

“CORRUPT BARGAINS AND
UNCONSCIONABLE PRACTICES”:
THE EXPECTANT HEIR IN THE
SEVENTEENTH-CENTURY CHANCERY

BY

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Abstract

“Corrupt Bargains and Unconscionable Practices”: The Expectant Heir in Seventeenth-Century Chancery

Helen Saunders

The ‘expectant heir’ Chancery suits have been identified in modern case law, and much of the relevant academic literature, as the origin of the modern doctrine of unconscionable dealing. These suits typically saw young heirs seeking relief from improvident bargains entered into while, short of ready money, they waited to succeed to their estate. The usual relief granted by Chancery was to set aside the bargain on payment of the amount the borrower had actually received, plus reasonable interest, and the basis for this relief has been the subject of conjecture by legal scholars. One prevalent modern theory reflects the contemporary doctrine of unconscionability: that is, the court was protecting the perceived weakness (through youth and inexperience) of the heirs. Another explanation is that Chancery’s jurisdiction to relieve expectant heirs reflected the court’s concern with protecting the wealth – and thus status – of the ruling classes; however, both these explanations are drawn only from cases appearing in the printed reports, the earliest of which dates from 1663. In contrast, this thesis also analyzes unreported expectant heir suits – and similar suits involving non-heir profligate obligors – found in the enrolled decrees of Chancery, across the whole of the seventeenth century. As a consequence, and by adopting a contextual case study approach, assessing these suits in light of the historical, economic and social context in which they were brought, pleaded and decided, this thesis suggests a qualitatively different understanding of Chancery’s jurisdiction to relieve expectant heirs: that the seventeenth-century court of Chancery was at least as concerned with preventing the disruption of the normal operation of the culture of credit which existed at that time, as with the protection of individual obligors or the assets of the dominant classes.

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<i>Strydom v Vendside Ltd</i> [2009] EWHC 2130 (QB).....	12
<i>Thompson v Veysey</i> (1633) C 78/515, no. 4.....	A1.8, 82, 98
<i>Tirwhitt v Martyn</i> (1646) C 78/529, no. 12.....	A1.10, 83-85, 94
<i>Tryon v Stistead</i> (1681) C 5/568/42	57
<i>Twisleton v Griffiths</i> (1716) 1 P.Wms 310.....	19
<i>Varnee's Case</i> (1680) 2 Freeman 63; 2 Eq. Ca. Abr. 184	A1.18, 94, 125, 141
<i>Waller v Dale</i>	A1.15, 4, 21, 38, 83, 94, 108-109
(1 May 1676) C 33/246, f. 518	
(1677) Rep. Temp. Finch 295; 1 Chan. Cas. 276; Dickens, 8	

<i>Wharrow v. Browne, Oglander, Onslow, Woodroff, Clerk, Muschamp, Clerke; and Burton</i> (1685) C78/2030, no. 1	59
<i>Whitley v Price</i>	A1.24, 86, 94, 107, 145
(1688) 2 Vern. 78	
(24 July 1688) C 33/270, f. 745	
<i>Williams v Smith</i> (1671) 3 Chan. Rep. 75	A2.13, 80, 98, 103
<i>Wiseman v Beak</i> (1691) 2 Vern. 122; 2 Freeman 111	
.....	A1.25, 4, 19, 21-25, 52, 79, 85-86, 94, 109-110, 112
<i>Wood v Duke of Newcastle</i> (1683) C 78/1223, no. 4.....	A1.21, 98
<i>Woodward v Alport</i>	A2.3, 87, 94, 97, 109
(28 July 1612) C 33/121, f. 1209	
(25 October 1614) C 33/127, f. 91	
(31 January 1615) C 33/127, f. 765v	

Conventions

Spelling and capitalization have been modernised in all quotes, both from the Chancery records and proceedings and, where necessary, reported suits, for the sake of clarity. However, punctuation has not been modernised in quotes from the record, to avoid the risk of altering the original sense.

This thesis uses the terminology of ‘Chancery records and proceedings’ to refer to the various manuscript records held at The National Archives, which includes enrolled decrees (TNA class C 78), entry books (C 33), pleadings, depositions and masters’ reports. All C 78 enrolled decrees, and those C 33 entries dating from before 1651, were accessed through the Anglo-American Legal Tradition (AALT) digital archive assembled by Robert C. Palmer, Elspeth K. Palmer, and Susanne Jenks. Where required, pinpoint references for C 78 documents are given as membrane and AALT image numbers. An ‘A’ reference number is given at the first use of those suits which appear in the appendices.

The year is taken to have started on 1 January.

Chapter 1 Introduction

1.1 Introduction

The archetypal expectant heir suit found in the printed reports, dating from the late seventeenth century to the end of the nineteenth century, involved a young man of an aristocratic or landed gentry family seeking relief in Chancery from financially disadvantageous bargains which he had entered in order to obtain the money needed to maintain his place in society while he waited to inherit his family estate. These bargains commonly involved the heir entering a bond or other penal obligation to secure a loan of money or the provision of goods on credit, and were of a nature intended to circumvent the usury laws.¹ For example, many expectant heir suits involved entry into a post-obit. bond, in which no repayment was required from the obligor heir until a specified time after the death of the individual from whom he expected to inherit.² The contingent nature of the post-obit. bond – the lender would only be repaid if the young heir outlived his ancestor – put the transaction outside the scope of the usury statutes, allowing unscrupulous lenders to double, or even treble, their money in a relatively short time. Another common kind of bargain found in these suits involved the provision of goods on credit, secured by a bond or other penal instrument; the goods were then sold on by the heir in order to secure the ready money he needed, but all too often he discovered that the goods were worth only a fraction of the amount secured.

Typically, the plaintiff obligor heir alleged that his entry into such bargains was the result of sharp practice, such as ‘drawing in’, either on the part of the defendant lenders, or, in a significant number of cases, at the hands of a third party of a kind identified by Jones as ‘professional confidence men’.³ The young heir could run up large, and potentially ruinous, debts against his inheritance in this way, and it seems clear from previous examinations⁴ of the expectant heir suits appearing in the printed reports that by the later years of the

¹ By the beginning of the seventeenth century, the outright prohibition of the charging of interest had been lifted: in 1571 Elizabeth I restored (13 Eliz. I, c. 8) the allowable rate of ten percent which had been established in 1545 (37 Hen. VIII, c. 9), then repealed in 1551 (5&6 Edw. VI, c. 20). The legal rate dropped to eight percent in 1624 (21 Jac. I, c. 17), then six percent in 1660 (12 Car. II, c. 13). This remained the legal rate until 1713, when it was lowered to five percent (12 Ann st. 2, c.16). As will become apparent, the majority of the bargains discussed in this thesis afforded the lender a potential gain far beyond these legal rates, and so were structured to avoid the operation of the usury statutes. This was usually done by inserting a contingency, or through disguising what was in substance a loan contract as a sale of goods.

² ‘Inherit’ here is meant in its broadest sense, meaning both by testamentary disposition and succession, in the case of the transmission of some types of real property interests. For a more detailed discussion of the court’s treatment of expectancy, see Chapter 5, below at 5.3.1.

³ WJ Jones, *Elizabethan Court of Chancery* (Oxford, 1967), 433.

⁴ See, for example, LA Sheridan, *Fraud in Equity: A Study in English and Irish Law* (London, 1957), 134.

seventeenth century there was an established jurisdiction in Chancery to relieve these heirs from the consequences of their improvidence, although the basis for such relief is less clear.

Reported expectant heir suits – and modern courts’ and writers’ interpretation of them – have influenced the development of the modern doctrine of unconscientious dealing. Most of that influence has come from the leading eighteenth- and nineteenth-century cases of *Earl of Chesterfield v Janssen* (1751)⁵ and *Earl of Aylesford v Morris* (1873),⁶ although a handful of reported expectant heir suits dating from the later part of the seventeenth century have also played a role. This thesis briefly surveys the leading modern interpretations of the basis of Chancery’s jurisdiction to relieve expectant heirs, and references to seventeenth-century expectant heir suits in the case law of the eighteenth and nineteenth centuries, in order to place new information about this jurisdiction, discovered through the methodology described below, in the context of the previous understandings of expectant heir suits. In the course of that survey it will become apparent that, in relation to the jurisdiction to relieve expectant heirs in the seventeenth-century Chancery, these modern interpretations and legal principles have been drawn from a very small number of reported suits, dating only from the last two decades of the century. Additionally, no meaningful distinction has been made between the economic, social or historic contexts of the seventeenth-century expectant heir suits and those dating from later centuries, raising the possibility that modern understandings of the seventeenth-century expectant heir suits have been skewed by the influence of nineteenth-century contract law doctrines and theories. In contrast, this thesis expands the material available for analysis by adding a significant number of unreported suits from an earlier period than any previous analysis through the use of the manuscript Chancery records and proceedings – the first time these have been examined for this purpose – and, as far as possible, enhances that analysis by considering the suits in their economic, social and historical context.

The methodology adopted in this thesis, described below, endeavours to answer four key questions in relation to Chancery’s jurisdiction to grant relief to expectant heirs in the seventeenth century. The first of these is whether the jurisdiction referred to in the case law and academic literature as a jurisdiction to relieve expectant heirs was, rather, a jurisdiction to relieve both expectant heirs and non-heir profligates;⁷ the second, whether such a jurisdiction was already in existence at the beginning of the seventeenth century; the third asks what constituted the basis of the granting of relief in these suits; and the fourth considers the form of relief granted, and whether it remained consistent across the thesis period. A fifth, over-arching issue this thesis considers is whether modern explanations of the basis of the jurisdiction remain valid, when considered in light of the additional evidence

⁵ 2 Ves. Sen. 125.

⁶ L.R. 8 Ch. App. 484.

⁷ See Chapter 5, below at 5.1. As will be seen, the analysis undertaken in this thesis reveals no meaningful difference in the court’s treatment of expectant heir and non-heir profligate obligors. However, given that discussions of the jurisdiction in the modern case law and academic literature refer only to expectant heirs, for the sake of clarity that terminology is adopted when dealing with those discussions.

uncovered by the more comprehensive examination of the jurisdiction undertaken in this thesis.

1.2 Methodology

The type of legal history undertaken in this thesis can be described as classical legal history:⁸ although not purely doctrinal, nevertheless a significant focus of the analysis undertaken has been to investigate – and seek to reach conclusions regarding – the nature and development of the requisite elements for the granting of relief to expectant heir and non-heir profligate obligors by the court of Chancery over the course of the seventeenth century.⁹ The principal sources which have been used in determining this are the suits themselves, in keeping with the ‘internal’ nature of classical legal history; as Ibbetson explains,

[internal legal history] deals with law on its own terms, its sources are predominantly those thrown up by the legal process – in England, that is, the records of courts, law reports and legal treatises – and its practitioners are as often as not trained lawyers, or at least scholars whose discipline is law.¹⁰

This is often contrasted with what has been characterised as ‘external’ legal history, described by Swain as ‘that which looks at legal development from outside the legal system’,¹¹ and which involves the use of non-legal sources in order to view the law in its social or economic context. However, it is clear that in the broader development of legal historiography this distinction is not now absolute (if indeed it ever was): as Swain puts it, ‘[e]ven legally trained legal historians are perfectly well aware that legal development occurs within a social context’.¹² Accordingly, in this thesis non-legal sources have been used to provide contextual information, in order to obtain a deeper, and, as Threedy describes it, a ‘qualitatively different’,¹³ understanding of this equitable jurisdiction. This latter activity – and purpose – is framed with characteristic imagination by Simpson:

a reported case does in some ways resemble those traces of past human activity – crop marks, post holes, the footings of walls, pipe stems, pottery shards, kitchen middens, and so forth, from which the archaeologist attempts, by excavation, scientific testing, comparison, and analysis to reconstruct and make

⁸ Rose describes this form of legal history, largely concerned with the intellectual history of law, as having developed from the scholarship of F.W. Maitland: Jonathan Rose, ‘Studying the Past: The Nature and Development of Legal History as an Academic Discipline’ (2010) 31(2) *Journal of Legal History* 101, at 118.

⁹ The period examined in this thesis, referred to throughout as the seventeenth century, is more accurately 1596-1700. These parameters were chosen by reference to the tenures of lord chancellors/lord keepers, beginning with the tenure of Egerton LK (later Ellesmere LC) and ending with that of Somers LC.

¹⁰ David Ibbetson, ‘What Is Legal History a History Of?’ in Andrew Lewis and Michael Lobban (eds), *Law and History* (Oxford, 2004) 33, at 34.

¹¹ Warren Swain, *The Law of Contract, 1670-1870* (Cambridge, 2015), 6.

¹² *Ibid.*, 5.

¹³ Debora L Threedy, ‘Legal Archaeology: Excavating Cases, Reconstructing Context’ (2006) 80 *Tulane Law Review* 1197, at 1200.

sense of the past. Cases need to be treated as what they are, fragments of antiquity, and we need, like archaeologists, gently to free these fragments from the overburden of legal dogmatics and try, by relating them to other evidence, which has to be sought outside the law library, to make sense of them as events in history and incidents in the evolution of the law.¹⁴

This thesis therefore adopts a mixed methodology, involving both what can be termed a 'horizontal' approach, examining as many relevant suits as possible across the period, in order to determine whether patterns can be discerned in the treatment of such suits in Chancery in this period; and a 'vertical' approach, which takes individual suits and elicits as much contextual information about the parties and the litigation as possible from other sources. These two approaches then inform each other, providing a clearer picture of contemporary developments in, and experiences of, the jurisdiction. The necessary prerequisite for the first of these approaches was to find the largest possible number of Chancery suits involving expectant heir and non-heir profligate obligors dating from the seventeenth century, both reported and unreported.¹⁵

1.2.1 Finding the Suits

There are a number of reported seventeenth-century expectant heir¹⁶ cases, mostly dating from after 1680, which have been frequently used both in the case law¹⁷ and the academic literature¹⁸ and which are therefore reasonably well known. A further search of the printed

¹⁴ AWB Simpson, *Leading Cases in the Common Law* (New York, 1997), 12. Simpson resisted the temptation to name this book 'Legal Archaeology' – as he was encouraged to do by a colleague – and thus 'invent, or at least ... name, a new category of legal scholarship' (ibid). Although the author is much taken by this terminology, the more prosaic 'contextual case study' is used in this thesis.

¹⁵ It should be noted that no attempt has been made to undertake quantitative analysis in relation to the suits found: for discussion of the difficulties of 'case counting' in the context of seventeenth-century Chancery see David Waddilove, 'Mortgages in the Early-Modern Court of Chancery' (PhD, University of Cambridge, 2014), 32.

¹⁶ The research undertaken for this thesis has revealed that in some of the suits which have been discussed in the case law and literature as expectant heir suits, the obligor was in fact a non-heir profligate at the time of entering the bargain: see, for example, *Earl of Ardglass v Muschamp* (1684) 2 Chan. Rep. 266.

¹⁷ The suits used in the case law are *Waller v Dale* (1677) Rep. Temp. Finch 295; A1.15; *Nott v Hill* (1682) 2 Chan. Cas. 120; 1 Chan. Cas. 276; A1.19; *Earl of Ardglass v Muschamp* (1684) 2 Chan. Rep. 266; A2.14; *Wiseman v Beak* (1691) 2 Vern. 122; 2 Freeman 111; Dickens 8; A1.25; and the four reported Berney cases, *Berry v Fairclough* (1681) (included in a note to *Davis v Duke of Marlborough* (1819) 2 Swans 108 and later published in DEC Yale (ed), *Lord Nottingham's Chancery Cases* (London, 1961) vol II (Selden Society Annual Series, vol 79), 868, hereafter cited as 79 Selden Soc. 868; note also that for the sake of consistency with the use of this suit in other sources, this thesis retains the incorrect plaintiff name of Berry); *Barny v Beak* (1683) 2 Chan. Cas. 136; *Barney v Tyson* (1684) 2 Ventris 359; and *Berney v Pitt* (1687) 2 Vern. 14, 2 Chan. Rep 396. Throughout this thesis – with the exception of the Berney case study in Chapter 4 – the various Berney suits are treated as one, on the basis that the significant features of all the bargains from which Berney sought relief are almost identical, and to treat them individually would distort the results of the analysis contained in Chapters 5 and 6. Additionally, the four reported Berney cases all deal with the same set of bargains.

¹⁸ In addition to the suits listed in n 17 above, the most frequently used suits in the academic literature are *Fairfax v Trigg* (1677) Rep. Temp. Finch 314; A1.14; *Pawlett v Pleydell* (1679) 79 Selden Soc. 739; A1.17; *Batty v Lloyd* (1683) 1 Vern. 142; 1 Eq. Ca. Abr. 276; A1.20; *Bill v Price* (1687) 1 Vern. 467; A2.16; and *Lamplugh v Smith* (1688) 2 Vern. 77; A1.23.

reports included in the English Reports series, other printed reports,¹⁹ and the manuscript reports contained in the *English Legal Manuscripts* series,²⁰ was undertaken in order to find any further reported expectant heir and non-heir profligate suits from the thesis period. In addition to the ten frequently-used reported seventeenth-century suits, a further seven were found: of this total of seventeen reported suits, twelve involved expectant heirs, the remainder non-heir profligates. The earliest reported suit found dated from shortly after the Restoration.²¹ In order to obtain the fullest possible picture of the relief granted to expectant heirs in the seventeenth century, therefore, it was necessary to find as many relevant unreported suits as was practicable, given the time constraints of the PhD project.

An enormous number of seventeenth-century Chancery records have survived, including enrolled decrees, entry books of decrees and orders, pleadings, depositions and masters' reports, and are held at The National Archives (TNA), providing a rich repository of information about suits brought and adjudicated in that period.²² The chief difficulty for the researcher is finding a way to efficiently search these records for the subject matter with which the suits contained in them deal. Bearing this difficulty in mind, it was decided to begin the search for unreported suits in the enrolled decrees, known as the C 78s after their TNA catalogue class. The C 78s are not a comprehensive record as not all final decrees were enrolled; Horwitz thinks it likely that only a minority of decrees were enrolled, giving the numbers for the decades of 1627-36 and 1685-94 as 180 and 170 respectively.²³ Additionally, suits that were not decreed could not be enrolled.

Nevertheless, the C 78s are a valuable resource in that they contain the substance of the pleadings and a brief summary of any interlocutory proceedings, as well as the final decree made by the court. Additionally, full digital coverage of these records is available.²⁴ Most useful for the purposes of this thesis, however, is the fact that calendars of these enrolled decrees have been compiled, giving the date of the hearing, names of the parties, and, usually, a brief description of the subject matter of the suit.²⁵

¹⁹ For example, WH Bryson (ed), *Reports of Cases in the Court of Chancery from the Time of King James II* (Indianapolis, 2015). Additionally, this thesis treats as reported those suits noted by Nottingham LC and appearing in Yale, above n 17.

²⁰ JH Baker, *English Legal Manuscripts* (Zug, 1978).

²¹ *Godscall v Walker* (1663) 2 Freeman 169; Nelson 84; 3 Chan. Rep. 10; A2.12.

²² In addition to providing a source of previously unknown suits, the Chancery records were also used to supplement the information found in reported suits. In exceptional circumstances, reference was also had to the pleadings or the relevant C 33 entries to clarify information contained in unreported suits found in the C 78s where it was deemed necessary for further clarity, although this was rarely necessary, as the substance of the pleadings and interlocutory proceedings are already included in the enrolled decrees. The records were also used to provide contextual information relating to parties' other activities in Chancery where that was appropriate, and as a source of additional biographical information.

²³ Henry Horwitz, 'Record-Keepers in the Court of Chancery and Their "Record" of Accomplishment in the Seventeenth and Eighteenth Centuries' (1997) 70(171) *Historical Research* 34, at 45.

²⁴ Images for the decree rolls for the entire seventeenth century are available at the Anglo-American Legal Tradition digitisation project website at <<http://aalt.law.uh.edu/>> accessed 11 February 2019.

²⁵ These calendars are more properly known as the 'chronologists'. As the enrolled decrees were not necessarily entered in chronological order, a number of researchers over the years have created

The search method adopted was initially to be guided by the descriptions provided by the calendars; these were searched for entries relating to ‘debts’, ‘bonds’ and/or ‘loans’, in order to identify as many of the entries dealing with loan transactions across the thesis period as possible. In addition, entries in which there was any other indication that the suit involved loans – for example, the description of parties as ‘creditors’ – were also included.²⁶ This produced 894²⁷ ‘possibles’ – that is, entries that might possibly involve expectant heir or non-heir profligate bargains – across the thesis period. The percentage of possibles to total entries for each year was then calculated, in order to ensure consistency of coverage across the time period as a whole. Concern with consistency also prompted the calculation of the percentage of calendar entries per year for years in which a significant proportion of entries carried no description. This was a particular issue from 1666 onwards, where entries without description ranged from just over ten percent per year, to over sixty percent per year later in the century. Where necessary, entries without description were selected randomly as possibles within the affected years, on the basis that a larger base number of entries would produce a more comprehensive sample, even if some of those entries turned out not to be relevant.

Given that this search method relied heavily on the descriptions in the calendars, a ‘control’ search was also undertaken. A random selection of fifty-three decrees from across the 105 years of the thesis period was made from the C 78 calendars, but without reference either to parties’ names or to descriptions of the subject matter. The fifty-three decrees were then examined: five suits were of peripheral interest; the rest were not at all relevant. It was consequently concluded that where the calendar did have a description for the entry it was usually accurate, although not always very detailed. The reliance on the calendar descriptions in compiling the 894 possibles, therefore, was considered to be a valid method for finding relevant loan transactions.

Twenty-six relevant suits were found amongst the enrolled decrees: thirteen involving expectant heir obligors and a further thirteen involving non-heir profligate obligors. The earliest expectant heir suit found dated from 1608,²⁸ the earliest non-heir profligate suit from 1596.²⁹

chronological listings of the entries: (‘Chancery Final Decrees’, *Anglo-American Legal Tradition* at <http://aalt.law.uh.edu/C78_79.html> accessed 11 February 2019).

²⁶ Business to business transactions were excluded at this stage, on the basis that the types of suits being sought involved obligors contracting in a personal capacity only.

²⁷ Initially, because the examination of 894 decrees seemed a task beyond the bounds of the PhD project, a sample of approximately forty percent was taken. The figure of forty percent was chosen through calculating how long each record would take to examine, and allowing a period of six months’ work to perform this part of the project. Suits were then selected according to a numerical pattern designed to provide a relatively even and representative chronological spread across each decade of the thesis period, resulting in a sample of 41.2 percent overall (378 suits). However, after a significant number of decrees in this sample were examined and either transcribed or noted, it became apparent that this could be done more quickly than at first anticipated: accordingly, all of the original 894 ‘possible’ suits were ultimately examined.

²⁸ *Neaste v Poole* (1608) C 78/176, no. 12; A1.1.

²⁹ *Griffin v Sayer* (1596) C 78/102, no. 8; A2.1.

The other main record of Chancery proceedings, the entry books (TNA catalogue class C 33), while comprehensive in a way that the C 78s are not, are also much more time-consuming to search. The only finding aids for the C 33s are contemporary alphabets, in which suits are listed by the name of the plaintiff; consequently, a search for suits based on subject matter requires the examination of each individual entry. It was not feasible to read the whole of the entry books for the thesis period, due to the time constraints of the PhD project; however, a sample of the C 33s was taken to try to discover further expectant heir or non-heir profligate obligor suits not found in the C 78s. This sample involved examining three ‘slices’ of fifty folios each, from the beginning, middle and end of the entries for Michaelmas term in the B books³⁰ of 1630, 1640, 1650, 1660, 1670 and 1680; one suit of relevance was found, although it was later discarded as the plaintiff obligor was granted relief on grounds unrelated to the concerns of this thesis.³¹ In employing this kind of sampling, serendipity is required: this is illustrated by the fact that the sole suit included in the thesis which appears only in the entry books, *Earl of Lincoln v Fuller* (1618),³² was not discovered through the sampling process but was brought to the author’s attention by Dr Neil Jones, who found it while looking for something else.

The overall search process described above resulted in a total of forty-four suits, as set out in Table 1.1:

Table 1.1: Reported and Unreported Suits, by Obligor Type

Obligor Type	Reported	Unreported		Both
		C 78	C 33	
Expectant heir	12	13	1	26
Non-heir profligate	5	13	0	18
Total	17	26	1	44

These forty-four suits form the basis of the analysis undertaken in the thesis; this is the largest number of expectant heir (and non-heir profligate) suits examined to date in relation to the existence, content, and basis of Chancery’s jurisdiction to relieve expectant heirs in the seventeenth century.³³ In addition to this horizontal coverage, this thesis also applies a vertical, contextual case study, approach to as many of these suits as possible.

1.2.2 Contextual Case Studies

As mentioned above, a contextual approach involves eliciting as much background information as possible about the circumstances of individual suits. Amassing all this

³⁰ During the period covered by this sample, the B books contained only the second half of the alphabet, by name of plaintiff. This was not considered to make any material difference to the sample.

³¹ *Earl Rivers v Browne* (24 October 1650) C 33/196, f. 8v.

³² C 33/135, f. 90; (28 June 1617) C 33/131, f. 1180; A1.4.

³³ A brief account of the facts, decision, and relevant contextual information of each of these suits appears in the Appendices.

information, however, as Threedy points out, is not sufficient.³⁴ Although possibly deeply gratifying to the researcher's 'vulgar curiosity',³⁵ the true purpose of contextual case study must be to make sense of this information in a way that is both coherent and which contributes to a deeper understanding both of individual cases and their subsequent importance to the development of legal doctrine. In this thesis, the contextual aspect takes two forms. The first of these is the two case studies which constitute Chapters 3 and 4: in each of these chapters the family background, underlying circumstances of the bargain (or bargains) from which relief was sought, and any other relevant biographical or contextual information about an individual obligor is investigated in detail. One of the key considerations in selecting these individuals was to facilitate comparison between the two case studies, thus allowing for the drawing of conclusions in relation to the content and development of the jurisdiction. Accordingly, one case study involves an expectant heir obligor, and the other a non-heir profligate obligor; for the same reason the first of these dates from the 1680s, when the jurisdiction appears to have been well-established, and the second from the 1620s, a period not yet studied in this respect. Contextual information is drawn from legal sources – such as the records of other proceedings in Chancery – and non-legal sources, including parish registers, genealogical reference books (for example, peerages and baronetages), geographical histories and gazetteers, institutional registers (for example, of the universities of Cambridge and Oxford, and the Inns of Court), general reference works such as the *Oxford Dictionary of National Biography*, and privately published family histories.³⁶

The second form of contextual study contained in the thesis is the application of the same process, although in less detail, to every expectant heir and non-heir profligate suit discussed. As well as providing a more accurate picture of the individual obligors, their bargains and their family backgrounds in general, the contextual approach applied here also informs the doctrinal analysis: for example, in some instances the identification of obligors as expectant heirs or non-heir profligates could be made through biographical research, where that identification had either not been made in the reports or decrees, or had been made incorrectly.³⁷

The contextual approach also enables the bargains examined in this thesis, and the litigation to which they led, to be viewed as taking place within a wider society; in this sense, the examination of legal doctrine undertaken is understood as operating within the

³⁴Debora L Threedy, 'Unearthing Subversion with Legal Archaeology' (2003) 13 *Texas Journal of Women and the Law* 133, at 135.

³⁵ Simpson, above n 14, 9.

³⁶ Additionally, in the case of the individual obligor who features in Chapter 3, Richard Berney, a personal visit was made to his grave in Reedham, Norfolk. This proved fortunate, as a published mis-transcription of the inscription on Berney's tomb in the aisle of the parish church gives an incorrect age at death: see Chapter 3, below at 3.2.1.

³⁷ For discussion of the relevance of obligors' failure to identify themselves as expectant heirs in their pleadings, see Chapter 5, below at 5.2.2.2.

early modern economic and social context that Muldrew describes as a ‘culture of credit’.³⁸ This form of contextualisation allows a more nuanced view of the court’s concern with bargains made with expectant heir and non-heir profligates, which, as will be seen, positions what could be understood to be purely questions of legal doctrine – for example, the requirement for the presence of ‘fraud’ before relief is granted – within the broader operation of societal norms.

1.3 Summary

The horizontal and vertical approaches adopted by this thesis provide a more detailed, and nuanced, examination of Chancery’s jurisdiction to relieve expectant heirs – and, as will be seen, non-heir profligates – in the seventeenth century than has previously been undertaken. While largely concerned with describing and analyzing the nature of this jurisdiction in its own right, and on its own terms, the significant role of the expectant heir suits in the development of the modern doctrine of unconscionable dealing cannot be disregarded; accordingly, Chapter 2 of the thesis surveys the use of expectant heir suits in the academic literature generally, and the two main modern interpretations of Chancery’s jurisdiction to relieve expectant heirs put forward in that literature. The use of seventeenth-century expectant heir suits in the case law of succeeding centuries is then discussed, before some problems with the use of the seventeenth-century suits in both the academic literature and the case law are raised.

Chapters 3 and 4 then undertake contextual case studies of a late seventeenth-century expectant heir obligor and an early seventeenth-century non-heir profligate obligor respectively, examining the circumstances of the bargains for which they sought relief, relevant biographical and family detail for both the individual obligors and the other parties to their suits, and analysing both the relief granted, and any indications of the basis for that relief. Drawing on that analysis, as well as on that undertaken for all the reported and unreported suits discovered for the thesis, Chapter 5 goes on to discuss the development of the jurisdiction to relieve expectant heir and non-heir profligate obligors, the characteristics of such obligors, and the type of relief granted to them. Chapter 6 then further draws together the results of the horizontal and vertical approaches of the thesis in order to discuss the basis of the jurisdiction. Through this process this thesis – in addition to providing a deeper understanding in relation to the suits with which it deals – considers Chancery’s jurisdiction to relieve expectant heirs and non-heir profligates within the wider economic context which existed in the seventeenth century, thus suggesting a more nuanced interpretation of the basis of that jurisdiction than has previously been seen in either the modern case law, or the academic literature.

³⁸ Craig Muldrew, *The Economy of Obligation* (Basingstoke, 1998). See discussion in Chapter 6, below at 6.3.1.

Chapter 2 Later Perceptions of the Expectant Heir Suits

2.1 Introduction

The first section of this chapter examines modern interpretations of the basis for the jurisdiction to relieve expectant heirs.³⁹ The second section then briefly explores the use of seventeenth-century expectant heir suits⁴⁰ in the eighteenth and nineteenth centuries, and the chapter concludes by raising some of the methodological and conceptual constraints which have influenced and shaped modern perceptions of the jurisdiction to relieve expectant heirs.

2.2 Modern Explanations of the Basis of the Jurisdiction

2.2.1 Introduction

This section of the thesis surveys modern understandings of the basis of the jurisdiction to grant relief to expectant heirs, as revealed by the case law and academic literature on the doctrine of unconscionable dealing. While this does not purport to be a comprehensive review of either cases or literature, the examples of each discussed in this section are sufficient to show that there are two main interpretations of the expectant heir suits found in the modern academic literature: the first, that they can be explained according to the present understanding of the doctrine of unconscionable dealing (that is, the unconscientious taking advantage of a special disability); the second, that they represent an attempt by the court to preserve the assets and prestige of the ruling classes. The modern case law overwhelmingly reflects the first of these interpretations, characterising the relief given by Chancery to expectant heirs as of the same nature as (and indeed one of the sources of) the court's concern with protecting the weak from exploitation. While the line of known expectant heir suits on which these interpretations are based stretches from the late seventeenth to the late nineteenth centuries, later in this thesis⁴¹ it is argued that a more nuanced – and historically informed – explanation of the basis for relief in the seventeenth century suits is that the seventeenth-century court's concern in these suits was with fraud,

³⁹ As mentioned above in Chapter 1, one of the key questions in this thesis is whether the jurisdiction also included non-heir profligates. As discussion of the jurisdiction in the modern case law and academic literature refers only to expectant heirs, however, that is how the jurisdiction is discussed in this chapter.

⁴⁰ It must be borne in mind that only reported seventeenth-century expectant heir suits appear in later cases, and the academic literature; for that reason, as will be seen, only a fraction of the suits with which this thesis deals have been used in the development of the jurisdiction to relieve expectant heirs, and, by extension, the modern doctrine of unconscionable dealing.

⁴¹ See Chapter 6, below at 6.3.1.

at least partly because fraud disrupted the operation of the early modern ‘culture of credit’ described by Muldrew.⁴² In this analysis, both these alternate modern explanations are seen to be merely different species of fraud. For the purposes of this chapter, however, the modern explanations are set forward in the terms used by their proponents, in order to show that the current explanations of the jurisdiction to relieve expectant heirs – at least as it existed in the seventeenth century – do not fully account for certain aspects of that jurisdiction which can only be revealed through a process of intensive, contextual analysis such as that undertaken in this thesis.

2.2.2 Modern Case Law

In order to have a contract set aside on the grounds of unconscionable dealing in modern English law, three⁴³ requirements must be satisfied. These are summarised in *Chitty on Contracts* as:

first ... that the bargain must be oppressive to the complainant in overall terms; the second [requirement is] that [the doctrine of unconscionable dealing] may only apply when the complainant was suffering from certain types of bargaining weakness; and the third that the other party must have acted unconscionably in the sense of having knowingly taken advantage of the complainant.⁴⁴

While there is discussion in the cases as to the exact nature and content of each of those requirements,⁴⁵ there appears to be no dispute that the purpose of the doctrine is to protect a party to a contract who is suffering a ‘special disability’ (to use the Australian terminology) from exploitation by the other party. It is within that conceptual context, therefore, that references to the expectant heir suits are found in modern cases. For example, in the key case of *Alec Lobb (Garages) Ltd v Total Oil Ltd*,⁴⁶ Millett QC (sitting as a deputy high court judge) placed the expectant heirs firmly within this framework:

In the development of the equitable jurisdiction to relieve against fraud and oppression, there was a natural tendency to categorise cases by reference to the relationship between the parties or *the special situation of the weaker party*. Thus equity frequently intervened to protect the expectant heir, the reversioner, and the mortgagor. As the law has progressed, however, it has become possible to analyse the basis of the court's jurisdiction and the criteria for its exercise. It can now be seen that all those cases are merely particular examples of situations in which one party may be unfairly exploited by the other.⁴⁷

⁴² Muldrew, above n 38, 3.

⁴³ A fourth element as to which party carries the onus of proving the bargain fair and reasonable is also sometimes included: see, for example, *Strydom v Vendside Ltd* [2009] EWHC 2130 (QB).

⁴⁴ Hugh Beale, *Chitty on Contracts* (London, 33rd ed, 2018), [8-135].

⁴⁵ For example, what constitutes the sort of weakness for which relief may be granted, see *Boustany v Pigott* (1993) 69 P&CR 298.

⁴⁶ [1983] 1 All ER 303.

⁴⁷ *Ibid*, at 99 (emphasis added).

A more detailed example of the modern understanding of the expectant heir suits is provided by the leading Australian case of *Commercial Bank of Australia v Amadio* (1983).⁴⁸ This decision was a watershed moment in the development of the modern doctrine of unconscionable dealing in Australian law, and while there are also commonwealth and state statutory regimes dealing with aspects of unconscionability,⁴⁹ this decision remains the key articulation of the equitable principle of relief from unconscionable dealing in Australian law.⁵⁰ This case is used as an illustration of the modern doctrine of unconscionable dealing – and the role of expectant heirs in its development – because the doctrine of unconscionable dealing has gone further, and in a more liberal direction, in Australia than in England and Wales.⁵¹ Despite this, the underlying conception of the purpose of the doctrine is the same in both jurisdictions.

Commercial Bank of Australia v Amadio dealt with an elderly immigrant couple, the Amadios, with a limited grasp of written English who entered a mortgage agreement with the Commercial Bank, to provide a guarantee for the bank's provision of credit to their son's building company. At the time of entering the agreement the Amadios were unaware that their son's apparently prosperous company was in financial difficulties. The bank, on the other hand, was demonstrably aware of the company's situation; it had been selectively honouring cheques for the Amadios' son, providing at least the appearance of solvency in the company's dealings with third parties. Additionally, the Amadios had been told by their son that the mortgage was limited to the amount of \$50,000, and a period of six months; in fact, it was unlimited both as to amount and duration. The Amadios trusted their son and relied on him; they accordingly signed, without reading, the lengthy document presented to them by the manager of the bank's local branch. The only explanation of the content of the document given by the bank manager was his correction of Mr Amadio's statement that there was a time limit of six months, informing them both of the true duration.

When the bank later called on the guarantee and its true nature was revealed, Mr and Mrs Amadio sought relief in the Supreme Court of South Australia, with the matter eventually making its way to the High Court. The majority of Mason, Deane and Wilson JJ found for the Amadios on the basis of unconscionability, and of the three majority judges, the judgments of Mason J and Deane J both made reference to the expectant heir cases.⁵²

⁴⁸ 151 CLR 447. Despite this, the underlying conception of the purpose of the doctrine is the same in both jurisdictions.

⁴⁹ For example, the Contracts Review Act 1980 (NSW); Parts 2-2 and 2-3 of the Australian Consumer Law, located in Schedule 2 of the Competition and Consumer Act 2010 (Cth); and the fair trading legislation enacted in the various states.

⁵⁰ The later High Court of Australia decision in *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, while requiring a higher threshold of knowledge of the obligor's special disability on the part of the obligee, and introducing the requirement of a 'predatory' aspect to the obligee's behaviour in the context of commercial contracts, does not fundamentally change the principles of unconscionable dealing established in *Amadio*.

⁵¹ Beale, above n 44, [8-142].

⁵² The judgment of the third majority judge, Wilson J, after stating his agreement with the reasoning of Deane J, discussed only the dealings of the bank's representative with the Amadios.

Mason J's conception of the basis for relief is widely held⁵³ to be the bedrock of the decision:

... relief on the ground of 'unconscionable conduct' is usually taken to refer to the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage, e.g., a catching bargain with an expectant heir or an unfair contract made by taking advantage of a person who is seriously affected by intoxicating drink.⁵⁴

Clearly, the understanding of the expectant heir cases expressed here is of a species of special disability: the weakness of the obligor heir's position contrasted with the unconscientious taking advantage by the obligee lender. This interpretation was shared by Deane J:

The jurisdiction of courts of equity to relieve against unconscionable dealing developed from the jurisdiction which the Court of Chancery assumed, at a very early period, to set aside transactions in which expectant heirs had dealt with their expectations without being adequately protected against the pressure put upon them by their poverty ...⁵⁵

This statement from Deane J immediately precedes a passage in which he laid out the basis of the jurisdiction: the special disability of the one party, and an unconscientious taking of advantage by the other.⁵⁶ This characterisation of the expectant heir cases was further underlined by Deane J's citation of a passage from *Blomley v Ryan* (1956),⁵⁷ in which McTiernan J cited Lord Hardwicke's third kind of fraud in the leading expectant heir case of *Earl of Chesterfield v Janssen* (1751),⁵⁸ that of taking 'surreptitious advantage'⁵⁹ of the weakness of another. Evidently, then, the understanding of the basis of the jurisdiction to relieve expectant heirs displayed in *Commercial Bank of Australia v Amadio* reflects – and represents – the broader view taken in the modern case law that Chancery, in granting relief to expectant heirs, intended to protect 'weak' individuals exploited by unscrupulous and calculating money lenders.

2.2.3 Academic Literature

This understanding of the relief granted to expectant heirs as based on the special disability of the heir is also frequently encountered in the academic literature. For example, Sir

⁵³ See, for example, *Boustany v Pigott* (1993) 69 P&CR 298; and *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 at 438.

⁵⁴ 151 CLR 447 per Mason J at 461.

⁵⁵ *Ibid*, per Deane J at 474. In this passage Deane J refers to the case of *O'Rorke v Bolingbroke* [1877] 2 AC 814 at 822, and paraphrases the judgment of Hatherly LJ, who dissented by finding that the obligor heir should be granted relief from the transaction chiefly on the grounds that the consideration was inadequate, and that he had received no independent advice.

⁵⁶ 151 CLR 447 per Deane J at 474.

⁵⁷ *Blomley v Ryan* (1956) 99 CLR 362 at 392.

⁵⁸ 2 Ves. Sen. 125 at 155-156.

⁵⁹ *Ibid*, at 156.

Anthony Mason, writing on the subject in 1994, views the line of expectant heir cases unequivocally in terms of special disability:

The power to grant relief on [the ground of unconscionability] was in the past largely confined to cases in which the party seeking relief was a person suffering from some special distinct disability or disadvantage, e.g. the expectant heir...⁶⁰

While this should, perhaps, come as no surprise, given the judgment of Mason J (as he then was) in *Amadio*, other writers have also identified the concern of the courts in such cases as relating to the protection of those unable to protect themselves due to some disability. Waddams, for example, in his seminal 1976 article 'Unconscionability in Contract Law' discusses expectant heirs (albeit briefly) under the heading 'Protection of Weaker Parties'; his overall explanation of the underlying principle of unconscionability rests specifically on the concept of inequality of bargaining power, and it is apparent that he classes the expectant heirs as an example of weaker parties to a transaction.⁶¹ Similarly, Bigwood, in discussing the role of the expectant heir cases in the development of the unconscionability jurisdiction, asserts that '[e]arly unconscionability doctrine was concerned almost exclusively with protecting a person because of his or her own weaknesses'.⁶² Getzler also identifies protection of weakness as a key concern in these cases:

Chancery's intrinsic jurisdiction to protect the vulnerable grew to embrace lunatics, children, women, sailors, expectant heirs, and other parties regarded as incapable of contracting rationally.⁶³

The elements of this weakness – that is, the characteristics of the expectant heir which are perceived to constitute a special disability – are most frequently identified in the literature as twofold: firstly, the youth and/or inexperience of the heir;⁶⁴ and secondly, the position of financial necessity in which he found himself.⁶⁵ The necessary corollary to this position of weakness, in this interpretation of the significance of the expectant heir cases, is the advantage taken by the other party of that disability,⁶⁶ which results in substantive unfairness.

⁶⁰ Sir Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238, at 248-249.

⁶¹ Stephen Waddams, 'Unconscionability in Contract Law' (1976) 39 *Modern Law Review* 369, at 385.

⁶² Rick Bigwood, *Exploitative Contracts* (Oxford, 2003), 233.

⁶³ Joshua Getzler, 'Chancery Reform and Law Reform' (2004) 22(3) *Law and History Review* 601, at 607.

⁶⁴ See, for example, Sheridan, above n 4, 142; JL Barton, 'The Enforcement of Hard Bargains' (1987) 103 *Law Quarterly Review* 118, at 133.

⁶⁵ See, for example, Barton, above n 64, at 133; AH Angelo and EP Ellinger, 'Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States' (1992) 14 *Loyola of Los Angeles International and Comparative Law Review* 455, at 461; John Phillips, 'Protecting Those in a Disadvantageous Negotiating Position: Unconscionable Bargains as a Unifying Doctrine' (2010) 45(3) *Wake Forest Law Review* 837, at 840.

⁶⁶ See, for example, Waddams, above n 61, at 386; Barton, above n 64, at 133; Angelo and Ellinger, above n 65, at 461.

MacMillan, in an examination of the leading nineteenth-century expectant heir case of *Earl of Aylesford v Morris* (1873)⁶⁷ – although still grounding her explanation of the basis of the jurisdiction in the concept of the protection of the weak⁶⁸ – places the expectant heir cases squarely within the economic and social context provided by the strict settlement.⁶⁹ In this analysis, the ‘weakness’ of the heir stemmed from necessity, arising both from the degree of monetary control exercised by the heir’s parent, and also, in the nineteenth century at least, increased parental longevity.⁷⁰ However, MacMillan also posits that Chancery was at least as concerned with protecting the heir’s family as it was with protecting the heir.⁷¹ There were two aspects to this concern: certainly, ‘the depredations of an expectant heir could destroy his family fortunes’,⁷² but also the non-parental money made available to the heir through these transactions was seen to encourage disobedience.⁷³ The importance given to the protection of the family can be seen, MacMillan suggests, through the instances of cases in which transactions with heirs were sanctioned by the court, either because the transaction was made within the family (or with family approval), or because the heir later affirmed the transaction after receiving his expectancy.⁷⁴ The explanation offered by MacMillan for the court’s denial of relief in this latter situation is that the heir at that point was no longer under necessity, and had ‘full information’.⁷⁵

This latter aspect of Macmillan’s view of the jurisdiction – the protection of the family – is also reflected in a strand of the literature that this thesis refers to as the economic preservation analysis. In this analysis, the expectant heir decisions rest on the concern of the court with the potentially disastrous effect such bargains with improvident heirs could have on landed families. As Clark says, they were

not necessarily cases in which the courts were concerned with ensuring justice inter partes. Rather, they reflect a desire to uphold the unity and integrity of estates, that is, the need to ensure that a testator was not deceived into leaving landed estates to an heir who would promptly part with them in favour of a creditor.⁷⁶

Other commentators to take this view include Dawson, whose characterization of the decisions of Chancery in the expectant heir cases as ‘the protection of a landed aristocracy

⁶⁷ LR 8 Ch. App. 484.

⁶⁸ Catharine MacMillan, ‘Earl of Aylesford v Morris (1873)’ in Paul Mitchell and Charles Mitchell (eds), *Landmark Cases in Equity* (Oxford, 2014) 329, at 329.

⁶⁹ *Ibid.*, at 329-330.

⁷⁰ *Ibid.*, at 330.

⁷¹ *Ibid.*, at 332. Lobban also shares this view of the court’s twofold concern: ‘Chancery was seeking to protect the aristocratic family, as much as the individual in question’: Michael Lobban, ‘Contractual Fraud in Law and Equity, c.1750-c.1850’ (1997) 17 *Oxford Journal of Legal Studies* 441, at 451.

⁷² MacMillan, above n 68, at 332.

⁷³ *Ibid.*, at 333.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*, at 334.

⁷⁶ Robert W Clark, *Inequality of Bargaining Power: Judicial Intervention in Improvident and Unconscionable Bargains* (Toronto, 1987), 3. Although Clark uses the term ‘testator’ this discussion does not appear to be limited to transmission of property by will.

against its own improvidence',⁷⁷ in particular, has proved influential with later writers.⁷⁸ Dawson is uncompromising in his analysis of these decisions: '[t]he motive was clear – to preserve for a dominant class the economic resources on which its prestige and power depended.'⁷⁹ Posner, following in Dawson's path, expands on the nature of the difficulty. According to this analysis,

the problem of expectant heirs beginning in sixteenth-century England ... involved the adult children of the gentry, who felt compelled to maintain a lavish standard of living and would often borrow on their expectancies if their families refused to subsidize their lifestyle. When heirs defaulted, important families lost their future wealth and power to common businessmen.⁸⁰

The perceived outcome of this was, of course, that 'allowing heirs to take on debt and to default would undermine the social and political structure of the country'.⁸¹ In addition to this undesirable possibility on the larger societal stage, Clark points out the courts' concerns on a more personal level:

the possibility of relatives of the heir being ejected from an estate, as a result of the heir's improvidence, was a prospect too horrible for the courts to contemplate.⁸²

There is also an acknowledgement in some of the literature that the basis of the jurisdiction to relieve expectant heirs shifted with economic developments over the course of the four or five hundred years in which the jurisdiction is understood to have existed. For example, Atiyah, while acknowledging that there was 'an element of class protection in the rules about expectant heirs',⁸³ posits that because by the eighteenth century 'reversions and expectancies had acquired ... a reasonably measurable and objective value'⁸⁴ and other market developments such as life insurance had taken the risk out of such dealings, the jurisdiction to relieve expectant heirs from that period onwards was more concerned with the protection of the weak:

⁷⁷ John P Dawson, 'Economic Duress - an Essay in Perspective' (1947) 45(3) *Michigan Law Review* 253, at 267.

⁷⁸ See, for example, Gregory S. Alexander, 'The Dead Hand and the Law of Trusts in the Nineteenth Century' (1985) 37 *Stanford Law Review* 1189, at 1247; and Kevin M Teeven, 'Decline of Freedom of Contract since the Emergence of the Modern Business Corporation' (1992) 37(1) *Saint Louis University Law Journal* 117, at 137.

⁷⁹ Dawson, above n 77, at 268.

⁸⁰ Eric A Posner, 'Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract' (1995) 24(2) *The Journal of Legal Studies* 283, at 314. Posner, however, also asserts that as the jurisdiction developed throughout the nineteenth century, the focus of the court moved more towards the idea of what is described in this thesis as the special disability analysis (*ibid*, at 315).

⁸¹ *Ibid*.

⁸² Clark, above n 76, 7.

⁸³ PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, 1985), 172.

⁸⁴ *Ibid*, at 172.

the young expectant heirs of eighteenth-century England very often did not know about [these market developments] at all. Like the common sailors, they had very little idea of the present value of a future right, and many of them did not even appreciate that they could apply for professional advice to discover what they did not know themselves. Inevitably, they fell a prey to those who understood how to value future rights, and frequently made dreadfully disadvantageous bargains.⁸⁵

2.3 Seventeenth-Century Suits in the Eighteenth and Nineteenth Centuries

2.3.1 Introduction

This section canvasses references to seventeenth-century expectant heir suits⁸⁶ in cases decided in the eighteenth and nineteenth centuries. Although no explicit consideration of seventeenth-century expectant heir suits in twentieth- and twenty-first century reported cases on unconscionable dealing has been discovered, a number of the more significant modern cases cite the eighteenth-century leading case of *Earl of Chesterfield v Janssen*,⁸⁷ the nineteenth-century leading case of *Earl of Aylesford v Morris*,⁸⁸ or both.⁸⁹ As will be seen, several seventeenth-century expectant heir suits were considered in *Earl of Chesterfield v Janssen*, and, although *Earl of Aylesford v Morris* does not cite any seventeenth-century expectant heir suits, it does cite *Earl of Chesterfield v Janssen*. Given the precedential nature of the development of case law, therefore, it is possible to trace the influence of, in particular, *Nott v Hill* (1683),⁹⁰ *Earl of Ardglass v Muschamp* (1684),⁹¹ *Wiseman v Beake* (1690)⁹² and the reported cases arising from the numerous and disastrous bargains entered by Richard Berney,⁹³ on the modern doctrine of unconscionable dealing through their use in the eighteenth and nineteenth centuries.

2.3.2 Seventeenth-Century Expectant Heirs in the Eighteenth Century

The first use of seventeenth-century expectant heir suits found in eighteenth century reported cases is in *Twisleton v Griffiths* (1716),⁹⁴ in which Cowper LC, as we are informed by the reporter, ‘grounded his opinion, chiefly, upon the case of *Berney v Pitt*’.⁹⁵ In setting

⁸⁵ Ibid, 172-173.

⁸⁶ As mentioned previously, only those seventeenth-century expectant heir suits appearing in the printed reports are used in later cases.

⁸⁷ For example, *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447.

⁸⁸ For example, *Alec Lobb (Garages) Ltd v Total Oil Ltd* [1983] 1 All ER 303; *Hart v O’Connor* [1985] 1 AC 1000; *Boustany v Pigott* (1993) 69 P&CR 298; *Credit Lyonnais v Burch* [1997] 1 All ER 144; and *Portman Building Society v Dusangh* [2000] All ER (D) 582.

⁸⁹ *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392.

⁹⁰ 1 Vern. 167.

⁹¹ 1 Vern. 237; 2 Chan. Rep. 266.

⁹² 2 Vern. 122; 2 Freeman 111.

⁹³ In the following discussion it will be seen that the reported Berney cases of *Berry v Fairclough* (1681) 79 Selden Soc. 868 (in the form of a note to *Davis v Duke of Marlborough* (1819) 2 Swans 108 – see above n 17); *Berney v Pitt* (1687) 2 Vern. 14, 2 Chan. Rep 396; *Barny v Beak* (1683) 2 Chan. Cas. 136; and *Barney v Tyson* (1684) 2 Ventris 359, make up ten of the twenty-five references to seventeenth-century expectant heir suits in eighteenth- and nineteenth-century cases.

⁹⁴ 1 P.Wms 310.

⁹⁵ Ibid, at 312.

aside the sale of a reversion at an undervalue, Cowper LC briefly set out the facts of *Berney v Pitt*, then discussed the differing approaches of successive lord chancellors to the granting of relief to the expectant heir in the re-hearings of that case, before concluding that as the decision of Jefferys LC in favour of the heir remained in effect it ‘shewed that every one thought the same was just; and that there was therefore no attempt in Parliament to reverse it’.⁹⁶ *Berney v Pitt* remained relevant as authority – at least according to counsel⁹⁷ – nearly twenty years later, when *Cole v Gibbons* (1734),⁹⁸ a case involving the sale of a contingent legacy, was heard by Talbot LC; unfortunately for the obligor in this case, his lordship rejected his argument that he was an expectant heir, thus rendering immaterial any precedential value of *Berney v Pitt*, as well as the other seventeenth-century suits of *Earl of Ardglass v Muschamp* and *Nott v Hill*.⁹⁹

In *Barnardiston v Lingood* (1740),¹⁰⁰ a case in which specific performance of the conveyance of a remainder was sought, Hardwicke LC referred to *Earl of Ardglass v Muschamp*, *Berney v Pitt*, and *Nott v Johnson and Graham* (1687)¹⁰¹ as containing the ‘material ingredients ... to set aside this agreement as a catching bargain, against a necessitous and improvident heir’.¹⁰² In the event, however, his lordship refused relief on the grounds that the said conveyance purported to be of the whole estate, and was thus void at law.¹⁰³

The next eighteenth-century expectant heir case in which seventeenth-century suits were used was the leading case of *Earl of Chesterfield v Janssen* (1751).¹⁰⁴ In addition to Hardwicke LC, the case was heard by Sir John Strange MR, and three common law judges: Sir William Lee CJKB, Sir John Willes CJCP, and Sir Thomas Burnet J. All except Willes CJ delivered judgments.¹⁰⁵ The action was brought by John Spencer’s executors to prevent Abraham Janssen¹⁰⁶ obtaining judgment at law on a post-obit. bond made in his favour by Spencer. The bargain secured by the bond was that in return for Janssen lending Spencer £5,000, Spencer would pay Janssen £10,000 on the death of Spencer’s grandmother, the dowager duchess of Marlborough, from whom he stood to inherit a great deal of money and

⁹⁶ Ibid, at 313; 404.

⁹⁷ The body of the report states that ‘several cases were cited out of Mr Vernon’s reports’ in argument; these suits, including *Berney v Pitt*, are then identified in a footnote, possibly by a later editor (*Cole v Gibbons* (1734) 3 P. Wms 290, at 292).

⁹⁸ 3 P.Wms 290.

⁹⁹ Talbot LC nevertheless provided his understanding of the basis of the jurisdiction to relieve heirs: ‘the policy of the nation to prevent what was a growing mischief to ancient families, that of seducing an heir apparent from a dependence on his ancestor who probably would have supported him, and, by feeding his extravagancies, tempting him in his father’s life-time, to sell the reversion of that estate, which was settled upon him; forasmuch as this tended to the manifest ruin of families’ (ibid, at 293).

¹⁰⁰ 2 Atk. 133.

¹⁰¹ 2 Vern. 27.

¹⁰² *Barnardiston v Lingood* (1740) 2 Atk. 133 at 135.

¹⁰³ Ibid.

¹⁰⁴ 2 Ves. Sen. 125.

¹⁰⁵ Willes CJ was apparently unable to attend on 4 February; his concurring judgment was noted by the lord chancellor.

¹⁰⁶ Janssen succeeded to his father’s baronetcy in September 1749, so although he was Sir Abraham by the time of the hearing in Chancery, he was not when the bargain with Spencer was made or affirmed. Accordingly, references to Janssen throughout the chapter reflect this.

property;¹⁰⁷ the bond also carried a further £10,000 penalty in the event of default.¹⁰⁸ This bargain had been made in 1738,¹⁰⁹ six years before the duchess died. Shortly after her death in 1744 Spencer confirmed the bargain with Janssen by means of a new bond and partial repayment, also executing a ‘warrant of attorney for confessing judgment thereon’.¹¹⁰ Spencer himself died in 1746,¹¹¹ and Janssen took action at law to recover the £10,000 owing. The executors, in response, sought relief in Chancery; firstly in the form of an injunction against the action at law, and subsequently against being required to pay any more than the amount actually advanced plus reasonable interest.¹¹²

The plaintiffs argued that Chancery had a clear jurisdiction to grant relief upon payment of what had actually been advanced, plus reasonable interest, citing the seventeenth-century suits of *Waller v Dale* (1677),¹¹³ *Batty v Lloyd* (1683),¹¹⁴ *Nott v Hill*, *Earl of Ardglass v Muschamp*, the Richard Berney cases of *Barny v Beak* (1683),¹¹⁵ *Berny v Pitt*, and *Barney v Tyson* (1684),¹¹⁶ and unspecified cases ‘relieving against unreasonable bargains in case of young heirs in the time of Lord Ellesmere, Bacon and Coventry’.¹¹⁷ Counsel for the plaintiffs described Chancery’s jurisdiction in this regard as based on

an unconscionable bargain, and it being contrary to public convenience to encourage it. Such contracts are generally founded in oppression by taking advantage of the borrower’s necessity; which is the general ground of the malignancy of usury: they are of public mischief by encouraging extravagance of young men.¹¹⁸

In addition, *Earl of Ardglass v Muschamp* and *Wiseman v Beak* were cited as authority by counsel for the plaintiffs for the argument that Spencer’s confirmation of the bargain after the death of the duchess did not preclude relief, as that confirmation stemmed from his inability to repay the debt at that time.¹¹⁹ Counsel for the defendant used rather fewer

¹⁰⁷ The estate Spencer stood to inherit from his grandmother comprised, at her death, ‘twenty-seven estates in twelve counties, with a capital value of more than £400,000 and an annual rent roll, after outgoings, in excess of £17,000 a year: all of them, except her parental lands of Sandridge and Agney, of her own acquiring. In addition she had well over £250,000 in capital ... and there was a further £12,000 in annuities. It was a fortune which must easily have made her the richest woman in her own right in England’ (Frances Harris, *A Passion for Government: The Life of Sarah, Duchess of Marlborough* (Oxford, 1991), 349).

