following the Norman Conquest, and the writs of the early English common law courts.

### A. *Interdict of Roman Law*

A number of scholars have noted the similarity between the Praetor's interdicts of Roman law and injunctions. Interdicts were "certain forms of words, by which the Praetor (the chief judicial magistrate of Rome) either commanded or prohibited something to be done; and they were chiefly used in controversies respecting possession, or *quasi* possession."<sup>4</sup> This definition indicates a resemblance to injunctions: the commanding or prohibiting something to be done.

Interdicts of the Praetor were of three sorts: prohibitory, forbidding an act; restitutory, ordering property to be restored to a party; and exhibitory, commanding a defendant to produce something in court.<sup>5</sup> Although interdicts were of three types, the prohibitory form appears to have been the most common; one writer has explained that interdicts were frequently used "to prevent persons being disturbed in the exercise of any just right, or to prohibit

---

3. BLACK'S LAW DICTIONARY 705 (rev. 5th ed. 1979).

4. 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 866 (5th ed. 1849). Story added that "it is said to have been called Interdict, because it was originally interposed in the nature of an interlocutory decree between two parties, contending for possession, until the property could be tried. But afterwards the appellation was extended to final decretal orders of same nature." *Id.*

5. *Id.*

any acts being done which would obstruct the free use of the public ways or navigable rivers, or to prevent the cutting down trees, and the like."<sup>6</sup> And it is in situations like these, where harm is threatened, that injunctions would come to be used in English equity.

Is there any relationship between the Praetor's interdict and the injunction of Chancery? A number of scholars have speculated on this question.<sup>7</sup> The most likely answer is that "[t]he interdict was in point of form very similar to the injunction of our law, and it is probable that the suggestion for the latter came from the former."<sup>8</sup> But it is not certain that this is what happened, for decisions in the early years of Chancery, when the injunction began to be used, did not contain reasoned, legal explanations. There is no direct evidence that the Chancellors were prompted to use injunctions by the example of Roman law interdicts. There are, however, many points of similarity between the interdict and the injunction.

### B. Orders (Writs) of the King

The writ of the early English Kings was another device that resembled the injunction. In the period from the Norman Conquest until about 1258 there were writs, or more properly, orders from the King, concerning individual disputes.<sup>9</sup> Although called writs, they were not writs in the modern sense, not standard forms obtained from Chancery to begin an action;<sup>10</sup> they were more in the nature of orders or mandates.

Before examining the way these orders or writs were used, it is helpful to consider why the King and his officials were involved in resolving private disputes. There were, during this early period in English legal history (c. 1066 - c. 1258) local courts of the feudal lords which heard legal controversies.

6. 1 G. SPENCE, *THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY* 670 (1846); see also W. BUCKLAND & A. MCNAIR, *ROMAN LAW AND COMMON LAW: A COMPARISON IN OUTLINE* 421 (2d ed. 1952).

7. T. SCRUTTON, *THE INFLUENCE OF THE ROMAN LAW ON THE LAW OF ENGLAND* 162 (1885), said that injunctions are "comparable to Praetorian Interdicts." See 2 J. STORY, *supra* note 4, at § 868, where it is said that interdicts "partake very much of the nature of injunctions in Courts of Equity, and were applied to the same general purposes; that is to say, to restrain the undue exercise of rights, to prevent threatened wrongs, to restore violated possessions, and to secure the permanent enjoyment of the rights of property." See also 1 G. SPENCE, *supra* note 6, at 669 (the interdict "afforded a model" for the injunction in Chancery). This relationship was said to be very strong by 4 J. POMEROY, *A TREATISE ON EQUITY JURISPRUDENCE* § 1337 (3d ed. 1905), who stated that "[t]he remedy of injunction was undoubtedly borrowed by the chancellors from the 'interdicts' of the Roman law."

8. W. BUCKLAND & A. MCNAIR, *supra* note 6, at 420 (citing 1 G. SPENCE, *supra* note 6, at 669, 670).

9. M. BIGELOW, *HISTORY OF PROCEDURE IN ENGLAND 197-98* (1880).

10. T. PLUCKNETT, *supra* note 2, at 355. Plucknett described these writs by saying "and here it must be remembered that the word 'writ', in Latin *breve*, means nothing more than a formal letter of a business character; it does no (sic) necessarily imply either a court or court procedure." *Id.*

But there also was the belief that the Kings were the "fountains of justice."<sup>11</sup> An early ordinance, about a century before the Conquest, said this: "And let no one apply to the king, in any suit, unless he at home may not be worthy of law, or cannot obtain law. If the law be too heavy, let him seek a mitigation of it from the king . . ."<sup>12</sup> This concept of the King being the fountain of justice meant that the King had a duty to provide justice to suitors if the ordinary avenues of relief proved ineffectual.<sup>13</sup> There was, in this early period, no Court of Chancery, no court of equity, to provide a remedy where the existing courts could not.<sup>14</sup>

The Norman sovereigns appear to have still retained to themselves the ancient Saxon prerogative, or rather duty, of protecting and assisting the poor, the impotent, and defenceless [sic], who were unable to obtain redress in the ordinary tribunals. Besides which the king appears to have exercised . . . a prerogative jurisdiction to protect the enjoyment of rights in cases where the ordinary modes of proceeding would not afford effectual relief.<sup>15</sup>

One of the ways in which the Kings fulfilled this duty was to issue orders (termed writs) in specific cases.<sup>16</sup> It appears that litigants, frustrated by the regular courts, would appeal to the King for relief. The King could then do one of two things: command the lord of the manor or some other person to do "full right" or justice to the plaintiff,<sup>17</sup> or "address his mandate directly to a recusant defendant, requiring him to do what the plaintiff

11. D. KERLY, AN HISTORICAL SKETCH OF THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 13 (1890).

12. The Secular Ordinance of Edgar, ch. 2 (959-75), reprinted in R. POUND & T. PLUCKNETT, READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW 194 (3d ed. 1927). See also the Statute of Westminster I, 3 Edw. 1, ch. 17 (1275), which stated in part that "the King, which is Sovereign Lord over all, shall do Right there unto such as will complain."

13. Several legal scholars have noted this royal duty. T. PLUCKNETT, *supra* note 2, at 681, said "equity is inseparable from the duty of the king to do justice and his power to exercise discretion, and . . . this duty and power is at least as old as the conquest." Adams, *The Origin of English Equity*, 16 COLUM. L. REV. 87, 91 (1916), referred to the King's "duty of furnishing security and justice to all in the community." See also Holdsworth, *The Relation of the Equity Administered by the Common Law Judges to the Equity Administered by the Chancellor*, 26 YALE L.J. 1, 22 (1916) [hereinafter cited as Holdsworth, *Relation of Equity*]. Holdsworth mentioned "the theory that the king must do justice—even though he interfered with the strict rules of law." *Id.*

14. M. BIGELOW, *supra* note 9, at 19. Bigelow added that although the Chancellor did not have an equitable jurisdiction at this time, "[t]he nation, however, possessed a judge in equity in the king." *Id.*

15. I G. SPENCE, *supra* note 6, at 107-08.

16. See M. BIGELOW, *supra* note 9, at 199, where Bigelow described these writs as "the embodiment of the principle that the king personally was the fountain of justice."

17. *Id.* at 151. See also T. PLUCKNETT, *supra* note 2, at 355-56. Plucknett had a different emphasis than Bigelow, and said that these writs were used to increase the jurisdiction of the royal courts. The writ would require a sheriff to command the feudal lord to do justice or explain his actions in the King's Court, with the result of bringing many disputes before the King's Court.

prayed, or rather, what the king was pleased to order."<sup>18</sup> These latter writs, addressed "directly to a recusant defendant," deserve attention as possible forerunners of injunctions.<sup>19</sup>

One case involving a writ directly from the King arose during the reign of William the Conqueror (1066-1087) when a dispute developed between the Abbot of St. Edmund and the Abbot of Peterborough.<sup>20</sup> King William issued an order commanding the Abbot of Peterborough not to molest the Abbot of St. Edmund who was carrying away stones for his church. In another case, c. 1092, the Abbot of Abingdon obtained an order from King William II, commanding the King's foresters not to molest the Abbot's lands, wood, and pastures.<sup>21</sup> In a similar suit during the reign of Henry I (1100-1135), the Abbot Faritius obtained an order commanding the King's falconer, Ared, and all the King's foresters to allow the Abbot to take away wood.<sup>22</sup> King Stephen, in a case in 1148, issued an order analogous to an injunction. His order, directed to the sheriffs, bailiffs, and townsmen of Canterbury, prohibited any interference with the men of Canterbury going to or coming from the mill.<sup>23</sup> These four cases—four instances where royal orders were issued—all involved orders prohibiting the molestation or interference with the plaintiffs in their exercise of rights. The rights involved were generally property rights—rights to stones or wood, or rights to use a mill. In this respect, these cases resemble many injunction cases, where plaintiffs seek to prevent interference with the exercise of property rights. These royal orders correspond to injunctions in another respect: they were in personam orders, addressed directly to the defendants. One legal scholar has said:

Some of these [orders or writs] were of a kind which in modern times would be called equitable. The most numerous were what may be termed writs of protection. These writs are interesting as being *the forerunners of modern writs of injunction*, and perhaps of the protective process generally of the early Chancery.<sup>24</sup>

---

18. M. BIGELOW, *supra* note 9, at 152.

19. One other form of these writs were those "issued to the king's judges, or to his officers and bailiffs generally or in particular, commanding them to do, or more commonly to refrain from doing, and to prohibit others from doing, certain specified things, or to respect certain specified rights." These writs were orders to officials, not injunction-like commands to parties in litigation. M. BIGELOW, *supra* note 9, at 152.

20. Abbot of St. Edmund v. Abbot of Peterborough (n.d.), reported in M. BIGELOW, *PLACITA ANGLO-NORMANICA: LAW CASES FROM WILLIAM I. TO RICHARD I.* 32 (1881) [hereinafter cited as M. BIGELOW, *LAW CASES*]; M. BIGELOW, *supra* note 9, at 192.

21. Abbot of Abingdon v. The King's Foresters (c. 1092), reported in M. BIGELOW, *LAW CASES*, *supra* note 20, at 64; M. BIGELOW, *supra* note 9, at 192-93.

22. Abbot Faritius v. Ared (c. 1108), reported in M. BIGELOW, *LAW CASES*, *supra* note 20, at 96; M. BIGELOW, *supra* note 9, at 193.

23. Men of Canterbury (1148), reported in M. BIGELOW, *LAW CASES*, *supra* note 20, at 159; M. BIGELOW, *supra* note 9, at 193.

24. M. BIGELOW, *supra* note 9, at 192 (emphasis added).

As noted earlier in the discussion of Roman interdicts, it is, perhaps, not possible to know with certainty if the Chancellors based injunctions on these royal orders or writs. But clearly these orders have many points of agreement with injunctions used in Chancery.

### C. *Equity in the Early Common Law Courts*

The common law courts in England existed long before Chancery became a court of law (which occurred c. 1380-1400 A.D.). This does not mean that there was no equity in the law before Chancery; nor does it mean that when Chancery began administering equitable remedies—such as injunctions—that these remedies were original creations of the Chancellors. The Chancellors found the common law courts to be a fertile source of ideas.

The early common law courts (King's Bench, Exchequer, and Common Pleas) were offshoots of the King's Court. They administered both law and equity,<sup>25</sup> although to express it this way is an anachronism. They did not see themselves as offering remedies of two different sorts; the distinction between law and equity was unknown then.<sup>26</sup> The common law courts were fulfilling the King's duty of doing justice in ways now considered to be both legal and equitable.

In this early period, there were few judicial precedents and only a handful of statutes. The central common law courts possessed wide discretionary powers and could do whatever equity required.<sup>27</sup> Perhaps these courts, in the centuries following the Conquest, believed themselves able to grant

---

25. See generally Hazeltine, *The Early History of English Equity*, in *ESSAYS IN LEGAL HISTORY* 261 (P. Vinogradoff ed. 1913). I am greatly indebted to this excellent essay for my account of equity in the common law courts that follows.

26. See Adams, *The Origin of English Equity*, 16 *COLUM. L. REV.* 87 (1916). Adams wrote: [W]e may confidently assert that Equity and Common Law originated in one and the same procedure, that during the first two hundred years of their history they were not distinguished from one another, and that if we now distinguish between them during that period, we do it artificially, by the application of tests impossible to contemporaries . . . It is well on in the fourteenth century before we get any clear distinction between Equity and Common Law . . . .

*Id.* at 89; see also Barbour, *Some Aspects of Fifteenth-Century Chancery*, 31 *HARV. L. REV.* 834 (1918) [hereinafter cited as Barbour, *Fifteenth-Century Chancery*]. Barbour said, "In fact to speak of law and equity is to import into the twelfth and thirteenth centuries a modern distinction which is absent." *Id.* at 834.

27. Hazeltine, *supra* note 25, at 262; see also 1 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 448-49 (A. Goodhart & H. Hanbury eds. 1924) ("both the court of Common Pleas and the court of King's Bench did apply to cases which came before them ideas and doctrines which we have come to associate with equity rather than with law"). And see 1 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 189-90* (2d ed. 1968), where it is explained that,

our king's court is according to very ancient tradition a court that can do whatever equity may require. . . . In the days of Henry II and Henry III the king's court wields discretionary powers such as are not at the command of lowlier courts, and the use of these powers is an exhibition of 'equity.'

flexible, "equitable" remedies not only because they were an extension of the King and could carry out his duty to do justice, but also because they were outside the ordinary system of justice, just as Chancery was later to be outside the ordinary common law system.<sup>28</sup> Thus, where the local courts were unable to provide a remedy, the central common law courts furnished one, even if the case required an equitable remedy. It appears, therefore, that the history of these common law courts contains the beginnings of English equity. In the words of one scholar, "[t]hese courts developed a rudimentary system of equitable principles and equitable remedies very like, in some respects, the more fully and elaborately developed system of Chancery in a later age."<sup>29</sup> The following section discusses some of the writs<sup>30</sup> by which these equitable remedies were administered in the early common law.<sup>31</sup>

### 1. Writ of Prohibition

One of the principal writs of the early common law courts was the writ of prohibition. In its present use it serves as a writ from a superior court to prevent an inferior court from exercising jurisdiction over matters not within its cognizance, or from exceeding its jurisdiction in matters of which it has cognizance.<sup>32</sup> The early common law courts used the writ of prohibition in two ways. The first way, similar to its present use, was to prevent other courts, especially ecclesiastical courts, from hearing matters not properly within their jurisdiction,<sup>33</sup> to insure that these other courts did not expand

28. Adams, *supra* note 26, at 93. Adams wrote:

We must not overlook the fact that at the accession of Henry II the system of justice which grew into the Common Law was as much outside of, and in violation of, the ordinary system of justice which prevailed throughout the Anglo-Norman state, as ever Equity was at any later time in relation to the Common Law system.

*Id.*

29. Hazeltine, *supra* note 25, at 262.

30. These writs, as will be seen, are writs more in the modern sense of the term than the royal orders, or writs, discussed above.

31. See Adams, *The Continuity of English Equity*, 26 YALE L.J. 550, 554-55 (1917). Adams described the development and path of equity. The first period he listed as 1066 to c. 1170, when equity was still part of the King's large sphere of prerogative action, and it was "administered by the Council, great and small." During the second period, from c. 1170 to c. 1300, the royal courts were administering equity by carrying out the King's prerogative. This was done by the Itinerant Justices and by the central courts. It is this period, during which equity flourished in the courts of law, which is being discussed in the text above. After this time, these courts became inflexible and set in their ways, and after c. 1300, their use of equity diminished.

32. BALLENTINE'S LAW DICTIONARY 1006, 1381 (3d ed. 1969).

33. Hazeltine, *supra* note 25, at 277. Hazeltine explained this use of the writ of prohibition as follows:

In the long struggle of the common law courts with their rivals—in the Middle Ages, chiefly the ecclesiastical tribunals—the writ of prohibition proved itself a

their jurisdiction at the expense of the common law courts. The second use of the writ of prohibition was as an order directly from the common law court to the defendant. It is this second use that resembles an injunction.

The common law courts used the writ of prohibition as an order directly addressed to the defendant, by fashioning their decree in one of several forms. The first form such a decree took was an order to the defendant to refrain from committing some wrongful act. For example, in a case in 1219, the court entered a writ of prohibition to prevent guardians of property from making waste of the woods.<sup>34</sup> In another case, a party with a reversionary interest in property sued the present tenant for waste. The court, by a writ of prohibition, ordered that the tenant pay damages for the waste committed and that she be prohibited from committing further waste;<sup>35</sup> the court thus combined legal (damages) and equitable (writ of prohibition) remedies. In another case, the court entered a writ of prohibition specifying that the defendant refrain not only from active waste—the doing of voluntary acts that constitute waste—but also from passive waste—here, permitting a fish pond and mill to dry up.<sup>36</sup>

The second form the writ of prohibition took was an order that defendant take affirmative steps to remove an interference with another's property. For example, in one case the defendant had built a dike that cut off the plaintiff's animals from access to pasture land. The court decreed, by writ of prohibition, that the defendant remove the dike.<sup>37</sup> It was ordered in another case that the defendant's market, which was being held in violation of its own charter and which constituted a nuisance to plaintiff's market, be closed down.<sup>38</sup> These cases illustrate that the writ of prohibition was not limited to *prohibiting* actions; it could also function to require defendants to perform remedial actions.

---

weapon of wonderful power. It was a writ which could be and was directed not only against parties, but also against tribunals. In cases involving subject matter claimed by the common law courts as falling within their own exclusive jurisdiction, not only were parties restrained by prohibition from suing in ecclesiastical courts, but those courts were themselves restrained by prohibition from entering such proceedings. It was thus largely by this writ that the courts of common law preserved and extended their jurisdiction, keeping other tribunals to their own peculiar province, and that they protected parties in their common law rights as opposed to rights good at ecclesiastical law.

*Id.*

34. 2 H. BRACON, BRACON'S NOTE-BOOK, pl. 27 (1219) (F. Maitland ed. 1887) [hereinafter cited as BRACON'S NOTE-BOOK]; see also *id.*, pl. 607 (1231) (where the court used a writ of prohibition to restrain the defendant from making further waste of the property).

35. 2 BRACON'S NOTE-BOOK, *supra* note 34, pl. 540 (1231).

36. 3 BRACON'S NOTE-BOOK, *supra* note 34, pl. 1617 (1223); Hazeltine, *supra* note 25, at 272.

37. 3 BRACON'S NOTE-BOOK, *supra* note 34, pl. 1253 (1238).

38. 3 BRACON'S NOTE-BOOK, *supra* note 34, pl. 1162 (1235).



