

THE WRIT OF PROHIBITION:  
**Jurisdiction in Early Modern English Law**

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Appendix to Volume III:  
The Boundaries of the Equitable Function\*

\* Originally published in *The American Journal of Legal History*, Vol. XX, 192-226.

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# The Boundaries of the Equitable Function

by CHARLES M. GRAY\*

## I.

The year 1616 is a landmark in the history of English equity because of what is usually referred to as Lord Coke's quarrel with the Chancery.<sup>1</sup> The quarrel is ordinarily said to have been resolved in the Chancery's favor by King James's declaration of July, 1616, and to have contributed, along with a number of other differences between Coke and the King, to Coke's dismissal from the Bench. That there was a controversy is certain, nor is there any doubt that the King purported to settle it in favor of the Chancery. Although the importance of any single consideration in the decision to dismiss the Chief Justice is imponderable, Coke's tactics against the Chancery and the dubious legal position that sustained them were in all probability a major factor. Yet the exact character of the quarrel remains unclear. In one sense the issues were limited, but the immediate issues may be taken to represent only the surface of a deeper, indeed vaguer, disagreement.

At least on the surface, the controversy of 1616 was about the propriety of equitable intervention *after* judgment at common law. May the Chancery (or other court of equity) enjoin a man from executing a common law judgment when there are intrinsically sound equitable reasons for preventing him from taking advantage of his "legal" rights? Or is the Chancery restricted to enjoining such a man from pursuing a common law judgment? For example, suppose A has fraudulently misrepresented goods sold to B. Let us grant that it is appropriate for a court of equity to prevent A from taking steps to recover the full purchase price. But suppose A sues B at common law for such full price and that A has judgment to recover such sum. May B now go to a court of equity and get an injunction forbidding A from taking steps to collect his judgment debt? Coke's answer was "No". While one must avoid

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1. Observations on the 1616 controversy below depend on no factual matter beyond what can be gathered from standard accounts. E.g.: S. R. Gardiner, *History of England 1603-1642*, Vol. III, Ch. XXII; W. S. Holdsworth, *History of English Law*, Vol. I, 246-251, and Vol. V, 423 ff. (Coke's career), 231-254 (Chancellors Ellesmere and Bacon).

the frequent and egregious tendency to attribute Coke's opinions to common lawyers and common law judges as a group, there is little doubt that his position on the present issue was the "better opinion". There are good reasons for it on the level of policy and principle. It expresses the idea, for which there is support in various other legal contexts, that entitled parties should act promptly to take advantage of their entitlements, and especially that they should act before any tribunal proceeds to judgment against them. In addition to raising considerations of orderly and economical law-administration, opposition to equitable intervention after judgment probably had a more "mystical" dimension: It ought not to be implied by the acts of courts of equity that the judgments of common law courts are capable of working injustice; that is implied by enjoining execution of a judgment, whereas enjoining a party from seeking to use the law for unjust advantage implies no more than that the common law, like any other conceivable system, is not airtight against abuse by the unscrupulous. At the same level of principle, there are also good arguments on the other side. The sacrifice of substantive justice to efficient traffic rules for the legal system is always questionable; the desirability of seeking equitable relief before judgment is hard to dispute, but doing so is not likely to be practicable in all cases; the symbolic line between indirectly impugning a judgment and preventing parties from pursuing judgments they will probably obtain is a sophistical line.

Coke's position against intervention after judgment was not, however, based solely on the principles that support it. He believed that such intervention was directly forbidden by statute. On this score, he was opposed, not by counter-balancing principles, but by the argument that he was grossly and opportunistically misinterpreting the statutes he invoked. If the complexities of this matter may be cut through with a "summary judgment": It is not manifest that Coke made irresponsible use, though he may have made incorrect use, of *one* statute — 4 Henry IV, c. 23,<sup>2</sup> which is at least generally directed against calling judgments in question. With respect to another statute (or group of statutes), his position is harder to defend. Coke maintained (with how much agreement on the part of other lawyers is difficult to say) that it was a criminal offense under the ancient Praemunire acts<sup>3</sup> to seek equitable relief after common law judgment. Verbalism and disregard of historical context were necessary to reach that construction, for the Praemunire acts were expressly directed only against the Church. The best that can be said for Coke is that the principle of the acts, uncontradicted by their language, is broader than the application which the statute makers had immediately in mind. That is, while the statutes were aimed at preventing

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2. It is notable that St. German (*Doctor and Student*, Dialogue I, Ch. XVIII) put the same interpretation on this act as Coke did. St. German's point there seems clearly to be that by virtue of the statute the party is helpless in equity after judgment at common law—not simply that the judgment as such may not be reversed by the Chancery.

3. Principally 27 Edw. III, St. I, c.1.

ecclesiastical encroachment on the King's jurisdiction, it may be possible to see their implied target as *any* infringement on the regular processes of law in the realm. Such argument from immediate purpose to underlying principle is not unheard of in the annals of statutory construction; it cannot be called *wrong*; but the contrary canon of construction—that the literal, historical intent of the legislature has at least a primary claim on attention—was a fair and powerful weapon in the hands of Coke's opponents. It is morally certain that the makers of the Praemunire acts were neither thinking about equity-common law relations with their conscious minds nor unconsciously possessed by a principle capable of embracing them; they were simply writing vague statutes as moves in a continuous skirmish between "temporal" and "spiritual" interests. In short, Coke's reading of the Praemunire acts was strained, though not utterly indefensible. Even if his interpretation had been more plausible, it would have been statesmanlike to refrain from acting on it too unreservedly. Instead, Coke promoted (unsuccessfully) the indictment under the statutes of some litigants and their lawyer for resorting to the Chancery after judgment. That is to say, he proposed to make his point about the Chancery's authority by visiting severe criminal sanctions on people who could not possibly have supposed that in going to the Chancery they were doing anything seriously wrong.<sup>4</sup> Coke's use of this tactic testifies to the strength of his convictions, and perhaps to his despair about making the point in any other way. As a last or next-to-last straw leading to his dismissal, the tactic was probably more important than the substance of Coke's opinion.

The issues of the controversy about intervention after judgment can only be stated on the assumption that equitable intervention before judgment is unexceptionable in a given case. There was no political quarrel in the early seventeenth century about the propriety of equitable activity as such—across the board or in this or that particular situation. It is possible to suspect, however, that a larger quarrel was implicit in the controversy over judgments. Was intervention after judgment objected to for its own sake, or because Coke and other common lawyers thought that the scope of equitable activity was too wide and getting wider? (Indeed, was equitable relief after judgment a convenient target in a still wider campaign—against all the common law's competitors, the King's support for those competitors, and his persistent meddling with the judicial system?) Did the common lawyers attack intervention after judgment mainly because it was equity's most vulnerable point—at least subject to respectable objection and at best flatly illegal by the statute book? Would the real value of victory to Coke have been

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4. This states "the principle of the thing." I have no doubt that if any Chancery petitioner or his counsel had actually been convicted of Praemunire he would have been pardoned, and little doubt that the judges would have recommended it. The Praemunire acts were a sore point even with the churchmen, their admitted target: arguably they had no application to the Church of England, but only the foreign and hostile Church of Rome.

a net reduction of equitable relief—directly in the case of parties unlucky or negligent enough to seek it after judgment, and perhaps indirectly by means of a blow to the reputation and confidence of the equity courts, by making them more cautious about supplying remedies lest, having been beaten once, they be attacked again and restricted further?

These are good questions to ask, but one should avoid jumping to conclusions about them. There is no necessity that the judgments controversy be taken as the tip of an iceberg. That debate presents in its immediate terms a perfectly real and significant set of issues about legal policy and the meaning of legislation on the books. A lawyer could regard the role of equity in the English legal system as highly benign, even as deserving of expansion into areas it had not yet touched, and still believe that the equity system must act before the common law system has proceeded to judgment. He would obviously be guilty of no logical contradiction, and one should be wary about seeing so much as an “emotional contradiction.” There is admittedly some *prima facie* basis for attributing a general disapproval of equity to Coke and others who shared his attitudes, as well as to some strands of seventeenth century thought that do not really share Coke’s point of departure. Such was Coke’s professed belief in the perfection of the common law that he cannot easily be imagined to have been willing to concede the usefulness of an equitable supplement. He concedes it in his literary works with such restraint as to suggest embarrassment.<sup>5</sup> Outside the temple of the law, the Chancery enjoyed some disfavor that may have had more to do with its red tape than with its equitable remedies and was associated unfavorably in some minds with the Crown, the Church, and “discretion”. Anxiety about “discretion”, legal “uncertainty”, and hence equity, also took nourishment from some veins of Puritanism.

However, though it is reasonable to hypothesize that winds of general hostility to equity were blowing in the early seventeenth century, the evidence for such an hypothesis is thin. This paper is intended to furnish a more concrete approach to one aspect of the larger question of attitudes toward equity—namely, what the common law judges in their official capacity thought courts of equity ought and ought not to be doing. The judges in that capacity do not speak for common lawyers as a group, or even necessarily for their own views of a *desirable* legal order, and of course they do not speak for the public. Nevertheless, their positions have a pretty good claim to represent the legal community, and judges’ opinions of the law are apt to be compatible with their own and their colleagues’ predilections for the law. To the degree that the judges in general, and Coke in particular, cannot be associated with indiscriminate hostility to equity, there is the less reason to see more in the judgments controversy than it presents to the eye, except as such personal factors as Coke’s multifaceted enmity toward Lord Chancellor Ellesmere supply the deeper dimension. While the dispute over Chancery intervention after judgment went on in the political arena—in a setting of other disputes

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5. 4 Inst., Ch. VIII.

between the Crown and the common lawyers — control over the operations of equity was routinely exercised in a spirit far from “indiscriminate hostility”, though not without its restrictive aspects. The scope of equity was fairly well settled by principles founded on usage and “the artificial reason of the law.”

## II

When may a court of equity provide a remedy? When is it lawful, appropriate, constructive, harmonious with the institutional discrimination of law and equity and with the necessary imperfection of even the best legal system? The question can be stated in timeless form because it is at least not a defunct one in the Anglo-American system, despite the modern disappearance of separate courts of equity and the longer-standing stereotyping and precedent-binding of equitable remedies. The subject of this paper is limited and historical: When may a court of equity provide a remedy by the lights of English lawyers in the earlier decades of the seventeenth century? That chronological locus is a significant one even apart from the shadow cast by the judgments controversy, because in the early seventeenth century equity was fairly “mature”, on the one hand, and, on the other, still fairly “open,” still governed by the old-fashioned canons of equitable jurisprudence. It was a familiar part of the legal system, competent to furnish remedies in some specifiable situations without serious question, but it was not yet reduced to the post-Nottingham model which enabled Blackstone,<sup>6</sup> for example, to conceptualize it as a branch of the law essentially homogeneous with the others. Courts of equity were still “courts of conscience”, with a still open warrant to scrutinize the moral acceptability of men’s taking advantage of their “legal” rights and to enjoin them from doing so.

“When may a court of equity provide a remedy by early seventeenth century lights?” is really answerable only by working through the uncharted evidence for what courts of equity were actually doing in the period and how they came to their decisions in problematic cases. By and large, the scope of equitable remedies was fought out in the Chancery (by common lawyers, before Chancellors usually trained as common lawyers). However, the chief courts of common law were not precluded from dealing formally with the question. That is true mainly because of those courts’ power to issue writs of Prohibition. (Occasionally the courts had other procedural openings, such as review on *habeas corpus* of commitments for contempt by equity courts.) The vast majority of Prohibitions sought and issued went to restrain ecclesiastical courts and the Court of Admiralty,<sup>7</sup> but Prohibitions to courts of equity exist in some quantity.

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6. Commentaries, Pt. III, Chs. IV and XXVII, esp. 429 ff.

7. Here and hereafter, general statements about the law of Prohibitions are not specifically documented. They are based on my work on Prohibition law across the board, of which the equity cases are a small corner, and admit of documentation too extensive to cite meaningfully.