¹⁰⁸ 2 Ves. Sen. 125 at 126.

¹⁰⁹ *Ibid*, at 125.

¹¹⁰ *Ibid*, at 126.

¹¹¹ Charles Spencer, *The Spencers: A Personal History of an English Family* (2000), 106.

¹¹² 2 Ves. Sen. 125 at 126. Many of the suits dealt with in this thesis, both reported and unreported, refer to ‘reasonable interest’. This is not defined or expressly quantified in any of the records and proceedings examined; presumably it referred to an interest rate within the particular usury statute operating at the time.

¹¹³ Rep. Temp. Finch 295.

¹¹⁴ 1 Vern. 142.

¹¹⁵ 2 Chan. Cas. 136.

¹¹⁶ 2 Ventris 359.

¹¹⁷ 2 Ves. Sen. 125 at 128.

¹¹⁸ *Ibid*, at 129.

¹¹⁹ *Ibid*, at 131.

seventeenth-century authorities, with only *Berry v Fairclough* (1681)¹²⁰ and *Batty v Lloyd* being cited: the first of these as an illustration that Nottingham LC, at least, felt that an heir could validly deal on a contingency in the absence of fraud; the second as authority that there was no general rule against annuities for the seller's own life.¹²¹

The leading judgment in *Earl of Chesterfield v Janssen* is that of Hardwicke LC, whose discussion of the different species of fraud figures largely in the subsequent case law on unconscionability, amongst other equitable areas.¹²² Perhaps incongruously, given the case's predominant position in the history of the expectant heir cases specifically, and unconscionable dealing more generally, the decision in the case was not made on the basis of the equitable jurisdiction, but rather rested on Spencer's confirmation of the bargain. However, Hardwicke LC's invitation to the master of the rolls and the three distinguished common law judges to join him in hearing the case was clearly intended to enable this case to set a definitive position on the problem of bargains with improvident expectant heirs, both from the perspective of the equitable jurisdiction, and in respect of the possibly usurious nature of such bargains.

Each of the judgments discussed both of these issues, in varying degrees of detail. It was established per curiam that a genuinely contingent bargain did not fall within the usury statutes; further to this point there was general agreement that it was a question of substance rather than form as to whether a bargain was covered by the statutes. On the facts of this case, all agreed that the bargain in question contained a 'real and forcible'¹²³ contingency, and thus was not usurious; fatally for Lord Hardwicke's ambitions for a definitive position on the equitable jurisdiction, all the judges also agreed that the case was determined by Spencer's confirmation of the bargain after his grandmother's death, making any discussion of the equitable jurisdiction irrelevant to the outcome.

It is arguable, however, that the court's decision that the confirmation of the bargain was the determining point of the case does provide some further illumination on the equitable jurisdiction to intervene in bargains made with expectant heirs. Every judgment made the point that Spencer's situation had changed at the time of the making of the new agreement. In this regard, the judges were clearly – whether explicitly or otherwise – distinguishing the case at hand from *Earl of Ardglass v Muschamp* and *Wiseman v Beake*, where later confirmation of the original bargain was held to be merely a continuation of the original unconscionable bargain. The alteration in Spencer's circumstances was described by Lord Hardwicke:

the condition of the necessity of Mr Spencer was over; for though he had no power over the capital of this accession of estate, yet it was so great a one,

¹²⁰ 79 Selden Soc. 868.

¹²¹ 2 Ves. Sen. 125 at 140.

¹²² Of the other four judgments delivered, three made reference to seventeenth-century suits; however, as their use did not differ materially from that made by Hardwicke LC they are not discussed here.

¹²³ 2 Ves. Sen. 125 at 151, per Lee CJ.

that little more than one-third of a year's income would have paid off the whole. ... [T]he state of expectancy was over by the death of the Duchess: and also the danger of her coming to the knowledge of his conduct and circumstances ... which was the principal restraint upon him: so that there was no ancestor or relation left upon whom any deceit could be committed in consequence of any new agreement.¹²⁴

When the absence of 'fraud, contrivance or surprise'¹²⁵ in the new bargain is added to this description, an image – albeit in the negative – of the basis for the equitable jurisdiction is revealed. At the time of the new bond, Spencer was neither necessitous, nor an expectant heir, nor constrained by fear of his debt becoming known to his grandmother; further, as he had entered into ownership of the property in question, his dealing with it in any way he chose could not be seen as a fraud against the testator.

It is in the judgment of Hardwicke LC, as might be expected, that the most intensive consideration of the jurisdiction is found. The lord chancellor took the opportunity to emphasise that Chancery has 'an undoubted jurisdiction to relieve against every species of fraud',¹²⁶ and went on to discuss five such species. It was in the fifth of these that Hardwicke LC made his most explicit analysis of the jurisdiction to grant relief to expectant heirs. The fraud here was that which 'infects catching bargains with heirs, reversioners, or expectants, in the life of the father &c',¹²⁷ and may comprise any or all of the first four species of fraud mentioned: actual fraud; fraud inferred from the nature of the bargain itself; fraud presumed from the circumstances of the parties; and fraud affecting third parties. Whichever form this fifth category takes, the lord chancellor was in no doubt that Chancery had an accepted jurisdiction to deal with it, describing it as a form of fraud 'against which relief always extended',¹²⁸ and it was the seventeenth-century suit of *Berney v Pitt* which was cited by the lord chancellor in this context.¹²⁹ But despite the existence of the jurisdiction, in the event the court did not apply it, finding that Spencer's new bond, and the judgment attached to it, should stand, and Spencer's executors were ordered to pay the defendant the full amount of £10,000, plus interest, less the amount paid to Janssen by Spencer before his death.¹³⁰

The final eighteenth-century suit discussed in this section was heard nearly thirty years after *Earl of Chesterfield v Janssen*. *Gwynne v Heaton* (1778)¹³¹ involved a rent charge granted by the plaintiff reversioner, who had been cast off by his father for making an

¹²⁴ Ibid, at 159, per Hardwicke LC.

¹²⁵ Ibid.

¹²⁶ Ibid, at 155, per Hardwicke LC.

¹²⁷ Ibid, at 157, per Hardwicke LC.

¹²⁸ Ibid.

¹²⁹ Hardwicke LC also raised *Ardglass v Muschamp* and *Wiseman v Beake*, but only in the context of distinguishing them on the point of the confirmation of the bargain: *ibid*, at 159.

¹³⁰ Ibid, per Hardwicke LC. For more detailed discussion of the content of Hardwicke LC's fifth species of fraud see Chapter 6, below at 6.2.1.

¹³¹ 1 Bro. C. C. 1.

imprudent marriage.¹³² That the court had the power to relieve in such a case, Thurlow LC had no doubt:

The heir of a family dealing for an expectancy in that family, shall be distinguished from ordinary cases, and an unconscionable bargain made with him shall not only be looked upon as oppressive in the particular instance, and therefore avoided, but as pernicious in principle, and therefore repressed. This must be taken to be the established principle.¹³³

In applying this principle to the case before him, Thurlow LC referred to the seventeenth-century suits of *Earl of Ardglass v Muschamp* and *Nott v Hill*, as well as to *Earl of Chesterfield v Janssen*, and consequently ordered that the rent charge be set aside, except as security for the money actually advanced, plus the costs of redeeming the mortgage.¹³⁴

2.3.3 Seventeenth-Century Expectant Heirs in the Nineteenth Century

In the middle of the eighteenth century, *Earl of Chesterfield v Janssen* became the leading case in relation to the jurisdiction to relieve expectant heirs. Accordingly, the reported seventeenth-century expectant heir suits seem afterwards to have become less influential; they were, however, referred to in a handful of suits in the nineteenth century, even after the leading expectant heir case of that century, *Earl of Aylesford v Morris* (1873),¹³⁵ was decided.¹³⁶ The earliest of the nineteenth-century suits in which seventeenth-century suits were referred to was *Bowes v Heaps* (1814),¹³⁷ in which Grant MR, in the context of a post-obit. bond entered by a remainderman, cited *Berney v Pitt* and *Nott v Hill* as authority that '[t]he mere absence of fraud does not necessarily decide upon the validity of the transaction'.¹³⁸ *Berney v Pitt* was also referred to as an illustration of the court's concern with inadequacy of consideration,¹³⁹ and *Earl of Ardglass v Muschamp* and *Wiseman v Beake* were used as evidence that a bargain could be set aside despite being contingent in nature, no matter how uncertain that contingency might be.¹⁴⁰

In *Davis v Duke of Marlborough* (1819),¹⁴¹ Eldon LC gave *Wiseman v Beake* and *Barney v Tyson* as authority that the age of the expectant heir was not particularly relevant.¹⁴² Additionally, in a note to Eldon LC's statement that the onus of showing that a particular

¹³² *Ibid.*, at 1.

¹³³ *Ibid.*, at 9-10.

¹³⁴ *Ibid.*, at 11.

¹³⁵ LR 8 Ch. App. 484.

¹³⁶ No reference is made to any seventeenth-century suit in this case.

¹³⁷ 3 V&B 117.

¹³⁸ *Ibid.*, at 119.

¹³⁹ *Ibid.*, at 121.

¹⁴⁰ *Ibid.*, at 120.

¹⁴¹ 2 Swans. 108.

¹⁴² *Ibid.*, at 142. Eldon LC does not seem to have considered 26, the reported age of Berney when he made his bargain with Tyson, a young age, a view which is not reflected in the many Berney pleadings relating to other bargains made by Berney at that age (see, for example, *Berney v Fairclough and Stystead* (14 February 1680) C 10/201/12).

bargain with an expectant heir was reasonable rested on the other party,¹⁴³ the reporter Swanston set out his understanding of the content of the jurisdiction. In this lengthy note several seventeenth-century suits¹⁴⁴ were cited to support the proposition ‘that expectant heirs dealing for their expectancy are entitled, for mere inadequacy of price, to have the contract rescinded, upon terms of redemption’.¹⁴⁵

The final two nineteenth-century reported suits found which made reference to seventeenth-century expectant heir suits were decided not only after *Earl of Aylesford v Morris*, but also after the passing of the Sale of Reversions Act 1867.¹⁴⁶ In the earlier of these two suits, *O’Rorke v Bolingbroke* (1877),¹⁴⁷ Swanston’s note in *Davis v Duke of Marlborough* was referred to by Hatherley LJ in his dissenting judgment as having collected ‘the early cases’ on the expectant heirs;¹⁴⁸ his lordship made the reference in the context of his view that Chancery had ‘assumed jurisdiction, at a very early period, to set aside transactions in which expectant heirs had dealt with their expectations, when the court was satisfied that they had not been adequately protected against the pressure put upon them by their poverty’.¹⁴⁹ *Wiseman v Beake* – in which the expectant heir who was granted relief was around 40 years old and a proctor in Doctors’ Commons – was cited by Hatherley LJ as ‘[a] strong instance of the length to which the doctrine of inadequacy of protection was carried’,¹⁵⁰ and his lordship also cited the differing approaches taken by Nottingham LC, Jeffreys LC and North LK in successive re-hearings of *Nott v Hill* as evidence of ‘the considerable oscillation of opinion on this jurisdiction’ displayed in the seventeenth century.¹⁵¹ This case was decided four years after *Earl of Aylesford v Morris*, and so it is not altogether surprising that the majority judgments – in which Blackburn and Gordon LJJ refused relief on the ground that proof of actual fraud was required – are predominantly based on the decision in that case; in *Fry v Lane* (1888),¹⁵² however, the last nineteenth-century reported suit in which a seventeenth-century suit is referred to, it can be seen that oscillation of opinion was not confined to the seventeenth century. Kay J found for the plaintiff remainderman on the basis that Chancery had a long history of granting relief from bargains with remaindermen or reversioners ‘on undervalue alone’,¹⁵³ and cited *Wiseman v*

¹⁴³ 2 Swans. 108 at 139.

¹⁴⁴ *Nott v Hill* (1683) 1 Vern. 167; *Barny v Beak* (1683) 2 Chan. Cas. 136; *Batty v Lloyd* (1683) 1 Vern. 142; *Wiseman v Beak* (1690) 2 Vern. 122; *Barney v Tyson* (1684) 2 Ventris 359; *Berney v Pitt* (1687) 2 Vern. 14.

¹⁴⁵ *Davis v Duke of Marlborough*, above n 141, at 170.

¹⁴⁶ 31 Vic., c. 4. This Act established that, if there had been no fraud, a sale of a reversion would not be set aside merely for undervalue.

¹⁴⁷ 2 App. Cas. 814.

¹⁴⁸ *Ibid.*, at 822.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² 40 Ch. D. 312. *Fry v Lane* was one of the cases in which the jurisdiction to relieve expectant heirs transitioned to a broader, allied, jurisdiction to relieve the ‘poor and ignorant.’ See, for example, *Evans v Llewellyn* (1787) 1 Cox 333; *Longmate v Ledger* (1860) 2 Giff. 157; and *Baker v Monk* (1864) 4 D.J.&S. 388.

¹⁵³ 40 Ch. D. 312.

Beake as authority that this relief would be granted ‘even where the remainderman was of mature age and accustomed to business’.¹⁵⁴

2.3.4 Summary

The above survey shows that a handful of reported seventeenth-century expectant heir suits continued to be considered in the case law into the late nineteenth century, in relation to both the existence and content of a jurisdiction to relieve expectant heirs from improvident bargains. The protection of expectant heirs from the consequences of their weakness and inexperience appears to have become established as the underlying rationale for the granting of relief by the middle of the eighteenth century, and it is suggested in this thesis that this understanding of the jurisdiction influenced later perceptions of the basis of the jurisdiction in the seventeenth century.

2.4 Problems with Existing Explanations

This section examines methodological and conceptual constraints which have influenced interpretations of the jurisdiction to relieve expectant heirs in the modern case law and academic literature, especially in regard to the basis of that jurisdiction in the seventeenth century.

The first of these constraints is that only those seventeenth-century expectant heir suits which appear in the printed reports are considered in the later cases and academic literature discussed above. While not surprising, this means – given the nature of Chancery reporting during most of the seventeenth century¹⁵⁵ – that these discussions (and the conclusions drawn from them) deal overwhelmingly with suits from the eighteenth and nineteenth centuries. It also means that only suits from the later part of the seventeenth century are included in such discussions. Additionally, even where reference is made to suits from the seventeenth century, there is often no distinction made between the doctrinal, or historical, social and economic contexts operating during this period, and those of the eighteenth, or even nineteenth, centuries.

Accordingly, in considering the presence and significance of seventeenth-century expectant heir suits in both the modern case law and the academic literature, it is possible to see a form of presentism¹⁵⁶ at work; this is described by Atiyah in relation to later perceptions of Chancery’s treatment of unconscionable, or unfair, bargains in the seventeenth and eighteenth centuries:

¹⁵⁴ *Ibid.*

¹⁵⁵ For a discussion of pre-Restoration Chancery reporting, see Michael Macnair, ‘The Nature and Function of the Early Chancery Reports’ in Chantal Stebbings (ed.), *Law Reporting in Britain* (London, 1995), 123.

¹⁵⁶ This term is used here in the historical analysis sense, to mean an interpretation of the past through the lens of present, or more recent, normative frameworks. This is not a new concept in legal history; for example, Milsom gives a warning in this regard, saying that ‘the largest difficulty in legal history is precisely that we look at past evidence in the light of later assumptions, including our own assumptions about the nature and working of law itself’ (SFC Milsom, *A Natural History of the Common Law* (New York, 2003), xvi).

The importance of [the pre-nineteenth-century court of Chancery relieving in a variety of unfair bargains] has been obscured for us because this body of equitable doctrine, on its way down to the twentieth century, had to pass through the nineteenth. And in the nineteenth century [seventeenth- and eighteenth- century equitable rules of fairness] came to seem increasingly anomalous, and many glosses were put on the older case law. It was always possible to find dicta here or there more in accordance with the views of nineteenth-century lawyers, and these dicta were given great prominence by those more concerned with the consistency of legal doctrine over the centuries than with authentic legal history.¹⁵⁷

This ‘glossing’ process is arguably particularly evident in the material discussed in the first section of this chapter, where it was noted that very few modern courts, or academic writers, make any meaningful distinction between the approach of Chancery to expectant heirs in the seventeenth century, and the approach taken in later centuries. This is particularly problematic given the significantly different economic and social context which existed in the seventeenth century to that of the nineteenth century;¹⁵⁸ accordingly, as will be seen in Chapter 6, this thesis adopts Muldrew’s ‘culture of credit’ explanation of early modern economics as a better way of understanding the nature and significance of the jurisdiction to relieve expectant heirs in the seventeenth century.

2.5 Conclusion

The most prevalent modern interpretation of Chancery’s jurisdiction to relieve expectant heirs is that the court sought to prevent exploitation of the expectant heir’s weakness, based on a ‘special disability’ of youth and financial necessity; for example, this interpretation played a key role in the development of the modern doctrine of unconscionable dealing in *Commercial Bank v Amadio* (1983),¹⁵⁹ a watershed decision which extended the doctrine of unconscionability in Australian law further than in many other common law jurisdictions, including England and Wales.

Much of the academic writing on modern unconscionability also positions the expectant heir cases as reflecting Chancery’s concern with the protection of the weak from exploitation; however, an alternate explanation is also found in the secondary literature, which interprets the expectant heir cases as grounded in the protection, not of the individual, but of the economic – and thus political – power of the ruling classes. In this interpretation, the court’s concern was with the risk posed to the wealth of the aristocracy, should their children be permitted to waste and encumber their estates by entering improvident bargains.

¹⁵⁷ Atiyah, above n 83, 148. In Chapter 6, at 6.3.1, it is suggested that the presentist process described by Atiyah has contributed to a view of the jurisdiction in the seventeenth century which is not entirely supported by the evidence uncovered by this thesis.

¹⁵⁸ For a discussion of the economic and political contexts in which nineteenth century contract law cases were decided, see William Cornish et al, *The Oxford History of the Laws of England: 1820-1914 Private Law* (Oxford, 2010) vol XII, 297-300.

¹⁵⁹ 151 CLR 447.

The validity of both the special disability and the economic preservation analyses, in terms of the basis of Chancery's jurisdiction to relieve expectant heirs in the seventeenth century, must, however, be assessed in light of the fact that these interpretations are based only on those expectant heir suits which appear in the printed reports: consequently, only a small number of suits, dating from after the Restoration, are referred to in either the case law or the academic literature. While it is possible to see the influence of these reported seventeenth-century suits in the later case law, where seventeenth century suits are used, no clear distinction is made between the economic, social and historical contexts of this century and those of the eighteenth and nineteenth centuries. Indeed, it is possible that modern views of pre-nineteenth century expectant heir suits have been skewed by the tendency of later courts and commentators to view these decisions through the lens of nineteenth-century contract law doctrines and theories. To enable a clearer, more accurate and less presentist analysis of the jurisdiction to relieve expectant heirs in the seventeenth century, the next chapter applies a contextual case study approach to the bargains of Richard Berney, the plaintiff in a number of reported seventeenth-century suits which were, as can be seen above, widely used in later cases.

Chapter 3 Case Study 1: Richard Berney

3.1 Introduction

In the early part of the 1670s, Richard Berney esq. left his father's Norfolk estate for London. At the time he was heir to one of the largest and most valuable estates in the county. Following his death in 1695, his entire estate had to be sold to cover his debts. If his delinquencies lessened the ancient name of Berney¹⁶⁰ in late seventeenth- and early eighteenth-century English society, the reported Chancery cases concerning Richard Berney's financial dealings¹⁶¹ have had the opposite effect in the smaller world of equity: as seen in the previous chapter, the cases bearing his name have been influential in a number of subsequent expectant heir decisions, including perhaps the best-known of them all, *Earl of Chesterfield v Janssen* (1751).¹⁶² In addition to the significance of the reported Berney suits in the later expectant heir jurisprudence, the numerous bargains from which Richard Berney sought relief in Chancery display all the elements of the archetypal expectant heir suit which appear in many of the other suits examined in this thesis: allegations of 'drawing in' and other fraudulent behaviour, extravagant expenditure, repayment amounts disproportionately high in comparison to the amount received, and irreparable damage to the family estate. Additionally, the large number of proceedings brought by Richard Berney resulted in a wealth of material from the Chancery records for analysis; when coupled with the contextual detail discovered concerning the heir, the lenders, and the brokers involved, the adventures of Richard Berney in post-Restoration London offer a valuable insight into the phenomenon of the later seventeenth-century expectant heir.

3.2 The Heir

3.2.1 Richard Berney

In the later cases of *Earl of Chesterfield v Janssen* and *Earl of Aylesford v Morris* (1873),¹⁶³ the expectant heirs are both clearly identifiable from the printed reports of the cases, and both belonged to titled families about whom much information is now, and has long been, in the public domain. The identification of the plaintiff expectant heir in the various Berney/Barny/Barney Chancery cases has to be made, however, from the information contained in several of the pleadings, most notably in the bill of *Berney v Pitt* (1680), where

¹⁶⁰ As will become apparent, the printed reports employ a variety of spellings of the name Berney; the approach taken here is to use the relevant variants for case names, but to use 'Berney' in discussion thereof.

¹⁶¹ *Berry v Fairclough* (1681) 79 Selden Soc. 868; *Barny v Beak* (1683) 2 Chan. Cas. 136; *Barney v Tyson* (1684) 2 Ventris 359; and *Berney v Pitt* (1687) 2 Vern. 14, 2 Chan. Rep 396.

¹⁶² 2 Ves. Sen. 125.

¹⁶³ LR 8 Ch. App. 484.

he is described as 'Richard Berney of Parkehall in the parish of Reedham in the county of Norfolk'.¹⁶⁴

Further information comes from a number of sources. Some key facts can be found in the various brief Berney case reports: he was heir to 'a great estate'¹⁶⁵ and his father died in 1679.¹⁶⁶ A search of wills proved in the Prerogative Court of Canterbury during the relevant period uncovered the will of Richard Berney of Parkhall, Norfolk, proved on 6 February 1680, which names his son and heir as Richard Berney;¹⁶⁷ and further information is found in the following passage from Blomefield's *History of Norfolk*, referring to the son of the elder Richard Berney of Parkhall, Norfolk:

Richard his son and heir ... died s.p. having sold the family seat at Redham, and spent very near his whole estate. His manors of Redham, Norton Subcross, Caston, Shipdam, Kirkhall in Rockland, Saham, Leny, the Birlinghams Strumpshagh, Bradeston, Frethorp, Limpenshaw cum Southwood &c being sold to pay his debts.¹⁶⁸

The date of the younger Richard Berney's death is provided by an inscription on a slab in the South Chapel of the parish church at Reedham, and while no authoritative date of birth has so far been discovered,¹⁶⁹ the same source gives some indication:

Richard the only child of Richard Berney esq., who died in the 46 years of his Age and ye 18th day of Oct. 1695. He was in health and sick and died in 12 hours. Seeing the certainty of Death and nothing more uncertain than the time when, how absolutely necessary is it to make a preparation for so sudden a change.¹⁷⁰

Accordingly, an approximate year of birth of 1649 may be deduced, and the expectant heir at the centre of these cases can be identified as Richard Berney esq. (c.1649 – 18 October 1695) of Parkhall, Reedham, Norfolk, only son of Richard Berney esq. (d. 1680), and grandson of Sir Richard Berney, Bt.

3.2.2 Family

Humphrey Prideaux, dean of Norwich, wrote of the Berney family in 1693:

¹⁶⁴ C 10/208/7.

¹⁶⁵ *Berney v Pitt* (1686) 2 Vern. 14 at 14.

¹⁶⁶ *Berney v Pitt* (1686) 2 Chan. Rep 396 at 396.

¹⁶⁷ Will of Richard Berney of Parkhall, Reedham, Norfolk, 6 February 1680, PROB 11/362/110.

¹⁶⁸ Francis Blomefield and Charles Parkin, *An Essay Towards a Topographical History of the County of Norfolk* (London, 1810) vol XI, 128. Blomefield also provides the information that Richard Berney's grandfather was Sir Richard Berney, Baronet.

¹⁶⁹ Unfortunately, the Reedham Parish Registers for the relevant period were destroyed by fire in the eighteenth century.

¹⁷⁰ Transcribed from personal visit. Farrer's mistranscription incorrectly gives Berney's age at death as 40: Edmund Farrer, *Church Heraldry of Norfolk* (Norwich, 1887), 220.

[t]he greatest family [in Norfolk] next ye lords,¹⁷¹ and I think before them both for antiquity an[d] estate, is the Barneys, which is now expiring.¹⁷²

By the time Richard Berney inherited his father's estates in 1680, the Berney family seat at Reedham had been theirs since Thomas de Berney married Margaret, daughter and heir of William de Reedham, esq. in the fourteenth century.¹⁷³ The de Berneys had apparently settled near the town of Berney, in Norfolk, by the Norman Conquest;¹⁷⁴ certainly by the time of the Domesday survey it was an ancestor of the family who held the manor.¹⁷⁵ Sir Thomas Berney, Richard Berney's great-grandfather, inherited the estates of the Reedham branch of the family in 1584 on the death of his father, Henry Berney esq.¹⁷⁶ Henry was responsible for moving the family seat from its previous location near the church in Reedham to a more spacious location in the park.¹⁷⁷ This new 'magnificent house' with 'very large gardens to it', built in 1577, he named Parkhall.¹⁷⁸ Sir Thomas had four sons, of whom Sir Richard Berney, Richard Berney's grandfather, was the third.¹⁷⁹ Berney's grandfather was made a baronet on 5 May 1620, and died in 1668.¹⁸⁰ He had four sons, Thomas,¹⁸¹ Richard,¹⁸² John,¹⁸³ and William.¹⁸⁴ The eldest son was disinherited by Sir Richard; although he succeeded to the baronetcy, becoming Sir Thomas on his father's death, the substantial Berney estates went to his brother Richard.¹⁸⁵ Although the reason for Thomas's falling from favour is unknown, Blomefield describes it as based on 'some pique and resentment',¹⁸⁶ and Wotton is in no doubt that this decision of Sir Richard's was ultimately to blame for the loss of the estates of this branch of the family: '[this] may be observed as an instance of the fatal effects consequent upon disinheriting the eldest son, contrary to the law of nature, and nations'.¹⁸⁷

¹⁷¹ Prideaux is here referring to the only two noblemen at that time in Norfolk: Charles, Viscount Townshend, and the earl of Yarmouth.

¹⁷² Humphrey Prideaux, *Letters of Humphrey Prideaux, Sometime Dean of Norwich, to John Ellis, Sometime Under-Secretary of State, 1674-1722* (London, 1875), 166.

¹⁷³ Thomas Wotton, *The English Baronetage* (London, 1741) vol I, 378.

¹⁷⁴ *Ibid.*, at 378.

¹⁷⁵ Francis Blomefield and Charles Parkin, *An Essay Towards a Topographical History of the County of Norfolk* (London, 1808) vol IX, 212.

¹⁷⁶ Wotton, above n 173, 380.

¹⁷⁷ *Ibid.*, at 379.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*, at 380; William, the eldest of the sons of Sir Thomas, married a daughter of Sir Edward Coke, but died without issue, as did the next son, John. The fourth son, Thomas, started the Swardeston, Norfolk, branch of the Berney family (*ibid.*).

¹⁸⁰ Blomefield and Parkin, above n 168, 128. He was apparently 74 years of age when he died, giving an approximate year of birth of 1594: Farrer, above n 170, 219.

¹⁸¹ Wotton, above n 173, 380.

¹⁸² *Ibid.*, at 380.

¹⁸³ *Ibid.*

¹⁸⁴ Francis Blomefield and Charles Parkin, *An Essay Towards A Topographical History of the County of Norfolk* (London, 1808) vol VIII, 201.

¹⁸⁵ Blomefield and Parkin, above n 168, 128; Will of Sir Richard Berney of Reedham, Norfolk (21 January 1669) PROB 11/329/25.

¹⁸⁶ Blomefield and Parkin, above n 168, 128.

¹⁸⁷ Wotton, above n 173, 380.

3.2.3 Fortune

Despite the looming disaster apparently following inexorably upon the sin of denying primogeniture, Sir Richard's second son Richard gained possession of extensive estates in Norfolk producing an annual income of around £7,000¹⁸⁸ on his father's death in 1668.¹⁸⁹ These estates were, however, merely Richard's for life, entailed upon his son,¹⁹⁰ the Richard Berney with whom this chapter deals. By the time the younger Richard Berney dealt with those expectations in the transactions described below, the yearly income from the estates was somewhat less, being stated in two of the bills as being around £5,000 per annum.¹⁹¹ Assuming this to be accurate, the decrease may reflect either the lingering effects of the decrease in rents experienced in the middle part of the seventeenth century,¹⁹² or, possibly, poor management of the estate by Berney's father.¹⁹³ Whatever the explanation, the yearly income of the estates to which Richard Berney would succeed on the death of his father remained a substantial amount of money.

Perhaps not surprisingly, the best sources for identifying the number and location of the various real properties comprising Richard Berney's expectations are found in the accounts of the dismantling of the estate. Twenty-five properties,¹⁹⁴ in addition to the manor of Reedham, are named as having been mortgaged, sold, or in some other way dealt with in order to cover the debts of Richard Berney.¹⁹⁵ These were located in Norton Subcourse, South Burlingham, North Burlingham, Burlingham St Andrew, Burlingham St Peter, Strumpshaw, Freethorpe, Limpenhoe, Southwood, Lingwood, Blofield, Cantley,

¹⁸⁸ This amount of money in 1670 was worth almost £800,000 in contemporary terms: The National Archives Currency Converter at <<http://www.nationalarchives.gov.uk/currency/>> accessed 15 April 2019.

¹⁸⁹ Blomefield and Parkin, above n 168, 128; see also descriptions of the value of the estate to which Richard Berney was heir in *Barney v Tyson* (1684) 2 Ventris 359, at 359 (£5,000 p.a.); *Pitt v Berney* (2 December 1675) C 10/125/85 ('yearly value of five thousand pounds and upwards...'); and *Berney v Hungerford, Pitt, Muschamp and Stisted* (24 March 1680) C 10/208/10 ('several thousand pounds at least').

¹⁹⁰ This arrangement was a strict settlement, a standard mechanism utilised by landed families to safeguard estates across generations (for a full consideration of this, see John Habakkuk, *Marriage, Debt, and the Estates System: English Landownership, 1650-1950* (Oxford, 1994)). The settlement made by Sir Richard Berney in his lifetime is ratified in his will: Will of Sir Richard Berney of Reedham, Norfolk (21 January 1669) PROB 11/329/25.

¹⁹¹ *Pitt v Berney* (2 December 1675) C 10/125/85 and *Barney v Tyson* (1684) 2 Ventris 359 at 359, respectively.

¹⁹² See, for example, Margaret Gay Davies, 'Country Gentry and Falling Rents in the 1660s and 1670s' (1978) 4(2) *Midland History* 86.

¹⁹³ It is also possible that the Berney estates were still wrestling with the financial turmoil arising from the Civil War: Berney's father may have been quite simply unable to provide more than a small allowance for his son for this or similar reasons. For a more detailed discussion of post-Civil War debt amongst the aristocracy, see Ian Ward, 'Settlements, Mortgages and Aristocratic Estates 1649-1660' (1991) 12(1) *Journal of Legal History* 20.

¹⁹⁴ The number may be greater, as it is not always clear from the sources whether only one estate at the stated location is involved in any given transaction.

¹⁹⁵ Blomefield and Parkin, above n 168, 128; Francis Blomefield, *An Essay Towards A Topographical History of the County of Norfolk* (London, 1805) vol II, 282; Deed between Richard Berney, Robert Bedingfield and Edward Miles, and Robert Hodgson (14 October 1681) Norfolk Records Office BER40 685 X 5.

Wickhampton, Halvergate, Hemblington, Brundall, Caston, Shipdham, Kirkhall in Rockland, Saham, Leny, Bradeston, Moore Hall, Middleton and Rainsbury.¹⁹⁶

Richard Berney's expectations took two forms: as the remainderman to the real estate belonging to the Reedham branch of the Berney family, and its associated yearly income, according to his grandfather's settlement, discussed above; and as the likely inheritor of his father's personal estate. This personal estate was valued at some £40,000, all or most of which Berney seemed likely to receive as the elder Berney's only son.¹⁹⁷ This alone would have made him a wealthy man; with the addition of his entitlement under the settlement, on his father's death in 1680 Richard Berney came into what could only be described as a fortune. By that time, however, he had anticipated his expectations to such an extent that that fortune could be viewed as existing in name only.

3.2.4 Debts

Richard Berney borrowed £1,000 from George Pitt on 8 June 1675, and a further £1,000 in October or November of the same year.¹⁹⁸ In his bill against Pitt, seeking relief from the judgments securing those amounts, Richard Berney explained his need for money at the time he borrowed the first £1,000:

[Berney's] father in his lifetime paying or allowing [him] but a small sum of money [on which] to live and subsist [he] was forced to borrow money of several persons to support his ordinary expenses and became indebted ... And the plaintiff's creditors threatening to sue the plaintiff ... the plaintiff to avoid imprisonment borrowed of the defendant £1000.¹⁹⁹

Clearly, the transaction with Pitt was, as discussed above, not the only money borrowed by Berney. In addition to the prior debts referred to in the bill, Berney borrowed at least £7,610 in ready money (including the £2,000 borrowed from Pitt), and received goods to the value of around £3,900, between 1675 and the death of his father on 26 January 1680.²⁰⁰

This would suggest that Richard Berney's 'ordinary expenses and charges' between June 1675 and December 1678 amounted to well over £11,000; or around £919,000 as an approximate modern equivalent.²⁰¹ It is entirely possible – and indeed probable – that the 'charges' to which Berney referred included sums required to service other debts. The picture presented by Berney in his various bills is that, having needed to borrow money in the first place to 'supply his necessary and ordinary occasions',²⁰² entirely as a result of his inadequate allowance, it was only due to the pernicious influence of the brokers and lenders

¹⁹⁶ Modern spelling has been used where the location is still extant.

¹⁹⁷ *Berney v Hungerford, Pitt, Muschamp and Stisted* (24 March 1680) C 10/208/10.

¹⁹⁸ *Berney v Pitt* (9 February 1681) C 33/255, f. 258.

¹⁹⁹ *Berney v Pitt* (16 February 1680) C 10/208/7.

²⁰⁰ Where an imprecise amount of money is provided in the pleadings, the lower estimate has been used.

²⁰¹ The National Archives Currency Converter, above n 188.

²⁰² *Berney v Fairclough and Stystead* (14 February 1680) C 10/201/12.

who supplied him that the extravagance of his lifestyle increased²⁰³ – a change in circumstance bringing with it, of course, an even greater demand for ready money.

Humphrey Prideaux, on the other hand, held responsible someone quite other than Berney's brokers or lenders for his predicament, and recounts Berney as having

squandered all away and yet never lived like a gentleman in his life. He hath been infatuated to a vile expensive whore, and she hath been ye broad ditch which has swallowed all.²⁰⁴

It is possible that this was Elizabeth Cowan, described in Berney's will as the sister of 'James Cowan, of London, gent.'²⁰⁵ Cowan and Berney married in St Nicholas Cole Abbey, in the city of London, on 10 June 1692;²⁰⁶ they had a son (also called Richard Berney), and there seems little doubt of this son's illegitimacy. The child was in existence before 29 May 1682, when Richard Berney's cousin, Sir Richard Berney – concerned by the ramifications for the entail should the boy be legitimate – had Berney enter a statute staple of £30,000 to him, enforceable only if Sir Richard could prove Berney's marriage, which he was unable to do.²⁰⁷

Whether Richard Berney's disastrous financial activities can be put down to his naivety in allowing others to persuade him into extravagance, and the manipulation of that naivety by the unscrupulous; his own greed; a susceptible heart; or a mix of all these, the outcome for the Berneys of Reedham went some way to justify Lord Jeffreys' opinion that such bargains 'tended ... to the utter ruin of families'.²⁰⁸

3.2.5 Outcomes

Richard Berney was successful in having at least seven of the eighteen bargains for which he sought relief set aside, on repayment of the principal actually received, plus interest.²⁰⁹ Despite this, Berney's estate was sold to cover his debts: as has been suggested, he may have had other liabilities than those dealt with in these Chancery cases. It must not be forgotten, either, that the cost of pursuing suits in Chancery must surely have added to the burden on his estate. Humphrey Prideaux, writing in December 1693, had this to say:

²⁰³ For example, Berney claimed that one Edward Stistead, discussed in more detail below at 3.5, encouraged him to 'increase his retinue and live in a higher and more splendid way and manner': *ibid.* ²⁰⁴ Prideaux, above n 172, 166.

²⁰⁵ Will of Richard Berney of Park Hall, Reedham, Norfolk (7 December 1695) PROB 11/429/186.

²⁰⁶ London Metropolitan Archives, *Church of England Parish Registers, 1538-1812*; Reference Number: P69/NIC2/A/002/MS05686.

²⁰⁷ *Cowan v Berney* (1707) C 79/202, unnumbered [Membrane 13; IMG_0126]. Although the younger Richard Berney denied claiming any title or rights as heir, except under his father's will (*ibid* [Membrane 16; IMG_0133]), the court ordered a master to inquire into his legitimacy, no doubt preferring there to be no doubt (*ibid* [Membrane 18; IMG_0136]).

²⁰⁸ *Berney v Pitt* (1687) 2 Chan. Rep 396 at 397.

²⁰⁹ As discussed below, no outcomes in relation to the remaining eleven bargains have been found; however, it seems likely that for at least seven of these Berney would have ended up paying no more than the amount actually received, plus interest, and it is almost certain that he would not have had to pay the penalty amounts: see discussion of relief against penalties in Chapter 5, below at 5.4.2.1.

[Berney] hath advanced the charge upon ye estate so high that next Easter Term, by decree of Chancery, ye mortgagees enter all unless he can find a chapman in the interim to purchase ye estate.²¹⁰

Some idea of the size of the encumbrances on Berney's estate can be gathered from the decree made in proceedings brought after Berney's death by Elizabeth Berney's brother and administrator, James Cowan.²¹¹ On 5 January 1682 Berney mortgaged several of his lands to Edward Miles, his attorney, and one Ann Martell for £8,260,²¹² and in February of the same year he borrowed £22,000 from Sir James Edwards, secured by a mortgage over several other properties,²¹³ including the manors of Freethorpe, Moorehall, Limpenhoe, Southwood and Rainsbury.²¹⁴ Shortly before his death in October 1695, Berney owed £32,719 1s. on this mortgage.²¹⁵ These manors, along with many others, had been included in a deed tripartite in 1681, conveying them from Richard Berney to Robert Bedingfield and Edward Miles, apparently for the purpose of recovering moneys owed to the third party to the deed, one Robert Hodgson, described as a 'citizen and painter stainer of London'.²¹⁶ Given that Berney mortgaged these manors to Sir James Edwards four months later, it seems likely that the deed was never executed. The deed does, however, reveal that Robert Hodgson was another of Berney's creditors, although no further information about this debt has been discovered. In addition to the above mortgages to Sir James Edwards, and Martell and Miles, Berney mortgaged still other lands to Edward Miles for £5,900, apparently some time afterwards.²¹⁷

In his will, Berney had directed that his mortgaged properties be sold by his trustees (his wife Elizabeth, Denzil Onslow,²¹⁸ John Clopton,²¹⁹ and Francis Wise) within seven years of his death, with the proceeds going firstly to pay off the mortgagees, secondly to the payment of legacies as directed under the wills of his grandfather, Sir Richard Berney, and his father,

²¹⁰ Prideaux, above n 172, 166: fascinatingly, Prideaux goes on to say, 'My Lord N[ottingham] offered at it, but I gave him those reasons against meddling there that he did not proceed.' Lord Nottingham, lord chancellor at the time of the first Berney hearing, had long been Prideaux's patron (ibid, at ii; Hugh de Quehen, 'Prideaux, Humphrey (1648-1724) in *Oxford Dictionary of National Biography* (Oxford, 2009) at < <https://doi.org/10.1093/ref:odnb/22784>> accessed 13 April 2019).

²¹¹ *Cowan v Berney* (1707) C 79/202, unnumbered.

²¹² Ibid [Membrane 14; IMG_0128].

²¹³ Ibid [Membrane 2; IMG_0105].

²¹⁴ Assignment of Mortgage (1694) NRO BER41 685 X 5.

²¹⁵ *Cowan v Berney* (1707) C 79/202, unnumbered [Membrane 4; IMG_0108].

²¹⁶ Deed between Richard Berney, Robert Bedingfield and Edward Miles, and Robert Hodgson (14 October 1681) NRO BER40 685 X 5.

²¹⁷ *Cowan v Berney* (1707) C 79/202, unnumbered [Membrane 7; IMG_0114].

²¹⁸ Denzil Onslow was a Whig politician, and held various Surrey seats in the House of Commons between 1679 and 1721: Romney R. Sedgwick, 'Onslow, Denzil (c.1642-1721) of Pyrford, Surr.' in *The History of Parliament: the House of Commons 1715-1754*, ed. R. Sedgwick (1970) <<http://www.historyofparliamentonline.org/volume/1715-1754/member/onslow-denzil-1642-1721>> accessed 3 April 2019.

²¹⁹ John Clopton of Norwich married Frances Berney of Reedham on 1 April 1678 (NRO ANF13 Archdeacon's Parish Register Transcripts, 1600-1812: Parish of Reedham, April 1 1678 at 18 [Microfiche]); it is possible that Frances was a sister or other close relative of Richard Berney – certainly one of the five daughters of his cousin, Sir Richard Berney, was named Frances: Wotton, above n 173, 381.

Richard Berney esq., and thirdly to the payment of his trustees' expenses.²²⁰ Any money remaining from the sale of these properties was to be used by the trustees to purchase real estate with a value of £500 per annum, the income from which was to be used to support both Elizabeth and their son. Elizabeth was also bequeathed £3,000 from Berney's personal estate.²²¹ The residual estate was to be used for the payment of debts.²²²

Blomefield records that Richard Berney's estates were not sold until 1709, and that the sales took place by reason of a decree in Chancery.²²³ This presumably refers to the action taken by James Cowan, which sought to have the terms of Berney's will performed.²²⁴ Cowan was successful in this, with the court ordering that the lands mortgaged to Edwards, Martell and Miles be sold to the uses stipulated in the will.²²⁵ Additionally, an annuity (with arrears and interest) was to be paid to Gilbert Passmore from Berney's estate.²²⁶ Amongst the manors and lands to be lost to the Berney family through the extravagance of Richard Berney was the family seat of Parkhall in Reedham, which was purchased by Sir James Edwards in the sale of the mortgaged properties.²²⁷

3.3 The Suits

3.3.1 Introduction

The Chancery records reveal that Richard Berney sought relief from eighteen bargains entered into between 1675 and the death of his father in January 1680. All of these were post-obit. in nature, and all involved penal instruments, either bonds, statutes, or judgments. The conditioned amounts of these instruments added up to around £30,000;²²⁸ the penalty amounts totalled around £60,000.²²⁹ Richard Berney's need for relief from these bargains was the more pressing because the bulk of the conditioned amounts – nearly £28,000 – was due within one month of the death of his father.

²²⁰ Will of Richard Berney of Park Hall, Reedham, Norfolk (7 December 1695) PROB 11/429/186.

²²¹ Ibid.

²²² Ibid.

²²³ Blomefield, above n 195, 282.

²²⁴ *Cowan v Berney* (1707) C 79/202, unnumbered.

²²⁵ Ibid [Membrane 20; IMG_0140]. Of the three mortgagees named in the will, only Sir James Edwards and Ann Martell appear as the subsequent purchasers of the properties: (Blomefield, above n 195, 282, 319; vol I, 473; vol IX, 20).

²²⁶ *Cowan v Berney* (1707) C 79/202, unnumbered [Membrane 20; IMG_0140]. This is presumably the same Gilbert Passmore who lent Berney £200 in 1677, secured by a penal bond of £900, conditioned for payment of £600 on the day of Berney's father's death, and against whom Berney exhibited a bill in Chancery seeking to compel Passmore to accept only principal and interest (*Berney v Passmore* (23 February 1679) C 10/495/27). It has not been possible to ascertain the outcome of this bill, with only a single, purely procedural, entry book entry having been located (*Richard Berney v Gilbert Passmore* (26 February 1680) C 33/253, f. 258). Berney does not seem to have been discouraged from further dealings with Passmore: the annuity discussed above was agreed on 20 June 1685, and secured by a penal statute of £3,000 (*Cowan v Berney* (1707) C 79/202, unnumbered [Membrane 16; IMG_0132]).

²²⁷ Blomefield and Parkin, above n 168, 121–132.

²²⁸ The approximate equivalent of £2,255,580 today (The National Archives Currency Converter, above n 188).

²²⁹ £4,688,264 (ibid).

Seven of these bargains are found in the earliest of the reported Berney cases, *Berry v Fairclough* (1681),²³⁰ although the hearing with which the report deals may well have included up to a further ten: bills complaining of fifteen separate bargains of the same kind were exhibited by Berney between 14 February and 23 March 1680, with a sixteenth exhibited on 27 November 1680. There are indications in the entry books for the relevant period that all these matters were dealt with together at various times.²³¹ It cannot be determined why the hearing before Nottingham LC that appears in the printed reports named only seven of these defendants; perhaps there were sufficiently different circumstances pertaining to some of the cases to warrant separate treatment, although no record of separate hearings of these matters has been found.²³²

The last reports of suits involving Berney date from 1687, with a final resolution of the dispute between Berney and Pitt.²³³ Of the other defendants in 1681, Beake and Tyson also returned to the Chancery reports, for hearings in 1683 and 1684 respectively.²³⁴ In the case of Tyson, this second hearing was sufficient; for Beake, on the other hand, a second Chancery rehearing in 1686, which was not reported, and an appeal to the House of Lords,²³⁵ were necessary to finally conclude the matter.

In the discussion of reported suits below, the information contained in the reports is augmented (and, on occasion, corrected) by that found in entry book entries, enrolled decrees, and pleadings. These Chancery records also form the basis of the discussion of those proceedings brought by Richard Berney which were not reported.

3.3.2 The Reported Cases

3.3.2.1 *Berry v Fairclough* (1681)

In this case, Richard Berney sought relief from bargains made with George Pitt,²³⁶ Dr James Fairclough,²³⁷ Sir James Smyth,²³⁸ Samuel Beake,²³⁹ Nathaniel Mason,²⁴⁰ John Pargiter,²⁴¹ and Francis Tyson.²⁴² These bargains were for ready money or goods, and were all of a type

²³⁰ 79 Selden Soc. 868.

²³¹ See, for example, *Berney v Pitt, Turner, Forster, Thompson, Skipwith, Boreman, Passmore, Stystead, Sherman, Coney, Tyson, Beake, Fairclough, Mason, Smith, Gargrave, John Utting and Mingay* (11 February 1680) C 33/253, f. 382v.

²³² For the sake of convenience, these 'other' defendants are discussed separately below.

²³³ *Berney v Pitt* (1687) 2 Chan. Rep 396; *Berney v Pitt* (1687) 2 Vern. 14.

²³⁴ *Barny v Beak* (1683) 2 Chan. Cas. 136; *Barney v Tyson* (1684) 2 Ventris 359.

²³⁵ 'House of Lords Journal Volume 14: 21 December 1689', in *Journal of the House of Lords: Volume 14, 1685-1691* (London, 1767-1830), at 395-396: *British History Online* <<http://www.british-history.ac.uk/lords-jrnl/vol14/pp395-396>> accessed 4 January 2019. A right of appeal from Chancery to the House of Lords was only established after the Restoration, although prior to this it was possible to petition Parliament or the Crown to bring about a reconsideration by the lord chancellor (DM Kerly, *An Historical Sketch of the Equitable Jurisdiction of the Court of Chancery* (Cambridge, 1890), 167).

²³⁶ *Berry v Fairclough* (1681) 79 Selden Soc. 868.

²³⁷ *Berney v Fairclough and Stystead* (14 February 1680) C 10/201/12.

²³⁸ *Berney v Smyth and Stistead* (14 February 1680) C 10/197/16.

²³⁹ *Berney v Beake* (14 February 1680) C 10/197/17.

²⁴⁰ *Berney v Mason and Stistead* (14 February 1680) C 10/197/19.

²⁴¹ *Berney v Pargiter* (23 March 1680) C 10/547/4.

²⁴² *Berney v Tyson* (26 February 1680) C 33/253, f. 243v.

designed to circumvent the operation of the usury statutes,²⁴³ a ruse that was by this time familiar to the Court.²⁴⁴

The defendants Pargiter, Mason, Beake and Tyson had supplied goods to the plaintiff for resale, with the money to be paid for these goods by the plaintiff far in excess of their value;²⁴⁵ the difference between the true worth of the goods and the prices paid by the plaintiff constituted a gain for the defendants that could not be described as interest, therefore falling outside the usury statutes.²⁴⁶ In addition, through the use of penal bonds to secure the transactions, there was the possibility (although increasingly remote by the latter part of the seventeenth century) that the defendants could recover further amounts in penalties.²⁴⁷

The printed report of this case gives no details regarding the bargains entered into with these four defendants, beyond the naming of ‘parcels of wine, hemp, cambric [and] jewels’ as the goods involved.²⁴⁸ Fortunately, the relevant entry book entries provide a more detailed picture of these transactions, as do the surviving bills against Pargiter, Mason and Beake.

On 16 October 1677, Berney allegedly entered into the following bargain with John Pargiter, a goldsmith: in return for receiving, then and there, jewels alleged to be worth £500, Berney would pay the £500 on 25 March 1680. As security, Berney acknowledged a penal statute for £1,000, defeasanced on payment of the £500 on the due date. In his bill, Berney alleged both that he had been inveigled into the bargain by Pargiter and one Thomas Warkehouse, and that the jewels turned out to be worth a great deal less than £500; Pargiter answered that the proposal had emanated from Berney and Warkehouse, neither of whom he knew, and that if Berney had not been able to find a purchaser who would give him full value for the jewels, that was not Pargiter’s fault.²⁴⁹

Just over a month later, on 16 November 1677, Berney entered a very similar bargain with merchant Nathaniel Mason, for wines and other goods said by Mason to be worth £800.²⁵⁰ This bargain was facilitated by one Edward Stinstead, who allegedly ‘insinuated himself into [Berney’s] company’ and, when Berney found himself in need of money, arranged for him to

²⁴³ See Chapter 1 at 1.1.

²⁴⁴ See, for example, *Fairfax v Trigg* (1677) Rep. Temp. Finch 314.

²⁴⁵ Nottingham LC asserted that the various goods sold to Berney ‘could never be sold for a quarter of the price at which they were delivered’: 79 Selden Soc. 868 at 868.

²⁴⁶ Other common methods of avoiding the statutes were the annuity and the post-obit bond. Sheridan identifies these goods for resale bargains as ‘evidently the origin of the principle as to catching bargains with young expectants’ and concludes that the granting of relief for other types of bargains with expectant heirs was merely an extension of this (Sheridan, above n 4, 143). However, this view seems to be based on the fact that the two earliest reported expectant heir suits, *Waller v Dale* (1676) 1 Ch. Cas. 276 and *Draper v Dean* (1679) Rep. Temp. Finch 439; A1.16; both involved goods for resale. The unreported suits examined for this thesis clearly show that relief was granted in non-goods suits from the earliest part of the seventeenth century.

²⁴⁷ See discussion of relief against penalties in the seventeenth century in Chapter 5, below at 5.4.2.1.

²⁴⁸ 79 Selden Soc. 868.

²⁴⁹ *Berney v Pargiter* (23 March 1680) C 10/547/4.

²⁵⁰ *Berney v Mason and Stinstead* (14 February 1680) C 10/197/19.

meet his 'friend in London', Mason.²⁵¹ Once again, to provide security Berney entered a penal statute, in this instance for the sum of £1,700, defeasanced for a payment of £888 to be made after the death of Berney's father.²⁵² The similarities to the transaction with Pargiter also extend to Berney's allegation that the wines, at least, rather than being of the value stated, were 'sour and flat'.²⁵³

Undeterred by his previous experiences, on 17 November 1678, a year almost to the day after he entered the bargain with Mason, Berney made a near-identical bargain with Samuel Beak, wine merchant of London.²⁵⁴ Once again, Stistead was alleged by Berney to have facilitated the transaction; once again a penal statute (this time for £2,880) was entered into, defeasanced on payment of £1,440, for wine alleged to be worth £1,200-1,300;²⁵⁵ these wines too, Berney alleged, were dead and flat.²⁵⁶ In answer to these allegations, Beake asserted that, rather than taking advantage of the expectant heir's predicament, he had known nothing of Berney's circumstances, and it was Berney himself who had pressed the bargain.²⁵⁷ Further, he alleged, Berney had arranged for his own cooper to taste and mark the wine barrels in question.²⁵⁸

The pleadings in the matter of Tyson do not seem to have survived,²⁵⁹ and so the details of this bargain come from an entry book entry of 6 May 1680,²⁶⁰ and a report of the rehearing of the matter in 1684.²⁶¹ While neither source gives an exact date for the bargain, Berney is described in the report of the rehearing as 'about twenty six years of age'²⁶² at the time, from which a date some time in 1675 or 1676 can be deduced. Tyson apparently supplied Berney with cambric, flax and Holland,²⁶³ allegedly of the value of £400, secured by a penalty statute of £1,600 defeasanced for payment of £800 within forty days of the death of Berney's father.²⁶⁴ Once again, Stistead seems to have been involved in the transaction.²⁶⁵

These four bargains concerning goods, three of which were made within a period of fourteen months, amounted to a total of over £3,600 due on or about the death of Berney's father, without even considering the penalties. This amount, however, represented only part of the

²⁵¹ Ibid.

²⁵² Ibid.

²⁵³ Ibid.

²⁵⁴ *Berney v Beake* (14 February 1680) C 10/197/17.

²⁵⁵ In the 1683 rehearing of the matter, Berney alleged that the wines could be sold for no more than £360 (*Barny v Beak* (1683) 2 Chan. Cas. 136 at 137.).

²⁵⁶ *Berney v Beake* (14 February 1680) C 10/197/17.

²⁵⁷ Ibid.

²⁵⁸ Ibid.

²⁵⁹ Given the vagaries of seventeenth-century naming and filing of Chancery pleadings, it may well be that the papers in Tyson have survived, but cannot be located.

²⁶⁰ *Berney v Tyson* (6 May 1680) C 33/253, f. 488v.

²⁶¹ *Barney v Tyson* (1684) 2 Ventris 359.

²⁶² Ibid, at 359.

²⁶³ A generic term for good-quality plain woven linen (Nancy Cox and Karin Dannehl, 'Hobnail - Holliwortle', in *Dictionary of Traded Goods and Commodities 1550-1820* (Wolverhampton, 2007): *British History Online* <<http://www.british-history.ac.uk/no-series/traded-goods-dictionary/1550-1820/hobnail-holliwortle>> accessed 3 April 2019.

²⁶⁴ *Berney v Tyson* (6 May 1680) C 33/253, f. 488v.

²⁶⁵ Ibid.

liabilities from which Berney sought relief: *Berry v Fairclough* also deals with three bargains for the advance of money, rather than of goods.

As with the bargains made for goods, the transactions for money into which Berney entered with Pitt, Fairclough, and Smyth were engineered to avoid the usury statutes. In these cases, on receipt of a sum of money Berney entered into post-obit. bonds with the lenders: the security for the money advanced was a bond for an amount to be paid on, or at some stipulated time after, the death of Berney's father, and Berney's subsequent inheritance.

There is some confusion in the printed reports as to the exact details of Berney's bargain for money with Pitt, which, while easily solved by reference to the entry books, serves as a salutary warning in relation to the accuracy of the printed reports of this time.²⁶⁶ The entry for the hearing on 9 February 1681 states that on 8 June 1675 Berney received £1,000 from Pitt, in the form of £950 in cash plus three horses worth a combined £50; this was secured by a judgment of £5,000 defeasanced on payment of £2,500 within a month after the death of Berney's father;²⁶⁷ some four or five months later Pitt lent him another £1,000, secured by a judgment, once again of £5,000 defeasanced for £2,500.²⁶⁸

The details of Berney's bargain for money with James Fairclough presented in Berney's bill were not disputed in Fairclough's answer to that bill.²⁶⁹ In return for an advance of £500, Berney gave Fairclough a bond for £4,000, defeasanced on payment of £2,000 within two days of the death of his father.²⁷⁰ The circumstances of this bargain, made one month before Berney's transaction with Samuel Beake, and after his allegedly unsatisfactory transactions with Pargiter and Mason, shed further light on the role allegedly played by Edward Stinstead:

[Berney] was several times in great straits for ready money to supply his necessary and ordinary occasions which being taken notice of by one Edward Stinstead a person well skilled in the art of inveighing ... young gentlemen he the said Edward Stinstead insinuating himself into [Berney's] company and acquaintance and pretended great love and fondness ... ²⁷¹

According to Berney, Stinstead told him that whenever Berney needed money, he, Stinstead, could obtain it for him on Berney's own security; Berney need only repay it when he was able to do so.²⁷² He also apparently encouraged Berney to live beyond his means, implying that as heir to a great estate he ought to 'live in a higher and more splendid way',²⁷³ and

²⁶⁶ In one report of the rehearing Berney is said to have received £1,000, with one bond of £5,000 defeasanced on payment of £2,500 after the death of his father (*Berney v Pitt* (1687) 2 Chan. Rep 396); the other report of the same case asserts that Berney received £2,000, with two bonds of £5,000 defeasanced on payment of £2,500 for each (*Berney v Pitt* (1687) 2 Vern. 14).

²⁶⁷ *Berney v Pitt* (9 February 1681) C 33/255, f. 258.