A third form of the writ of prohibition was a command requiring defendants to go beyond removing interferences, requiring them to restore or replace property that had been damaged or lost. One such case occurred when a guardian of property gave two trees and two houses to a dowress who removed them from the property. The court ordered, by writ of prohibition, that the guardian build two houses of the same value as those he had given away.<sup>39</sup> In another case, a guardian of an estate who had committed waste was ordered to restore a kitchen that had burned and to repair two buildings that had collapsed—damage that was due to her lack of maintenance. She was also ordered to repair all the other buildings on the property and to refrain from further waste.<sup>40</sup> These two cases demonstrate that courts used the writ of prohibition to require substantial affirmative, restorative acts, not simply to prohibit threatened harm.

The writ of prohibition was, in procedural terms, an *order* from the early common law courts. It was issued at the conclusion of an action or proceeding, such as an action on the writ of waste.<sup>41</sup> The writ of prohibition was an in personam order; it was frequently laid directly upon the defendant by the court.<sup>42</sup> The writ could be used both as a temporary measure—such as an order to refrain from acting while a legal action was pending—or as a permanent decree—an order, for example, to permanently close the defendant's market.<sup>43</sup> These features of the writ of prohibition—its use as an order concluding the proceedings, its in personam character, and its use as an interlocutory or permanent decree—are also features of injunctions. Another similarity was that one of the possible punishments for violation of the writ of prohibition was imprisonment of the disobedient party,<sup>44</sup> just as it is a punishment for contempt for one who ignores an injunction. One significant difference between prohibition and injunctions was that prohibition could be addressed directly to other courts to prevent them from acting; injunctions could not.

The majority of the early writ of prohibition cases in the common law courts concerned wrongs to property or property rights—frequently waste

---

39. The defendant was also required to find pledges to guarantee that he would not remove trees or commit further waste and that he would build the two houses. See 3 BRACTON'S NOTE-BOOK, *supra* note 34, pl. 1075 (1225); Hazeltine, *supra* note 25, at 273.

40. 3 BRACTON'S NOTE-BOOK, *supra* note 34, pl. 1165 (1235); Hazeltine, *supra* note 25, at 273.

41. Hazeltine, *supra* note 25, at 283.

42. *Id.* Hazeltine noted that the writ of prohibition was also issued in some cases as an order to the sheriff to make sure, for example, that the defendant would commit no further waste. But Hazeltine did not believe that this altered the essentially in personam nature of the writ of prohibition.

43. *Id.* at 282-83.

44. *Id.* at 283. Concerning this writ, Hazeltine wrote that, "disobedience resulted in serious consequences. In some cases breach of the prohibition gave rise to self-help on the part of the aggrieved person, forceful measures by the sheriff, and even imprisonment of the disobedient party." *Id.*

or nuisance.<sup>45</sup> The writ of prohibition operated, as we have seen, in a negative fashion, prohibiting certain acts, such as active or passive waste. But it was also used to require, in a positive way, defendants to take affirmative steps, such as removing interferences to the property rights of others, or repairing and restoring property that had been damaged or destroyed. The flexibility of the writ of prohibition is yet another feature that it had in common with injunctions.

The case of *Prior of Coventry v. William Grauntpie*<sup>46</sup> illustrates this similarity between injunctions and prohibitions. The plaintiff claimed that he had an exclusive right to hold a market in the town on Fridays, and that the defendants had violated this right by buying and selling outside his market, at another location. The plaintiff prevailed. The court, by a writ of prohibition, ordered the defendants not to expose their wares for sale in the town on Fridays anywhere other than at the plaintiff's market.<sup>47</sup> Maitland, commenting on this order, said, "If this is not an 'injunction' and a 'perpetual injunction,' we hardly know what to call it."<sup>48</sup> He therefore concluded that, "[w]e can hardly say that the idea of an injunction was foreign to the common law."<sup>49</sup> Maitland is not the only scholar to have observed the parallel between early writs of prohibition and injunctions. Holdsworth wrote:

[I]n the case of waste the court possessed another weapon in the writ of prohibition, which at this period, was so developed that *it did work analogous to that done both by the perpetual and the interlocutory injunction of our modern law*. . . . No doubt these writs of prohibition were as often as not addressed to the sheriff, because he was the executive officer of the court. But they could also be addressed to the parties, and, in such cases, it is clear that *they present an analogy to the equitable injunction*.<sup>50</sup>

The number and reputation of the legal scholars who have pointed out the correspondence between this writ and the injunction leads to the conclusion that the writ of prohibition of the early common law courts was indeed one of the chief forerunners of the injunction.<sup>51</sup>

45. 2 W. HOLDSWORTH, *supra* note 27, at 248.

46. Y.B. 2 Edw. 2, pl. 141 (1308-1309), *reprinted in* 19 SELDEN SOCIETY 71 (F. Maitland ed. 1904).

47. *Id.* at xiii.

48. *Id.*

49. *Id.* at 74 n.1.

50. 2 W. HOLDSWORTH, *supra* note 27, at 248-49 (emphasis added).

51. See Hazeltine, *supra* note 25, at 279 ("[T]he courts of the common law were in this early period exercising a jurisdiction *in personam* by prohibition which anticipated Chancery jurisdiction *in personam* by injunction."); see also T. PLUCKNETT, *supra* note 2, at 678 ("Then, too, there were occasions upon which the common law would issue what is really an injunction under the name of a writ of prohibition . . ."); H. POTTER, AN HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 552 (2d ed. 1943) ("Like specific performance this

## 2. Writ of Estrepment

In this period before the emergence of the Court of Chancery, the common law courts had another writ of an equitable nature—the writ of estrepment. This writ could be obtained in a real property action *after* judgment but *before* execution, to prevent the defendant (who had lost the suit but was still in possession of the property) from committing waste before the judgment was executed and he was removed.<sup>52</sup> The purpose of the writ was to prevent waste before it occurred.<sup>53</sup>

At common law, the writ of estrepment was available only after a judgment had been obtained. In order to expand the writ of estrepment's role, the Statute of Gloucester<sup>54</sup> established a new, statutory writ of estrepment that was available at any time during litigation if the plaintiff feared that the possessor of the property would commit waste.<sup>55</sup> This broadened scope obviously made estrepment a more desirable remedy. One of the possible penalties for breach of a writ of estrepment was imprisonment.<sup>56</sup>

This writ had several characteristics in common with later injunctions: it was an *in personam* order, it commanded the defendant not to do certain actions, and it entailed the possibility of imprisonment for disobedience. One writer has suggested that the writ of estrepment served as a model for the injunction;<sup>57</sup> another has described its similarity to the interlocutory

remedy [the injunction], which is looked upon as peculiarly equitable, had a forerunner in the Common Law in the writ of prohibition.'"); 2 F. POLLOCK & F. MAITLAND, *supra* note 27, at 595-96:

Nor can we say that what is in substance an 'injunction' was as yet unknown. The 'prohibition' which forbids a man to continue his suit in ecclesiastical court on pain of going to prison is not unlike that weapon [the injunction] which the courts of common law will someday see turned against them by the hand of the chancellor.

52. See 2 W. HOLDSWORTH, *supra* note 27, at 248-49; Hazeltine, *supra* note 25, at 275.

53. See 2 J. STORY, *supra* note 4, at 266; 2 E. COKE, INSTITUTES 328 (1628 & photo. reprint 1979).

54. Statute of Gloucester, 6 Edw. 1, ch. 13 (1278); see also Hazeltine, *supra* note 25, at 276.

Several centuries later (c. 1594), when the Court of Chancery had developed injunctions and was using them, the common law courts attempted to enlarge the preventive relief they could offer by extending the writ of estrepment beyond its traditional bounds. But this attempt was foiled by Lord Keeper Egerton (who later became Chancellor Ellesmere) by his refusal to allow such writs to issue (Chancery had the task of issuing common law writs) except according to their traditional bounds—in real actions to prevent waste pending suit or after judgment. D. KERLY, *supra* note 11, at 150.

55. 1 A. FITZHERBERT, THE NEW NATURA BREVIVM 60 (9th ed. 1794), mentioned these two occasions for the use of the writ of estrepment—during the pendency of a real action, and after judgment but before execution.

56. Hazeltine, *supra* note 25, at 276. See also 2 E. COKE, INSTITUTES 329 (1628 & photo. reprint 1979), who noted that upon a writ of estrepment the sheriff could imprison those who threatened to do waste, in order to prevent it from occurring.

57. W. ASHBURNER, ASHBURNER'S PRINCIPLES OF EQUITY 360 n.1 (D. Browne ed. 2d ed. 1933).

injunction.<sup>58</sup> But it appears that this writ was only available in real property actions, and, before the Statute of Gloucester, it was only available after judgment and before execution. It did not possess the flexibility of the writ of prohibition: it could not be used to order defendants to take affirmative steps to restore or replace damaged property. In these respects it differed significantly from later Chancery injunctions.<sup>59</sup>

This discussion of the common law writs concludes this survey of the forerunners of injunctions. Roman interdicts, early royal orders or writs, and the common law writs mentioned above all partook, to a greater or lesser degree, of some of the features that were later to be found in Chancery's injunctions.

## II. CHANCERY AND ITS DEVELOPMENT INTO A COURT

### A. *Office of the Chancellor*

In order to properly understand the growth and development of injunctions, it is beneficial to briefly examine Chancery's emergence as a judicial body.<sup>60</sup>

Chancery did not become an adjudicatory body until about 1380-1400; it existed before then but did not function as a court.<sup>61</sup> The office of Chancellor originated in the Roman Empire, where it signified a chief scribe and secretary who supervised the other officers of the Emperor. Later in history, Chancellors existed in the Roman church and in moderu European kingdoms, where they usually would oversee public documents and keep the King's seal.<sup>62</sup>

The Chancellor in England was at first an ecclesiastic with secretarial duties.<sup>63</sup> He issued the common law writs, and kept the Great Seal to stamp

58. "How like unto the interlocutory injunction was the old common law writ of *estrepment!* In its form it was an interlocutory order *in personam* and in its object it was a remedy of preventive justice." Hazeltine, *supra* note 25, at 276-77.

59. The Common Law writs *quia timet* have also been compared to the injunction. See generally Hazeltine, *supra* note 25, at 285. These were writs brought by a suitor when "he fears" (*quia timet*) an injury to his property or rights. They were generally used to prevent wrongs before they occurred, and not to give redress after the injury had been done. See 1 E. COKE, COKE UPON LITTLETON § 100a (Philadelphia 1853), for a more detailed description of these writs.

60. See generally J. PARKES, A HISTORY OF THE COURT OF CHANCERY (1828); D. KERLY, *supra* note 11.

61. See 1 F. POLLOCK & F. MAITLAND, *supra* note 27, at 193 ("[E]ven in Edward I's reign [1272-1307] it [Chancery] is not in our view a court of justice; it does not hear and determine causes. It was a great secretarial bureau, a home office, a foreign office and ministry of justice.').

62. J. STORY, *supra* note 4, at § 40.

63. The name "Chancellor" is said to come from *cancelli* or the lattice-like screen behind which the Chancellor and his clerks worked. I W. HOLDSWORTH, *supra* note 27, at 37.

on important documents copied by his clerks. He was an important member of the Council and often the King's principal political advisor.<sup>64</sup>

The Chancellor and his clerks at first had considerable latitude in designing and issuing to suitors common law writs that fit the circumstances of individual cases.<sup>65</sup> This power to issue new writs gave Chancellors significant control over the rights the royal courts recognized.<sup>66</sup> But in the latter part of the thirteenth century, this power was curtailed by the common law judges who successfully asserted that they, not Chancery, had the power to decide whether a new writ issued by Chancery was valid.<sup>67</sup> The rule developed that new writs could only be made by Parliament, not by Chancery,<sup>68</sup> thus diminishing the Chancellor's power.<sup>69</sup> During the later part of the thirteenth century and most of the fourteenth century, the Chancellor remained an official of the Crown but not a judge of equity.<sup>70</sup>

### B. *Decay of Equity in the Common Law Courts*

Near the end of the thirteenth century the equity in the common law courts began to decline. These courts were becoming rigid, technical, and overly formal;<sup>71</sup> they focused more often on the strict letter of the law, less often on equitable considerations.<sup>72</sup> This increasing rigidity was gradual: in Edward I's reign (1272-1307), the common law courts were undecided over the competing concepts of applying the law strictly or tempering their decision

64. T. PLUCKNETT, *supra* note 2, at 164.

65. C. REMBAR, *supra* note 1, at 274.

66. I W. HOLDSWORTH, *supra* note 27, at 398.

67. T. PLUCKNETT, *supra* note 2, at 164.

68. It is said that this was due to the jealousy of Parliament, which realized that the power to make new writs was the power to make new law. Barbour, *Fifteenth-Century Chancery*, *supra* note 26, at 834.

69. This power declined despite the Statute of Westminster II, 13 Edw. I, ch. 24 (1285), which said:

And whensoever from henceforth it shall fortune in the Chancery, that in one Case a Writ is found, and in like case falling under like Law, and requiring like Remedy, is found none, the Clerks of the Chancery shall agree in making the Writ; or adjourn the Plaintiffs until the next Parliament, . . . by Consent of Men learned in the Law, a Writ shall be made, lest it might happen after that the Court should long time fail to minister Justice unto Complainants.

This statute was interpreted to allow Chancery only to extend writs to cases that were very similar to cases covered by existing writs, and did not restore the latitude and flexibility in framing writs that Chancery formerly possessed.

70. In addition to the duties already described, the Chancellor had one other: to supervise the exercise of the powers connected with the King's feudal rights. (This became known as the "common law" or "Latin" side of Chancery: "common law" as opposed to equity, and "Latin" because its proceedings were in Latin while equitable proceedings were in English.) These rights included such things as the King's interest in property when a tenant-in-chief died, and the King's power to grant lands or offices. See T. PLUCKNETT, *supra* note 2, at 164-65.

71. See De Funiak, *Origin and Nature of Equity*, 23 TUL. L. REV. 54 (1948).

72. T. PLUCKNETT, *supra* note 2, at 681.

to do equity in the particular case;<sup>73</sup> even in the reigns of Edward II (1307-1326) and Edward III (1326-1377), traces of the earlier equity lingered in the common law courts.<sup>74</sup>

There were several factors that contributed to this tendency toward technicality. One, which has been noted above, was that Chancery was no longer permitted to create new common law writs; the forms of action could not easily expand. Thus a fertile source of flexibility in the common law courts disappeared. A second factor was that the common law judges, who had formerly been closely associated with the Crown and therefore more disposed to do equity on behalf of the King, were becoming more independent of the Crown and therefore more inclined to apply rigid legal rules.<sup>75</sup> The use of equity also declined because judges were now more often drawn from the ranks of lawyers than of clerics; they lacked the canon law influence that disposed their predecessors toward equitable precepts.<sup>76</sup> A number of factors, then, were causing the common law to become more certain and settled, but less equitable.

### C. *Petitions to King, Council, and Chancellor*

When the common law courts no longer were flexible and equitable in administering justice, suitors who were unable to obtain relief addressed petitions to the King and the Council.<sup>77</sup> The Council heard them, but it also had many political and administrative duties, and these petitions were becoming numerous and burdensome. The Council decided to give the responsibility for them to the Chancellor, since he was already the head of a department that had some judicial functions.<sup>78</sup> The petitions were forwarded to the Chancellor, sometimes including a brief instruction.<sup>79</sup> As time went

---

73. 2 W. HOLDSWORTH, *supra* note 27, at 335.

74. *Id.*

75. 1 W. HOLDSWORTH, *supra* note 27, at 447-48.

76. See Barbour, *Fifteenth-Century Chancery*, *supra* note 26, at 834-35; 2 W. HOLDSWORTH, *supra* note 27, at 345. Holdsworth said of the judges at this time, "[t]hey ceased to care so much for those larger principles which, in the thirteenth century, had made for rapid development." See also J. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 87 (2d ed. 1979) where the author commented that "the judges preferred to suffer mischiefs to individuals than to make exceptions to clear rules . . . ."

77. "Litigants, if they wanted equity, were driven to a tribunal the procedure of which had remained free from the technical rules which governed the procedure of the common law courts; and so cases which called for equity went to the Council and later to the Chancery." 1 W. HOLDSWORTH, *supra* note 27, at 449. For a discussion of these petitions and how they ended upon in Chancery, see T. PLUCKNETT, *supra* note 2, at 178-81.

78. 1 W. HOLDSWORTH, *supra* note 27, at 339-404.

79. "The Chancellor, therefore, commanded the machinery which sooner or later would have to be set in motion in order to give redress to petitioners, and so nothing could be simpler than for the Council to transmit petitions addressed to it to the Chancellor, sometimes (but not always) endorsing them with a brief instruction what to do." T. PLUCKNETT, *supra* note 2, at 180-81.

on, the Council began sending these petitions more frequently to the Chancellor;<sup>80</sup> by 1400, suitors began to address their petitions directly to him.<sup>81</sup>

In handling these petitions, the Chancellor considered himself empowered with a certain amount of discretion and equity. Additionally, he began to operate Chancery with some of the characteristics of a court, so that facts stated in the petitions could be sifted and persons against whom the complaints were made could have an opportunity to present a defense.<sup>82</sup> This was a gradual process by which Chancery evolved from a purely administrative institution into one that was also judicial. It is difficult to set an exact date, but it is fairly certain that between 1380 and the early part of the following century, Chancery was hearing petitions or cases as a court.<sup>83</sup> At first the Chancellor did not sit as the sole judge in Chancery; frequently members of the Council or common law judges sat with him. As the fifteenth century progressed, however, the Chancellor increasingly delivered decrees on his own in Chancery cases.<sup>84</sup>

### III. FOURTEENTH AND FIFTEENTH CENTURY DEVELOPMENT OF CHANCERY AND INJUNCTIONS

The proceedings and decisions of early Chancery are shrouded in some obscurity. In the fourteenth and fifteenth centuries, there were no published reports of Chancery cases.<sup>85</sup> Even today, only a small proportion of these cases have been published, mostly by modern scholars relying on early Chancery records.<sup>86</sup> Of those that have been published, there are drawbacks

80. S. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 82 (2d ed. 1981).

81. J. BAKER, *supra* note 76, at 87.

82. 1 W. HOLDSWORTH, *supra* note 27, at 403.

83. There is no unanimity of scholarly opinion on the precise date Chancery began to operate as a judicial body. See Baildon, *Introduction to SELECT CASES IN CHANCERY A.D. 1364 TO 1471* xix (Selden Society Vol. 10) (W. Baildon ed. 1896) [hereinafter cited as Baildon] ("[i]t seems clear that the Chancellor had and exercised judicial functions of his own as early as the reign of Richard II [1377-1399] if not Edward III [1326-1377]"); see also 3 W. BLACKSTONE, *COMMENTARIES* \* 51 (separate jurisdiction of Chancery as a court of equity began to be established about the end of the reign of Edward III); 1 G. SPENCE, *supra* note 6, at 345 ("By circa 1394, the Court of Chancery was a distinct and permanent court, having its own procedures."); O.W. HOLMES, *Early English Equity*, in *COLLECTED LEGAL PAPERS* 1 (1920) ("At the end of the reign of Henry V [c. 1413] the Court of Chancery was one of the established courts of the realm.").