So far as is known, however, the Chancery was never prohibited. It was probably a fact of law, or at least the prevailing opinion, that the Chancery *could* be prohibited, but it never was. The scope of equity cannot be read off from the law of Prohibitions—as the scope of ecclesiastical courts can be, subject to the ordinary problems of finding consistencies in a mass of case law. There is no law of Prohibitions concerning the great court of equity. But three courts, besides the Church courts and the Admiralty, were frequently prohibited—the Court of Requests, the Council of Wales, and the Council of the North. Of these, the first was to all intents simply a court of equity; the other two exercised limited commonlaw jurisdiction; Star Chamber jurisdiction, and equity jurisdiction. The Requests simply, and the two Councils in their equity departments, were in effect regarded as competent to do whatever was proper for the Chancery to do. When their proceedings (and those of a few other courts, such as the equity branch of the Duchy of Lancaster) came in question in Prohibition cases, the common law judges had a chance to say when courts of equity could and could not provide remedies. Had these minor courts handled a volume of equity business comparable to the Chancery's, and if attempts to regulate their handling of it by Prohibition had been frequent enough, there would be a comprehensive chapter of the law of Prohibitions defining the scope of equity courts, which would be extrapolable to the Chancery itself. Although these conditions do not obtain, nevertheless some notes toward such a chapter can be sketched out.

The procedural setting of Prohibition cases is simple. The Prohibition was a judicial writ indifferently issuable (for all practical purposes) by the King's Bench or Common Pleas. A party (usually but not always defendant) in an ecclesiastical, Admiralty, or equity court who hoped to stop the suit there "suggested" or "surmised" his grounds to one or the other of the major common law courts. Adversary debate was often held on such first motion for Prohibition; if a writ was granted without debate, the other party was almost always allowed to move to reverse it (properly, to move for a writ of Consultation, the form by which Prohibitions were set aside.) Most Prohibition cases were settled once a writ was granted and the opposing party had had a chance to argue against issuance on motion if he wanted to, though it was possible to seek a Consultation by more formal means—by pleading to issue and judgment thereon, either upon demurrer or pursuant to trial of a controverted factual question.

The Prohibition is conventionally spoken of as a procedure for controlling jurisdiction. Sometimes it was that in a straightforward sense—when the prohibiting court said in effect that although a claim might well be perfectly good in itself, it should be pursued in a different court from that in which the suit had been commenced. Otherwise, "jurisdiction" is not a very helpful word for indicating what Prohibitions did. Plaintiffs were sometimes prohibited, not for suing in the *wrong* court, but because the judges thought that *no* court should give relief for the cause stated. Suits were often prohibited, not because there was doubt of the initial jurisdiction of the court in

which they were brought, but because an issue arising in such a suit was thought fit to be tried by a common law jury or judicially determined by the common law, or because the prohibiting court considered a ruling by the original court contrary to law. These different roles of the Prohibition were typical in different contexts; several of them appear in the cases concerning courts of equity below.

Before taking up those cases, it will be advisable to insist on a question an answer to which has already been implied: Was there any doubt about the *general* legitimacy of prohibiting courts of equity? The question has *a priori* validity because the Prohibition was historically and in the vast majority of its modern employments an instrument for controlling the Church courts. (That is to say, the roots of the Prohibition lie in the same situation that produced the Praemunire statutes discussed above.) Before the Reformation, the power to prohibit was power to prevent encroachment of a “foreign”, or supra-national, judicial system on the King’s jurisdiction. Not without challenge, but in fact, the prohibiting power as against Church courts survived the Reformation. Ecclesiastical courts had ceased to be really “foreign”, but their encroachment on lay territory remained a threat. They remained “foreign” in the less literal sense that they were manned by civil lawyers and administered a body of law which had its origin in the medieval international Church and which was at any rate a distinct law, whose rules could sometimes conflict directly with English rules governing the same subject. The often-prohibited Admiralty was “foreign” in the sense that the post-Reformation Church courts were: civilian-run, administering an international body of law capable of substantive conflict with English law. Although it was procedurally similar to the civil law courts (and in one instance — the Court of Requests — was manned by civilians), equity is hardly “foreign” in the same way. For equity was usually thought of as a necessary means to mitigate the rigor of positive law — English *or* “foreign”. May a writ whose end is the control of “foreign” jurisdictions be used against equity at all?

There are traces in the reports of anxiety lest there might be a reasonable general objection to prohibiting courts of equity. Whether counsel arguing against Prohibitions ever pushed such an objection very hard is difficult to discern, but some lawyers probably tried it out in a few cases. On the other hand, such doubts as there were seem to have been easily overcome; if the general objection was urged it was rejected. In addition to the fact that there are numerous Prohibition cases involving courts of equity argued solely on the merits — that is, on the assumption that at least the minor equity courts were prohibitable in principle — there are several express assertions of the universal scope of Prohibitions, to control *any* court that gets out of bounds, including courts of equity.

Perhaps the strongest example is *Coates and Suckerman v. Warner*.<sup>8</sup> The question there, omitting the substance, was whether to prohibit the

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8. M. [Michaelmas] 13 Jac. [James I] K.B. [King’s Bench] Harg. [British Museum Hargrave MSS.] 47, f. [folio] 47; 3 Bulstr., 119.

equitable branch of the Duchy of Lancaster. It is surmised that the general prohibitability of equity got raised — probably by counsel and certainly in the judges' minds — because the King was one of the plaintiffs in equity and the substantive reasons against Prohibition were weak. Before granting a Prohibition to the King's discomfiture, the judges wanted to be sure in their minds, and to say unmistakably, that the powers of the King's Bench, and hence its responsibility, extended to the control of *all* courts by Prohibition, including the equitable one in question. Coke, C.J., said so decisively.

In another case,<sup>9</sup> no facts are reported except that a Prohibition to the Court of Requests was sought. There may have been an attempt to urge that courts of equity were generally non-prohibitible, for the report has Coke asserting the contrary strongly. In contrast to *Coates and Suckerman*, where his emphasis is on the universal reach of the Prohibition, here Coke speaks specifically to courts of equity — all of them, not just the Requests. His remarks touch on *when* equity should be prohibited, and they are not wholly restrictive. He says that it ought to be prohibited when it meddles with common law matters or with freehold. That implies, *per exclusionem*, that equity should *not* be prohibited merely because the common law judges do not think an equitable remedy makes sense. That thesis is not easy to adhere to—and what counts as meddling with common law matters and freehold is not simple to discern—but at least Coke embraced the thesis, as did others. Coke also says by the way that equity ought to be prohibited before it gives judgment. In favor of prohibitability in general, Coke adduces two considerations. First, he emphasizes that to sue in equity when one could sue at common law is to draw the matter *ad aliud examen'* — that is, to trial without a jury. (He adds a note of mystical appreciation of the common law by pointing out that trial at common law is by twelve jurors, and the ultimate decision of legal issues by twelve judges in the Exchequer Chamber — *that* is what the subject is not to be deprived of by being drawn into equity.) This emphasis on Coke's part comes to saying that equity courts are at least “foreign” in procedure, and procedural difference *does* matter. Secondly, Coke stresses the absence of appellate recourse from equity judgments, in contrast to the common law, where a writ of error on points of law or attain on a false verdict could be brought. (For this reason, he says of equity courts, “their rules and judgments are as binding as the laws of the Medes and Persians, not to be altered.”) In other words, far from being unprohibitible, courts of equity need especially to be restrained by Prohibition, for there is no other control on them. Common law courts, *Coates and Suckerman* says expressly, are

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Unprinted cases are frequently cited to supplement those in the English Reports (which are referred to by standard citation.) Brackets in this note indicate how the familiar style of legal citation by regnal year, term, and court is abbreviated throughout. Abbreviations for other MSS.: Harl. = Harleian; Lansd. = Lansdowne; Add. = Additional. Occasional omission of a term or court means that the report does not specify.

9. H. 11 Jac. K.B. 2 Bulstr., 197.

prohibitible—even superior ones possessing the power of Prohibition, as if the Common Pleas should take a case appropriate to the King's Bench (an appeal of felony is the example given in *Coates and Suckerman*)—but it would at least be rational to argue that they may not be prohibited because a wrongful assumption of jurisdiction could be corrected by writ of error. Ecclesiastical courts were prohibitible *par excellence*, but except for the High Commission, which was sometimes said to need confining to a limited jurisdiction because there was no appeal from its determinations, they were controlled by a more comprehensive appellate system than the common law had. Equity, by contrast, could commit the most flagrant encroachment on the common law without so much as guaranteed review by a different or superior court of equity, were it not for the Prohibition. (Bills for review and special commissions occurred, but those were discretionary.)

The last two opinions come from Coke, but there is no sign of dissent from other judges. They at least affirm the authority of the King's Bench to prohibit equity. The authority of the Common Pleas to prohibit comprehensively was doubted, but the opinion that it may not was a dissenting opinion, and it was not specific to courts of equity. That is, the dissenting opinion held that the Common Pleas may not prohibit *any* extra-common law court unless that court takes a case which is actually pending before the Common Pleas. One of the sharpest discussions of this recurrent issue came in a case where a Prohibition to the Requests was sought, *Chapman v. Boyer*.<sup>10</sup> Walmsley, J., the leading exponent of the dissenting view, expressed it in that case, while asserting the contrasting general authority of the King's Bench to prohibit whenever courts got out of line, whether or not its own immediate interest was affected. The other members of the Court, Gawdy, Warburton, and Daniel, were equally explicit on the other side, saying in so many words that there was no difference between the Common Pleas and King's Bench. The majority relied on c. 11 of Magna Carta for the derivation of the Common Pleas out of the King's Bench, and hence its participation in the parent court's powers. The three judges, so holding, granted Prohibition in a case concerning equity, and therefore the decision may be taken as upholding the general prohibitibility of equity by the Common Pleas.

Although the Chancery was apparently never prohibited, there seems to be no reason to exclude the Chancery from the sweeping affirmations of the scope of Prohibition above. But is there authority directly in point? There are some special reasons why the minor equity courts that were frequently prohibited should have been. The regional Councils had limited common law jurisdiction as well as general equitable jurisdiction. It is probably inevitable that they would sometimes be prohibited in the former capacity just because simple, positive jurisdictional limits—typically, in the case of these Councils, to personal actions under a certain value—will sometimes be exceeded and sometimes be ambiguous in application. The Council of Wales had a statutory basis,<sup>11</sup> and jurisdiction delimited in general terms by the statute,

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10. M. 3 Jac. C.P. Add. 25,205, f.33.

11. 34 Hen. VIII, c. 26.

so that the common law judges' usually acknowledged responsibility to see that statutes were obeyed required them to see that that court stayed within bounds. Both Councils were authorized and confined by royal instructions—pursuant to the statute in the case of the Council of Wales; it is sound enough law that royal patents, commissions, *et similia* were ultimately construable by the common law judges and enforceable, as construed, by Prohibition. Thus the habit of prohibiting, and considering whether to prohibit, the regional Councils was bound to grow up. Theoretically, they could have been regarded as prohibitable only in their common law capacity and insofar as their acts were made out to violate the statute and instructions, leaving their equitable capacity uncontrolled. But it was not always easy to keep the Councils' common law and equitable capacities apart, and the mere habit of watching over the Councils' operations would tend to encourage including their equitable ones, in the absence of powerful convictions against prohibiting equity.

The Requests, in its turn, suffered from being not quite respectable. It was in fact allowed to operate as a court of equity, but there was serious doubt about its title, prescriptive or otherwise, to exercise the coercive powers of a court. In addition, it was "foreign" in the sense of civilian-dominated. One should not be too surprised to find a court of dubious reputation, something of a "tenant at sufferance", controlled by Prohibition, even in the face of reluctance so to control established courts of equity.

Therefore the prohibitability of equity is not quite cleanly raised in the case of the frequently prohibited courts. It comes up absolutely squarely only in the case of the Chancery —*the* court of equity and the court whose practice tended to be taken as the standard for what lesser equitable tribunals could legitimately do. One Abridgment case —43 Edw. III, Fitzherbert tit. Prohibition—was considered to support the Chancery's prohibitability. The case is cryptic. It probably lends countenance to the proposition that Prohibition may be used to prevent a party from taking advantage of a Chancery decree to defeat a prior common law judgment. If that is correct, the Abridgment case is at least a meaningful straw to grasp at—an indication that Chancery activity was not utterly beyond the reach of Prohibition—but whether it extends beyond the special situation of equitable intervention after common law judgment seems doubtful. Grasping at the straw, a little uncritically, is perhaps a sign of misgivings.