²⁶⁸ *Ibid.* This second judgment was taken in the name of Sir Edward Hungerford, although the court accepted that Hungerford held the judgment in trust for Pitt (*ibid.*).

²⁶⁹ *Berney v Fairclough and Stinstead* (14 February 1680) C 10/201/12.

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

²⁷² *Ibid.*

²⁷³ *Ibid.*

that Stistead would provide the funds for him to do so.²⁷⁴ When Berney then asked Stistead to lend him £100, as his father refused to supply him with any more money, Stistead allegedly replied that while he could not provide the funds himself, he had friends who could do so.²⁷⁵ James Fairclough was apparently one of these friends; not only, Berney alleged, did Stistead introduce them, but after Berney balked at the large amount of £2,000 payable on an advance of £500, encouraged him to stay and have a drink with them both.²⁷⁶ Shortly thereafter, Berney agreed to the bargain.²⁷⁷

Far less detail is available concerning the striking of the bargain between Berney and Sir James Smyth. Berney's bill does reveal that Stistead was once again involved, and that the amount borrowed was in the vicinity of £1,200 to £1,400.²⁷⁸ It is also unclear whether this was the only transaction between them, as in a later Chancery bill brought by Samuel Beake's executors against both Berney and Smyth, it was alleged that Berney had at some time before 3 February 1680²⁷⁹ borrowed £500 from Smyth, against a bond of £3,000, defeasanced on payment of £1,500 within one month of the death of Berney's father.²⁸⁰

Richard Berney's father died on 28 January 1680.²⁸¹ Even if the lesser amount referred to in Beake's bill is correct, the defeasanced sums due to Pitt, Fairclough and Smyth on the death of Berney's father would have amounted to approximately £8,500. Added to the £3,600 or so to be paid at the same time to those individuals with whom he made 'goods for resale' bargains, it becomes apparent that even had these amounts represented the full extent of his liabilities – which clearly they did not – Richard Berney would have been entering into his inheritance with a large burden of debt. The expense of bringing suit in Chancery must have seemed a better option than having to find the means to make these payments in such a short time.

Nottingham LC granted Berney relief, in the form of the payment of principal and interest only, against all the defendants except Pitt.²⁸² In his notes, the lord chancellor grounded his decision to relieve against the 'money for wares' bargains on what he perceived to be an established jurisdiction:

this infamous kind of trade and circumvention ought by all means to be suppressed; the Star Chamber used to punish it, and this Court did always relieve against it. No family can be safe if this be suffered.²⁸³

²⁷⁴ Ibid.

²⁷⁵ Ibid.

²⁷⁶ Ibid.

²⁷⁷ Ibid.

²⁷⁸ *Berney v Smyth and Stistead* (14 February 1680) C 10/197/16.

²⁷⁹ This is the date on which Smyth is asserted in the bill to have assigned Berney's debt to Beake in payment of his own debt to Beake: *Beake v Berney and Smith* (5 November 1687) C 10/508/11.

²⁸⁰ Ibid. Further work is needed on the jurisdiction in the Star Chamber, which is beyond the scope of this thesis: see discussion at 5.2.

²⁸¹ Farrer, above n 170, 220.

²⁸² *Berry v Fairclough* (1681) 79 Selden Soc. 868.

²⁸³ Ibid.

In the case of Pitt, however, the lord chancellor dismissed the bill,²⁸⁴ apparently distinguishing this bargain from the others due to the lack of ‘circumvention or practice’ on Pitt’s part, the fact that the bargain had been made at a time when the elder Berney was healthy, and because the bargain expressly stated the amount due was payable only on the contingency of the son surviving the father.²⁸⁵

These three elements of the bargain with Pitt – and not the fact that it was for the provision of money rather than goods, as has been reported²⁸⁶ – seem to have been fundamental to Nottingham LC’s refusal to grant relief. The idea that the important distinction was that between money and goods becomes even less compelling when one considers that relief was granted against both Fairclough²⁸⁷ and Smyth – both of whom also provided money to Berney rather than goods.

3.3.2.2 *Berney v Pitt* (1687)

The final resolution of matters between Berney and Pitt did not come until some six years later, when Berney secured a rehearing before Jeffreys LC. The two reports of this rehearing differ from each other, most notably in that Vernon ascribed a motive to Nottingham LC for not granting relief against Pitt in the first instance that was not supported by Lord Nottingham’s own notes; and that the date given by Vernon for that first hearing is five years early. Accordingly, preference is given in this thesis to the Chancery Reports version of this case where discrepancies arise.²⁸⁸

The Chancery Reports reveal that the defendant, in the rehearing before Lord Jeffreys, argued on the basis of the contingent nature of the bargain; hardly a surprising approach given the success of this argument before Lord Nottingham. Berney, on the other hand, seems to have argued that this bargain should be regarded in the same way as the ‘money for wares’ bargains from which Lord Nottingham *had* given relief, arguing

that the late lord chancellor and lord keeper had frequently relieved against such fraudulent and corrupt bargains, made by heirs in their father’s life-

²⁸⁴ While the lord chancellor is silent as to the details of this decree in his notes, a later reporter states that Nottingham refused relief ‘... otherwise than against the penalty, and decreed the plaintiff to pay to the defendant £2500 with interest’ (*Berney v Pitt* (1687) 2 Chan. Rep 396). As this report incorrectly stated the terms of the bargain, it can be presumed that the decree was for the full conditioned amount of £5,000; unfortunately the decree could not be found in the entry books.

²⁸⁵ *Berney v Fairclough* (1681) 79 Selden Soc. 868.

²⁸⁶ See *Berney v Pitt* (1687) 2 Vern. 14 at 15: ‘This cause came first to be heard ... before the Lord Nottingham, who in regard the judgments were for money lent, and not for wares taken up to sell again at undervalue ... did not think fit to relieve the plaintiff’.

²⁸⁷ Fairclough later obtained a rehearing of the matter of his statute, but the lord chancellor affirmed the decree of 9 February: *Berney v Fairclough and Stysted* (1 July 1681) C 33/255, f. 729.

²⁸⁸ This preference is also strengthened by the comparative clarity of the Chancery Reports version; it is far more difficult to differentiate between reported argument and judicial reasoning in the Vernon report. Wallace describes Vernon’s Reports as ‘often extremely meagre and incorrect’ (JW Wallace, *The Reporters Arranged and Characterized, with Incidental Remarks* (Philadelphia, 3rd ed, 1855), 310). Accordingly, it is arguably unsafe to draw conclusions concerning Jeffreys LC’s view from this report, although others have done so (Clark, for example, interprets the Vernon report as indicating that the basis for the overruling of Lord Nottingham’s judgment was that ‘the chance of the borrower predeceasing his aged parent was remote in the extreme’: Clark, above n 76, 2).

time; and that there was not any real difference where the contract is for money and where it is for goods.²⁸⁹

This argument seems to have had some resonance with Lord Jeffreys in his decision to overturn Lord Nottingham's decree and give relief to the plaintiff. Read in the light of Chancery's familiarity with the 'money for wares' ruse, the lord chancellor's reasons as reported in the Chancery Reports suggest a concern with the substance of such bargains, rather than their form:

This Court, on reading the defeazance, declared it fully appeared, that these bargains were corrupt and fraudulent, and tended to the destruction of heirs, sent [to London] for education, and to the utter ruin of families; and as there were new frauds and subtle contrivances for the carrying them on, so the relief of this court ought to be extended to meet with, and correct such corrupt bargains and unconscionable practices ...²⁹⁰

The relief granted in this instance was that, of the money received by Pitt to date, Berney should be repaid anything that exceeded the principal and interest.²⁹¹

3.3.2.3 *Barny v Beak* (1682)

Samuel Beake, wine merchant, was one of the six defendants against whom Berney obtained relief at first instance in *Berry v Fairclough* (1681).²⁹² The form of that relief was that Berney should pay only the principal advanced – in this case the value of the wine supplied by Beake – plus interest. Beake successfully sought a rehearing of the matter, which came before North LK in February 1682.²⁹³

The lord keeper, apparently looking favourably on Beake's evidence, overturned Lord Nottingham's decree, for the reason that there 'was no proof of any fraud, but that it was a hazardous bargain'.²⁹⁴ The lord keeper is also reported to have expressed the view that had there been any sharp practice concerning the quality of the wine, it was entirely possible that Stisted was responsible, rather than Beake.²⁹⁵ This suggestion does not appear in the relevant entry book entry, however; rather, North LK's reasons for overturning the former decree are given there as the absence of any 'fraud or contrivance by the defendant in obtaining the said statute'; that the plaintiff was around 27 years old at the time of making the bargain, which was brought about 'by the great importunity of the plaintiff's agent Stisted'; and that the bargain involved a real risk that the defendant would lose his money

²⁸⁹ *Berney v Pitt* (1687) 2 Chan. Rep. 396 at 397: the lord keeper referred to is presumably North LK, Lord Jeffrey's predecessor.

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*, at 398.

²⁹² 79 Selden Soc. 868.

²⁹³ *Barny v Beak* (1683) 2 Chan. Cas. 136 at 136. Beake had also been successful in obtaining an earlier rehearing before Nottingham LC, who declined to overturn his previous decree (*Berney v Beake* (13 February 1682) C 33/259, f. 247).

²⁹⁴ *Barny v Beak* (1683) 2 Chan. Cas. 136 at 137.

²⁹⁵ *Ibid.*

should the plaintiff die before his father.²⁹⁶ Whatever its basis, North LK's order meant that Berney was now required to pay the full defeasanced amount of £1,440 to Beake, rather than the (disputed) value of the wine plus interest.²⁹⁷

The matter did not rest there, however: Berney obtained a rehearing before Jeffreys LC on 27 October 1686. Beake having died in the latter part of 1685,²⁹⁸ the suit was revived against the executors of Samuel Beake's estate, Abraham Beake and John Cranenburgh. The relevant entry book entry reveals that Jeffreys LC 'declared that the contract in itself without any other evidence appears to be fraudulent and that the court ought to relieve against such infamous dealing'.²⁹⁹ The former order of North LK was accordingly set aside, and Beake's executors were ordered to restore to Berney the £1,440 he had paid under that order, less the value of the wines, plus interest.³⁰⁰

3.3.2.4 *Beake v Berney* (1689)

The final resolution of this matter came in 1689, some eleven years after the making of the bargain. Abraham Beake and John Cranenburgh, executors of Samuel Beake's will, on behalf of Samuel's daughter Elizabeth, a minor,³⁰¹ appealed against both the original decree of Lord Nottingham, and Jeffreys LC's later decree granting relief to Berney. They were unsuccessful, with the House of Lords dismissing the appeal and affirming both decrees.³⁰²

3.3.2.5 *Barney v Tyson* (1684)

In 1684, Tyson, another of the 'money for wares' defendants who had been unsuccessful before Lord Nottingham LC in 1681, secured a rehearing of the matter before North LK.³⁰³ Ventriss reports that, in the earlier hearing of the matter, it had been proven both that at the time the bargain was made Tyson knew of Berney's father's illness and grave prognosis, and also that the 'infamous' Stinstead was involved in the transaction; the implication being that both these facts prompted Lord Nottingham's decision in favour of Berney.³⁰⁴

It seems that North LK only reluctantly refused to overturn the previous decision: '[t]he lord keeper affirmed the decree; but said that he would not have it used as a precedent for this

²⁹⁶ *Berney v Beake* (5 March 1682) C 33/259, f. 328.

²⁹⁷ *Barny v Beak* (1683) 2 Chan. Cas. 136 at 137; *Berney v Beake* (5 March 1682) C 33/259, f. 328.

²⁹⁸ Will of Samuel Beake (2 December 1685) PROB 11/381/297.

²⁹⁹ *Berney v Beake* (13 February 1682) C 33/259, f. 247.

³⁰⁰ *Ibid.*

³⁰¹ A further Chancery suit concerning Beake and Berney was commenced before 12 July 1682, in which Samuel Beake exhibited a bill against Richard Berney, Sir James Smyth, and Edward Stinstead, on the grounds that Sir James Smyth had assigned the securities – including the £3,000 penalty statute – which he held from Richard Berney to Samuel Beake, in return for cancellation of the 'considerable' debt Smyth owed to Beake: *Beake v Berney and Smith* (12 July 1681) C 33/255, f. 563v. Beake's complaint was that Berney then sought relief in Chancery from the securities given to Smyth, and Beake, as the beneficiary of those securities, was not consulted or informed. Beake therefore sought an injunction against the relief granted to Berney against Smyth. No entry for any subsequent hearing of Beake's bill has been found.

³⁰² 'House of Lords Journal Volume 14: 21 December 1689', above n 235.

³⁰³ As with Beake, Tyson had also obtained an earlier rehearing before Nottingham LC; like Beake he failed to persuade his Lordship to overturn the previous order (*Berney v Tyson* (6 July 1681) C 33/255, f. 617v).

³⁰⁴ *Barney v Tyson* (1684) 2 Ventriss 359 at 359.

court to set aside men's bargains'.³⁰⁵ The fact that the case had already been determined, and that Tyson had accepted the payment of the principal and interest ordered thereby, allied to the minor and technical nature of the procedural defect which had allowed a rehearing at all (and the fact that the defendant was guilty of delay in his petition), all apparently deterred North LK from overturning the decision of his predecessor.³⁰⁶ The overall impression given in the report, however, is that North LK's view of such bargains was that they were ill-advised, but not fraudulent or otherwise improper to a degree warranting intervention by the court, a view supported by his decision in *Barny v Beak* (1683).³⁰⁷

3.3.3 Unreported Suits

The seven defendants who figured in the *Berry v Fairclough* (1681) hearing were far from being Richard Berney's only creditors; as mentioned above, evidence can be found in the Chancery records of eleven further bargains, entered between 1675 and the death of his father in January 1680, from which he sought relief.

Berney exhibited eighteen bills in Chancery between 14 February and 27 November 1680,³⁰⁸ complaining of seventeen separate post-obit. bargains.³⁰⁹ In addition to the seven defendants dealt with in *Berry v Fairclough*, Berney brought actions against Sir Thomas Skipwith,³¹⁰ Anthony Mingay and John Utting,³¹¹ Gilbert Passmore,³¹² Sir John Thompson,³¹³ Robert Forster,³¹⁴ George Coney,³¹⁵ Thomas Sherman,³¹⁶ Robert Gargrave,³¹⁷ Richard Morley³¹⁸ and Sir William Boreman.³¹⁹ Additionally, Berney exhibited a bill against Thomas Cox and Edward Allen,³²⁰ although as the bill has apparently not survived, its date is unknown.³²¹ As with the *Berry v Fairclough* defendants, some of these bargains were for ready money, and some were for goods. All were post-obit. in nature, all involved penal instruments, and many of them featured the involvement of a third party such as Stinstead

³⁰⁵ Ibid.

³⁰⁶ Ibid.

³⁰⁷ Unfortunately, no entry for the rehearing, which might have clarified North LK's reasoning, can be found in the entry books.

³⁰⁸ As discussed below, a nineteenth bill, against Thomas Cox and Edward Allen, complaining of yet another post-obit. bond entered into by Berney before 28 January 1680, was exhibited some time before 28 February 1682, when an entry was made recording the defendants' failure to answer the bill: *Berney v Cox and Allen* (28 February 1682) C 33/257, f. 285.

³⁰⁹ One of these bills, against Sir Edward Hungerford, George Pitt, Henry Muschamp and Edward Stinstead, dealt with the same bargain made with George Pitt, reported in *Berry v Fairclough* (1681) 79 Selden Soc. 868, and discussed above. This further bill appears to have been exhibited only because Hungerford's name had been made use of by Pitt in the transaction, and by the hearing of 9 February 1681 Hungerford's name had disappeared from the proceedings.

³¹⁰ *Berney v Skipwith* (14 February 1680) C 10/199/9.

³¹¹ *Berney v Mingay and Utting* (14 February 1680) C 20/495/26.

³¹² *Berney v Passmore* (23 February 1680) C 10/495/27.

³¹³ *Berney v Thompson* (26 February 1680) C 33/253, f. 382v.

³¹⁴ *Berney v Forster* (26 February 1680) C 33/253, f. 380v.

³¹⁵ *Berney v Coney* (26 February 1680) C 33/253, f. 380.

³¹⁶ *Berney v Sherman* (26 February 1680) C 33/253, f. 383.

³¹⁷ *Berney v Gargrave* (February 1680) C 10/201/11.

³¹⁸ *Berney v Morley* (15 June 1680) C 33/253, f. 699v.

³¹⁹ *Berney v Boreman and Stinstead* (27 November 1680) C 10/495/33.

³²⁰ *Berney v Cox and Allen* (28 February 1682) C 33/257, f. 285.

³²¹ In the first entry book entry found for the matter, on 28 February 1682, Berney's counsel complained that the defendants had not yet answered the bill.

or Henry Muschamp.³²² No final decrees in these suits can be found, and the entry book entries do not provide definitive outcomes. The entries do, however, allow the drawing of some inferences. In the cases of Skipwith, Thompson, Forster, Coney, Boreman, Sherman, and Cox and Allen, Berney was awarded injunctions preventing the defendants pursuing him at common law, on the condition that he pay the principal lent, plus interest, to the defendants.³²³ It may be that, having received this payment, these defendants simply decided not to contest the matter any further.

Of the remaining unreported suits, one – that against Richard Morley – proceeded to a hearing, although no entry for that hearing has been found. The final entry for this matter is a request by the defendant that the lord chancellor set a date for giving his judgment.³²⁴ In the suit against Gargrave, a date for a hearing is set, but no subsequent entries have been found.³²⁵ Even less is known of the final resolution of the suits against Mingay and Utting, and Passmore: the final entry found for the former is an attachment against the defendants for failing to answer,³²⁶ and for the latter the granting of an injunction staying the defendant's proceedings at the common law.³²⁷

The bargains dealt with here are very similar in nature to those found in *Berry v Fairclough*, and consequently it is unnecessary to discuss them all in detail. Rather, two of these bargains are examined below, as being representative.

3.3.3.1 *Berney v Skipwith*

Berney's bill against Sir Thomas Skipwith was sworn on 14 February 1680,³²⁸ the same date as the bills against Beake, Mason, Fairclough, and Smyth, all defendants in *Berry v Fairclough*. Any explanation of Skipwith's absence from that hearing can only be speculative: perhaps an arrangement had been made between Berney and Skipwith; or perhaps Skipwith was content with the principal and interest received on the granting of the injunction. Whatever the truth of the matter, the bill reveals that the bargain between Berney and Skipwith was of a similar nature to those made with Fairclough and Smyth. On 17 December 1678, one month after entering the bargain with Beake and three months after the bargain with Fairclough, Stinstead allegedly took Berney to see 'Sir Thomas Skipwith, Knight and Baronet Serjeant at Law' at his chambers in Gray's Inn.³²⁹ The bargain struck was that Skipwith would provide Berney with £260 in ready money, and a further £260 in

³²² Muschamp also had dealings with the earl of Ardglass (*Earl of Ardglass v Muschamp* (1684) 2 Chan. Rep. 266; 1 Vern. 237): see discussion below at 3.5 and A2.14.

³²³ *Berney v Skipwith* (1 July 1680) C 33/253, f. 692v; *Berney v Thompson* (13 May 1680) C 33/253, f. 456v; *Berney v Forster* (26 February 1680) C 22/253/380v; *Berney v Coney* (26 February 1680) C 33/253, f. 380; *Berney v Boreman* (22 February 1681) C 33/255, f. 256v; *Berney v Sherman* (18 December 1680) C 33/255, f. 135v; *Berney v Cox and Allen* (12 May 1682) C 33/257, f. 753v.

³²⁴ *Berney v Morley* (5 March 1681) C 33/255, f. 274v. The date of the hearing is given as 8 February 1681, the day before the hearing reported in *Berry v Fairclough* (1681) 79 Selden Soc. 868.

³²⁵ *Berney v Gargrave* (29 April 1681) C 33/255, f. 410.

³²⁶ *Berney v Mingay and Utting* (Hillary Term 1682) C 33/257, f. 328.

³²⁷ *Berney v Passmore* (26 February 1680) C 33/253, f. 258.

³²⁸ *Berney v Skipwith* (14 February 1680) C 10/199/9.

³²⁹ *Ibid.* See further biographical detail below at 3.4.3.

'bonds bills and securities ...due [to Skipwith] from several persons'; Skipwith assured Berney that 'the persons named in the said securities was [sic] able and responsible persons'.³³⁰ In return, Berney acknowledged a penalty statute of £2,240, defeasanced for payment of £1,120 on the death of Berney's father.³³¹ The cash was handed over to Berney, but the securities seem to have been assigned to Stistead.³³²

In Skipwith's answer to the bill, dated July 1680, he asserted that he did not know either Berney or Stistead prior to the bargain being made, with the transaction engineered solely by Stistead.³³³ He further provided the information that one of the securities assigned in the transaction was in the name of a Mrs Kettlewell, widow of Timothy Kettlewell. Stistead apparently knew that Mrs Kettlewell was also indebted to Sir William Boreman, so that security was included in the bargain as well.³³⁴

3.3.3.2 *Berney v Boreman*

The combination of ready money and securities was also a feature of the bargain Berney made with Sir William Boreman of Whitehall on 17 December 1678, the same day of the bargain with Skipwith.³³⁵ In return for a penalty statute of £4,000, defeasanced for payment of £2,000 within thirty days of the death of Berney's father, Boreman apparently gave Berney £500 in ready money and £500 in securities.³³⁶ Berney alleged that Stistead offered to collect on these securities, and so took them into his custody; he further alleged that he never received any of the money due thereby.³³⁷ Berney apparently paid Sir William Boreman the amount of £500, plus interest, in May 1679 in the hope both that Boreman would accept it as discharging the debt, and that Stistead would return the securities: Boreman refused, and Stistead allegedly claimed he had never had possession of the securities.³³⁸ Berney made the further claim that Boreman and Stistead had conspired together against him, and that Stistead had gone to the lengths of procuring others to commit perjury on the question of the possession of the securities.³³⁹ Once again it is unknown why Berney's commencement of proceedings against Sir William Boreman did not lead to Boreman's inclusion as a defendant before Nottingham LC in 1681; as with Skipwith, it may be that Boreman, after commencement of the suit, decided to accept the £500 plus interest that Berney had already paid.

³³⁰ Ibid.

³³¹ Ibid.

³³² Ibid.

³³³ Ibid.

³³⁴ Ibid.

³³⁵ *Berney v Boreman and Stystead* (27 November 1680) C 10/495/33.

³³⁶ Ibid.

³³⁷ Ibid.

³³⁸ Ibid.

³³⁹ Ibid.

3.3.4 Summary

In Nottingham LC's note of *Berry v Fairclough*, the lord chancellor stated that Richard Berney was 'in debt to the value of £50,000 or £60,000',³⁴⁰ a staggering amount at that time.³⁴¹ The total amount owed by Berney under the eighteen bargains discussed above is somewhat less than that, unless his lordship was referring to the combined total of the penalties Berney would be liable to pay (should they be enforced) if he failed to pay the conditioned amounts by the relevant dates. Those penalties added up to £61,120, with the conditioned amounts reaching £29,398. In the event, it is likely that Berney paid no more than the principal amounts, which totalled £7,610, plus interest. If Lord Nottingham was correct in his estimate, then the financial affairs of Richard Berney were in even worse shape than these various Chancery proceedings reveal; a conclusion supported by the fact that his substantial estates in Norfolk had to be sold to cover his debts.³⁴²

3.4 The Lenders

3.4.1 Introduction

In the view of the expectant heir cases that this thesis describes as the 'economic preservation analysis',³⁴³ writers such as Dawson, Posner and Clark posit that the court, when dealing with bargains such as those entered into by Richard Berney, was not primarily concerned with doing justice in individual cases; rather, in Dawson's phrase, Chancery wished to 'preserve for a dominant class the economic resources on which its prestige and power depended.'³⁴⁴ Posner identifies the threat to that dominant class as coming from the individuals from whom such heirs borrowed money; when the loans could not be repaid, 'important families lost their future wealth and power to common businessmen'.³⁴⁵ In the case of Richard Berney, who then were these individuals whose financial dealings with the heir, according to this analysis, threatened the fabric of seventeenth-century society?

3.4.2 The *Berry v Fairclough* Defendants

3.4.2.1 Pitt

The earliest of Richard Berney's known bargains was with George Pitt, the only one of the seven defendants to escape Lord Nottingham's grant of relief in 1681.³⁴⁶ Further information about the identity of Pitt is found in his bill of 2 December 1675, in which he is named as 'George Pitt of Strathfield Sea [sic] in the county of Southampton ...'.³⁴⁷ The Pitts of

³⁴⁰ 79 Selden Soc. 868.

³⁴¹ The modern equivalent would be approximately £5.5 million to £6.8 million (The National Archives Currency Converter, above n 188).

³⁴² Blomefield, above n 195, 282.

³⁴³ See Chapter 2, above at 2.2.3.

³⁴⁴ Dawson, above n 77, at 268.

³⁴⁵ Posner, above n 80, at 314.

³⁴⁶ 79 Selden Soc. 868.

³⁴⁷ *Pitt v Berney* (2 December 1675) C 10/125/85.

Stratfieldsaye were later elevated to the peerage,³⁴⁸ but at the time of his bargain with Berney, George Pitt was only the second generation of his family to hold this estate: it had been purchased by his father, Edward Pitt, in 1629 from the Dabridgecourt family, who had held the manor since at least 1370.³⁴⁹ The Pitt family may have had other land holdings; certainly at his death in 1694 George Pitt had other properties in Hampshire, London, Dorset and Gloucestershire to bequeath, as well as coal mines and other properties in Durham and Northumberland.³⁵⁰ These properties, along with a quite extensive personal estate, he distributed amongst his three sons and three daughters.³⁵¹ It is not inconceivable that his personal fortune was augmented by his practice of entering post-obit. bonds with expectant heirs,³⁵² and presumably other – perhaps less risky – financial activities.

3.4.2.2 Fairclough

The second of the defendants named in Lord Nottingham's note of the 1681 hearing³⁵³ is identified in the pleadings as James Fairclough, of London, 'Dr in Physick'.³⁵⁴ Fairclough received his medical education at the University of Cambridge, and was licensed to practice medicine in 1658; practising in London, and 'of the Inner Temple', he died in 1685.³⁵⁵ By his will, Fairclough left the sum of 500 guineas, which was in the custody of his cousin, and another £400, held by a firm of goldsmiths of Lombard Street, London, to his son Henry,³⁵⁶ along with a half share of his personal estate (the other half to go to his other son James).³⁵⁷ A good proportion of that personal estate consisted of mortgages, debts, contracts and other securities owed to Fairclough: his will appointed Henry as trustee and sole executor, and provided Henry with a great deal of latitude under the will with which to deal with these securities without interference from James.³⁵⁸ From this it is perhaps not unreasonable to suppose that in addition to being a medical man, Fairclough was an active moneylender, and to infer that his son Henry was either already involved in the business, or shortly to take it up; the £900³⁵⁹ in ready cash certainly suggests the business was a lucrative one.

³⁴⁸ This George Pitt's great-grandson was created Lord Rivers of Stratfieldsaye in 1776: 'Parishes: Stratfieldsaye' in *A History of the County of Hampshire, Volume 4*, ed. William Page (London 1911), at 57-63: *British History Online* <<https://www.british-history.ac.uk/vch/hants/vol4/pp57-63>> accessed 3 January 2019.

³⁴⁹ *Ibid.*

³⁵⁰ Will of George Pitt (August 1694) PROB 10/7368/8.

³⁵¹ *Ibid.*

³⁵² In addition to his dealings with Richard Berney, Pitt entered a similar arrangement with the earl of Ardglass: *Earl of Ardglass v Muschamp* (1684) 1 Vern. 237 at 239.

³⁵³ 79 Selden Soc. 868.

³⁵⁴ *Berney v Fairclough and Stystead* (14 February 1680) C 10/201/12.

³⁵⁵ John Venn and JA Venn (eds), *Alumni Cantabrigienses: A Biographical List of All Known Students, Graduates and Holders of Office at the University of Cambridge, from the Earliest Times to 1900* (Cambridge, 1922) vol 1, part 2, 116.

³⁵⁶ Henry was also educated at Cambridge (*ibid.*).

³⁵⁷ Will of James Fairclough, Doctor of Physic (16 February 1685) PROB 11/379/267.

³⁵⁸ *Berney v Fairclough and Stystead* (14 February 1680) C 10/201/12.

³⁵⁹ At this time a guinea was worth the same as a pound: see, for example, David Fox and Wolfgang Ernst (eds), *Money in the Western Legal Tradition: Middle Ages to Bretton Woods* (New York, 2016), 209.

3.4.2.3 Smyth

Identification of the ‘Smith’ named in *Berry v Fairclough*³⁶⁰ as Sir James Smyth, one-time lord mayor of the City of London,³⁶¹ comes from both Berney’s 1680 bill,³⁶² and Beake’s bill of 1687.³⁶³ Sir James Smyth was knighted in October 1672, and was an alderman of the City of London from 1674 to 1687, and from 1688 to 1689.³⁶⁴ A merchant, he was a member of the Drapers’ Company, and was master of the Company in 1673-4 and 1684-5.³⁶⁵ His will of January 1706 left his substantial residual estate to his son James, son of his second wife Elizabeth.³⁶⁶

3.4.2.4 Beake

First mentioned as one of the defendants in *Berry v Fairclough*, as has been seen, Beake met Berney twice more in Chancery,³⁶⁷ and the matter was not finally resolved until after Beake’s death, following an appeal to the House of Lords by his executors.³⁶⁸ In Berney’s initial bill against him, this defendant was identified as ‘Samuel Beake, merchant of London’.³⁶⁹ Further information is revealed in subsequent Chancery pleadings: the executors of Beake’s will were Abraham Beake and John Cranenburgh,³⁷⁰ and he had a daughter, Elizabeth.³⁷¹ This allows a definite identification of this lender as Samuel Beake, ‘of London Without’, whose house at the time he made his will in 1682 was located in the block between ‘Botolph Lane and Lovat Lane in the parishes of St George and St Mary at Hill in the Ward of Billingsgate’.³⁷² Legacies to the Dutch Church in London, and to cousins with Dutch surnames, suggest that the Beake family were of Dutch origin.³⁷³ It is possible that the Beakes came to England as part of the sixteenth-century wave of Protestant refugees fleeing religious persecution; other Dutch people went to London at that time in search of economic opportunities.³⁷⁴

³⁶⁰ 79 Selden Soc. 868.

³⁶¹ Thomas Wotton, *The English Baronetage* (London, 1741) vol IV, 157.

³⁶² *Berney v Smyth and Stistead* (14 February 1680) C 10/197/16.

³⁶³ *Beake v Berney and Smith* (5 November 1687) C 10/508/11.

³⁶⁴ Alfred P Beaven, ‘Aldermen of the City of London: Portsoken Ward’, in *The Aldermen of the City of London Temp. Henry III - 1912* (London, 1908), at 179-188: *British History Online* <<http://www.british-history.ac.uk/no-series/london-aldermen/hen3-1912/pp179-188>> accessed 3 January 2019.

³⁶⁵ *Ibid.*

³⁶⁶ *Berney v Smyth and Stistead* (14 February 1680) C 10/197/16. Although successful in business, Smyth appears to have been less successful in his choice of wives: his first two wives predeceased him, and of the third, Philadelphia, he writes in his will: ‘although I do believe she was in great part the cause of my daughter Elizabeth’s death and hath been the cause of shortening my days by her causeless jealousy and continual disturbing of me I do hereby forgive her and pray God forgive her’ (Will of Sir James Smyth (12 December 1706) PROB 11/491/398).

³⁶⁷ *Barny v Beak* (1683) 2 Chan. Cas. 136; and an unreported hearing before Lord Chancellor Jeffreys in 1686, referred to by the House of Lords: ‘House of Lords Journal Volume 14: 21 December 1689’, above n 235.

³⁶⁸ ‘House of Lords Journal Volume 14: 21 December 1689’, above n 235.

³⁶⁹ *Berney v Beake* (14 February 1680) C 10/197/17.

³⁷⁰ *Berney v Beak and Cranenburgh* (26 January 1686) C 10/224/11.

³⁷¹ *Beake v Berney and Smith* (5 November 1687) C 10/508/11.

³⁷² Will of Samuel Beake (2 December 1685) PROB 11/381/297.

³⁷³ *Ibid.*

³⁷⁴ See, for example, Harold John Cook, *Trials of an Ordinary Doctor: Joannes Groenevelt in Seventeenth-Century London* (Baltimore, 1994), 106.

The goods provided to Berney by Beake took the form of wine, and in an entry in the Treasury books for September 9, 'Arnold Beak, Abram. Beak [and] Samuell [sic] Beak' are included in a list of importers of French wines.³⁷⁵ Additionally, a dispute heard in Chancery in 1675 identifies Arnold and Abraham Beake as brothers to Samuel and gives the information that the brothers – with another brother, Elias – were engaged in trade in 'Wines, Corn, Salt &c' as early as 1648.³⁷⁶ Samuel Beake is also named as a defendant in another Chancery case dealing with an expectant heir.³⁷⁷ The estate of which Samuel Beake died possessed was substantial, amounting to a sum in the vicinity of £10,000, the vast majority of which was to go to his daughter Elizabeth.³⁷⁸

3.4.2.5 Mason, Pargiter and Tyson

The final three defendants from *Berry v Fairclough* can be identified from the pleadings and entry book entries as: 'Nathaniel Mason, merchant of London',³⁷⁹ the goldsmith 'Mr John Pargiter',³⁸⁰ and Francis Tyson.³⁸¹ Little or no further information is discoverable regarding these men: it is possible that Pargiter belonged to a family of goldsmiths, as probate was granted on the will of a William Pargiter, goldsmith of London, in 1718.³⁸² Similarly, it is possible that Tyson, given the nature of the goods provided to Berney – cambric, flax and Holland cloth – was a merchant dealing in textiles, but no information to confirm this has been discovered.

3.4.3 Lenders in Other Suits

It has not been possible to definitively identify most of the other defendants in Berney's Chancery actions, as little detail is provided about them in pleadings and entry book entries. For example, while the pleadings provide the information that both Gilbert Passmore³⁸³ and Robert Gargrave³⁸⁴ were merchants, and the inference can be drawn that they were located in London, no further information on them has been found. Similarly, while a George Coney seems to have been very active in Chancery both as plaintiff and defendant in the late seventeenth century,³⁸⁵ there is insufficient evidence in the Berney entry book entries on

³⁷⁵ 'Entry Book: September 1672', in *Calendar of Treasury Books, Volume 3, 1669-1672*, ed. William A Shaw (London, 1908), at 1302-1319: *British History Online* <<http://www.british-history.ac.uk/cal-treasury-books/vol3/pp1302-1319>> accessed 4 January 2019. The entry includes the Beakes in a list of importers who had not paid the Additional Duty on wines for 1671-1672. This additional duty was in force from 1670 to 1681, in response to the Crown's pressing need for revenue (see William J Ashworth, *Customs and Excise: Trade, Production, and Consumption in England 1640-1845* (Oxford, 2003), 18).

³⁷⁶ *Beak v Beak* (1675) Rep. Temp. Finch 189: the case was brought by Elias's widow and children against Arnold, Abraham and Samuel, alleging irregularities in the keeping of the accounts that had resulted in a smaller inheritance for the plaintiffs.

³⁷⁷ *Wiseman v Beake* (1691) 2 Vern. 122; *Beake v Wiseman* (9 June 1683) C 10/497/15.

³⁷⁸ Will of Samuel Beake (2 December 1685) PROB 11/381/297.

³⁷⁹ *Berney v Mason and Stistead* (14 February 1680) C 10/197/19.

³⁸⁰ *Berney v Pargiter* (23 March 1680) C 10/547/4.

³⁸¹ *Berney v Tyson* (6 May 1680) C 33/253, f. 488v.

³⁸² Will of William Pargiter (4 April 1718) PROB 11/563/264.

³⁸³ *Berney v Passmore* (23 February 1680) C 10/495/27.

³⁸⁴ *Berney v Gargrave* (? February 1680) C 10/201/11.

³⁸⁵ See, for example, *Coney v Deering* (1670) C 7/61/35; *Coney v Vale* (1675) C 7/76/93; *Halley v Coney* (1680) C 6/81/32; and *Coney v Horden* (1680) C 6/237/66.

which to base a conclusion that this was the same individual. However, firm identifications have been possible for four of these Chancery defendants, as well as those individuals to whom Berney mortgaged lands.

Sir William Boreman was Clerk of the Green Cloth, a position within the Royal Household,³⁸⁶ and followed his father, Thomas Boreman, as ‘overseer and keeper of game as well of venery as of falconry in and about the manor of Greenwich’.³⁸⁷ Obviously a man of substance, Boreman established a free school at Greenwich,³⁸⁸ which became the basis for a charitable foundation administered through the Drapers’ Company, and which still exists.³⁸⁹ He also left various properties in Kent and elsewhere to his wife for her life, with reversion to his son.³⁹⁰

Sir Thomas Skipwith died in 1694, possessed of properties in Lincoln which he left to his wife, and other, unspecified, properties as part of his residual estate, which went to his son, Thomas.³⁹¹ To his daughter, ‘the Lady Williams’ he bequeathed 50 guineas, as well as 20 guineas each to her daughters; various other, smaller, legacies went to his servants, and to the poor of several parishes.³⁹² Skipwith, a member of Gray’s Inn, was created serjeant in April 1675;³⁹³ he was knighted in 1673, was created baronet in 1678, and served as king’s serjeant from 1684-89.³⁹⁴

While ‘John Thompson’ was as common a name in the seventeenth century as it is today, there was only one Sir John Thompson, baronet, during the period in question: the son of Maurice Thompson, a London merchant, Sir John Thompson was created a baronet on 12 December 1673, and was a prominent member of the House of Commons.³⁹⁵ He was raised to the peerage, as Baron Haversham, in 1696.

The identification of the previous three individuals is reasonably clear; that of Anthony Mingay is more tenuous. Described in the relevant bill as ‘a merchant of London that lived

³⁸⁶ ‘The Household Below Stairs: Clerks of the Green Cloth 1660-1782’, in *Office-Holders in Modern Britain: Volume 11 (Revised), Court Officers, 1660-1837*, ed. R O Bucholz (London, 2006), at 403-407: *British History Online* <<http://www.british-history.ac.uk/office-holders/vol11/pp403-407>> accessed 3 April 2019: Boreman was appointed to the position – essentially an auditor of the household finances – on 26 May 1671 (ibid).

³⁸⁷ ‘Entry Book: August 1683, 4-14’, in *Calendar of Treasury Books, Volume 7, 1681-1685*, ed. William A Shaw (London, 1916), at 887-894: *British History Online* <<http://www.british-history.ac.uk/cal-treasury-books/vol7/pp887-894>> accessed 4 January 2019.

³⁸⁸ Walter Thornbury, ‘Throgmorton Street: The Drapers’ Company’, in *Old and New London: Volume 1* (London, 1878), at 515-522: *British History Online* <<http://www.british-history.ac.uk/old-new-london/vol1/pp515-522>> accessed 3 January 2019.

³⁸⁹ ‘Sir William Boreman’s Foundation’ in *The Drapers’ Company at* <<https://www.thedrapers.co.uk/Charities/Grant-making-trusts/Sir-William-Boremans-Foundation.aspx>> accessed 4 January 2019.

³⁹⁰ Will of Sir William Boreman (1 July 1686) PROB 11/384/4.

³⁹¹ Will of Sir Thomas Skipwith (7 June 1694) PROB 11/421/45.

³⁹² Ibid.

³⁹³ JH Baker, *Order of Serjeants at Law: A Chronicle of Creations, with Related Texts and a Historical Introduction* (London, 1984), 196.

³⁹⁴ Ibid, 537.

³⁹⁵ Alan Thomson, ‘Thompson, John, first Baron Haversham (1648-1710)’ in *Oxford Dictionary of National Biography* (Oxford, 2009) at <<https://doi.org/10.1093/ref:odnb/27269>> accessed 4 January 2019.

in great credit and repute',³⁹⁶ it is possible that he was a son of Alderman Roger Mingay,³⁹⁷ and part of the established Norwich family of merchants by that name.³⁹⁸ Further circumstantial evidence for this identification is provided by the inclusion of John Utting as co-defendant in Berney's suit against Mingay; the Uttings were another prominent Norwich family.³⁹⁹

When Richard Berney died in 1695, as discussed previously, he left his various estates mortgaged to Sir James Edwards, Ann Martell, and Edward Miles. Little has been discovered about Edward Miles, except that he was Berney's attorney,⁴⁰⁰ and a tenant of Furnival's Inn.⁴⁰¹ Sir James Edwards, like Sir James Smyth, served a term as lord mayor of the City of London.⁴⁰² He left a substantial estate on his death in 1691,⁴⁰³ a significant proportion of which was the 'diverse manors messuages lands tenements and hereditaments in the County of Norfolk which were purchased of Richard Berney esq.',⁴⁰⁴ and which he left to his nephew, also named Sir James Edwards,⁴⁰⁵ as part of his residual estate.⁴⁰⁶

When Ann Martell, widow of Lawrence Martell, merchant, died in 1718,⁴⁰⁷ the Berney estates which she had acquired as mortgagee had already been sold.⁴⁰⁸ She left a substantial estate: there were specific bequests amounting to £1,300, as well as a large amount of silverware to be divided amongst her numerous grandchildren. Several of her grandchildren also shared her residual estate with her son, daughter, and son-in-law; besides these stipulations, and two or three small annuities to needy relatives, Martell used her will to forgive the debts of several of her family members, including those arising from 'having lived with her and at her expense'.⁴⁰⁹ The impression gained from this, and from the several codicils to the will in which the size of various legacies is increased or reduced, is of a wealthy matriarch of a large family, using her testamentary power to ensure compliance with her wishes. The inclusion of a legacy in the will of Ann Martell to the Dutch Church also suggests a similarity of background between the Martells and the Beakes.⁴¹⁰

³⁹⁶ *Berney v Mingay* (14 February 1680) C 20/495/26.

³⁹⁷ Ancestry.com. *Norfolk, England, Church of England Baptism, Marriages, and Burials, 1535-1812* [database on-line]. Provo, UT, USA: Ancestry.com Operations, Inc., 2016.

³⁹⁸ Francis Blomefield, *An Essay Towards A Topographical History of the County of Norfolk* (London, 1806) vol V, 58–63.

³⁹⁹ *Berney v Mingay and Utting* (26 February 1680) C 33/253, f. 383.

⁴⁰⁰ *Cowan v Berney* (1707) C 79/202, unnumbered [Membrane 6; IMG_0112].

⁴⁰¹ Deed, 1681, NRO BER40 685 X 5.

⁴⁰² 'Mayors and Sheriffs of London 1643-1750: Stage Three' in *Mayors and Sheriffs of London* (University of Toronto, 2018) at

<https://masl.library.utoronto.ca/MASLworkinglistfrom1643_revOct2018.pdf> accessed 4 January 2019.

⁴⁰³ Will of Sir James Edwards (10 March 1691) PROB 11/404/37.

⁴⁰⁴ Will of Sir James Edwards (9 April 1702) PROB 11/464/124.

⁴⁰⁵ It was the younger Sir James Edwards of whom Humphrey Prideaux observed: 'He makes profuse waste enough of his money, but doth it with so ill a grace that it gains him nothing [but to] make him yet more ridiculous and [ill] bred. He is as ridiculous silly fellow as ever I saw in my life.' Prideaux, above n 172, 167.

⁴⁰⁶ Will of Sir James Edwards (9 April 1702) PROB 11/464/124.

⁴⁰⁷ Will of Ann Martell (5 September 1718) PROB 11/565/198.

⁴⁰⁸ Blomefield, above n 195, 282.

⁴⁰⁹ Will of Ann Martell (5 September 1718) PROB 11/565/198.

⁴¹⁰ *Ibid.*

3.4.4 Summary

On the face of it, it would seem from the above examination of the individuals to whom Richard Berney became indebted that Chancery's concern that such bargains with expectant heirs would lead to the loss of assets from the ruling classes – if the analysis of those such as Dawson, Posner and Clark is correct – may have been well-founded. The lenders fall into one of three categories, none of which, arguably, the court would have wished to see acquiring the assets of one of the most ancient landed families in the county of Norfolk. George Pitt, Sir James Smyth, Sir William Boreman, Sir Thomas Skipwith, Sir John Thompson and Sir James Edwards, while clearly men of substance and some standing, did not belong to the landed class in the way that Berney did. James Fairclough, it can be plausibly concluded, was a professional moneylender. Samuel Beake, Nathaniel Mason, John Pargiter, Francis Tyson, Gilbert Passmore, Robert Gargrave and perhaps Anthony Mingay, all fell within the category of retail merchants, of a lower social standing than Smyth (but possibly of a higher one than Fairclough), and Ann Martell would appear to have been the widow of a merchant of a similar social status to these men. In the event, it was Martell and Sir James Edwards's nephew who took possession of the largest parts of the estates formerly belonging to the Berneys of Reedham: clearly the intervention of Chancery could not, in the final analysis, save the family from the excesses of its wayward son.

3.5 Brokers

As is well established, a 'consumer revolution'⁴¹¹ occurred in London in the latter part of the seventeenth century, with the landed class being enthusiastic participants;⁴¹² while the money of the aristocracy and gentry had an influence on the growth of the urban economy,⁴¹³ the reverse is also true. As can be seen from Humphrey Prideaux's remarks concerning the young Viscount Townshend of Norfolk, lately down from Cambridge, Richard Berney was not the only young heir whose participation in the urban economy influenced the fortunes of his family:

[Viscount Townshend] is now at London. We are made to hope well of him; but London is ye place that is to try him, and ye company he first gets into is that which will either make or mar him. For, as yet, we may reckon him a *rasa tabula*; a twelvemonth hence we shall better see whether good or evil is to be wrote thereon.⁴¹⁴

⁴¹¹ Peter Earle, 'The Economy of London' in Derek Keene, Marjolein C' Hart and Patrick O'Brien (eds), *Urban Achievement in Early Modern Europe: Golden Ages in Antwerp, Amsterdam and London* (Cambridge, 2001) 4, at 95; Jan de Vries, *The Industrious Revolution: Consumer Behavior and the Household Economy, 1650 to the Present* (Cambridge, 2008), 44.

⁴¹² Earle, above n 411, at 88.

⁴¹³ *Ibid.*

⁴¹⁴ Prideaux, above n 172, 165. It would seem that Charles, Viscount Townshend, had a happier experience in London than Richard Berney; he pursued a diplomatic career, becoming ambassador to The Hague, secretary of state, and lord lieutenant of Ireland.

If Richard Berney's view of how he came to be indebted for such a large amount of money in such a relatively short space of time is to be accepted, then the company he first got into in London fell into the second of Prideaux's two possibilities: thirteen of the eighteen bargains for which Berney sought relief in Chancery involved brokers who not only introduced the young heir in need of money to those with money to lend, but encouraged him to spend it. In particular, making the acquaintance of Edward Stistead could be said to have 'marred' Berney, as Prideaux put it.

According to Berney's various Chancery bills, Stistead 'insinuated' and 'ingratiated' himself into Berney's company⁴¹⁵ and encouraged him to live above his means⁴¹⁶ by entering into ten of the bargains from which Berney later sought relief. Stistead is described in one of the reported cases as 'a man very infamous':⁴¹⁷ in two of the bills exhibited by Berney that resulted in the hearing of *Berry v Fairclough*⁴¹⁸ in 1681, Stistead is described as: 'well skilled in the art of inveigling ... young gentlemen',⁴¹⁹ and as 'designing to abuse and make a prey of' Berney.⁴²⁰

It may well be that this was so; to put it in more impartial terms, there must have been a need for men such as Stistead to connect borrowers with lenders. Although Berney expressly alleged collusion between Stistead and both Sir Thomas Skipwith and Sir William Boreman in the matter of the securities handed over to Stistead's custody in each case,⁴²¹ and implied in all cases that Stistead was working for the various lenders (most clearly in his account of the transaction with Fairclough),⁴²² in the majority of cases Berney apparently could not muster clear evidence of Stistead receiving a commission or any fee from them; presumably if he had such evidence he would have included it as going directly to fraud on the part of the lender. It is only in an entry book entry relating to the rehearing of the matter of Beake that there is an explicit statement that Stistead received a £20 fee from Berney;⁴²³ the report of this matter also mentions an unspecified 'gratification' to Stistead from Beake.⁴²⁴ Interestingly, neither allegation appears in Berney's initial bill against Beake.⁴²⁵

⁴¹⁵ *Berney v Beake* (14 February 1680) C 10/197/17; *Berney v Mason and Stistead* (14 February 1680) C 10/197/19; *Berney v Fairclough and Stistead* (14 February 1680) C 10/201/12; *Berney v Skipwith* (14 February 1680) C 10/199/9; *Berney v Smyth and Stistead* (14 February 1680) C 10/197/16; *Berney v Hungerford, Pitt, Muschamp and Stistead* (24 March 1680) C 10/208/10; *Berney v Boreman and Stistead* (27 November 1680) C 10/495/33.

⁴¹⁶ *Berney v Fairclough and Stistead* (14 February 1680) C 10/201/12; *Berney v Hungerford, Pitt, Muschamp and Stistead* (24 March 1680) C 10/208/10.

⁴¹⁷ *Berney v Tyson* (1684) 2 Ventris 359 at 359.

⁴¹⁸ 79 Selden Soc. 868.

⁴¹⁹ *Berney v Fairclough and Stistead* (14 February 1680) C 10/201/12.

⁴²⁰ *Berney v Smyth and Stistead* (14 February 1680) C 10/197/16.

⁴²¹ *Berney v Skipwith* (14 February 1680) C 10/199/9; *Berney v Boreman and Stistead* (27 November 1680) C 10/495/33.

⁴²² *Berney v Fairclough, Stistead* (14 February 1680) C 10/201/12.

⁴²³ *Berney v Beake* (5 March 1682) C 33/259, f. 327v.

⁴²⁴ *Berney v Beake* (1683) 2 Chan. Cas. 136.

⁴²⁵ *Berney v Beake* (14 February 1680) C 10/197/17.

A search of the catalogued Chancery pleadings for the period reveals nine further bills involving Edward Stistead: in five of these he is the plaintiff,⁴²⁶ in four the defendant,⁴²⁷ and all relate to the recovery of money. Stistead is also named in the suit of *Lamplugh v Smith* (1688).⁴²⁸ His conduct with heirs was so infamous that he was immortalized in a satirical poem in 1686: 'Each heir by dice, drink, whores, or masking, Or, Stistead brought into the [prison]'.⁴²⁹ He was also described as 'the then notorious cheat of the town' in relation to his behaviour in altering the date of an assignment in the case of *Thornhill v Clifton* (1695).⁴³⁰ In a much later case the reporter noted that

Lord Nottingham in one day made eleven decrees against Stystead, and after the first decree, the second cause being opened, and so every one in their order, and the council informing his lordship, that every cause was of the same nature, he ordered the register to draw up the same decree in each cause mutatis mutandis.⁴³¹

It has not been possible to identify this particular day in court through the entry books, unless it refers to the Berney hearings of 9 February 1680; the difficulty with that is that the decrees made were not against Stistead as such, although this could simply reflect a lack of precision in a note made some fifty years later. Stistead's father, Edward, 'served the late King till he became eldest clerk of the pastry, clerk of the avery, and afterwards page of the bedchamber'.⁴³² After the death of his father, his mother, formerly a servant to Lady Cornwallis, petitioned Charles II for the payment of debentures due to the elder Stistead, a pension for herself, and the gift of her husband's place in the Palace to her eldest son: she was successful only in obtaining a pension for herself.⁴³³ Stisted took an MA at Marischal College⁴³⁴ in 1670, which was incorporated into an MA from Cambridge in 1671.⁴³⁵ He was admitted to the Middle Temple on 18 June 1673,⁴³⁶ and when he died in June 1686, left an estate worth approximately £300,⁴³⁷ in the form of personal and real estate, located in the

⁴²⁶ *Stisted v Bacon* (1673) C 5/561/54; *Stisted v Symonds* (1675) C 5/561/56; *Stisted v [unknown]* (1675) C 6/556/211; *Stisted v Hurdis* (1676) C 6/79/5; and *Stisted v Shrewsbury* (1676) C 7/328/125.

⁴²⁷ *Lord Cavendish v Stysted* (1674) C 5/459/142; *Hawley v Stisted* (1681) C 5/497/2; *Tryon v Stistead* (1681) C 5/568/42; *Cox v Stistead* (1684) C 5/466/53.

⁴²⁸ 2 Vern. 77.

⁴²⁹ Henry Higden, *A Modern Essay of the Tenth Satyr of Juvenal* (London, 1686), 38.

⁴³⁰ Parliament of Great Britain, *The Manuscripts of the House of Lords, 1695-1697* (London, 1903) vol II (New Series), 120.

⁴³¹ *Thornicraft v Harwood* (1730) Mosely 371.

⁴³² 'Charles II - Volume 59: September 1-17, 1662', in *Calendar of State Papers Domestic: Charles II, 1661-2*, ed. Mary Anne Everett Green (London, 1861), at 474-492 <<http://www.british-history.ac.uk/cal-state-papers/domestic/chas2/1661-2/pp474-492>> accessed 4 January 2019.

⁴³³ *Ibid.*

⁴³⁴ Later one of the constituent institutions of the University of Aberdeen.

⁴³⁵ John Venn and JA Venn, *Alumni Cantabrigienses: A Biographical List of All Known Students, Graduates and Holders of Office at the University of Cambridge, from the Earliest Times to 1900* (Cambridge University Press) vol I, Part 4, 164.

⁴³⁶ Sir Henry F MacGeagh, *Register of Admissions to the Honourable Society of the Middle Temple, 1501-1781* (London, 1949) vol I, 187.

⁴³⁷ Inventory of Edward Stistead (21 June 1687) PROB 4/19688. The modern equivalent is around £35,000 (The National Archives Currency Converter, above n 188).

then village of Ratcliffe, in the parish of Stepney, to his wife Sarah.⁴³⁸ After Stistead's death, his widow Sarah appeared in a number of Chancery pleadings dealing with the recovery of money: one possible explanation is that she carried on her husband's involvement in money lending.⁴³⁹ Although it seems Edward Stistead did not amass a fortune to rival that of the Berneys of Reedham through his financial activities, it may well be that he still died possessed of more than Richard Berney.

Three other individuals are named in the Berney pleadings as having facilitated Richard Berney's acquisition of money: Henry Muschamp,⁴⁴⁰ Ralph Swinerton,⁴⁴¹ and Thomas Warkehouse.⁴⁴² Henry Muschamp, who was named by Berney as having been involved in the transaction with Pitt, was the defendant in a case in Chancery concerning the earl of Ardglass.⁴⁴³ Muschamp was found by Lord North in that case to have been the expectant heir's companion in 'riot and debauchery', and the lord keeper certainly had no difficulty finding against him;⁴⁴⁴ Muschamp also appears in the records of the House of Lords, having unsuccessfully appealed a Chancery decree in favour of one Phillip Burton.⁴⁴⁵ Swinerton is described in Berney's bill as 'a person very notorious for ill and unjust designs and practices upon young gentlemen under [Berney's] circumstances',⁴⁴⁶ however no further suits involving him, nor information about him, has been discovered. Similarly, nothing is known of Thomas Warkehouse, who allegedly arranged Berney's bargain with Pargiter, the goldsmith, except that Warkehouse was, in the mid-to late seventeenth century, the name of a prominent Norfolk family.⁴⁴⁷ It is possible that this individual was a previous connection of Berney's, although this is merely conjecture.

It is difficult to judge to what extent the court was influenced by the involvement of men like Stistead, Muschamp, Swinerton and Warkehouse in bargains with expectant heirs. As third parties to the contracts, the orders made in these suits did not directly affect them: no instance of an order requiring any restitution or other action on their part has been found. However, it seems likely that their involvement contributed to the court's assessment of the fraudulent nature of the transactions, and if the note in the report of *Thornicraft v Harwood*

⁴³⁸ Will of Edward Stistead of the Middle Temple, London (15 June 1686) PROB 11/383/318.

⁴³⁹ See, for example, *Sheppard v Stisted* (1696) C 7/309/53; *Degelder v Stisted* (1698) C 5/364/2; and *Onions v Stistead* (1699) C 5/622/20.

⁴⁴⁰ *Berney v Hungerford, Pitt, Muschamp and Stistead* (24 March 1680) C 10/208/10; *Berney v Pitt* (16 February 1680) C 10/208/7.

⁴⁴¹ *Berney v Passmore* (23 February 1680) C 10/495/27.

⁴⁴² *Berney v Pargiter* (23 March 1680) C 10/547/4.

⁴⁴³ *Earl of Ardglass v Muschamp* (1684) 1 Vern. 237 at 237: for an account of the case see A.2.14. This case also involved George Pitt.

⁴⁴⁴ *Ibid.*

⁴⁴⁵ ('House of Lords Journal Volume 15: 21 November 1692', in *Journal of the House of Lords: Volume 15, 1691-1696* (London, 1767-1830), at 117-120: *British History Online* <<http://www.british-history.ac.uk/lords-jrnl/vol15/pp117-120>> accessed 3 February 2018). This matter appears to be related to the sale of the estate of Sir William Clerke, for the payment of his debts (*Wharrow v Browne, Oglander, Onslow, Woodroff, Clerk, Muschamp, Clerke; and Burton* (1685) C78/2030, no. 1.

⁴⁴⁶ *Berney v Passmore* (23 February 1680) C 10/495/27.

⁴⁴⁷ In 1684 a John Warkehouse was sworn in as deputy recorder of Norwich (Francis Blomefield, *An Essay Towards a Topographical History of the County of Norfolk* (London, 1806) vol III, 419-421); in 1698 Samuel Warkehouse was Mayor of the same city (Francis Blomefield, *An Essay Towards a Topographical History of the County of Norfolk* (London, 1806) vol IV, 358).