84. Baildon, *Introduction*, *supra* note 83, at xvi-xxi.

85. In this early period, the Chancellors did not write opinions. The cases that have been unearthed and published frequently have no more than a very brief description of the facts and the prayer for relief.

86. Barbour, *Fifteenth-Century Chancery*, *supra* note 26, at 840, explained that the actual proceedings of Chancery for this early period are preserved in documents in bundles in the Public Records Office. Barbour estimated (in 1918) that there were three hundred thousand proceedings contained in these enormous bundles, covering c. 1377 to c. 1547, and that fewer than 1% had been published. *Id.* at 841.

to their usefulness: many consist of bills or petitions in which the remedy sought was not specifically named,<sup>87</sup> and most of the cases do not include judgments; there is no indication of the Chancellor's rulings, making it difficult to know when injunctions were first ordered.<sup>88</sup> One can only surmise that if a large number of petitions asked for a specific form of relief, it was probably available.<sup>89</sup>

### A. *The Growth of Chancery*

There were several noteworthy attributes of the Court of Chancery in the period from its inception to the close of the fifteenth century. First, the equity it dispensed was extremely flexible, not fettered by definite rules or bound by precedent.<sup>90</sup> The decisions have been described as desultory and uncertain, rendered according to the personal predilections of the Chancellor;<sup>91</sup> it took time for principles and precedents to become part of Chancery.

Second, Chancery did not have many cases when it first began to operate as a court; its caseload was small before 1417,<sup>92</sup> but then began to grow rapidly. Between 1420 and 1450, Chancery's business increased dramatically.<sup>93</sup> By 1450, Chancery's popularity among litigants made it the fourth major court at Westminster.

This growth was due to the fact that Chancery met a conspicuous need. The common law courts, during this period, had many shortcomings: they were, for instance, slow, overly technical, and subject to abuse by powerful litigants. They also refused to admit the testimony of interested parties or voluntary witnesses, and were unable to compel discovery.<sup>94</sup> In addition, these courts could not grant specific relief, nor could they prevent a threatened wrong.<sup>95</sup>

---

87. Sometimes the remedy sought was described in very general terms, as the petitioner evidently did not know the appropriate remedy to request; the remedy was often left up to the Chancellor's good judgment. Baildon, *Introduction*, *supra* note 83, at xv.

88. *See id.* at xxix n.1 (only about 9% of the cases have final decrees).

89. *Id.*

90. F. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 225 (H. Fisher ed. 1920). See also D. KERLY, *supra* note 11, at 2, who characterized these Chancery decisions as more in the nature of judicial awards than judicial decisions based on precedent.

91. 1 W. HOLDSWORTH, *supra* note 27, at 454 (citing 3 W. BLACKSTONE, *COMMENTARIES* \* 53).

92. Avery, *The History of the Equitable Jurisdiction of Chancery Before 1460*, 42 *BULL. INST. OF HIST. RES.* 129, 129-31 (1969).

93. There were four times as many petitions filed per year in 1450 as there were in 1420. *Id.* at 130-32.

94. T. PLUCKNETT, *supra* note 2, at 689.

95. 1 W. HOLDSWORTH, *supra* note 27, at 458. The common law courts did not have injunctive powers. It appears that, when these courts became more rigid and technical, they ceased using the writ of prohibition as an equitable remedy.



Chancery's procedures allowed it to overcome many of these defects,<sup>96</sup> and therefore made it attractive to many suitors.

There were also gaps in the *substance* of the common law, which Chancery endeavored to fill. For example, the common law courts did not deal with trusts or uses, nor did they grant relief based on fraud, accident, or mistake; Chancery dealt with these subjects and others neglected by the common law.<sup>97</sup> Thus Chancery thrived by supplying remedies where the substance or procedure of the common law was deficient.<sup>98</sup>

### B. Fourteenth and Fifteenth Century Injunction Cases

Injunctions appeared in Chancery as early as the 1390's. Injunction cases in Chancery's early period (from the 1390's to about 1500) were quite diverse, involving such disparate areas of law as real property, personal property, tort, and contract. But the single thread running through all of them was (as alluded to above) that Chancery cases generally reflected some defect in the common law system, and it is illuminating to examine injunction cases in light of the shortcomings in the common law that they attempted to rectify.

For example, there were cases where the common law simply had no appropriate remedy. There were other cases where the common law, while having a remedy available in the type of case, was unable to effectuate it due to some special circumstances in the case.<sup>99</sup> There also were cases where the common law procedures were themselves being misused.<sup>100</sup> In all of these situations, litigants sought injunctions from Chancery.

An example of a dispute where the common law was unable to grant relief due to some special circumstances was the case of *Edmund Faunceys v. James de Clifford and Hugh de Byslee*,<sup>101</sup> where the defendants prevented the owner of a piece of land, or anyone else, from entering and farming it. The plaintiff, the owner, asked the Chancellor to order the defendants to cease their interference. It appears that the only reason this case was in

---

96. Chancery was, at this period, less technical and more efficient. Barbour, *Fifteenth-Century Chancery*, *supra* note 26, at 854. It was also less expensive and less subject to abuse by powerful parties. By its subpoena, Chancery could compel the defendant to appear, where he would be questioned under oath. And, as we will see, Chancery granted "injunctions against a variety of wrongful acts." T. PLUCKNETT, *supra* note 2, at 689.

97. 5 W. HOLDSWORTH, *supra* note 27, at 292. Holdsworth listed other areas where equity supplemented the common law: forgery, relief against penalties, contract, agency, partnership, suretyship, accounting, and administration of assets. *Id.*

98. T. PLUCKNETT, *supra* note 2, at 688-89.

99. See Avery, *supra* note 92, at 132-33.

100. One way the common law procedure was misused was by prosecuting a suit that was inequitable or "against conscience." See H. POTTER, *supra* note 51, at 552, where the author says that by the middle of the fifteenth century the Chancellor began issuing injunctions to halt such suits.

101. Baildon, *supra* note 83, at 68-69, pl. 70 (c. 1402).

Chancery was that the violence and power of the defendants thwarted the ordinary common law remedies.<sup>102</sup>

During this period, there were a number of cases relating to recovery of personal property that were brought to the Chancery because, for one reason or another, the normal common law action of detinue was unavailable. In the case of *Thomas Bond v. John Nicolle*,<sup>103</sup> Bond claimed that his inheritance—certain goods and chattels—was placed in the hands of defendants as trustees, but they refused to deliver it to him. Detinue was unavailable here because the plaintiff lacked documentary evidence;<sup>104</sup> he was forced to request that the Chancellor order the property turned over to him. Similarly, detinue was ineffective in *John Harleston v. John Caltoft*.<sup>105</sup> Plaintiff had left certain valuables and papers with his mother when he went on a trip. While he was gone, she died. Defendant, his step-father, took control of the valuables and papers, refusing to return them to plaintiff. The plaintiff applied to the Chancellor for relief; a common law action of detinue would have been unsuccessful, as there was no privity—no dealings or agreement—between the parties.<sup>106</sup> In these cases,<sup>107</sup> the ordinary remedies of the common law were futile, and thus suitors resorted to Chancery, requesting an injunction to obtain recovery of the property.

Injunctions were also sought in cases where the common law simply furnished no appropriate remedy. There is a report of a case that occurred in the reign of Richard II (1377-1399) in which the Chancellor enjoined the defendant from committing waste.<sup>108</sup> The plaintiff, who had a remainder interest in the land, could not have sued the tenant at common law for waste; instead he obtained an injunction from Chancery. This was not an unusual situation, but common law had no remedy available. The Chancellor, whose powers were flexible and equitable, was free to grant one. There also were more unusual situations where litigants sought injunctions, as in *John*

102. *Id.* at 69 n.1.

103. *Id.* at 100, pl. 104 (c. 1410-1412).

104. *Id.* at 101 n.1. For a similar case, see Martin, *Some Chancery Proceedings of the Fifteenth Century*, 59 *ARCHAEOLOGIA* 1, 16-17 (1904), for the case of John Besynbe v. Dame Margaret Welughbe (Martin provides no dates for the cases in his article beyond the fact that they take place in the 15th century). Plaintiff and his wife Isabell alleged that defendant, Isabell's mother, was executrix of the estate of Isabell's father, and that she refused to deliver Isabell's inheritance. They sought an order from the Chancellor commanding her to do so.

105. Baidon, *supra* note 83, at 113-14, pl. 116 (c. 1413-1417).

106. *Id.* at 114 n.3.

107. See also the 15th century Chancery case, *Robert Draycote v. William Bayly*, discussed in Martin, *supra* note 104, at 17. Plaintiff claimed that divers of his deeds and evidence of property were in the hands of defendant, who refused to return them. Since plaintiff did not know precisely how many of these documents existed, he could not recover at common law, and thus went to Chancery. For other, similar cases, see Barbour, *The History of Contract in Early English Equity*, in 4 *OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY* 111-12 (P. Vinogradoff ed. 1914).

108. 1 G. SPENCE, *supra* note 6, at 671.

*Craven and Simon Irby v. Treasurer of Calais*.<sup>109</sup> The plaintiffs had captured prisoners at the battle of Agincourt, but William Buketon wrongfully took and ransomed them, without paying any of the ransom to plaintiffs. The plaintiffs then learned that part of the ransom money was held by the Treasurer of Calais' wife. They sought an order from the Chancellor to the defendant "firmly charging and *enjoining* that the said sum"<sup>110</sup> be kept until a trial at law could be held to determine if it belonged to plaintiffs. Plaintiffs were seeking an interlocutory injunction that the property be preserved until trial—a remedy which did not exist in the common law.<sup>111</sup>

Another case in which the lack of suitable relief at law forced the plaintiff to resort to Chancery was *Margaret Appilgarth v. Thomas Sergeantson*.<sup>112</sup> Defendant told the plaintiff that he desired to marry her, and asked her for a sum of gold and currency for wedding costs and business investments (to make him a more profitable husband). She gave him the gold and currency without demanding a formal contract of marriage; he then married another, and refused to return the gold and currency. Plaintiff sought an order from the Chancellor to compel him to do so. Here again, as in the two cases above, an injunction was requested because there was no common law form of relief.<sup>113</sup>

There were also cases where the common law procedures were being misused. For example, in *Campyn Pynell v. Richard Underwood*<sup>114</sup> the plaintiff, a foreign merchant from Lombardy, alleged that the defendant had filed numerous suits against the plaintiff, each with the same allegations—that the plaintiff had taken defendant's wife and goods. In each case, defendant had been nonsuited, but plaintiff had been put to considerable cost and expense for defense. Defendant had again filed a suit at law repeating the same grounds. Plaintiff, therefore, sought an order from Chancery that defendant cease harassing plaintiff with suits at law. This is an early (1396) example of a case where the Chancellor was asked to enjoin a

109. Baildon, *supra* note 83, at 110, pl. 112 (c. 1415-1417).

110. *Id.*

111. It is interesting to note that this injunction was sought against seemingly innocent third parties who had done nothing wrong but who possessed property claimed by plaintiffs. Unfortunately, we do not have a record of the Chancellor's decision to learn whether an injunction was issued.

112. *Margaret Appilgarth v. Thomas Sergeantson* (c. 1439), reported in T. PLUCKNETT & R. POUND, *supra* note 12, at 196.

113. *Cf.* Baildon, *supra* note 83, at 80, pl. 86. Baildon discusses the case of Hugh Loterell v. John Hayme and John Clerke (c. 1401-1403), where defendant was slandering plaintiff (and Chancery) by saying that plaintiff improperly received letters patent from Chancery, instead of from the King, to entitle him to the Office and ward of a forest. There was no remedy at law to compel the defendant to cease the slander, so the plaintiff sought an injunction from Chancery.

114. *Id.* at 20-21, pl. 18 (c. 1396).

party's use of the legal procedures.<sup>115</sup> A similar case was the fifteenth century Chancery case *Matthew Petit v. Robert Gybson*,<sup>116</sup> where plaintiff, another foreign merchant, had helped defendant's wife (his wife's cousin) to obtain food and medical attention. Defendant then sued him in trespass, alleging that he had taken away, by force of arms, defendant's wife and goods. Plaintiff sought relief in Chancery, stating that because he was a foreign merchant and since defendant had procured prejudiced jurors, he could not receive justice at law. Plaintiff was obviously seeking an injunction to stop defendant from proceeding with his suit at law.

These injunction cases in the fourteenth and fifteenth centuries involved a wide variety of matters; they were not confined solely to real property. This wide variety was due to the fact that the injunction was not a substantive rule of law but a remedy that was often resorted to when the ordinary legal processes of the common law left a suitor unsatisfied.

### C. *Response of Judges and Parliament to Injunctions*

Before examining the response of the common law judges and Parliament to Chancery's injunctions, it is helpful to gauge their reaction to the new court, to Chancery itself. The initial reaction of the common law judges to Chancery was one of some resentment.<sup>117</sup> They disliked competition, especially from a court that disregarded the traditional rules of law and procedure. But soon the judges cooperated with Chancery, at least to the extent of assisting the Chancellor in deciding some cases.<sup>118</sup> They did not seem to bear Chancery strong animosity; they even advised suitors with equitable claims to seek relief from the Chancellor.<sup>119</sup>

This cordial relationship appeared to change as time went on. Cases such as *Russell's Case*<sup>120</sup> reflected latent hostility between common law and Chancery. In *Russell's Case*, the defendant had committed a trespass of the plaintiff's goods, with damages set at twenty pounds. Before judgment was entered, the defendant obtained an injunction from Chancery that prohibited the plaintiff from proceeding to judgment. After some time had passed, one

---

115. The remedy actually sought here, though not in so many words, is an injunction to restrain the vexatious proceedings at common law. From the fact that no particulars are given as to the precise nature of the remedy asked for, it may perhaps be argued that this part of the jurisdiction of the Court of Chancery was at an inchoate stage. The practice [granting injunctions to restrain suits at law] was well recognised by the time of Henry VI [1422].

*Id.* at 21 n.3.

116. Martin, *supra* note 104, at 9-10 (n.d.).

117. T. PLUCKNETT, *supra* note 2, at 187.

118. *Id.* at 188.

119. 2 W. HOLDSWORTH, *supra* note 27, at 345.

120. Y.B. 22 Edw. 4, pl. 37 (K.B. 1482), reported in T. PLUCKNETT & R. POUND, *supra* note 12, at 197-98.

of the judges in King's Bench asked the plaintiff's attorney if his client wished to pray for a judgment. The attorney responded that he did, unless he would be punished for disobeying the Chancellor's injunction.<sup>121</sup> Judge Hussey recommended that he take a judgment; if the Chancellor imprisoned him, the judges would, he said, release him by habeas corpus. This case shows judges not only unsympathetic to an injunction, but promising to take active measures to help a party avoid punishment for its violation.

One scholar has written that "when the Chancellor claimed to arrest the fruits of an unconscionable judgment, the seeds of a contest between 'the two sides of Westminster Hall' were sown."<sup>122</sup> And this is no surprise: these courts had, in a sense, competing jurisdictions. Both strove to maintain and increase their power and authority—and the judges "feared that all suitors would be drawn into Chancery if the power of the Chancellor to override or intercept their decisions became established . . ."<sup>123</sup> When the Chancellor issued an injunction to a party to halt a proceeding at law, the judges were deprived of their power to hear the case. When the injunction prohibited a party who had prevailed at law from enforcing his judgment until the matter could be heard in Chancery, "[t]he proceedings in Chancery look[ed] like an illegitimate form of appeal,"<sup>124</sup> at least to the judges. Furthermore, the legal system was supposed to represent justice; it was hard for the judges to admit that, although the procedures were followed correctly, the result was unjust.<sup>125</sup> Therefore, it can be said that the reaction of the judges to the Chancellor's injunctions—at least to the injunctions that interfered with common law proceedings—was, by the end of the fifteenth century, one of some antagonism.<sup>126</sup>

What was the reaction of Parliament? During this period Parliament appears to have been adverse to the equity jurisdiction of Chancery generally, not merely disenchanted with the use of injunctions.<sup>127</sup> Parliament enacted

121. At this point, Fairfax, one of the judges, suggested that if the injunction prohibited the *plaintiff* from praying judgment, then the attorney (who was, strictly speaking, not bound by the injunction) could do so. *Id.*

122. D. KERLY, *supra* note 11, at 89.

123. *Id.* at 107.

124. S. MILSOM, *supra* note 80, at 92.

125. *Id.* at 93.

126. Barbour, *Fifteenth-Century Chancery*, *supra* note 26, at 835.

127. See generally D. KERLY, *supra* note 11, at 37-46. There were numerous complaints in Parliament, from the beginning of the reign of Richard II (1377) onward, that Chancery was interfering in matters that more properly belonged in common law courts. Parliament manifested its disapprobation by insisting, on several occasions, that the Magna Charta declared that the common law courts alone—not Chancery—had jurisdiction over the persons and property of Englishmen. But these protestations appear to have been ineffectual in curbing Chancery. See T. PLUCKNETT, *supra* note 2, at 187-88.

There were several statutes and petitions from Parliament to the King that reflected Parliament's antipathy toward Chancery. In c. 1390, there were petitions which prayed that the Chancellor not make any ordinance against the common law, and that no one be required to

two statutes, known as statutes of *Praemunire*,<sup>128</sup> which were thought by some judges to have been intended to apply to Chancery—although this was questionable, as will be shown.<sup>129</sup> These two statutes provided that a judgment in a court of law shall not be impeached or attacked, but shall be kept in peace unless overturned by attain or error.<sup>130</sup>

#### IV. INJUNCTIONS IN OTHER COURTS<sup>131</sup>

Chancery was not the only court to exercise an equitable jurisdic-

appear before Chancery on a matter which could be heard at common law. The King answered these petitions evasively. D. KERLY, *supra* note 11, at 38-39. A petition in 1415 denounced Chancery's *subpoena* (used to compel defendants to appear) as a recently-invented subtlety; and another in 1421 alleged that the *subpoena* was not "due process." The King bluntly rejected these petitions. T. PLUCKNETT, *supra* note 2, at 188. A petition of Parliament in 1422 made a serious attack on Chancery's power; it would have required that before a party could sue in Chancery, two common law judges must certify that the common law has no remedy. I W. HOLDSWORTH, *supra* note 27, at 459 n.7, pointed out that "this would clearly have put the Chancery under control of the law courts." This provision never became effective. A statute in 1436, 15 Hen. 6, ch. 4, required that no writ of subpoena issue from Chancery until sureties had been found to pay for possible damage to defendant (in time, these sureties may have become a fiction). It seems that most of the complaints in Parliament were prompted by the numerous common law lawyers who were jealous of the growing jurisdiction of Chancery. D. KERLY, *supra* note 11, at 37. See also Pollock, *The Transformation of Equity*, in *ESSAYS IN LEGAL HISTORY* 293 (P. Vinogradoff ed. 1913), where Pollock said:

There is no reason to believe that the jurisdiction of the mediaeval Chancellors was unpopular. Complaints began to be loud in the sixteenth century, and were heard of earlier. But these were for the most part, if not altogether, made or instigated by practitioners of the common law who were aggrieved by the growing competition of Chancery. If the competition had not met a public want it would not have been effective.