It is no accident, perhaps, that equity's prohibitability was discussed with particular consciousness in *Coates and Suckerman*, where the court in question was a relative *rara avis*, compared to the frequently prohibited Councils and Requests. Being confronted with a motion to prohibit a court as to which precedents of Prohibition could not easily be produced forced consideration of equity's general prohibitability, going by implication to the Chancery itself, where precedents were equally hard to find. The very discussion in *Coates and Suckerman* is a sign of doubt, though it issued in a strong vindication of prohibitability. In one other comparable case, doubt was

less confidently banished. *Vawdrey v. Pannell*<sup>12</sup> concerns the equitable branch of the Palatinate of Chester, another *rara avis*. Prohibition to that court was sought, and there was apparently no question but that it should lie on the merits. The King's Bench, in the absence of Coke, C. J., told Hyde — the lawyer moving for Prohibition — to show precedents of Prohibitions to “such courts”. (I would propose reading “such courts” as “courts of equity apart from the routinely prohibited Councils and Requests.”) Hyde came back later and reported that he could find no precedents. He argued that Prohibition should nevertheless be granted, as the party's only remedy. Coke, present this time, delivered himself of the *Coates and Suckerman* position again — *all* courts are within the survey of the King's Bench. Even so, the judges did not prohibit at once, but postponed the question for advisement and told Hyde to look at 13 Edw. III, tit. Prohibition. That he had evidently not found that scrap of evidence for himself suggests that it was hardly celebrated as the crucial link with tradition. (That the Abridgment case deals with the Chancery of England means that a precedent covering that court would serve, in the judges' eyes, for the Chancery of Chester. They were concerned with the prohibitability of equity, not of one specific obscure court.) With the possible exception of Coke, the judges were at least reluctant to act on principle without precedent, though — with whatever degree of skepticism about its significance — they suspected that a precedent existed and wanted Hyde to have a go at arguing from it. On the whole, one may say that the power to prohibit courts of equity, while not out of reach of embarrassing questions, can be supported by a reasonable amount of authority besides the frequent practice of prohibiting the regional Councils and Requests, To that practice we now turn.

### III

The area where equity was most frequently and consistently prohibited will be examined first. This area has a rough, but by no means exact, correspondence to the field of real property. By general consent, courts of equity were not supposed to “meddle” with real estate in the sense of trying legal title to it or duplicating common law remedies for recovery of, or protection in, landed property. This principle is reflected in simple form in several Prohibition cases.<sup>13</sup> On the other hand, there are important ways in

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12. M. 13 Jac. K.B. 1 Rolle, 246.

13. (1) M. 7 Jac. K.B. Add. 25,208, f.75b. (2) P. 8 Jac. K.B. 2 Brownl. and Golds., 11 (*Wagginer v. Wood*). (3) H. 8 Jac. K.B. 1 Bulstr., 107. (4) P. 9 Jac. K.B. 1 Bulstr., 110 (*Baker v. Dickenson*). (5) P. 12 Jac. K.B. 2 Bulstr., 224 (*Fox v. Prickwood*). (6) M. 12 Jac. K.B. 1 Rolle, 83 (*Gibbs v. Cann*). (7) M. 1 Car. K.B. Benloe, 156 (*Mitton v. Vernon*). (8) H. 4 Car. K.B. Harg. 39, f.3b. (9) M. 15 Car. K.B. March, 63 (*Curtisse v. Aleway*).

With respect to the cases cited here and in ensuing notes: there are of course complications in getting from the reports to the general points for which they are cited. These cannot be reflected in article-length treatment. I have prepared brief summaries

which equity was allowed to prevent people from taking advantage of their “legal” rights to real property — by enforcing the duties of trustees of land and the equity of redemption, for example. Courts of equity were also permitted to perform some ancillary functions in the system of real property law.<sup>14</sup> What they were pretty insistently not allowed to do (besides gratuitous “meddling”) was to infringe certain “maxims” of the common law, as they were usually called — whatever the equities of the individual case, or however indefensible the “maxim” as a rational rule for the generality of cases. A “maxim” was not strictly a “peculiar institution” of the peculiar English system of property law, but operationally it was close to that. When courts of equity were prohibited from violating “maxims” outside the real property area, the “maxims” in question typically had their roots or primary applications in that area.

The idea that some common law rules — such rules dignified into “maxims” (or synonymously, but with a more portentously specious ring, into “principles” and “grounds”) — are inviolable by equity may be regarded as a concretization of the proverb “*Aequitas sequitur legem*”. The saying has a respectable pedigree and an intelligible meaning in the proper philosophic setting. But it is far from obvious that equity can be made to “follow” the law — to fulfill it, like the Gospel, and not destroy — in a respectable or intelligible sense by picking out some rules of law, mostly dealing with one kind of subject matter, for inviolable status. There were quite good reasons for conferring immunity on the “maxims” of property, and those very reasons go to show that “*Aequitas sequitur legem*” misstates the grounds for restraining equity in the area where it was most restrained. But let us first see what “maxims” were protected in fact.

Joint tenancy is a good example. The institution of joint tenancy — whereby the whole tenement goes to the survivor and one partner can take all the profits if he can get away with it — does not make much sense outside its commonest context, the marriage jointure. Outside that context, a man who takes a joint tenancy can be seen as either a fool or a gambler. There is “natural equity” in the position that one who finds himself a joint tenant and wants to convert to a tenancy in common unilaterally should, in most circumstances, be able to do so, partly because the feoffor who creates a joint estate is unlikely to intend all the incidents of the tenure very seriously.<sup>15</sup>

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and analyses of the cases (including more refined statements of most of those discussed individually in the text) and can supply this material to any reader who may want to pursue the subject of the article in detail.

14. For the equity of redemption, *infra*, note 63 and accompanying text. I have no cases specifically concerning trusts in land. For trusts in general, *infra*, note 64. The ancillary functions are discussed *infra*, this section.

15. Suppose A. gives a family farm to two bachelor cousins, who plan to cultivate it together and whom A. justifiably trusts to share the profits. A. makes them joint tenants solely because they are likely to have different collateral heirs and he would prefer to see the farm stay in one piece. One of the confirmed bachelors marries belatedly and has issue. The children will have no means of support if their father

A few attempts to overcome joint tenancy in equity were frustrated by Prohibition. *Portington v. Beamont*<sup>16</sup> involved an equity suit against the survivor by an alienee or devisee of his late partner, seeking a decree with the effect of excluding the survivor from half the tenement. A Prohibition was granted on the ground that equity may not go against a “maxim of law”, meaning simply the institution of survivorship. The judges did not, however, propose to ban all equitable interference with joint tenancy, for they qualified their holding with an express statement that equity might enforce an agreement between joint tenants that there should be no survivorship.<sup>17</sup> An earlier case<sup>18</sup> comes to the same result for the sole reported reason that a “ground” of the law was at stake. In this case the survivor was protected against the devisee of a moiety. In another case,<sup>19</sup> a suit to force sharing on a joint tenant who had taken all the profits was prohibited with no further explanation than that the unlucky partner “has no remedy”. Related to the joint tenancy cases, but more commercial in context, is a decision, supported by another cited as precedent,<sup>20</sup> that equity may not require one surety on a penal bond to make contribution to another against whom the whole principal debt and penalty had been recovered. Here the Common Pleas did a little better than incant “joint and several liability is joint and several liability,” for the judges relied in part on the utilitarian consideration that letting contribution among joint sureties in the door would multiply lawsuits.

Dogmatic insistence on hard-to-defend property rules can be seen in a decision<sup>21</sup> prohibiting equity from restraining waste by a life tenant who was

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predeceases his partner and cannot pass half of the farm to his widow and offspring. Leaving out compassion and social policy and thinking only of A.’s intentions: it is arguably less than probable that A.’s desire to preserve the farm as a unit outweighs his desire to benefit both cousins equally in ways that would matter to them; had he anticipated their circumstances as they turned out to be, he probably would not have pursued his purposes by means of a common law joint tenancy.

16. P. 22 Jac. C.P. Winch, 79; Harl. 5148, f. 15b.

17. The meaning must be at least that if the partners agree to sever equity may enforce the contract specifically while they are both alive (as by compelling the reluctant one to join in a conveyance to the use of the two partners as tenants in common). A more radical meaning would be that the intended beneficiary (heir or purported devisee of the first to die) may compel the survivor to convey a half-interest—the presence of a contract making the whole difference as compared to the principal case.

18. H. 9 Jac. C.P. Add. 25,210, f. 4.

19. H. 13 Jac. K.B. 1 Rolle, 338; Harg. 47, f. 114b (*Finn v. Smith*).

20. H. 11 Jac. C.P. Godbolt, 243 (*Wormleighton v. Hunter*). The precedent, said to be recent, is Sir William Whorwood’s Case.

21. M. 5 Car. C.P. Littleton, 310. The point that the Chancery would restrain lessees despite “without impeachment” clauses was made from the Bench by Richardson, C. J. Yelverton, J., replied that that had not been done since the publication of *Lewis Bowle’s Case* (11 Coke, 79). It is not evident to me that *Bowle* has any implications as to what the Chancery should be doing. One contrary case (Sir John Cope’s) was cited: lessee restrained by the Chancery from ploughing up ancient

not liable at common law (because there was a remainder for life between the defendant in equity and the fee). The decision went in the face of an objection that the Chancery was in the habit of restraining particular tenants protected by “without impeachment of waste” clauses. But this was denied as current practice, and there is an earlier dictum,<sup>22</sup> supported by a cited precedent, that the Chancery may neither defeat a “without impeachment” clause nor restrain tenant in tail after possibility of issue extinct from doing waste. In the same report, Justice Foster said it was resolved that the Chancery may not prevent a man from voiding a conveyance made when he was an infant, whatever the equities.<sup>23</sup> Another instance of insistence that a “maxim”, “principle”, or “ground” of law may not be impugned by equity does not involve real estate, but the rule probably owed its existence to the land cases in which it could be invoked. In *Beverley’s Case*,<sup>24</sup> a man indebted on a £ 1000 bond sought to be relieved of liability by a Requests suit because he was *non compos mentis* when he entered the obligation. The suit was prohibited because it went against the maxim that a man will not be received to stultify himself. In another case<sup>25</sup> “*aequitas sequitur legem*” was stated as the sole reason for preventing equity from giving effect to a devise of a remainder in personal property. There was no such interest at common law, ergo an equitable equivalent of such an interest could not be created. But the decision is not so starkly limiting as it seems, because it was observed that a remainder in the “use and occupation” of goods could be created by will, though not in the goods themselves.

Apart from the cases holding that “maxims” of English law were beyond equitable emendation and those preventing equity courts from deciding legal issues about real property or duplicating common law remedies, there are several Prohibitions that rather regulate equitable handling of matters touching real estate than exclude it altogether. Courts of equity had some well-known ancillary functions in the real property system. There was no disposition to interfere with those functions, but their boundaries sometimes came in question. For example, the function of quieting possession—that is, ordering one party to a dispute over land to yield possession to the other pending settlement of the rights at common law—was upheld as such, but

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pasture — presumably in the face of a “without impeachment” clause, since that is the point under discussion.

22. M. 8 Jac. C.P. Harg. 15, f. 225. The precedent cited is *Stepden’s Case*.

23. There is a nice case in *Doctor and Student* (Dialogue I, Ch. XXI) showing how there could be strong equities against a man trying to escape a conveyance made when he was under age. In effect: A shrewd “infant” gets a chance to buy a manor worth £ 200 at a bargain price of £ 100. To raise the cash he sells another manor at the fair price of £ 100. By voiding his conveyance and (as of course he is obliged to) refunding the £ 100 paid by his purchaser, he ends in a favorable position and hardly seems to need the protection which the law accords to minors.