(1730) quoted above is any indication, Nottingham LC at least did not look with any favour on their activities.

3.6 Conclusion

The process of contextual case study undertaken with regard to this group of bargains made by an expectant heir in the later part of the seventeenth century provides a great deal more detail about the plaintiff, and his financial activities, than is included in the printed reports. The identification of the expectant heir as Richard Berney esq., heir to one of the most substantial family estates in Norfolk at that time, in conjunction with the further information uncovered about the number, and the nature, of the improvident bargains entered into by this young heir during his time in London, offers a clear illustration of the potential disruption such ‘adventures’ could cause to the fabric of English society as it then stood. The Parkhall, Reedham branch of the Berney family fell squarely within Stone’s social class of ‘the county elite’ of squires, knights and baronets;⁴⁴⁸ while the baronetcy conferred on Richard Berney’s grandfather survived the damage done by Richard’s extravagance, the substantial land holdings of the family – some of which had been held since at least the time of the Domesday survey – did not.

The suits brought by Richard Berney in Chancery provide an invaluable source of information about the jurisdiction to relieve expectant heirs in the later part of the seventeenth century, and the details of the bargains he entered clearly show the archetypal extravagance of a profligate heir newly arrived in London, extraordinary only for the scale of the liabilities incurred. So too, these suits illustrate the key features of the typical expectant heir case: the allegations of ‘drawing in’ in these suits, for example, provide a clear illustration of the type of conduct described as behavioural fraud in this thesis; similarly, the use of the post-obit. bond, and the goods for resale bargains, show two methods, popular at the time, of avoiding the usury statutes, thus enabling lenders to gain far more than they would under the legal rate of interest. Additionally, the involvement of individuals such as Edward Stinstead in facilitating these bargains shows the role played by the ‘professional confidence man’, as described by Jones,⁴⁴⁹ in the downfall of an individual expectant heir; the excessive gains which lenders stood to make from some of the bargains Berney entered provide a clear demonstration of the type of fraud described in this thesis as outcome fraud; and, finally, the form of relief granted to Berney – the setting aside of the bargains on payment of the principal actually received plus interest – reflects that found in the examination of expectant heir and non-heir profligate suits undertaken in this thesis as a whole.

In addition to the representative nature of the Berney suits in relation to these elements of the jurisdiction, the contextual information discovered regarding the social class of the lenders provides an opportunity to evaluate the economic preservation analysis, as

⁴⁴⁸ Lawrence Stone, ‘Social Mobility in England, 1500-1700’ (1966) 33 *Past & Present* 16, at 18.

⁴⁴⁹ Jones, above n 3, 433.

described in Chapter 2. Overwhelmingly, as has been seen, the lenders in the various Berney bargains came from the merchant class, whether at the lower retail-trade end, such as the wine trader Nathaniel Mason, or the higher, more socially mobile end, such as merchant-turned-lord-mayor Sir James Smyth. At first glance, this seems to support the view of the economic preservation analysis that the basis of Chancery's jurisdiction to relieve expectant heirs rested on the court's desire to keep the assets of the ruling classes – such as the county elites to which the Berney family belonged – from the hands of Posner's 'common businessmen'.⁴⁵⁰ However, it is suggested that this view does not necessarily reflect the wider economic and social context in which these suits were brought and decided; it is possible that the significant role played by the Berney cases in the development of modern understandings of the expectant heir cases, as discussed in Chapter 2, might have influenced the perception of modern commentators in relation to the difference in social class between obligors and obligees in expectant heir suits more generally. Although it cannot be proven, it also seems possible that the sheer scale of Berney's indebtedness, the active involvement of brokers such as Stistead, and the subsequent loss of the family estates – along with the appearance of the hearings and re-hearings of Berney's suits against Pitt, Beake and Tyson in printed reports, and their consequent availability to the legal profession in later decades – may have influenced the development of Chancery's jurisdiction to relieve such obligors going forward, as a form of 'cautionary tale' as to the consequences of allowing bargains with such obligors to stand.

⁴⁵⁰ Posner, above n 80, at 314.

Chapter 4 Case Study 2: Arthur Smythes

4.1 Introduction

Arthur Smythes, the plaintiff in *Smythes v Weedon* (1622),⁴⁵¹ was not an expectant heir at the time he entered the bargains discussed below. His father died when Smythes was under the age of majority, thus precluding the possibility that he could incur debts in his father's lifetime. He was, however, of his own confession, a profligate young man, and his debts – at least those from which he sought relief in Chancery – reflect this. Although Arthur Smythes' extravagance did not compare in scale to that of Richard Berney, his excesses, bargains, and family background nevertheless provide a useful illustration of a non-heir profligate obligor, and his treatment in the court of Chancery. Additionally, the analysis of the suit of *Smythes v Weedon* undertaken in this chapter offers an examination of the jurisdiction to relieve the non-heir profligate from improvident bargains in the 1620s, a far earlier period than any undertaken previously in the academic literature; the choice of Arthur Smythes as the second case study therefore allows for a comparison to be made between the circumstances of a non-heir profligate obligor and an expectant heir obligor, and between the jurisdiction to relieve such obligors at the beginning of the seventeenth century, and at the end.

4.2 The Profligate

Arthur Smythes was the eldest son of George Smythes, goldsmith and alderman of London,⁴⁵² and was baptised at St Vedast Foster Lane and St Michael Le Querne, London, the parish church of the Worshipful Company of Goldsmiths, on 15 February 1596.⁴⁵³ The Smythes⁴⁵⁴ family appear to have been what Stone refers to as 'lesser, or parish, gentry',⁴⁵⁵ having owned land in Somerset for at least the two generations preceding Arthur's.⁴⁵⁶ His father George and uncle William jointly inherited the family estate of Wyke's Court from their father; by 1602 this appears to have been wholly in the hands of George, presumably

⁴⁵¹ C 78/224, no. 3.

⁴⁵² RH Smythies, *Records of the Smythies Family* (London, 1912), 29.

⁴⁵³ Ancestry.com *England, Select Births and Christenings 1538-1975* [Database online] Provo, UT, USA: Ancestry.com Operations, Inc., 2014.

⁴⁵⁴ Several variant spellings of the family name occur in the sources; this thesis adopts the spelling 'Smythes' in discussion (the spelling used by Arthur's father, George in signing his will: Will of George Smythes (18 July 1615) PROB 11/126/51), and the relevant variants for the names of suits.

⁴⁵⁵ Stone, 'Social Mobility in England, 1500-1700', above n 448, at 18.

⁴⁵⁶ Smythies, above n 452, 28.

because William had by that time either died or conveyed his rights in the estate to George.⁴⁵⁷ By this time, however, George, as the second son, had established himself in London as a master goldsmith, and eventually held the offices of prime warden of the company of goldsmiths (1610-11),⁴⁵⁸ sheriff of London (1611)⁴⁵⁹ and alderman of Bridge Ward in the City of London (1611-15).⁴⁶⁰

George Smythes married Sarah, daughter of Anthony Woolhouse, a haberdasher, of Chapwell in Derbyshire, and of the parish of St Magnus, London, in 1588.⁴⁶¹ Although Sarah remarried after George's death, to General Sir Arthur Savage,⁴⁶² she specified in her will that she be buried at St Mary Steynings, in the City of London,⁴⁶³ which is where George Smythes was buried. It is tempting therefore to speculate that her marriage to George was a happy one; certainly they had seven children, of whom five survived to adulthood.⁴⁶⁴ In addition to Arthur and his younger brother William, there were three daughters, of whom two at least appear to have married within the merchant class to which George's career brought the family: Hester married Christopher Eyre of Salisbury, described as 'citizen and merchant of London',⁴⁶⁵ and Elizabeth married Edward Sewster, a goldsmith of London.⁴⁶⁶ Both Eyre and Sewster appear to have been men of substance: an indication of Eyre's status comes from the fact that he established Eyre's Hospital in Salisbury in 1617,⁴⁶⁷ which accommodated six poor men and their wives, and paid them 2s. 6d. each week.⁴⁶⁸ Sewster bequeathed £2,000 to each of his two sons, over and above their share in the customary moiety of his estate,⁴⁶⁹ and had an interest in the Forest of Braden at his death: his will appointed Arthur Smythes as one of the trustees and executors of his will, an appointment that was to lead to Smythes becoming embroiled in a Chancery suit brought by Sewster's daughters regarding the failure to include Sewster's interest in the Forest of Braden in the customary moiety.⁴⁷⁰ No detailed information regarding George and Sarah's youngest

⁴⁵⁷ Ibid at 28.

⁴⁵⁸ Ibid, at 5.

⁴⁵⁹ Ibid.

⁴⁶⁰ Ibid.

⁴⁶¹ Ibid.

⁴⁶² Ibid.

⁴⁶³ Will of Dame Sarah Savage (3 June 1654) PROB 11/236/598.

⁴⁶⁴ Smythies, above n 452, 5.

⁴⁶⁵ Ibid at 5.

⁴⁶⁶ Ibid.

⁴⁶⁷ John Burke, *A Genealogical and Heraldic History of The Commoners of Great Britain and Ireland Enjoying Territorial Possessions or High Official Rank; but Uninvested with Heritable Honours* (London, 1836) vol II, 291.

⁴⁶⁸ James Easton, *The Salisbury Guide, Giving an Account of the Antiquities of Old Sarum* (Salisbury, 1818), 44.

⁴⁶⁹ Will of Edward Sewster (1 March 1628) PROB 11/153/281. As a citizen of the City of London, Sewster's estate was governed by the custom of the City: one third of all goods, chattels, ready money and debts to be left to the testator's wife if living, one third to those of the testator's children for whom no other advancement had been made, and the remaining third to be distributed according to the will of the testator. This restriction on testamentary power continued to apply in London until 1724 (WS Holdsworth, *A History of English Law* (London, 7th ed., 1966) vol III, 552. Sewster's will also directed that he be buried 'in the vault where my father in law Mr George Smithes ... and my dear late wife do lie' (Will of Edward Sewster (1 March 1628) PROB 11/153/281).

⁴⁷⁰ *Nott v Smithers* (1637) C 78/366, no. 4.

daughter, Anne, has been found, although she appears to have married one Vernon by 1654.⁴⁷¹

At his death in 1615, George Smythes left a substantial estate; as a citizen of the City of London, and subject to the custom of the City, only one third of this estate could be disposed of by will. The cash bequests contained in this final third amount to around £2,000,⁴⁷² from which it can be inferred that the ready money component of George Smythes' estate was around £6,000.⁴⁷³ In addition to this, he left a life interest in the manors of Sagebury and Obden in Worcestershire to his wife Sarah, with remainder to Arthur.⁴⁷⁴ Arthur also received unspecified lands in Gloucestershire,⁴⁷⁵ and his brother William received the manor of Templeton in Berkshire.⁴⁷⁶ The family estate of Wyke's Court in Somerset is not mentioned.

As well as the lands he inherited under his father's will, Arthur received around £1,400 through operation of the custom.⁴⁷⁷ As he was under the age of 21 at the time of his father's death, his estate became the subject of a crown wardship; George's will stipulated that Arthur was to have the benefit of his own wardship, the money for the purchase of which was to come from the profits of the lands left to him.⁴⁷⁸ There seems to have been some difference between Arthur and his mother on this point, although the precise details of their disagreement are unknown.⁴⁷⁹ Certainly, in later Chancery proceedings taken against his father-in-law, Giles Tooker, Arthur alleged that he had paid £400 for his wardship, having married while still a ward.⁴⁸⁰

On 10 May 1615, at the age of nineteen, Arthur Smythes married Elizabeth Chaffin, widow of William Chaffin and daughter of Giles Tooker, of Madington in Wiltshire.⁴⁸¹ Tooker was a man of substance, active in the political life of Salisbury; he was the member of parliament for that constituency in 1601, 1604 and 1614, as well as being appointed the city's first recorder in 1611, a post he held until his death in 1623.⁴⁸² The son of a wealthy yeoman,

⁴⁷¹ Will of Dame Sarah Savage (3 June 1654) PROB 11/236/598.

⁴⁷² This does not include unspecified amounts allocated for the purchase of mourning clothes for family members, friends and colleagues, nor unspecified sums to Arthur, William and Anne to make their customary portions up to £800, £1,400 and £1,400 respectively: Will of George Smythes (18 July 1615) PRO 11/126/51.

⁴⁷³ This is equivalent to around £800,000 in modern money: The National Archives Currency Converter, above n 188.

⁴⁷⁴ Will of George Smythes (18 July 1615) PRO 11/126/51.

⁴⁷⁵ These appear to have been the manors of Elverton, Olveston, Northwick, and Redwick, which were in Arthur's possession in 1623: *Smithes v Tooker* (May 1623) C 3/382/7.

⁴⁷⁶ Will of George Smythes (18 July 1615) PRO 11/126/51.

⁴⁷⁷ *Smithes v Tooker* (May 1623) C 3/382/7.

⁴⁷⁸ Will of George Smythes (18 July 1615) PRO 11/126/51. It is unclear whether the land in question was held under a military tenancy in chief, or whether the crown took the wardship by right of prerogative (see discussion in Sir John Baker, *The Oxford History of the Laws of England. Vol VI, 1483-1558* (Oxford, 2003) vol VI, 552.

⁴⁷⁹ *Smithes v Tooker* (May 1623) C 3/382/7.

⁴⁸⁰ *Smithes v Tooker* (May 1623) C 3/382/7.

⁴⁸¹ Ancestry.com. *Wiltshire, England, Marriages, 1538-1837* [database on-line]. Provo, UT, USA: Ancestry.com Operations, Inc., 2013.

⁴⁸² S.T. Bindoff, 'Tooker, Giles (c. 1565-1623), of Salisbury, Wilts' in *The History of Parliament: the House of Commons 1558-1603*, ed. P.W. Hasler (1981)

Tooker was admitted to Lincoln's Inn in 1581 and called to the bar in 1589, and at his death owned a house in Salisbury and land in a number of locations in Wiltshire.⁴⁸³ He married the daughter of Thomas Eyre, of Salisbury in 1586, and his brother-in-law William Eyre was a close business associate.⁴⁸⁴

Tooker's daughter Elizabeth was some five years older than Smythes, having been born in 1591,⁴⁸⁵ and had married her first husband in 1609.⁴⁸⁶ She had at least three daughters from this marriage living when she married Smythes.⁴⁸⁷ Her second marriage does not seem to have been a happy one; her father, and her brother Edward, in their answers to Smythes' bill complaining that the agreed marriage settlement had not been performed, alleged that Smythes had abused his wife, refusing to provide any money for the maintenance of her and the children (including his own children), and abandoning her for long periods in order to pursue a dissolute course in London.⁴⁸⁸ There is also a thinly veiled allegation in the answer of Giles Tooker that Smythes had infected his wife with a venereal disease.⁴⁸⁹ The Tookers, and the third defendant, William Chaffin, the father of Elizabeth's first husband, also referred to Smythes' improvidence with his own estate, Chaffin alleging that Smythes 'very wastefully has spent his own estate or a great part thereof ... and so he is likely to do with his wife's said annuity'.⁴⁹⁰

Certainly, by 13 June 1618 Arthur Smythes' profligacy had prompted him to put his estate into trust, 'to prevent further debts and judgments and for the payment of his ... then debtors'.⁴⁹¹ Given that two of the three trustees, Henry Sherfield and Anthony Hynton, had links to Salisbury, it is possible that his father in law, Giles Tooker, had some hand in persuading Smythes to follow this course. Putting an estate into trust to protect it from the

<<http://www.historyofparliamentonline.org/volume/1558-1603/member/tooker-giles-1565-1623>> accessed 8 February 2018.

⁴⁸³ Ibid.

⁴⁸⁴ Ibid. It was presumably through this family connection that Arthur Smythes' sister Hester married into the Eyre family.

⁴⁸⁵ Wiltshire and Swindon History Centre; Chippenham, Wiltshire, England; *Wiltshire Parish Registers*; Reference Number: 1900/5.

⁴⁸⁶ Wiltshire and Swindon History Centre, *Wiltshire Church of England Bishop's Transcripts 1538-1812*, BT/SISE/Bdl.1/OS. Elizabeth's first marriage lasted around four years: William Chaffin was buried on 31 May 1613, at Salisbury St Edmund (*England Deaths and Burials, 1538-1991*. Salt Lake City, Utah: FamilySearch, 2013).

⁴⁸⁷ Will of Giles Tooker (30 January 1624) PROB 11/143/84.

⁴⁸⁸ *Smithes v Tooker* (May 1623) C 3/382/7.

⁴⁸⁹ Ibid. The 'scandalous' matter included by Giles Tooker in his answer was referred to Sir Edward Leech, a master of Chancery, and the court on reading his report found it to be 'so foul as the same was in the nature of a libel and not fit for the dignity of this court to remain of record'. The offending material was ordered to be expunged from the pleadings (*Smithes v Tooker* (29 October 1623) C 33/145, f. 100). This was either not done, or the answer held by The National Archives for this matter may not be the final version. Certainly, if the ordinances of Sir Francis Bacon, made 1617-20, were being followed at this time, the scandalous material should have been suppressed: Sir Francis Bacon, *Ordinances Made By The Right Honourable Sir Francis Bacon Knight, Lord Verulam, and Viscount of Saint Albans, Being Then Lord Chancellor*. (London, 1642), 13.

⁴⁹⁰ *Smithes v Tooker* (May 1623) C 3/382/7. The annuity in question, of £120 per annum, came to Elizabeth through her first husband, and was, if the defendants are to be believed, the only money she and the children had to live on. A final decree in the suit has not been found, the last entry being an order that the defendants show cause why the annuity should not be brought into court: *Smithes v Tooker* (29 October 1623) C 33/145, f. 100.

⁴⁹¹ *Smythes v Sherfield* (1623) C 78/223, no. 8 [Membrane 1; IMG_0049].

depredations of a spendthrift appears to have been a common strategy;⁴⁹² nevertheless, Smythes incurred all of the debts from which he sought relief in Chancery after the trust conveyance. He was also imprisoned in the Fleet for debt, sometime after the end of June 1620: this approximate date⁴⁹³ is drawn from Smythes' statement in his bill against Giles Tooker that in May 1623, when the bill was exhibited, he had been imprisoned 'about the space of three years';⁴⁹⁴ as he entered a bargain with James Buckley, a tailor, on 27 June 1620⁴⁹⁵ he cannot have been in in debtors' prison before that. In November 1622, the creditor who had been responsible for having Smythes arrested, Thomas Weedon, was ordered to release Smythes on his giving security for the payment of the conditioned amount in that case, which was to be made in two instalments. It is not clear whether Smythes gave such security, as in May 1623, some six months after the decree in that suit, he remained in the Fleet.⁴⁹⁶ The second of the instalments was due on 14 November 1623⁴⁹⁷ and appears to have been paid⁴⁹⁸ so presumably Smythes was released at that time, if not before.

On 24 May, 1623, Chancery ordered the trustees to re-convey Smythes' estate to him,⁴⁹⁹ and thereafter he appears to have conducted himself more prudently, at least with regard to financial matters. He was knighted on 26 February 1624,⁵⁰⁰ and while this may not have been the guarantee of standing in society it may once have been, given the inflation of honours under James I,⁵⁰¹ it does suggest he had sufficient resources to purchase the honour, as well as to foot the bill for the associated pageantry.⁵⁰² Little more can be

⁴⁹² NG Jones, 'Trusts: Practice and Doctrine, 1536-1660' (PhD, University of Cambridge, 1994), 293-295. Bonds were also used to restrain prodigals. For example, in *Goodhand v Goodhand* (1640) C 78/425, no. 9 a father had made his son, then young and living in London, enter a penal bond 'to keep him from ill-husbandry'. Presumably this was intended as a form of good behaviour bond. If the plaintiff ran up debts, or otherwise behaved badly during his time in London, his father could demand payment of either the conditioned sum, or, after the date for repayment of the condition, the penalty amount.

⁴⁹³ Unfortunately, definite dates for Smythes' imprisonment cannot be found as the Fleet Prison records from this period do not survive: Margery Bassett, 'The Fleet Prison in the Middle Ages' (1944) 5(2) *The University of Toronto Law Journal* 383, at 383.

⁴⁹⁴ *Smithes v Tooker* (May 1623) C 3/382/7.

⁴⁹⁵ *Smithies v Cable* (26 January 1624) C 2/JasI/S15/19.

⁴⁹⁶ *Smithes v Tooker* (May 1623) C 3/382/7.

⁴⁹⁷ *Smythes v Weedon* (1622) C 78/224, no. 3.

⁴⁹⁸ *Smythes v Polehill* (10 February 1624) C 33/145, f. 544v.

⁴⁹⁹ *Smythes v Sherfield* (1623) C 78/223, no. 8 [Membrane 1; IMG_0049]. This was done on 30 October 1624, with his lands in Worcestershire returned to his full control, and those in Roydon made subject to another trust for the benefit of Smythes and his heirs (Reconveyance of Property in Trusteeship, by Henry Sherfield and Anthony Hinton to Sir Arthur Smithes of Dorchester, Dorset, and his servant William Roydon (1624) Hampshire Archives 44M69/L69/1).

⁵⁰⁰ John Philipot, *A Perfect Collection or Catalogue of All Knights Batchelaurs Made by King James since His Coming to the Crown of England* (London, 1660), 89.

⁵⁰¹ See, for example, Lawrence Stone, *The Crisis of the Aristocracy 1558-1641* (Oxford, 1965), 74-77.

⁵⁰² Stone reports that Sir William Howard's bill in 1623 for his knighthood, in addition to the payment for the honour itself, and the regulation fees of around £60, included payments of £5 each 'to the heralds, the sergeants at arms, the gentlemen ushers' daily waiters, and the gentlemen ushers of the Privy Chamber, and smaller sums to lesser attendants at the court, ending up with 10s. for the King's jester' (ibid, 77).

discovered about Sir Arthur Smythes, beyond the fact that he held the office of sheriff of Worcestershire in 1630-31,⁵⁰³ and that he married twice more.⁵⁰⁴

4.3 The Suits

4.3.1 *Smythes v Weedon* (1622)

The only Chancery proceedings in which Smythes sought relief for a debt for which the outcome is known, *Smythes v Weedon* (1622)⁵⁰⁵ was decided on 14 November 1622, and dealt with the largest known liability that Smythes incurred. When Smythes exhibited his bill against the defendants in this matter he had already put his estate in trust, and the trustees – Henry Sherfield, Humphrey Walrond and Anthony Hinton – joined him as plaintiffs. The bargain in question had, however, been entered into by Smythes before the trust conveyance had been made, and may even have been the catalyst for the decision to do so.⁵⁰⁶

On 16 May 1618 Arthur Smythes acknowledged a statute for £800, defeasanced for payment of £450 10s. within nine months, to Thomas Weedon, a draper and broker.⁵⁰⁷ Smythes alleged in his bill that this loan had been engineered by Weedon and the other defendants, Nicholas Polehill, a silkman, Ralph Blecherden, Polehill's servant, and Toby Wright, described only as a gentleman, in order to defraud him.⁵⁰⁸ Wright seems to have been a friend of Smythes, and entered the statute with him: by the time the bill was exhibited he had apparently vanished and thus could not be served with a subpoena.⁵⁰⁹ The agreement was for £100 to be paid to Smythes in cash, with the remainder delivered in the

⁵⁰³ 'Parishes: Dodderhill', in *A History of the County of Worcester: Volume 3* (London, 1913), at 58-69: *British History Online* <<http://www.british-history.ac.uk/vch/worcs/vol3/pp58-69>> accessed 19 March 2018.

⁵⁰⁴ In 1626, three months after the death of his first wife, he married Jane Rowland, widow of Thomas Rowland (London Metropolitan Archives; London, England; Church of England Parish Registers, 1538-1812; Reference Number: P69/ANL/A/001/MS09016). Jane died in 1642, and was described in the relevant parish register as 'an ancient lady wife of Sir Arthur Smitheyes knight' (London Metropolitan Archives; London, England; Church of England Parish Registers, 1538-1812; Reference Number: P69/AND2/A/010/MS06673/ 003). In 1642 Smythes was 46 years old; given the description of Jane as 'ancient', it is therefore probable that his second wife was somewhat older than him, although it has not been possible to confirm this from any other source. Conversely, his third wife appears to have been significantly younger than him. Smythes married Dorothy, daughter of Sir Rowland Rugeley of Dunton in Warwickshire, at some point after Jane's death in 1642: Dorothy's mother was the daughter of a younger brother of the earl of Banbury, and appears to have been the third youngest of ten children, all of whom were under age at the death of their father in 1629, making it likely that she was born around 1611. (Joseph Jackson Howard (ed), *Miscellanea Genealogica et Heraldica* (London, 1874) vol 3, 201). Further evidence for the age difference between Smythes and Dorothy comes from the fact that Smythes had a son, Ferdinando, born between 1647 and 1653, when a wife of Smythes' own age would have been more than ten years beyond the age at which such a feat would ordinarily be achievable (Ferdinando, a fellow of Queen's College, Cambridge, died in 1725: Venn and Venn, above n 435, 115. While this source gives Ferdinando's age at his death as 72, a contemporary source states him to have been 78: C Meere, *The Historical Register* (London, 1725) vol X, 46).

⁵⁰⁵ C 78/224, no. 3.

⁵⁰⁶ As mentioned above, the trust conveyance was made on 13 June 1618. This was less than a month after Smythes acknowledged the statute to Weedon: *Smythes v Sherfield* (1623) C 78/223, no. 8 [Membrane 1; IMG_0049].

⁵⁰⁷ C 78/224, no. 3 [Membrane 1; IMG_0090].

⁵⁰⁸ *Ibid.*

⁵⁰⁹ *Ibid* [Membrane 2; IMG_0091].

form of various types and quantities of silk and lace, and items of apparel including a 'scarlet suit'.⁵¹⁰

The exact amount of the loan is unclear from the decree: in the plaintiff's bill it is given as '£420 or thereabouts', meaning the value of the wares was around £320, although the itemisation of the wares included in the bill adds up to £396 5s. 3d.⁵¹¹ In the defendants' answer the amount paid to the defendant Polehill is given as £324, although the value of the goods was allegedly £344;⁵¹² the court, in its summary of the facts, uses the convenient term '£300 odd pounds'.⁵¹³ Assuming the amount paid to Polehill was indeed £324, then Weedon expected to receive £26. 10s. for the nine months of the loan period.

However, Smythes alleged in his bill that the wares provided were

not worth half the money they so were rated at, and that yet notwithstanding although the defendants Polehill and Blecherden made show of delivering them to the said complainant Smythes and the said Wright yet in truth ...Smythes... received but only the said suit of apparel worth about thirty pounds.⁵¹⁴

In Weedon's answer to the bill, he alleged that he had been approached by Wright, on Smythes' behalf, to lend 'four or five hundred pounds at interest' to Smythes; believing Smythes to have an estate sufficient to repay him, he agreed, on condition that a surety should become bound with Smythes.⁵¹⁵ Wright then allegedly offered himself as surety, which Weedon accepted.⁵¹⁶ After Smythes and Wright acknowledged this statute, Weedon paid Smythes £100 and, at Smythes' direction, paid the remainder of the loan amount to Polehill,⁵¹⁷ thus discharging Smythes' debt to Polehill, and leaving Weedon to recover the money from Smythes. The defendants Polehill and Blecherden in their joint answer, however, alleged that Smythes and Wright had instigated the bargain, having come to their shop and ordered the goods in question.⁵¹⁸ Smythes and Wright then apparently offered the defendant Weedon as their security for credit, which Polehill accepted.⁵¹⁹

After examination of the defendants by the court, Williams LK (assisted by Chamberlain JKB) found Weedon to be blameless in the matter, and that it was Polehill who had taken advantage of the plaintiff's youth by providing him with wares worth far less than the amount paid for them.⁵²⁰ Accordingly, on 14 November 1622 Smythes was ordered to pay the whole of the conditioned amount of £450 10s. to Weedon, upon which payment the

⁵¹⁰ Ibid [Membrane 1; IMG_0090].

⁵¹¹ Ibid [Membrane 1; IMG_0089-IMG_0090].

⁵¹² Ibid [Membrane 2; IMG_0092].

⁵¹³ Ibid [Membrane 3; IMG_0093].

⁵¹⁴ Ibid [Membrane 1; IMG_0090].

⁵¹⁵ Ibid [Membrane 2; IMG_0091].

⁵¹⁶ Ibid.

⁵¹⁷ Ibid [Membrane 2; IMG_0092].

⁵¹⁸ Ibid.

⁵¹⁹ Ibid.

⁵²⁰ Ibid [Membrane 3; IMG_0094].

statute was to be delivered up to the plaintiff and cancelled,⁵²¹ and the defendant Polehill was ordered to pay Smythes £250 of the approximately £350 he had received from Weedon on Smythes' behalf.⁵²² This meant that Smythes was in effect liable only for £200. 10s., an amount that – as far as can be calculated from the somewhat vague and contradictory estimates of the true value of the wares found in the bill and answers – reflects the amount actually received by Smythes.

The court's decision in this suit is entirely consistent with the approach taken in other suits of this kind at this time, and which, as can be seen from the relief granted to Richard Berney, continued into the latter part of the century. Overwhelmingly the relief granted to profligate young men such as Smythes who had entered into improvident bargains was cancellation of the penal instrument on repayment of the principal, usually with interest.⁵²³ The interesting part of this decision, however, is that the lender in this case, Weedon, found by the court to be innocent of any fraud or unconscientious behaviour, was assured of the entire conditioned amount, but not of the penalty; this is further evidence that relief against penalties was a matter of routine in Chancery at this time, at least in regard to penal bonds. The restitutionary element of the relief in this case was clearly attached to the party who engaged in unconscientious behaviour, the silkman, Polehill: the reduction of Smythes' liability to the true value of the goods received was made at the expense of Polehill, not Weedon.

4.3.2 Other Suits

A search of the Chancery records reveals that after the bargain with Weedon, Arthur Smythes entered four further bargains, resulting in principal debts of around £430, with corresponding penalties amounting to £830, from which he sought relief in Chancery.⁵²⁴ All of the bargains involved the provision of goods on credit, and Arthur Smythes' preferred manner of living can be inferred from the fact that these goods were lace, clothes, and jewels.

The bargain Smythes made with the merchant Robert Garsett in Michaelmas term 1619 was for a quantity of satin lace, for which he entered a recognisance of £260 defeasanced for payment of £130.⁵²⁵ Describing himself in his bill as 'then near about the age of one and twenty years and wastefully given and then being in want of money', Smythes alleged that

⁵²¹ Ibid: the money was to be paid over the course of a year, with the plaintiff to give security to Weedon in the meantime so that he could be released from the Fleet Prison, where he had been since Weedon took action on the statute at common law.

⁵²² Ibid.

⁵²³ See Chapter 5, below at 5.4.2.1.

⁵²⁴ *Smithes v Downes* (6 February 1622) C 2/Jas I/S33/25; *Smythes v Polehill, Garsett and Herbert* (27 November 1622) C 2/Jas I/S20/19; *Smithies v Cable* (26 January 1624) C 2/Jas I/S15/19; and *Sir Arthur Smithes v Poole (Wells)* (February 1625) C 3/379/46. The fact that Smythes put his estate in trust in June 1618, before he entered the bargains discussed here, suggests that he had already incurred several prior debts. However, the only one of these found in the Chancery records is his bargain with Weedon, discussed in detail above.

⁵²⁵ *Smythes v Polehill, Garsett and Herbert* (27 November 1622) C 2/Jas I/S20/19.

Garsett, Nicholas Polehill (the same silkman who had figured in the bargain Smythes had made with Weedon around eighteen months earlier) and Smythes' co-obligor, Thomas Herbert, had conspired to defraud him in the bargain.⁵²⁶ Smythes complained that the satin lace was not worth the £100 at which Garsett and Polehill had valued it, and that a bond for £30 – a debt owed by a third party to Polehill which was to be given to Smythes to make the total up to £130 – had been taken by Herbert.⁵²⁷ He alleged that he had himself received only £8 value in the deal, and complained that, when the defeasanced amount remained unpaid by the due date, Garsett sought to recover the whole sum due on the recognisance, including the penalty, from Smythes alone.⁵²⁸ In their respective answers to the bill Polehill and Garsett both denied any fraud, alleging that their valuation of the satin lace was correct, and that the bargain had been made at the instigation of Smythes and Herbert.⁵²⁹ Garsett further stated that suit had been brought solely against Smythes because Herbert 'as this defendant has heard hides himself in obscure places and has no estate to pay the said debt or any part thereof that this defendant can hear of'.⁵³⁰ The outcome of Smythes' suit is unknown, as no entry for the hearing of the matter has been found; the last entry for the matter is an order that Polehill, already imprisoned in the Fleet for breaching a Chancery decree,⁵³¹ and refusing to be examined in this matter, 'stand committed close prisoner to his chamber until he shall conform himself to the order of this court to be examined'.⁵³²

The outcome of Smythes' suit against Mary Downes, widow and executrix of Jeremy Downes, a goldsmith, is also unknown.⁵³³ Smythes was himself a prisoner in the Fleet at the time he exhibited his bill on 6 February 1623, by reason of Mary Downes' execution of a judgment obtained on the bond in question.⁵³⁴ The facts of the bargain were as follows: in January 1619 Smythes, William Conway and Edward Wiseman entered a penal bond of £300, conditioned for the payment of £150 in three months, for jewels supplied to them by Jeremy Downes.⁵³⁵ Smythes alleged that Downes had agreed that each of the three obligors should be liable only for £50, although this was not reflected in the wording of the bond, and consequently Smythes was sued for the whole amount.⁵³⁶ The substance of Smythes'

⁵²⁶ Ibid. The allegation of confederacy here, and in the other suits discussed below, may have been pro forma rather than substantive: West in his *Symboleography* included 'a general charge of confederacy' as one of the standard nine parts of a bill: WS Holdsworth, *A History of English Law* (London, 7th ed., 1966) vol IX, 383–384.

⁵²⁷ *Smythes v Polehill, Garsett and Herbert* (27 November 1622) C 2/Jas I/S20/19.

⁵²⁸ Ibid.

⁵²⁹ Ibid.

⁵³⁰ Ibid.

⁵³¹ It is possible that the decree in question is that made in *Smythes v Weedon* (1622) C 78/224, no. 3.

⁵³² *Smythes v Polehill* (16 May 1623) C 33/143, f. 810.

⁵³³ *Smithes v Downes* (6 February 1623) C 2/JasI/S33/25.

⁵³⁴ Ibid. This period of imprisonment would seem to overlap with that brought about by Thomas Weedon, discussed above.

⁵³⁵ Ibid.

⁵³⁶ Ibid. At common law an obligee could not sue only one of several joint debtors, unless the instrument expressly created joint and several liability: David Ibbetson, *An Historical Introduction to the Law of Obligations* (New York, 1999), 76. However, Chancery had the power to rectify documents to reflect the true intentions of the parties and so the court could have, had it seen fit, treated the bond as creating joint and several liability (ibid, 210).

bill against Downes contains many parallels with those exhibited against Garsett and Polehill, and against Weedon: he alleged that his co-obligors had colluded with the obligees to defraud him;⁵³⁷ that the goods supplied were worth less than the sum he became indebted for; and that the obligees sought to recover the whole of the debt from him alone.⁵³⁸

In her answer to the bill, Mary Downes denied that that there had been any collusion between Jeremy Downes and Smythes' co-obligors, and explained the decision to take action only against Smythes as based on the fact that Conway was dead, and Wiseman could not be found.⁵³⁹ She also denied that her late husband had promised to limit the co-obligors' respective liabilities to £50, and alleged that the jewels were worth somewhat more than the price given for them, rather than less, offering that

if the said complainant can procure the said jewels to be redelivered to her this defendant in the same case and sort they were when the said complainant bought the same without any alteration, and also pay her such costs and expenses as she has disbursed for recovery thereof, she will free the said complainant and the said Conway and Wiseman both of the said judgment, execution and obligation.⁵⁴⁰

While it seems unlikely that Smythes would have been in a position to accept this offer,⁵⁴¹ some other settlement with the defendant may have been reached as no entry of a hearing in the suit can be found in the entry books; what appears to be the last entry in the matter is an order relating to Smythes' petition to examine the defendants on interrogatories, having no witnesses of his own.⁵⁴² Certainly, some eight months after that final entry, when Smythes exhibited his bill to be relieved against a debt incurred to one James Buckler, a London tailor, he was no longer a prisoner in the Fleet.⁵⁴³ This may indicate that some form of settlement had been reached with Downes, although this can only be speculation.

Smythes' suit in Chancery regarding the debt to Buckler was taken against Philip Cable, the husband of Buckler's widow Mary, on the basis that she was the representative of Buckler's estate.⁵⁴⁴ Smythes sought relief in this case from two penal bonds, one of £200 conditioned for payment of £112 6s., dated 27 June 1620, and the other, dated 20 February 1622, of £40 conditioned for £20 9s.⁵⁴⁵ These were to secure payment for 'cloaks, doublet and hose'

⁵³⁷ As mentioned above, this may have been a pro forma allegation: see n 526 above.

⁵³⁸ *Smithes v Downes* (6 February 1623) C 2/JasI/S33/25.

⁵³⁹ *Ibid.*

⁵⁴⁰ *Ibid.*

⁵⁴¹ In his bill Smythes alleged that he had received only a third share of the jewels, which he had subsequently sold (*Smithes v Downes* (27 April 1623) C 33/143, f. 724).

⁵⁴² *Ibid.*

⁵⁴³ *Smithies v Cable* (26 January 1624) C 2/Jas I/S15/19.

⁵⁴⁴ *Ibid.*: in his plea and demurrer to the bill Cable pointed out that as executrix to her former husband's estate, Mary should have been named defendant to the suit, rather than him.

⁵⁴⁵ *Ibid.* The details of the bonds are taken from Cable's plea and demurrer: Smythes apparently did not remember that his liabilities to Buckler had been split in this fashion; in his bill he sought relief against a single bond of £240 'or thereabouts', and did not recollect that date for payment.

bought by Smythes from Buckler, which Smythes alleged were worth less than half the £132 15s. agreed for them.⁵⁴⁶ Smythes alleged that Buckler knew that he was ‘in want of money [and] then not prudent of his estate’ and, taking advantage of Smythes’ youth, drew him in to pay more than the clothes were worth.⁵⁴⁷ Once again, the outcome of the suit is unknown, and given that no entries for the suit have been found in the entry books, it is again highly likely that some form of settlement was made between the parties; the more so as Cable expressed himself in his plea as ready to accept the principal sum plus interest and charges.⁵⁴⁸

The final bill brought by Smythes in relation to these bargains concerned a penal bond by which he became bound to Robert Wells on 26 June 1618. This bond was for £30 conditioned for payment of £15 in six months, and for which Smythes alleged he was only a surety (along with one John Walker) for a William Bamfield.⁵⁴⁹ In his bill Smythes alleged that the principal debt had already been paid, by either Bamfield or Walker, but that Wells and Walker had conspired to recover the whole penalty sum from Smythes.⁵⁵⁰ In his answer Wells denied that the £15 had been paid, or that he had conspired with Walker in any respect.⁵⁵¹ He also stated that he believed Smythes to be the principal debtor in the bond, as the money in question had been delivered directly to him.⁵⁵² No outcome of the suit can be found in the record, the final entry being a referral of the defendant’s answer to Sir Richard Moore, a master of Chancery, to determine whether the answer was sufficient.⁵⁵³

Given that no trace of the outcome of any of the four suits discussed above can be found, it is impossible to draw any conclusions from them regarding Chancery’s jurisdiction to relieve non-heir profligates from improvident bargains; the details of these bargains do, however, provide a further indication of the nature of these kinds of goods for resale bargains in the earlier part of the seventeenth century, as well as the profligacy of Arthur Smythes. The next section of the chapter discusses the contextual information discovered about the lenders, and other defendants, involved in that profligacy.

4.4 The Lenders

4.4.1 The *Smythes v Weedon* Defendants

Thomas Weedon, the obligee of the bond from which Arthur Smythes sought relief in the suit of *Smythes v Weedon*, was born in 1571 in Chesham, Buckinghamshire.⁵⁵⁴ His father, Richard, had acquired extensive property holdings during his lifetime, thereby attaining the

⁵⁴⁶ Ibid.

⁵⁴⁷ Ibid.

⁵⁴⁸ Smythes and his trustees had apparently already offered to pay Cable what they felt the true value of the goods to be, which offer he had refused: *ibid.*

⁵⁴⁹ *Smithes v Wells* (February 1625) C 3/379/46.

⁵⁵⁰ Ibid.

⁵⁵¹ Ibid.

⁵⁵² Ibid.

⁵⁵³ *Smiths v Wells* (16 May 1625) C 33/147, f. 804v.

⁵⁵⁴ AM Thomas, S Foxell and AHJ Baines, ‘The Weedon Charity in Chesham’ (1973) 19(3) *Records of Buckinghamshire* 302, at 302.

status of 'gentleman',⁵⁵⁵ and was able to leave land to each of his five sons, as well as cash bequests to his three daughters.⁵⁵⁶ Thomas, Richard's third son, inherited from his father a house, and the land belonging to it, in Chesham.⁵⁵⁷ Thomas established a business as a draper, in the parish of St Clement Danes, London,⁵⁵⁸ and when he died, on 11 September 1624, Thomas Weedon held lands in Chesham, Chesham Bois, Drayton Beauchamp, a half share in the advowson of Ellesborough,⁵⁵⁹ all in Buckinghamshire, and at least one property held by customary title, a copyhold in the manor of Tring, Hertfordshire.⁵⁶⁰ He also established a charity, the Weedon Almshouse, in Chesham, leaving £500 for this purpose.⁵⁶¹

There are some significant parallels between the social standing of Thomas Weedon and that of Arthur Smythes' father, George: both came from minor provincial gentry families; and both, as younger sons, went into trade and thus gained membership of the merchant class.⁵⁶² Weedon does not seem to have taken George Smythes' path to high office, however. It seems possible that Weedon, as well as conducting the trade of draper, was a moneylender in a professional sense: that is certainly an inference that can be drawn from the fact that Toby Wright, Smythes' co-obligor, approached Weedon as someone who could lend Smythes 'four or five hundred pounds at interest',⁵⁶³ although no further evidence to this effect has been found.

The other significant defendant in *Smythes v Weedon*, Nicholas Polehill, was born in 1586, the sixth child (and third son) of John Polehill of Etchingham, Sussex.⁵⁶⁴ John Polehill seems to have been a merchant, an inference drawn from the mention in his will of expected profits from 'three voyages which are now upon the sea to the East Indies or elsewhere',⁵⁶⁵ and at his death in 1611 left cash bequests of around £3,400,⁵⁶⁶ lands in Goudhurst, Kent, and the leases of two houses in London.⁵⁶⁷ One of these leases was left jointly to Nicholas and his brother William 'for their trading together wherein they now dwell';⁵⁶⁸ the other, of a house in Soper Lane, a thriving silk district in the seventeenth century, was left to Nicholas' brother Thomas, who was an apprentice at the time their father made his will.⁵⁶⁹

⁵⁵⁵ Ibid.

⁵⁵⁶ Will of Richard Weedon (23 January 1594) PROB 11/85/39.

⁵⁵⁷ Ibid.

⁵⁵⁸ Will of Thomas Weedon (15 September 1624) PROB 11/144/583.

⁵⁵⁹ Chancery Inquisition Post Mortem: Thomas Weedon, Buckingham (1625) C 142/420/90.

⁵⁶⁰ Will of Thomas Weedon (15 September 1624) PROB 11/144/583.

⁵⁶¹ Ibid; Thomas, Foxell and Baines, above n 554.

⁵⁶² Stone, 'Social Mobility in England, 1500-1700', above n 448, at 18.

⁵⁶³ *Smythes v Weedon* (1622) C 78/224, no. 3 [Membrane 2; IMG_0091].

⁵⁶⁴ Ancestry.com. *England, Select Births and Christenings, 1538-1975* [database on-line]. Provo, UT, USA: Ancestry.com Operations, Inc., 2014.

⁵⁶⁵ Will of John Polhill (23 September 1611) PROB 11/118/223.

⁵⁶⁶ The modern equivalent is around half a million pounds: The National Archives Currency Converter, above n 188.

⁵⁶⁷ Will of John Polhill (23 September 1611) PROB 11/118/223.

⁵⁶⁸ Ibid.

⁵⁶⁹ Ibid.

Nicholas had himself completed his apprenticeship as a mercer in 1610;⁵⁷⁰ he had apparently received £800 from his father towards the setting up of his business, and was required to account to his father's executors for this money.⁵⁷¹ He seems to have encountered some financial difficulties later on: in 1627 he became bound to his mother, Elizabeth, in a penal bond of £200, for payment of £108, and was also indebted to his brother Edward for 'a great sum of money by a statute which [he] is not well able to pay'.⁵⁷² A warrant was also issued on 22 September 1622 by the earl of Middlesex for particulars of lands in Mayfield, Sussex, held by Nicholas Polehill to be seized for a debt of £1,800 to the crown.⁵⁷³ Nothing more can be discovered about this debt, nor about Polehill himself.

4.4.2 Defendants in Other Suits

Due to the scant information provided in the pleadings, it has not been possible to positively identify any of the lenders in the other four suits brought by Smythes discussed in this chapter. As can be seen from the discussion above, three of the obligees – Robert Garsett, Jeremy Downes, and James Buckler – appear to have belonged to the merchant class as defined by Stone,⁵⁷⁴ being a draper, a goldsmith and a tailor respectively, but it is impossible to ascertain whether any of these individuals had attained the sort of social mobility seen in the case of George Smythes. The occupation of the fourth obligee, Robert Wells, is identified in the relevant pleading as 'barber'.⁵⁷⁵ The bargain involving Wells appears to have been for the provision of money, not goods or services, which suggests that he may have been at least a part-time moneylender.

4.5 Conclusion

The process of contextual case study undertaken in this chapter has revealed a number of significant points in regard to the jurisdiction to relieve non-heir profligates from improvident bargains in the earlier part of the seventeenth century. The first of these is that, in substance – although differing slightly in form – the court's treatment of the non-heir profligate obligor in the only suit for which an outcome was found, *Smythes v Weedon* (1622), did not differ in any meaningful respect from that meted out to expectant heir obligors. Rather than setting aside the penal statute in question, Williams LK ordered that the full defeasanced amount be paid by Smythes to the obligee, Thomas Weedon, the basis of this order being the absence of any fraud on Weedon's part. However, by also ordering the other defendant, Nicholas Polehill, to pay to Smythes £250 of the approximately £350 Polehill had received from Weedon on Smythes' behalf, the end result was identical to the

⁵⁷⁰ *Record of London's Livery Companies Online: Apprentices and Freemen 1400-1900* at <http://www.londonroll.org/event/?company=mrc&event_id=MCMM2419> accessed 21 March 2018.

⁵⁷¹ Will of John Polhill (23 September 1611) PROB 11/118/223.

⁵⁷² Will of Elizabeth Polhill (20 November 1627) PROB 11/152/675. Fortunately, his mother forgave him his debt to her in her will, and left him £100 to put towards his debt to Edward (*ibid*).

⁵⁷³ Earl of Middlesex to West. Warrant for particular for grants of land in Maighfeild, Sussex, seized for debt of Nicholas Polhill of London, mercer. Chelsey, 22 Sept. 1622 (SP 46/70 f.213).

⁵⁷⁴ Stone, 'Social Mobility in England, 1500-1700', above n 448, at 18.

⁵⁷⁵ *Smithes v Wells* (February 1625) C 3/379/46.

standard form of relief granted in the expectant heir and non-heir profligate suits examined in this thesis as a whole: the plaintiff obligor was liable only for the amount he had actually received in the bargain.

The kind of fraud relieved against in this case is also in keeping with that found in the other suits examined in this thesis. Polehill was found by the court to have provided goods worth significantly less than the sums he received for them, a form of behavioural fraud⁵⁷⁶ which was commonly found in these types of bargains. As discussed in Chapter 6, there is every indication that status as an expectant heir – or indeed a non-heir profligate – was not sufficient in and of itself, to warrant intervention by the court in these bargains in the seventeenth century, and so it is reasonable to conclude that, had Smythes been an expectant heir, Weedon would still have been awarded his full conditioned amount. Accordingly, this case study suggests that Chancery did not make any meaningful distinction between expectant heir and non-heir profligate obligors in its jurisdiction to grant relief, a hypothesis which will be tested in the discussion of the other suits which follows in Chapter 5.

The final point of significance derived from the contextual case study process, as applied to Arthur Smythes, relates to the economic preservation analysis discussed in Chapter 2. Applying Stone's categories of social class⁵⁷⁷ to the parties to the suits discussed in this chapter, it can be seen that they all – plaintiff and defendants – came from the merchant class. While the variations found within that class can be seen in a comparison of the status of Smythes' father George – the second son of a lesser or parish gentry family who went into trade and eventually became a wealthy alderman of the city of London – with that of Nicholas Polehill – who was born into the merchant class, but seems to have ended up worse off than he started – it is nevertheless obvious that the suit of *Smythes v Weedon* is not an example of a court granting relief to a member of the county elite or peers ruling classes. This single example is not, of course, definitive in relation to the validity or otherwise of the economic preservation analysis; however, it is suggested that the more detailed picture obtained from the contextual information discovered about the parties in this case contributes to a more accurate knowledge of the types of expectant heir and non-heir profligate obligors which were granted relief in the seventeenth century court of Chancery. It is also apparent that, having demonstrated the benefits of this type of case study in this and the preceding chapter, further research involving more case studies would be a valuable means of further assessing the accuracy of the economic preservation analysis, and in exploring the question of networks of credit in the period, given that the kind of litigation explored in relation to both Richard Berney and Arthur Smythes provides a useful starting point for such investigations.

⁵⁷⁶ See discussion at 6.2.3.1.

⁵⁷⁷ Stone, 'Social Mobility in England, 1500-1700', above n 448, at 18.

Chapter 5 Analysis of the Suits

5.1 Introduction

This chapter considers whether a jurisdiction to relieve expectant heirs and non-heir profligates from improvident bargains existed in the earlier part of the seventeenth century, examining the indications to that effect in unreported suits which date from the beginning of the seventeenth century, up to the earliest reported case, in 1663.⁵⁷⁸ It then analyses the characteristics of expectant heirs and non-heir profligates and the types of relief granted in this period to expectant heir and non-heir profligate obligors, drawing on all of the seventeenth-century suits, both unreported and reported, examined for this thesis.⁵⁷⁹

Firstly, however, it is necessary to address the question raised above: were there two separate jurisdictions – one to relieve expectant heirs, and one to relieve profligates – or merely one? Based on the analysis which follows, it is suggested that what is commonly described in the academic literature and the modern case law as a jurisdiction to relieve expectant heirs was, in practice and conception, a jurisdiction to relieve both expectant heirs and non-heir profligates. As is further discussed below, the type of relief granted to expectant heir and non-heir profligate obligors was the same, and there is demonstrably a great similarity between the two classes of obligors, in relation to their shared characteristics of youth and necessity. Additionally, courts and reporters did not always appear to make a distinction: it is reported that in hearing the case of *Earl of Ardglass v Muschamp* (1684),⁵⁸⁰ the court had reference to

precedents in this court, as well in the reigns of Queen Elizabeth, King James, King Charles the First, as in his now majesty's reign, where relief hath been given against over-reaching bargains and contracts made by young *heirs*.⁵⁸¹

The obligor earl in this suit (the plaintiff's nephew) had succeeded to both title and estate at time he entered the bargain, and was thus not an expectant heir in any sense.⁵⁸² However, it

⁵⁷⁸ *Godscall v Walker* (1663) 2 Freeman 169.

⁵⁷⁹ In this analysis, and in the analysis of fraud in Chapter 6 which follows, the numerous Berney suits are treated as one, on the basis that the significant features of all the bargains from which Berney sought relief are almost identical, and to treat them individually would distort the results of the analysis.

⁵⁸⁰ *Earl of Ardglass v Muschamp* (1684) 2 Chan. Rep. 266.

⁵⁸¹ *Ibid*, at 269; emphasis added.

⁵⁸² *Ibid*, at 266. Despite this fact, the reported cases involving the obligor earl are invariably treated in the case law and the academic literature as involving an expectant heir. This mis-categorisation may have initially arisen from the somewhat involved and thus confusing facts set out in the printed reports, or even from the post-obit. nature of the bargain itself. Although the bargain in question was

is suggested that the use of the word 'heirs', rather than a less specific term such as 'men', in this passage, carries a connotation of expectancy: in the reported cases, and the academic literature discussing them, that connotation seems to have been widely accepted.⁵⁸³ Accordingly, this use of the term 'heirs' suggests the court considered previous suits involving expectant heirs to have been relevant to the non-heir profligate suit before them. Similarly, the report of *Bill v Price* (1687)⁵⁸⁴ describes the defendant as an exchange-man⁵⁸⁵ practising on young heirs, although the plaintiff in that particular suit, Charles Bill, was not an expectant heir, having already become 'seised of an estate of inheritance'.⁵⁸⁶ This reference to heirs in a suit involving a non-heir profligate obligor appears to have been made by the reporter, rather than the court, however, and it is possible that the reporter was simply mistaken as to the facts.

It is possible that what had originally been two jurisdictions had been conflated by the later part of the seventeenth century, the period from which both these suits date, though no express statement by the court on this point has been found. However, the evidence of the suits discussed below in terms of the characteristics of both expectant heir and non-heir profligate status suggests that if the court made a distinction between the two types of obligors, it was arguably one without a difference. It would seem that expectant heir status, of a kind that resulted in a grant of relief, almost always involved the characteristics of youth and financial necessity; these were, of course, the two key characteristics of a non-heir profligate obligor. Additionally, when it is considered that the type of relief granted by the court to expectant heir and non-heir profligate obligors was identical – as illustrated by the relief granted to the obligors in the case studies of the expectant heir Berney and the profligate Smythes – it is perhaps permissible to suggest that an expectant heir was just a particular sub-type of obligors whose youth and position of necessity justified the intervention of the court.⁵⁸⁷ The next question to be addressed, therefore, is whether this single jurisdiction was already in existence at the beginning of the seventeenth century.

post obit. in nature, repayment was to commence after the obligor earl's own death, providing he died without male issue: *ibid*, at 268.

⁵⁸³ See, for example, Dawson, above n 77, at 269; MacMillan, above n 68, at 332; Warren Swain, 'Reshaping Contractual Unfairness in England 1670-1900' (2014) 35(2) *Journal of Legal History* 120, at 125, in all of which the Ardglass case is treated as concerning an expectant heir, as it is in *Barnardiston v Lingood* (1740) 2 Atk. 133 at 135, and *Earl of Chesterfield v Janssen* (1751) 2 Ves. Sen. 125 at 146 (per Burnette J) and 159 (per Hardwicke LC).

⁵⁸⁴ 1 Vern. 467 at 467.

⁵⁸⁵ This term appears to have been used in the seventeenth century to describe the sorts of individuals this thesis terms brokers: see Roger Whitley, '1 November 1685', *Roger Whitley's Diary 1684-1697 Bodleian Library, Ms Eng Hist C 711*, ed. Michael Stevens and Honor Lewington ([s.l.], 2004), *British History Online* <<http://www.british-history.ac.uk/no-series/roger-whitley-diary/1684-97/november-1685>> accessed 1 June 2018.

⁵⁸⁶ *Bill v Price* (28 October 1685) C 6/277/15. This is also supported by biographical research: see A2.16.

⁵⁸⁷ For a discussion of the expectant heir's need for secrecy as a distinguishing factor, see Chapter 6, below at 6.2.2.

5.2 Establishment and Development of The Jurisdiction

It is widely accepted by academic commentators that a jurisdiction to relieve expectant heirs (and, as this thesis posits, non-heir profligates) from improvident bargains was relatively firmly established in Chancery by the later part of the seventeenth century;⁵⁸⁸ it is much less clear whether that jurisdiction already existed in the first half of the century. Ballow suggests that the jurisdiction originated in, and initially was exclusive to, a different court:

in former times Chancery did not interpose in these [expectant heir] cases; but the reason was, because there was another court that then did, and this was the Star Chamber, which could not only relieve the plaintiff, but punish the defendant.⁵⁸⁹

Certainly Hudson makes reference to that court intervening in what sounds very much like the 'goods' cases found amongst the suits examined for this thesis, although the true issue here may have been that the obligors were underage:

If subtle merchants or tradesmen will draw young gentlemen under age before a judge, or any other which hath power to take a fine or recognizance, knowing him to be under age, he shall be grievously fined ... Yea, the drawing of young gentlemen into security for commodities of tobacco and phillizellas, and such unnecessary stuffs, which they are compelled forthwith to sell away to brokers at half the vale, is usually fined.⁵⁹⁰

Given the constraints of the PhD project, it was not feasible to make a search through Star Chamber records for expectant heir or non-heir profligate cases, nor to search Chancery records and proceedings prior to the beginning of the thesis period. Consequently, no definitive conclusion can be drawn as to the beginning of the jurisdiction, nor whether it was originally exclusively a matter for the Star Chamber; similarly, no evidence has been found amongst secondary sources as to the earliest date of the granting of relief by any court to expectant heirs and non-heir profligates.

The following discussion therefore canvasses the indications of the existence of such a jurisdiction found in unreported suits in Chancery from the beginning of the thesis period,

⁵⁸⁸ See, for example, Swain, above n 583, at 125. Illustrations of the established nature of the jurisdiction at the end of the seventeenth century can also be found in suits such as *Lamplugh v Smith* (26 January 1688) C 5/70/83 (where the obligee accepted in his answer that, due to the operation of the jurisdiction, the expectant heir obligor would only be ordered to repay the true value received plus interest) and *Wiseman v Beake* (1690) 2 Vern. 122 (in which the obligee, on the advice of counsel, exhibited a 'pre-emptive' bill against the obligor so that the obligor could affirm the validity of the bargain in his answer, in an attempt to avoid any future relief being granted on the basis of the obligor's status as an expectant heir).