128. 27 Edw. 3, ch. 1 (1353); 4 Hen. 4, ch. 23 (1403).

129. See *infra* notes 289-300 and accompanying text.

130. Those who believed that these statutes applied to Chancery said that Chancery's injunctions against the enforcement of judgments at law violated these statutes by not leaving the judgments in peace.

131. A branch of the Chancery and a use of injunctions that was somewhat outside the usual use of injunctions was what may be called Criminal Equity. See H. McCLINTOCK, *EQUITY* 443 (1948), where McClintock wrote: "In the early days of equity the chancellors frequently undertook to prevent acts of violence which were undoubted crimes. Most, if not all, of the cases in which relief was given were cases in which a private suitor sought protection for his person or property . . ." In the fourteenth and fifteenth centuries there was no rule, as there is in modern law, that equity would not enjoin a crime. An example of this branch of equity was the case of *Thomas Saintquintyn v. Roger de Wandesford* (after 1396), reported in Baildon, *supra* note 83, at 19-20, pl. 17. The plaintiff alleged that the defendant and others armed themselves and hid in ambush to murder plaintiff and his people, and when the constable and bailiffs learned of this and came to arrest them, the defendant and his men severely beat two of the men, thereby causing the plaintiff to lose the services of his tenants and servants. The plaintiff prayed for a "remedy in safeguard of the peace." *Id.* at 20.

There were other cases, and although some of them involved property rights, they were instituted to preserve the peace and prevent crime. See Mack, *Revival of Criminal Equity*, 16 HARV. L. REV. 389, 390 (1903). Mack explained that "as the government became more stable and the courts of law more efficient, the need for a criminal equity lessened, and little by little

tion.<sup>132</sup> For example, many of the local courts that developed in the fifteenth and sixteenth centuries used equitable procedures.<sup>133</sup> In addition, the Court of the Exchequer and the Court of Requests both had equitable jurisdictions.

The Court of the Exchequer<sup>134</sup> exercised equitable and injunctive powers. Its equitable jurisdiction appears to have begun sometime before 1547 and, from its inception, it increased in popularity.<sup>135</sup> It has been said, concerning this jurisdiction, that "[t]he types of cases heard were, in general, equity cases according to the usages and traditions of chancery. The early equity cases, those before 1558, were founded on a broad range of equitable grounds. The most frequent prayer was for an *injunction* for quiet possession of property rights."<sup>136</sup> The Court of the Exchequer retained its equitable jurisdiction until the reforms of the courts of equity in 1841.

The Court of Requests<sup>137</sup> was another body with equitable and injunctive powers. It was conceived by Henry VII (1485-1509) and became a functioning court during his reign.<sup>138</sup> Although it later became known as the Court of Requests, its original name was the Court of Poor Men's Causes, as it was a court of equity for litigants who could not afford Chancery or common law. This Court led a stormy existence and frequently clashed with the common law courts. During Elizabeth's reign, the courts of law were becoming jealous of any jurisdiction other than their own.<sup>139</sup> They were especially antagonistic toward Chancery, and this antagonism recoiled upon the lesser equity courts such as Requests.<sup>140</sup> The judges denied that Requests was a valid court and sought its elimination. They were unsuccessful; it

the chancellor's criminal jurisdiction fell off, until finally toward the end of the fifteenth century it ceased entirely." *Id.* at 391 (footnotes omitted).

The King's Council also had criminal jurisdiction, and this became the Court of the Star Chamber. Although it did some valuable work in helping to curb lawlessness, "its summary methods applied to the trial of crimes eventually became arbitrary and tyrannical, and the court became so odious that it was abolished by statute in 1645." *Id.* (footnote omitted).

132. See W. BRYSON, *THE EQUITY SIDE OF THE EXCHEQUER* 1 (1975) ("Equity was bigger than Chancery and . . . others besides the lord high chancellor had a hand in its development.").

133. *Id.* at 7.

134. The Exchequer itself had jurisdiction over the King's revenues and financial rights, such as his income from lands, fees, customs, duties, and fines.

135. W. BRYSON, *supra* note 132, at 32-33.

136. *Id.* at 9 (emphasis added). On the same page, Bryson listed the following Exchequer cases involving injunctions: *Vaughan v. Twisden*, E. 111/46 - K(1554-1555); *Gyfforde v. Bishop of Bangor*, E. 111/46D - D.(1557); *Bell v. James*, E. 111/45 (1554-1558); *Cotton v. Hamond*, E. 112/20/50 (1554-1558); *Mantell v. Mayor of Wickhane*, E. 112/3/22 (1558). *Id.* at 9 n.2.

137. See generally *SELECT CASES IN THE COURT OF REQUESTS A.D. 1497-1569* (Selden Society Vol. 12) (I. Leadam ed. 1898) [hereinafter cited as 12 SELDEN SOCIETY]. I am heavily indebted to the Introduction in this volume for the following discussion.

138. 1 W. HOLDSWORTH, *supra* note 27, at 413. Holdsworth fixes the date of its origin at 1493.

139. *Id.* at 414.

140. See Yale, *Introduction to LORD NOTTINGHAM'S 'MANUAL OF CHANCERY PRACTICE' AND 'PROLEGOMENA OF CHANCERY AND EQUITY'* (D. Yale ed. 1965) Introduction at 11 [hereinafter cited as LORD NOTTINGHAM'S 'MANUAL OF CHANCERY PRACTICE'].

continued to gain popularity, and by 1627 entertained as many suits as Chancery itself.<sup>141</sup>

The principal cause of the judge's animosity was Requests' frequent use of injunctions to stay suits in other courts.

Its injunctions 'to stay the sutes [sic] at common lawe [sic]' were numerous. They included suits upon bonds or specialties for debt, for performance of covenants, upon leases, upon titles of land, upon actions of the case, for trespass, and debt. Injunctions were also issued to the Courts of the Cinque Ports and to the Courts of the Universities, and all the courts were comprised in the injunctions laid upon defendants not to arrest, sue, or impede the plaintiff during the dependence of his suit in this court, or after judgment given by it.<sup>142</sup>

The judges in the Court of Requests believed that these injunctions were necessary if a party were conducting or using another proceeding inequitably; Requests would then issue such injunctions even though this raised the ire of the other courts.<sup>143</sup>

This dispute over the use of injunctions eventually led to direct conflict. In a case in 1593, the Court of Common Pleas issued a writ of prohibition against a plaintiff who had sued in the Court of Requests.<sup>144</sup> A few years later, in another case, Requests issued an injunction to stop a party from proceeding in Common Pleas, but Common Pleas issued a prohibition against Requests in response, and the prohibition prevailed.<sup>145</sup> There were also instances of Queen's Bench issuing prohibitions in cases where Requests had granted injunctions to stay proceedings in Queen's Bench.<sup>146</sup> These cases reveal the strife that was engendered when the Court of Requests used injunctions to arrest proceedings or judgments at law.

Both the Court of the Exchequer and the Court of Requests issued injunctions. But their use in Exchequer was minor compared to that of Chancery, and did not shape the path along which injunctions were to develop. The Court of Requests, also, was not a major force in the injunction's development because the Court of Requests was abolished in 1641. To trace the history of injunctions, one must return to Chancery.

141. 1 W. HOLDSWORTH, *supra* note 27, at 415.

142. Leadam, *Introduction*, 12 SELDEN SOCIETY at xxii.

143. W. JONES, *THE ELIZABETHAN COURT OF CHANCERY* 469 (1967).

144. *Lemmond v. de Malignes*, reprinted in Leadam, *Introduction*, 12 SELDEN SOCIETY at xxxviii. The purpose of this writ of prohibition was, presumably, to prevent the plaintiff from continuing the action in Requests.

145. *Tatnall v. Gomersall* (1598), reprinted in Leadam, *Introduction*, 12 SELDEN SOCIETY at xxxvii. Here Requests appears to have been in the right. The plaintiff (in Requests) had paid an obligation, in full, to the defendant in installments, but the defendant sued on the bond in Common Pleas. The Court of Requests then granted an injunction to stay that suit.

146. *See id.*



## V. THE SIXTEENTH CENTURY

As time passed, injunctions became more frequent and more important. They were important because they provided a means by which Chancery could, as noted earlier,<sup>147</sup> supplement some of the deficiencies of the common law, such as by issuing injunctions to prevent threatened harm.<sup>148</sup> Injunctions also enabled Chancery to implement concepts not recognized by the common law—such as fraud or duress—and to enjoin proceedings at law so that Chancery could apply these concepts in appropriate cases. In the words of one commentator:

The use of injunctions to stay actions at law was almost coeval with the establishment of the chancery jurisdiction. Without this means of interference to protect the rights of its suitors, the court of chancery could never have established, extended, and enforced its own jurisdiction. It is no exaggeration to say that, during its formative periods, the equitable jurisdiction was built up through the instrumentality of the injunction restraining the prosecution of legal actions, where the defendants sought the aid of chancery, which alone could take cognizance of the equities that would defeat a recovery at law against them. This was not accomplished, however, without a long and severe opposition from the common law judges, which continued until the reign of James I.<sup>149</sup>

Another reason that injunctions were essential was that they allowed Chancery to protect its jurisdiction. If a bill had been filed first in Chancery, the Chancellor could enjoin a suit later in common law involving the same matter.

A. *A Note on Chancery Procedure*

In order to properly assess injunction cases, a general description of Chancery procedures is helpful. These procedures were informal and much less technical than those of the common law.<sup>150</sup> Plaintiff would send his bill—often simple or even illiterate—to Chancery, requesting that a subpoena be issued to compel the defendant to come forward to be examined. When the defendant appeared,<sup>151</sup> the Chancellor would examine plaintiff and defendant (and any witnesses) under oath. The Chancellors turned aside attempts by common law lawyers to introduce technical pleadings, such as replications and rejoinders, preferring to keep the procedures simple. An

---

147. See *supra* notes 94-98 and accompanying text.

148. 1 W. HOLDSWORTH, *supra* note 27, at 458.

149. J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1360, at 2699-2700 (3d ed. 1905).

150. See generally 5 W. HOLDSWORTH, *supra* note 27, at 285-86.

151. The defendant could make a written response to plaintiff's bill, such as an answer or demur, in addition to appearing for examination. *Id.*

injunction could be requested either in the bill of complaint or in a separate motion after the proceedings had begun.<sup>152</sup>

### B. Injunction Cases—Sixteenth and Early Seventeenth Centuries

The number of cases in Chancery continued to increase in the sixteenth and seventeenth centuries,<sup>153</sup> and injunction cases were a large part of this growth.<sup>154</sup> When examining injunction cases during this period,<sup>155</sup> it is convenient to divide them into those that are related to property, tort, and miscellaneous areas of law, and those that involve injunctions to stay proceedings of law.<sup>156</sup>

#### 1. Property

Injunctions in Chancery involved many types of real property cases. Probably the majority of injunctions at this time pertained to property or property rights.

In one type of case, the Chancellor would grant an injunction to prevent interference with a party's possession of property pending trial—a temporary or interlocutory injunction.<sup>157</sup> The Chancellor might alternatively order a party who had obtained possession of property *after* the bill was filed in Chancery to restore possession to the other party, as was done in *Hawkes v. Champion*.<sup>158</sup> This was, in a sense, using an injunction to quiet possession, at least pending trial, and it was a use that was essential in order for Chancery to settle questions of ownership.<sup>159</sup>

Injunctions to quiet possession, in some instances founded upon the advice of the judges, granted sometimes until trial at law, sometimes

152. W. JONES, *supra* note 143, at 184.

153. 1 W. HOLDSWORTH, *supra* note 27, at 409. Holdsworth said of the growing popularity of Chancery that, "the constantly increasing number of cases which it heard during the sixteenth and seventeenth centuries shows that it satisfied a real want." *Id.* He gave these statistics: while Sir Thomas More was Chancellor (1529-1532) about 500 Chancery cases were started, an average of about 140 per year. During the reign of James I (c. 1603-1625), an average of about 1,464 suits were started each year in Chancery. During Nottingham's tenure as Chancellor (1673-1682) an average of 1,650 suits were begun each year. *Id.* at 409-10.

154. 5 W. HOLDSWORTH, *supra* note 27, at 321.

155. Just as noted above concerning the records of the 14th and 15th century Chancery proceedings, *see supra* text accompanying notes 85-89, the records and case reports for this later period are also fragmentary. The case reports generally do not begin until c. 1550, and they are not full and complete opinions but usually only a few sentences, with the facts frequently vague and the reasoning often absent. *See generally* W. HOLDSWORTH, *SOURCES AND LITERATURE OF ENGLISH LAW 177-202* (1925).

156. This classification of cases was suggested by 5 W. HOLDSWORTH, *supra* note 27, at 321.

157. 1 G. SPENCE, *supra* note 6, at 673. In fact, the judges in the courts of law sometimes suggested that a party seek this type of injunction from Chancery. *Id.*

158. Cary 36, 21 Eng. Rep. 20 (Ch. 1558).

159. 5 W. HOLDSWORTH, *supra* note 27, at 336.

until the hearing in Chancery, and sometimes, after the right had been established in one way or the other, in perpetuity, are found in many cases during this period, and they formed one of the matters in contest in the great dispute between the Chancellors and the judges.<sup>160</sup>

Another use of injunctions was to stop repeated actions at law for ejectment or possession by the same party concerning the same property,<sup>161</sup> for the common law did not prohibit the losing party from suing again.

In another area of property law, landlords and tenants sought injunctions to enforce their respective rights and duties. In one case,<sup>162</sup> Chancery allowed an interpleader; a tenant who was uncertain which of two defendants should properly receive his rent was permitted to pay it into court. Chancery then enjoined the defendants from molesting the tenant during the suit, provided he continued to pay his rent into court. The Chancellor issued an injunction in another suit to enforce a judgment of justices of assizes concerning tenant rights.<sup>163</sup> In a decision upholding a tenant's rights, where the landlord had repossessed the property, Chancery granted the tenant "an injunction for the corn" he had sown.<sup>164</sup> The Chancellor also enforced obligations tenants owed their landlords, as in *Litton v. Couper*.<sup>165</sup> There the Chancellor issued an injunction requiring the tenant to perform the obligations he owed the lord of the manor: to pay rent, to do suit and service at the lord's court, and to pay the appropriate fines and amercements for trespass or lack of service.

Injunctions were also used to safeguard other property rights, such as to grant access to or protection for common pasture land.<sup>166</sup> In the case of *Atkins v. Temple*, there was a bill to restrain the defendant from plowing up ancient meadow and pasture ground which, it was claimed, "hath not been plowed in the memory of man."<sup>167</sup> The Chancellor enjoined the defendant from plowing the land. Injunctions were also issued to declare whether easements for roads existed,<sup>168</sup> and to order that certain lands be enclosed

---

160. D. KERLY, *supra* note 11, at 149 (footnotes omitted). See also *Kidnere v. Harrison*, Cary 48, 21 Eng. Rep. 26 (Ch. 1559-1560), and *Sapcote v. Newport*, Cary 47, 21 Eng. Rep. 25 (Ch. 1559-1560), for further examples of injunctions used to quiet possession.

161. See *Denis v. Carew*, Tothill 63, 21 Eng. Rep. 124 (Ch. 1618-1619).

162. *Alnete v. Bettam*, Cary 46, 21 Eng. Rep. 25 (Ch. 1559-1560).

163. *Burtet v. Redman*, Cary 47, 21 Eng. Rep. 26 (Ch. 1559-1560). In a similar decision, *Harper v. Middleton*, Choyce Cases 180, 21 Eng. Rep. 104 (Ch. 1583-1584), tenants obtained an injunction to protect the traditional tenurial customs and to prevent defendants from disturbing tenants' possession by attempting to raise new ones.

164. *Harrison v. Chomeley*, Cary 51, 21 Eng. Rep. 28 (Ch. 1560-1561).

165. Cary 51, 21 Eng. Rep. 28 (Ch. 1563-1564).

166. See *Lawrence v. Windham*, Cary 64, 21 Eng. Rep. 34 (Ch. 1576-1577).

167. 1 Chan. Rep. 13, 21 Eng. Rep. 493 (1625-1626). See also Tothill 143-44, 21 Eng. Rep. 149, which lists several cases where Chancery enjoined plowing up "ancient pasture grounds."

168. See *Wotton v. Wotton*, Tothill 70, 21 Eng. Rep. 126 (Ch. 1634-1635) ("highway" easement "decreed"); *Powell v. Parsons*, Tothill 70, 21 Eng. Rep. 126 (Ch. 1627) (declared no easement existed).

or enclosures continued.<sup>169</sup> Thus a great variety of property-related disputes occasioned injunctions in Chancery, including cases to prevent threatened damage (i.e., plowing up pasture) and cases to enforce various property rights (possession, tenant obligations, etc.).

## 2. Tort

Injunctions involving torts—especially where damage or injury was imminent—were common. “The grant of injunctions in all cases of threatened wrongs formed one of the chief branches of the Court’s [Chancery] business . . . .”<sup>170</sup> Although the cases in this section concern torts, many involve torts against property; in the words of one commentator: “[N]early all the torts against which an injunction was sought were, at this period, torts to property.”<sup>171</sup>

There were frequent injunctions against waste<sup>172</sup> and nuisances. An injunction was sought against waste in *Peterson v. Shelley*,<sup>173</sup> where the plaintiff, who had a reversionary interest in land, wanted to prevent the present tenant from committing waste of the timber. A case concerning nuisance was *Osburne v. Barter*,<sup>174</sup> where plaintiff alleged that defendant had wrongfully diverted water from plaintiff’s mill by building a mill of his own; plaintiff sought an injunction against this conduct. *Bush v. Field*<sup>175</sup> was a case illustrating another type of threat to property. There plaintiff’s property was endangered when the defendant began tearing down a common wall that joined their houses. Since defendant’s demolition threatened the stability of plaintiff’s upper rooms, the Chancellor enjoined defendant from removing any more of the wall until there could be a hearing.

Suitors also petitioned the Chancery for injunctions in cases involving torts of duress<sup>176</sup> or fraud. One writer has said, “[t]here are many cases in

169. See generally Tothill 109-12, 21 Eng. Rep. 138-39.

170. D. KERLY, *supra* note 11, at 150.

171. 5 W. HOLDSWORTH, *supra* note 27, at 325.