24. P. 1 Jac. K.B. 4 Coke, 123b. The report cited in note 22 *supra* includes a confirmation of *Beverley*. A later report is also confirmatory: T. 21 Jac. Benloe, 139 (*Keylock v. Taylor*).

25. T. 17 Car. C.P. March. 106.

regulated in detail, in several cases.<sup>26</sup> Suits for the discovery and recovery of evidences relating to land are another well-known equitable supplement to the law of real property, and a pervertable one insofar as deciding who was entitled to the documents could slip into usurpation of the common law function of trying title to the land. Prohibition cases relating to such suits tend to be nice about the distinction—that is, to avoid interfering with the discovery process, while insisting that courts of equity stick to that.<sup>27</sup> Some attempts to add new ancillary equitable functions were stopped by Prohibition.<sup>28</sup> As to more material efforts to write an equitable gloss on property law—without, perhaps, infringing its “maxims”—one case<sup>29</sup> holds that equity may not intervene to avoid a long lease—that is, to prevent unjust enrichment of one party to a lease negotiated in a long-outdated market. On the other hand, one case<sup>30</sup> recognizes a substantial equitable right concerning property. It was said there that equity might relieve against one who practices deceitfully to take advantage of a condition — as if A makes a lease to B with a condition of re-entry for non-payment of rent, B pays the rent before it is due, A demands the rent on the due-date and enters for a literal breach of the condition when B refuses to pay again. A special branch of property law from which equity could not be excluded was copyhold. Copyholders with vested estates were protected by the common law actions of Trespass and Ejectment, but persons with mere rights to be admitted to tenancy as alienees or heirs could enforce their rights only through equity. Sometimes the handling of copyhold cases by courts of equity, or their title to handle certain issues in such cases, was challenged by Prohibition when, as a claim to admission, the suit as such was properly before the court of equity.<sup>31</sup>

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26. (1) P. 13 Jac. K.B. 3 Bulstr., 34; 1 Rolle, 190; Harl. 4561, f. 46a (*Parslow or Pasloe v. Dennis*). (2) M. 22 Jac. K.B. Benloe, 152 (*Vaughan's Case*). (3) M. 4 Car. C.P. Littleton, 166. (4) M. 15 Car. K.B. March, 51.

27. (1) H. 8 Jac. K.B. Harg. 32, f. 53b (*Cane's Case*). (2) H. 13 Jac. K.B. 1 Rolle, 294 (*Cotton v. Cooke*). (3) M. 1 Car. K.B. 3 Bulstr., 315 (*Beverley v. several defendants*). (4) T. 2 Car. K.B. Harg. 38, f. 84 (*Stiles v. Barrey*).

28. (1) M. 11 Jac. C.P. Godbolt, 208 (*Jenoar v. Alexander*. Attempt to compel a tenant to attorn when he did not need to at law.) (2) M. 2 Car. K.B. Harg. 38, f. 134 (*Winston v. Harford*. Attempt to compel an alienor to make better assurance than he had bargained to.) (3) M. 5 Car. K.B. Harg. 39, f. 71 (*Prince v. Morrice*. Attempt to make a man give seisin of a rent seck. Dissent by Hyde, C.J.)

29. T. 12 Jac. K.B. 1 Rolle, 42 (*Beaumont v. Hospital of Wigston*).

30. M. 12 Jac. K.B. 1 Rolle, 120.

31. For the general position of copyholders in law and equity, see C. Gray, *Copyhold, Equity, and the Common Law* (Cambridge, Mass., 1963).

Prohibition cases on equitable handling of copyhold matters: (1) M. 13 Jac. K.B. 1 Rolle, 236 (*Jewell v. Norwood*). (2) M. 16 Car. K.B. Cro. Car., 597 (*Aspye v. —*). (3) P. 3 Car. C.P. Hetley, 2; Harl. 5148, f. 119 (*Blackhall v. Thursby*). (4) H. 41 Eliz. Q.B. Add. 25,203, f. 43b (*Eggleton v. —*). (5) P. 10 Jac. C.P. Harg. 15, f. 262 (*Dyer v. Fuller*). (6) T. 7 Jac. K.B. Add. 25,208, f. 65b.

## IV

Cases involving real property do not demonstrate a simple propensity to restrain courts of equity, but they are, on the whole, restrictive. "Hands off land" is too strong, but "Handle with care" is not, "Hands off maxims" commanded almost unwavering assent, and the "maxims" consciously recognized and protected have their primary home, though not their exclusive application, in the land law. Let us now look at the field of contract by way of comparison. In general, equity was less restricted there. The going rules of the common law of contracts did not have the same tendency as real property rules to settle into "maxims". The lesser equity courts were prohibited from rewriting some articles of contract law, but the more arresting point is that they were not prevented from interfering with certain others.

Of the various functions of the Prohibition, some were more problematic than others. The least problematic was straightforward protection of the common law's own jurisdiction. For a simple example: Ecclesiastical courts had a recognized jurisdiction in defamation. However, if A sued B in a Church court for words actionable at common law, A's suit would undoubtedly be prohibited. That the procedure, remedy, allowable defenses, etc., in the ecclesiastical court are different does not matter; when A can sue the common law and get an adequate remedy if he succeeds, he must sue there. It seems predictable by analogy, for the early seventeenth century, that a standard suit for breach of a considerate contract brought in a court of equity should be prohibited. An exception might indeed be made—in the manner familiar in modern law—if the common law remedy of damages were genuinely inadequate in the circumstances. The focus should be on the need for the equitable remedy of specific performance, and pretended need should get a hard look. The same point can be expressed as a general proposition about courts of equity: They exist to give relief which justice requires, but which the common law does not provide. They have no business supplying essentially concurrent relief in a slightly different version which some people may prefer. These expectations are not, however, consistently borne out by the cases.

There is probably no doubt that an equity suit would be prohibited if brought when an action of Debt would lie.<sup>32</sup> Where Covenant would lie, there are scraps of evidence that specific enforcement of the contract in equity was regarded as inappropriate, although one judge who so held acknowledged that the Chancery would in fact order specific performance of covenants

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32. (1) H. 6 Jac. C.P. Add., 25,209, f. 127b (*Banes v. Wharton*). (2) T. 7 Jac. K.B. Harg. 32, f. 2b. (3) T. 10 Jac. C.P. Godbolt, 201 (*Archbishop of York v. Sedgwick*). (4) M. 11 Jac. C.P. Godbolt, 219 (*Rearsby v. Cuffer*). (5) T. 17 Car. C.P. March, 102 (*White v. Grubbe*).

A special consideration against allowing equity to encroach on Debt is mentioned in some of these cases: the King would lose his "fine"—i.e., a percentage of the sum recovered in Debt payable to the King for the services of his court (said in *Archbishop v. Sedgwick* to be 1¼%.)

under seal.<sup>33</sup> On the other hand, where an Action on the Case, or Assumpsit, was the only common law remedy available, the authority is in conflict. Two mid-Jacobean decisions hold clearly that if Case will lie, equity will be prohibited. The first, *Payne's Case*,<sup>34</sup> involved a simple duty to pay an agreed sum of money for a service (promisee's use of her good offices to help promisor get a shop in her master's house), so that there is no way in which a monetary recovery could be an inadequate remedy. The second decision, in *Bromage v. Genning*,<sup>35</sup> is stronger, because specific performance would have been a meaningful and reasonable remedy. Counsel arguing against a Prohibition urged that point. In the equity suit, promisee on a contract to make a lease sought specific enforcement before the Council of Wales. The three members of the King's Bench who are heard from in the report—Coke, Dodderidge, and Houghton—held strongly that an equitable remedy would undermine the common law actions of Case (the relevant action here) and Covenant (if the contract had been under seal.) Coke, C. J., expressly embraced the theory of contracts that in effect casts every contract into the alternative: A promisor intends, he said, to leave himself the choice of performing or paying damages. Serjeant Harris, who opposed Prohibition partly on the ground that specific enforcement of such contracts was common in the Chancery, ended by explaining to the Court that he had taken his position against his conscience, only because of the Chancery usage—which is to say, he thought it prudent to apologize to the judges for defending an equitable remedy. In one further case,<sup>36</sup> at the beginning of Charles I's reign, the Council of Wales was prohibited from enforcing a contract to convey real estate simply on the ground that it lacked jurisdiction over freehold—nothing said about Chancery practice or whether Assumpsit ought in general to preempt equitable suits for specific performance.

Diametrically opposed to these cases are two reports from Caroline courts.<sup>37</sup> Neither gives the facts of a controversy at hand, but both contain unambiguous pronouncements that a party who could bring an Action on the Case at common law may sue in equity at his election. These statements are taken to refer to the situation where *only* an Action on the Case would lie,

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33. (1) M. 2 Car. K.B. Harg. 38, f. 134 (*Winston v. Harford*. Dictum by Jones, J., who acknowledges Chancery practice contra.) (2) Dictum in *Bromage v. Genning*, note 35 *infra*.

34. M. 11 Jac. C.P. Godbolt, 216.

35. P. 14 Jac. K.B. 1 Rolle, 368.

36. M. 1 Car. Benloe, 152.

37. (1) H. 3 Car. C.P. Littleton, 82 (*per* Richardson, C.J., but "*non fuit negatum*."") (2) T. 9 Car. K.B. Harl. 1631, f. 412 (*per* Richardson and the Court: "If there is an agreement between any parties touching land or other thing on the infringement of which an action accrues at common law, yet the party may well, upon breach thereof, sue in the Chancery. For at common law damages will be recovered, but in a court of equity, such as the Marches [i.e., Council of Wales] the thing itself will be decreed." *N.b.* the generality of the language, though it is doubtful that it was meant to extend beyond contracts solely remediable by Assumpsit.

hence not to apply where Debt and Assumpsit were alternative common law remedies. The rationale in both instances is that damages and specific performance are distinct “ends”, so that equity does not infringe the common law if it entertains a complaint which would support an action for damages. There is no indication that extraordinary need for specific performance ought to appear. One circumstantially reported case from late in James I’s reign<sup>38</sup> may accord with these pronouncements; at least it does not support the radically opposite position that where Case is available equity must always, or almost always, stay away. Other fragmentary evidence tends both ways and down the middle.<sup>39</sup>

The second and later tendency — to think of Assumpsit and equity as alternative remedies — is the more surprising with hindsight, but perhaps not so surprising without. Time-lag and equity’s vested interest in enforcing contracts would explain it in part. That is, equity would always have been out of place if it had usurped the function of the ancient contractual actions, but it was for a long time suffered to enforce contracts outside the ancient writs; when Actions on the Case had evolved to the point where an adequate common law remedy was available for most ordinary situations, it may have seemed improper to deprive equity of business it was accustomed to do. The view, expressed by Coke in *Bromage v. Genning*, that promisors normally reserve the option of performing or paying damages, perhaps goes against the grain of ordinary moral sensibility, in contrast to the view that promisees have a right to performance if they want to demand it. The procedural etiquette of Prohibition law may cut the same way: Ought common law courts to prohibit a contractual suit when, in the judgment of the competent equitable tribunal, specific performance *might* be an appropriate remedy for special reasons? Ought common law courts to demand a plausible showing that that remedy *is* appropriate in the case at hand, and even if such a showing is offered, are they competent to assess it?

Cases on more complex contractual situations do not on the whole indicate a strong disposition to restrict equity, or to insist that the common law courts have the exclusive authorship of contract law short of a narrow range of cases where the need for specific performance is conceded. Two cases show willingness to permit a suit in equity by a third-party beneficiary of a contract between two other parties. The earlier, *Archdale v. Bennet*,<sup>40</sup> is straightforward: Bennet promised Walton, in consideration of an outstanding debt, to pay £ 60 to Walton’s daughter upon her marriage; the daughter married Archdale, and she and her husband sued for the money in the Court

38. P. 21 Jac. K.B. Benloe, 120 (misdated 15 Jac.); Lansd. 1080, f. 165b (*Arrias v. Briggs*).

39. (1) M. 15 Jac. C.P. Harl. 5149, f. 36b (*Howson v. Howson*). (2) H. 16 Jac. K.B. 2 Rolle, 59. (3) 3-7 Car. C.P. Hetley, 107 (*Bristowe’s Case*). (4) P. 3 Car. C.P. Littleton, 33; Hetley, 14; Harl., 5148, f. 139 (*Wiver, Viner, or Wyner v. Lawson*).