⁵⁸⁹ Henry Ballow, *Treatise of Equity with the Addition of Marginal References and Notes by J. Fonblanque* (London, 1793), 126.

⁵⁹⁰ William Hudson, 'A Treatise of the Court of Star Chamber: Part the Second' in Francis Hargrave (ed), *Collectanea Juridica. Consisting of Tracts Relative to the Law and Constitution of England* (London, 1791) 49, at 111.

and pre-dating the earliest known reported case of *Godscall v Walker* (1663).⁵⁹¹ The discussion is confined to four categories of suit – two of which tend to support the existence of a jurisdiction to relieve, and two which tend to suggest the opposite view – whose probative value does not depend upon a plaintiff obligor’s identification of their own status. This is because such an identification could be merely incidental to a statement of the circumstances or nature of the obligation – for example, an obligor’s expectancy might be revealed through the fact that the bond entered was post obit. in nature – rather than being an appeal to an established jurisdiction to grant relief based on expectant heir or non-heir profligate status. In other words, because it is entirely possible in such cases that a plaintiff obligor was relying upon some other ground of relief, and just happened to have the characteristics of an expectant heir or a non-heir profligate, it would not be safe to assume that a plaintiff obligor’s identification of themselves – whether expressly or by circumstance – as an expectant heir or non-heir profligate was necessarily made with the intention of claiming relief on that basis.

5.2.1 Indications of the Existence of the Jurisdiction

The first two categories of suits discussed here, those which tend to suggest the existence of the jurisdiction, are those in which reference was made by the court to the existence of a jurisdiction to relieve expectant heirs and/or non-heir profligates; and those in which expectant heir or non-heir profligate status was falsely claimed by an obligor.

5.2.1.1 Reference Made by the Court

The earliest example of the first of these categories, suits in which reference was made by the court to such a jurisdiction, is *Earl of Lincoln v Fuller* (1618),⁵⁹² in which the court stated that it ‘much mislike[d] that heirs of great families should be drawn by loans of small sums of money to pay a great deal more than was received’.⁵⁹³ Although the court then went on to order the heir in question to pay the full conditioned amount of the bond in question, despite only having received part of that sum,⁵⁹⁴ it is possible to infer from this statement that, at the very least, the court perceived that there was a practice of preying on heirs at this time, and disapproved – albeit not to the point of granting relief on that basis, at least in this instance.⁵⁹⁵

A similar inference can be drawn in relation to non-heir profligates from a suit heard a few years later, *Maddocks v Needham* (1621),⁵⁹⁶ in which Sir Richard Moore and Sir Robert Rich,

⁵⁹¹ 2 Freeman 169.

⁵⁹² *Earl of Lincoln v Fuller* (24 October 1618) C 33/135, f. 90v.

⁵⁹³ *Ibid.*

⁵⁹⁴ *Ibid.*

⁵⁹⁵ Although the report of *Williams v Smith* (1671) 3 Chan. Rep. 75; A2.13, a suit heard by Bridgman LK, notes that precedents from the times of Coventry (lord keeper from 1625-1639) and Ellesmere LC (lord keeper from 1596-1603, then lord chancellor until early 1617) were cited in relation to these sorts of cases, in the absence of reference to specific suits this cannot be taken to be definitive.

⁵⁹⁶ C 78/204, no. 4; A2.4.

masters of Chancery, described the matter in their report – in a passage which can be interpreted as indicating familiarity with the practice – as

being of this nature to draw young gentlemen at the Inns of Court into a statute for tufted fustians and wares and commodities which appear by the defendant's answer not to be worth the money defeasanced to be paid for them.⁵⁹⁷

While there are several examples from later in the century⁵⁹⁸ of the court more explicitly identifying the jurisdiction, these two examples from the earlier part of the century suggest that, if the jurisdiction to relieve expectant heirs and non-heir profligates was not yet firmly established at this time, it was at least emerging.

5.2.1.2 Status Falsely Claimed by an Obligor

The second category of suits discussed here – in which expectant heir or non-heir profligate status was falsely claimed by an obligor – arguably provides compelling evidence of the existence of the jurisdiction in the first half of the century. In *Beeve v Whitehead* (1622),⁵⁹⁹ the plaintiff obligor characterised himself as an improvident young man of whom advantage had been taken, alleging in his bill that

the complainant ... being then [a] very young man living in Gray's Inn was by ... unconscionable circumventions many times drawn into wasteful expenses and for small or no consideration was often drawn into bonds and recognizance [*sic*] for the same.⁶⁰⁰

The court, however, found that the debt in question related to a fine incurred by the plaintiff for having assaulted the defendant.⁶⁰¹ It is difficult to escape the inference that the plaintiff, in falsely ascribing to himself the status of a profligate in relation to this bond, was acting on the belief that there was a jurisdiction to grant relief on that basis, or at least in the hope that the court would look on him favourably were he in the predicament he claimed; indeed, there was no other substantive basis to his action, brought to prevent the defendant obligor pursuing him at common law on the recognizance in question.⁶⁰²

Similarly, the plaintiff obligor in *Thompson v Veysey* (1633)⁶⁰³ does not appear to have been entitled to claim the status of an expectant heir in regard to the transactions he sought to avoid; both the defendant's denial that he had dealt with the plaintiff during the lifetime of

⁵⁹⁷ Ibid [Membrane 3; IMG_0042]. In this instance, however, the plaintiff obligor was ordered to match a composition with the obligee made by one of his co-obligors: see discussion at A.2.4.

⁵⁹⁸ See, for example: Nottingham LC's statement '[t]hat this Court ought to discountenance and relieve against all corrupt traffic between the shopkeepers and young gentlemen who are usually drawn in and entangled with such kind of bargains' (*Fairfax v Trigg* (1676) 79 Selden Soc. 448); and North LK's view that 'the practice of purchasing from heirs was grown too common, and therefore he would not in any sort countenance it' (*Johnson, executor of Hill v Nott* (1684) 1 Vern. 271).

⁵⁹⁹ C 78/328, no. 8; A2.5.

⁶⁰⁰ Ibid [Membrane 1; IMG_0085]. Although Beeve may have been living in Gray's Inn, he does not seem to have been a member as he does not appear in the admissions register (Joseph Foster, *Register of Admissions to Gray's Inn, 1521-1889* (London, 1889)).

⁶⁰¹ C 78/328, no. 8 [Membrane 2; IMG_0088].

⁶⁰² For an account of the circumstances giving rise to the fine, see A.2.5.

⁶⁰³ C 78/515, no. 4; A.1.8.

the plaintiff's father, and the biographical research undertaken on the suit, indicate that the transactions complained of had been entered many years after the death of his father, and several years after the death of his elder brother, from whom he may perhaps have inherited the family estate. The fact that the plaintiff nevertheless appeared to think that it was worth claiming expectant heir status strongly suggests that, like the plaintiff in *Beeve v Whitehead*, he, or his legal advisor, believed that there was a jurisdiction to grant relief on that basis. Arguably, therefore, both these suits provide strong indications – which can be added to the fainter indications provided by *Earl of Lincoln v Fuller* (1618) and *Maddocks v Needham* (1621), discussed above – that there was an established, or at least emerging, jurisdiction to relieve expectant heirs and non-heir profligates in the first half of the seventeenth century.

5.2.2 Indications Against the Existence of the Jurisdiction

In contrast, the other two categories of suits considered in this section – those in which the obligee identified the obligor as an expectant heir, and those in which an obligor's status as an expectant heir or profligate was not identified in the suits themselves but has been established from extrinsic evidence – provide some contra-indications for the existence of that a jurisdiction to relieve expectant heirs and non-heir profligates before the Restoration period.

5.2.2.1 Status Identified by Obligee

Evidence suggesting that the jurisdiction was not firmly established at the beginning of the century comes from *Neaste v Poole* (1608),⁶⁰⁴ in which the identification of the plaintiff as an expectant heir was made in the defendant's answer, rather than in the plaintiff's bill.

Despite the facts in this case clearly reflecting a key feature of later understandings of the archetypal expectant heir case – Neaste was short of money because he was in disgrace with his father – at no point in either the original bill or the bill of revivor did Neaste argue his status as an expectant heir. While this is not, in itself, conclusive – both parties may simply have had less than competent legal advice – the fact that it was the defendant who provided facts enabling the plaintiff to be identified as an expectant heir tends to suggest that the jurisdiction to relieve expectant heirs had yet to be firmly established at this time. If expectant heir status was – and was known to be – a basis for relief in Chancery, we might expect that an obligee would avoid mentioning the fact; presumably rational self-interest would preclude a party from providing the court with a reason to find against them, and competent legal advisers would prevent their clients from so doing. The substance of the defendant obligee's pleading arguably did not require the inclusion of the information that the bargains in question were made during the lifetime of the plaintiff's father, nor that the plaintiff was in disgrace with his father: the salient fact appears to have been only that the plaintiff was in need of money. Indeed, the defendant's identification of the plaintiff's predicament – and thus status as an expectant heir – appears to have been intended to

⁶⁰⁴ C 78/176, no. 12.

position the defendant's provision of credit to him as a conscientious act, further suggesting the possibility that the jurisdiction to relieve expectant heirs had yet to become firmly established.

5.2.2.2 Status Not Identified in Suit

Two suits from the first half of the century⁶⁰⁵ fall within the final category of suit discussed in this section, those in which an obligor's status as an expectant heir or non-heir profligate was not identified in the suit, but has been established from extrinsic evidence: in the first of these, *Black v Earl of Carlisle* (1641),⁶⁰⁶ despite the obligor, Sir James Hay, being an expectant heir⁶⁰⁷ at the time of entering into the first bond in 1609, his status was not referred to in any of the pleadings, nor by the court. In light of the defendants' acceptance that the debts in question were justly due and payable,⁶⁰⁸ this is perhaps not surprising, and accordingly this suit has little or no probative value in relation to the existence or otherwise of the jurisdiction.

As with *Black v Earl of Carlisle*, the transactions between the parties to the suit of *Tirwhitt v Martyn* (1646)⁶⁰⁹ occurred prior to the death of the plaintiff's father, and no mention of the plaintiff's status as an expectant heir was made in the pleadings. Unlike the earlier suit, however, in this instance the obligation was disputed, and there was an allegation – although a somewhat tentative one – of 'drawing in': the plaintiff's bill alleged that Christopher Martyn had 'insinuated himself into the acquaintance of the complainant and thereby the complainant employed him'.⁶¹⁰ There was also an allegation – accepted by the court – that Martyn had unconscientiously broken a promise to the plaintiff not to obtain judgment on the counterbonds in question.⁶¹¹ However, one can only speculate as to the reason for the failure to argue the plaintiff's status as an expectant heir: it might perhaps reflect the non-existence of a jurisdiction in Chancery to grant relief on that basis at this time; or, if such a jurisdiction did exist, the plaintiff and his advisers may have been unaware of it.

5.2.3 Summary

On the basis of the above discussion, particularly in light of the indications provided by the two suits in which the plaintiffs falsely claimed expectant heir and non-heir profligate status, it is perhaps justifiable to conclude that a jurisdiction to relieve expectant heirs and

⁶⁰⁵ One suit from after the Restoration was also found in which no reference was made to the plaintiff's status as an expectant heir: *Waller v Dale* (1677) Rep. Temp. Finch 296; Dickens 8; 1 Chan. Cas. 276. The significance of this omission is difficult to determine, however, it may suggest that either the jurisdiction to relieve expectant heirs was still developing at this time, or – as the bargain complained of by the plaintiff involved the provision of goods of a lesser value than the ready money he expected – the argument that the plaintiff was an expectant heir may have been considered to be unnecessary: see A1.15.

⁶⁰⁶ C 78/573, no. 6; A1.9.

⁶⁰⁷ See discussion at A1.9.

⁶⁰⁸ C 78/573, no. 6 [Membrane 2; IMG_0278].

⁶⁰⁹ C 78/529, no. 12; A1.10.

⁶¹⁰ Ibid [Membrane 1; IMG_0001].

⁶¹¹ Ibid [Membrane 2; IMG_0003].

non-heir profligates was in existence in the first half of the seventeenth century, as well as in the second half; bearing in mind the evidence of *Neaste v Poole* (1608), however, it seems likely that if that is the case, the jurisdiction had yet to become firmly established in the earliest part of the century, and indeed was still developing by 1646, when *Tirwhitt v Martyn* was decided. The next section considers what characteristics were required for an obligor to hold the status of expectant heir or non-heir profligate, thus enabling them to bring suit on the basis of that jurisdiction.

5.3 Status

5.3.1 Characteristics of Expectant Heir Status

Expectant heir status, as gleaned from the suits examined for this thesis, comprised a number of characteristics. The most obvious of these is, of course, the obligor's expectancy. In identifying suits for this thesis, no distinction was made in terms of the type of expectancy: both obligors who stood to inherit real property by descent or through operation of a settlement, and those with expectations of personal property (and, in some cases, real property) by testamentary disposition were included. The court likewise seems to have made no distinction, with the type of expectancy apparently having no effect on the court's decision whether to grant relief.⁶¹² No express statement suggesting a requirement for a particular kind of expectancy is made by the court in this respect, nor is it argued by counsel or raised by an obligee. Although this absence of evidence may not amount definitively to evidence of absence, such a conclusion is supported to an extent by the fact that in the handful of suits in which substantive relief⁶¹³ was not granted to plaintiff expectant heir obligors,⁶¹⁴ there is no reason to believe the nature of the obligor's expectancy was in any way relevant.

In addition to expectancy, two other characteristics – while not universal – are mentioned frequently enough to suggest their significance to expectant heir status as it was perceived by the court, counsel, and the parties: the obligor's youth and their financial necessity. The age of the obligor – with particular regard to youth⁶¹⁵ – was mentioned in eighteen of the

⁶¹² This appears to have also been the case much later in the development of the jurisdiction: “[the phrase “expectants or expectant heirs”] is used, not in its literal meaning, but as including every one who has either a vested remainder or a contingent remainder in a family property, including a remainder in a family property, including a remainder in a portion as well as a remainder in an estate, and every one who has the hope of succession to the property of an ancestor, either by reason of his being the heir apparent or presumptive, or by reason merely of the expectation of a devise or bequest on account of the supposed or presumed affection of his ancestor or relative’ (*Beynon v Cook* (1875) LR 10 Ch. App. 389 per Jessel MR, note 1 at 391).

⁶¹³ This term is used in this thesis to mean relief against anything more than the penalty.

⁶¹⁴ There are five such suits: the failure to grant substantive relief appears to be based respectively on affirmation of the bargain (*Fines v Wheatley* (1616) C 78/311, no. 23 [Membrane 1; IMG_0033]; A1.3; and *Fairfax v Trigg* (1677) 79 Selden Soc. 448), an absence of fraud (*Batty v Lloyd* (1682) 1 Vern. 141 at 141), and an apparent wish on the part of the court to hold the obligor liable for his own foolishness (*Earl of Lincoln v Fuller* (24 October 1618) C 33/135, f. 90v. and *Pawlett v Pleydell* (1679) 79 Selden Soc. 739).

⁶¹⁵ The plaintiff obligors in the suits examined in the thesis were all above the age of 21, and therefore were not protected by the rules regarding minors. No express statement was made by the court in any of the suits examined in the thesis as to what constituted ‘young’; however, when considering the ages

twenty-four expectant heir suits, and this includes all eleven suits in which plaintiff expectant heirs were granted substantive relief.⁶¹⁶ In the vast majority of those suits the obligor was young; this description from the bill in *Hubberstie v Danser* (1614) is a typical example of the way in which this was expressed:

the plaintiff being then young and altogether unexperienced in such affairs yet then the son and heir of George Hubberstie citizen and leatherseller of London and by that means likely to be owner and possessed of good estate after the death of his father being aged...⁶¹⁷

In two suits, however, *Draper v Dean* (1679)⁶¹⁸ and *Wiseman v Beake* (1690),⁶¹⁹ relief was granted despite the plaintiffs in those suits being of full age. Sir Robert Jason, the obligor⁶²⁰ in the former suit, was 33 years of age, and Samuel Wiseman somewhat older, at the time of entering the bargains from which relief was sought. The granting of relief in both these suits, at least in relation to the importance of youth as a significant factor, appears to have run counter to the previous approach of the court, with counsel for the defendant in *Wiseman v Beake* arguing that

this was not *the ordinary case* of surprising a young heir into a hard bargain, but [the plaintiff] was above thirty, near forty years old when this bargain was made.⁶²¹

This despite Nottingham LC in the earlier case of *Draper v Dean* having ‘declared that this kind of infamous traffic with sons in the lifetime of their fathers ought to be discouraged and destroyed, though the sons be of full age’.⁶²² In the same entry his lordship referred to ‘many precedents’⁶²³ relating to these bargains, although it is unclear whether these precedents related to relieving heirs generally, or specifically to relieving those of full age; the number of expectant heir suits throughout the century which include reference to the youth of the obligor, however, arguably weighs against the latter interpretation. Accordingly, it seems at least a plausible interpretation of the overall approach of the court to conclude that the youth of the obligor was an integral part of the jurisdiction to relieve; it could even

of the plaintiff obligors in most of these suits it is possible tentatively to conclude that an age between 21 and 26 – depending on the life experience of the individual in question – was held to fall within the scope of ‘youth’.

⁶¹⁶ Twelve suits in which plaintiff expectant heir obligors were granted substantive relief were found, but in one of them, *Tirwhitt v Martyn* (1646) C 78/529, no. 12, discussed above, the plaintiff’s status as an expectant heir was not mentioned by either party, or the court; the expectancy was discovered through biographical research.

⁶¹⁷ C 78/184, no. 1 [Membrane 1; IMG_0083]; A1.2.

⁶¹⁸ 79 Selden Soc. 602.

⁶¹⁹ 2 Vern. 122.

⁶²⁰ Although Jason was not the plaintiff in this suit, the court found that the suit had been brought by Draper on Jason’s behalf, the obligor having been outlawed (*Draper v Dean* (1679) 79 Selden Soc. 602).

⁶²¹ *Wiseman v Beake* (1690) 2 Vern. 122; emphasis added.

⁶²² *Draper v Dean* (1679) 79 Selden Soc. 602.

⁶²³ *Ibid.*

be said that the stress laid on the grant of relief to the obligors in the two anomalous suits *despite* their relatively advanced years gives further support for this conclusion.

While the characteristic of the financial hardship of the obligor expectant heir does not recur as frequently as that of youth, it still features in a significant number of suits: thirteen of the twenty-four suits involving expectant heirs, including in five⁶²⁴ of the eleven suits in which plaintiff expectant heirs were granted substantive relief. The necessity of the expectant heir was in some instances expressed to be a result of the heir's own profligacy or extravagance⁶²⁵ and it was also often attributed to his father's lack of generosity; for example, in many of the bills brought by Richard Berney he complained that his father had allowed him only 'a small sum of money'⁶²⁶ on which to live, thus compelling him to borrow. Similarly, the plaintiff in *Neaste v Poole* (1608) alleged he was in financial difficulties due to the 'very small or little maintenance allowed him by his said father'.⁶²⁷ This lack of generosity was linked, in some suits, to a difficult relationship between the expectant heir and the ancestor from whom their expectancy derived. In *Neaste v Poole*, for example, the small allowance complained of by the plaintiff was said to be a result of him being in disgrace with his father;⁶²⁸ in other cases, expectant heir obligors sought to avoid such disgrace – with its concomitant risk of disinheritance – by seeking to keep their borrowings secret.⁶²⁹ As will be discussed later, the familial consequences – potential or already in existence – of the expectant heir's financial predicament may well have contributed to the court finding the requisite element of fraud to be present in the transaction.

5.3.2 Characteristics of Non-Heir Profligate Status

Unlike the expectant heir suits, in which suits selected by reference to a central attribute – expectancy – revealed other, associated, characteristics, the suits dealing with non-heir profligate obligors were selected for inclusion in the thesis on the basis of two key characteristics, so that by definition these characteristics are present and integral. These are the youth of the obligor, and an element of financial necessity.⁶³⁰ Of the fourteen profligate suits found, twelve suits contain a reference to the obligor's youth, ten to

⁶²⁴ *Neaste v Poole* (1608) C 78/176, no. 12; the Berney suits, for example *Berney v Fairclough and Stystead* (14 February 1680) C 10/201/12; *Nott v Hill* [1682] 2 Chan. Cas. 120; *Lamplugh v Smith* (1688) 2 Vern. 77; and *Whitley v Price* (20 July 1686) C 9/420/225; A1.24. It is possible that this is because only expectant heirs who were in financial difficulties would end up in court. However, the way in which necessity is treated by the court seems to suggest that it was viewed as a basis of relief, rather than simply a reason why relief was sought.

⁶²⁵ See, for example *Lamplugh v Smith* (26 January 1688) C 5/70/83; and *Frevile v Atkins* (1628) C 78/473, no. 13 [Membrane 1; IMG_0052]; A1.7.

⁶²⁶ *Berney v Pitt* (16 February 1680) C 10/208/7; see also *Berney v Passmore* (23 February 1679) C 10/495/27 and *Berney v Mingay and Utting* (14 February 1680) C 20/495/26, amongst others.

⁶²⁷ C 78/176, no. 12 [Membrane 2; IMG_0004]. Similar complaints were made by the plaintiffs in, for example, *Nott v Hill* (1682) 2 Chan. Cas. 120; the Berney suits, for example *Barny v Beak* (1683) 2 Chan. Cas. 136; *Whitley v Price* (1686) C 9/420/225 and *Pawlett v Pleydell* (1679) 79 Selden Soc. 739.

⁶²⁸ C 78/176, no. 12 [Membrane 2; IMG_0004].

⁶²⁹ See, for example, *Frevile v Atkins* (1628) C 78/473, no. 13 [Membrane 1; IMG_0051]; *Fairfax v Trigg* (20 April 1676) C 6/220/35; and *Earl of Lincoln v Fuller* (28 June 1617) C 33/131, f. 1180.

⁶³⁰ In this context, necessity is used to encompass extravagance as well as the state of financial hardship per se.

necessity, and nine to both. In only one suit was neither mentioned; the obligor in this suit being identified as profligate through biographical research.⁶³¹ Of the seven suits in which plaintiff profligate obligors were granted substantive relief, all⁶³² referred to the obligor's youth, five⁶³³ to his necessity, and all but two⁶³⁴ to both. That the court granted relief – at least partly – on the basis of an obligor having these characteristics can be determined, as well as by inference from the numbers of suits mentioned above, through explicit statements to that effect.⁶³⁵

If there is any doubt as to the importance of youth and necessity to the grant of relief in these cases, it can perhaps be lessened by reference to the suit of *Beeve v Whitehead* (1622), in which, as has been seen, a plaintiff obligor, in an attempt to have a bond which actually related to a fine incurred by him for assaulting the defendant set aside, claimed that he 'being then very young and living in Gray's Inn was by very conniving and unconscionable circumventions many times drawn into very wasteful expenses'.⁶³⁶ While this may perhaps have been factually true, nevertheless it did not relate to the bond in question. It seems likely that, with no genuine basis for seeking relief, the plaintiff shaped his plea to an existing, and presumably well known, jurisdiction to relieve.

⁶³¹ *Ashley v Earl of Suffolk* (1656) C 78/560, no. 7; A2.11.

⁶³² *Bill v Price* (1687) 1 Vern. 467; *Woodward v Alporte* (28 July 1612) C 33/121, f. 1209; A2.3; *Smythes v Weedon* (1623) C 78/224, no. 3 [Membrane 3; IMG_0093]; *Godscall v Walker* (1663) 3 Chan Rep. 10; *Earl of Ardglass v Muschamp* (1684) 1 Vern. 237; and *Smith v Burroughs* (1696) 2 Vern. 346; A2.17; *Prescott v Sotherton* (1632) C78/442, no. 10 [Membrane 1; IMG_0088]; A2.9.

⁶³³ *Smythes v Weedon* (1623) C 78/224, no. 3 [Membrane 1; IMG_0089]; *Godshalke v Walker* (1665) C 78/746, no. 5 [Membrane 1; IMG_0172]; *Earl of Ardglass v Muschamp* (1684) 1 Vern. 237; *Bill v Price* (1687) 1 Vern. 467; and *Smith v Burroughs* (1696) 2 Vern. 346.

⁶³⁴ The exceptions being *Woodward v Alporte* (28 July 1612) C 33/121, f. 1209 and *Prescott v Sotherton* (1632) C78/442, no. 10.

⁶³⁵ See, for example, the masters' statement in *Maddocks v Needham* (1621) C 78/204, no. 4, discussed at 5.2.1.1.

⁶³⁶ C 78/328, no. 8 [Membrane 1; IMG_0085]. Several other plaintiff obligors, both expectant heirs and profligates, were, and made a point of describing themselves as, students at the Inns of Court: see *Fairfax v Trigg* (1677) Rep. Temp. Finch 314 (Henry Fairfax, admitted 12 May 1656 to Lincoln's Inn: The Honorable Society of Lincoln's Inn, *The Records of the Honorable Society of Lincoln's Inn: Admissions* (London, 1896) vol I, 273.; *Frevile v Atkins* (1628) C 78/473, no. 13 [Membrane 1; IMG_0051] (George Frevile, admitted 9 August 1612 to Gray's Inn: Foster, above n 600, 130); *Freeman v Lassalls* (1622) C 78/336, no. 9 [Membrane 1; IMG_0130]; A1.5 (Coningesby Freeman, admitted 23 May 1612 to the Inner Temple: *The Inner Temple Admissions Database*, at <<http://www.innertemplearchives.org.uk/index.asp>> accessed 10 January 2019); and *Maddocks v Needham* (1621) C 78/204, no. 4 [Membrane 1; IMG_0039] (George Maddocks, admitted 11 February 1607 to the Inner Temple: *ibid*). The plaintiff in another suit alleged he had gone to London 'with an intent to be admitted of one of the Inns of Court' (*Boll v Bowles* (1627) C 78/292, no. 4 [Membrane 1; IMG_0066]; A2.8) but no record of his admission has been found. The reference by plaintiffs to their connection with the Inns of Court may suggest the existence of a common understanding of such students as the 'natural prey' of the unscrupulous, although there are no judicial statements supporting that idea. Lemmings, in his study of the Inns of Court, says: 'in the later sixteenth and early seventeenth centuries the inns of court became the fashionable resort of large numbers of well-born gentlemen who regarded them simply as "finishing schools"' (David Lemmings, *Gentlemen and Barristers: The Inns of Court and the English Bar 1680-1730* (Oxford, 1990), 8). It would not be surprising, therefore, if the exchange-men who figure in these suits saw the Inns of Court as fertile ground.

5.3.3 Family Background

A final consideration when discussing expectant heir and non-heir profligate status is family background: one of the two main modern explanations of the jurisdiction to relieve such obligors – referred to in this thesis as the ‘economic preservation’ explanation – was, as Dawson puts it, that the jurisdiction acted ‘to preserve for a dominant class the economic resources on which its prestige and power depended’.⁶³⁷ Accordingly, the social class of the obligors in the suits examined for this thesis has been ascertained (where possible) and categorised according to the class divisions identified by Stone as operating in the seventeenth century.⁶³⁸ Table 5.1 shows that the strata of society that Dawson might be expected to be referring to as a ‘dominant class’ in the seventeenth century – the peers and the county elite – make up 66.6 percent of expectant heir obligors in the suits examined for this thesis, 50 percent of non-heir profligate obligors, and 60.4 percent of both groups combined. These two groups make up the largest number of obligors in all suits examined; the number of obligors from each of the merchant class and the lesser gentry are significantly lower, and only one suit was found in which the obligor came from any of the lowest three social classes.

Table 5.1: Family background, all suits

	Expectant Heirs (N = 24)		Profligates (N = 14)		Both (N = 38)	
	N	%	N	%	N	%
Groups 1-3 ⁶³⁹	1	4.2	0	0	1	2.6
Merchants	1	4.2	4	28.6	5	13.2
Lesser or parish gentry	4	16.7	0	0	4	10.5
The county elite: squires, knights and barons	8	33.3	6	42.9	14	36.8
The peers: barons, viscounts, earls, marquises, and dukes.	8	33.3	1	7.1	9	23.6
Unknown	2	8.3	3	21.4	5	13.2

Narrowing this down to suits in which the obligor was the plaintiff, Table 5.2 shows that those percentages remain fairly stable: 66.7 percent of expectant heir plaintiffs, 41.6 percent of non-heir profligate plaintiffs, and 56.7 percent of both groups combined, came from the peer and county elite classes.

⁶³⁷ Dawson, above n 77, at 268.

⁶³⁸ Stone, ‘Social Mobility in England, 1500-1700’, above n 448, at 18-19.

⁶³⁹ This refers to the first three groups of Stone’s model: Group 1 consisted of ‘[t]he dependents on charity, whether widows, aged, or unemployed; also the apprentices and living-in servants, domestic, agricultural, or industrial’; Group 2 was [t]he living-out labourers, both rural and urban, agricultural and industrial’; and Group 3 comprised ‘[t]he husbandmen, the lesser yeomen (both tenants and freeholders), and the more substantial yeomen; also the artisans, shopkeepers and small internal traders’ (ibid, at 18).

Table 5.2: Family background, plaintiff obligors

	Expectant Heirs (N = 18)		Profligates (N = 12)		Both (N = 30)	
	<i>N</i>	%	<i>N</i>	%	<i>N</i>	%
Groups 1-3	1	5.6	0	0	1	3.3
Merchants	1	5.6	4	33.3	5	16.7
Lesser or parish gentry	3	16.7	0	0	3	10.0
The county elite: squires, knights and barons	7	38.9	4	33.3	11	36.7
The peers: barons, viscounts, earls, marquises, and dukes.	5	27.8	1	8.3	6	20.0
Unknown	1	5.6	3	25.0	4	13.3

Narrowing this down further to plaintiff obligors who were successful in obtaining substantive relief, Table 5.3 shows that the percentages of peer and county elite obligors again stay relatively stable: they made up 66.6 percent of successful expectant heir plaintiff obligors, 42.9 percent of successful non-heir profligate plaintiff obligors, and 57.9 percent of both combined.

Table 5.3: Family background, plaintiff obligors granted substantive relief

	Expectant Heirs (N = 12)		Profligates (N = 7)		Both (N = 19)	
	<i>N</i>	%	<i>N</i>	%	<i>N</i>	%
Groups 1-3	0	0	0	0	0	0
Merchants	1	8.3	4	57.1	5	26.3
Lesser or parish gentry	2	16.7	0	0	2	10.5
The county elite: squires, knights and barons	7	58.3	2	28.6	9	47.4
The peers: barons, viscounts, earls, marquises, and dukes.	1	8.3	1	14.3	2	10.5
Unknown	1	8.3	0	0	1	5.3

Tables 5.4, 5.5 and 5.6 respectively show the percentage of peers and county elite, merchant, and lesser or parish gentry plaintiff obligors who were granted substantive relief:

Table 5.4: Peers and county elite plaintiff obligors granted substantive relief

	Expectant Heirs	Profligates	Both
	<i>N</i>	<i>N</i>	<i>N</i>
Total peers and county elite plaintiff obligors	12	5	17
Peers and county elite plaintiff obligors granted relief	8	3	11
Percentage of total peers and county elite plaintiff obligors who were granted relief	66.7	60.0	64.7

Table 5.5: Merchant plaintiff obligors granted substantive relief

	Expectant Heirs	Profligates	Both
	<i>N</i>	<i>N</i>	<i>N</i>
Total merchant plaintiff obligors	1	4	5
Merchant plaintiff obligors granted relief	1	4	5
Percentage of total merchant plaintiff obligors who were granted relief	100	100	100

Table 5.6: Lesser or parish gentry plaintiff obligors granted substantive relief

	Expectant Heirs	Profligates	Both
	<i>N</i>	<i>N</i>	<i>N</i>
Total lesser or parish gentry plaintiff obligors	3	0	3
Lesser or parish gentry plaintiff obligors granted relief	2	0	2
Percentage of total lesser or parish gentry plaintiff obligors who were granted relief	66.7	0	66.7

Thus, we see that 64.7 percent of peers and county elite plaintiff obligors were granted substantive relief; 100 percent of merchant plaintiff obligors were granted substantive relief; and 66.7 percent of lesser or parish gentry plaintiff obligors were granted substantive relief.

While the numbers involved here are very small, and, overall, insufficient to warrant the kind of definitive conclusions that a larger sample size would provide, it might be thought that if the economic preservation explanation was correct, the proportion of county elite and peer obligors gaining relief would be greater when compared to the lesser gentry and merchants. As can be seen in Table 5.7, however, this comparison shows that the percentage of the combined class of county elite and peers plaintiff obligors gaining relief remains stable, as does the percentage of lesser or parish gentry; while the percentage of the merchant class gaining relief rises, in terms of their representation as plaintiff obligors:

Table 5.7: Comparison (both expectant heir and non-heir profligates)

	Percentage of obligors	Percentage of plaintiff obligors	Percentage of plaintiff obligors granted relief
	%	%	%
Merchants	13.2	16.7	26.3
Lesser or parish gentry	10.5	10.0	10.5
Peers and county elite	60.4	56.7	57.9

Despite the merchant class making up only 16.7 percent of all plaintiff obligors, they make up 26.3 percent of all plaintiff obligors who were successful; whereas for the combined peers and county elite groups those two figures are 56.7 percent and 57.9 percent, a barely perceptible difference. From these figures, it appears plaintiff obligors of the merchant class were more successful in gaining relief than plaintiff obligors belonging to Dawson's dominant classes. It is possible, of course, that these figures are skewed by a difference in strength of claims between social groups: if plaintiffs of the lesser gentry and merchant class knew that the jurisdiction was more favourable to peer and county elite obligors, they may only have brought suit where their claim was particularly strong; this would be another potential explanation for the relative parity between the classes in terms of relief. The suits examined for the thesis, however, do not display any marked difference in the strengths of the cases according to social category: in fact, the only expectant heir plaintiff to belong to the social group below the merchants, the Group 3 artisan goldsmith in *Batty v Lloyd* (1683),⁶⁴⁰ brought one of the weakest cases. There could be a number of explanations for the fact that there was only one suit found which was brought by an obligor belonging to any of the lowest three groups: the cost of litigation may have prevented such obligors from seeking relief; or it may be that people from these lower classes were less likely to have expectations, or the opportunity to be profligate. However, it is possible that it was generally known (or at least believed) that the court was less likely to grant relief to obligors from lower social groups, and that possibility should be borne in mind.

Accordingly, while the sample size prevents any definitive conclusion, it can at least be said that plaintiff obligors of the merchant class – not the peers or county elites – appear to have enjoyed the most success when seeking relief from the sorts of improvident bargains dealt with in this thesis. This might suggest that, at least in practice, the court was not discernibly favouring the dominant peer and county elite groups, which seems to contradict the idea of economic preservation as a discrete basis of the jurisdiction.⁶⁴¹ It must be noted, however, that if preservation of the assets of the ruling classes was the aim of the court, it may have manifested in a normative way. That is, the court may have granted relief to

⁶⁴⁰ *Batty v Lloyd* (1683) 1 Vern. 142.

⁶⁴¹ The validity of the economic preservation explanation of the expectant heir cases is discussed further in Chapter 6, below at 6.3.1.

obligors of all social classes equally, on the basis that the types of bargains dealt with were of a nature which *could* damage the economic power of the ruling classes, rather than basing decisions in individual suits on the grounds that they *would*. If this were the case, then there would be no differentiation in treatment based on the social class of the obligor, or disparities in class between obligors and obligees, in individual suits.⁶⁴²

5.4 Relief Granted

5.4.1 Introduction

The discussion which follows of the types of relief granted in the seventeenth century to expectant heirs and non-heir profligates is organised according to the role of plaintiff in the bargain; that is, whether the plaintiff was the obligor, the obligee, or a surety, since the granting of relief to an obligee, for example, holds a different significance to that granted to an obligor when considering the overall concern of this chapter, the basis of relief granted in the expectant heir and non-heir profligate suits examined by this thesis. As has been seen, no difference has been found in the relief granted to expectant heir obligors, compared to that granted to their profligate counterparts; accordingly, the following discussion makes no distinction between them. Given that a significant number of the bargains with which this thesis deals involved conditioned bonds, this section also discusses Chancery's approach to granting relief against penalties – at least in relation to money-bonds – in the seventeenth century.

5.4.2 Plaintiff Obligors

5.4.2.1 Securities for More than Principal and Interest

In thirty of the thirty-eight expectant heir and non-heir profligate suits examined by this thesis, the action was brought by the obligor. In twenty-seven of those thirty suits, the suit was to be relieved from a type of security allowing an obligee to obtain payment of more than simply principal and interest on the obligor's default: that is, penal bonds, statutes, judgments and recognizances, as well as simple bonds, counterbonds, statutes, judgments, recognizances, mortgages and post obit. securities which, despite not being penal in nature, were intended to result in a significant profit to the obligee. In nineteen of those twenty-seven suits substantive relief was granted, and in a further three the only relief granted was against the penalty.⁶⁴³

Substantive Relief

By the seventeenth century, the court of Chancery had 'a well-recognised suite of orders to prevent the enforcement and undo the effects of contracts and gifts that offended equity's

⁶⁴² There is also an evidentiary difficulty in making the case that any difference in treatment stemmed from the kind of motivation Dawson alleges: as Swain puts it, '[b]y definition, if the law is being used covertly to further the interests of particularly powerful groups, then it is going to be difficult to find historical evidence that this is so' (Swain, above n 11, 6–7).

⁶⁴³ Of the remaining five suits, four were dismissed, and in one the parties were ordered to adhere to a previous arbitration award.

conscience'.⁶⁴⁴ Those of most relevance to the suits discussed in this thesis are orders of rescission, and orders for conditional relief.⁶⁴⁵ In the nineteen suits in which substantive relief was granted, this conditional relief took the form of orders that the security in question be rendered unenforceable – whether by cancellation, assignment to the obligor, acknowledgement of satisfaction, or perpetual injunction – on payment of the true value of goods or money received by the obligor, plus interest (and occasionally costs). In order for such orders to be made, the court must first have, in effect, rescinded – or, to use the terminology of the time, 'set aside'⁶⁴⁶ – the contract between the parties. The conditional orders then took the place of the contractual obligations between the parties; accordingly, such orders are, in modern terms, restitutionary in nature.

From the reported cases, and the extra-curial writings of Nottingham LC, it seems beyond doubt that this was the established remedy by the later part of the seventeenth century, at least where goods, rather than ready money, provided the consideration. In 1676, in his notebook account of the suit of *Fairfax v Trigg* (1676), Nottingham LC stated that '[t]he usual measure of such relief is to reduce the satisfaction to the true and real value of the goods sold'.⁶⁴⁷ His lordship was even more definite on the subject when dealing with the case of *Draper v Dean* (1679), three years later: 'there are many precedents in cases of contracts for brown paper, wine, silk stockings, &c., upon which this court *did never* allow any more than the true value'.⁶⁴⁸ By 1689, the form of relief appears to have been so well-established that the wishes of one of the lords commissioners hearing the suit of *Wiseman v Beake and Tyson* (1690) were overridden: 'Maynard was so much against these bargains, that he was for giving only the principal, and no interest: but the practice having been otherwise, the defendant had his interest.'⁶⁴⁹

The unreported suits examined in this thesis provide evidence that Nottingham LC's assertion of the long-established nature of the 'true value' form of relief was correct. Dating from a far earlier period than that covered by previous work on this topic, the suit of *Woodward v Alporte* (1615)⁶⁵⁰ is an example of the granting of this form of relief for a bargain involving the provision of goods; the suits of *Neaste v Poole* (1608)⁶⁵¹ and *Hubberstie*

⁶⁴⁴ Dominic O'Sullivan, Steven Elliott and Rafal Zakrzewski, *The Law of Rescission* (Oxford, 2nd ed, 2014), 56.

⁶⁴⁵ *Ibid*, 57.

⁶⁴⁶ See, for example, *Earl of Ardglass v Muschamp* (1684) 2 Chan. Rep. 266 at 269; *Astley v Patten* (1687) C78/1594, no. 14 at [Membrane 5; IMG_0201]; A1.22. In the case study suit of *Smythes v Weedon* (1622) C 78/224, no. 3, the same end was achieved without setting aside the contract: the court found that the obligee had not behaved fraudulently, and thus was entitled to the full defeasanced amount of the penal statute. The difference between that and the true value of the goods received by the obligor was recovered from a third-party defendant, who was found to have engaged in sharp practice: see Chapter 4, above at 4.3.1.

⁶⁴⁷ 79 Selden Soc. 448.

⁶⁴⁸ 79 Selden Soc. 602 (emphasis added).

⁶⁴⁹ 2 Freeman 111. Sir John Maynard held the great seal as a lord commissioner briefly in 1689, with Anthony Keck and Sir William Rawlinson, (GW Thomas, 'Maynard, Sir John' in AWB Simpson (ed), *Biographical Dictionary of the Common Law* (London, 1984) 359, at 360).

⁶⁵⁰ *Woodward v Alporte* (31 January 1615) C 33/127, f. 765 v.

⁶⁵¹ *Neaste v Poole* (1608) C 78/176, no. 12.

v Danser (1614)⁶⁵² also suggest that it was a form of relief granted in the early part of the century for bargains for ready money, not just those involving goods. As shown by the reported and unreported suits examined in this thesis, it is a remedy that was ordered consistently throughout the century where relief was sought against securities for more than principal and interest.⁶⁵³

Relief against Penalties

In none of the suits involving penal instruments examined for this thesis – regardless of whether they were brought by obligors, obligees, or sureties – was the penalty enforced. Relief against penalties – at least with respect to penal instruments securing the payment of money – became routine in Chancery at some point; there has been an ongoing question as to when that occurred.

A.W.B. Simpson took the view that in the early part of the seventeenth-century the court would usually only relieve against the penalty sum where either the obligor had defaulted through no fault of his or her own, or most of the principal sum had been paid before the due date (and it was clear that the residue was to follow shortly afterwards).⁶⁵⁴ Similarly, in the case where a bond entered into many years previously was sued long after the obligor had defaulted, Chancery might also intervene,⁶⁵⁵ but, Simpson argues, '[i]t is clear that the Chancery had not yet begun to grant relief against penalties simply upon the ground that they were penalties ...'.⁶⁵⁶ Simpson appears to have based this view on that of Carey – in turn taken from the notes of the early seventeenth-century master of Chancery William Lambard – that if relief against the forfeiture of the penalty were not based solely on such exceptional circumstances, there would be no point in using penal bonds.⁶⁵⁷

Further, Simpson discounts Norbury's complaint, made in 1621 (although not published until much later), that, after what Norbury alleges to have been the more austere tenure of Ellesmere LC, 'lenity has been used to all debtors, so that men, after four or five years' suit and charges in this court, were glad to go away with their principal without costs or charges'.⁶⁵⁸ Simpson suggests that the 'lenity' in question was 'perhaps the ordering of a

⁶⁵² *Hubberstie v Danser* (1614) C 78/184, no. 1.

⁶⁵³ Relief in the form of the value received plus interest was granted in suits brought by obligors in 1608 (*Neaste v Poole*, C 78/176, no. 12), 1614 (*Hubberstie v Danser*, C 78/184, no. 1), 1622 (*Freeman v Lassalls*, C 78/336, no.9), 1632 (*Prescott v Sotherton*, C 78/442, no. 10), 1646 (*Tirwhitt v Martyn*, C 78/529, no. 12), 1663 (*Godscall v Walker*, 2 Freeman 169), 1677 (*Waller v Dale*, Rep. Temp. Finch 295), 1679 (*Draper v Dean*, Rep. Temp. Finch 439), 1680 (*Varnee's Case*, 2 Freeman 63; A1.18), 1682 (*Nott v Hill*, 2 Chan. Cas. 120), 1684 (*Earl of Ardglass v Muschamp*, Chan. Rep. 266), 1687 (*Bill v Price*, 1 Vern. 467), 1688 (*Witley v Price*, 2 Vern. 78), 1690 (*Wiseman v Beak*, 2 Vern. 122), and 1696 (*Smith v Burroughs*, 2 Vern. 346).

⁶⁵⁴ AWB Simpson, 'The Penal Bond with Conditional Defeasance' (1966) 82 *Law Quarterly Review* 392, at 416.

⁶⁵⁵ *Ibid*, at 417.

⁶⁵⁶ *Ibid*.

⁶⁵⁷ AWB Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford, 1975), 118–19.

⁶⁵⁸ George Norbury, 'The Abuses and Remedies of Chancery' in *A Collection of Tracts Relative to the Law of England from Manuscripts* (Dublin, 1787) vol I, 425, at 431, discussed in Simpson, above n 657, 119–120.

stay of execution at common law where the debtor seemed likely to pay money within a short time of the contractual date',⁶⁵⁹ rather than anything more broadscale. In Simpson's view, it was not until after the Restoration that 'it ... became established that the Chancery would relieve against money bonds on payment of principal, interest and costs'.⁶⁶⁰

Waddilove, on the other hand, concludes that relief against the penalty – at least for money-bonds⁶⁶¹ – was widespread even under Ellesmere LC, and that his lordship 'offered relief in the vast majority of bond cases in a record simply rife with them'.⁶⁶² The belief in Ellesmere LC's more rigid approach to penalties, he argues, stems from the reliance by previous writers on the subject – such as W.J. Jones – on printed reports, which, by their very nature at this time, dealt with exceptional cases rather than those in which settled principles or usual practice were applied.⁶⁶³ Waddilove also suggests that the statement of Norbury on the topic should be viewed in its context, that is, as 'a polemical pamphlet, designed to persuade, not necessarily to represent equity with assiduous accuracy'.⁶⁶⁴

Henderson, in her brief account of entries in the Chancery record from 1543 to 1568, provides evidence that Chancery's willingness to grant relief against penalties – again, at least in the context of money-bonds – may pre-date even Ellesmere LC, suggesting that by the middle of the sixteenth century Chancery was 'intervening against penal bonds quite frequently'.⁶⁶⁵ These interventions, it seems, were still mostly based on what Henderson describes as 'exceptional cases': the relief against the penalty was based either on the ground that the obligor was being sued for the penalty amount despite having paid all or most of the principal sum,⁶⁶⁶ or, in cases where the bond was securing not a debt but the performance of a covenant, on the ground that substantial or substituted performance had been tendered.⁶⁶⁷

However, Henderson also posits that there was a 'shift from giving relief in exceptional cases to giving relief routinely'⁶⁶⁸ where the obligee had suffered no loss or damage from the obligor's breach: this was most evident in bonds which secured the payment of money, and she cites a number of suits from the 1560s in which the court awarded only the amount of

⁶⁵⁹ Simpson, above n 657, 120.

⁶⁶⁰ Ibid at 120. Ibbetson suggested that relief against forfeiture of conditioned money bonds had become routine slightly earlier, that is by the mid-seventeenth century (Ibbetson, above n 536, 214).

⁶⁶¹ The distinction between relief against the penalty in money-bonds, and those securing performance, Waddilove argues, is because '[b]asic damages upon money-bonds are straightforward to calculate: it simply requires adding the principal to interest for late repayment. The Chancery could thereby straightforwardly relieve an obligor from the forfeiture of a money bond while compensating an obligee.' Calculating damages for breach of a performance bond was not so easy (Waddilove, above n 15, 168).

⁶⁶² Ibid, 167.

⁶⁶³ Ibid.

⁶⁶⁴ Ibid.

⁶⁶⁵ Edith G Henderson, 'Relief from Bonds in the English Chancery: Mid-Sixteenth Century' (1974) 18 *The American Journal of Legal History* 298, at 299.

⁶⁶⁶ Ibid, at 302–303.

⁶⁶⁷ Ibid, at 303.

⁶⁶⁸ Ibid, at 304.

the obligee's actual loss (and prevented them from recovering the penalty at common law).⁶⁶⁹ She concludes that 'by about 1562 Chancery was beginning to feel that the law of harsh penalties for small defaults was wrong in principle'.⁶⁷⁰

While examples of Henderson's and Simpson's exceptions are found amongst the suits discussed in this thesis which pre-date the Restoration,⁶⁷¹ there are others where the granting of relief against the penalty cannot be easily ascribed to any of those situations. In eight such suits,⁶⁷² no part of the conditioned amount had been paid; the failure to pay cannot be explained by any blameless misfortune to the debtor; and there had been no great delay between entering the bond and bringing the action at common law. Despite this, however, relief against the penalty was granted in all of them.⁶⁷³ It can therefore be concluded that although some of the decisions to grant relief against forfeiture of the penalty sums of conditioned money bonds from the first half of the seventeenth-century can be explained by reference to exceptional circumstances, not all of them can: a bare majority of eight of the fourteen suits in which relief against forfeiture was granted did not involve any of the exceptions put forward either by Henderson or Simpson. The evidence gathered in this thesis, therefore, supports Waddilove's view that the routine granting of relief against penalties in money-bonds may well have been established long before the Restoration.

This routine granting of relief against penalties appears to have been based on the principle of compensation;⁶⁷⁴ this was certainly the case later in the century, with Simpson positing that '[t]he basis of equitable intervention was that the exaction of penalties was inequitable

⁶⁶⁹ The suits identified by Henderson, with their details, are: '*Johnson v. Stone*, C 33/27 fo. 192a, 424a, 437a, 10 Nov., 4 Eliz. (1562) to 24 May, 5 Eliz. (1563; recovery limited to £100 on a bond of £300) *Gorte v. Willis*, C 33/28 fo. 217a, 20 Oct., 10 Eliz. (1568); *Ascough v. Wentworth*, C. 78/35, case 33, 22 June, 8 Eliz. (1566; damages of £10 ordered to be paid on breach of a covenant in a lease, but the lessee's legal remedy as to other covenants in the lease preserved); *Kempe v. Erdeswike*, C 33/38 fo. 227, 25 Oct., 10 Eliz., (1568; obligor limited to recovery of the principal debt without penalty)': *ibid.*

⁶⁷⁰ *Ibid.*

⁶⁷¹ Some or all of the conditioned amount had been paid by the obligor in the suits of *Woodward v Alporte* (31 January 1615) C 33/127, f. 765 v; *Maddocks v Needham* (1621) C 78/204, no. 4; *Freeman v Lassalls* (1622) C 78/336, no. 9; and *Frevile v Atkins* (1628) C 78/473, no. 13. The bonds in *Neaste v Poole* (1608) C 78/176, no. 12, and *Black v Earl of Carlisle* (1641) C 78/573, no. 6, may have been considered by the court to be too old to enforce – there was fifteen years between entry into the bond and the taking of action in the first case, and twenty in the second (see NG Jones, 'Lapse of Time in Equity 1560-1660' in Harry Dondorp, David Ibbetson and Eltjo JH Schrage (eds), *Limitation and Prescription: a Comparative Legal History* (Berlin, 2019) 189).

⁶⁷² *Hubberstie v Danser* (1614) C 78/184, no. 1; *Earl of Lincoln v Fuller* (24 October 1618) C 33/135, f. 90v; *Freeman v Lassalls* (1622) C 78/336, no.9; *Smythes v Weedon* (1623) C 78/224, no. 3; *Bing v Polley* (1627) C 78/235, no. 7; A2.7; *Prescott v Sotherton* (1632) C 78/442, no. 10; *Audley v Harrison* (1653) C 78/580, no. 12; A1.11; and *Ashley v Earl of Suffolk* (1656) C 78/560, no. 7.

⁶⁷³ The penal bond, statute or judgment in question was cancelled on payment of the money actually received by the obligor, plus interest, in all but one of these suits: the exception was *Earl of Lincoln v Fuller* (24 October 1618) C 33/135, f. 90v, in which the obligor was required to pay the amount of the condition, despite having received much less than that. Accordingly, this suit is the only one examined in which the only relief granted was against the penalty: the obligors in *Maddocks v Needham* (1621) C 78/204, no. 4 and *Fairfax v Trigg* (1677) Rep. Temp. Finch 314 were also required to pay the conditioned amount despite not having received all of it, but in both these suits the obligors were taken to have affirmed the bargain.

⁶⁷⁴ While the aim of compensating the obligee for their loss is clear, this actually takes the form of restitution, subsequent to the rescission of the contract between the parties. Accordingly, the 'compensation' being discussed here should not be understood as equivalent to modern contractual damages.

where it was possible to compensate the obligee for the loss suffered through default'.⁶⁷⁵ Where it was not possible to provide compensation – as, for example, in cases where it was impossible to assign a monetary value to the obligee's loss – the court enforced the penalty.⁶⁷⁶ This principle was well established by the time of Nottingham LC⁶⁷⁷ and can be plainly seen operating in the suits discussed above, in which the penal instrument was ordered to be cancelled or otherwise voided on payment of the value truly received by the obligor, plus interest.

5.4.2.2 Principal and Interest only

The remaining three of the thirty-one suits in which the plaintiff was the obligor involved an obligation to pay only the principal borrowed, plus interest.⁶⁷⁸ In none of the three was substantive relief granted, with the orders in all three suits indicating that the plaintiff obligors were liable for the debts in question. In *Boll v Bowles* (1627)⁶⁷⁹ and *Thompson v Veysey* (1633)⁶⁸⁰ the relief granted was to stay the obligees' proceedings at common law (for book debts and monies owing on a lease respectively), with the plaintiffs ordered to pay the sums found by a master of Chancery to be truly owing.⁶⁸¹ Similarly, from the very brief report of the third of these suits, *Williams v Smith* (1671),⁶⁸² it does not appear that substantive relief was granted, in that the mortgage entered by the plaintiff to the defendant obligee was upheld, and although a recognizance also entered by the plaintiff to the defendant was cancelled, this seems to have been because it was found to be a duplicate security for the amount already secured by the mortgage.⁶⁸³

5.4.3 Other Types of Plaintiff

As discussed above, the vast majority of the suits involving expectant heirs and profligates examined in this thesis were brought by the obligor, with only seven suits having been brought by other types of plaintiffs: five were brought by obligees, and three by sureties.

5.4.3.1 Obligees

Two of the five suits brought by obligees were resolved by consent;⁶⁸⁴ two were dismissed;⁶⁸⁵ and in one the court awarded the plaintiff obligee only the conditioned amount of the bond,

⁶⁷⁵ Simpson, above n 657, 121.

⁶⁷⁶ As an example of this, Simpson cites *Tall v Ryland* (1670) 1 Chan. Cas. 183, which involved a bond conditioned for maintaining good behaviour (ibid).

⁶⁷⁷ See, for example, DEC Yale (ed), *Lord Nottingham's Manual of Chancery Practice : And Prolegomena of Chancery and Equity* (Cambridge, 1965), 275.

⁶⁷⁸ As opposed to a conditioned bond, in which the obligation was to pay the penalty amount unless the conditioned amount was paid by a set date.

⁶⁷⁹ *Boll v Bowles* (1627) C 78/292, no. 4.

⁶⁸⁰ *Thompson v Veysey* (1633) C 78/515, no. 4.

⁶⁸¹ In both cases the plaintiff obligors were found by masters' accounts to owe more than the amounts initially sought by the obligees.

⁶⁸² *Williams v Smith* (1671) 3 Chan. Rep. 75.

⁶⁸³ Ibid, at 75. Neither the decree nor any entries, which might have provided more detail, have been found for this suit.

⁶⁸⁴ *Black v Earl of Carlisle* (1641) C 78/573, no. 6; and *Wood v Duke of Newcastle* (1683) C 78/1223, no. 4; A1.21.

⁶⁸⁵ *Lambe v Finch* (1626) C 78/239, no. 9; A1.6; and *Rich v Sydenham* (1671) 3 Chan. Rep. 74; A1.13.

despite a previous judgment obtained at common law for the full penalty amount.⁶⁸⁶ These last three suits all contain points of interest in determining the kind of relief which was – or was not – granted to obligee plaintiffs. For the purposes of this thesis, of course, the relief granted to such plaintiffs must be viewed from the perspective of what such relief meant for the defendant expectant heir or non-heir profligate obligor (or, in some cases, their sureties): two of the three suits were resolved in ways favourable to the defendants, but, as will be seen, not because they were dismissed.

Henry Lambe, the plaintiff obligee in *Lambe v Finch* (1626), brought action in Chancery to recover the sum of £300, the conditioned amount of a penal bond that had never been sealed by the obligor or the defendant surety. The court dismissed Lambe's suit to common law, despite his assertion that he could not meet the requisite level of proof for a common law action.⁶⁸⁷ While this dismissal initially appears to have favoured the defendant surety, in the event, the plaintiff was awarded damages of £600 at common law,⁶⁸⁸ a greater sum than he could have recovered in Chancery, even with the application of interest.

The plaintiff obligee in *Rich v Sydenham* (1671) sought Chancery's permission to recover the conditioned amount of a penal bond entered into by the defendant obligor from monies held in trust for the defendant's wife. While the issue here was more properly the circumstances under which money held in trust for the obligor's wife could be accessed to pay debts, from the two brief reports⁶⁸⁹ of the suit it appears that it was dismissed on the basis that the plaintiff had precluded the equitable remedy he sought by his failure to do equity himself: the defendant had apparently entered the penal bond in question while drunk, and had only received £90 of the conditioned amount of £300. Unlike the plaintiff in *Lambe v Finch*, the plaintiff in *Rich v Sydenham* could not subsequently take his suit to common law, at least not to access these funds: only Chancery had the jurisdiction to deal with a third party creditor's claim against a wife's separate estate trust.⁶⁹⁰ It is not perhaps unreasonable to presume that, had the plaintiff any other means of recovering the money from the defendant, he would not have sought an equitable remedy; on this basis, then, Chancery's dismissal of his suit meant in effect that the plaintiff recovered nothing on this bond, not even the £90 received by the defendant.