172. See D. KERLY, *supra* note 11, at 150:

Injunctions against waste were granted, not only where the Common Law remedy of writ of waste would, but for some accidental bar, have lain, as for instance, where a second life tenancy followed that vested in the offending party, and therefore no one could claim the inheritance forfeited by the wasting, but even where waste was by law allowed.

173. Choyce Cases 117, 21 Eng. Rep. 72 (Ch. 1577). This case was very similar to an earlier case, noted *supra* note 108 and accompanying text.

174. Choyce Cases 176, 21 Eng. Rep. 102 (Ch. 1583-1584). See also *Swayne v. Rogers*, Cary 26, 21 Eng. Rep. 14 (Ch. 1604), another case where the plaintiff sought an injunction because actions of the defendant had stopped the flow of water to plaintiff’s mill.

175. Cary 90, 21 Eng. Rep. 48 (Ch. 1579-1580).

176. 5 W. HOLDSWORTH, *supra* note 27, at 328. Holdsworth observed that “[i]n the case of duress the common law gave a remedy; but it would seem that at this period the Court of Chancery exercised a concurrent jurisdiction.” *Id.*

which the court [Chancery] relieved against fraud and sharp practice."<sup>177</sup> The Chancellor gave relief against fraud in a case<sup>178</sup> where the sale of property was supposed to have been made conditional upon a marriage (which later did not occur) but the condition had been fraudulently omitted from the agreement. The Chancellor ordered a reconveyance to correct the fraud. Thus the tort cases in this period involving injunctions included torts to property—such as waste and nuisance—and nonproperty torts such as fraud and duress.

### 3. Other Cases

In addition to property and tort, myriad other types of cases gave rise to injunctions in the 1500's. In one case,<sup>179</sup> for example, the plaintiff had been a suitor for the hand of the defendant, and had given her a tablet of gold. After she married another, the plaintiff requested the Chancellor to order her to return the gold. It appears, therefore, that the Chancellor could, by injunction, compel the return of property where he deemed it equitable even though there had been no agreement between the parties. In *Wood v. Tirrell*,<sup>180</sup> the plaintiff attempted to repair a house that he had agreed to lease to defendant, but defendant threatened the workmen, preventing the repairs. Plaintiff asked that the Chancellor prohibit defendant from interfering. In another decision, a temporary injunction was issued to prevent the infringement of patents and copyrights<sup>181</sup>—a decree that sounds quite modern. The Chancellor did not hesitate to employ injunctions in multifarious matters; an injunction was even used in one case to induce the parties to settle.<sup>182</sup>

It should be noted that an injunction was not available in every case of hardship. A plaintiff could not, for example, obtain an injunction if the predicament was due to his own misconduct. The Chancellor denied an

177. *Id.*

178. *Birket v. Beresey*, Choyce Cases 146, 21 Eng. Rep. 86 (Ch. 1581).

179. *Young v. Burrell*, Cary 54, 21 Eng. Rep. 29 (Ch. 1576). This case is similar to *Margaret Appilgarth v. Thomas Sergeantson*, reported in T. PLUCKNETT & R. POUND, *supra* note 12, at 196, and discussed *supra* note 112 and accompanying text.

180. Cary 59, 21 Eng. Rep. 32 (Ch. 1576-1577).

181. *Wolfe v. Payne*, 5 & 6 Eliz. at 143, as cited in 1 G. SPENCE, *supra* note 6, at 672 n.(e).

182. *Stanebridge v. Hales*, Cary 47, 21 Eng. Rep. 26 (Ch. 1559-1560). Here plaintiff (in Chancery) had been sued at law by defendant for a debt of 500 pounds. Chancery ordered that its earlier injunction to stay that suit would be dissolved unless plaintiff brought 223 pounds into Chancery. If he did, execution upon the remainder of the debt would be stayed until further order of the Chancellor. 5 W. HOLDSWORTH, *supra* note 27, at 336, said that it appears that in this case, an injunction is being used "to enforce a compromise between parties to an action at law."

injunction in a case where the plaintiff, when he uttered words that gave rise to an action on the case, had been drunk.<sup>183</sup>

#### 4. Injunctions Restraining Actions and Judgments at Law

It was not unusual, at this time, for Chancery to issue injunctions that prevented parties from continuing an action or enforcing a judgment at law. The Chancellors did not believe that they were overstepping their powers, as these injunctions were addressed only to the party, not to the court of law or the judge.<sup>184</sup> Perhaps the Chancellors allowed their concern for justice to exceed their circumspection. It has been suggested that these injunctions were easy to obtain,<sup>185</sup> that the Chancellors issued them on surmises, without requiring proof.<sup>186</sup> It is difficult to tell whether this was true.

Injunctions restraining proceedings or judgments at law have been called "the most practically important class of injunctions."<sup>187</sup> Another scholar has written concerning them:

The most frequent exercise of the jurisdiction of the Court [Chancery] in granting injunctions was to restrain proceedings at law. It must have been very soon found that without such an interference, it would be impossible for the court to carry out the jurisdiction it had assumed of controlling the law on the principles of equity and conscience. Accordingly, from the time of Henry VI. downwards, we find numerous instances of the granting of such injunctions.<sup>188</sup>

In many cases, there were sound reasons to issue injunctions of this kind, even to restrain a party from enforcing a judgment at law. "[T]hese judgments at law, not in Chancery, were often given without any reference to the conduct of the parties, and were sometimes got (sic) by very sharp practice."<sup>189</sup> Chancery could assess the suit to determine if a party had acted inequitably or if one of the areas overlooked by the common law—i.e., fraud, duress, mistake—was involved. The inability of the courts of law to

---

183. *Kendrick v. Hopkins*, Cary 93, 21 Eng. Rep. 50 (Ch. 1579-1580). See 5 W. HOLDSWORTH, *supra* note 27, at 329-30, for a description of this decision. See also *Power v. Copperinger*, MONRO, ACTA CANCELLARIA 219-20, as cited in 5 W. HOLDSWORTH, *supra* note 27, at 330 n.1. In that case, plaintiff asked the Chancellor to relieve him of a gambling debt incurred while drunk. The Chancellor refused.

184. F. MAITLAND, *EQUITY* 9 (A. Chaytor & W. Whitaker eds. 1932).

185. 1 G. SPENCE, *supra* note 6, at 672 n.(b) (citing 2 R. NORTH, *LIFE OF LORD GUILDFORD* 79).

186. *Id.* at 676 ("It was common practice at this time to issue injunctions on mere surmises").

187. 5 W. HOLDSWORTH, *supra* note 27, at 325.

188. 1 G. SPENCE, *supra* note 6, at 673-74 (footnotes omitted). Holdsworth concurred, explaining why these injunctions were essential: if parties had been free to ignore Chancery and pursue their rights at law, Chancery would have been unable to grant effective relief. 5 W. HOLDSWORTH, *supra* note 27, at 335.

189. 5 W. HOLDSWORTH, *supra* note 27, at 326.

grant relief gave rise to Chancery's injunctions.<sup>190</sup> The judges were most disconcerted when injunctions stopped a party from executing a judgment; but despite their opposition, the Chancellors continued to issue these injunctions during the 1500's and early 1600's.

In the sixteenth century, Chancery continued the practice of enjoining proceedings where the legal process was being abused. For example, in one case the plaintiff sued at law when he learned that the defendant would be unable to defend because all the defendant's witnesses were overseas.<sup>191</sup> The Chancellor enjoined the action. Another suit was enjoined because the plaintiff had filed it solely to prevent the defendant from giving testimony against the plaintiff in another cause.<sup>192</sup> In a case where the plaintiff filed first a bill in Chancery and then a suit at law concerning the same dispute, the Chancellor enjoined the suit at law so that defendant need not defend two actions.<sup>193</sup> These and other abuses of legal procedures frequently resulted in an injunction from Chancery.<sup>194</sup>

Injunctions could extend beyond the parties to include their attorneys and counsellors. The latter could be enjoined from proceeding at law or enforcing a judgment,<sup>195</sup> and they could be held in contempt of Chancery if they violated the injunction.<sup>196</sup>

The Chancellor issued injunctions to stay proceedings not only in the major common law courts but in almost every court. Cases in King's Bench,<sup>197</sup> Exchequer,<sup>198</sup> Common Pleas, and Admiralty<sup>199</sup> were enjoined, as were cases in Ecclesiastical Court,<sup>200</sup> the Court of Wards,<sup>201</sup> and other courts. But Chancery would not permit those courts to restrain a party from proceeding in Chancery.<sup>202</sup>

190. Holdsworth commented that "[a]ll through this period the law made such scanty provision that the judges themselves admitted the necessity for the equitable jurisdiction." *Id.*

191. *Swigo v. Hanbury*, Choyce Cases 156, 21 Eng. Rep. 92 (Ch. 1581-1582).

192. *Angrome v. Angrome*, Choyce Cases 176, 21 Eng. Rep. 102 (Ch. 1583-1584).

193. *Bill v. Body*, Cary 50, 21 Eng. Rep. 27 (Ch. 1559-1560). As mentioned above, this also allowed Chancery to protect its jurisdiction against encroachments from the common law courts. See *supra* note 188 and accompanying text.

194. See also *Rose v. Reynolds*, Choyce Cases 147, 21 Eng. Rep. 87 (Ch. 1581) (injunction issued to restrain a widow from proceeding with a dower action, since she had already obtained the jointure she had been promised).

195. See *Cotes v. Freston*, Choyce Cases 108, 21 Eng. Rep. 67 (Ch. 1558).

196. See *Allen v. Dingley*, Choyce Cases 113, 21 Eng. Rep. 70 (Ch. 1576-1577). Perhaps this was done to insure that the attorney would not pray for judgment if the injunction prohibited only the party, a suggestion which was made by Fairfax, J., in *Russell's Case*, Y.B. 22 Edw. 4, pl. 37 (K.B. 1482); see also *supra* note 121.

197. *Cliffe v. Turnor*, Cary 83, 21 Eng. Rep. 44 (Ch. 1579).

198. *Catwallell v. Wynn*, Tothill 113, 21 Eng. Rep. 140 (Ch. 1593).

199. *Aylett v. Aylett*, Tothill 114, 21 Eng. Rep. 140 (Ch. 1590-1591).

200. *Beamont v. Harvy*, Tothill 113, 21 Eng. Rep. 140 (Ch. 1631-1633).

201. *Smith v. Snotsbull*, Tothill 114, 21 Eng. Rep. 140 (Ch. 1590-1591).

202. I G. SPENCE, *supra* note 6, at 676.

Several conclusions can be drawn from the injunction cases of the 1500's and early 1600's.<sup>203</sup> A number of the attributes of injunctions noted earlier continued during this period. Injunctions were still commonly used to protect property rights; even tort cases often dealt with threatened harms to property. The Chancellors also continued to issue injunctions in both prohibitory and mandatory forms: prohibitory, to restrain the defendant from engaging in certain acts; and mandatory, to require the defendant to undertake certain acts. Several trends concerning injunctions which had been merely inchoate now emerged. For example, Chancery came to recognize the distinction between interlocutory or temporary injunctions and permanent or final ones; and the former were becoming more common. Perhaps the most portentous feature of injunctions in this period was that they were increasingly used to stay actions or judgments at law. It appeared that, during this period, the power to issue injunctions was indispensable if Chancery was to continue to temper the rigidity of the common law with equity.<sup>204</sup>

It is difficult to discern the emergence of general rules or principles governing the issuance of injunctions during this time. This is, perhaps, due in part to the short and scanty condition of the reported cases.<sup>205</sup> But a more compelling reason is that at the close of the sixteenth century there seem to have been, in fact, no binding rules, no clear and constant principles, concerning injunctions. Chancery was still largely a court of conscience; the Chancellor had almost unfettered discretion to grant an appropriate remedy as his conscience dictated.<sup>206</sup>

### C. *Injunctions and the Relations Between Courts of Law and Chancery*

In the fifteenth century, the common law judges, although somewhat irritated by injunctions that halted proceedings at law, were generally favorably disposed toward Chancery. This attitude continued throughout most

---

203. See generally 5 W. HOLDSWORTH, *supra* note 27, at 325.

204. *Id.* at 336.

205. See *supra* note 155.

206. See generally 5 W. HOLDSWORTH, *supra* note 27, at 336-38. It was this lack of definite rules that caused John Selden (1584-1654) to remark:

Equity is a roguish thing, for law we . . . have a measure. . . . Equity is according to [the] conscience of him [that] is Chancellor, and as [that] is larger or narrower so . . . is equity[.] ['T]is all one as if they should make [the] standard for [the] measure we . . . call a foot, to be [the] Chancellor's foot; what an uncertain measure would this be; one Chancellor ha[s] a long foot another a short foot a third an indifferent foot; ['T]is [the] same thing in [the] Chancellor[']s conscience.

J. SELDEN, TABLE TALK 43 (F. Pollock ed. 1927).



of the sixteenth century. There were occasional decisions at law<sup>207</sup> which reflected some animosity, but on the whole there were no major disruptions in relations until Cardinal Wolsey's tenure as Chancellor from 1515 to 1529. Cardinal Wolsey was accused of certain improprieties by articles of impeachment that were drawn up against him after he lost the royal favor<sup>208</sup> and was dismissed from office by Henry VIII:

[N]o complaint was made against him of bribery or corruption, and the charges were merely that he had examined many matters in Chancery after judgment had been given at common law; - that he had unduly granted injunctions; - that when his injunctions were disregarded by the Judges, he had sent for those venerable magistrates and sharply reprimanded them for their obstinancy.<sup>209</sup>

Thus it appears that Wolsey not only issued injunctions too freely, but was also high-handed in his dealings with the judges. That there was friction between the courts of law and Chancery during his Chancellorship is understandable.

After Wolsey and beginning with Thomas More (Chancellor from 1529 to 1532), the Chancellors were no longer predominantly cleric, but were usually laymen, often common law lawyers such as More. One scholar asserted that "the fact that English *lawyers* . . . presided over Chancery, tended to keep the equity administered by the court of Chancery in close touch with the development of the common law, and to improve the relations between common law and equity."<sup>210</sup>

After More became Chancellor, the hostility Wolsey created was dispelled by More's probity and by his scrupulousness about issuing injunctions. "[H]e made it a habit never to grant a subpoena till he was satisfied that the plaintiff had some real ground of complaint. The result was that *the number of injunctions granted considerably decreased*."<sup>211</sup> When he heard that some

207. There were two King's Bench decisions, both during the reign of Edward IV, which revealed some hostility toward Chancery. In one, *Russell's Case*, Y.B. 22 Edw. 4, pl. 37 (K.B. 1482), the judges stated that if the Chancellor imprisoned a party for disobeying an injunction, they would release him by habeas corpus. See *supra* note 120 and accompanying text. In the other case, Y.B. Pasch. 21 Edw. 4, pl. b (K.B. 1483), the Judge declared that if a case came within the common law court's jurisdiction, King's Bench might prevent the parties from resorting to any other jurisdiction; in other words, prevent them from seeking relief in Chancery. This does not appear to have happened. But see W. JONES, *supra* note 143, at 466, who suggested that these judicial remarks displaying hostility toward Chancery may have been given undue emphasis by legal historians, since the threatened confrontations do not appear to have materialized.

208. See generally 1 J. CAMPBELL, *LIVES OF THE LORD CHANCELLORS* 390-419 (1868).

209. *Id.* at 462. See also 4 E. COKE, *INSTITUTES* 88-95 (1628 & photo reprint 1979), for a list of all 44 articles of impeachment against Wolsey.

210. 5 W. HOLDSWORTH, *supra* note 27, at 217 (emphasis added); see also T. PLUCKNETT, *supra* note 2, at 688. Plucknett stated that the fact that the Chancellors were now generally common law lawyers was crucial: "It is to this fact that we owe, no doubt, the cordial relations which existed during Elizabeth's reign between common law and equity." *Id.*

211. 5 W. HOLDSWORTH, *supra* note 27, at 223 (emphasis added).

judges were still perturbed by his injunctions, More invited all the judges to dinner:

[A]nd after dinner, when he had broken with them what complaints he had heard of his injunctions, and moreover showed them both the number and causes of everyone of them, in order so plainly, that, upon full debating of those matters, they were all enforced to confess that they, in like case, could have done no otherwise themselves. Then offered he this unto them; that if the justices of every court unto whom the reformation of the rigour of the law, by reason of their office, most especially appertained, would upon reasonable considerations by their own discretion, as they were, as he thought, in conscience bound, mitigate and reform the rigour of the law themselves, there should from henceforth by him no more injunctions be granted. Whereunto, when they refused to condescend, then said he unto them, 'Forasmuch as yourselves, my lords, drive me to that necessity for awarding out injunctions to relieve the people's injury, you cannot hereafter any more justly blame me.'<sup>212</sup>

Since the judges refused to mitigate the rigors of the common law, More continued to issue injunctions when he believed them necessary.<sup>213</sup> Despite this, there is no doubt that "[t]he result of his tenure in office was to restore harmonious relations between the Chancery and the common law courts."<sup>214</sup>

Although More succeeded in effecting a rapprochement, the cause of friction remained: Chancery's use of injunctions.<sup>215</sup> Enjoining legal proceedings in progress did not vex the judges as much as enjoining the enforcement of judgments already obtained; a few decisions from courts of law even denied that Chancery had this power.<sup>216</sup> The judges were disturbed by what they saw as the capricious granting of injunctions,<sup>217</sup> and worried about loss of profit<sup>218</sup> and power. They believed that if Chancery could issue injunctions

212. W. ROPER, *THE LIFE OF SIR THOMAS MORE* 34-35 (W. Rouse ed. 1924), *quoted in* 5 W. HOLDSWORTH, *supra* note 27, at 223-24.

213. "He was cautious in granting injunctions yet granted and maintained them with firmness, where he thought that justice required his interference with the judgments of the Courts of the common law . . ." 2 J. CAMPBELL, *supra* note 208, at 34. It also appears that More thoroughly disposed of the backlog of cases that existed when he took over the Chancery. This gave rise to a popular bit of doggerel:

When More sometime had Chancellor been  
No more suits did remain.  
The like will never more be seen  
Till More be there again.

T. MAYNARD, *HUMANIST AS HERO: THE LIFE OF SIR THOMAS MORE* 173 (1947).

214. 5 W. HOLDSWORTH, *supra* note 27, at 224.

215. Yale, *Introduction*, *supra* note 140, at 9.

216. *See, e.g.*, *Humfrey v. Humfrey*, 3 Leonard 1718, 74 Eng. Rep. 513 (C.P. 1572) ("The Chancery after judgment could not enjoyn [sic] the party that he shall not sue forth execution."). Despite such decisions, Chancery continued to do just that.

217. Chancellors did at times abuse their power and issue injunctions "indiscriminately and on no ascertainable principle[s]." Yale, *Introduction*, *supra* note 140, at 10; *see also supra* note 186.