40. T. 4 - P. 5 Jac. K.B. Add. 25,211, f. 172b; Lansd. 11 11, f. 344a (former report dated T. 4, latter P. 5, but it is probable that the case continued over several terms).

of Requests. A Prohibition was sought on the ground that a common law action by the daughter would lie, a proposition that is probably plausible as of the time of this case.<sup>41</sup> The King's Bench rejected that proposition unani-

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41. See Arthur L. Corbin, "Contracts for the Benefit of Third Persons," *Law Quarterly Review*, XLVI (1930), 2. Corbin's view is summed up as follows: "In the 17th century there seemed to be little doubt as to a donee beneficiary. [Donee beneficiary contrasts with creditor beneficiary. The latter appears where A. promises B. to pay C. a debt which B. owes to C. The daughter in *Archdale* is a donee beneficiary.] Such third person was allowed to maintain assumpsit on the promise in numerous cases."

Most of Corbin's authority is from later in the 17th century, however. *Archdale* figures as quite strong authority that as of 1607-08 a beneficiary was *not* able to sue. At the same time, it is good evidence of uncertainty on the point. (A lawyer thought it worthwhile to seek a Prohibition; hope for a Prohibition was apparently allowed to ride entirely on the theory that a common law action would lie—as opposed to the contention that, if one would not, equity ought to "follow the law" by withholding its remedy also; the absence of the latter contention is itself a sign of realization that helplessness in the beneficiary was not a desirable state of affairs.)

The strongest earlier case favoring the beneficiary's right to sue is *Rockwood* (M. 31/32 Eliz. Q.B. Cro. Eliz., 164), but I believe it is distinguishable. In *Rockwood*, Elder Son-and-Heir promised Father to pay an annual sum to Younger Son in consideration of Father's refraining from charging Elder Son's inheritance with a rent payable to Younger Son. The following points are notable: (a) The consideration was a detriment to Younger Son, speaking realistically. It should, I think, be taken as a fact on pleadings that Father was determined to benefit Younger Son—not just thinking about it; he was "bound" to do so in the sense of "certain to do so in the absence of new information which would render his decision irrelevant" —not just morally bound, or bound in the absence of new information going to such things as Younger Son's moral deservingness. *At that point*, Father was induced to break the "bond" by information "rendering his decision irrelevant" —viz., by awareness that the end his decision was intended to accomplish could be gained by another means, and a preferable one, in the sense that Elder Son would be better satisfied and Younger Son just as satisfied; Younger Son was deprived of something which he as good as had—not just of something which he had more or less good reason to expect. (b) It was express on the record in *Rockwood* that Younger Son was present when Elder Son made his promise and that Younger Son "agreed". Younger Son was "just as satisfied" on his own word (though objectively it is better to have a rent charge enforceable by distraint than the benefit of a promise). Younger Son not only *lost* something he as good as had; he *gave it up* by the act of "agreeing"; a reified consideration could be said to "pass" from him.

Neither of the conditions present in *Rockwood* obtained in *Archdale*. (The first, though not the second, may be said to have obtained in typical family settlement cases from the later 17th century where beneficiaries were allowed to sue—for example, the leading *Dutton v. Poole*: M. 29 Car. II. K.B. 2 Lev., 210.) That there is no sign of *Rockwood* in the discussion of *Archdale* requires no explanation in view of the general state of reporting and legal memory in the early 17th century. It might, however, have been thought of and dismissed because it seemed manifestly different.

Corbin's position was that a common law remedy was fairly open to beneficiaries in the 17th century, removing any need for an equitable remedy in typical cases. Disappearance of a common law remedy later on generated an indirect equitable remedy, whereby promisee, being solely entitled to sue at common law, was treated as ben-

mously, however, and proceeded to deny Prohibition, thus taking the position that an equitable remedy was unobjectionable. The other case, *Lea v. Lea*,<sup>42</sup> is singular. King James intervened personally in a dispute between the Leas over land and persuaded one of them to promise him—the King—to pay money to the other, on condition that the latter not molest promisor in his possession of the land. That is to say, the promise as between the King and the promisor was without consideration, although the beneficiary was by the terms of the arrangement to be entitled to the money only on performance of a detrimental condition. When the beneficiary sued in the Requests for his money, it was nevertheless argued for a Prohibition that he could recover by Action on the Case. In contrast to *Archdale v. Bennet*, where there was good consideration as between promisor and promisee, the Court—this time the Common Pleas—did not deny that Case would lie. In the upshot, the Court did nothing at all, except put off decision and advise the parties to settle, because the situation was unprecedented and because it would not do to offend the King.

Related to the beneficiary cases are two more dealing with the equitable liabilities under contracts of persons other than promisor and promisee. In *Frevill v. Ewebancke*,<sup>43</sup> a man was induced to surrender a lease to a Dean and Chapter in consideration of a promise to make him a new one. The corporation instead let the land to the sub-dean, whom the promisee then sued in the Requests. In favor of a Prohibition it was argued that the corporation-promisor ought to have been sued. This argument could imply that a common law action against the corporation would lie, but it might mean simply that an equitable remedy should not be permitted against a non-party to the contract, whether or not the promisee had any common law recourse against the promisor. The Court *per* Coke held that the corporation could not be sued at common law because there was no deed under seal embodying the contract, but that equitable suits against corporations could be brought in the form of suits against individual members, of which the sub-dean was one. In denying Prohibition, the Court held that the promisee had “great equity” on his side. The decision is taken to mean, not that a stranger in the sub-dean’s position could be pursued in equity, but that his complicity in the breach as a member of the corporation afforded equitable grounds against him. (The complicity is presumptive, not a matter of real notice of the contract, for Coke said expressly that the equity suit would be good even if the sub-dean had not been a member when the contract was made.) In a manner, the corporation-promisor—not a party who benefitted by the breach—was the defendant in equity.

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eficiary’s trustee and compellable to sue as such. *Archdale* tends to say that in the absence of the special conditions of *Rockwood* beneficiary may not sue at common law, but may sue promisor straightforwardly in equity for the thing due.

42. T. 10 Jac. C.P. Godbolt, 198.

43. M. 12 Jac. K.B. 1 Rolle, 82.

In *Mathew's Case*,<sup>44</sup> A contracted to assign a term of years to B for an annual rent, but instead assigned the term to C. C sued in the Requests to enforce the contract on B—that is, to make him accept from C the assignment which he had agreed to take from A, paying the rent to C. Prohibition was denied on the ground that C was helpless at common law; it is hard to see how the contrary could be maintained. There is a hint in a remark by one of the judges that the Court was skeptical as to whether C ought, or was likely to, recover in equity. If so, the case is an instance of Prohibition denied solely because no common law remedy was available—that is, of the common law court's not passing on the validity of the equitable claim, at least so long as there seemed to be a chance that the court of equity would reject it.

In *Scarlett's Case*,<sup>45</sup> the King's Bench held that an equity suit is appropriate to recover installments under a contract to pay a debt by stages. The common law proposition espoused by the Court was that Case and Covenant, as well as Debt, would not lie until the last payment-date had gone by. There was no apparent disposition to say that an installment creditor is out of luck if particular installments go unpaid, that he must wait until the whole debt is due and take his legal remedy then. There is a degree of implicit economic sophistication in permitting an equitable remedy—disinclination to frown on installment contracts and realization that “time is money.” A somewhat later case from the Common Pleas holds that periodic payments secured by a bond may not be recovered separately in equity, but that situation is distinguishable.<sup>46</sup>

A well-known equitable remedy arose when a specialty debtor paid the debt, but failed to have the bond surrendered or canceled or to take a sealed acquittance. Without adequate evidence to show against the creditor's bond, he would be required to pay twice at common law; equity commonly intervened to prevent that injustice. There are no signs of attempts to prohibit courts of equity from doing so in the straightforward case. An unsuccessful attempt was made to curtail extension of equitable liability to the creditor's executor.<sup>47</sup> That is, the creditor was paid, but the bond was not surrendered; the creditor died and his executor sued on the bond; attempting to prohibit the debtor's equity suit, the executor argued that he was not privy to the payment, if it occurred, and, unlike his testator, had no knowledge on the basis of which he could confute evidence of payment put forward by the debtor. The King's Bench nevertheless refused to prohibit.

Liberality towards imprudent or unlucky debtors also appears in the following case:<sup>48</sup> A debtor by specialty agreed to deliver certain wares to the creditor in partial satisfaction of the debt and allegedly did so. The creditor subsequently sued for the whole debt. The debtor was not helpless at com-

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44. M. 15 Jac. C.P. Harl. 5149, f. 43.

45. T. 13 Jac. K.B. 1 Rolle, 211; Harg. 7, f. 61.

46. M. 3 Car. C.P. Littleton, 79; Hetley, 69 (*Feaks v. —*).

47. T. 9 Jac. K.B. 1 Bulstr., 158 (*John Strong v. —*).

48. M. 5 Car. K.B. Harg. 39, f. 71.

mon law in principle because, while he could not have defended against the creditor's suit for the debt, he could have sued for restitution of the goods or their value. In the actual case, however, he was debarred from doing so by the statute of limitations. Nevertheless, two Justices, Jones and Croke—no other contradicting them—opposed prohibiting the debtor from using the Court of Requests to save himself from having to pay in full. This seems to me a strong decision, since it amounts to letting equity prevail against the statute of limitations collaterally. (There is no doubt that a head-on attempt to frustrate that statute, or any statute, would have been prohibited.)<sup>49</sup> Jones and Croke added an interesting qualification: Equity ought not to intervene if the goods in the instant case had not been delivered with specific reference to the debt being sued for.

As against these cases upholding equity, there are several involving contracts that go the other way. To take the easier points first: various dicta say that a "nude pact" may not be enforced in equity, and would not be by the Chancery,<sup>50</sup> but no cases have been found in which an equity suit was prohibited for being an attempt to compel performance of such an inconsiderate promise. In one case,<sup>51</sup> it was undisputed that a suit in the Requests was to enforce a naked promise to pay £ 50, but the King's Bench denied Prohibition because the Requests had proceeded so far as decreeing payment. The judges said expressly that they would have prohibited if the case had been moved before decree. In one singular and complex case,<sup>52</sup> limited willingness to let equity enforce a nude promise can be seen. There is no discussion in my evidence of the interesting questions that one would expect to be engendered by the principle that "nude pacts" are unenforceable—what consideration means, whether reliance on an unsealed promise to make a gift could in *any* circumstances give rise to a good equitable claim when it would not furnish a cause of action at common law.

A few cases may be dismissed as meritless attempts by imprudent and unfortunate people to get equitable protection, prohibition of which is hard to oppose: a woman who took administration of her husband's estate under the misimpression that it was encumbered only by petty debts and after settling the estate was sued on various bonds;<sup>53</sup> surety on an obligation whom the creditor promised orally not to sue and nevertheless did;<sup>54</sup> a specialty debtor trying to take advantage of his real creditor's orally expressed wish that a

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49. See C. Gray, "Bonham's Case Reviewed" (*Transactions of the American Philosophical Society*, CXVI—1972 —, 51 ff.) for the general question of whether there may be equity against a statute.

50. (1) M. 8 Jac. C.P. Harg. 15, f. 231b (*Hide's Case*). (2) M. 15 Jac. C.P. Harl. 5149, f. 36b (*Howson v. Howson*). (3) H. 2 Car. C.P. Harl. 5148, f. 106b.

51. T. 17 Jac. K.B. Harg. 30, f. 25 (*Muskett v. Man*).

52. Early Car. K.B. Latch, 115 (*Vicar of Auford's Case*). The case is intricately involved with the law of tithes and points to no policy for commonplace situations.