The plaintiff executrix of the obligee in *Ashley v Earl of Suffolk* (1656) also brought suit in Chancery because she sought payment of the debt from assets held in trust; unlike the

⁶⁸⁶ *Ashley v Earl of Suffolk* (1656) C 78/560, no. 7. The plaintiff had been unable to execute the judgment, apparently due to evasion on the part of the administrators of the obligor's estate (ibid [Membrane 1; IMG_0219]).

⁶⁸⁷ As Lambe was, in fact, successful in subsequent action in the court of Common Pleas, it is unclear why Lambe initially brought action in Chancery: see Helen Saunders, 'Lambe v Finch (1626): An Early Seventeenth-Century Expectant Heir Suit in Context' (2019) 40 *Journal of Legal History* (publication forthcoming).

⁶⁸⁸ *Lambe versus Finch* (1632) Jones, W. 312 at 312.

⁶⁸⁹ The only entry found for the suit was procedural, ordering that two individuals initially named as defendants be struck from the bill (*Rich v Siddenham, Ratliff and Malke* (13 January 1671) C 33/236, f. 197).

⁶⁹⁰ Allison Anna Tait, 'The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate' (2014) 26(2) *Yale Journal of Law and Feminism* 165, at 210.

plaintiff in *Rich v Sydenham*, however, she had already obtained a judgment at common law for the full penal amount of the bond. While the plaintiff (or rather her executor, she having died before the matter was resolved) was also successful in Chancery, the defendant was ordered to pay only the conditioned amount of the bond, plus interest, rather than the full penalty amount.

5.4.3.2 Sureties

Suits brought by sureties have little or no contribution to make in determining the basis of the relief granted to expectant heirs and non-heir profligates; given that the suit was not being brought by the expectant heir or non-heir profligate themselves, the most these suits can tell us about the jurisdiction to relieve expectant heirs and non-heir profligates is that the mere involvement of such an individual as principal debtor was not sufficient as a ground for the granting of relief to a surety.

The three suits brought by sureties all involved penal bonds, and relief was granted in all three; in *Frevile v Atkins* (1628),⁶⁹¹ this took the form of an order that the bond be cancelled, the conditioned amount having already been repaid. The plaintiff surety in *Bing v Polley* (1627)⁶⁹² was also successful in obtaining cancellation of the bond in question, in this instance on payment of the conditioned amount.⁶⁹³ In neither of these suits was it alleged that the principal debtor had received less than the conditioned amount, and so there was no necessity for the court to either set aside the bargain, or make a restitutionary ‘true value’ order.

The situation in *Audley v Harrison* (1653)⁶⁹⁴ was slightly more complicated: the plaintiff sought relief from two bonds, and while he claimed he was a mere surety for his late brother in relation to both, the court found him to be a co-obligor in the first of these bonds as he had personally received half the conditioned amount. Audley was ordered to repay his half to the defendant, on which payment that bond was to be cancelled. As there was no suggestion that the plaintiff’s late brother had not received his half of the conditioned amount, and as he had certainly not repaid anything owed on the bond before his death, the cancellation of this bond was therefore ordered on the basis of the defendant recovering only £50 of the £100 he had lent. This order could, accordingly, be characterised in modern terms as restitutionary in nature, as requiring the plaintiff to pay the defendant only what he personally had received, on rescission of the contract.⁶⁹⁵

⁶⁹¹ *Frevile v Atkins* (1628) C 78/473, no. 13.

⁶⁹² *Bing v Polley* (1627) C 78/235, no. 7.

⁶⁹³ The plaintiff was given express permission by the court to pursue the principal debtor for this amount at common law (ibid [Membrane 3; IMG_0034]).

⁶⁹⁴ C 78/580, no. 12.

⁶⁹⁵ Although it is tempting, therefore, to add the order regarding this bond to those in the other suits in which plaintiff obligors were granted the relief of value received, it must be remembered that the plaintiff in this suit was a co-obligor to an expectant heir, not an expectant heir himself.

In regard to the second bond in the suit, however, the plaintiff was found to be merely a surety, having received nothing; for this bond the defendant Harrison was also only a surety, but he had received the conditioned amount from the principal debtor in order to lend it at interest for his own benefit before it was paid to the obligee on the due date.⁶⁹⁶ The defendant had, however, failed to pay this money over to the obligee when it fell due; the court ordered that he do so, and that on such payment the bond be cancelled. The nature of this relief is quite straightforward, as the plaintiff was seeking to prevent the obligee of this bond from taking action on it at common law, the court's order simply directed the defendant, as a surety who had received the money from the hands of the principal debtor, to discharge the conditioned amount of the bond.

5.5 Conclusion

The analysis of suits undertaken in this chapter establishes several key points. The first of these is that, although it is not within the scope of this thesis to determine the point at which the jurisdiction in Chancery to relieve expectant heirs and non-heir profligates began, it seems probable that such a jurisdiction already existed in the first half of the seventeenth century. The form and content of that jurisdiction may have been developing over the course of the century, although there seems to have been a degree of consistency from the beginning of the century onwards, both in terms of the characteristics of expectant heir and non-heir profligate obligors who sought relief, and in relation to the form of that relief when it was granted. In analysing the characteristics of the expectant heirs and profligates, attention has also been paid to the contextual question of their family background, where that could be determined. Although the small numbers involved prevent any definitive conclusions on this point, no apparent difference in relation to social class has been found in the incidence of relief granted by the court.

The analysis of suits undertaken in this chapter has also established that the most common form of relief granted to expectant heir and non-heir profligate obligors in the seventeenth century was an order that the bargain be set aside on payment by the obligor of the amount actually received – whether in ready money, or the true value of the goods provided – and interest; the discussion of the form of relief also provides further evidence that relief against penalties was already routine at the beginning of the seventeenth century, at least in the context of penal bonds.

Finally, based on both the great similarity of the characteristics of expectant heir and non-heir profligate obligors, and the absence of any difference in treatment of those two classes of obligors by the court, it has been shown that the Chancery jurisdiction described in the academic literature and the case law of later centuries as one to relieve expectant heirs,

⁶⁹⁶ C 78/580, no. 12 [Membrane 2; IMG_0439].

was, rather, a jurisdiction to relieve both expectant heirs and non-heir profligates. We now turn to the basis of that jurisdiction: *why* did the seventeenth-century court of Chancery grant relief to such plaintiffs?

Chapter 6 Basis of the Jurisdiction

6.1 Introduction

In a number of suits examined in this thesis, despite the obligor having been accepted by the court as possessing the relevant characteristics of an expectant heir or non-heir profligate, relief was not granted.⁶⁹⁷ From this it seems clear that in the seventeenth century the involvement of an expectant heir or non-heir profligate obligor was not sufficient, on its own, to prompt Chancery to vitiate a bargain, and that something more was required to enliven the jurisdiction to grant relief. Based on an examination of the reported and unreported suits dealt with in this thesis, it is possible to conclude that the jurisdiction to relieve such obligors in the seventeenth century was founded on the combination of an obligor holding such status, and an element of fraud; an indication of this has already been seen in the case study suit of *Smythes v Weedon* (1622), in which the obligee was found to be entitled to the full conditioned amount of the penal statute entered by the profligate obligor, on the basis that the obligee himself had not behaved fraudulently. This section of the thesis begins by discussing the types of allegations and/or findings of fraud in the suits with which this thesis deals, and concludes by suggesting an explanation of the nature of the jurisdiction to relieve expectant heirs and non-heir profligates which is qualitatively different from those found in the existing academic literature and modern case law.

6.2 Fraud

6.2.1 Definition of Fraud

An authoritative definition of fraud is difficult, if not impossible, to find, especially in the context of the early modern court of Chancery. There has been a reluctance – apparently from the earliest functioning of Chancery as a court⁶⁹⁸ – to provide any kind of exclusive list of the behaviours and circumstances which constitute fraud, for fear that any such list would prompt new inventiveness from the ill-intentioned, and limit the ability of the court to grant relief.⁶⁹⁹ While this desire for flexibility is understandable, it has resulted in a degree of uncertainty which has continued into the present day; whereas the terminology of ‘unconscionability’ has superseded that of ‘fraud’ in the context of modern equity, there

⁶⁹⁷ See, for example, *Pitt v Keneday* (1622) C 78/272, no. 17; A2.6; *Bing v Polley* (1627) C 78/235, no. 7; *Williams v Smith* (1671) 3 Chan. Rep. 75; *Pawlett v Pleydell* (1679) 79 Selden Soc. 739; *Batty v Lloyd* (1683) 1 Vern. 142; and *Astley v Patten* (1687) C 78/1594, no. 1.

⁶⁹⁸ Swain, above n 583, at 123.

⁶⁹⁹ DEC Yale, ‘Introduction: An Essay on Mortgages and Trusts and Allied Topics in Equity’ in DEC Yale (ed), *Lord Nottingham’s Chancery Cases* (London, 1961) vol II (Selden Society Annual Series, vol 79), 7, at 7.

remains an unwillingness to provide an exclusive definition of the characteristics of unconscionable behaviour or circumstances,⁷⁰⁰ and a corresponding perception that this lack of definition has led to an unacceptable lack of certainty as to the reach of the doctrine of unconscientious dealing, particularly in regard to commercial contracts.⁷⁰¹

There have, nevertheless, been some attempts to define fraud, and indeed unconscionability: in his influential work on fraud, for example, Sheridan formulates a definition of fraud by reference to principles rather than examples,⁷⁰² and there have been a number of theories devised to explain the content and operation of unconscientious dealing in modern contract law.⁷⁰³ One of the sources cited frequently in such attempts is Hardwicke LC's formulation of the five species of fraud, as set out in *Earl of Chesterfield v Janssen* (1751).⁷⁰⁴ Hardwicke LC's fifth species of fraud deals specifically with the jurisdiction to relieve expectant heirs, and – in the absence of a corresponding comprehensive judicial statement dating from the seventeenth century – provides a logical starting point for a consideration of the nature of fraud in these cases:

The last head of fraud, on which there has been relief, is that, which infects catching bargains with heirs, reversioners, or expectants, in the life of the father, &c., against which relief always extended. These have been generally mixed cases, compounded of all or several species of fraud; there being sometimes proof of actual fraud, which is always decisive. There is always fraud presumed or inferred from the circumstances of the parties contracting: weakness on one side, usury on the other, or extortion or advantage taken of that weakness. There has been always an appearance of fraud from the nature of the bargain; which was the particular ground on which there was relief against *Pit* [*sic*]; there being no declaration there of any circumvention, as appears from the book, but merely from the intrinsic unconscionableness of the bargain.⁷⁰⁵

Several elements can be identified in this formulation: a weakness on the part of the obligor expectant heir; the taking of advantage of that weakness by the obligee; and a resulting excessive gain on the part of the obligee. Additionally, in the absence of actual deceit, fraud

⁷⁰⁰ See, for example, *Blomley v Ryan* (1956) 99 CLR 362 per Fullagar J at 405.

⁷⁰¹ See, for example, Bryan Horrigan, 'The Expansion of Fairness-Based Business Regulation - Unconscionability, Good Faith and the Law's Informed Conscience' (2004) 32 *Australian Business Law Review* 159, at 159.

⁷⁰² Sheridan, above n 4.

⁷⁰³ See, for example, Stephen Waddams, 'Protection of Weaker Parties in English Law' in Mel Kenny, James Devenney and Lorna Fox O'Mahony (eds), *Unconscionability in European Private Financial Transactions* (Cambridge, 2010), 26; Bigwood, above n 62; Hugh Beale, 'Undue Influence and Unconscionability' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Contract* (Oxford, 2017), 87; Mindy Chen-Wishart, *Unconscionable Bargains* (Wellington, 1989); Nelson Enonchong, 'The Modern English Doctrine of Unconscionability' (2018) 34 *Journal of Contract Law* 211.

⁷⁰⁴ 2 Ves. Sen. 125.

⁷⁰⁵ *Ibid*, at 157, per Hardwick LC.

can be presumed from the nature of the bargain as a whole.⁷⁰⁶ In this account, the weakness – or, to use the modern terminology, the special disability – of the obligor appears to stem not only from his status as an expectant heir, but, as is made clear later in the same passage, his youth.⁷⁰⁷ Interestingly, the financial necessity of the obligor – which, as is discussed above, was considered significant in a number of the seventeenth-century suits examined for this thesis⁷⁰⁸ – was not considered by Hardwicke LC to be germane, although his lordship did mention that it was argued as a material point for the plaintiff.⁷⁰⁹

Hardwicke LC also considered that there was a further key aspect to the type of fraud to be found in these cases:

In most of these cases have concurred deceit and illusion on other persons not privy to the fraudulent agreement: the father, ancestor, or relation, from whom was the expectation of the estate, has been kept in the dark: the heir or expectant has been kept from disclosing his circumstances, and resorting to them for advice, which might have tended to his relief and also reformation. This misleads the ancestor; who has been seduced to leave his estate not to his heir or family, but to a set of artful persons, who have divided the spoil beforehand.⁷¹⁰

As well as providing some support for the modern economic preservation analysis,⁷¹¹ in terms of the financial damage done to a family's estate,⁷¹² Hardwicke LC here also describes the defrauding of a third party, and appears to refer to actual fraud, or deceit. Modern interpretations of the basis of the jurisdiction to relieve expectant heirs tend to deal with this aspect of Hardwicke LC's formulation as contributing to the special disability of the expectant heir; that is, only as it relates to the need for the heir to keep his transactions secret, for fear of disinheritance.⁷¹³ Arguably, however, in Hardwicke LC's view it was not only the obligor who was subject to the fraud in this respect, but also his ancestor.

⁷⁰⁶ For a discussion of the presumption, or inference, of fraud in early modern Chancery, see Michael Macnair, *The Law of Proof in Early Modern Equity* (Berlin, 1999), 273–274.

⁷⁰⁷ 2 Ves. Sen. 125 at 157, per Hardwick LC: Hardwicke LC viewed the obligor's relatively advanced age (he was 30 at the time of the bargain) as counting against the relief he sought.

⁷⁰⁸ See Chapter 5, above at 5.3.2.

⁷⁰⁹ 2 Ves. Sen. 125 at 157, per Hardwick LC.

⁷¹⁰ *Ibid.*

⁷¹¹ See Chapter 2, at 2.2.3.

⁷¹² Hardwicke LC mentioned 'the discouragement of prodigality and preventing the ruin of families' (2 Ves. Sen. 125 at 157, per Hardwick LC) as considerations of weight, but did not go into any detail on these points, no doubt because the case at hand was decided on the basis of the obligor's confirmation of the bargain. His lordship did, however, refer to 'the Macedonian decree', which appears to have been the name current in the eighteenth century for the *senatus consultum Macedonianum*, the Roman law against lending money to heirs in their fathers' lifetime (see, for example, the use of the same term in Ballou, above n 589, 123. Transactions which contravened this Roman law were not invalid, but could not be enforced (Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford, 1996), 700).

⁷¹³ See, for example, KL Fletcher, 'Review of Unconscionable Transactions' (1972) 45 *University of Queensland Law Journal* 45, at 49.

Whether the seventeenth-century court of Chancery understood the nature, and significance, of the fraud involved in bargains made with expectant heirs and non-heir profligates in the same way as its eighteenth-century counterpart remains to be seen.

6.2.2 Fraud in the Suits

The operation of fraud in the expectant heir and non-heir profligate suits examined in this thesis can be categorised as relating either to fraudulent features occurring at, or before, formation of the contract, or to those occurring afterwards. The former category is by far the most populous, with sixteen of the twenty-four expectant heir suits, and ten of the fourteen non-heir profligate suits, containing references⁷¹⁴ to fraud at or before formation; only two suits⁷¹⁵ refer to fraud occurring afterwards.⁷¹⁶ In the discussion of the suits which follows, it appears that the only difference between expectant heir suits and non-heir profligate suits in relation to fraud is that there were certain circumstances attaching to a bargain with an expectant heir which afforded opportunities for fraud that were not available to those dealing with a non-heir profligate obligor: chief amongst these was keeping a bargain secret for fear the heir's ancestor would disinherit them,⁷¹⁷ and knowledge on the part of the obligee of the heir's ancestor's ill-health or great age, before entry into a post obit. bargain.⁷¹⁸ These aside, the types of fraud found in the suits do not differ between the two types of obligors, giving further support to the conclusion that only one jurisdiction to relieve – on the basis of youth and necessity – was operating in the seventeenth century, and that an expectant heir obligor was simply a sub-type covered by this jurisdiction.

6.2.3 Fraud at or before Formation

Fraud at or before formation of the contract, for the purposes of this discussion, has been divided into that which relates to behaviour, and that relating to the outcome of the bargain.⁷¹⁹ These categories are discussed in terms of both their content and their incidence.

⁷¹⁴ For the sake of clarity, 'reference' is used here to mean an allegation and/or finding of circumstances or conduct amounting to fraud; it should not be assumed that the word 'fraud' necessarily appears in the suit, although often it does: see, for example, *Fines v Wheatley* (1616) C 78/311, no. 23 [Membrane 2; IMG_0032]; *Prescott v Sotherton* (1632) C 78/442, no. 10 [Membrane 1; IMG_0088]; and *Lamplugh v Smith* (26 January 1688) C 5/70/83.

⁷¹⁵ Both these suits also contain allegations of fraud at or before formation: see below.

⁷¹⁶ While this would appear to be in keeping with modern principles of contractual vitiation, it is perhaps more helpful to conceptualise it as simply logical on the part of the court – bad behaviour engaged in to bring a contract into existence gives rise to questions about that contract's validity – rather than ascribing to the court any adherence to contractual doctrine in a modern sense.

⁷¹⁷ See, for example, *Fairfax v Trigg* (1677) Rep. Temp. Finch 314 at 314.

⁷¹⁸ See, for example, *Berry v Fairclough* (1681) 79 Selden Soc. 868.

⁷¹⁹ This refers to the outcome of the formation process, that is, the contract price. In modern terms these two categories of 'behaviour' and 'outcome' would be referred to as procedural and substantive fairness; this thesis does not employ the latter terms (except when dealing with modern interpretations of the jurisdiction) in order to avoid suggesting that the seventeenth-century court of Chancery conceived of the jurisdiction in those terms.

6.2.3.1 Behaviour

[T]he said plaintiff being a young man was drawn in by the cunning and practice of the said [defendant] who was much given to deceit to enter into the said statute without any just consideration at all, there being some hope of benefit to come to the plaintiff after the decease of his father...⁷²⁰

'Drawing in', mentioned above in a quote from Ellesmere LC's decision in the suit of *Neaste v Poole* (1608), was the type of behavioural fraud most commonly referred to in both expectant heir and non-heir profligate suits.⁷²¹ This term appears to have encompassed behaviours such as befriending the young obligor who had recently arrived in London,⁷²² introducing him to helpful individuals with money to lend,⁷²³ encouraging him to spend money,⁷²⁴ and helping him to spend it.⁷²⁵ It is no coincidence that all these behaviours seem, on the face of it, positive. It seems clear that pretended friendship and helpfulness was an integral part of the mechanism by which young and inexperienced obligors were brought to enter these bargains, and demonstrates the relationship between this key characteristic of the expectant heir/non-heir profligate status – youth – and the fraudulent behaviour in question.

This kind of behaviour was often associated with the type of professional confidence men identified by Jones in relation to the Elizabethan period,⁷²⁶ and clearly active in the seventeenth century, in the form of individuals such as Edward Stinstead, who, as well as providing this dubious form of assistance to Richard Berney,⁷²⁷ figured in the suits of *Bill v Price* (1687),⁷²⁸ *Witley v Price* (1688)⁷²⁹ and *Lamplugh v Smith* (1688).⁷³⁰ As has been seen, a note in a much later reported case suggests that the view of at least one lord chancellor of such individuals was, to say the least, uncompromising:

Lord Nottingham in one day made eleven decrees against Stinstead, and after the first decree, the second cause being opened, and so every one in their order, and the council informing his lordship, that every cause was of the same nature, he

⁷²⁰ *Neaste v Poole* (1608) C 78/176, no. 12 [Membrane 4; IMG_0008].

⁷²¹ Five of the sixteen expectant heir suits, and six of the ten non-heir profligate suits, in which fraud was alleged contained such allegations and/or findings. Of the expectant heir and non-heir profligate suits in which plaintiff obligors were granted substantive relief, four of ten expectant heir suits, and three of seven non-heir profligate suits, contained such allegations and/or findings.

⁷²² See, for example, *Freeman v Lassalls* (1622) C 78/336, no. 9.

⁷²³ See, for example, *Berney v Mason and Stinstead* (14 February 1680) C 10/197/19.

⁷²⁴ See, for example, *Frevile v Atkins* (1628) C 78/473, no. 13; *Lamplugh v Smith* (26 January 1688) C 5/70/83; see also *Beeve v Whitehead* (1622) C 78/328, no. 8, where such an allegation was made despite being patently false, presumably on the basis it was a recognised basis for relief at that time.

⁷²⁵ See, for example, *Earl of Ardglass v Muschamp* (1684) 2 Chan. Rep. 266.

⁷²⁶ Jones, above n 3, 433–434.

⁷²⁷ For discussion of Stinstead's involvement with Berney, see Chapter 3, above at 3.5.

⁷²⁸ 1 Vern. 467.

⁷²⁹ 2 Vern. 78.

⁷³⁰ 2 Vern. 77.

ordered the register to draw up the same decree in each cause mutatis mutandis.⁷³¹

In six of the twenty-six expectant heir and non-heir profligate suits in which fraud was present,⁷³² the behavioural fraud referred to was that, having entered bargains on the promise they would receive ready money, the obligors were instead given goods, alleged to be worth the equivalent of the promised sum.⁷³³ As a form of fraud, this relied for its success on the other key characteristic of the expectant heir/non-heir profligate status, necessity: with an urgent need for funds, and the securities already sealed, the obligors were in no position to refuse to accept the goods in lieu of the promised cash, even had they been able to determine at that point the true value of the goods. It seems likely that a number of these bargains involved the kind of professional confidence man described above, although the exact number cannot be determined without more detailed information on the brokers and exchange-men involved in each particular suit.

However, while it is conceivable that the various behaviours described above may in some cases have arisen from circumstance rather than from a malicious or dishonest intent, in nine of the twenty-six suits which contain allegations or findings of fraud, the behaviours described clearly amount to deceit.⁷³⁴ An example of this kind of behaviour is found in *Hubberstie v Danser* (1614)⁷³⁵ in which the court found that the defendants had persuaded the plaintiff to enter a bond by promising not to sue on a judgment previously obtained from him, despite a release already having been given on that judgment at the time the promise was made.⁷³⁶ Other kinds of deceit found in the suits include the use of sham contingencies to evade the usury statutes;⁷³⁷ the deceiving of the plaintiff obligor as to the identity of the lender;⁷³⁸ a broker who received the goods on behalf of the obligor and, rather than delivering them to the obligor, promptly gave them to third parties;⁷³⁹ and the persuading of an infant obligor to appoint the defendants as his guardian and attorney respectively before making use of those positions to benefit from him financially.⁷⁴⁰ It is not perhaps surprising

⁷³¹ *Thornicraft v Harwood* (1730) Mosely 371, at 372. As mentioned above, it is possible that the day in question was 9 February 1681, in which multiple suits brought by Richard Berney were heard: some of these suits appear to have become condensed into the suit discussed in this thesis as *Berry v Fairclough* (1681) 79 Selden Soc. 868 (see Chapter 3, above at 3.3.2.1). Certainly, no other day was found in the record in which Stisted figured so prominently.

⁷³² For the subset of these suits in which plaintiff obligors were granted substantive relief, the number is four of seventeen, or just under a quarter.

⁷³³ *Freeman v Lassalls* (1622) C 78/336, no.9; *Fairfax v Trigg* (1677) Rep. Temp. Finch 314; *Waller v Dale* (1677) Rep. Temp. Finch 295; *Lamplugh v Smith* (1688) 2 Vern. 77; *Maddocks v Needham* (1621) C 78/204, no. 4; and *Smith v Burroughs* (1696) 2 Vern. 346.

⁷³⁴ 'Deceit' is used here as a non-anachronistic term for what modern courts recognise as actual fraud.

⁷³⁵ C 78/184, no. 1.

⁷³⁶ *Hubberstie v Danser* (1614) C 78/184, no. 1 [Membrane 3; IMG_0088].

⁷³⁷ *Draper v Dean* (1679) 79 Selden Soc. 602; *Earl of Ardglass v Muschamp* (1684) 2 Chan. Rep. 266. In both suits the court found that the condition of the contingency could not happen.

⁷³⁸ *Smith v Burroughs* (1696) 2 Vern. 346.

⁷³⁹ *Maddocks v Needham* (1621) C 78/204, no. 4.

⁷⁴⁰ *Godshalke v Walker* (1665) C 78/746, no. 5.

that, of the nine suits in which the fraudulent behaviour referred to is such as to amount to deceit, eight of them resulted in a grant of substantive relief.⁷⁴¹

However, not all of the suits in which plaintiff obligors were granted substantive relief contain allegations or findings of behavioural fraud. In two such suits – *Nott v Hill* (1682)⁷⁴² and *Wiseman v Beake* (1690)⁷⁴³ – there were no references of this kind. In both these suits, however, as in a number of others, the court found fraud relating to outcome, in the form of excessive gain to the obligees.⁷⁴⁴

6.2.3.2 Outcome

Twenty-five⁷⁴⁵ of the twenty-six suits involving expectant heirs and non-heir profligates in which allegations and/or findings of fraud were made contain reference to a fraudulent outcome; all of the suits in which plaintiff obligors were granted substantive relief contain such a reference. In one suit the plaintiff obligor was found to have received no consideration at all; in the others, the obligor either received goods worth significantly less than the amount promised to him, and secured by him,⁷⁴⁶ or the obligor received the full amount promised to him, but the security was such that the obligee stood to make an excessive gain.⁷⁴⁷

It seems clear that these ‘hard bargains’ – that is, contracts the terms of which disproportionately benefited the obligee – did not attract a grant of relief simply on this basis, at least in the earlier part of the century.⁷⁴⁸ Of the six suits which fall within this category, but in which no reference to behavioural fraud was made, substantive relief was granted in only two, both of which date from the later years of the century: *Nott v Hill* (1682)⁷⁴⁹ and *Wiseman v Beake* (1690).⁷⁵⁰ As has been discussed elsewhere, the decision in *Wiseman v Beake* appears to have been something of a surprise on a number of grounds,

⁷⁴¹ The ninth, *Maddocks v Needham* (1621) C 78/204, no. 4, was decided on the basis of an affirmation of the bargain.

⁷⁴² *Nott v Hill* (1682) 2 Chan. Cas. 120.

⁷⁴³ *Wiseman v Beak* (1690) 2 Vern. 122.

⁷⁴⁴ In the case of Samuel Wiseman, the court also found there had been fraudulent behaviour after formation of the contract; see *Wiseman v Beake* discussion at 6.2.4.

⁷⁴⁵ The one suit which does not, *Frevile v Atkins* (1628) C 78/473, no. 13, does contain an allegation of behavioural fraud; it also contains a reference to fraud after formation (see discussion below at 6.2.4).

⁷⁴⁶ See, for example, *Hubberstie v Danser* (1614) C 78/184, no. 1; *Waller v Dale* (1677) Rep. Temp. Finch 295; *Lamplugh v Smith* (1688) 2 Vern. 77; *Woodward v Alporte* (31 January 1615) C 33/127, f. 765 v; *Smythes v Weedon* (1623) C 78/224, no. 3; and *Bill v Price* (1687) 1 Vern. 467.

⁷⁴⁷ See, for example, *Neaste v Poole* (1608) C 78/176, no. 12; *Fines v Wheatley* (1616) C 78/311, no. 23; *Nott v Hill* (1682) 2 Chan. Cas. 120; *Wiseman v Beak* (1690) 2 Vern. 122 and *Earl of Ardglass v Muschamp* (1684) 2 Chan. Rep. 266.

⁷⁴⁸ As mentioned elsewhere, the vast majority of bargains examined in this thesis were structured to avoid the operation of the usury statutes. It would seem, therefore – if the conclusion that excessive gain on the part of the obligee was insufficient on its own to prompt the granting of relief is correct – that during this period the court was yet to look beyond form, and to inquire whether the true intent or substance of the bargain was usurious. For discussion of this development, see Warren Swain and Karen Fairweather, ‘Usury and the Judicial Regulation of Financial Transactions in Seventeenth- and Eighteenth-Century England’ in Mel Kenny, James Devenney and Lorna Fox O’Mahony (eds), *Unconscionability in European Private Financial Transactions Protecting the Vulnerable* (Cambridge, 2010) 147, at 151.

⁷⁴⁹ *Nott v Hill* (1682) 2 Chan. Cas. 120.

⁷⁵⁰ *Wiseman v Beak* (1690) 2 Vern. 122.

including with reference to the age of the obligor.⁷⁵¹ In the case of *Nott v Hill*, however, there is explicit discussion of the issue, and Nottingham LC appears to have based his grant of relief on the fact that the obligee had received five times the amount he had advanced to the obligor.⁷⁵²

The treatment of outcome fraud alone as a basis for relief appears to have varied between holders of the great seal, although in general terms the approach of the various lord chancellors, lord keepers and lords commissioners to granting relief to expectant heirs and non-heir profligates seems to have been more or less consistent across the century. The 1680s, however, saw a number of re-hearings of suits which resulted in the overturning of previous decrees, largely due to the difference in approach taken by North LK in comparison with his predecessor, Nottingham LC.⁷⁵³ An examination of these suits, as well as others heard only by North LK, suggests that the difference lay in the type, and degree, of the element of fraud required before North was prepared to grant relief. For example, in a rehearing of Richard Berney's suit against Samuel Beak,⁷⁵⁴ North LK overturned the relief granted by Nottingham LC on the grounds that there had been no fraud, but that it was simply a hard bargain. To apply the terms used in this thesis, the lord keeper appears to have required an element of what this thesis terms behavioural fraud on the part of the obligee, rather than merely outcome fraud. Similarly, in the rehearing of *Nott v Hill* (1683), North LK overturned Nottingham's decree, stating that:

if it be to be declared a law in Chancery, that no man must deal with an heir in his father's life-time, that were something; but as it now stood, he saw no reason to relieve the plaintiff.⁷⁵⁵

It would seem from this that the lord keeper was firmly of the view that mere status as an expectant heir was insufficient basis for the granting of relief; as discussed above, it is also clear from the facts of the case that there was no behavioural fraud involved in the bargain.⁷⁵⁶ The requirement of something more than mere outcome fraud also seems to be present in North LK's decision in *Batty v Lloyd* (1683).⁷⁵⁷ North was of the opinion that the contingency in this case, while turning out well for the defendant, might have gone very

⁷⁵¹ See discussion at 5.3.1. It is possible that the relief granted in this suit was at least partly based on what this thesis characterises as fraud after formation: see discussion below at 6.2.4.

⁷⁵² *Nott v Hill* (1682) 2 Chan. Cas. 120 at 121. This decision was overturned by North LK in a rehearing of the matter the following year, who found no basis for relief.

⁷⁵³ This appears to have been a more general phenomenon, with perhaps the most well-known illustration of North LK's tendency to take a different approach to that of Nottingham LC being his reversal of the lord chancellor's decision in *The Duke of Norfolk's Case* (1682) 3 Chan. Cas. 1.

⁷⁵⁴ *Barny v Beak* (1683) 2 Chan. Cas. 136 at 136.

⁷⁵⁵ *Nott v Hill* (1683) 1 Vern. 167 at 168.

⁷⁵⁶ However, he refused to grant the order sought by the executors of Hill, for specific performance of the promise to convey the property. This refusal was on the basis that 'a contract which carries an equity to have it decreed in specie, ought to be without all objection' (*Johnson, exec. Hill v Nott* (1684) 1 Vern. 271 at 272), and said 'the practice of purchasing from heirs was grown too common, and therefore he would not in any sort countenance it' (*Johnson, exec. Hill v Nott* (1684) 1 Vern. 271 at 272).

⁷⁵⁷ *Batty v Lloyd* (1683) 1 Vern. 142.

differently: ‘Suppose these women had lived twenty years afterwards, could Lloyd have been relieved by any bill here?’⁷⁵⁸ North LK further appears to discount the notion that the defendant had taken advantage of the plaintiff’s necessity: ‘One that is necessitous must sell cheaper than those who are not. ... [W]here people are constrained to sell, they must not look to have the fullest price.’⁷⁵⁹ By removing necessity as an element of the status of expectant heir (or indeed non-heir profligate) his lordship in effect neutralises the one argument that could be made for behavioural fraud in this instance; and without behavioural fraud, in his view, there was no basis for relief.

In *Earl of Ardglass v Muschamp* (1684),⁷⁶⁰ however, North LK found plenty of behavioural fraud: North’s reasons for granting relief depended largely on his perception of the defendant Muschamp’s wrongdoing in bringing about such a bargain, finding that Muschamp had known of the impossibility of the earl producing an heir,⁷⁶¹ and that he had participated in encouraging other parties to make similar bargains with the earl.⁷⁶² North LK found that Muschamp would not have made such a bargain unless ‘in expectation of an unreasonable advantage, and that the earl would in a short time by his vicious debauched course of life destroy himself (as he did)’.⁷⁶³ He also described Muschamp as the earl’s ‘companion in those debaucheries’,⁷⁶⁴ and the reporter tells us that: ‘[t]he Lord Keeper declared, that the more he heard of the cause, the worse he liked it, and that the Earl of Ardglass, being easy, dissolute and necessitous, the defendant ... beset the earl’.⁷⁶⁵

It would seem, then, that North LK’s approach to these suits, rather than indicating that he was hesitant to exercise a jurisdiction to relieve expectant heirs, as has sometimes been suggested,⁷⁶⁶ shows only that his emphasis was on a different element of that jurisdiction: whereas for Nottingham LC the presence of outcome fraud could, under the right circumstances, be a sufficient basis for the granting of relief, North LK required an element of behavioural fraud on the part of the obligee.

The plaintiff in *Nott v Hill* was eventually granted relief in a further rehearing, this time before Jeffreys LC, his lordship stating that ‘he took it to be an unrighteous purchase in the beginning; and that nothing happening afterwards would help it’.⁷⁶⁷ Given that it was the lords commissioners⁷⁶⁸ who followed Jeffreys LC who granted relief to Wiseman, despite the

⁷⁵⁸ *Batty v Lloyd* (1683) 1 Vern. 142, at 142; for the details of the bargain see A1.20.

⁷⁵⁹ *Ibid.*

⁷⁶⁰ *Earl of Ardglass v Muschamp* (1684) 1 Vern. 237.

⁷⁶¹ The rent grants in question were contingent on the earl failing to have male issue who lived until the age of 21: see detailed discussion of the bargain at A.14.

⁷⁶² Lord North here refers to Pitt, and also to Henry Muschamp’s cousin Denny, the earl’s bargain with whom had already apparently been set aside by Chancery (*ibid.*, at 238).

⁷⁶³ *Ibid.*

⁷⁶⁴ *Ibid.*

⁷⁶⁵ *Ibid.*, at 239.

⁷⁶⁶ See, for example, DEC Yale, ‘Introduction’ in DEC Yale (ed), *Lord Nottingham’s Chancery Cases* (London, 1954) vol I (Selden Society Annual Series, vol 73), ix, at xcvi.

⁷⁶⁷ *Nott v Johnson* (1687) 2 Vern 27 at 27.

⁷⁶⁸ Sir John Trevor, Sir William Rawlinson, and Sir George Hutchins were the lords commissioners at this time.

absence of behavioural fraud, it is perhaps possible to hypothesise that the later part of the century – except for the tenure of North LK – saw a movement towards the granting of relief in Chancery to expectant heir and non-heir profligate plaintiffs on the basis of outcome fraud alone.⁷⁶⁹

6.2.4 Fraud after Formation

As mentioned previously, two suits involving expectant heir and non-heir profligate obligors contained references to fraud occurring after formation of the contract. In *Frevile v Atkins* (1628)⁷⁷⁰ the obligee had apparently refused to acknowledge satisfaction of the statute despite the sums secured by it having been repaid in full;⁷⁷¹ and in *Wiseman v Beake* (1691)⁷⁷² the obligee attempted to have the bargain confirmed by the obligor by means of a later ‘sham’ action in Chancery.⁷⁷³

In each case relief was granted; however, in addition to the post-formation fraud alleged in these cases, *Frevile v Atkins* also contained a reference to pre-formation behavioural fraud, and *Wiseman v Beake* contained a reference to pre-formation outcome fraud. It is difficult, therefore, to determine from this very small sample the significance of post-formation fraud to the granting of relief. Similarly, it is impossible to determine whether the presence of post-formation fraud in these suits removed the necessity, posited above, that *both* types of pre-formation fraud were required for a grant of relief: while in *Wiseman v Beake* the presence of pre-formation outcome fraud and post-formation fraud appears to have been sufficient, at least for Nottingham LC, in the earlier case of *Frevile v Atkins* relief was clearly based on the court’s acceptance that the conditioned amounts had already been paid in full.

It is clear from the suits examined for this thesis that an element of fraud was required before Chancery would relieve an expectant heir or non-heir profligate obligor during the seventeenth century, and that mere status as an expectant, or a profligate, was not sufficient. Whereas modern explanations of the expectant heir suits have interpreted the granting of relief either as based on protection of the heir, necessitated by his special disability, or on the desire of the court to preserve the economic assets and thus influence of the ruling classes, the following section of the thesis suggests a more nuanced way of understanding these explanations which takes into account the economic and social context in which these suits were brought, heard, and decided.

⁷⁶⁹ A larger number of suits from the later part of the century would need to be found and analysed to test this hypothesis, requiring the sort of comprehensive search of the C 33 entries for the period that was not achievable for this thesis due to time constraints.

⁷⁷⁰ *Frevile v Atkins* (1628) C 78/473, no. 13.

⁷⁷¹ *Ibid.*

⁷⁷² *Wiseman v Beak* (1690) 2 Vern. 122.

⁷⁷³ *Ibid.*

6.3 Explanations of the Jurisdiction in Context

6.3.1 The 'Culture of Credit'

One of the key aims of this thesis as a whole has been to examine the seventeenth-century expectant heir and non-heir profligate suits within their historical, social, and economic contexts. To this end, as much biographical and contextual detail as possible has been uncovered about the suits discussed in the thesis, in order that a deeper understanding of them can be achieved. Of major significance to this understanding is the acknowledgment that the economic context of the seventeenth century was fundamentally different to that of the eighteenth and nineteenth centuries; acknowledging this difference is necessary to gaining an understanding of the history of the jurisdiction which is not skewed by later legal interpretations, as discussed in Chapter 2.

The nature of credit was understood very differently in the seventeenth century; this was a period before commercial banking was established, and largely before risk could be managed through the use of life insurance or other such mechanisms.⁷⁷⁴ Accordingly, there was a strong social and ethical dimension to the extending of credit between individuals: Muldrew argues that 'credit', during this period meant 'a person's reputation, the estimate in which his or her character was held, their repute or trustworthiness',⁷⁷⁵ rather than the modern understanding of a 'buy now, pay later' financial transaction. Thus, trust, in a personal sense, was crucial to the decision on the part of one individual to lend money, or provide goods without immediate payment, to another.⁷⁷⁶

From the middle of the sixteenth century, consumption increased; there was no corresponding increase in the amount of gold and silver in circulation, however, and so the expansion of commercial activity was largely based on credit.⁷⁷⁷ There was also, over the next hundred years or so, an increase in the complexity of commercial activity, and as a result the interconnected chains of credit between individuals got longer and more complicated.⁷⁷⁸ This meant that one debtor's inability to repay a debt to one creditor could start a domino effect of defaults: the first default could lead to that creditor being unable to repay his or her own debts, which could lead to their creditor's inability to pay theirs, and so on.⁷⁷⁹ This was especially problematic as Muldrew's research suggests that the majority of households owed more than they, in turn, were owed, and indeed owed more than could be

⁷⁷⁴ Muldrew, above n 38, 17.

⁷⁷⁵ *Ibid.*, at 3.

⁷⁷⁶ *Ibid.*, at 7. For discussion of the importance of personal trust in the context of early modern mortgages, see Waddilove, above n 15, 108–109.

⁷⁷⁷ Muldrew, above n 38, 3.

⁷⁷⁸ *Ibid.*

⁷⁷⁹ As Yale points out, the ramifications of this in relation to conditioned bonds, which were involved in many of the bargains examined in this thesis, could be disastrous: 'Credit was very largely raised ... by such bonds. Apart from there being no notion of limited trading liabilities the cumulative effect of a failure upon a series of these bonds was ordinarily complete financial collapse. Generally the risk was heavy and the incidence of casualties high' (Yale, 'Introduction: An Essay on Mortgages and Trusts and Allied Topics in Equity', above n 699, at 13).

covered by their own credits and the sale of their moveable goods. If the household owned land, this could be sold to cover debt, but at the cost of reducing the patrimony.⁷⁸⁰ In this context, the prodigality of the younger generation could have a highly detrimental impact on a family's credit, and consequently on its overall economic health.⁷⁸¹

Perhaps because of the potential magnitude of the damage to households which could result from default, there was a moral aspect to the obligation to repay one's debts. Muldrew suggests that:

Since the redistribution of wealth through defaults was random and unpredictable, it was considered to be unjust if it resulted from profitable households simply spending too much. It was only considered just when poor householders defaulted out of need.⁷⁸²

In this context, extravagance and a resulting default by an expectant heir had an impact not just on that heir's family, but also, potentially, on the creditworthiness of everyone connected by a particular chain of credit. This thesis posits, therefore, that in granting relief to expectant heirs in the seventeenth century, the court of Chancery was to at least some extent concerned with preventing the disruption of the normal operation of this culture of credit by fraud.

This theory is not, of course, susceptible of incontrovertible proof: there are no express statements by the court to be found in the decrees and entries examined for this thesis on the subject of credit chains or overall household indebtedness, which might conceivably be present if the court's purpose in granting relief in these cases was to prevent the disruption described above. However, the absence of such statements cannot be taken to show that the theory is invalid: quite apart from the fact that judicial comment as to reasons (in the modern sense) is almost entirely lacking from the decrees, entries, and the printed reports examined for this thesis, the pervasiveness of the culture of credit as described by Muldrew suggests that those individuals living in it – including judges, lawyers, and parties – would scarcely feel it necessary to explain it.⁷⁸³ It must also be borne in mind, when assessing the existence or otherwise of evidence in support of the culture of credit explanation of the jurisdiction to relieve expectant heirs and non-heir profligates that – as with the economic preservation analysis – the concern of the court in protecting the operation of

⁷⁸⁰ Muldrew, above n 38, 118.

⁷⁸¹ Ibid, at 17. For discussion of family attempts to protect estates from spendthrift children through the use of trusts, see Chapter 4, above at 4.2.

⁷⁸² Ibid, at 4. While many of the expectant heir and non-heir profligate suits examined for this thesis involve personal extravagance, only one suit was discovered in which a decision to not grant relief was – or appears to have been – made on the basis of disapproval of extravagance: see *Earl of Lincoln v Fuller* (24 October 1618) C 33/135, f. 90 at f. 90v; A1.5. This suggests that extravagance per se was not sufficient to put a transaction outside the court's suggested concern with the normal operation of credit.

⁷⁸³ As Milsom says '[p]eople do not formulate their assumptions for themselves, let alone spell them out for the benefit of future historians, and in the case of the law there is never occasion to write down what everybody knows' (Milsom, above n 156, 76).

credit may have been normative: that is, a concern with the presence and nature of conduct or circumstances of a type which would disrupt the normal operation of credit generally, not with the specific details of the chains of credit of individual obligors or their families, which might have been discoverable in the pleadings and depositions. Accordingly, the most this thesis claims for this explanation is that it is at least as plausible as the existing modern special disability and economic preservation explanations, and, indeed, provides an elucidation of the elements of those explanations which takes account of the seventeenth-century context.

The types of fraud which occurred at or before formation of the bargains examined for this thesis clearly disrupted the normal operation of credit. The first of these, behavioural fraud – ‘drawing in’, the substitution of goods for money, and outright deceit – was disruptive in convincing individuals to incur debt (or, in some cases, extend credit⁷⁸⁴) on the basis of untrue representations, or carefully engineered circumstances. The numerous bargains entered by Richard Berney considered above serve as an illustration of this, particularly in relation to the activities of Edward Stinstead. Berney was not only assisted in finding sources of credit by Stinstead, but also encouraged to adopt a more extravagant standard of living, thus necessitating higher levels of debt than he might otherwise have taken on;⁷⁸⁵ this kind of ‘drawing in’ and encouragement in debauchery appears to have been particularly disliked by Chancery.⁷⁸⁶

The significance of outcome fraud in this explanation of the jurisdiction is that an individual (and by extension their family) ended up indebted, or extended, to an amount greater than they had either intended or could afford. In modern terminology, what this thesis calls outcome fraud is usually referred to as ‘substantive unfairness’, and the question as to whether courts do, or should, relieve on that basis alone has often been discussed.⁷⁸⁷ It is difficult to draw any definitive conclusion as to the court’s willingness – in the context of a concern with maintaining the normal operation of the culture of credit – to relieve on the basis of outcome fraud alone, based on the two suits involving outcome fraud in which relief was granted despite the absence of behavioural fraud. It is possible, however, given that outcome fraud was present in all of the suits in which substantive relief was granted, tentatively to conclude that some kind of outcome fraud was necessary to trigger the court’s jurisdiction to relieve expectant heirs and non-heir profligates, and that it may have been enough on its own to warrant the court’s intervention.

If this is so, it can perhaps be explained in these terms: an individual who became indebted or extended to a greater amount than they had intended or anticipated, due

⁷⁸⁴ See, for example, *Lambe v Finch* (1626) C 78/239, no. 9.

⁷⁸⁵ See Chapter 3, above at 3.2.4.

⁷⁸⁶ See, for example, *Earl of Ardglass v Muschamp* (1684) 2 Chan. Rep. 266. This may also reflect the moral repugnance for debt through extravagance described above.

⁷⁸⁷ See, for example, Barton, above n 64, at 136.

to the hard terms of the bargain, might well find themselves unable to meet the liabilities arising from the chain of credit relationships in which they stood. This would disrupt the normal operation of the culture of credit, and if this was the basis of the jurisdiction, then it is a qualitatively different concern to those posited by a number of modern writers in relation to substantive unfairness, such as undervalue, or inadequacy of consideration. Rather than a focus on abstract ideas of what was ‘fair’ in individual bargains, in this analysis the seventeenth-century court of Chancery was concerned with the protection of an economic system underpinned by norms of trustworthiness. In this context, the nature of the relief granted in these suits, the repayment of the principal plus reasonable interest,⁷⁸⁸ served to restore the normal operation of credit: the obligee was kept to what they should have had out of the deal, and the obligor was kept to what they had actually received out of the deal, thus removing an inflated gain on one hand, and inflated debt on the other.

In the culture of credit explanation of Chancery’s jurisdiction to relieve expectant heirs, the modern understandings described in Chapter 2 – the special disability and economic preservation analyses – become, rather than discrete explanations of the basis of the jurisdiction, accounts of different aspects of the disruptive effect fraud had on the culture of credit. In this context, the protection from exploitation described in the special disability analysis operates to prevent interference with the decisions of individuals in taking up or extending credit; correspondingly, the economic preservation analysis can be seen, rather, as a concern with the ability of households, or families, to maintain accurate levels of creditworthiness, unaffected by the distorting effects of fraud. This is, of course, slightly different to the social class-based analyses of Clark, Dawson and Posner,⁷⁸⁹ in which the social class of the families being protected is key, but these analyses draw largely on express statements from suits heard in the eighteenth and nineteenth centuries.⁷⁹⁰ It is suggested, therefore, that twentieth-century theories of Chancery’s intention to maintain the economic power of the dominant classes – while perhaps valid for the decisions of the later-eighteenth and nineteenth centuries – are flawed by Atiyah’s presentism when applied to the seventeenth century.

⁷⁸⁸ See Chapter 5 at 5.4.2.1.

⁷⁸⁹ See discussion in Chapter 2, above at 2.2.3.

⁷⁹⁰ For example, Dawson refers to Talbot LC’s statement that ‘the policy of the nation [was] to prevent what was a growing mischief to ancient families, that of seducing an heir apparent from a dependence on his ancestor who probably would have supported him, and, by feeding his extravagancies, tempting him in his father’s life-time, to sell the reversion of that estate, which was settled upon him; forasmuch as this tended to the manifest ruin of families’ (*Cole v Gibbons* (1734) 2 P.Wms 290 at 293). Dawson also quoted a passage from *Earl of Portmore v Taylor* (1831) 4 Sim. 182 at 213, which reads, in part, ‘this court will not allow the heir of a family of rank to be reduced to poverty and distress by dealing with his expectancies’ as an indication of ‘[t]he snobbery with which these cases reek’ (Dawson, above n 77, at 268).

It is true that one⁷⁹¹ of the seventeenth-century suits examined for this thesis includes an express statement by the court in regard to protection of the obligor's family. In his note of *Berry v Fairclough* (1681),⁷⁹² Nottingham LC said:

At the hearing I relieved him ... notwithstanding he were of full age at the time, for this infamous kind of trade and circumvention ought by all means to be suppressed. The Star Chamber used to punish it and this court did always relieve against it. No family can be safe if this be suffered.⁷⁹³

In the later rehearing of the same matter, but in relation only to the defendant Pitt, Jeffreys LC appears to concur with his predecessor's concern for the family, declaring that 'these bargains were corrupt and fraudulent, and tended to the destruction of heirs, sent [to London] for education, and to the utter ruin of families.'⁷⁹⁴

These statements, however, are at least equally consistent with a court motivated by the protection of the normal operation of the culture of credit as with modern commentators' theories of the preservation of the wealth of the ruling classes. This suggestion is further supported by the analysis of the incidence of the relief granted according to family background described in Chapter 5, which showed no evidence of any meaningful distinction in the granting of relief to obligors of different social classes; and while at first glance the social class disparity between obligor and obligees revealed in the Berney case study suggests a court motivated by the depredations of common businessmen on the assets of the ruling classes, the absence of any such disparity did not prevent a grant of relief in the case study suit of *Smythes v Weedon*. While the small numbers involved in the family background analysis mean that no definitive conclusion on this point can be safely asserted, it is at least worthy of note that plaintiff obligors of the merchant class had a greater success rate in obtaining substantive relief than obligors belonging to the combined county elite and peer classes, which this thesis suggests – while bearing in mind the caveat in relation to a normative approach by the court in this regard discussed in Chapter 5 – is more consistent with an explanation of the granting of relief to expectant heirs and non-heir profligates based on the court's concern with ensuring the normal operation of credit networks, than with preserving the assets of the dominant county elite and peer classes.

6.4 Conclusion

Merely possessing the characteristics, and thus status, of an expectant heir or non-heir profligate was not sufficient in the seventeenth century to secure an obligor a grant of relief in Chancery from an improvident bargain. An element of fraud was also necessary, and an analysis of the allegations and/or findings of fraud made in the suits examined for this thesis has revealed that the most prevalent type of fraud found in suits in which relief was

⁷⁹¹ This may be explained by the scarcity of judicial comment of any kind found in the decrees and entries, as well as the reports, at this time.

⁷⁹² 79 Selden Soc. 868.

⁷⁹³ Ibid.

⁷⁹⁴ *Berney v Pitt* (1687) 2 Chan. Rep. 396, at 397.

granted was that which occurred at or before formation, whether behavioural in nature, or relating to the outcome of the bargain. Further, it is apparent that, while there were instances later in the century in which relief was granted purely on the basis of outcome fraud, it was far more likely that the court would grant relief in suits where both behavioural and outcome fraud were present.

It is suggested that the significance of both behavioural and outcome fraud, in relation to the underlying basis of the jurisdiction to relieve expectant heirs and non-heir profligates in the seventeenth century court of Chancery, lies in the disruption caused to the normal operation of the culture of credit, which this thesis argues was the applicable economic and social context in which these suits were brought, pleaded and decided. The court's concern with this disruption is also seen in the established restitutionary remedy granted in these suits: by setting aside a bargain brought about or affected by behavioural and/or outcome fraud on payment of the amount actually received by the obligor, plus interest, the court restored the normal operation of credit by removing the over-indebtedness of the obligor and, by extension, the risk to the creditworthiness of the obligor's family.

Chapter 7 Conclusion

This thesis has examined Chancery's jurisdiction to grant relief to expectant heir and non-heir profligate obligors in the seventeenth century, adopting a mixed methodology which took both a horizontal and a vertical approach, identifying and analysing forty-four expectant heir and non-heir profligate suits in their social, economic and historical contexts across the thesis period. Twenty-seven of these suits do not appear in the printed reports and have therefore been examined for the first time in this thesis. Two of these suits – one involving an expectant heir, the other a non-heir profligate – have been the subject of in-depth contextual case study; additionally, contextual information has been found for the other suits analysed, where this was possible. This combination of the horizontal and the vertical has resulted in a contextualised analysis of the elements and basis of the jurisdiction in the seventeenth century, providing more detailed information, and of a different kind, than has previously been available, as well as covering an earlier period of the jurisdiction than had hitherto been examined.

This research suggests several conclusions in relation to the jurisdiction in this period, the first of these being that the jurisdiction with which this thesis deals, described in the academic literature and the case law as a jurisdiction to relieve expectant heirs, was in fact a jurisdiction to relieve both expectant heir and non-heir profligates. This conclusion is drawn initially from the comparisons made between the contextual case studies of the expectant heir Richard Berney and the non-heir profligate Arthur Smythes. The information revealed in the Smythes case study, in particular, suggested that the bargains of a non-heir profligate obligor, and his treatment by Chancery, did not significantly differ from those of an expectant heir. The type of fraudulent behaviour Smythes complained of was identical in nature to that appearing in many of the suits involving expectant heirs, and the substance of the relief granted to Smythes – while in this instance differing slightly in form – was the same. This view was then confirmed by the analysis of all forty-four suits, which found no meaningful difference between the court's treatment of expectant heir and non-heir profligate obligors.

Although this thesis did not set out to discover the beginnings of Chancery's jurisdiction to grant relief to expectant heirs, it has been possible to conclude that it is likely that such a jurisdiction already existed by the beginning of the seventeenth century, although the form and content of that jurisdiction may have been still developing at that time. There appears, however, to have been a degree of consistency from the earliest years of the century onwards in relation to the form of the relief granted, and the analysis of suits undertaken for this thesis revealed that the most common type of relief granted to expectant heir and profligate obligors in the seventeenth century was restitutionary in nature, usually taking the form of

an order that the bargain be set aside on repayment by the obligor of the true value received, plus reasonable interest. Additionally, given that a large number of the bargains with which this thesis deals took the form of conditioned bonds, this thesis has also provided further evidence for the theory that relief against penalties in Chancery – at least in relation to these bonds – was already routine at the beginning of the seventeenth century.

In relation to the basis of the jurisdiction, the analysis of the suits revealed that mere status as an expectant heir or profligate was not a sufficient basis for an obligor to be granted relief from improvident bargains during the seventeenth century; an element of fraud was also necessary. While the presence of either behavioural or outcome fraud at or before formation of the contract could result in a grant of relief, it seems to have been far more likely that the court would grant relief where both these types of fraud were present.

This thesis also sought to consider the basis for relief in broader terms, considering the social, economic and historical contexts in which these suits were brought, heard and adjudicated, in order to assess the validity of modern explanations of the jurisdiction. This process began with a brief survey of the modern case law and academic literature, and two main modern interpretations of the basis of the expectant heir suits were found: the first of these, the most prevalent, is that Chancery granted relief in these suits in order to prevent exploitation of the perceived weakness, stemming from youth and necessity, of the expectant heir obligor. This ‘special disability’ interpretation is found in both the modern case law and the academic literature relating to the doctrine of unconscionable dealing, and it is widely held that the expectant heir suits form a key historical basis of that doctrine. The second main interpretation of the basis for the relief granted to expectant heirs is found only in the academic literature, and posits that, rather than being solely concerned with the protection of individual obligors, Chancery sought to preserve the assets – and therefore the economic and political power – of the ruling classes. But, as has been shown, both these interpretations are based only on expectant heir suits appearing in printed reports. In relation to the seventeenth century this has meant that only a small number of suits, mainly dating from after 1680, have been discussed; furthermore, in those discussions no meaningful distinction has been made between the economic, social or historical contexts of the seventeenth-century suits and those dating from later centuries. Consequently, this thesis has argued that modern understandings of the seventeenth-century expectant heir suits have been skewed by the influence of nineteenth-century contract law doctrines and theories, which developed in a significantly different economic, social and historical context. In order to counteract that possibility, the analysis of the expectant heir and profligate suits undertaken in this thesis has been placed, as far as possible, in the context of their own period.

Accordingly, this thesis suggests that a more nuanced, and historically informed, interpretation can be derived from an understanding of the economy of the seventeenth century as based on a culture of credit. In this interpretation the concern of the court was to prevent the disruption of the normal operation of credit through fraud, and in this light both

modern interpretations, rather than providing discrete explanations of the basis of relief, become illustrations of different aspects of fraud. This view, at least in relation to the economic preservation analysis, is supported by the fact that – as far as can be concluded from the small sample size – there does not appear to have been any meaningful difference in either the incidence or type of relief granted to expectant heir and profligate obligors on the basis of social class. Additionally, the restitutionary nature of the relief granted acted to restore the normal operation of credit by removing the over-indebtedness of the obligor – and the risk to the creditworthiness of the obligor’s family – brought about by behavioural or outcome fraud.