218. *See* 1 G. SPENCE, *supra* note 6, at 674 n.(e), where Spence states that the judges may have been distressed by Chancery's interference because they received fees in each case that was tried in their court.

to prevent their judgments from being enforced, Chancery's power would be superior to their own.<sup>219</sup>

An attempt was made to defuse complaints about Chancery's injunctions by one of the Chancellors following More: Nicholas Bacon (Chancellor from 1558 to 1579, father of Francis Bacon). "It was while he was Chancellor that we get the first detailed rules as to the procedure of the court,"<sup>220</sup> rules which Chancery had been lacking. His procedural rules included a provision that parties seeking injunctions must give security for the truth of their allegations,<sup>221</sup> which seems to have been in response to the accusation that injunctions were issued indiscriminately.

Viewing the sixteenth century as a whole, it can be said that after Wolsey's dismissal, relations between Chancery and the common law courts improved and remained civil, although an underlying tension persisted: the dispute over the use of injunctions to interfere with cases in the courts of law. It was during the first part of the next century, in the reign of James I (1603-1625), that this dispute reached major proportions.

## VI. CONFLICT AND CONFRONTATION

### A. Political Factors

In 1616, the tension between common law and Chancery flared into sharp and open conflict. Before examining the details of this conflict, it is important to understand some of the political factors at the time, for, although there was unconcealed disagreement over the proper use of injunctions, there was deeper and more serious political dissension beneath the surface.<sup>222</sup> One scholar has commented that "[t]he differences over injunctions were of long standing and had been used to facilitate and promote political quarrels."<sup>223</sup>

Perhaps the most serious point of political discord concerned the relationship between the King and the law. King James was an absolutist; he

---

219. See 1 W. HOLDSWORTH, *supra* note 27, at 461. "The courts of common law saw well enough that their supremacy was at stake." *Id.*

220. 5 W. HOLDSWORTH, *supra* note 27, at 228.

221. D. KERLY, *supra* note 11, at 150.

222. Yale, *Introduction*, *supra* note 140, at 12, stated that this was essentially a political dispute:

Thus the solution of legal differences had to await a political settlement which was not achieved with sufficient permanence till the Restoration. The further fact that the last vestiges of the jurisdictional trouble disappear on the final political settlement at the end of the century further relates the solution of the trouble to the politics of the seventeenth century.

Pollock, *supra* note 127, at 294, maintained that the causes of the dispute "were not legal but political, and are to be found in the controversies between king and parliament, between prelates and Puritans, which led to the Civil War."

223. Yale, *Introduction*, *supra* note 140, at 10.

believed that the King was above the law<sup>224</sup> and was the source of law.<sup>225</sup> The Chancellor at the time, Lord Ellesmere (Chancellor, 1596-1617), had strong royalist proclivities and would not tolerate arguments against the King's prerogative.<sup>226</sup> Edward Coke (Chief Justice, Common Pleas 1606-1613; Chief Justice, King's Bench 1613-1616), on the other hand, was a staunch advocate of the common law; he maintained, along with many lawyers, judges, and members of Parliament, that the law was independent and above the king.<sup>227</sup>

From this primary disagreement, others followed, over such questions as the proper role of the common law judges. King James thought that the judges were officers of the crown,<sup>228</sup> and thus bound to speak as he directed them<sup>229</sup>—clearly a subservient position.<sup>230</sup> Coke craved an independent judiciary. His position was, according to one scholar, that “the common law was the supreme law in the state, and the judges, unfettered and uncontrolled save by the law itself, were the sole exponents of this supreme law.”<sup>231</sup> A related subject of contention was the role of the King's prerogative and the prerogative courts, especially Chancery. The King and his supporters held that the King's prerogative was supreme,<sup>232</sup> and that Chancery, as a prerogative court, could do whatever the King desired, being accountable only to him.<sup>233</sup> The supporters of the common law asserted that the King's prerogative was subject to legal limitations, and that the common law judges were obligated to see that these limitations were not exceeded.<sup>234</sup> They were suspicious of the Chancellor because he was an important minister,<sup>235</sup> on intimate terms with the King, and because his power was susceptible of being used by the King to further the King's political ends.<sup>236</sup> Given these views, it is

224. James saw this conflict in 1616 as an opportunity to demonstrate that he was “the supreme lord of all the justice that was done in his name.” F.W. MAITLAND, *History of English Law*, in *SELECTED HISTORICAL ESSAYS OF F.W. MAITLAND* 133 (H. Cam ed. 1957).

225. 2 G. TREVELYAN, *HISTORY OF ENGLAND* 167 (1927).

226. 5 W. HOLDSWORTH, *supra* note 27, at 231.

227. 2 G. TREVELYAN, *supra* note 225, at 188-92.

228. 5 W. HOLDSWORTH, *supra* note 27, at 428.

229. 2 G. TREVELYAN, *supra* note 225, at 188-92.

230. 9 G. DAVIES, *OXFORD HISTORY OF ENGLAND, THE EARLY STUARTS 1603-1660*, at 21 (2d ed. 1959).

231. 5 W. HOLDSWORTH, *supra* note 27, at 428.

232. *Id.*

233. Holdsworth says that the royalists maintained the Chancellor had “absolute power to purge the defendant's conscience.” *Id.* at 235. But see T. PLUCKNETT, *supra* note 2, at 193, where Plucknett argued that the royalists' claim of Chancery's “absolute power” was unfounded; Chancery's procedures were becoming settled and the arbitrary element of equity had largely been eliminated.

234. 9 G. DAVIES, *supra* note 230, at 20.

235. 5 W. HOLDSWORTH, *supra* note 27, at 236-37.

236. *Id.* See also Barbour, *Fifteenth-Century Chancery*, *supra* note 26, at 858, who explained this mistrust of Chancery: “Such is the political power of the Chancellor that, if his action be arbitrary and unrestrained, it may be utilized for purely political ends; it is not so much the Chancellor as the king who may deride the common law.”

not surprising that Coke and the common law lawyers wanted to limit Chancery's jurisdiction.<sup>237</sup>

### B. Ellesmere and Coke

Clearly, Ellesmere and Coke held widely divergent views on the question of whether Chancery could properly restrain parties from enforcing judgments at law. Ellesmere believed that this function was neither improper nor illegal but indispensable. Without it, Chancery would need the permission of common law in order to administer equity;<sup>238</sup> the Chancellor would be unable to remedy unconscionable acts by which parties sometimes obtained judgments at law.<sup>239</sup> As Chancellor, Ellesmere did not hesitate to act on this belief; it has been said that "[h]e encouraged suits in Chancery after judgment had been given at common law,"<sup>240</sup> that he issued some injunctions indiscriminately,<sup>241</sup> and that he was too quick to imprison parties who disobeyed his injunctions.<sup>242</sup> It must, however, be set down to his credit that he promulgated rules to govern the issue of injunctions, apparently to prevent their being issued too freely.<sup>243</sup>

Coke denied that Chancery could stay the execution of common law judgments, and is said to have announced in open court (King's Bench) that any lawyer who sought an injunction to stay a judgment would be forever barred from presenting cases in King's Bench.<sup>244</sup> He insisted that it was illegal to examine a judgment, to reopen it in Chancery.<sup>245</sup> Therefore Coke began to release, by habeas corpus, parties that Ellesmere had imprisoned for disregarding injunctions by continuing suits or enforcing judgments.<sup>246</sup> Thus, Coke<sup>247</sup>

237. 1 W. HOLDSWORTH, *supra* note 27, at 461.

238. See 5 W. HOLDSWORTH, *supra* note 27, at 236.

239. See *supra* note 189 and accompanying text.

240. J. BAKER, *supra* note 76, at 92.

241. Yale, *Introduction*, *supra* note 140, at 10.

242. W. JONES, *supra* note 143, at 470.

243. Lord Ellesmere "had . . . gone to some lengths to check the indiscriminate use of injunction by laying down certain rules to govern their issue." Yale, *Introduction*, *supra* note 140, at 71. These procedural rules stated that injunctions were available in only three situations: where the defendant refused to come to court and was in contempt; where the defendant confessed the matter; or where the complaint was proved. *Id.* This appeared to be an attempt to eliminate injunctions granted solely upon the petitioner's allegations.

244. 2 J. CAMPBELL, *supra* note 208, at 364.

245. *Id.* at 386. Coke asserted that this was a violation of the statutes of *Praemunire*. See *infra* notes 269-312 and accompanying text.

246. Coke also urged the released prisoners to prosecute all those involved for the alleged criminal offense of violating the statutes of *Praemunire* by obtaining an injunction after a judgment in a court of law. J. BAKER, *supra* note 76, at 92.

247. Coke's single-minded devotion to the cause of the common law has been thought by some to have become rather excessive. See 5 W. HOLDSWORTH, *supra* note 27, at 437 ("[H]is views as to [the common law's] supremacy had become a matter of settled belief not wholly devoid of fanaticism.").

staked out his ground as being firmly opposed to this use of injunctions.<sup>248</sup>

An additional factor in the clash between the courts of law and Chancery was the personalities involved: both Ellesmere and Coke were very strong-willed, even intolerant.<sup>249</sup> There was little of that spirit of cooperation that existed when More was Chancellor.

### C. Cases Leading to the 1616 Dispute

Preceding the case in 1616 that was the focus of the conflict between courts of law and Chancery, there were a number of decisions concerning the propriety of Chancery enjoining parties from proceeding with suits or judgments at law.<sup>250</sup> These cases set the stage for the confrontation which occurred in 1616.

In 1589, there was an indictment on the statute of *Praemunire*<sup>251</sup> against an attorney for seeking an injunction against the execution of a judgment at law, but the indictment was not brought to trial.<sup>252</sup> The very fact of an indictment, however, shows a mounting dissatisfaction with this kind of injunction. Chancery did not, however, remain quiescent; there was a case in 1594 where the Chancellor imprisoned both a party and his attorney for continuing a suit at law in spite of an injunction, and it appears that parties in other cases were similarly punished.<sup>253</sup> These minor skirmishes between the courts of law and Chancery at the close of the 1500's portended a more serious altercation in the 1600's.

There were decisions of courts of law during this period that, on their face, appeared to have resolved the issue by prohibiting Chancery from enjoining proceedings at law. Coke reported a decision, *Throckmorton v. Finch*,<sup>254</sup> which seems to have held that the Chancellor did not have the power to hear a dispute (or issue an injunction) after a judgment at law. Finch, the defendant (in Chancery), had obtained a judgment, which was affirmed on a writ of error. Throckmorton, the plaintiff, then sought an

---

248. See T. PLUCKNETT, *supra* note 2, at 194, who pointed out that the supporters of the common law in this controversy "had to take up the difficult position that . . . the injunction against enforcing a judgment obtained by fraud was reprehensible, and a number of other equally doubtful theses."

249. See Yale, *Introduction*, *supra* note 140, at 12; J. BAKER, *supra* note 76, at 92. Baker commented that "[t]he trouble in 1616 was largely caused by a clash of strong personalities." *Id.*

250. Some of these cases have been discussed. See, e.g., *supra* note 120 and accompanying text. See generally cases cited *supra* notes 182-206.

251. See *infra* notes 281-87 and accompanying text.

252. 2 J. CAMPBELL, *supra* note 208, at 362.

253. W. JONES, *supra* note 143, at 469; see also cases cited *supra* notes 195-96 and accompanying text.

254. See 4 E. COKE, *supra* note 209, at 86.

injunction from Chancery to stay execution of the judgment. Finch claimed that, by virtue of his judgment at law, he need not respond to the bill in Chancery. When Chancellor Ellesmere ordered him to answer, the defendant petitioned Queen Elizabeth, who referred the matter to all the judges. The judges, while acknowledging that the plaintiff had good cause for relief,<sup>255</sup> decided that defendant was not required to respond; the Chancellor could not examine a case after there had been a judgment at law.<sup>256</sup> Coke believed that this case was decided correctly,<sup>257</sup> and was controlling, but Ellesmere continued issuing such injunctions, and the problem persisted.

Several years after *Throckmorton*, there was a short decision from King's Bench (where Coke was Chief Justice)—*Heath v. Rydley*<sup>258</sup>—which stated as follows:

In an action of debt at the common law, judgment being against the defendant, and day given to move in arrest thereof, he in the interim preferred his bill in Chancery, and *obtained an injunction* to stay judgment and execution: but, notwithstanding the Court granted both . . . .<sup>259</sup>

In other words, in *Heath*, King's Bench proceeded to enter judgment and allow execution, despite the injunction, because the judges believed that parties must submit to a judgment at law (obtained, if not yet entered), unless that judgment was reversed by error or attainet.<sup>260</sup> In the course of this decision, the judges referred to a recent case that held that courts of equity were to be prohibited from hearing matters cognizable at common law.<sup>261</sup> The ruling in *Heath*, where a court of law allowed a party to ignore

255. See *Courtney v. Glanvil*, Croke's James 344, 79 Eng. Rep. 294 (K.B. 1614), where the facts of *Throckmorton* are discussed in more detail. In *Throckmorton*, a lease was declared void due to nonpayment of rent. The nonpayment involved an incident that happened about 30 years before the suit, when Throckmorton's rent was late because his servant, who was carrying the money to make the rent payment, was robbed. Throckmorton paid the rent the very next day, and it was accepted.

According to the discussion in *Courtney*, the judges said that Throckmorton's bill in Chancery "comprehended much matter of equity, and there was very good cause he should have been relieved," but they ruled that Chancery could not grant relief because he waited until *after* the judgment at law. *Courtney*, Croke's James 344, 79 Eng. Rep. at 294.

256. Since the common law judges had long been opposed to Chancery's enjoining parties from enforcing judgments, their decision here was predictable. See D. KERLY, *supra* note 11, at 110 ("In fact the question in dispute being referred to one of the parties [because the dispute was actually between law and Chancery the judges were a party] was naturally decided in that party's favour . . . .").

257. See 4 E. COKE, *supra* note 209, at 86. Coke commented that although the Chancellor, in such cases, may claim to be examining the conduct of the defendant, not the judgment, "he would by his decree take away the effect of the judgment . . ." *Id.* Coke did not equivocate when stating his view on whether Chancery should be permitted to do this: "But that such a course should be permitted, it should be not only full of inconvenience, but directly against the laws and statutes of the Realm . . ." *Id.*

258. Croke's James 336, 79 Eng. Rep. 286 (K.B. 1613).

259. *Id.* at 336, 79 Eng. Rep. at 286 (emphasis added).

260. This was the common law view of the statutes of *Praemunire*.

261. See *Heath*, Croke's James at 335-36, 79 Eng. Rep. at 286. The *Heath* court does not name this prior case.

Chancery's injunction, was yet a further illustration that the courts of law were fundamentally opposed to Chancery on the issue of injunctions.

An opinion by Chancellor Ellesmere in 1615<sup>262</sup> set forth, in no uncertain terms, Chancery's position. Ellesmere explained that if a judgment had been obtained by oppression, wrong, or "hard conscience," he would set it aside, not for any defect in the judgment itself, but because of the "hard conscience" of the party.<sup>263</sup> Chancery, Ellesmere wrote, did not examine the truth or justice of a judgment; it examined only the conduct of the parties.<sup>264</sup>

Another significant case before the conflict in 1616<sup>265</sup> was *Courtney v. Glanvil*,<sup>266</sup> decided in King's Bench in 1614. The defendant had defrauded the plaintiff by selling him a jewel worth 20 pounds for 360 pounds. The defendant then sued at law on the bond he had received in payment and obtained a judgment. The plaintiff, discovering the fraud, brought a writ of error at law to reverse the judgment, but the judgment was affirmed. The plaintiff then resorted to Chancery. The Chancellor ordered the defendant to take back the jewel and release the judgment. When he refused, he was imprisoned.<sup>267</sup>

Coke and the King's Bench then released the defendant on bail by a writ of habeas corpus, even though he still refused to comply with the Chancellor's injunction. Coke justified this by asserting that the injunction and the imprisonment, coming after a judgment at law, were illegal. It is unfortunate that Coke and the supporters of the common law were forced to defend judgments upholding the egregious conduct of parties like Glanvil and Finch.<sup>268</sup> In both cases, the common law did not provide relief, even upon a writ of error, when the unconscionable actions were proved.

262. Earl of Oxford's Case, 1 Ch. Rep. 1, 21 Eng. Rep. 485 (Ch. 1615).

263. *Id.* at 10, 21 Eng. Rep. at 487.

264. *Id.* at 7, 21 Eng. Rep. at 486.

265. There appears to be some uncertainty about whether *Courtney*, Croke's James 344, 79 Eng. Rep. 294, preceded the 1616 dispute, or whether it actually was *the* case that was the focus of the conflict. See T. PLUCKNETT, *supra* note 2, at 194, who seems to say that *Courtney* was the case which precipitated the conflict. Other commentators are noncommittal. See, e.g., 1 W. HOLDSWORTH, *supra* note 27, at 461-63. But see D. KERLY, *supra* note 11, at 110-15, who discussed *Courtney* and then described the facts of the case at the heart of the 1616 crisis—clearly not *Courtney* but a later case (one that involved a key witness being lured away from the courthouse to a tavern to drink). See Wilson, *Life of James I*, in T. PLUCKNETT & R. POUND, *supra* note 2, at 202-03. Perhaps the most compelling reason for concluding that *Courtney* was not the case involved in 1616 is that the 1616 case was not resolved but was appealed to King James, as we will see, whereas the report of the case of *Courtney*, Croke's James 344, 79 Eng. Rep. 294, ends with a clear conclusion—the defendant was released on bail and discharged by King's Bench the following term. *Id.* at 295. It is, however, curious to note that the extant documents surrounding the 1616 dispute do not list the case name.

266. Croke's James 344, 79 Eng. Rep. 294 (K.B. 1614); see also D. KERLY, *supra* note 11, at 110 (discussing *Courtney*); 1 W. HOLDSWORTH, *supra* note 27, at 461-62 (same).

267. Croke's James 344, 79 Eng. Rep. at 294.

268. See *supra* note 255.



These cases show an increasing hostility between the courts of law and Chancery, and an increasing willingness to imprison or to release parties to undo the actions of the (by now) rival courts. Decisions by Chancery or the courts of law on the issue of whether an injunction could prohibit a party from enforcing a judgment did not appear to be sufficient to resolve the impasse.