53. P. or T. 17 Jac. K.B. Cro. Jac., 535; Lansd. 1080, f. 75 (*Jobbin's Case*).

54. T. 17 Jac. C.P. Harl. 5149, f. 307 (*Harman v. Wilkinson*).

beneficiary-creditor release the obligation (where, moreover, the obligation had long since been converted into a judgment debt and execution had thereon);<sup>55</sup> a vendor who gave credit in a sale highly favorable to himself, then panicked and tried to use equity to exact better security.<sup>56</sup>

More substantial limits were imposed on equity in two cases prohibiting extension of contractual liability from ancestor to heir. This was done in *Chapman v. Boyers*<sup>57</sup> in the case of a promise by the ancestor to make assurance of lands—which is to say, a promise that only the heir could perform specifically, and where a good argument for specific performance as a remedy can be made. In *Bristowe's Case*,<sup>58</sup> no particulars appear from the report, except that an attempt was made to charge the heir on a parol, though written, contract which would have been remediable, as against the ancestor, by Action of the Case. The probable argument against Prohibition was that sufficient property to cover the debt had come to the heir from the ancestor. A Prohibition was granted even though the Requests had proceeded to a decree against the heir.

Also significant are two cases prohibiting the Requests from intervening in the affairs of insolvents to equalize losses among the creditors and take the debtor off the hook. In both instances, the initiative came from the insolvent. In *Crews v. Draper*,<sup>59</sup> he negotiated an extension with all his creditors but one, then resorted to equity to compel the hold-out to agree to a similar arrangement. In the other case,<sup>60</sup> the bankrupt got some of his creditors to accept part payment in satisfaction and then sought to compel the others to do likewise. The common law judges do not seem to have been disposed to let equity supplement an underdeveloped statutory law of bankruptcy.

As the common law courts did not interfere with equity's preventing double payment of uncanceled obligations, so there is no significant sign of interference with equitable relief against excessive penalties.<sup>61</sup> The closest

55. H. 45 Eliz. C.P. Lansd. 1058, f. 57.

56. M. 15 Car. K.B. Harg. 378, f. 121 (*Colt's Case*, on *Habeas corpus*).

57. M. 3 Jac. C.P. Add. 25,205, f. 33.

58. 3-7 Car. C.P. Hetley, 107.

59. P. 8 Jac. K.B. 1 Bulstr., 19.

60. M. 16 Jac. C.P. Harl. 5149, f. 247b.

61. In connection with penalties, I should like to contribute a scrap of evidence on the common law. 39 Eliz. C.P. Add. 25,199, f. 2, is as follows: A man was obliged by specialty in £ 5. On the due date he made another obligation to pay the same debt but did not have the first obligation surrendered. He paid the second obligation on time. Obligees sued on the unsurrendered first bond. *Per* Walmesley, J.: "You tell us a fable of a foolish fellow who has given two separate obligations for one debt, which does not lie in our power to redress."

Walmesley's position is the standard common law "hard line" on uncanceled obligations which have allegedly been paid, but cannot be met with a sealed acquittance: it is the debtor's folly, and he must pay twice. The reporter adds a *nota* to this case, however, which suggests that the common law line on *penalty* bonds was not so hard. (The margin in the MS. alongside the report has the heading "Conscience

approach<sup>62</sup> is a case in which a judgment debtor in execution paid his creditor £ 200, representing the principal debt, plus £ 40, representing costs and damages, in exchange for a release from a £ 400 bond. The debtor then brought an equity suit seeking to reduce the £ 40 to £ 20; he was prohibited.

Common law, or conditional fee, mortgages tend in effect to exact excessive penalties unless controlled by the equity of redemption. The only mortgage case found<sup>63</sup> does not involve a direct attempt to prohibit protection

obligations.”) “Their course here”, says the *nota*, “is for the most part that if the defendant will at the first appearance confess the debt or the greater part and tender the rest with costs and forbearance according to 10 in the 100, the Justices will moderate the matter. But if he denies the debt, or does not come until after judgment or verdict, then they will rarely meddle with it, but let the law run.”

The *nota* indicates that the late Elizabethan Common Pleas was administering its own equity in actions of Debt on penalty bonds. Would courts of equity have been permitted to offer more liberal relief? No Prohibition cases test that clearly. *N.b.* the limits of “Common Pleas equity” as described: (a) Its discretionary or less-than-completely-routine character is emphasized. (b) 10 percent of the penalty must be tendered. *Quaere* whether courts of equity would insist on less. (c) Respect for judgment, and indeed verdict, will *almost* always be shown by the Common Pleas judges administering their own equity. Insistence that equity courts show the like respect is surely the more acceptable for that reason. (d) No relief will be given to debtors who try to make out in the face of an uncanceled obligation that they have paid the principal debt— subject to the qualification that it is sometimes enough to confess that *most* of the principal debt is unpaid.

There is no better evidence that the common law would interfere with equitable relief against penalties than any inferences that can be drawn from the indication above that the Common Pleas was in the habit of furnishing its own. The only Prohibition case suggesting that such interference might occur (H. 7 Jac. C.P. 2 Brownl. and Golds., 297— *Read v. Fisher*) possibly means that a debtor may not be relieved of a penalty if the creditor so much as says in his sworn pleading that the principal debt has not been paid. That comes to an adaptation of the rule in the *nota* above that the debtor must confess the principal debt before relief from the penalty may be considered, even if he has actually paid it. If *Read* so implies, it also implies that relief against penalties by courts of equity is as such appropriate. The sparse report of *Read* is consistent with the proposition that in the case of a non-penal bond equity may not prevent double payment if the creditor will put in a sworn pleading that the debt is unpaid, but I doubt that so extreme a restriction on equity’s power to investigate the truth was law.

62. T. 21 Jac. K.B. 2 Rolle, 327. *N.b.* the figures in relation to the last note *supra*: plaintiff in equity was trying to reduce his “costs and damages” to the 10 percent of the penalty said to be the common law standard.

63. H. 1 Car. Benloe, 160 (*Edwards v. Woolfe*). Though cursory, the Court’s opinion in this case suggests that bills for foreclosure were routine in the Chancery as of 1625. That does not quarrel with the general position of R.W. Turner (*The Equity of Redemption*, Cambridge, 1931) that “arrival” of the equity of redemption proper (as a routine right, without showing special circumstances to excuse non-payment of the debt) can probably be assigned to Francis Bacon’s Chancellorship. Turner’s thesis is assisted, however, by his taking the first bill to foreclose to be the first one mentioned in

of the mortgagor by the equity of redemption, but it does tend to suggest that the common law courts would not interfere with that equitable function. The case presents a suit to foreclose before the Council of Wales. The report does not give enough facts to permit reconstruction of the mortgagor's motives in seeking a Prohibition. He appears to have paid off none of the debt, and hence may have been in danger of losing the land on worse terms than the Council of Wales offered him by a decree ordering him to pay the full debt or hold the land of the mortgagee. Perhaps he hoped to do better in another court of equity. In any event, the judges refused to prohibit, taking the position that the case was purely equitable and of a type that was common in the Chancery. This is taken as a sign of readiness to leave the adjustment of interests between mortgagor and mortgagee to equitable discretion and as an example of a tendency, also visible in other cases, to take Chancery practice as the standard for what was permissible in lesser equity courts.<sup>64</sup>

## V

Herewith, we have not completed the story of common law control over equity's scope, but we have looked at the main substantive departments of it. Unreasonable restrictiveness is hard to make out. The strongest line was drawn around certain "maxims" of the common law, whose enforcement in the face of all equities may be hard to justify, but whose crumbling by non-legislative means might be the equally hard-to-justify consequence of letting equity in the door. It tends to be difficult at first sight to make analytic sense of distinctions which the phenomena permit one to feel. For example, if the common law gives no action to a third-party beneficiary of a contract, why is it not a "maxim" that contractual relations run solely between prom-

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reports of Chancery cases (Turner, p. 28). That bill comes from 1629, and, as Turner argues, it is likely that there would have been a gap between recognition of the equity of redemption and development of a procedure to cut it off. There are eight years between Bacon's fall and 1629, only four between his fall and 1625. If foreclosure procedure was routine in 1625, there would be grounds for pushing the equity of redemption back somewhat, notwithstanding Turner's closely reasoned use of fragmentary evidence to sustain the Bacon hypothesis. Turner's treatment (pp. 27-28) seems to me unduly influenced by the assumption that the common law attitude, and especially Coke's, would have been hostile to equitable development of mortgage law.

64. I omit trusts from the text because there is hardly a coherent body of cases bearing on them. There is nothing to interfere with the assumption that trusts were equity's business. If the minor equity courts were significantly involved with the construction and enforcement of trusts, there was little effort to prohibit them from handling such suits as they saw fit. Occasionally Prohibitions were sought to prevent equity courts from masking as trusts matters which could have been taken care of at common law, usually by action of Account. The following cases are of this type:

(1) M. 13 Jac. K.B. 1 Rolle, 263 (*Powell v. Harris*). (2) M. 4 Car. C.P. Littleton, 211; Hetley, 118 (*Goffe v. Skipton*). (3) T. 9 Car. K.B. Harl. 1631, f. 405 (*Frere v. Devreaux*). (4) P. 17 Car. C.P. March, 88.

isor and promisee, leaving beneficiaries as much out in the cold as people who rely on “nude pacts”? Why may equity help the third party get his benefit, but may not relieve the widow or orphans of a joint tenant who has died out of season after making a deathbed will purporting to devise a moiety for the support of his unhappy relicts?

For such differences, quite good analytic justifications can in the end be given. With reference to the immediate example: The duty to keep promises is, and ought to be, perceived as “natural” or moral, subject to the difficulties of identifying serious, intended, or properly promissory uses of promissory language—difficulties which, for “nude pacts”, are at least rationally, if not altogether satisfactorily, soluble by formalism. On the other hand, it is arguable that the advantages of having a system of private property transcending the bare protection of possession can only be gained by creating a more or less arbitrarily limited range of possible interests, which people are told clearly how to convey and which they must be stuck with, in spite of equities and intentions, once they have taken them up. Although fairly durable conceptual and moral distinctions account for the legal characteristics under discussion, there is no inconsistency in talking more historical language and suggesting that the common law’s perceived “vested interest” in contractual relationships was less marked than in the inherited system of real property. It is hard to know how much awareness there was that increased economic activity must make contracts a more central feature of the legal fabric, that it must bring a greater variety of contractual situations before the courts and generate a demand for development—whether the famous 16th-17th century development of the common law of contracts itself, or the development of equitable supplements. It was in any event fortunate that need encountered relative indefiniteness, relative non-reduction of contract law to “maxims” and “principles”—the kind of reduction which allowed Littleton’s *Tenures* to be thought of as the property law analogue of Euclid’s *Elements*. A certain willingness to share the field of contracts with equity may have been one consequence. In more symbolic—and simply political—terms, the early 17th century saw stepped-up anxiety about legal certainty, about the legitimacy of rules of law which figured as “certain certainties” when tradition seemed threatened along with the property of the propertied. Any settled rule can theoretically serve in that figurative role, but the fundamental rules of real property were especially eligible, by virtue of their settledness and of their association with those “estates” and “birth-rights” in which men needed to feel secure. Comparable favor was not bestowed upon a single theory of contracts; perhaps it has never come to be.

“*Aequitas sequitur legem*” would probably have been invoked by the 17th century judges to account for the rather gerrymandered line they drew around equity’s province. The *sententia* can perhaps be given a sense in which it will do that job, but its usefulness is open to question. It may be better to say simply that a certain rigidity is necessary in the law of property, and therefore that equity should not be allowed to soften the established

structure of interests. To stay away is not to follow, though merely to help people secure what they have within that structure—the conceded ancillary role of equity in the field of property—is indeed a form of following. On the other side, as in the law of contracts, where the need for such a fixed structure is less clear, it may be as well to admit that equitable intervention, insofar as it is allowed, is a matter of correcting the common law, not fulfilling it.