There are two main areas in which further research might enhance the findings of this thesis: the first is to increase the number of expectant heir and non-heir profligate suits from which conclusions can be drawn by engaging in a more comprehensive examination of the C 33 entry books for the thesis period. Although a sample of these entries was undertaken, as described in Chapter 1, the time constraints of the PhD project limited the use of this important component of the Chancery records and proceedings. It may also be possible to find expectant heir and non-heir profligate suits in the record from a far earlier period than the printed reports might suggest, giving a better idea of the beginnings of the jurisdiction. The second potential research path reflects the demonstration in this thesis of the value of the evidence of litigation as a means of discovering more about credit relationships: the information contained in the Chancery records and proceedings as a whole, particularly the enrolled decrees, entry books and pleadings, could be used to map the credit relations between significant individuals, thus providing further insight into the operation of the culture of credit. For example, by focusing on a significant individual such as Edward Stinstead, it is likely that the credit relationships between a large number of merchants, exchange-men, and expectant heir and non-heir profligate individuals and their families would be revealed. This has the potential to identify the web of financial interdependence operating in a particular period, in a particular location, with its concomitant ramifications for the necessity and efficacy of debt litigation within that web; it also builds on the insights into the operation of credit, the means to secure indebtedness, and methods of procuring credit in this period which have already been achieved in this thesis.

More broadly, of course, the Chancery records and proceedings remain an invaluable resource for legal, social and economic historians, which – due to its sheer size – has yet to be fully exploited. This thesis, by going beyond the reported suits and into the wealth of previously unexamined material to be found in the vast collection held by The National Archives, has followed in the footsteps of a number of distinguished legal historians in order to shed new light on one particular jurisdiction to grant relief about which many assumptions – not all of them well-founded – have been made in the past; it remains to be seen what other valuable insights into both law and society can be unearthed from these sources in the future.

Appendix 1: Calendar of Expectant Heir Suits

This appendix contains the facts, relief granted, and any relevant contextual and biographical detail, of each expectant heir suit, in chronological order.

A1.1 *Neaste v Poole* (1608)

In *Neaste v Poole* (1608),⁷⁹⁵ the plaintiff, Thomas Neaste of Chaceley in Worcestershire,⁷⁹⁶ acknowledged a statute staple for £1,000 to the defendant, Henry Poole, defeasanced for payment of £500.⁷⁹⁷ In a separate agreement, the defendant promised not to take any action on the statute until six weeks after the plaintiff's father died.⁷⁹⁸ The defendant alleged that in 1583,⁷⁹⁹ when he acknowledged the statute, Thomas Neaste was in disgrace with his father, and consequently received little in the way of maintenance from him.⁸⁰⁰ The defendant further alleged that due to the financial necessity forced upon Thomas Neaste by his father's ill-favour, he supplied Neaste with 'money, apparel, horses, meat, drink, and necessaries for his maintenance'.⁸⁰¹ In addition, Poole alleged that on two occasions when Neaste was charged with delivering items of value to Poole from third parties, he kept them for himself: firstly, the sum of £30 payable to Poole by one John Whiting,⁸⁰² and secondly 'three trunks filled and stuffed with apparel, money, plate, jewels &c to the value of four hundred pounds'.⁸⁰³ In all, Poole alleged, the plaintiff owed him the sum of £500, a figure arrived at by a reckoning between the two men which led to the acknowledgement of the statute.⁸⁰⁴

⁷⁹⁵ C 78/176, no. 12.

⁷⁹⁶ The Neaste family appear to have been of the lesser or parish gentry; the plaintiff described himself as 'gentleman' in the bill, and appears to have had moderate landholdings in and around Chaceley (Covenant by Indenture Confirming Grant (1606) Gloucestershire Archives D2957/312/4).

⁷⁹⁷ C 78/176, no. 12 [Membrane 4; IMG_0008].

⁷⁹⁸ Ibid [Membrane 3; IMG_0006]: the post obit. bond is predicated on the assumption that after the ancestor's death and the obligor's subsequent inheritance, the obligor will be able to pay the debt.

⁷⁹⁹ Although the statute was acknowledged in 1583, it was not until 1608 – twenty-five years later – that a final decree was made. Henry Poole sued on the statute at common law in 1597, eighteen months after the plaintiff's father died, prompting the plaintiff's original bill in 1598 (ibid [Membrane 3; IMG_0006]). A stay of execution was ordered by Chancery; the plaintiff apparently did not then take any further action to bring the matter to a hearing in Chancery (ibid [Membrane 3; IMG_0007]; C 33/95, f.564, 15 April 1598). The defendant died in 1602 and his executor, his brother George Poole, finding the statute amongst his brother's papers, successfully sued at common law to extend the plaintiff's lands and goods (C 78/176, no. 12 [Membrane 4; IMG_0008]). The plaintiff was arrested, and the plaintiff's bill in Chancery was then revived against George Poole (ibid [Membrane 2; IMG_0004]).

⁸⁰⁰ C 78/176, no. 12 [Membrane 1; IMG_0002].

⁸⁰¹ Ibid.

⁸⁰² Ibid.

⁸⁰³ Ibid [Membrane 2; IMG_0004].

⁸⁰⁴ Ibid [Membrane 1; IMG_0003].

Ellesmere LC ordered that the statute be delivered up to the plaintiff to be cancelled on payment of £50; the defendant was also ordered to free the plaintiff from prison and to discharge the plaintiff's lands and goods of the extent obtained on them.⁸⁰⁵

A1.2 *Hubberstie v Danser* (1614)

The plaintiff in *Hubberstie v Danser* (1614)⁸⁰⁶, Robert Hubberstie, son and heir of George Hubberstie,⁸⁰⁷ was in the King's Bench prison for another debt when he was persuaded by the defendants Danser, Daintith and Henchman to acknowledge a judgment for £400, defeasanced for payment of £200.⁸⁰⁸ This was for goods of the value of £200 to be provided to the plaintiff; however, on learning of the judgment the plaintiff's father, George Hubberstie, discovered that the goods his son had received were worth no more than £14.⁸⁰⁹ George then paid the defendant Danser £50 in return for a general release of the judgment.⁸¹⁰ Danser and Daintith, however, subsequently persuaded the plaintiff to enter, firstly, a bond of 200 marks conditioned for payment of £60, the consideration being that the defendants would forbear to sue on the judgment, and, secondly, a bond for £200, conditioned for payment of £107, in return for the defendants securing the plaintiff's release from prison.⁸¹¹

The court clearly disapproved of the defendants' actions, finding that Danser had given a release for the judgment before he promised the plaintiff not to sue on it, and that none of the defendants had taken any action to secure Hubberstie's release from prison.⁸¹² Indeed, Ellesmere LC described the defendants' actions as a course of dealing that 'this court does utterly dislike and condemn', and ordered both bonds to be delivered up to be cancelled.⁸¹³ No payment was required on the part of the plaintiff before the bonds were cancelled.

⁸⁰⁵ Presumably the sum to be repaid consisted of the £30 which the court found to be the only money paid to the plaintiff by Henry Poole, plus interest (ibid [Membrane 4; IMG_0008]).

⁸⁰⁶ C 78/184, no. 1.

⁸⁰⁷ Ibid [Membrane 1; IMG_0083]: George Hubberstie died between 26 August and 2 September 1611 (Will of George Hubberstie (2 September 1611) PROB 11/118/187). He left a substantial estate, including property in Westmorland (now Cumbria) and Sussex, and Ralph's Quay, one of the Legal Quays of the Port of London. His will included cash bequests of more than £850, giving an indication of the size of his fortune, and he was warden and master of the Company of Leathersellers ('List of Masters' and 'List of Wardens' in *The Leathersellers' Company* at <<https://leathersellers.co.uk/the-company-city-livery/#publications>> accessed 4 January 2019). It is reasonable to assume from this that, aside from his wealth, George Hubberstie was a man of some standing in his community. It is hardly surprising that the defendants Henchman, Danser and Daintith should target the heir to this fortune, if we accept the plaintiff's allegation that they were 'men well experienced in abusing young men by such like courses tricks and plots' (C 78/184, no. 1 [Membrane 1; IMG_0084]).

⁸⁰⁸ C 78/184, no. 1 [Membrane 3; IMG_0087].

⁸⁰⁹ Ibid [Membrane 3; IMG_0088].

⁸¹⁰ Ibid.

⁸¹¹ Ibid.

⁸¹² Ibid.

⁸¹³ Ibid.

A1.3 *Fines v Wheatley* (1616)

The plaintiff in *Fines v Wheatley* (1616),⁸¹⁴ Edward Fines,⁸¹⁵ the second son of Henry Clinton, earl of Lincoln, needed money in or around October 1615,⁸¹⁶ and requested one McHale to find it for him.⁸¹⁷ This McHale did, by means of the defendant Andrew Wheatley, who offered to lend the plaintiff £33, secured by a bond of £200.⁸¹⁸ The £200 was to be paid six months after the death of the plaintiff's father, who was then 'very old and sickly'.⁸¹⁹ Fines alleged in his bill that when he objected, on the grounds that his father was unlikely to live more than another six months, either McHale or one of the defendant's friends assured him that if the earl were to die within a year of the making of the bargain, the defendant would 'deal reasonably' with him, and not expect payment of the full £200.⁸²⁰ Fines then acknowledged a judgment of £400 to the defendant, defeasanced for payment of £200 within six months of the death of his father, to secure payment of the £200 bond.⁸²¹

As a second son, Edwards Fines was not the earl's heir in the strict sense; however, it is a reasonable assumption that he stood to gain materially from his father's death, and this was clearly an assumption made by the defendant. Henry Clinton's will – which would have given an indication of the sort of estate inherited by Edward – has sadly not survived,⁸²² although the sentence nullifying it has.⁸²³ The earl appears to have been a difficult man, to say the least, with some modern commentators concluding that towards the end of his life he was probably insane.⁸²⁴ The earl died less than a year after Fines acknowledged the judgment, on 29 September 1616.⁸²⁵ The plaintiff alleged that the defendant then refused to 'deal reasonably' with him, despite standing to recover £200 for the outlay of £33 for eighteen months, and so Edward Fines sought relief in Chancery.⁸²⁶

⁸¹⁴ C 78/311, no. 23.

⁸¹⁵ Also Fiennes, and in some records, Fynes. The family also used the surname Clinton. This plaintiff was the younger brother of the plaintiff in *Earl of Lincoln v Fuller* (24 October 1618) C 33/135, f. 90v, discussed below at A1.4.

⁸¹⁶ In the opening lines of the bill the date of the loan is given as 'about a year before' the earl's death; later in the bill, however, the acknowledgement of the judgment is said to be 'Michaelmas Term in the twelfth year' of James I, which was 1614. This latter date is presumably an error, as all the other internal evidence of the bill, and that of the defendant's plea and demurrer, indicates 1615 to be correct.

⁸¹⁷ C 78/311, no. 23 [Membrane 1; IMG_0031].

⁸¹⁸ *Ibid.*

⁸¹⁹ *Ibid.* This form of post obit. bond loan is found in other, later, expectant heir cases, notably *Varnee's Case* (1680) 2 Freeman 63, *Batty v Lloyd* (1682) 1 Vern. 141, and *Berney v Pitt* (1686) 2 Chan. Rep. 396.

⁸²⁰ C 78/311, no. 23 [Membrane 1; IMG_0032].

⁸²¹ *Ibid.*

⁸²² N.M. Fuidge, 'Clinton, Sir Henry (d. 1616), of Tattershall, Lincs.', in *The History of Parliament: the House of Commons 1558-1603*, ed. P.W. Hasler (1981) at <<http://www.historyofparliamentonline.org/volume/1558-1603/member/clinton-sir-henry-1616>> accessed 3 January 2019.

⁸²³ (23 October 1616) PROB 11/128/389.

⁸²⁴ N.M. Fuidge, 'Clinton, Sir Henry (d. 1616), of Tattershall, Lincs.', above n 822.

⁸²⁵ *Ibid.*

⁸²⁶ C 78/311, no. 23 [Membrane 1; IMG_0032].

The plaintiff's bill contains no allegations of fraud or other unconscionable conduct, a point made by the defendant in his plea and demurrer, in which he argued that the bill should be dismissed as nothing more than an attempt to avoid a hard bargain. Chancery, the defendant asserted, 'used not to relieve hard or straight bargains except the same be accompanied with fraud practice or circumvention which was not so much as laid [or] pretended in or by the said complainant's bill'.⁸²⁷ The defendant also argued that the plaintiff was of mature years,⁸²⁸ and a justice of the peace in his home county, and therefore did not qualify for the court's protection either as 'an infant or a man of weak or imperfect judgment'.⁸²⁹

The matter was referred by the court to Sir John Tyndall, a master of Chancery, who found no evidence of fraud, and that both parties were 'of years and good understanding'.⁸³⁰ He also reported that the plaintiff had given the defendant a new defeasance, adding a further ten pounds to the existing £200, to be paid 'at a day yet to come'.⁸³¹ Accordingly, Tyndall saw no reason why the bill should not be dismissed, and this was subsequently ordered by the court.⁸³²

A1.4 *Earl of Lincoln v Fuller (1618)*

The only sources for this suit are two entry book entries, dealing with the grant of an injunction⁸³³ in the case and the hearing⁸³⁴ respectively. Although these entries do provide some detail, including the relief granted, there are discrepancies between them as to the terms of the bargain made between the plaintiff and one Haslewood. In the first entry, of 28 June 1617, counsel for the plaintiff stated that the plaintiff had entered a recognisance of £2,000 to Haslewood, conditioned for £1,200 'upon a secret trust and confidence and upon promise and agreement that no advantage should be taken thereof if the intestate should die before the now plaintiff should be Earl of Lincoln'.⁸³⁵ The amount of £600 was to be lent on the recognisance, of which, it was alleged, the plaintiff had only received £200, and it was further alleged that Haslewood had died some time before the plaintiff's father,⁸³⁶ and

⁸²⁷ Ibid.

⁸²⁸ Edward Fines was baptised on 30 May 1578, at Tattershall, Lincoln, the family seat. (Ancestry.com. England, Select Births and Christenings, 1538-1975 [database on-line]. Provo, UT, USA: Ancestry.com Operations, Inc., 2014.) He was therefore around 37 years old when he acknowledged the judgment.

⁸²⁹ C 78/311, no. 23 [Membrane 1; IMG_0033].

⁸³⁰ Ibid.

⁸³¹ Ibid. No indication is given of when the new defeasance was entered.

⁸³² Ibid.

⁸³³ *Earl of Lincoln v Fuller* (28 June 1617) C 33/131, f. 1180.

⁸³⁴ *Earl of Lincoln v Fuller* (24 October 1618) C 33/135, f. 90v.

⁸³⁵ *Earl of Lincoln v Fuller* (28 June 1617) C 33/131, f. 1180.

⁸³⁶ The recognisance was entered on 28 June 1594, when the plaintiff, Thomas Clinton, later the third earl of Lincoln, was around 26 years of age (*Earl of Lincoln v Fuller* (28 June 1617) C 33/131, f. 1180; W.J.J., 'Clinton, alias Fiennes, Thomas, Lord Clinton (c.1568-1619), of Tattershall, Lincs.' in *The History of Parliament: the House of Commons 1558-1603*, ed. P.W. Hasler (1981) at <<http://www.historyofparliamentonline.org/volume/1604-1629/member/clinton-thomas-1568-1619>> accessed 16 May 2018). Thomas's father, Henry Clinton, second earl of Lincoln, died on 29 September 1616 (ibid).

that, accordingly, it should have been delivered up and cancelled.⁸³⁷ Instead, Haslewood's administrators had put the recognisance in suit.⁸³⁸

In the entry of the hearing on 24 October 1618, however, the court found that the recognisance of £2,000 had been entered into on the promise that Haslewood would supply the plaintiff with £400 in ready money and plate worth £100, of which he had received only £200.⁸³⁹ The discrepancy between the terms of the bargain as alleged by the plaintiff, and those found by the court may be explained by the court's finding that 'the condition of the said recognisance was not made as it was agreed upon'.⁸⁴⁰ This suggestion of fraud is not explored further in the entry, and while the court expressed its disapproval of bargains such as these, stating that 'this court much dislikes that heirs of great families should be drawn by loans of small sums of money to pay a great deal more than was received',⁸⁴¹ it added that 'nevertheless this court thinks fit the plaintiff should pay for his improvidence'.⁸⁴² Accordingly, the only relief was against the penalty, with the plaintiff being ordered to pay the defendant the amount of £500 in return for the cancelling of the recognisance, although it seemed to be an accepted fact that only £200 had been actually lent.⁸⁴³

A1.5 Freeman v Lassalls (1622)

In *Freeman v Lassalls* (1622)⁸⁴⁴ Coningsby Freeman exhibited his bill against four defendants, Samuel Lassalls, Bartholomew Jukes, John Barradell and John Saunders, alleging that the four had conspired to draw him into two bonds when he was 'a young raw and unexperienced man', in the lifetime of his father.⁸⁴⁵ The first of these bonds was for £200, conditioned for payment of £110, entered by Freeman and Barradell as co-obligors to Lassalls, and for which Freeman expected to receive £50.⁸⁴⁶ Freeman was unaware, however, that Barradell already owed the sum of £145 to Lassalls, and so Freeman had, in effect, been used to secure this existing debt.⁸⁴⁷

Rather than receiving the £50, the plaintiff was persuaded to enter the second bond, again of £200 conditioned for payment of £110, to Saunders, for which he received 44s. and a promise from Lassalls that he would deliver to the plaintiff a horse said to be worth £30,

⁸³⁷ *Earl of Lincoln v Fuller* (28 June 1617) C 33/131, f. 1180.

⁸³⁸ *Ibid.*

⁸³⁹ *Ibid.*

⁸⁴⁰ *Ibid.*

⁸⁴¹ *Earl of Lincoln v Fuller* (24 June 1618) C 33/135, f. 90v.

⁸⁴² *Ibid.*

⁸⁴³ *Ibid.*

⁸⁴⁴ (1622) C 78/336, no. 9.

⁸⁴⁵ *Ibid* [Membrane 1; IMG_0130]: Edward Freeman, the plaintiff's father, held, amongst other estates, the manor of Evenlode in Worcester, which he had purchased in 1605, and to which the plaintiff succeeded on his father's death in 1631 ('Parishes: Evenlode', in *A History of the County of Worcester: Volume 3* (London, 1913), at 347-352: *British History Online* <<http://www.british-history.ac.uk/vch/worcs/vol3/pp347-352>> accessed 3 April 2019). The plaintiff's status as an expectant heir is not expressly addressed either in the bill or the decree, however.

⁸⁴⁶ C 78/336, no. 9 [Membrane 4; IMG_0136].

⁸⁴⁷ *Ibid.*

and cloth to make up the total to £50.⁸⁴⁸ The horse was duly received, but the plaintiff alleged he could only sell it for £8.⁸⁴⁹ Barradell and Jukes had apparently promised that Lassalls would deliver up the first bond to the plaintiff on the sealing of the second bond, but Lassalls refused to do so, instead obtaining a judgment against the plaintiff on the bond at common law.⁸⁵⁰ The plaintiff was subsequently arrested, and had to be bailed by his father, Edward Freeman.⁸⁵¹

The court – Williams LK, assisted by Bromley B and Chamberlain JKB – found that the plaintiff had been ‘abused and merely cheated’ by Jukes and Barradell, and, given that Lassalls had received £30 paid by the plaintiff into court, he had ‘more in conscience [than] he ought to have had from the complainant’.⁸⁵² Accordingly, Lassalls was ordered to deliver up the first bond and acknowledge satisfaction of the judgment obtained on it, and Saunders was ordered to deliver up the second bond.⁸⁵³ Lassalls was permitted to take such action against Barradell as he could to recover the pre-existing debt.⁸⁵⁴

A1.6 *Lambe v Finch* (1626)

In *Lambe v Finch* (1626)⁸⁵⁵ a lender, Henry Lambe, exhibited his bill against a surety for a debt of £300. The difficulty facing the plaintiff was that the principal debtor, Sir Theophilus Finch (deceased by the time the bill was brought), and the defendant surety, Sir Theophilus’ brother Sir Thomas Finch, had in 1618 prevailed upon the plaintiff to lend the sum in question without sealing the agreed penal bond. In lieu of the sealed bond, the plaintiff could rely in an action at common law only on his allegation that both debtor and defendant had promised to repay the money advanced.⁸⁵⁶

Sir Theophilus, the eldest son of Sir Moyle Finch,⁸⁵⁷ was described in the plaintiff’s bill as:

⁸⁴⁸ Ibid.

⁸⁴⁹ Ibid [Membrane 2; IMG_0131].

⁸⁵⁰ Ibid.

⁸⁵¹ Ibid [Membrane 4; IMG_0135].

⁸⁵² Ibid [Membrane 4; IMG_0136].

⁸⁵³ Ibid.

⁸⁵⁴ Ibid.

⁸⁵⁵ C 78/239, no. 9.

⁸⁵⁶ Ibid [Membrane 2; IMG_0021]. If the penal bond had been sealed, the bond itself would have been in the form of an acknowledgment of indebtedness for the sum lent plus the penalty, that is, a grant under seal of an indebtedness (conditioned for voidness upon payment of the principal). In the absence of the bond, the plaintiff was left with the defendant’s promise to repay the principal, made prior to the sealing of the first bond.

⁸⁵⁷ Peter Lefevre, ‘Finch, Sir Theophilus (1573-1619), of Heneage House, London, and Eastwell, Kent’ in *The History of Parliament: the House of Commons 1604-1629*, ed. Andrew Thrush and John P. Ferris (2010) at <<http://www.historyofparliamentonline.org/volume/1604-1629/member/finch-sir-theophilus-1573-1619>> accessed 3 January 2019; P.W. Hasler, ‘Finch, Moyle (c. 1550-1614), of Eastwell, Kent’ in *The History of Parliament: the House of Commons 1558-1603*, ed. P.W. Hasler (1981) at <<http://www.historyofparliamentonline.org/volume/1558-1603/member/finch-moyle-1550-1614>> accessed 3 January 2019.

...both in the life time of his said father and mother being a knight of great expense and living at a higher rate than his present means for maintenance which was but mean in comparison of his then present expenses did or could defray...⁸⁵⁸

Due to Sir Moyle's opinion that his son Sir Theophilus was not to be trusted with money, Sir Moyle, shortly before his death, put his estate in trust for his wife during her lifetime and instructed his trustees to make Sir Theophilus an annual allowance of no more than £100, until he succeeded to the reversion on her death.⁸⁵⁹ This allowance was vastly insufficient to meet his existing debts and obligations.⁸⁶⁰ In the event, Sir Theophilus died before his mother, leaving debts of around £9,000.⁸⁶¹ From this, it can be seen that despite the transaction complained of having occurred some four years after the death of Sir Moyle, Sir Theophilus retained the status of an expectant heir at this time.

The plaintiff alleged that at the time of the transaction, Sir Theophilus Finch owed him over £760, including the £300 which formed the basis for the suit.⁸⁶² With Sir Thomas to be jointly bound as his surety, Sir Theophilus allegedly promised to pay the plaintiff £700 in two instalments: the first was duly secured by a sealed penal bond of £800 conditioned for payment of £400; the second was intended to be secured by a bond of £600 conditioned for payment of £300.⁸⁶³ It was this latter bond, alleged never to have been sealed, that formed the basis of the complaint, and Lambe sought recovery of the £300. The court, however, viewed the action as 'more proper and fitter to be tried at the common law', to which the matter was therefore dismissed.⁸⁶⁴

A1.7 *Frevile v Atkins* (1628)

The plaintiff in *Frevile v Atkins* (1628),⁸⁶⁵ was a surety who sought relief against a statute of £300 in which he was bound to the defendant. The plaintiff had entered into the statute as surety for his brother, George, who had borrowed several sums (amounting to £130) from several persons, all of which loans had been arranged and delivered by the defendant, a scrivener.⁸⁶⁶ Each of the several sums was secured by bond or other specialty, but the defendant had also insisted that the plaintiff and George become bound to him by statute, which was defeasanced for payment of the £130.⁸⁶⁷ The plaintiff was seeking to have the statute cancelled, alleging that the several sums had all been repaid, but that the defendant had refused to acknowledge satisfaction on the statute.⁸⁶⁸

⁸⁵⁸ C 78/239, no. 9 [Membrane 1; IMG_0019].

⁸⁵⁹ Peter Lefevre, 'Finch, Sir Theophilus (1573-1619), of Heneage House, London, and Eastwell, Kent', above n 857.

⁸⁶⁰ Ibid.

⁸⁶¹ Ibid.

⁸⁶² C 78/239, no. 9 [Membrane 1; IMG_0020].

⁸⁶³ Ibid [Membrane 2; IMG_0021].

⁸⁶⁴ Ibid [Membrane 3; IMG_0023].

⁸⁶⁵ C 78/473, no. 13.

⁸⁶⁶ Ibid [Membrane 1; IMG_0052].

⁸⁶⁷ Ibid [Membrane 1; IMG_0052 to Membrane 2; IMG_0053].

⁸⁶⁸ Ibid [Membrane 2; IMG_0053].

George Frevile, the principal debtor, was the heir apparent to his uncle, Sir George Frevile.⁸⁶⁹ Sir George is described in the bill as ‘of great estate ... and issueless’.⁸⁷⁰ Sir George had been responsible for George’s education and his placement at the Inns of Court,⁸⁷¹ and it was certainly believed by the defendant that George would inherit his uncle’s estate.⁸⁷²

In this belief, the plaintiff alleged, the defendant ‘observing withal the said George to be tractable to prodigality and expense’,⁸⁷³ for his ‘own private ends upon all occasions furnished the said George with money without the privity of the said Sir George’.⁸⁷⁴ These are the archetypal elements of expectant heir cases: the vulnerability of the heir; the taking advantage of that vulnerability for gain; and the keeping of the ancestor in the dark as to the heir’s true financial position. However, given that the suit was brought by a surety, and not the principal debtor, the suit is treated here as non-archetypal.

The plaintiff alleged that the defendant had been at such pains to achieve the latter point – that Sir George should not know of his nephew’s extravagance and thus disinherit him – that despite George owing the defendant £100, the defendant had forborne to join action with George’s other creditors while he was imprisoned for debt.⁸⁷⁵ It was only after Sir George made it known that he would pay George’s debts in order to release him, that the defendant apparently ‘discovered that George owed him a hundred and five pounds’.⁸⁷⁶

It seems that Sir George’s knowledge of his nephew’s debts had exactly the effect feared by the defendant (and presumably George): when Sir George died in 1619, it was discovered that he had changed his will⁸⁷⁷ in favour of the plaintiff, George’s brother Nicholas.⁸⁷⁸ Once the defendant became aware of this, the plaintiff alleged, he would lend George money only on condition that the plaintiff become bound with him.⁸⁷⁹ It was at this point that the defendant required the plaintiff and George to enter the statute at issue in the suit.

⁸⁶⁹ Ibid [Membrane 1; IMG_0051].

⁸⁷⁰ Ibid.

⁸⁷¹ Ibid.

⁸⁷² Ibid [Membrane 2; IMG_0053]. Sir George Frevile was member of parliament for Appleby, County Westmorland, in 1572, and was possessed of the manors of Hardwick, and Shotton, as well as other lands in Middleham and Elwick, all in County Durham (W.J.J., ‘Frevile, George (1536-1619), of Sedgfield and Hardwick, co. Dur.’ in *The History of Parliament: the House of Commons 1558-1603*, ed. P.W. Hasler (1981) at <<http://www.historyofparliamentonline.org/volume/1558-1603/member/frevile-george-1536-1619>> accessed 22 May 2018).

⁸⁷³ C 78/473, no. 13 [Membrane 1; IMG_0051].

⁸⁷⁴ Ibid [Membrane 1; IMG_0051].

⁸⁷⁵ Ibid [Membrane 1; IMG_0052].

⁸⁷⁶ Ibid.

⁸⁷⁷ Unfortunately, Sir George’s will has not been found.

⁸⁷⁸ Ibid [Membrane 1; IMG_0052]; shortly before he died, Sir George placed most of his lands in trust. Presumably Nicholas received the personal estate on Sir George’s death, if not the benefit of the real estate (W.J.J., ‘Frevile, George (1536-1619), above n 872).

⁸⁷⁹ C 78/473, no. 13 [Membrane 1; IMG_0052].

Relief was granted on the basis that the debts it secured had all been fully satisfied.⁸⁸⁰ In any event, the debts in question were owed to third parties, rather than the defendant, and thus in the court's view the defendant had suffered no loss or damage.⁸⁸¹

A1.8 *Thompson v Veysey* (1633)

In *Thompson v Veysey* (1633),⁸⁸² the plaintiff, John Thompson, alleged that the defendant had taken advantage of his youth and his necessity during his father's lifetime, lending him at first small amounts of money but then allowing these to accumulate, with interest, to a far greater sum.⁸⁸³ Eventually, Thompson alleged, he had been persuaded to enter bonds totalling £200, and in 1610, after he attained the age of 21, to grant the defendant leases over his manor of Bradwell, Oxfordshire, and other lands.⁸⁸⁴

In his answer, the defendant, Robert Veysey, denied that he had dealt with the plaintiff during his father's lifetime, or that the plaintiff was in fact an heir of any kind at the time of the transactions complained of; rather, he alleged, Thompson had purchased the lands over which the leases were granted from his elder brother.⁸⁸⁵ He likewise denied that he had taken advantage of the plaintiff's youth, alleging that Thompson was at least 30 years old at the time of the transactions.⁸⁸⁶

Investigation suggests that Veysey's version was closer to the truth: the Thompson family, noted recusants,⁸⁸⁷ held the manor of Bradwell Odyngsell in Oxfordshire from the late sixteenth century until 1627, when it was sold to the Hampson family.⁸⁸⁸ John Thompson's father, also named John Thompson, died in 1591, at which time John's elder brother Robert inherited.⁸⁸⁹ Robert died in 1601, and ownership of the manor passed to John.⁸⁹⁰ It is unclear whether John purchased the manor from Robert, as alleged by Veysey, or whether it passed through right of inheritance.⁸⁹¹ Certainly no mention of the manor is made in Robert's will.⁸⁹² It is stated in the bill that Thompson came of age circa 1610; if this is correct, a birth year of around 1589 can be deduced.⁸⁹³ This would have made him around 3

⁸⁸⁰ Ibid [Membrane 2; IMG_0054].

⁸⁸¹ Ibid.

⁸⁸² C 78/515, no. 4.

⁸⁸³ Ibid [Membrane 1; IMG_0242].

⁸⁸⁴ Ibid.

⁸⁸⁵ Ibid [Membrane 1; IMG_0243].

⁸⁸⁶ Ibid.

⁸⁸⁷ In his answer Veysey described Thompson as 'a convicted recusant', and alleged that he had been outlawed several times, but waived his right to argue both in bar of Thompson's claim (ibid [Membrane 1; IMG_0242]).

⁸⁸⁸ 'Broadwell Parish: Broadwell', in *A History of the County of Oxford: Volume 17*, ed. Simon Townley (Woodbridge, Suffolk, 2012), at 20-59: *British History Online* <<http://www.british-history.ac.uk/vch/oxon/vol17/pp20-59>> accessed 3 April 2019.

⁸⁸⁹ Ibid.

⁸⁹⁰ Ibid.

⁸⁹¹ The answer to this question may depend on the penalties incurred by the Thompson family for their recusancy, as multiple convictions under 29 Eliz. I, c. 6 could lead to Catholics losing their rights of inheritance. Two-thirds of the land owned by John Thompson's father was apparently seized in the late 1580s, although ownership was restored to his son Robert in 1593 (ibid).

⁸⁹² Will of Robert Thomson of Bradwell, Oxon (24 December 1601) PROB 11/98/510.

⁸⁹³ Unfortunately, no record of the baptism of the plaintiff has been found.

years old at the time of his father's death, and 12 when Robert died, making it unlikely in the extreme that he purchased the manor of Bradwell from his brother. He may have inherited it, but on the facts presented in his own bill he certainly could not claim the status of an expectant heir in 1610, when the leases from which he sought relief were sealed, and it seems very probable that even the earlier transactions referred to took place after his elder brother's death.

In any event, neither Coventry LK, nor the master to whom he referred the matter for account, made any reference to the plaintiff's alleged status as an expectant heir. The master's report found that Thompson owed Veysey £1,032. 13s. 3d., and it was ordered that the leases and bonds should be delivered up for cancellation on payment of that sum.⁸⁹⁴

A1.9 *Black v Earl of Carlisle* (1641)

The facts in *Black v Earl of Carlisle* (1641)⁸⁹⁵ are relatively simple: the widow and administratrix of the obligee brought suit against the trustees⁸⁹⁶ and heir of the deceased obligor, seeking discovery of assets to enable the payment of two penal bonds entered into by the obligor to the obligee during their respective lifetimes, and long since forfeited.⁸⁹⁷ Repayment of the outstanding principal amounts, plus interest,⁸⁹⁸ was ordered with the consent of the defendants, albeit the plaintiff was to be paid only according to her priority amongst the borrower's other creditors.⁸⁹⁹

Sir James Hay, later the first earl of Carlisle⁹⁰⁰ came to England with James I in 1603, and held many offices under the king, including privy counsellor, ambassador to France, and keeper of the royal wardrobe.⁹⁰¹ His influence continued under Charles I, who granted Hay the island of Barbados, and made him governor of the Caribbean Islands. He was also notoriously extravagant; Edward Hyde, earl of Clarendon, described him as

... having no bowels in the point of running in debt or borrowing all he could. He was surely a man of the greatest expense in his own person of any in the age he

⁸⁹⁴ C 78/515, no. 4 [Membrane 5; IMG_0253]. In a later suit, Thompson again sought relief in the same matter, having apparently failed to perform this order: the court on this occasion ordered that the lands given as security be conveyed absolutely to the defendant Veysey (*Thompson v Veysey* (1635) C 78/515, no. 13).

⁸⁹⁵ C 78/573, no. 6.

⁸⁹⁶ The earl had put certain lands and assets into trust for the payment of his debts: *ibid* [Membrane 2; IMG_0277].

⁸⁹⁷ *Ibid* [Membrane 1; IMG_0276].

⁸⁹⁸ Coventry LK ordered an interest rate of five per cent per annum to be imposed, significantly lower than the statutory interest rate of eight per cent at the time (21 Jac I c. 17). This appears to have been because an application of the maximum lawful rate of interest over the twenty-odd years since the bonds were due would have amounted to more than the penalties: *Ibid* [Membrane 3; IMG_0279].

⁸⁹⁹ *Ibid* [Membrane 3; IMG_0280].

⁹⁰⁰ Hay was created earl in 1622, largely due to his influence within the court of James I: GEC Cokayne, *The Complete Peerage of England, Scotland, Ireland, Great Britain and the United Kingdom Extant, Extinct, or Dormant* (London, 1887) vol I, 151. Given that he had not attained this rank at the time of the transactions discussed, for greater clarity he is referred to as Sir James Hay in this thesis.

⁹⁰¹ Roy E. Schreiber, 'Hay, James, first earl of Carlisle (c. 1580–1636)' in *Oxford Dictionary of National Biography* at <<http://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-12723>> accessed 26 August 2018.

lived, and introduced more of that expense in the excess of clothes and diet than any other man ... [A]fter having spent, in a very jovial life above four hundred thousand pounds, which, upon a strict computation he received from the crown, he left not a house nor acre of land to be remembered by.⁹⁰²

It seems likely that Patrick Black, the obligee in the case, was a tailor: certainly a man of that name was granted the office of Tailor to the Prince in July 1613.⁹⁰³ Given Sir James Hay's proximity to the palace, and his extravagance in the way of clothing, it is not inconceivable that the debts that led to the entering of the bonds in question arose from Black's provision for Hay's sartorial needs.⁹⁰⁴

Although at the time of entering into the first bond, in 1609, the obligor, Sir James Hay, was an expectant heir,⁹⁰⁵ this status was not referred to in any of the pleadings, nor by the court; in light of the defendants' acceptance that the debts in question were justly due and payable,⁹⁰⁶ this is perhaps not surprising.

A1.10 *Tirwhitt v Martyn* (1646)

The suit of *Tirwhitt v Martyn* (1646)⁹⁰⁷ also involved a tailor and an expectant heir; and, as was the case in *Black v Earl of Carlisle*, the obligor's expectancy was not argued. The obligor – the plaintiff in this suit – was Sir Phillip Tyrwhitt,⁹⁰⁸ baptised in 1598, the son and heir of Sir Edward Tyrwhitt.⁹⁰⁹ Sir Edward died in 1638, meaning that at the time of the transactions complained of, the plaintiff had yet to succeed to his father's title or estate.

The plaintiff sought relief from two counterbonds which he had sealed to the defendant Christopher Martyn in 1624, when he was in his mid-twenties, indemnifying Martyn in

⁹⁰² Edward Hyde, *The History of the Rebellion and Civil Wars in England Begun in the Year 1641* (Oxford, 1702) vol I, books I-IV, 77–78.

⁹⁰³ 'James I - Volume 74: July 1613', in *Calendar of State Papers Domestic: James I, 1611-18*, ed. Mary Anne Everett Green (London, 1858), at 189-196: *British History Online* <<http://www.british-history.ac.uk/cal-state-papers/domestic/jas1/1611-18/pp189-196>> accessed 3 April 2019. The prince in question was later Charles I.

⁹⁰⁴ Further evidence for the identification can be found in a reference to Prince Charles having 'availed himself of the services of Lord Carlisle's tailor': Lesley Ellis Miller, 'Dress to Impress: Prince Charles Plays Madrid, March-September 1623' in Alexander Samson (ed), *The Spanish Match: Prince Charles's Journey to Madrid, 1623* (Aldershot, 2006) 30, at 37. To date it has been impossible to date the reference, which was found by Miller in National Library of Scotland Ms. 1879, although given the use of Hay's title of Carlisle, it would seem to be after 1622.

⁹⁰⁵ Unfortunately, the standard works of biographical reference are silent as to the date of death of Sir James Hay, the borrower's father, but he appears to have died in 1610 ('1:16 Hays of Errol (Kinnoull Branch' in *The Spectator*, 10 June 1865, page 12 at <<http://archive.spectator.co.uk/article/10th-june-1865/12/116-hays-of-erroll-kinnoull-branch>> accessed 3 April 2019).

⁹⁰⁶ C 78/573, no. 6 [Membrane 2; IMG_0278].

⁹⁰⁷ C 78/529, no. 12.

⁹⁰⁸ As the name is more commonly spelled 'Tyrwhitt', that spelling is adopted here except in references to the decree.

⁹⁰⁹ GEC Cokayne, *Complete Baronetage* (Exeter, 1900) vol I, 83. The identification of the plaintiff as this Sir Philip Tyrwhitt, third Baronet (as opposed to his grandfather, the first baronet, or his son, the fourth, both of the same name) is based on the description of the plaintiff as 'baronet' in the bill, which was exhibited in 1633: the first baronet died in 1624, and the fourth did not succeed to the title until 1668.

regard to several bonds Martyn had entered as the plaintiff's surety.⁹¹⁰ Martyn had apparently been Sir Philip Tyrwhitt's tailor since 1619, and various financial arrangements had been made between them. This included the counterbonds in question, on which Martyn obtained judgment in the King's Bench despite having expressly promised not to do so.⁹¹¹ The plaintiff alleged that the defendant had for a number of years refrained from executing this judgment – and had, in fact, kept its existence secret from the plaintiff – in order to use it as leverage later.⁹¹² This chance came, Sir Philip alleged, when he was imprisoned in the Fleet Prison for other debts: '...the complainant having then many suits and troubles the better to obtain his enlargement was forced to compound with the said Christopher Martyn before he could be released'.⁹¹³

The defendant died before the matter could come to a full hearing, and the bill was revived against his executor, John Martyn.⁹¹⁴ In the event, the plaintiff's bill was dismissed.⁹¹⁵ The initial hearing of the matter resulted in an order that disputed accounts made between the parties in 1630 and 1633 – which appear to have been to the advantage of the defendant – should be set aside, and that the plaintiff should pay John Martyn the amount of the losses actually suffered by his testator, as certified by master's report.⁹¹⁶ The defendant petitioned the court to reverse this order, arguing that as the executor of the obligee, the now defendant John Martyn was a stranger to the transactions in question, and presumably therefore would be unable to prove the details of them; accordingly, it was argued, the accounts made between the parties while the obligee was alive should stand.⁹¹⁷ The plaintiff failed to appear at the subsequent hearing, or to otherwise show cause why this view should not prevail, and consequently his bill was dismissed.⁹¹⁸

A1.11 *Audley v Harrison* (1653)

In *Audley v Harrison* (1653)⁹¹⁹ the evidence that the obligor was an expectant heir at the time of the transaction in question comes from the plaintiff's bill, although not framed in a way that makes the issue material to the outcome. The plaintiff, Mulineux Audley, entered two bonds as surety for his brother Thomas: the first, of £200 conditioned for payment of £104, to the defendant, Benjamin Harrison, in July 1641;⁹²⁰ and the second (of £50 conditioned for payment of £25), to a Susan Morris in September 1646.⁹²¹ The defendant was also a surety in this second bond.⁹²² Neither bond was paid by Thomas before his death

⁹¹⁰ C 78/529, no. 12 [Membrane 2; IMG_0003].

⁹¹¹ Ibid [Membrane 1; IMG_0001].

⁹¹² Ibid.

⁹¹³ Ibid [Membrane 2; IMG_0003].

⁹¹⁴ Ibid [Membrane 1; IMG_0002].

⁹¹⁵ Ibid [Membrane 4; IMG_0006].

⁹¹⁶ Ibid [Membrane 3; IMG_0004].

⁹¹⁷ Ibid [Membrane 4; IMG_0005].

⁹¹⁸ Ibid.

⁹¹⁹ C 78/580, no. 8B.

⁹²⁰ Ibid [Membrane 1; IMG_0438].

⁹²¹ Ibid [Membrane 2; IMG_0439].

⁹²² Ibid.

in 1649, although he had apparently tried to pay Morris the conditioned amount of £25 before it was due.⁹²³ Morris declined to receive the money early, not wishing to lose the corresponding amount of interest, and so the defendant prevailed upon Thomas to give the £25 to him, so that he might have the benefit of it, promising to pay it to Morris on the due date.⁹²⁴ The defendant never paid Morris; moreover, after Thomas's death he sued the plaintiff on the first bond, and caused the second bond to be put in suit against him, on which debt Mulineux was arrested.⁹²⁵

The court found that the plaintiff had received half of the principal amount of the first bond to his own use, and therefore ordered that he repay £50 to the defendant, upon which the defendant was to release him from prison, pay the £25 to Morris, and deliver up the bonds.⁹²⁶

The identification of the principal obligor, Thomas Audley, as an expectant heir is made in the bill, where Thomas's attempt to pay Morris the £25 before the due date is explained by the fact that shortly after entering this second bond he 'received a great estate of money'.⁹²⁷ It has so far been impossible to reconcile the internal evidence of the pleadings with any other primary or secondary source in order to satisfactorily identify the principal obligor. The bill shows that Thomas Audley had a brother called Mulineux; that he died on or about 17 August 1649; and that shortly after September 1646 he 'received a great estate'. The TNA catalogue entry for the bill shows that the events took place in Huntingdonshire.⁹²⁸

However, the details of the most likely branch of the fairly extensive Audley family in Huntingdonshire, the Audleys of St Ives, do not entirely match the internal evidence: Thomas Audley of St Ives, although having a brother by the right name, apparently lived until at least 1680,⁹²⁹ and his father, Robert, from whom it might be assumed his 'great estate' descended, died in 1641, some five years before the bill indicates.⁹³⁰ Further research is necessary either to resolve these apparent contradictions, or to identify a different branch of the family as the correct one.

⁹²³ Ibid [Membrane 2; IMG_0440].

⁹²⁴ Ibid [Membrane 2; IMG_0439].

⁹²⁵ Ibid [Membrane 2; IMG_0439].

⁹²⁶ Ibid [Membrane 2; IMG_0440].

⁹²⁷ Ibid [Membrane 2; IMG_0439].

⁹²⁸ *Audley v Harrison* (1651) C 9/7/3.

⁹²⁹ 'Priory Manor' in 'Parishes: St Ives', in *A History of the County of Huntingdon: Volume 2*, ed. William Page, Granville Proby and S Inskip Ladds (London, 1932), at 210-223: *British History Online* <<http://www.british-history.ac.uk/vch/hunts/vol2/pp210-223>> accessed 3 April 2019.

⁹³⁰ Will of Robert Audley (9 November 1641) PROB 11/187. Given that it was an estate of money, it is possible that the money was paid over upon the administration of his father's estate, which may have taken some time.

A1.12 *Crofts v Buck* (1653)

The identification of the status of the principal obligor in *Crofts v Buck* (1653)⁹³¹ – in this instance, as a reversioner – also comes from the plaintiff's bill.⁹³² However, as the plaintiff was the executrix of the obligee, the presence of this information in the bill arguably raises, rather than resolves, doubts about the establishment of a jurisdiction to relieve expectant heirs, at least in the form of those with a reversionary interest, in Chancery at this time.

Having accrued debts⁹³³ to the testator, Margaret Chosell, and with no way to repay them until the reversion vested in him, the principal obligor, the defendant Stephen Allen, apparently absented himself to avoid arrest.⁹³⁴ Chosell placed the matter (and other debts owed to her) in the hands of one Thomas Coates, by way of a letter of attorney.⁹³⁵ The defendant Dennis Buck negotiated a deal with Coates for the debt on Allen's behalf, and subsequently came to an arrangement whereby Buck entered two bonds to Coates, and one to a third party, to secure payment of the negotiated amount.⁹³⁶ The suit arose from the lender's allegation that Coates had no longer retained his power of attorney at the time of this arrangement, and that consequently Allen's debts remained unpaid; she also alleged that Allen had conveyed certain lands to Buck in trust, from which the debt to her was to be repaid.⁹³⁷

In his answer, Buck alleged that he had acquainted Margaret Chosell with his arrangement with Coates, and that her only response had been to tell him that she would have made a more favourable bargain with Buck than Coates had.⁹³⁸ He also denied the existence of any trust.⁹³⁹ The court found no cause in equity to relieve the plaintiff, and the bill was dismissed.⁹⁴⁰

⁹³¹ C 78/552, no. 2.

⁹³² Ibid [Membrane I; IMG_0162]. It has not been possible positively to identify the principal obligor, or indeed any of the parties, for the purpose of discovering biographical detail, although it seems from the TNA catalogue entry for the pleadings in the suit, C 10/13/27, that at least one of the parties was located in Norfolk.

⁹³³ The amount owed to Chosell by Allen was in dispute: the plaintiff's bill alleged the amount to be around £300, whereas the defendant's answer put the figure at £75. It was unnecessary for the court to decide the matter, but as the eventual composition of £65 between Buck and Coates was left in force, due to the dismissal of the plaintiff's bill, perhaps we can infer that the court preferred the defendant's view (C 78/552, no. 2 [Membrane 1; IMG_0162-0163].)

⁹³⁴ Ibid [Membrane I; IMG_0162].

⁹³⁵ Ibid.

⁹³⁶ Ibid [Membrane 2; IMG_0165]. The second of the bonds Buck entered to Coates is particularly interesting, as it was made payable one year after the death of the widow of the holder of Allen's reversionary estate; in other words, it was post-obit. As far as can be ascertained, this fact does not seem to have troubled the court.

⁹³⁷ Ibid [Membrane 1; IMG_0162-0163].

⁹³⁸ Ibid [Membrane 1; IMG_0164].

⁹³⁹ Ibid [Membrane 2; IMG_0166].

⁹⁴⁰ Ibid.

A1.13 *Rich v Sydenham* (1671)

The plaintiff obligee in *Rich v Sydenham* (1671)⁹⁴¹ brought suit in Chancery to enable recovery of money owed on a bond from the estate gained by the defendant obligor on his marriage, then held in trust for his wife.⁹⁴² The pleadings reveal that the defendant, John Sydenham, had, with one John Stydolph, entered a bond of £1,600 to the plaintiff, Charles Rich, defeasanced for payment of £800 within three months of the death of either of the obligor's fathers, or when either of them married.⁹⁴³ In his answer to the suit, Sydenham alleged that he had never received any more than £90 from Rich, and that he had entered the bond when he 'was but newly come from the tavern'.⁹⁴⁴

No entry of the hearing of the matter could be found in the entry books, so the only information available as the court's decision comes from the two very brief printed reports of the suit. The first of these states only that there was 'no equitable consideration' leading to dismissal.⁹⁴⁵ The second is a little more forthcoming:

the security being gotten from the defendant when he was drunk, [Bridgman LK] would not give the plaintiff any relief in equity, not so much as for the principal he had really lent; and so the bill was dismissed.⁹⁴⁶

A1.14 *Fairfax v Trigg* (1677)

The plaintiff in *Fairfax v Trigg* (1677)⁹⁴⁷ appears to have been a remainderman, with his father's estate passing firstly to the plaintiff's mother for her life before coming to him.⁹⁴⁸ Consequently, at the time of the transactions complained of in the suit, Henry Fairfax had substantial expectations – including of the manor of Hurst in Berkshire,⁹⁴⁹ and his father's interests in the estate of Evenwood Park in County Durham – but little ready cash.⁹⁵⁰ Wishing to obtain money without his mother or his uncle, William Barker, learning of it, Fairfax approached the defendant, Stephen Trigg, a 'doctor of physick' and one Richard King, and subsequently entered a penal bond of £600 to Trigg, securing what he thought would be a loan of £300 in cash.⁹⁵¹ Having entered this bond, Fairfax was then prevailed upon by Trigg to also give a warrant of attorney for a judgment for £600, Trigg apparently

⁹⁴¹ 3 Chan. Rep. 74; 1 Chan. Cas. 202.

⁹⁴² *Rich v Sydenham* (1671) 1 Chan. Cas. 202.

⁹⁴³ *Rich v Sydenham* (23 January 1667) C 6/178/52.

⁹⁴⁴ *Ibid.*

⁹⁴⁵ *Rich v Sydenham* (1671) 3 Chan. Rep. 74.

⁹⁴⁶ *Rich v Sydenham* (1671) 1 Chan. Cas. 202.

⁹⁴⁷ Rep. Temp. Finch 314; 79 Selden Soc. 448.

⁹⁴⁸ Will of Henry Fairfax (7 August 1650) PROB 11/213/218; 'Parishes: Hurst', in *A History of the County of Berkshire: Volume 3*, ed. PH Ditchfield and William Page (London, 1923), at 247-260: *British History Online* <<http://www.british-history.ac.uk/vch/berks/vol3/pp247-260>> accessed 24 May 2018. Henry Fairfax's father was the second son of Thomas, Viscount Fairfax of Emely in Ireland, and his mother was the daughter of Sir Thomas Browne, author of *Religio Medici* (*ibid.*).

⁹⁴⁹ CW Penny, 'The Fairfaxes of Hurst' (1891) 2 *Berkshire Archaeological and Architectural Society Quarterly Journal* 122, at 126.

⁹⁵⁰ *Fairfax v Trigg* (20 April 1676) C 6/220/35.

⁹⁵¹ *Ibid.*

promising to seal a defeasance of this judgment for £300.⁹⁵² However, the defeasance was never drawn up, and when the plaintiff asked for his money Trigg instead persuaded him to accept what he claimed to be £300 worth of stockings.⁹⁵³ These stockings were selected and sold on by Richard King, and raised only £120, of which the plaintiff received £60.⁹⁵⁴ Shortly afterwards Trigg executed the judgment against the plaintiff, and threatened also to sue on the bond, alleging that they were two distinct securities.⁹⁵⁵ Notwithstanding his dissatisfaction at this state of affairs, and hoping to prevent his family discovering his predicament, Fairfax paid Trigg several sums at various times, amounting to £240, and did not seek relief in Chancery until some eight years after entering the securities.⁹⁵⁶

Nottingham LC granted relief only against the penalty, despite noting that:

this court ought to discountenance and relieve against all corrupt traffic between shopkeepers and young gentlemen who are usually drawn in and entangled with such kind of bargains.⁹⁵⁷

His lordship explained his refusal to grant the usual relief – cancellation of the securities on payment of what had actually been received by the plaintiff, plus interest – as being based on the fact that Fairfax

never complained of this bargain in eight years, but which is worse hath actually paid 240l. of the money, whereby he hath admitted the values to be reasonable ... [If] he had freshly pursued the matter, his case had been better.⁹⁵⁸

Accordingly, the defendant was ordered to assign and transfer the judgment at the plaintiff's direction, and to deliver up the bond, on the plaintiff paying the remaining £60 of the £300.⁹⁵⁹ As a mark of the court's dislike of such bargains, however, the defendant received no interest or costs.⁹⁶⁰

A1.15 *Waller v Dale* (1677)

The transaction complained of in *Waller v Dale* (1677)⁹⁶¹ conforms in every respect to the archetypal expectant heir case, with one important difference. The plaintiff, Sir William Waller, in around 1660 had entered into two penal bonds, with accompanying warrants of attorney for judgment, of £600 and £400, conditioned for £300 and £200 and interest respectively, for which, rather than

⁹⁵² Ibid.

⁹⁵³ Ibid.

⁹⁵⁴ Ibid.

⁹⁵⁵ *Fairfax v Trigg* (4 November 1676) C 33/247, f. 37 at 37v.

⁹⁵⁶ Ibid.

⁹⁵⁷ *Fairfax v Trigg* (1677) 79 Selden Soc 448.

⁹⁵⁸ Ibid.

⁹⁵⁹ *Fairfax v Trigg* (4 November 1676) C 33/247, f. 37 at 37v.

⁹⁶⁰ Ibid.

⁹⁶¹ Rep. Temp. Finch 296; Dickens 8; 1 Chan. Cas. 276.

the ready money he expected, he received a parcel of silk alleged to be worth £500 but which could only be sold for £200.⁹⁶² Despite the fact that he had entered the bonds with two other young men, the defendant only brought action on the bonds against Waller.⁹⁶³ The relief granted also conformed to that granted in similar cases, with Nottingham LC ordering that the bonds be cancelled and the judgments be assigned to the plaintiff on payment of £200 and interest.⁹⁶⁴

The important difference between this and the reported other suits involving expectant heirs is that none of the printed reports, or the entry book entries for the suit,⁹⁶⁵ mention that Sir William Waller was an expectant heir at the time he entered the bargain with Dale. Waller was the son of Sir William Waller, a Parliamentary general in the civil war, who died in 1668,⁹⁶⁶ meaning that the bargain in question was entered during the lifetime of the elder Waller. The plaintiff inherited a substantial estate from his father, including Osterley Park in Middlesex, which he sold in 1670.⁹⁶⁷

A1.16 Draper v Dean (1679)

In 1675 Edmund Draper exhibited his bill against Sir Robert Jason and Thomas Deane, alleging that he had lent Jason £1,000 secured by mortgage, but that the mortgaged properties were subject to encumbrances, including a penal statute into which Jason had entered with Deane.⁹⁶⁸ In reality, this suit was brought to benefit Jason, as he was then outlawed and so could not seek relief in Chancery against the statute to Deane on his own behalf. Deane's counsel were not taken in by this ruse, objecting that Draper had no interest in bringing the action, and was therefore without equity in the matter, but Nottingham LC did not agree.⁹⁶⁹

Robert Jason and his brother Henry had, in the lifetime of their father,⁹⁷⁰ become indebted to Deane, a silkman of Paternoster Row, London, in the amount of £2,554 6s. 4d. for the

⁹⁶² Rep. Temp. Finch 296.

⁹⁶³ Ibid.

⁹⁶⁴ *Waller v Dale* (1 May 1676) C 33/246, f. 518.

⁹⁶⁵ Unfortunately the pleadings for the suit do not seem to have survived, so it is impossible to discover whether the plaintiff's expectancy was raised in his bill. However, as the substance of the bill seems to be reproduced in the entry for the hearing of the suit, it seems likely that it was not.

⁹⁶⁶ M.W. Helms, Eveline Cruickshanks and Basil Duke Henning, 'Waller, Sir William I (1598-1668), of Osterley Park, Mdx.' in *The History of Parliament: the House of Commons 1660-1690*, ed. B.D. Henning (1983) at <<http://www.historyofparliamentonline.org/volume/1660-1690/member/waller-sir-william-i-1598-1668>> accessed 24 May 2018.

⁹⁶⁷ Eveline Cruickshanks and Basil Duke Henning, 'Waller, Sir William II (c.1639-99), of Strutton Ground, Westminster' in *The History of Parliament: the House of Commons 1660-1690*, ed. B.D. Henning (1983) at <<http://www.historyofparliamentonline.org/volume/1660-1690/member/waller-sir-william-ii-1639-99>> accessed 24 May 2018.

⁹⁶⁸ *Draper v Jason* (1679) C 78/950, no. 4 [Membrane 1; IMG 0200].

⁹⁶⁹ *Draper v Dean* (1679) 79 Selden Soc. 602.

⁹⁷⁰ Sir Robert Jason of Broad, Somerset, the first baronet and father of Robert and Henry, died in 1675 (J Burke, *A Genealogical and Heraldic History of the Extinct and Dormant Baronetcies of England* (London, 1837), 281).

provision of various goods, secured by a statute of £5,000 penalty.⁹⁷¹ The actual value of the goods received by the Jasons, however, was considerably less: in his answer, Sir Robert Jason alleged that the goods, including silks, lace and horses, were worth, and could be sold for, no more than £280.⁹⁷² Relief against the statute was granted on the basis of the repayment by Jason to Deane of the true value of the goods received (to be assessed by a master) with interest.⁹⁷³ Nottingham LC ‘declared that this kind of infamous traffic with sons in the lifetime of their fathers ought to be discouraged and destroyed, though the sons be of full age’.⁹⁷⁴ His lordship also made reference to there being ‘many precedents’ for cases of this kind, in which ‘this court did never allow any more than the true value’; he also observed that there was no contingency involved in the bargain between Deane and Jason, because ‘the statute required present payment and both sons were bound in it, though it could not be executed in the father’s life’.⁹⁷⁵

A1.17 *Pawlett v Pleydell* (1679)

The plaintiff in *Pawlett v Pleydell* (1679),⁹⁷⁶ Lord Francis Pawlett, was a younger son of the Marquis of Winchester.⁹⁷⁷ Although entitled to a substantial estate on the death of his father, Pawlett received only a small allowance during his father’s lifetime.⁹⁷⁸ Sometime after March 1674⁹⁷⁹ he granted two annuities, one to the defendant Charles Pleydell of £40 per annum, in return for £60, and the other of £50 per annum to one Fox, in return for £100; both annuities were payable during the plaintiff’s lifetime, and each was secured by a statute of £500.⁹⁸⁰ Having paid the annuities for some time, Pawlett fell into arrears of £45, and Pleydell sued forth an extent on the statutes, from which Pawlett sought relief.⁹⁸¹

Despite the fact that Pleydell stood to receive £1,000 for his investment of £160, Nottingham LC saw no reason to grant relief, describing the transactions as ‘voluntary foolish bargains of [Pawlett’s] own making’;⁹⁸² he did, however, persuade the parties to settle, with the statutes being vacated on payment of £750.⁹⁸³

⁹⁷¹ *Draper v Jason* (1679) C 78/950, no. 4 [Membrane 2; IMG_0202].