#### D. *The Dispute Itself—1615-1616*

The controversy between common law and Chancery culminated in a case that arose in King's Bench in 1615-1616.<sup>269</sup> In this action,<sup>270</sup> the plaintiff had inveigled the defendant's main witness to a tavern to drink when he was supposed to testify, and told the judge that the witness was not at court because he was deathly ill. As a result, the plaintiff obtained a judgment. Defendant then persuaded the Chancellor to enjoin the plaintiff from enforcing the judgment. Then,<sup>271</sup> it appears that Coke, as Chief Justice of King's Bench, endeavored to have everyone involved in the injunction, including Chancellor Ellesmere, indicted for violating the statutes of *Praemunire*. The Chancellor at this point acquainted King James with the situation, and the King, taking an unusual step, referred the dispute to a commission of four men:<sup>272</sup> Sir Francis Bacon, his Attorney General; Sir Henry Montague and Sir Randall Crew, his Serjeants [sic] at Law; and Sir Henry Yelverton, his Solicitor. Their task was to investigate and report on two specific aspects of this dispute.<sup>273</sup> First, they were to examine court records to determine

269. Holdsworth gave the following explanation for the conflict between the courts of law and Chancery:

The revival of the quarrel between the common law courts and the court of Chancery at the end of the sixteenth and the beginning of the seventeenth centuries was due partly to the claim made by Coke that the common law and the common law alone must decide the ambit of the jurisdiction of all rival courts; partly to the constitutional differences between common lawyers who asserted the supremacy of the common law, and other lawyers who asserted the supremacy of the prerogative; partly to the undoubted fact that equity could not function properly unless it could stop litigants who wished to make an inequitable use of their legal rights; and partly to the temper of the two principal disputants—Coke and Ellesmere.

W. HOLDSWORTH, *SOME MAKERS OF ENGLISH LAW* 99 (1938).

270. See Wilson, *supra* note 265, at 202-03, and D. KERLY, *supra* note 11, at 113-15, for two accounts of this case. It appears that none of the existing reports of this decision gives it a name.

271. At this point, the reports of the case differ somewhat. Wilson, *supra* note 265, at 202-03, says that the Chancellor imprisoned the plaintiff for refusing to obey the injunction. D. KERLY, *supra* note 11, at 113-15, does not mention imprisonment of the plaintiff.

272. It appears that a fifth man, John Walter, was later added to the commission. The King's Order and Decree in Chancery, Cary 133, 21 Eng. Rep. 65 (1616).

273. See generally The King's Order and Decree in Chancery, Cary 115-35, 21 Eng. Rep. 61-65 (1616), for the correspondence, findings, and reports of this commission.

whether there were precedents in which Chancery had granted equitable relief even though a judgment at law had already been obtained.<sup>274</sup> Second, the members of the commission were asked whether Chancery could *properly* issue an injunction to restrain a party from enforcing a judgment at law. This was asked of them in the form of a hypothetical: if *A* obtained a judgment at law against *B*, and *B* wished to raise in defense certain matters of conscience and equity which the judges at law did not recognize, could *B* complain in Chancery? And, more importantly, did the statutes of *Praemunire*, or any other statutes, prevent Chancery from granting relief in this situation?<sup>275</sup>

### *E. The Commission's Report and the King's Order*

The commission's report on existing precedents contained thirteen points,<sup>276</sup> the most significant of which were as follows:

2. We find that there hath been a strong current of practice of proceeding in Chancery after judgment, and many times after execution, continued from the beginning of Henry the Seventh's reign, unto the time of the Lord Chancellor that now is . . . it being in cases where there is no remedy for the subject, by the strict course of the common law, unto which the Judges are sworn.<sup>277</sup>

. . . .

8. We find in said cases, not only the bill preferred, but motions, orders, *injunctions*, and *decrees thereupon*, for the *discharging and releasing of the judgments* . . . .<sup>278</sup>

. . . .

10. We find that the Judges themselves, in their own Courts, when there appeared unto them matter of equity, because by their oath and

274. *See id.* at 115, 21 Eng. Rep. at 61 (letter from Chancellor Ellesmere to Francis Bacon, dated 19 March 1615, requesting that the commission undertake this investigation).

275. This second part of the commission's task was contained in a letter of 27 March 1616 from Ellesmere to Bacon. *Id.* at 121-22, 21 Eng. Rep. at 62. The question posed to Bacon was in terms less neutral than those in the text above. The actual language read: "Whether the Chancery may relieve B in this or such like cases, or else leave him utterly remediless and undone" and "by what statute . . . is the Chancery so restrained, and conscience and equity banished, excluded and damned?" *Id.* at 122-23, 21 Eng. Rep. at 62.

276. *Id.* at 117-20, 21 Eng. Rep. at 61-62.

277. *Id.* at 118, 21 Eng. Rep. at 61. The report noted this had occurred "after judgments in your Majesty's several Courts, the King's Bench, Common Pleas, Justice in Oyer, & C." *Id.* at point 4.

278. *Id.* at 119, 21 Eng. Rep. at 62 (emphasis added). It was reported that in some cases the defendants had attempted to demur and defend based upon their judgment at law, but that this defense had been overruled. *Id.* at point 9.

office [they] could not stay the judgments, except it be for some small time, have directed the parties to seek relief in Chancery.<sup>279</sup>

Bacon's commission found, then, that there had been a history of cases where Chancery had issued injunctions to stay judgments at law, sometimes for parties sent to Chancery by the judges for that very purpose, in situations where the common law did not have a remedy available.

The more important question was whether any statutes prohibited Chancery from doing this. The commission focused on the statutes of *Praemunire*.<sup>280</sup> The first of these, dating from 1353, penalized anyone who drew a case out of the realm that belonged in the King's Court, or who sued in any other court to defeat or impeach a judgment of the King's Court. The second, dating from 1403, mandated that after a judgment was given in the King's Court, the parties must be "in peace" unless the judgment was reversed by Attaint or Error.

Bacon and his commission concluded that these statutes did not prevent Chancery from acting after a judgment at law, which was not altogether surprising since the commissioners were officers of the King, and Chancery was one of the King's prerogative courts. Their report listed a number of reasons why these statutes did not apply.<sup>281</sup> The commissioners concluded that the 1353 statute<sup>282</sup> was intended to prohibit litigants from involving foreign courts—most notably, the ecclesiastical courts of Rome—in matters belonging in England's courts.<sup>283</sup> They added that no one had ever been convicted under this statute for filing a bill in Chancery after a judgment.<sup>284</sup> The second statute of *Praemunire*<sup>285</sup> was found not to restrain Chancery because it was intended to relieve parties from having to answer matters

279. *Id.* at 119-20, 21 Eng. Rep. at 61-62. The commission stated that these precedents had occurred not only when the Chancellor sat in Chancery, but also when various judges sat in Chancery, in the vacancy or absence of the Chancellor. *Id.* at 120, 21 Eng. Rep. at 62, point 11. And it was added that a number of the bills filed in Chancery after judgments at law were filed by reputable attorneys who had since become judges. *Id.* at 120, 21 Eng. Rep. at 62, point 12.

280. 27 Edw. 3, ch. 1 (1353); 4 Hen. 4, ch. 23 (1403).

281. *See generally* The King's Order and Decree in Chancery, Cary 126-33, 21 Eng. Rep. 63-65 (1616). The report of the commission was drafted with a fine logic characterized by closeness of reasoning and niceness of distinction.

282. 27 Edw. 3, ch. 1 (1353).

283. *See* 1 W. HOLDSWORTH, *supra* note 27, at 462. The report also pointed out several other difficulties in attempting to apply the 1353 statute to Chancery. The statute provided that a person accused of this offense would be examined by the King, or his Council, or by Chancery. Clearly, the commissioners said, Chancery could not both commit the offense and be the judge of guilt. Also, the penalty for guilt—being put out of the King's protection—was far too harsh for an excess of jurisdiction by one of the King's courts; it would be more applicable to one who was using foreign courts, the commissioners believed. The King's Order and Decree in Chancery, Cary 127-28, 21 Eng. Rep. 63-64.

284. The King's Order and Decree in Chancery, Cary 129, 21 Eng. Rep. 64. But there had been two or three bills of indictment. *Id.*

285. 4 Hen. 4, ch. 23 (1403).

“anew,” that is, “again,” after a judgment; Chancery, on the contrary, examined matters of conscience and equity that had not been addressed by the courts of law.<sup>286</sup> Therefore, the commissioners concluded, this statute, too, was inapplicable.

Following these findings, King James entered an order approving and ratifying the commissioners' report, including their account of existing precedents and their view that the statutes of *Praemunire* did not bind Chancery. He commanded that Chancery be available to provide equity to his subjects where they were denied relief by the rigor and extremity of the law.<sup>287</sup> The King's order was very much in keeping with his views of the supremacy of the crown.<sup>288</sup>

In light of the precedents and statutes, were the commissioners' report and the King's order correct? This appears to be susceptible of argument.<sup>289</sup> As has been noted earlier,<sup>290</sup> there is no doubt that Chancery had frequently intervened in cases after judgment, occasionally at the suggestion of the judges;<sup>291</sup> but the difficult question is whether the two statutes of *Praemunire* applied to prevent Chancery from issuing injunctions of this sort.<sup>292</sup> It seems

286. The King's Order and Decree in Chancery, Cary 131-32, 21 Eng. Rep. 64-65. The commission also commented that the intent of this statute was to prevent an attack upon the judgment. Chancery, the commission said, leaves the judgment in peace and only “meddles with the corrupt conscience of the party.” *Id.* at 132, 21 Eng. Rep. at 65.

287. *Id.* at 133-35, 21 Eng. Rep. at 65. The King's order was dated 18 July 1616.

288. See 3 W. BLACKSTONE, COMMENTARIES \* 54, who wrote of these actions of the King: “[N]ot contented with the irrefragable rea[s]ions and precedents produced by his coun[s]el . . . he cho[s]e rather to decide the question by referring it to the plenitude of his royal prerogative.” See also F. MAITLAND, *supra* note 90, at 270. Maitland described this decision as giving the King “the pleasure of deciding in favor of the Chancery, and thus maintaining his theory that he was the supreme arbiter when his judges differed.” *Id.*

In his order, James included his views on the supremacy of the King:

[I]t appertaineth to our princely care and office only to judge over all our Judges . . . [and] to settle and decide as we in our princely wisdom shall find to stand most with our honour, and the good example of our Royal Progenitors, in the best times, and the general weal and good of our people, for which we are to answer unto God, who hath placed us over them . . .

The King's Order and Decree in Chancery, Cary 134-35, 21 Eng. Rep. 65 (emphasis added).

As noted, this decision has obvious political overtones. The fact that Coke was not in good favor with the King has been cited as a factor in this incident. See J. BAKER, *supra* note 76, at 93.

289. Yale, *Introduction*, *supra* note 140, at 11 n.3, commented that the statutes of *Praemunire* “were, it seems, aimed at papal jurisdiction. But the legislation was worded widely enough to permit of argument.”

290. See *supra* notes 184-90 and accompanying text.

291. “[T]he judges were not only concerned to direct litigants to seek relief in Chancery, but even afforded positive approval to the application of injunctions against common law proceedings both before and after verdict.” W. JONES, *supra* note 143, at 468.

292. See Earl of Oxford's Case, 1 Ch. Rep. 1, 21 Eng. Rep. 485 (1615) (discussed *supra* note 259 and accompanying text); *Arguments Proving From Antiquity the Dignity, Power, and Jurisdiction of the Court of Chancery*, 1 Ch. Rep., 21 Eng. Rep. 576 app. (n.d.). Both of these sources strenuously maintained that the statutes of *Praemunire* did not extend to Chancery.

fairly certain that the 1353 statute<sup>293</sup> was intended to apply to ecclesiastical courts and appeals to Rome,<sup>294</sup> not to Chancery. The second statute<sup>295</sup> is not as clear. The conclusion—by no means unanimous—of scholars seems to be that it was not meant to include Chancery. Blackstone believed that “the chief ju[s]tice [Coke] was clearly in the wrong.”<sup>296</sup> Other scholars have agreed with this assessment, that Coke and the common law lawyers were incorrect in maintaining that an injunction after a judgment at law violated the statutes of *Praemunire*.<sup>297</sup> But one prominent writer has stated that “there was authority tending to show that the statute applied to proceedings in the court of Chancery.”<sup>298</sup> Recently, one legal historian has strongly dissented from the received opinion that Bacon’s report and the King’s order were correct, and has insisted instead that Coke had the law on his side—that this use of injunctions was illegal.<sup>299</sup> Notwithstanding these scholarly lucubrations, the most probable conclusion is that these statutes did not encompass Chancery.<sup>300</sup>

There is a general consensus that the resolution of this issue in favor of Chancery was salutary. James’ decision was “so obviously right,” wrote Holdsworth, because it kept intact a system of equity that greatly benefited litigants.<sup>301</sup> Another noted legal historian commented that “[t]he victory of Chancery was final and complete—and if we were to have a court of equity at all, it was a necessary victory.”<sup>302</sup> The defects and omissions, procedural and substantive, in the common law required a supplementing system of equity, one that could stay judgments that were wrongfully obtained. The King’s order established that Chancery would have this power. But if Chancery and common law were to coexist, this power would have to be used with restraint.

293. 27 Edw. 3, ch. 1 (1353).

294. 1 W. HOLDSWORTH, *supra* note 27, at 462.

295. 4 Hen. 4, ch. 23 (1403).

296. 3 W. BLACKSTONE, *supra* note 288, at 54.

297. See, for example, J. POMEROY, *supra* note 149, § 1360, at 2700, who said that in this dispute, “the reasons urged by the common-law judges were frivolous.”

298. 1 W. HOLDSWORTH, *supra* note 27, at 462 (citing C. ST. GERMAIN, DOCTOR AND STUDENT, bk. i, c.18 (c. 1532); *Treatise on the Subpoena*, in HARGRAVE’S LAW TRACTS 348 (1786); Beck v. Hesill (Hen. VI) Cal. ii xii); see also D. KERLY, *supra* note 11, at 43 (“There seems little doubt that the statute was taken to bind the Chancellor . . .”).

299. J. BAKER, *supra* note 76, at 92-93. Baker argued that “[t]he procedure was an irregular appeal, an illegal challenge to judgments given notionally before the king himself.” *Id.* at 92. He added, “[o]nce the dust had settled, the 1616 decree would be seen as illegal . . .” *Id.* at 93 (citing King v. Standish, 1 Lev. 241, 83 Eng. Rep. 387 (1670)); see also Baker, *The Dark Age of Legal History 1500-1700*, in LEGAL HISTORY STUDIES 1972, at 1 (D. Jenkins ed. 1975).

300. See *supra* note 283. It also appears to be significant that these statutes could very easily have listed Chancery as included within their ambit, but they did not do so.

301. 5 W. HOLDSWORTH, *supra* note 27, at 237.

302. F. MAITLAND, *supra* note 90, at 270.

## VII. AFTER 1616—TOWARD STABILITY

A. *Common Law Recalcitrance*

The supporters of the common law were loath to accept the King's order in 1616 as final, and on occasion throughout the seventeenth century made attempts to reopen the issue. Coke remained defiant; in writing his *Institutes* he still maintained that injunctions after judgments were contrary to the statutes.<sup>303</sup> But injunctions—and Chancery—survived the calamitous seventeenth century in England despite the political upheavals and the continued hostility of some common law lawyers and judges.<sup>304</sup>

There were decisions in the courts of law which reflected this disagreement with the King's decision. An Exchequer decision in 1655, *Morel v. Douglas*<sup>305</sup> appears to have said that the second statute of *Praemunire*,<sup>306</sup> applied to the courts of equity. This decision cited *Throckmorton v. Finch*,<sup>307</sup> but ignored the report of Bacon's commission and the King's order of 1616. There was a case in King's Bench in 1670, *King v. Standish*,<sup>308</sup> where, after the plaintiff secured a judgment, the defendant obtained an injunction from Chancery. The plaintiff then sought to indict defendant on the first statute of *Praemunire*.<sup>309</sup> King's Bench did not simply follow the King's order of 1616 and dismiss the suit; it listened to arguments on the issue.<sup>310</sup> The King's order was cited but apparently was not, to this court, dispositive of the question. The case remained pending. When it was taken up again, Sir Matthew Hale was Chief Justice of King's Bench. He believed that the case was not within the statute and no further action was taken. These two cases indicate the lingering opposition to the King's order. But they were, Holdsworth said,

303. 3 E. COKE, *supra* note 209, at ch. 54.

304. See W. HOLDSWORTH, *supra* note 269, at 101. Holdsworth wrote that:

[I]t is true that the existence of equity was threatened when the outbreak of the Great Rebellion destroyed the constitution. But the decision of James was so obviously right; the need for a court of equity was so clear; the fact that the courts of common law and equity had, down to the outbreak of the Great Rebellion, worked well together to the advantage both of the litigant and the law was so evident—that even under the commonwealth it was impossible to dispense wholly with equity. At the Restoration it silently resumed the place which had been given to it by James I's decree.

*Id.*

305. Hardres 23, 145 Eng. Rep. 360 (Ex. 1655).

306. 4 Hen. 4, ch. 23 (1403).

307. 4 E. COKE, *supra* note 209, at 86. See *supra* note 254 and accompanying text.

308. 1 Lev. 241, 83 Eng. Rep. 387 (K.B. 1670).

309. 27 Edw. 3, ch. 1 (1353).

310. 1 Lev. at 241, 83 Eng. Rep. at 388.

merely of "academic interest,"<sup>311</sup> and were not controlling, since Chancery continued to enjoin parties from enforcing judgments.<sup>312</sup>

### B. Equity Becomes Settled

After 1616, there were gradual changes in both common law and Chancery that affected injunctions. There were improvements in the common law system that made injunctions less necessary and less frequent.<sup>313</sup> Chancery was also changing: there was a growing practice of citing cases—a practice which was "helping, not only to settle still more exactly the true sphere of the court's jurisdiction, but also to make some fixed rules for the exercise of the chancellor's discretion."<sup>314</sup> But it should be recognized that although rules were developing, the Chancellor was still largely free to do substantial justice.<sup>315</sup> The general movement, however, was toward a settled system of rules that supplemented the common law. One scholar has remarked that, during the first half of the seventeenth century:

[A]lthough we can see the origins of some of our later equitable rules, they are, as yet, very rudimentary. We must wait till the latter half of the seventeenth century for marked progress in this process of transformation. It is not till then that the lineaments of our modern system of equity begin to emerge with any distinctness.<sup>316</sup>

The development of rules continued, and by Nottingham's tenure in Chancery (1673-1682), equity seems to have become an ordered system of principles.<sup>317</sup>

311. As Holdsworth explained: "The objections [to the King's order] which some few common lawyers continued to raise right up to the end of the seventeenth century have merely an academic interest." W. HOLDSWORTH, *supra* note 269, at 101.

312. Parliament, too, remained discontented with Chancery after 1616. *See generally* 1 W. HOLDSWORTH, *supra* note 27, at 463-64. Parliament was not simply concerned about Chancery's injunctions; it was still not reconciled to Chancery's jurisdiction. *See supra* notes 127-30 and accompanying text. In 1676-1677, the House of Commons adopted a resolution that Chancery should not have jurisdiction over cases determinable at common law. In 1690, a bill introduced in the House of Lords would have given the courts of law power to issue writs of prohibition if Chancery encroached on the common law jurisdiction. The bill was later dropped. 1 W. HOLDSWORTH, *supra* note 27, at 464; *see also* Yale, *Introduction*, *supra* note 140, at 73 ("There was recurrent agitation in Parliament sponsored by the more recalcitrant of the common lawyers against the equitable jurisdiction, but it never developed into a serious conflict of jurisdictions.").