“*Aequitas sequitur legem*” makes most sense in two contexts. One goes back to Aristotle’s *epieikeia*, which was a conception of refinement or filling-out within the schema of a particular legal system—as opposed to a correction of the law’s shortcomings from an ideal point of view.<sup>65</sup> So conceived, equity follows the law in virtue of the meaning of *epieikeia* or “equity”. But what constrains this equity must be the choice of values that informs a country’s law — the principles of the law, yes, but not mere rules and institutions translated into “maxims” and thence into “principles”. The best reason for treating most operative English “maxims” as fundamentals of the system, immovable before equity, is that they are *not* expressions of those deep and fruitful value-choices that deserve to be called fundamental and so to control Aristotelian equity. What is arbitrary can be *called* “fundamental” because there is nothing behind it, as there is nothing behind the deep choices by which a people elects to have one kind of social order rather than another, but to *identify* the arbitrary element in law with the deep choices underlying law is a confusion based on a superficial similarity. It may be induced by the fact that there are excellent grounds for regarding the arbitrary element as immune from equitable scrutiny and other forms of infringement—because it is arbitrary and because an ordered system of property requires a somewhat arbitrary choice of legally recognized interests and capacities. The confusion, however, was immensely influential in history; it is almost “the English fallacy”; its contribution toward keeping the law from slipping away from its *real* fundamentals, especially in the constitutional sphere, may have been considerable.

There are, to be sure, some ways in which equity was kept in the follower’s role with respect to properly fundamental value-choices. The

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65. The crucial sentence in Aristotle (*Ethics*, V, 1137b) is: “Then when the law speaks generally, and something not covered by the generality happens, it is proper, where the legislator neglects something and has gone wrong in speaking in stark terms, to rectify the omission by what the legislator himself would say if he were present, and if he had known would have provided.”

I do not read Aristotle as meaning that the legislator should be presumed to intend nothing contrary to natural justice. The instruction, I believe, is to imagine the legislator of a *particular* polity, with his special character and purposes, confronting the misleadingly provided for situation. A fictitious legislator (which the Greek *nomothetes* amounts to anyhow) will do as well as a real one. I.e., non-statutory rules which in their usual stated form have a generality which leaves their applicability to the instant case uncertain or improbable should be construed according to their spirit—but *their* spirit, as the policies of a particular state.

policy against “nude pacts” — meaning that mere promissory language, or such language merely deemed by a trier of fact to be seriously intended, should not be given legal effect—represents such a choice. Equity showed no substantial propensity to violate it. The idea that a debt is a debt, and that creditors must take their chances in competition with other creditors for limited assets, is pretty fundamental to the decision to be one sort of social order. Equity may have offered a significant threat to that idea, and the common law judges may be thought of as saying that the English commitment to it was too strong to be reversed unless by the legislative means eventually adopted.

However, such confinements of equity to its Aristotelian place were comparatively rare. For the most part, save for protecting the “maxims” whose title to protection does not rest on Aristotelian principles, the judges let equity do justice, with the implicit admission that the common law was an imperfect instrument for doing it. They were commendably disinclined, on the whole, to project fundamental societal choices from the common law’s limitations — as one might, for example, by insisting that a contract by English lights is so profoundly bipartite a transaction that a non-party beneficiary cannot be thought of as having a legal interest. Coke’s projection of the idea that a contract by English lights is not strictly meant to be performed failed to convince his contemporaries. On the whole, the judges did not confuse legal abstractions with important societal choices as, more innocuously, they confused property rules with them. Part of the reason may be that they did not genuinely grasp and work within the Aristotelian conception of the equitable function. Had they done so, they might have been readier to reach for the idea behind the positive rule, to see in the common law, not the perfection of justice, but the sole and sufficient map of the English moral polity. The countervailing intellectual force— making for substantial justice and against overuse of the common law as the key to a romantic *Volkgeist* more precious than justice— was the conception of equity as natural law, as “conscience”, as the ideal point of view. To early 17th century sensibility— and I suspect this includes a Coke despite his tendency to overrate and overuse the common law— an accommodation between law and its critique, between the native and the universal, was still acceptable. To this effect the one important book on early English equity may have contributed. For St. German’s *Doctor and Student*, while coming to essentially the same position on equity’s boundaries as the 17th century judges reached in practice, casts equity in the role of critic and corrector of human law, in the *persona* of the law of nature.<sup>66</sup> That the common law owes not subservience but accommo-

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66. This point about St. German is left undocumented, since another essay would be required to sustain what is said with the qualifications due to a complex and sometimes ambiguous book. No secondary treatment does justice to it, especially to the sense in which it is about what courts of equity should *not* be doing. St. German’s influence on the 17th century judges certainly is suspected though they had probably not assimilated all his reasoning.

dation to natural justice is in no way better emphasized than in the symbolism of the judgments controversy: Let it be pretended that the common law itself is never ultimately unjust (or let it seem that the choices and commitments it represents can claim to be more precious than justice); let the etiquette prescribe that title to do justice in the face of the common law is only title to correct the consciences of those who would seek to make unscrupulous use of the common law to gain unjust advantages.

A second context in which "*Aequitas sequitur legem*" can be given a solid meaning is where equity is seen as a loophole in formalistic rules. In some cases, such rules can be thought of as half-meant — as made to produce a benign effect, but not intended to be strictly enforced. For example, it is a good rule that a sealed bond can only be defeated by a sealed acquittance, for the rule will encourage care in business and diminish factual controversies about whether debts have been paid. If equity is permitted to undercut the rule, it is not because the rule is faulty by a moral standard above the law, but because it is not meant literally. The common law itself does not hold that careless people should always or even usually have to pay twice, but only that a deterrent price should be attached to carelessness. The price consists in having to bring a suit in equity, with the trouble and risk of failure any lawsuit involves; in having to sue in time or lose the chance (given the common law position in the judgments controversy); in having — one may hope, even if one is willing to leave the determination to equity — to convince the court of equity that the carelessness was in some way excusable or the hardship of double payment an undue penalty in the circumstances. For a different kind of example (cf. *Frevill v. Ewebancke* above): The institution of corporations perhaps requires special rules about how a "fictitious person" can act, such as the rule that it cannot make a parol contract. But the common law does not intend that corporations should escape their contractual duties when they fail to observe, and those they deal with neglect to insist on, the form that the law requires. If, subject to the risks of having to bring a lawsuit promptly, equitable means can be found to see that fictitious persons are held to the same basic legal duties as natural persons, the common law is not defeated, but relieved of the burden of the letter — a necessary letter when the law for good reasons of utility creates an unnecessary "artificial animal", but hardly one meant to give corporations the privilege of victimizing the careless. Some approved equitable functions can be regarded as fulfilling the law's whole policy, as opposed to the part of its policy expressed in formalism. However, it is strained to make out that all equitable functions that were historically approved were, or can usefully be, reduced to that kind of fulfilling role. Had the courts' theory really been that equity only exists because some common law rules are meant to be circumventable with extra trouble, equity would have been more constricted than it was; it is probably easier to find an important policy behind the literal rule than to place it in the circumventable class, once those are seen as the two stark options. The established practice of the Chancery made equity too major a part of the system to be recast as a

poor handmaiden in all departments, and the jurisprudence descending from St. German conferred a higher dignity upon it.

## VI

From the point of view of the law of Prohibitions, common law control over equity was special, but not unique. In other contexts as well, the easiest ground for prohibiting was that someone suing outside the common law system could sue at common law. But Prohibitions were not confined to this simple model. The writ was in fact extended to regulate extra-common law entertainment and handling of suits which not only could not be brought at common law, but belonged positively, as abstract types of claims, to the court where they were brought. So equitable suits were sometimes stopped, or not stopped, because of the common law judges' view of the equitable merits. It was not, nor should one expect it to be, simply up to the courts of equity to decide whether someone without a cause of action at common law was entitled to relief, except that the Chancery's *de facto* freedom from Prohibition implies a trust in the principal court of equity to discipline itself—a trust not extended to the minor equity courts, nor to the ecclesiastical courts.

However, extension of the Prohibition to regulatory functions beyond protection of the common law's monopoly over certain types of claim was never wholly unproblematic. "Conservative" and "liberal" strains of thought on the scope of the writ can be seen twisting throughout the law of Prohibitions, the "conservative" tending to oppose prohibiting in the absence of direct threat to the common law's jurisdiction. Even "liberal" judges did not claim a blanket authority to regulate the law of other jurisdictions. It was a cliché that Prohibitions did not exist to permit review of the "justice" of decisions by prohibitable courts—for example, to undo misapplication of ecclesiastical law by ecclesiastical courts or to frustrate decisions which, rather than wrong by any positive standard, seemed unjustifiable by general canons of fairness and procedural propriety. The "liberal" judge had to look for indirect ways in which the acts of extra-common law courts could be said to infringe interests of special concern to the common law, and could therefore be brought within the range of Prohibition without turning the writ into an indiscriminate instrument of control. The most interesting, and messiest, chapter of Prohibition law resulted from this effort. These themes crop up in Prohibition cases dealing with equity, as elsewhere. The equitable merits of claims—and sometimes the merits of decrees, despite misgivings about going behind a final solution—were in fact debated, but here too the principle was sometimes voiced that the "justice" done by prohibitable courts was not reviewable.

One neat example of the tension between "conservative" and "liberal" approaches to the Prohibition is well documented in the equity cases. In ecclesiastical cases, the question sometimes arose whether one Church court could be prohibited from entertaining a suit that ought to be in another Church court. There was a clear clash in such cases between the "conserva-

tive,” who says “No—Prohibitions are to protect the common law, not to police lines of jurisdiction generally”, and the “liberal” who says the contrary. A similar issue arises when a claim that could be pursued in an ecclesiastical court is pursued in equity. Do the common law courts have interest and standing to interfere? Cases raising that question are also of substantive significance, since they touch on the ultimately important role of equity in testamentary matters, which traditionally belonged to ecclesiastical courts. Several cases are consistent in holding that equity should be prohibited from entertaining a simple claim to a legacy, which could just as well be pursued in an ecclesiastical court, but the cases show no inclination to prevent equity from ordering the payment of legacies which for some special reason could not be recovered in the spiritual court. On the whole, the “liberal” view won out with respect to the common law courts’ title to prevent equity from invading the ecclesiastical sphere; so it did too with respect to protecting one ecclesiastical court from another.<sup>67</sup> This result is also, of course, a matter of protecting the defendant against being vexed where he does not expect to be, sometimes to his inconvenience and necessarily so as to expose him to different judges, procedures, or sanctions, whether or not it would mean poorer substantial justice. There are, however, instances in other kinds of cases of effective “judicial restraint”, or success for the “conservative” attitude toward the Prohibition’s purpose.<sup>68</sup>

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67. (a) The following are legacy cases: (1) M. 3 Jac. K.B. Add. 25,209, f. 81. (2) P. 2 Jac. C.P. Winch, 78; Harl. 5148, f. 11b (*Good v. Good*). (3) H. 2 Car. Benloe, 202 (*Frier v. Meck*). (4) P. 3 Car. K.B. Godbolt, 431 (*Evers v. Owen*). (5) M. 16 Car. K.B. Cro. Car., 595 (*Sir Henry Williams’s Case*). (6) T. 17 Car. C.P. Marg. 23, f. 78 (*Wilkins v. Reynolds*).

(b) The following involve equitable encroachment on the Church’s marital jurisdiction: (1) H. 3 Jac. K.B. Add. 25,205, f. 205. (2) M. 3 Car. C.P. Hetley, 69; Littleton, 78. (3) M. 15 Car. K.B. March, 52.

(c) Miscellaneous testamentary cases: (1) T. 17 Car. K.B. March, 107. (2) H. 2 Jac. K.B. Noy, 3; Lansd. 1111, f. 41a (*Executors of Trott v. Taylor*). (3) P. 17 or M. 22 Jac. C.P. Winch, 103; Harl. 5149, f. 282a (*Buble or Bubbe’s Case*).

68. (1) M. 11 Jac. K.B. 2 Bulstr., 142 (*Glascock v. Rowley*. A complex case, but a strong example of refusal to block execution of an outrageous decree.) (2) H. 16 Jac. C.P. Harl. 5149, f. 264 (*Bennet v. Beckwith*). (3) M. 22 Jac. K.B. Lansd. 1063, f. 23b (A strong statement of principle: “It was agreed by the Justices that they will not reform the injustice of a decree obtained in the Council of the Marches or the Council at York. for the Councils decree according to equity, and the injustice of a decree in equity may not be amended by the Justices of the one Bench or the other, who have the administration of justice according to the rules of the common law.”) (4) 3-7 Car. C.P. Hetley, 59 (*Waddington’s Case*). (4) T. 17 Car. C.P. March, 102 (*White v. Grubbe*. In this case Prohibition was granted. It is significant in the present context because counsel thought it worthwhile to push a view more “conservative” than opposition to reviewing unjust decrees—viz., the position that mere acts of acquiescence by the party could cut off his right to a Prohibition. The attempt failed, but it goes to show the arguability of such a position.)

Besides the cases discussed, there are several—some of them *habeas corpus* cases—which speak to the procedural powers and sanctions of the equity courts. These cases will not be examined except to say generally that they present a mixture of permissiveness and restrictiveness. Equity was given reasonable scope to do what it must do to be effectual—to back up its decrees by imprisonment for contempt. It was not on the whole permitted to add further or different sanctions. For example, there are some attempts to prevent equity courts from forcing defendants to enter bonds to carry out decrees: ecclesiastical courts were sometimes restrained from doing the same.<sup>69</sup>

## VII

In general terms, a solution to the problem posed at the outset of this article, in connection with the judgments controversy of 1616, is implicit in what has been said: An ungenerous attitude or pervasive hostility toward equity, an unremitting propensity to curb the minor equity courts and indirectly to criticize and warn the Chancery, is hard to make out. It seems better to attribute to the judges a fairly coherent, though hardly articulated, theory of the equitable function—not an extravagantly permissive one, for numerous plausible efforts to secure equitable remedies were rebuffed, but a theory that distinguished intelligibly the sphere of restrictiveness from that of generosity. The judgments controversy, in this perspective, would seem to have been essentially about what it was ostensibly about—one point on which the accommodation between law and equity was by common lawyers' lights unsatisfactory.

Prohibition cases furnish good evidence that equitable intervention after judgment was regarded as objectionable in itself. Indeed, it is not too strong

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69. (a) Cases on bonds (unfavorable to the practice of taking them): (1) H. 13 Jac. K.B. 1 Rolle, 338; Harg. 47, f. 114b (*Adkinson v. Hobbs*). (2) M. 15 Jac. C.P. Harl. 5149, f. 41 (*Clapham's Case*). (3) T. 17 Jac. K.B. Harg. 30, f. 256; 2 Rolle, 96, 103.

(b) On miscellaneous sanctions other than imprisonment: (1) H. 13 Jac. K.B. 1 Rolle, 339; Harg. 47, f. 115 (*Oliver's Case*). (2) T. 17 Car. C.P. March, 99. (3) 39 Eliz. C.P. Add. 25,199, f. 2.

(c) Cases on Chancery imprisonment (somewhat protective against abuse of the court's unchallenged imprisoning power; all *Habeas corpus*): (1) P. 39 Eliz. Q.B. Add. 25,198, f. 225 (*Taylor v. Beale*). (2) P. - T. 13 Jac. K.B. 1 Rolle, 192, 218, 219; Harl. 47, ff. 58a, 60 (*Ruswell's Case*) (3) 1608 or 1609. K.B. Moore, 840; Harg. 47, f. 58b; Add. 25,213, f. 176 (*Apsley's Case*). (4) M. 12 - T. 13 Jac. K.B. 1 Rolle, 111; Moore, 838; Cro. Jac., 345; Add. 25,213, f. 176; Harg. 47, f. 59 (*Courtney v. Glanville*). (5) M. 13 Jac. K.B. 1 Rolle, 277; 3 Bulstr., 115; Add. 25,213, f. 180b (*Dr. Gouge's Case*).

(d) The following cases show that the power of the Requests to imprison was open to challenge, but was upheld sufficiently to allow the court to operate: (1) P. 41 Eliz. C.P. Lansd. 1065, f. 12b; Noy, 6. (2) P. 43 Eliz. C.P. Lansd. 1058, f. 10. (3) T. 10 Jac. C.P. Godbolt, 198 (*Lea v. Lea*). (4) 39 Eliz. C.P. Add. 25,199, f. 2. (5) M. 15 Car. K.B. Harg. 378, f. 121 (*Colt's Case*).

to say that on the best evidence available such intervention was simply illegal, by virtually unanimous opinion. Objection to it was not an overextended Cokean position, whether or not Coke's application of the Praemunire statutes to the matter was excessive. For in quite a few cases, scattered in time, the minor equity courts were prohibited because they proposed to give relief in the face of a common law judgment—usually when they would have been unlikely to be prohibited on other grounds.<sup>70</sup> Moreover, there are five cases *after 1616* in which Prohibitions were issued mainly to prevent post-judgment intervention.<sup>71</sup> No evidence is found in any report of an actual controversy<sup>72</sup> later than 1616 that the point was so much as debatable, just as no dispute about it has been found in a line of earlier cases going back to the mid-16th century. Prohibition cases are the only objective source of law on the matter, and they say that the law was against Chancellor Ellesmere and King James. From the cases after 1616, it would seem that the King had no factual power to change the law to console him for his manifest lack of legal power to do so. His decree could no doubt assure the Chancery of moral support were it to intervene after judgment in the future; whether the decree in fact affected its habits, in the face of the unconverted common law judges, is unknown.

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70. (1) M. 13/14 Eliz. Harg. 11, f. 93. (2) 14 Eliz. Dalison, 81 (*Humphrey v. Humphrey*). (3) P. 30 Eliz. Q.B. 2 Leon., 115 (*Heal's Case*). (4) 39 Eliz. C.P. Add. 25,199, f. 2. (5) P. 3 Jac. K.B. Add. 25,205, f. 14. (6) H. 3 Jac. K.B. Lansd. 1111, f. 167a (*Cardinal v. de la Bothe*. Whereas the cases above are fairly straightforward against equity after judgment, in this one Popham, C.J., and Williams, J., favored modification, though not abandonment, of insistence on respect for judgment. They were vigorously opposed by Coke, as Attorney General, and the reporter doubts their opinion.) (7) P. 7 Jac. C.P. Add. 25,209, f. 2. (8) M. 10 Jac. K.B. 1 Bulstr., 182 (*Ellis v. Parke*). (9) M. 11 Jac. K.B. (?) Add. 25,213, f. 159 (*Browne v. Heath*) (10) H. 11 Jac. C.P. Godbolt, 244 (*White v. Moor*). (11) M. 12 Jac. K.B., 1 Rolle, 111; Moore, 838, (*Courtney v. Glanville*). (12) M. 12 Jac. K.B. 2 Bulstr., 284; Moore, 836; 1 Rolle, 71 (*Wright v. Fowler*). (13) M. 13 Jac. K.B. 3 Bulstr., 115 (*Dr. Gouge's Case*). (14) M. 13 Jac. K.B. Harg. 47, f. 85 (*Coates and Suckerman v. Warner*). (15) Undated. C.P. Harl. 4817, f. 157. (16) Undated. Moore, 916.

See next note for cases of the same type later than 1616.

71. (1) T. or P. 14 Jac. K.B. Harl. 4561, f. 223; 1 Rolle, 380 (*Jones v. —*. Arbitrator's award given the same force as a judgment.) (2) T. 14 Jac. K.B. Harl. 4561, f. 223; 1 Rolle, 380 (*Skipwith's Case*, reported in *Lingham v. Broughton*). (3) M. 21 Jac. Benloe, 141 (*Reynel's Case*). (4) P. 5 Car. C.P. Littleton, 245. (5) M. 16 Car. K.B. Cro. Car., 595 (*Calmedy's Case*).

T. 17 Car. C.P. March, 105, rejects what some earlier cases give countenance to—that equity can be cut off by certain common law proceedings *short* of judgment—while confirming that judgment precludes equity.

72. One report (T. 3 Car. C.P. Littleton, 37; Harl. 5148, f. 145b) states as a *nota* the Chancery position that proceedings after judgment are unobjectionable. No litigative context is reported from which one can determine whether a judge gave this opinion or whether it represents only a reporter's impression of the law.

Even apart from their substance, Prohibition cases tend to put the rule against relief after judgment in a context of moderation and accommodation. For there are cases in which the respect demanded for common law judgments was extended reciprocally to equity judgments.<sup>73</sup> Although practice was not totally consistent, the common law courts' sensitivity to equitable intervention after judgment made it incumbent on themselves to be cautious about prohibiting equity after judgment. Such caution is emphatically not standard Prohibition law. Many attempts were made to persuade the judges that they should not prohibit ecclesiastical courts when Prohibition was sought after judgment; they were never convinced of that as a general principle, though they reserved discretion to refuse Prohibition in the event of especially inexcusable delay. (Admiralty judgments enjoyed considerably more respect.)

Breaking the cases down in more detailed ways does not seem to detract much from the general impression. Coke himself was involved in some restrictive decisions, and in the single case of *Bromage v. Genning* he took an anti-equity position on an important question stronger than was unambiguously acceptable (though it commanded the immediate agreement of Coke's brethren). But he was involved in some permissive decisions too, and, on the whole, there is little basis for supposing that he stood out from the consensus of his profession. If that is correct, it is consistent with his record as a wielder of the Prohibition in other fields. Coke's reputation as *the* prohibiting judge is exaggerated, largely because he was the leader of the common law forces when the policies of the courts in administering the writ were attacked politically. On the Bench, he was a stickler for precisely drawn jurisdictional boundaries within a complex legal system whose refined differentiation of function he admired; he was by no means always the judge most inclined to cut back the authority and independence of extra-common law courts. His strong, if basically unoriginal, position in the controversy with equity over intervention after judgment is in a way the perfect reflection of a sensibility both tolerant of the "diversity of courts" and aware that a mixed system requires accurate traffic rules—and besides traffic rules, manners (however much Coke forgot his own in controversy).

The practical insignificance of the dispute of 1616 and of the King's pretended settlement is the point that emerges most conspicuously from the chronology of the cases. The courts' substantive view of equity's scope does not seem to have been affected by the quarrel and its purported resolution, as their view of intervention after judgment does not. Different effects are imaginable. The Chancery's nominal victory in the quarrel might have led to more permissive treatment of equity on the part of judges unwilling to displease the government or to stir up renewed protest by the equity courts.

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73. *Muskett v. Man* (note 51 *supra*) is a strong example. For a counter-example, *Bristowe's Case* (note 58). The cases in note 68 illustrate respect for equity judgments along with the principle for which they are cited there.

On the other hand, “losing” the judgments controversy could conceivably have driven the judges to resist losing more to equity and so to stricter use of the Prohibition. It is tempting to see the first effect when a Richardson, C. J.— a distinctly royalist judge, sparing in various situations about issuing Prohibitions — appears to reverse earlier decisions and offer a great future in contract law to the courts of equity. Indeed, to see a conservative turn on the Bench after Coke’s dismissal in 1616 accords with the pattern throughout Prohibition law—except that it was only a turn, a few degrees without unanimity, hardly proportionate to the government’s extensive efforts to persuade and intimidate the courts into prohibiting less. In the matter of prohibiting equity, most appearances go to suggest that the events of 1616 made no difference. Although these figures are not carefully refined to allow for the ambiguities of many reports and for significances subtler than gross result, they are not likely to be seriously misleading: If one looks at contractual situations more complex than those suits for breach where there was a difference as to the interchangeability of Assumpsit and an equitable remedy, pre-1616 and post-1616 are scarcely distinguishable— five Prohibitions refused before 1616 and five after, six granted before and ten after. Prohibitions to prevent equity from meddling with real estate and infringing the “maxims” of property law were usually granted; ten were granted before 1616 and eleven after. Most attempts to protect ecclesiastical courts against equity came after 1616; in that period, six Prohibitions were granted and four refused. The rough appearances, at any rate, are that politics, royal interference with the judicial process, and generational change had little effect on the common law view of equity’s proper scope.