313. Yale, *Introduction*, *supra* note 140, at 70; *see also* D. KERLY, *supra* note 11, at 166.

314. 5 W. HOLDSWORTH, *supra* note 27, at 337.

315. *Id.*

316. *Id.* at 218. *See also* T. PLUCKNETT, *supra* note 2, at 692, who agreed that it was in the second half of the seventeenth century, after 1660 actually, that equity developed something of a definite body of rules, and discretion largely disappeared.

317. F. MAITLAND, *supra* note 90, at 312.

### C. *Injunctions and Chancellors Bacon and Nottingham*

Although there were fewer injunction cases in the 1600's due to improvements in the common law, injunctions were still issued.<sup>318</sup> But they were no longer a serious strain on the relations between courts of law and Chancery. The improvement of relations after 1616 was due in part to the appointment as Chancellor of men who were common law lawyers and who were willing to cooperate with the judges.<sup>319</sup> The improvement was also due to ameliorations of injunctive procedures: "Generally it was the regular use of the injunction which chiefly contributed to the settlement [of relations], just as its earlier use had contributed to the conflict between Coke and Ellesmere."<sup>320</sup> Seventeenth century Chancellors, especially Francis Bacon and Lord Nottingham, made conspicuous and successful attempts to regulate and moderate Chancery's use of the injunction.

#### 1. Francis Bacon

Francis Bacon<sup>321</sup> (Chancellor, 1617-1621) was named to the Chancery immediately following Ellesmere. Although Chancellor but a short time, he accomplished much. He began the practice of using cases as precedents in Chancery, to help establish consistency in decisions.<sup>322</sup> He also cooperated with the courts of law,<sup>323</sup> and thus helped to restore harmonious relations.<sup>324</sup> Valuable as these accomplishments were, they were not his most enduring contribution to Chancery. He created a code of procedure for Chancery

318. See generally Yale, *Introduction*, *supra* note 140.

319. *Id.* at 69-70; see also *supra* note 210 and accompanying text.

320. Yale, *Introduction*, *supra* note 140, at 70.

321. He was formerly Attorney General and head of the King's commission in 1616. See F. ANDERSON, FRANCIS BACON: HIS CAREER AND HIS THOUGHT (1962).

322. T. PLUCKNETT, *supra* note 2, at 690.

323. *Id.*

324. 5 W. HOLDSWORTH, *supra* note 27, at 254. Holdsworth described Bacon's efforts to restore cordial relations with the judges as follows:

No doubt the victory of the Chancery [in 1616], to which he largely contributed, had left the common lawyers rather sore. In the speech which he made on taking his seat in Chancery he promised that the issue of injunctions should be carefully regulated; and further, he imitated the example of Sir Thomas More, and invited the judges to dinner to discuss the matter. After dinner, he pointed out that the late controversy had been largely personal; that for the future, 'as I would not suffer any the least diminution or derogation from the ancient and due power of the Chancery, so if anything should be brought to them at any time touching the proceedings of the Chancery which did seem to them exorbitant or inordinate, that they should freely and friendly acquaint me with it, and we should soon agree; or if not, we had a master that could easily both discern and rule.' At which he says 'I did see cheer and comfort in their faces, as if it were a new world.'

*Id.* at 251 (citing 6 J. SPEDDING, LIFE AND LETTERS OF FRANCIS BACON 198 (1880)).



which remained largely in place until the 1800's;<sup>325</sup> it enabled Chancery to more easily formulate consistent rules and principles of equity.<sup>326</sup>

Bacon's code of procedure consisted of approximately 100 Procedural Orders that he issued in 1619 and 1620.<sup>327</sup> These Orders, or Ordinances, as they came to be called, covered virtually every subject; injunctions were dealt with in Orders 20 through 28.<sup>328</sup> These deserve examination because, by these Orders, Bacon curtailed the abuse of the Chancery's injunctive powers.<sup>329</sup> Orders 20 through 28 dealt mainly with injunctions staying suits at law and injunctions for possession.<sup>330</sup>

Order 21 prohibited injunctions to stay suits at law solely on priority of filing, or solely on "surmise of the plaintiff's bill"; rather, there must have been some grounds for the injunction revealed in the defendant's answer, or in a record, or in plain writing.<sup>331</sup> This important order appears to have been designed to prevent a party from obtaining an injunction *ex parte*, merely by filing a bill in Chancery. As a result, the defendant would usually have an opportunity to answer in Chancery before his suit at law was enjoined. This order also prohibited the granting of injunctions on priority of suit only.<sup>332</sup>

Order 22 specified that when a plaintiff was seeking to obtain an injunction to stay a defendant's suit at law, if the defendant did not answer or appear in Chancery, an injunction might issue. But once the defendant answered,

325. W. HOLDSWORTH, *supra* note 155, at 193.

326. Holdsworth stated: "The formation of such a code of procedure was a condition precedent to the development of a system of equity." *Id.*

327. See 5 W. HOLDSWORTH, *supra* note 27, at 253. These Orders can be found at 15 WORKS OF FRANCIS BACON 347-72 (J. Spedding ed. 1861) [hereinafter cited as WORKS OF BACON].

328. WORKS OF BACON, *supra* note 327, at 355-57.

329. 5 W. HOLDSWORTH, *supra* note 27, at 251-52. A further illustration of Bacon's concern about the abuse of injunctions is contained in his speech given when he became Chancellor.

Bacon in his speech on taking office describes graphically the facts of such a case where the bill only contained the following words: 'My Lord, the bill [in Chancery] came in on Monday, and the arrest at common law was on Tuesday: I pray the injunction upon priority of suit.' He did not, he said, intend to grant relief to the man with the fastest horse, and he abolished the practice by his twenty-first ordinance.

Yale, *Introduction*, *supra* note 140, at 70-71.

330. Two Orders, 20 and 28, did not deal with these two topics. Order 20 concerned private petitions: "No injunction of any nature shall be granted, revived, dissolved, or stayed upon any private petition." WORKS OF BACON, *supra* note 327, at 355. Order 28 concerned waste. It permitted injunctions to restrain waste—such as felling timber or plowing up ancient pasture—but did not allow them where the defendant claimed an estate of inheritance. *Id.* at 357.

331. *Id.* at 356. This Order also specified that an injunction could be obtained to stay a suit at law if the defendant was in contempt for not answering, or if the debt that was being sued upon at law was old and "hath slept long," or if the debtor or creditor had died some time before suit was brought. *Id.*

332. See Yale, *Introduction*, *supra* note 140, at 70, who says that the practice of granting injunctions based on priority of suit seems to have flourished near the end of the sixteenth century. See also *supra* note 329.

unless the plaintiff moved to continue the injunction, it would automatically be dissolved.<sup>333</sup> This Order, then, allowed an injunction whose purpose was to persuade the defendant to answer, but prevented its being abused by continuing longer than was necessary.

Sometimes a party would secure an injunction to stay a suit at law while an equitable point was litigated in Chancery. Order 24 sought to prevent this party from unduly delaying the proceedings in Chancery. Order 24 stated: "Where an injunction hath been obtained for staying of suits, and no prosecution is had for the space of three terms, the injunction is to fall of itself without farther motion."<sup>334</sup>

Order 25 said that a party could not obtain an injunction to stay a suit at law on a debt until he deposited in Chancery a sum of money equal to the debt. This was not required, however, if it was quite plain that the debt should be discharged in equity.<sup>335</sup> This rule was intended to discourage parties from seeking injunctions simply to avoid paying back the money.

Injunctions for possession of land were the subject of Order 26.<sup>336</sup> It stated that an injunction for possession could not be obtained before Chancery had heard the case and entered a decree, unless the party had been in possession with title for three years before the bill was filed. This excluded purchasers who did not have possession, or those who, in a dispute, had recently taken possession of the property; they could not obtain an immediate injunction for possession, but had to wait until the Chancellor heard the matter.<sup>337</sup>

The thrust of Chancellor Bacon's Orders was that injunctions should henceforth be granted with more circumspection and fairness. These Orders made it difficult to obtain an injunction without requiring the plaintiff to demonstrate why an injunction was merited, and without allowing the defendant an opportunity to respond. Bacon's efforts proved successful: "In his orders he provided against the abuse by litigants of the power to get injunctions; and it is clear that his measures succeeded, since the courts of common law and Chancery ceased to quarrel."<sup>338</sup> Bacon's Orders provided an additional benefit: by subjecting injunctions to clear procedural rules, they permitted equitable principles to begin to develop in an orderly, systematic fashion.

---

333. WORKS OF BACON, *supra* note 327, at 356.

334. *Id.* at 356-57.

335. *Id.* at 357.

336. *Id.*

337. Order 27 qualified this by allowing injunctions for possession if the defendant was in contempt and could not be found, or if he absented himself for a year. *Id.*

338. W. HOLDSWORTH, *supra* note 269, at 106-07.

## 2. Lord Nottingham

By Lord Nottingham's time (Chancellor, 1673-1682),<sup>339</sup> the rules concerning injunctions were fairly well settled. One scholar has written about injunctive practice that "generally the practice was by the later part of the seventeenth century regular and predictable . . . ."<sup>340</sup> Upon being appointed to the Chancery in 1673, Nottingham began to compile, for his personal use, a manual of practice in Chancery.<sup>341</sup> The section in this manual on injunctions delineates injunctive rules and procedures in 1673-1674.<sup>342</sup> The provisions in this manual concerning injunctions focused on several central ideas. There were provisions to prevent injunctions from being used for delay, provisions to assure that injunctive procedures treat both parties fairly, and provisions to keep injunctions from unnecessarily interfering with suits at law. This manual also revealed that injunctions were beginning to be used for discovery purposes.

Nottingham, at several places in his manual, insisted that injunctions should not be used as instruments of delay. At one point, concerning injunctions for possession, he stated that the injunction would be dissolved if the plaintiff delayed the hearing.<sup>343</sup>

At another point, Nottingham declared:

If he who hath obtained an injunction to stay a suit at law shall not prosecute his cause to a hearing as fast as by the rules of the Court he may, the injunction shall be dissolved, for no man who hath got an injunction to delay his adversary must be allowed to rest or sleep upon it.<sup>344</sup>

Elsewhere, the manual specified that one who had obtained an injunction to stay a suit at law could not take exceptions to the answer filed in Chancery, "for this is too notorious a ground for delay."<sup>345</sup>

339. Nottingham was Lord Keeper, 1673-1675, and Lord Chancellor, 1675-1682. See T. PLUCKNETT, *supra* note 2, at 702-03.

340. Yale, *Introduction*, *supra* note 140, at 72.

341. See generally LORD NOTTINGHAM'S 'MANUAL OF CHANCERY PRACTICE,' *supra* note 140. This manual was not published at the time; it was for Nottingham's personal use. Yale described the sources for this "Manual of Chancery Practice" as follows: "Much of Lord Nottingham's text is drawn from three sets of General Orders, namely those of Bacon in 1619, the Commissioners of the Great Seal in 1649, and Clarendon in 1661." Yale, *Introduction*, *supra* note 140, at 5.

342. LORD NOTTINGHAM'S 'MANUAL OF CHANCERY PRACTICE,' *supra* note 140, tit. XII, at 142-48.

343. *Id.* tit. XII, ¶ 7, at 144.

344. *Id.* ¶ 16, at 147.

345. *Id.* ¶ 17. Another point concerning delay stated that if an injunction had been granted "till answer and further order," it would be dissolved automatically within 14 days after the answer was filed. *Id.* ¶ 5, at 144. This is similar to Bacon's Order 22, discussed *supra* note 333 and accompanying text.

In addition to insisting on avoiding delay, Nottingham's manual also emphasized that injunctive procedures should be fair. For example, one point warned that an attorney who misleads the Chancellor by reading only part of the opponent's answer "shall justly incur the displeasure of the court."<sup>346</sup> Another point stated that no person's possession of property shall be removed by an injunction before a hearing,<sup>347</sup> thus giving the possessor an opportunity to argue his position to the Chancellor before being dispossessed. These reflected the goal of following procedures that treat both parties fairly and equally.

Some provisions in Nottingham's manual tended to promote conciliation with the courts of law. One declared: "Injunctions to quiet possession must not hinder the defendant's proceedings at law to evict plaintiff . . . ."<sup>348</sup> Another expressed a solicitude for the courts of law which would have been inconceivable in the days of Coke and Ellesmere: "Upon all motions for injunctions to stay suits at law, the Court [Chancery] is to be informed how far the suit hath proceeded and of the precise time of the trial, if it not be past, that so no trial may be unnecessarily stayed."<sup>349</sup>

There is also a new concept in Nottingham's manual: that of using Chancery proceedings and injunctions to obtain discovery for a suit at law. One point in the manual stated that taking exceptions to an answer in Chancery was not sufficient grounds for granting or continuing an injunction, "unless it appears to the Court [Chancery] that the answer is insufficient in such a point as might be evidence at law if it were well answered, and is necessary to the plaintiff's defence at law."<sup>350</sup> Nottingham was obviously aware that such an injunction was being used to help the plaintiff obtain information needed to defend the suit at law. Another point reflected this idea, saying that if the trial in the suit at law were scheduled too soon for the plaintiff to receive defendant's answer to plaintiff's bill in Chancery, which was expected to contain information necessary to plaintiff's defense at law, "Chancery may stay by injunction not only the suits but the trials themselves . . . ."<sup>351</sup>

346. LORD NOTTINGHAM'S 'MANUAL OF CHANCERY PRACTICE,' *supra* note 140, tit. XII, ¶ 3, at 143.

347. *Id.* ¶ 9, at 144. This point is similar to Bacon's Order 26. *See supra* note 336 and accompanying text. Nottingham's manual contained another point relating to the concept of fairness. It stated that when an injunction to stay a suit at law is issued, it must be served on the adverse party within four days. Nottingham noted the reason for this: "For it is mischievous to keep such order and serve them just before the trial, whereas if they had been served sooner, the adverse party might have moved against it." LORD NOTTINGHAM'S 'MANUAL OF CHANCERY PRACTICE,' *supra* note 140, tit. XII, ¶ 20, at 148. This obviously refers to an injunction that was granted *ex parte*.

348. LORD NOTTINGHAM'S 'MANUAL OF CHANCERY PRACTICE,' *supra* note 140, tit. XII, ¶ 8, at 144.

349. *Id.* ¶ 18, at 147.

350. *Id.* ¶ 12, at 146.

351. *Id.* ¶ 13.

Nottingham's unpublished manual, while of great interest to posterity, did less to direct the path of equity than Nottingham's decisions as Chancellor. Through his decisions, he provided a clear statement of the bounds of equitable jurisdiction<sup>352</sup> by helping to mold the scattered and disparate equitable concepts and notions into more definite and precise principles.<sup>353</sup> Equity became a settled system—a system of principles, precedents, and reported decisions. With Nottingham clarifying the extent of Chancery's jurisdiction, relations with the common law courts continued to improve.<sup>354</sup>

The transformation of equitable concepts into more definite rules included the development of specific rules for the issuing of injunctions. The use of injunctions had become more restrained, more stable and settled, and consequently was no longer a source of friction between the common law courts and Chancery.

### CONCLUSION

This article is not, of course, a complete history of the injunction; no single essay could seriously purport to be. Rather, this article has attempted to present some of the historical features of the injunction before 1700. It began by examining some possible ancestors or forerunners of the injunction: the Praetor's Interdict of ancient Rome; the royal orders or writs in early English law; and common law writs of an equitable nature, especially the writ of prohibition. The courts of law used these common law writs in a manner very similar to that of the Chancellors' equitable remedies. When the common law became less flexible and less equitable, Chancery began to receive petitions from unsatisfied suitors. Chancery soon became a judicial body with the Chancellor administering justice by issuing in personam orders. Chancellors used injunctions for a number of purposes: to prevent threatened harms; to allow certain equitable concepts, such as fraud and duress, to come into the law; and, most conspicuously, to restrain inequitable common law proceedings or judgments. It was this last use that aroused the enmity of the common law judges and resulted in the dispute that was eventually decided by King James' order in 1616, sanctioning Chancery's use of the injunction. After this order, the Chancellors slowly began to establish equity

---

352. Yale, *Introduction*, *supra* note 140, at 74.

353. See W. HOLDSWORTH, *supra* note 155, at 194. See also W. HOLDSWORTH, *supra* note 269, at 148, where Holdsworth noted that Nottingham's decisions "were beginning to settle the doctrines of equity." See also *id.* at 150, where Nottingham was compared to Ellesmere and Bacon: "His work was different from, yet a continuation of, theirs. They had organized and systematized the court of Chancery, its practice, and its procedure. He began the work of organizing and systematizing the principles upon which the court acted; and, as a result of his work, equity began to assume its final form." Holdsworth concluded that Nottingham deserves his title as "the Father of Modern Equity." *Id.*

354. See Yale, *Introduction*, *supra* note 140, at 74.

as a stable system of precedents and principles, including injunctive principles. This stabilization, which was largely accomplished by the end of Nottingham's tenure in Chancery, is an appropriate point on which to conclude this article.

The injunction—the personal order from the Chancellor directing a party to do or to refrain from doing a certain act—was perhaps the most significant equitable remedy. The development of the injunction was, like the development of Chancery itself, due to the defects and omissions of the common law. If the common law did not provide a remedy where one was needed, Chancery frequently would.<sup>355</sup> The injunction not only afforded an indispensable remedy, it also stimulated the common law system to improve, and to recognize concepts such as fraud, in an attempt to win back some of the business and power accruing to Chancery.

The use of the injunction had, however, a less beneficial effect: friction between the courts of law and Chancery caused when Chancery restrained proceedings and judgments at law. This friction cannot be blamed solely on the injunction. There is, however, no doubt that the injunction aggravated the dispute, since it was the means by which Chancery directly interfered with proceedings at law. But there were, in fact, judgments which were obtained by fraud and other inequitable means, and if some Chancellors—such as Wolsey and Ellesmere—abused the injunction, others—such as More—seem to have used it scrupulously and justly.

The injunction, therefore, played a major role in the Chancellor's efforts to administer a system of equity to supplement the law. The victory (if it may be called such) of Chancery in the long conflict over the use of the injunction was, perhaps, necessary if the Chancellors were to have the power to supply equity where the common law lacked it.

---

355. This is not to paint the picture in black and white, to make the common law sound ineffective and Chancery exemplary. Chancery would, all too soon, be plagued with egregious problems:

It is the height of irony that the court which originated to provide an escape from the defects of common law procedure should in its later history have developed procedural defects worse by far than those of the law. For two centuries before Dickens wrote *Bleak House*, the word 'Chancery' had been synonymous with expense, delay and despair.

J. BAKER, *supra* note 76, at 95. One may, however, be permitted a certain degree of skepticism about Baker's figure of two centuries.