⁹⁷² *Ibid.*

⁹⁷³ *Ibid.*

⁹⁷⁴ *Draper v Dean* (1679) 79 Selden Soc. 602. Robert Jason was apparently 33 years of age at the time of the transactions with Deane (*ibid.*).

⁹⁷⁵ *Ibid.* The insertion of a contingency into a bargain was a common attempt to avoid the usury statutes: see discussion of this point at 1.1.

⁹⁷⁶ *Pawlett v Pleydell* (1679) 79 Selden Soc. 739.

⁹⁷⁷ *Ibid.*

⁹⁷⁸ *Ibid.*

⁹⁷⁹ The time of the bargains, while not given, has been deduced from the fact that they were made ‘within a year’ (*Pawlett v Pleydell* (19 May 1679) C 33/251, f. 460v) before the death of the plaintiff’s father: John Paulet, Marquis of Winchester, died in March 1675 (GEC Cokayne, *The Complete Peerage of England, Scotland, Ireland, Great Britain and the United Kingdom, Extant, Extinct, or Dormant* (London, 1898) vol VIII, 175).

⁹⁸⁰ *Pawlett v Pleydell* (19 May 1679) C 33/251, f. 460v. The second annuity was later assigned by Fox to Pleydell (*ibid.*).

⁹⁸¹ *Pawlett v Pleydell* (19 May 1679) C 33/251, f. 460v.

⁹⁸² *Pawlett v Pleydell* (1679) 79 Selden Soc. 739.

⁹⁸³ *Pawlett v Pleydell* (19 May 1679) C 33/251, f. 460v.

A1.18 Varnees' Case (1680)

It has proved impossible to identify the plaintiff in *Varnee's Case* (1680),⁹⁸⁴ or to find any decree or entries in the record, and so the only information on the suit comes from an exceedingly brief report of the case. The young plaintiff, heir to his father and in his father's lifetime, entered a post obit. bond of £600 to secure a loan of £100.⁹⁸⁵ Varnee sought relief in Chancery in response to the bond being put in suit, and Nottingham LC granted relief on payment of £100, all of which he had received, and interest.⁹⁸⁶ The report does not mention any fraud: this may be because there was none, but, given the extreme brevity, may simply be an oversight. Accordingly, no detailed conclusion can be drawn regarding the basis of the relief.

A1.19 Nott v Hill (1682-1687)

The first reported hearing of the disputed bargain between Thomas Nott, son and heir of Sir Thomas Nott, and George Hill occurred on 20 July 1682.⁹⁸⁷ Thomas Nott, having argued with his father about Sir Thomas's use of a large amount of money left by Nott's mother (a Mrs Thinn, Sir Thomas's first wife) to the younger Nott and any siblings he may have had, was left in 'extremity of misery and want' by his father's decision to cut him off without any maintenance allowance.⁹⁸⁸ However, Sir Thomas could not disinherit the younger Nott entirely: the property at Richmond, Surrey,⁹⁸⁹ of which the elder Nott was life tenant under what appears to have been a strict settlement, with the remainder to go to the younger Nott on Sir Thomas's death. In 1671⁹⁹⁰ Thomas Nott agreed to convey this property to the defendant on the death of Sir Thomas in return for a lump sum of £30 plus the promise of £20 per annum⁹⁹¹ while both he and his father lived.⁹⁹² Sir Thomas apparently only lived five years⁹⁹³ beyond the making of this bargain.

The plaintiff argued that the bargain should be set aside on the grounds of significant undervalue, and because it had been 'gained by extremity, working on the plaintiff's necessity'.⁹⁹⁴ It was argued that there existed a precedent to grant relief from bargains

⁹⁸⁴ *Varnee's Case* (1680) 2 Freeman 63.

⁹⁸⁵ *Ibid.*

⁹⁸⁶ *Ibid.*

⁹⁸⁷ *Nott v Hill* (1682) 2 Chan. Cas. 120; note that in *Nott v Johnson and Graham, exec. Hill* (1687) 2 Vern. 27, the date of this first hearing is given as 24 June 1682.

⁹⁸⁸ *Nott v Hill* (1682) 2 Chan. Cas. 120 at 120.

⁹⁸⁹ This property was called 'the Queens Stables' (*ibid.*); it was worth £800 if sold (*Nott v Johnson and Graham, exec. Hill* (1687) 2 Vern. 27 at 27, and '£30 or £40 per annum' in income (*Nott v Hill* (1682) 2 Chan. Cas. 120 at 120).

⁹⁹⁰ *Nott v Hill* (1683) 1 Vern. 167 at 167.

⁹⁹¹ This annuity was to be paid by Hill's father: it is unclear from the wording of the report whether it is the elder or younger Hill who was 'an attorney at law'; certainly, the conveyance was to go to the younger Hill, the defendant.

⁹⁹² *Nott v Hill* (1682) 2 Chan. Cas. 120 at 120.

⁹⁹³ Two subsequent reports (*Nott v Hill* (1683) 1 Vern. 167 at 167 and *Nott v Johnson and Graham, exec. Hill* (1687) 2 Vern. 27 at 27) of later hearings of this matter state that Sir Thomas lived ten years; however, there is an editor's note in the first of these reports to the effect that the pleadings in the case state it was only five years.

⁹⁹⁴ *Nott v Hill* (1682) 2 Chan. Cas. 120 at 120.

obtained through the weakness of heirs during their father's life time, and that such a precedent also extended to bargains for land.⁹⁹⁵ In reply, the defendant argued that there had been no fraud involved, and that the heir had himself sought the bargain; additionally, the contingent nature of the bargain – in which the usual risk of the plaintiff pre-deceasing his father had been augmented by the possibility that the father would have lived for many years, resulting in the annuity adding up to more than the property was worth – should preclude the granting of relief.⁹⁹⁶ These arguments had no effect, and Nottingham LC granted Nott the relief sought; this was a reconveyance of the estate, presumably on payment of the £130 he had received, being the initial £30 and the five years of the £20 per annum annuity he received before his father's death.⁹⁹⁷ The matter was subsequently reheard by North LK, in 1683, and the decree of Nottingham LC overturned;⁹⁹⁸ a further rehearing by Jeffreys LC in 1687, however, reinstated the original order for relief.⁹⁹⁹

A1.20 *Batty v Lloyd* (1683)

The report of this suit is very brief, and gives very little detail: the plaintiff stood to inherit an estate on the deaths of 'two old women',¹⁰⁰⁰ and against that expectation made a bargain with the defendant Lloyd in which the plaintiff received £350, with Lloyd receiving £700 when Batty inherited.¹⁰⁰¹ As security for this amount, the plaintiff mortgaged the reversionary estate to Lloyd; the old women both died within two years of the making of the bargain, and Batty sought relief in Chancery.¹⁰⁰²

A fuller, and more accurate, picture of the transaction, however, emerges from the bill and answer in the suit. The reversionary estate in question was two-thirds of a one-third share of the manor and rectory of Bengworth in Worcestershire, which was to come to Elizabeth Batty, and through her to her husband Gilbert, a goldsmith, on the deaths of Elizabeth's grandmother, Anne Knivett, and mother, Mary Ewer.¹⁰⁰³ Knivett was around 80 years of age, and Ewer around 50, in February 1678 when the mortgage to John Lloyd was made, and the value of the estate was given in the plaintiffs' bill as £60 per annum, although this was disputed by Lloyd in his answer.¹⁰⁰⁴ There was also a second agreement made between the parties, in May 1680, in which the conveyance of the estate to Lloyd was made absolute on Lloyd lending the plaintiffs a further £100, with the condition that if they paid him £900 and

⁹⁹⁵ Ibid.

⁹⁹⁶ Ibid.

⁹⁹⁷ Ibid.

⁹⁹⁸ *Nott v Hill* (1683) 1 Vern. 167 at 168.

⁹⁹⁹ *Nott v Johnson and Graham, exec. Hill* (1687) 2 Vern. 27 at 27.

¹⁰⁰⁰ *Batty v Lloyd* (1683) 1 Vern. 142 at 142.

¹⁰⁰¹ Ibid.

¹⁰⁰² Ibid.

¹⁰⁰³ *Batty v Lloyd* (22 June 1682) C 5/453/37. Although the printed report of the case identifies only one plaintiff, Elizabeth, the suit was brought by both Battys.

¹⁰⁰⁴ *Batty v Lloyd* (22 June 1682) C 5/453/37.

interest within six months of the death of the longest lived of Knivett and Ewer, Lloyd would reconvey the estate to the plaintiffs.¹⁰⁰⁵

Knivett died in June 1681, and Ewer followed six months later, on 28 December of that year; accordingly, the plaintiffs were due to pay Lloyd £977 17s. on 28 June 1682, having received £400.¹⁰⁰⁶ They exhibited their bill on 22 June 1682. Unfortunately for the plaintiff, North LK saw ‘nothing ill in this bargain’.¹⁰⁰⁷ Relief was not granted, apparently on the grounds that the defendant had given full value for the estate thus acquired, although, in the event, the bargain had favoured the defendant.¹⁰⁰⁸

A1.21 *Wood v Duke of Newcastle* (1683)

In *Wood v Duke of Newcastle* (1683),¹⁰⁰⁹ the creditors of the late Henry, earl of Ogle, the son and heir of the duke of Newcastle, sought to recover their debts from money the earl had received on his marriage. These debts allegedly amounted to around £10,000,¹⁰¹⁰ and were owed to the sorts of merchants and tradespeople who supplied the wants of the fashionable young men of the seventeenth century: the plaintiffs were a mercer, a fringemaker, a tailor, and a coachmaker,¹⁰¹¹ and during the course of the proceedings in Chancery a linen draper, a harness maker, and a laceman were added as proven creditors.¹⁰¹² All of these debts had been incurred by the earl during his minority, between the ages of sixteen, when he married Elizabeth Percy, daughter and heir of the earl of Northumberland, and seventeen, when he died.¹⁰¹³

The minority of the obligor, however, was not raised by the defendant representatives of the late earl’s estate:¹⁰¹⁴ *Wood v Duke of Newcastle* is another example¹⁰¹⁵ of a suit in which the obligor (or, in this case his representatives) did not challenge the transactions with which the suit dealt. Rather, at issue was whether the £20,000 received by the earl on his marriage to Elizabeth Percy formed part of his estate, and whether, if so, that money was available from which to pay the debts owed to the plaintiffs.¹⁰¹⁶ The court answered both questions in the affirmative, and ordered the defendant earl of Essex, as guardian to the

¹⁰⁰⁵ John Lloyd alleged in his bill that this second loan was necessary because Gilbert Batty ‘mispen[t] his time and neglect[ed] his trade and employment [and] did waste and consume most of his estate and thereupon was cast into prison’ (*Batty v Lloyd* (22 June 1682) C 5/453/37). For this reason, half of the £100 advanced was put into trust for Elizabeth Batty, rather than paid to Gilbert (*Batty v Lloyd* (22 June 1682) C 5/453/37).

¹⁰⁰⁶ *Batty v Lloyd* (22 June 1682) C 5/453/37.

¹⁰⁰⁷ *Batty v Lloyd* (1683) 1 Vern. 142 at 142.

¹⁰⁰⁸ *Ibid.*

¹⁰⁰⁹ C 78/1223, no. 4.

¹⁰¹⁰ *Ibid* [Membrane 1; IMG_0105].

¹⁰¹¹ *Ibid.*

¹⁰¹² *Ibid* [Membrane 4; IMG_0111].

¹⁰¹³ *Ibid* [Membrane 1; IMG_0105].

¹⁰¹⁴ The plaintiffs were presumably intending to forestall any such argument by describing the goods bought on credit by the young earl during this time as ‘necessary and suitable to his honourable degree and quality’: *ibid.*

¹⁰¹⁵ See, for example *Black v Earl of Carlisle* (1641) C 78/573, no. 6.

¹⁰¹⁶ C 78/1223, no. 4 [Membrane 2; IMG_0107].

defendant widow Elizabeth (who was only thirteen when the bill was exhibited), to pay the plaintiffs from the late earl's estate.¹⁰¹⁷

A1.22 *Astley v Patten* (1687)

The plaintiff in *Astley v Patten* (1687)¹⁰¹⁸ had an expectancy of a remainder in tail after the death of his uncle; his uncle, being much indebted, persuaded the plaintiff to join with him in selling the lands in question.¹⁰¹⁹ The main concern of the plaintiff, and the court, was with the alleged sharp practice of both the original purchaser of the estate, one Williamson, and the defendant Patten.¹⁰²⁰ However, the court seems to have taken the view that that Patten at least had not acted contrary to equity – despite a fairly compelling argument that the estate had been purchased for significantly less than it was worth – and the plaintiff's bill was dismissed.¹⁰²¹

A1.23 *Lamplugh v Smith* (1688)

The suit of *Lamplugh v Smith* (1688),¹⁰²² is notable for two reasons. The first of these is that the notorious Edward Stisted¹⁰²³ figured in the case; the second is that the defendant, Sir James Smith,¹⁰²⁴ appears to have accepted as a matter of course that the court would find only the amount actually received by the obligors to be payable, suggesting that by this time the court's jurisdiction to grant relief on payment of principal and interest – rather than the defeasanced amounts – was well established.

Thomas Lamplugh, eldest son and heir to John Lamplugh of Cumberland,¹⁰²⁵ as a young man newly arrived in London had the misfortune to meet Edward Stisted, who proceeded to 'draw [Lamplugh] into ill company and gaming and extravagant ways of expense'.¹⁰²⁶ Having first, as the plaintiff alleged, created Lamplugh's need for money, Stisted then introduced

¹⁰¹⁷ Ibid [Membrane 5; IMG_0114].

¹⁰¹⁸ C 78/1594, no. 1.

¹⁰¹⁹ Ibid [Membrane 1; IMG_0194].

¹⁰²⁰ Ibid [Membrane 4; IMG_0200].

¹⁰²¹ Ibid [Membrane 10; IMG_0213].

¹⁰²² *Lamplugh v Smith* (1688) 2 Vern. 77.

¹⁰²³ See Chapter 3, above at 3.5, for a discussion of Stisted's involvement with Richard Berney; Stisted also figured in the bargain which resulted in the suits of *Bill v Price* (1687) 1 Vern. 467; and *Witley v Price* (1688) 2 Vern. 78.

¹⁰²⁴ The report incorrectly identifies the lender as Sir William Smith; it is clear from the entry book entries and pleadings in the suit that it was, rather, Sir James Smith to whom Lamplugh was indebted (*Lamplugh v Smith* (20 February 1688) C 33/270, f. 396v; *Lamplugh v Smith* (26 January 1688) C 5/70/83). Sir James Smith also featured in the Berney suits (see Chapter 3, above at 3.4.2.3).

¹⁰²⁵ The plaintiff appears to have been the son of Colonel John Lamplugh of Lamplugh Hall, Cumberland, who died in 1688; the younger Lamplugh succeeded to his father's Cumberland estates and an income of around £1,000 per annum (Eveline Cruickshanks and Richard Harrison, 'Lamplugh, Thomas (1656-1737), of Lamplugh Hall, Cumb.' in *The History of Parliament: the House of Commons 1690-1715*, ed. D. Hayton, E. Cruickshanks, S. Handley (2002) at <<http://www.historyofparliamentonline.org/volume/1690-1715/member/lamplugh-thomas-1656-1737>> accessed 1 June 2018).

¹⁰²⁶ *Lamplugh v Smith* (26 January 1688) C 5/70/83.

the young man to several lenders: the first of these was Sir James Smith.¹⁰²⁷ Lamplugh, along with one Soames as co-obligor, was persuaded in 1681 to enter into a penal bond for £1,200 to Smith, defeasanced for payment of £600; expecting ready money, Lamplugh alleged that he and Soames were instead 'kept ... at an inn or tavern in the city for three or four days without any money to discharge their reckoning' by Stistead and Smith's attorney, one Woodward, apparently at Smith's instigation.¹⁰²⁸ Forced by these means to accept whatever terms were offered, Lamplugh and Soames agreed to receive £50 in cash, thirty pairs of silk stockings, and a number of third-party debts.¹⁰²⁹ The plaintiff alleged that the actual value of these items was around £80, from which they were required to pay Stistead and Woodward £12 each.¹⁰³⁰

Despite the best efforts of counsel for Sir James Smith to hold Lamplugh, as one of two joint obligors, liable for the full amount received, Jeffreys LC decreed that the plaintiff was liable only for what he had himself received, and referred the matter to a master to determine that amount.¹⁰³¹

A1.24 Whitley v Price (1688)

Heard the same day as *Lamplugh v Smith* (1688),¹⁰³² *Whitley v Price* (1688)¹⁰³³ also featured Edward Stistead, and dealt with what appears to be the same bargain as that of the suit of *Bill v Price* (1687):¹⁰³⁴ in both suits, while the plaintiffs alleged that the defendant, Thomas Price, had supplied them with goods in return for each of them giving him a warrant of attorney for a judgment of £3,000, Price alleged that they, along with one Glynn or Gleane, had merely been sureties for one Thomas Platers.¹⁰³⁵ Platers apparently owed the defendant Price £1,500 for goods supplied to him; if this is correct, then the security taken by Price – judgments of £3,000 from Platers and each of his three sureties¹⁰³⁶ – seems excessive even

¹⁰²⁷ Ibid. Lamplugh complained in his bill of having been drawn into transactions with seven different individuals, and into entering bonds amounting to £2,560, and penalties amounting to over £5,000 (ibid).

¹⁰²⁸ Ibid.

¹⁰²⁹ Ibid.

¹⁰³⁰ *Lamplugh v Smith* (20 February 1688) C 33/270, f. 396v.

¹⁰³¹ *Lamplugh v Smith* (1688) 2 Vern. 77. It seems to have been settled by this time that, in the absence of specific circumstances, Chancery would not allow recovery from only one of joint obligors. Nottingham LC expressed the rule in his *Prologomena* that 'though at law a man may sue which obligor he pleases, yet no man shall have relief in equity against equity, and it is against equity to charge one obligor without his companions' (Yale, above n 677, 303).

¹⁰³² *Lamplugh v Smith* (1688) 2 Vern. 77.

¹⁰³³ 2 Vern. 78. It seems likely that the plaintiff, Roger Whitley, was the son of the diarist of the same name (Roger Whitley, *Roger Whitley's Diary 1684-1697 Bodleian Library, Ms Eng Hist C 711*, ed. Michael Stevens and Honor Lewington ([s.l.], 2004), *British History Online* <<http://www.british-history.ac.uk/no-series/roger-whitley-diary/1684-97>> accessed 1 June 2018). Whitley senior owned substantial estates in North Wales, and had several periods as a member of parliament (Eveline Cruickshanks and Richard Harrison, 'Whitley, Roger (c.1618-97), of St John's Hosp., Chester; Peele Hall, Cheshire; and Pall Mall, Westminster, Mdx.' in *The History of Parliament: the House of Commons 1690-1715*, ed. D. Hayton, E. Cruickshanks, S. Handley (2002) at <<http://www.historyofparliamentonline.org/volume/1690-1715/member/whitley-roger-1618-97>> accessed 1 June 2018).

¹⁰³⁴ *Bill v Price* (1687) 1 Vern. 467.

¹⁰³⁵ *Whitley v Price* (24 July 1688) C 33/270, f. 745; *Bill v Price* (28 October 1685) C 6/277/15.

¹⁰³⁶ *Whitley v Price* (24 July 1688) C 33/270, f. 745.

for an associate of Edward Stinstead. In the event, Jeffreys LC ordered that Whitley be examined on interrogatories by a master as to what goods, of what value, he had received from Price or Platers, and on payment of that sum (plus interest for any cash received), satisfaction on the judgment was to be acknowledged by the defendant.¹⁰³⁷

A1.25 Wiseman v Beake (1691)

In 1691, before the lords commissioners, a nearly 40-year-old proctor of Doctors' Commons¹⁰³⁸ who was entitled to his uncle's estate through entail brought a bill seeking relief from a bargain made with one Beake.¹⁰³⁹ Having given 'statutes of great penalties'¹⁰⁴⁰ of 'ten for one'¹⁰⁴¹ in return for upfront payment, Wiseman had also, the defendant argued, affirmed the bargain some years previously. Having taken legal advice, Beake had at that time offered Wiseman the chance to avoid the future penalties by then paying only principal and interest, an offer the plaintiff refused.¹⁰⁴²

This affirmation of the bargain took the form of a bill exhibited into Chancery by Beake, seeking Wiseman's confession that Beake had offered to deliver up the statute staple in question on payment of the £200 lent, plus interest; Wiseman in his answer said that 'upon serious and mature deliberation' he refused to pay the £200, and would

not directly or indirectly use any means to avoid payment thereof or to enforce the complainant to accept of the said two hundred pounds and interest in lieu of the said two thousand pounds with interest if ever the said two thousand pounds with interest shall be come due and payable according to the purport intent or true meaning of the said indenture of defeasance but is content to and does hereby consent to be forever or hereafter debarred and foreclosed of and from any relief in this court or elsewhere against the said statute other than against the penalty thereof.¹⁰⁴³

¹⁰³⁷ *Witley v Price* (1688) 2 Vern. 78.

¹⁰³⁸ Doctors' Commons was a society of civil lawyers; a proctor was the equivalent of a common law attorney (GD Squibb, *Doctor's Commons: A History of the College of Advocates and Doctors of Law* (Oxford, 1977) 2). The plaintiff, Samuel Wiseman, does not appear in the membership lists compiled by Squibb, although this may be due to the incompleteness of the surviving records of the society (ibid at 111). There is, however, a Sir Robert Wiseman listed by Squibb, admitted to the society as an advocate in 1640 (ibid at 179), who held its presidency between 1672 and 1684 (ibid at 117). Sir Robert may have been a relative of the plaintiff, although not the uncle from whom Samuel held his expectancy, who was Sir William Wiseman (*Beake v Wiseman* (9 June 1683) C 10/497/15).

¹⁰³⁹ This would appear to be the same Beake who figures in the Berney cases: see Chapter 3, above at 3.4.2.4.

¹⁰⁴⁰ *Wiseman v Beak* (1690) 2 Vern. 122 at 122.

¹⁰⁴¹ Ibid. The bargain appears to have been the advance of £200 in return for a statute staple of the penalty of £4000, conditioned for payment of £2000 within three months of the decease of the plaintiff's uncle (*Beake v Wiseman* (9 June 1683) C 10/497/15).

¹⁰⁴² *Wiseman v Beak* (1690) 2 Vern. 122 at 122.

¹⁰⁴³ *Beake v Wiseman* (9 June 1683) C 10/497/15.

The court, however, viewed this offer as ‘a contrivance only to double hatch the cheat’,¹⁰⁴⁴ as at the time it was made Wiseman had spent the money advanced to him and could not have paid the principal and interest even if he had wanted to.¹⁰⁴⁵ Accordingly, relief in the form of principal and interest, but without costs, was ordered.¹⁰⁴⁶

¹⁰⁴⁴ *Wiseman v Beak* (1690) 2 Vern. 122 at 122.

¹⁰⁴⁵ *Ibid.*

¹⁰⁴⁶ *Ibid.*

Appendix 2: Calendar of Profligate Suits

This appendix contains the facts, relief granted, and any relevant contextual and biographical detail, of each non-heir profligate suit, in chronological order.

A2.1 *Griffin v Sayer* (1596)

In *Griffin v Sayer* (1596),¹⁰⁴⁷ the plaintiff surety sued on a defective counterbond provided by the defendant principal debtor. In his answer the defendant alleged, amongst other things, that the principal debt in question, rather than being his own, was for provision of goods by a linen draper to third parties, Josias Calmady¹⁰⁴⁸ and Diggory Piper,¹⁰⁴⁹ a bargain the defendant described as ‘contracted and delivered by way of connivance and upon unlawful usury’.¹⁰⁵⁰ He also alleged that he had provided the counterbond in question only through the ‘undue practices’ and means of the plaintiff, Calmady, Piper, and one Edward Dyer, an attorney, who were all close friends, having been very unwilling to make such a bond due to the fact that he had already ‘lost too much by the said Calmady and Piper’ in other ways, to the amount of around £1,000.¹⁰⁵¹ The court appears to have been unpersuaded (or unmoved) by these allegations, finding for the plaintiff on the basis that the defendant had known that the counterbond was ineffective at the time he entered it, but had nevertheless promised to indemnify the plaintiff and so should be held to that promise.¹⁰⁵² Accordingly, he was ordered to repay the plaintiff the sum paid out on the principal debt, as well as a further amount for the plaintiff’s costs and damages.¹⁰⁵³

A2.2 *Ashefield v Smythe* (1607)

In *Ashefield v Smythe* (1607),¹⁰⁵⁴ the plaintiff sought relief from a statute to the defendant Ognall that he had jointly acknowledged with the defendant Smyth, to secure the release of one Edward Winter, imprisoned for a debt of £200 owed to Ognall.¹⁰⁵⁵ Winter’s debt was alleged by the plaintiff to be ‘for certain mercery wares which he had taken upon credit and trust of the said Ognall far above their value’, and for which he had given a recognizance of

¹⁰⁴⁷ C 78/102, no. 8.

¹⁰⁴⁸ It is likely that this was Josias Calmady of Langdon Hall in Devon (John Burke, *A Genealogical and Heraldic History of The Commoners of Great Britain and Ireland Enjoying Territorial Possessions or High Official Rank; but Uninvested with Heritable Honours* (London, 1836) vol I, 268). Calmady was born in 1565, and thus must have been 21 or 22 in 1587, when the alleged bargain was made.

¹⁰⁴⁹ C 78/102, no. 8 [Membrane 1; IMG_0032]. There was a pirate by the name of Diggory Piper active in 1587, (David Childs, *Pirate Nation: Elizabeth I and Her Royal Sea Rovers* (Barnsley, UK, 2014), 212) although further research is needed to confirm that it was the same man.

¹⁰⁵⁰ C 78/102, no. 8 [Membrane 2; IMG_0033].

¹⁰⁵¹ Ibid.

¹⁰⁵² Ibid [Membrane 2; IMG_0034].

¹⁰⁵³ Ibid [Membrane 3; IMG_0035].

¹⁰⁵⁴ C 78/114, no. 10.

¹⁰⁵⁵ Ibid [Membrane 1; IMG_0058]. An Edward Winter appears in *Westby’s Case* (1597) 3 Co. Rep. 67a, as one of three defaulting obligees in a statute of £440 to one Titus Westby; further research is needed before it can be concluded that this was the same man.

£400, conditioned for payment of the £200.¹⁰⁵⁶ The court found for the plaintiff on the basis that the principal money owing on the statute had all been paid, and Ognall was therefore ordered to deliver the statute up for cancellation.¹⁰⁵⁷ As with *Griffin v Sayer*, no mention was made by the court of the nature of Winter's bargain, presumably as it was not material to the outcome.

A2.3 Woodward v Alporte (1615)

The plaintiff in the suit of *Woodward v Alporte* (1615),¹⁰⁵⁸ Sir John Woodward, 'a young gent newly come of age',¹⁰⁵⁹ having been, as he alleged, 'drawn by the defendant [John] Machell (being of small worth) to join with him in the taking up of £500 at interest for six months', entered into two bonds to the defendants Thomas Alport and Francis Sambourne.¹⁰⁶⁰ The defendant John Daintith,¹⁰⁶¹ a broker, was employed by Woodward and Machell to arrange this, resulting in a bargain whereby the plaintiff and Machell became bound to Alporte and Sambourne in one bond of £400, conditioned for payment of £210, and another of £600, conditioned for payment of £315, both payable after six months.¹⁰⁶² In return they were provided with plate and diamonds by Sambourne, and 'worsted and silk stockings and beaver hats and mercery wares' by Alporte, which, the plaintiff alleged, were 'slight and bad wares and rated at unreasonable prices and could not after be sold for half the value they were rated at'.¹⁰⁶³ These wares were sold by Daintith for around £250, from which he deducted £25 for his services and a further £40 for the scrivener who had drawn up the bonds; the plaintiff alleged that he received less than £80 of the remainder.¹⁰⁶⁴

The matter was referred to a master for calculation of the true value of the wares provided, and how much of that value the plaintiff had received.¹⁰⁶⁵ On the hearing of the suit, Ellesmere LC found that although Woodward had indeed received less than £80, Alporte and Sambourne, who had not acted fraudulently, had relied on his creditworthiness alone when entering the bond and so ordered Woodward to pay the £440 certified by the master to be due for principal and interest.¹⁰⁶⁶ The lord chancellor also ordered that Machell and Daintith, whom he found were responsible for drawing the plaintiff in, and who then took most of the value of the goods to themselves, to pay Woodward £200 and £100

¹⁰⁵⁶ C 78/114, no. 10 [Membrane 1; IMG_0058].

¹⁰⁵⁷ Ibid [Membrane 3; IMG_0062].

¹⁰⁵⁸ *Woodward v Alporte* (31 January 1615) C 33/127, f. 765v.

¹⁰⁵⁹ *Woodward v Alporte* (28 July 1612) C 33/121, f. 1209. No biographical information has been found regarding the plaintiff, except that a John Woodward was knighted on 21 March 1613 at Royston (Wm A Shaw, *The Knights of England: A Complete Record from the Earliest Time to the Present Day of the Knights of All the Orders of Chivalry in England, Scotland, and Ireland, and of Knights Bachelors* (London, 1906) vol II, 152); unfortunately no pleadings in the matter, which may have assisted with the identification of the plaintiff, could be found.

¹⁰⁶⁰ *Woodward v Alporte* (28 July 1612) C 33/121, f. 1209.

¹⁰⁶¹ John Daintith also appears in the expectant heir suit *Hubberstie v Danser* (1614) C 78/184, no. 1, discussed at A.1.2.

¹⁰⁶² *Woodward v Alporte* (28 July 1612) C 33/121, f. 1209 at f.1209v.

¹⁰⁶³ Ibid.

¹⁰⁶⁴ Ibid.

¹⁰⁶⁵ *Woodward v Alport* (25 October 1614) C 33/127, f. 91.

¹⁰⁶⁶ *Woodward v Alporte* (31 January 1615) C 33/127, f. 765v at f. 766.

respectively.¹⁰⁶⁷ Machell and Daintith were to bring these sums into court, on pain of imprisonment in the Fleet.¹⁰⁶⁸ In the event that Woodward failed to pay the £440 as ordered, Alporte and Sambourne were free to proceed against him on the bonds at common law.¹⁰⁶⁹

A2.4 Maddocks v Needham (1621)

The plaintiff in *Maddocks v Needham* (1621),¹⁰⁷⁰ George Maddocks, was a student at the Inns of Court.¹⁰⁷¹ In April 1609 he and two of his fellow students, John Vaughan and Abraham Fortune – all of them under the age of 23 – acknowledged a statute staple for £400 to the defendant, defeasanced for payment of £200 within six months.¹⁰⁷² The deal was arranged by one Anthony Strain, described as the defendant’s ‘agent or broker’.¹⁰⁷³ After the statute was acknowledged, the defendant allegedly told the three young men that he was unable to supply the £200 in ready money; instead, he would supply them with wares to that value, which Strain would sell for them.¹⁰⁷⁴ The plaintiff alleged in his bill that the wares were not worth £200, and, further, that Strain had engaged in sharp practice in disposing of them: some were redelivered to Needham, and some were sold ‘secretly and cunningly’ to Needham and Strain’s acquaintances at reduced rates.¹⁰⁷⁵

The court¹⁰⁷⁶ referred the matter for report by Sir Richard Moore and Sir Robert Rich, masters of Chancery.¹⁰⁷⁷ The masters’ report, made on 5 July 1620, stated that the defendant confessed in his answer¹⁰⁷⁸ that the true value of the goods was far below £200, and that they had been sold for only £90, of which the three young men had received £30 each.¹⁰⁷⁹ The masters’ report also stated that Needham confessed that if the full £200 were paid he, the defendant, would have ‘been a great gainer thereby’, and that he sought to blame Strain as the ‘contriver’ of the deal.¹⁰⁸⁰

¹⁰⁶⁷ Ibid.

¹⁰⁶⁸ Ibid at f. 766v.

¹⁰⁶⁹ Ibid.

¹⁰⁷⁰ C 78/204, no. 4.

¹⁰⁷¹ Ibid [Membrane 1; IMG_0039].

¹⁰⁷² Ibid [Membrane 2; IMG_0040].

¹⁰⁷³ Ibid [Membrane 1; IMG_0039].

¹⁰⁷⁴ Ibid [Membrane 2; IMG_0040].

¹⁰⁷⁵ Ibid.

¹⁰⁷⁶ At this time the Great Seal was in commission following the impeachment of the preceding lord chancellor, Sir Francis Bacon, in April 1621 (Markku Peltonen, ‘Bacon, Francis, Viscount St Alban (1561–1626)’, in *Oxford Dictionary of National Biography*, (Oxford, 2007) at <<http://www.oxforddnb.com/view/article/990>> accessed 4 January 2019).

¹⁰⁷⁷ The gap of two years between exhibition of the bill in 1618 and this referral is perhaps explained by reference in the decree to ‘diverse orders reports and other proceedings had in this case’ that occurred before the plaintiff’s motion (C 78/204, no. 4 [Membrane 2; IMG_0041]), which apparently included three commissions of rebellion brought by the plaintiff for the defendant’s non-appearance (ibid [Membrane 3; IMG_0042]).

¹⁰⁷⁸ The defendant’s answer is not reproduced in the decree, although it is stated that due to the insufficiency of his efforts, he was required to make three answers (ibid [Membrane 2; IMG_0041]). It has so far not been possible to determine whether the answer survives in the pleadings for the case.

¹⁰⁷⁹ Ibid [Membrane 3; IMG_0042].

¹⁰⁸⁰ Ibid.

The masters found that the defendant had received £40 from the plaintiff, and £40 from Fortune;¹⁰⁸¹ they also found that Needham had made a new defeasance with Fortune, discharging him from the statute obligation on payment of a further £40, bringing the total amount paid by Fortune for his discharge to 100 marks,¹⁰⁸² a third of £200.¹⁰⁸³ The masters concluded that the plaintiff should be discharged by the defendant on the same terms as those given to Fortune, and calculated that as the plaintiff had already paid £40, and spent £9 in costs relating to actions for contempt against the defendant in the proceedings, £17. 13s. 4d. of the total of 100 marks remained to be paid.¹⁰⁸⁴

Following this report, the defendant moved that the masters review their report and examine witnesses as to the true value of the wares, and what Fortune and Vaughan had made from them.¹⁰⁸⁵ Despite the review being ordered, the defendant failed either to attend or to show cause why the report of 5 July should not be ratified.¹⁰⁸⁶ Thus, on 14 May 1621 – nearly twelve years after the statute was acknowledged – the court ordered that the masters’ report be ratified.

A2.5 *Beeve v Whitehead* (1622)

In *Beeve v Whitehead* (1622)¹⁰⁸⁷ the plaintiff alleged that the recognizance of £50 for which he sought relief arose from the defendant taking advantage of him:

... the complainant ... being then very young man living in Gray’s Inn was by ... unconscionable circumventions many times drawn into wasteful expenses and for small or no consideration was often drawn into bonds and recognizance [sic] for the same and that amongst the rest the said defendant being a vintner in London taking advantage of the complainant’s tenderness of years inserted himself into the said complainant’s company and familiarity with many offers and protestations of love and kindness toward him...¹⁰⁸⁸

¹⁰⁸¹ Ibid: it is possible that Fortune had actually paid forty marks, rather than pounds. This is the amount alleged in the plaintiff’s bill (ibid [Membrane 2; IMG_0040]), and is consistent with the subsequent calculation by the masters relating to the amount of the composition with Fortune. The masters make no mention of the £40 the plaintiff alleged had been paid by John Vaughan (ibid [Membrane 2; IMG_0040]).

¹⁰⁸² The equivalent of £66 13s. 4d.

¹⁰⁸³ C 78/204, no. 4 [Membrane 3; IMG_0042].

¹⁰⁸⁴ Ibid.

¹⁰⁸⁵ Ibid [Membrane 3; IMG_0043]: the motion argued that the debt of £200 had been outstanding for twelve or thirteen years, and that Fortune was then dead and Vaughan insolvent, leaving the plaintiff as the defendant’s only option for repayment. The defendant’s counsel is named as Heneage Finch, presumably the father of the future Nottingham LC, who took such a dim view of these types of bargains in *Berry v Fairclough* (1681) 79 Selden Soc. 868. He was also the brother of the defendant in *Lambe v Finch* (1626) C78/239, no. 9 (Andrew Thrush, ‘Finch, Sir Heneage (1580–1631)’, in *Oxford Dictionary of National Biography*, (Oxford, 2004) at <<http://www.oxforddnb.com/view/article/9432>> accessed 4 January 2019).

¹⁰⁸⁶ C 78/204, no. 4 [Membrane 3; IMG_0043].

¹⁰⁸⁷ C 78/328, no. 8.

¹⁰⁸⁸ Ibid [Membrane 1; IMG_0085].

The plaintiff then alleged that the defendant had persuaded him to enter the recognizance, the exact details of which, including the terms of the defeasance, he claimed to be unable to remember.¹⁰⁸⁹ The plaintiff also alleged that he had received no consideration of any kind from the defendant for the recognizance; notwithstanding this, he had paid the defendant various sums of money, including one of £20, which he believed were sufficient to discharge the obligation.¹⁰⁹⁰ The master's report ordered by the court found, however, that the recognizance in question was to secure an order for damages payable to the defendant awarded by a jury in the King's Bench: the plaintiff had apparently wounded the defendant in an attack.¹⁰⁹¹ Perhaps unsurprisingly, Williams LK dismissed the plaintiff's bill, with an order for costs.¹⁰⁹²

A2.6 *Pitt v Keneday* (1622)

Pitt v Keneday (1622)¹⁰⁹³ is mentioned only for the sake of completeness, as the nature of the transaction was not material to the case, or the court's decree, despite the defendant, Sir John Kennedy, more than adequately fitting the description of improvident.¹⁰⁹⁴ The plaintiffs had provided money and goods to Sir John, secured by a judgment for £243. 3s.; in his answer the defendant confessed the debts to be just, and denied having conspired with the creditors responsible for the sequestration of his lands in order to defraud the plaintiffs, alleging that he had merely asked the plaintiffs not to sue him on the judgment until a suit in Chancery relating to his other creditors had been resolved.¹⁰⁹⁵

A2.7 *Bing v Polley* (1627)

The basis for the granting of relief in *Bing v Polley* (1627)¹⁰⁹⁶ is unclear. The plaintiff, Henry Bing – incidentally a serjeant at law¹⁰⁹⁷ – became bound to the defendant as surety for his 'kinsman' George Bing for £600 conditioned for payment of £300 and interest at six

¹⁰⁸⁹ Ibid.

¹⁰⁹⁰ Ibid.

¹⁰⁹¹ Ibid [Membrane 2; IMG_0088]. The attack was described in detail by the defendant in his answer: the plaintiff owed the defendant, a tavern owner, money for food and drink provided on credit. Having been asked for the money several times, the plaintiff apparently took exception to being asked again and stabbed the defendant in the chest (ibid [Membrane 1; IMG_0086]).

¹⁰⁹² Ibid [Membrane 3; IMG_0089].

¹⁰⁹³ C 78/272, no. 17.

¹⁰⁹⁴ References to Kennedy's debts can be found elsewhere: see, for example, 'Parishes: Barnes', in *A History of the County of Surrey: Volume 4*, ed. H E Malden (London, 1912), at 3-8: *British History Online* <<http://www.british-history.ac.uk/vch/surrey/vol4/pp3-8>> accessed 3 January 2019, and Martin Butler, 'Masquers and Tilters' in *The Cambridge Edition of the Works of Ben Jonson Online* ed. David M. Bevington et al (Cambridge, 2014) at <http://universitypublishingonline.org/cambridge/benjonson/k/essays/masquers_tilters_essay/15/> accessed 4 January 2019. In 1609, Kennedy's debts amounted to £6200; James I granted him six months' protection from all but the debts he owed to Edward Ferrers (see below) (SP 14: *State Papers Domestic: James I: Volume 48, September-October 1609*, 30 September 1609).

¹⁰⁹⁵ C 78/272, no. 17 [Membrane 1; IMG_0003]: the other proceedings related to debts to Edward Ferrers and Richard Gosson. An earlier suit relating to those debts is found in *Kennedy v Gosson and Ferrers* (1616) C78/198, no. 5.

¹⁰⁹⁶ C 78/235, no. 7.

¹⁰⁹⁷ He was created serjeant in 1623 (Baker, above n 393, 337–338) and died on 1 March 1635 (ibid, 503).

months.¹⁰⁹⁸ Seven years later, only partial interest had been paid by the principal debtor, and the defendant in the Chancery suit, Thomas Polley, brought an action at common law against Henry Bing. The plaintiff's bill in Chancery was aimed at thwarting this common law action.¹⁰⁹⁹ In this he was successful, as the court ordered the bond to be delivered up and cancelled on payment of the principal sum of £300 by Henry Bing.¹¹⁰⁰ George Bing was ordered to pay the arrears of interest, and the plaintiff was allowed by decree to pursue George for repayment of the principal sum.¹¹⁰¹

Interestingly, in this case the defendant expressly asked the court to permit recovery of the penalty,¹¹⁰² and provided what appear to be cogent reasons for such an award: quite apart from the fact that the principal sum had not been paid at the time set out in the condition, the defendant had also been imprisoned as a surety for George Bing in another bond, and had had to pay the full amount of that penalty in order to be released, in addition to several other large sums which he had previously paid on George's behalf.¹¹⁰³ Acknowledging that the demand that the plaintiff as a mere surety be ordered to pay the penalty sum would otherwise be 'unreasonable',¹¹⁰⁴ the defendant argued that the plaintiff reputedly held 'lands, charges and securities'¹¹⁰⁵ from George to secure his position as surety, whereas the defendant had only a counter-bond, which, given George's financial predicament, the defendant feared was essentially worthless.¹¹⁰⁶ Nevertheless, the court did not award the penalty sum to the defendant.

Given that it was Henry Bing the surety who sought relief, with the principal debtor, George Bing, named as a defendant, it is not altogether surprising that the bill contains no direct allegation relating to George's status as a profligate young man. However, some preliminary research reveals that it is quite likely that George was just that: he was 24 years old in 1618, when he sealed the bond to the defendant Polley;¹¹⁰⁷ he had (at some unspecified time) become 'decayed in his estate';¹¹⁰⁸ and he owed several other large sums (including a further £350 to Polley).¹¹⁰⁹ George did not inherit the manor of Wrotham Park on his father's death in 1616, despite being the eldest son; instead, the manor passed to George's nephew

¹⁰⁹⁸ C 78/235, no. 7 [Membrane 1; IMG_0031].

¹⁰⁹⁹ Ibid [Membrane 2; IMG_0032].

¹¹⁰⁰ Ibid [Membrane 3; IMG_0035].

¹¹⁰¹ Ibid.

¹¹⁰² The exact words used in the defendant's answer to the bill were that he 'hoped by the favour of this honorable Court that upon the hearing of the cause he the said defendant should be allowed the whole forfeiture of the said bond...' (ibid [Membrane 3; IMG_0034]).

¹¹⁰³ Ibid.

¹¹⁰⁴ Ibid.

¹¹⁰⁵ Ibid [Membrane 2; IMG_0033].

¹¹⁰⁶ Ibid [Membrane 3; IMG_0034].

¹¹⁰⁷ Val Brown, 'Kent Baptisms 1538-1931 Transcription' in *Findmypast* at <<http://search.findmypast.co.uk/record?id=prs%2fbap%2fvb-kent%2f013406>> accessed 3 April 2019. Identification of George Bing as the great-grandson of John Byng of Wrotham Park is possible through his family connection with the plaintiff. Described in the bill as the plaintiff's 'kinsman', it is most likely that the two were second cousins: George's father and Henry were cousins, being the sons respectively of John Byng's first and second sons, Robert and Thomas.

¹¹⁰⁸ C 78/235, no. 7 [Membrane 1; IMG_0031].

¹¹⁰⁹ Ibid [Membrane 2; IMG_0033].

John.¹¹¹⁰ George's mother, Jane Bing, who apparently paid Polley £100 towards George's debt of £350, taking security from her son for the repayment of that money,¹¹¹¹ made no mention of George in her will except to direct that the £300 he owed to her on a penal bond be paid to her daughters.¹¹¹² From all of this it is possible to infer that George's profligate ways caused him difficulties with his family, as well as the courts.

A2.8 *Boll v Bowles* (1627)

The plaintiff in *Boll v Bowles* (1627),¹¹¹³ Sir Charles Boll, sought relief from debts alleged to be owed to his tailor, one Francis Bowles. The transactions in question spanned a period of some seven years, and apparently began when Sir Charles was under age, and a ward of the king.¹¹¹⁴ In his bill Boll alleged that the defendant knew that Boll had 'had a fair estate fallen unto him by the decease of Sir John Boll Knight the said complainant's father'¹¹¹⁵ and had consequently drawn Boll in to become indebted to him, both through the defendant purchasing materials with which to make clothes for the plaintiff, and through allowing the plaintiff to run up large bills for the making of those clothes.¹¹¹⁶

Various disputes arose over the years as to the exact amount owed to Bowles by the plaintiff. Boll alleged that, amongst other things, Bowles had inflated his labour costs, and that when the defendant had purchased materials for the plaintiff on credit, he had taken up that credit at an unnecessarily high rate of interest.¹¹¹⁷ Their dealings came to an end, according to the plaintiff, when Bowles refused to make Boll a suit from cloth purchased by Boll for that purpose, instead trying to persuade him to accept a suit made from inferior cloth.¹¹¹⁸ Subsequently, the defendant had the plaintiff arrested and imprisoned for outstanding debts, the amount of which Boll disputed in his bill.¹¹¹⁹

The defendant's version of events was markedly different: he alleged that it was Boll who had entreated him, the defendant, to provide him with clothes on credit, as well as to purchase various commodities on his behalf, and that this had first occurred in 1611, when

¹¹¹⁰ Edward Hasted, 'Parishes: Wrotham', in *The History and Topographical Survey of the County of Kent: Volume 5* (Canterbury, 1798), at 6-32: *British History Online* <<http://www.british-history.ac.uk/survey-kent/vol5/pp6-32>> accessed 3 April 2019.

¹¹¹¹ *Ibid* [Membrane 2; IMG_0033-0034].

¹¹¹² Will of Jane Byng (6 October 1630) PROB 11/158/253.

¹¹¹³ C 78/292, no. 4. Sir Charles Boll, of Thorpe Hall in Lincolnshire, son of Sir John Bolle, hero of the siege of Cadiz in 1596, was apparently 'one of the most zealous supporters of the royal cause, during the Civil war' (Burke, above n 467, 391).

¹¹¹⁴ C 78/292, no. 4 [Membrane 2; IMG_0066; IMG_0067]. Sir Charles' father died in 1606 (Thomas Allen, *The History of the County of Lincoln* (London, 1834) vol I, at 151. Sir Charles was born in 1592 ('Sir Charles Bolle, St James Churchyard, Louth, Lincolnshire' at <<https://www.findagrave.com/memorial/140863188/charles-bolle>> accessed 4 January 2019) and thus would have been around fourteen years old when his father died. Unfortunately, no record of Sir Charles' baptism has been found.

¹¹¹⁵ C 78/292, no. 4 [Membrane 1]; IMG_0066

¹¹¹⁶ *Ibid*.

¹¹¹⁷ *Ibid*.

¹¹¹⁸ *Ibid*.

¹¹¹⁹ *Ibid* [Membrane 2; IMG_0067].

Boll was a student at Queens' College, Cambridge.¹¹²⁰ Bowles denied that he had taken up credit on Boll's behalf at inflated rates, and further alleged that he had become bound as Boll's surety in a number of bonds for money.¹¹²¹ On hearing, the matter was referred to the master Sir Robert Rich, and the plaintiff was duly ordered to pay to the defendant the amount Sir Robert found to be owing to the defendant.¹¹²²

A2.9 Prescott v Sotherton (1632)

The plaintiff in *Prescott v Sotherton* (1632),¹¹²³ Sir John Prescott, alleged that the defendants Sir Augustine Sotherton and John Wortham, knowing that the plaintiff had inherited a substantial estate from his father, had taken advantage of his youth and inexperience and convinced him to become bound as a surety for Wortham in a bond of £200 to the defendant Jury, conditioned for the payment of £105.¹¹²⁴ In need of money, Prescott entered the bond on the proviso that Sotherton was a co-surety, and on the basis that he and Wortham would each receive half of the £100 thus borrowed from Jury.¹¹²⁵ The bond was put in suit at common law solely against the plaintiff, and it was from this action that the plaintiff sought relief.¹¹²⁶ The court found that Prescott had received no part of the £100; rather, the bond was a contrivance between Sotherton and Wortham to enable Wortham, at the plaintiff's expense, to repay a previous debt of £50 owed to Sotherton.¹¹²⁷

The court ordered that the plaintiff and Sotherton each pay half of the £105 to Jury; Wortham was to repay them both, and in default of such payment the plaintiff and Sotherton were free to sue Wortham on the bond at common law.¹¹²⁸

It seems likely that the plaintiff was the son of Alexander Prescott (d. 1621), alderman and goldsmith of London.¹¹²⁹ In his bill the plaintiff describes himself as 'newly come to his full age of twenty-one years and unexperienced in the world and being come to a good estate by the death of ... his father'.¹¹³⁰ While the decree shows no evidence that Prescott was particularly profligate, it is worth bearing in mind that, if the identification is correct, by the time of his entry into the bond in 1624 he had already inherited £1,000 under his father's will, as well as two manors in Essex.¹¹³¹ His entry into the bond suggests, however, that he

¹¹²⁰ Ibid; Venn and Venn, above n 355, 174.

¹¹²¹ Ibid [Membrane 3; IMG_0068].

¹¹²² Ibid [Membrane 4; IMG_0070].

¹¹²³ C 78/442, no. 10.

¹¹²⁴ Ibid [Membrane 1; IMG_0088]. The extra £5 was presumably in the nature of interest.

¹¹²⁵ Ibid.

¹¹²⁶ Ibid.

¹¹²⁷ Ibid [Membrane 2; IMG_0090].

¹¹²⁸ Ibid [Membrane 2; IMG_0091].

¹¹²⁹ Venn and Venn, above n 355, 392. The evidence that supports this identification includes the fact that in the bill Sir John Prescott is described as being from Great Dunmow, Essex; the John Prescott listed in the *Alumni Cantabrigienses* entry married Grigosa, daughter of Sir Kenelm Jenoure of Dunmow, making it possible that by the time the bill was exhibited he had added lands in Dunmow to the manors of Radwinter and Bendish he inherited under his father's will (Will of Alexander Prescott (18 January 1622) PROB 11/139/46).

¹¹³⁰ C 78/442, no. 10 [Membrane 1; IMG_0088].

¹¹³¹ Will of Alexander Prescott (18 January 1622) PROB 11/139/46.

had a fairly pressing need for the £50 he expected to receive: his misgivings about the transaction are recounted in both the bill and in the defendants' answers.¹¹³² It is possible that Prescott's finances were feeling the strain of an annual rent charge of £50 on his principal manor of Radwinter, payable to his younger brother Alexander, created by their father's will.¹¹³³

A2.10 Heveningham v Challenor (1633)

As with *Bing v Polley*, the plaintiff in *Heveningham v Challoner* (1633),¹¹³⁴ Sir Walter Heveningham, was a surety seeking relief in Chancery concerning the debts of a relative; the difference being, however, that the relief sought here was not from a Chancery defendant's common law action to recover the debt, but rather the recovery of money which the plaintiff had paid out to two co-sureties to indemnify them from his son's debts. Sir Walter alleged that the defendants Challenor and Craddock, bound as sureties with him for several of the debts of his late son Nicholas, had taken money provided by him for the settling of those debts and kept it for their own use.¹¹³⁵ Sir Walter also alleged that Challenor had falsely claimed to Sir Walter that he had been a surety for Nicholas in debts to the defendant Bowyer, the defendant Browne, and Sir Robert Ducy.¹¹³⁶

The court found that Challenor had indeed been a surety for Nicholas in the debts to Browne and Ducy: Craddock had been given money by the plaintiff to satisfy the debt to Browne, but had kept it, and Challenor had kept part of the money given to him by the plaintiff to pay the debt to Ducy.¹¹³⁷ Craddock and Challoner were ordered to satisfy the respective debts, and to repay to Sir Walter any residual amount of the sums provided to them by him.¹¹³⁸ In the case of the debt to Bowyer, however, the court required further proof that Challoner was bound as Nicholas' surety, and issued a commission to examine witnesses in Ireland, where Bowyer apparently lived.¹¹³⁹ Challoner failed to return the commission, and so was subsequently ordered to repay to the plaintiff the sum given to him to satisfy Bowyer's debt.¹¹⁴⁰

Given the nature of the relief sought, the profligacy of Nicholas Heveningham, and any concomitant taking of advantage of him by a lender, was not material to the court's decision. However, it is clear that Sir Walter Heveningham suffered great loss through the indebtedness of his son. In Nicholas' lifetime he and Sir Walter conveyed the manor of Aston in Staffordshire to Craddock and Challoner to enable them to use the profits to pay some of

¹¹³² In both bill and answers it is stated that the plaintiff refused to seal the bond unless Sotherton also became bound: C 78/442, no. 10 [Membrane 1; IMG_0088]; [Membrane 2; IMG_0090].

¹¹³³ Will of Alexander Prescott (18 January 1622) PROB 11/139/46.

¹¹³⁴ C 78/484, no. 6.

¹¹³⁵ Ibid [Membrane 1; IMG_0308] – [Membrane 2; IMG_0309].

¹¹³⁶ Ibid.

¹¹³⁷ Ibid [Membrane 2; IMG_0310].

¹¹³⁸ Ibid [Membrane 2; IMG_0311].

¹¹³⁹ Ibid [Membrane 3; IMG_0312].

¹¹⁴⁰ Ibid [Membrane 3; IMG_0313].

Nicholas' debts¹¹⁴¹ and, more permanently, Sir Walter sold the Staffordshire manors of Clifton and Haunton, amongst other lands, to pay off others.¹¹⁴² A further indication of Nicholas' financial difficulties can be found in the fact that in 1619 a post-nuptial settlement was made, assigning £150 per annum from the jointure of Nicholas and his wife Elizabeth to be paid toward Nicholas' debts.¹¹⁴³

A2.11 Ashley v Earl of Suffolk (1656)

Ashley v Earl of Suffolk (1656)¹¹⁴⁴ involved a penal bond entered by Theophilus, earl of Suffolk, described by Stone as 'a spendthrift on a monumental scale'.¹¹⁴⁵ However, the bargain dealt with in the suit – a bond of £600, conditioned for payment of £400¹¹⁴⁶ – took place when Theophilus was around 50 years of age,¹¹⁴⁷ and the pleadings contain no allegation or inference of fraud or any underhand dealing.¹¹⁴⁸ The action was brought by the executrix of the lender, who, having been successful in a suit brought on the bond at common law, had been unable to gain satisfaction of the judgment.¹¹⁴⁹ Theophilus had put most of his lands in trust, apparently for the payment of his extensive debts, before his death: the plaintiff, therefore, sought an order that the defendant, son and heir of the deceased Theophilus, and the trustees, satisfy the judgment from the trust.¹¹⁵⁰ The lords commissioners found, largely on the basis of the common law trial findings, that the facts as alleged by the plaintiff – both in relation to the existence of the bond and the debtor's failure to repay it – were correct. Interestingly, although the common law judgment was for the full

¹¹⁴¹ Ibid [Membrane 1; IMG_0308]. This conveyance was apparently made the day before Nicholas died: Lucy Underwood, *Childhood, Youth, and Religious Dissent in Post-Reformation England* (Basingstoke, 2014), 80–81.

¹¹⁴² C 78/484, no. 6 [Membrane 1; IMG_0308]. The manor of Clifton seems to have been sold to Coventry LK, or his son John: Sir Egerton Brydges (ed), *The Topographer, for the Year 1790* (London, 1790) vol II, 9.

¹¹⁴³ Exemplification of Post Nuptial Settlement of Nicholas Heveningham, Son and Heir of Walter Heveningham of Pye (co. Staffs.) and Elizabeth, Daughter of John Bowles of Elford (co. Staffs.), 17 May, 1611, Sheffield City Archives EM/1304. There was another source of stress within the family, which may also have contributed to their financial difficulties: Sir Walter and his wife Anne were Catholic, whereas Nicholas' wife Elizabeth was Protestant. After Nicholas' death there was a protracted battle to decide the religion of Nicholas' son and heir, Walter: Underwood, above n 1141, 80.

¹¹⁴⁴ C 78/560, no. 7.

¹¹⁴⁵ Lawrence Stone, *Family and Fortune: Studies in Aristocratic Finance in the Sixteenth and Seventeenth Centuries* (Oxford, 1973), 285–289.

¹¹⁴⁶ C 78/560, no. 7 [Membrane 1; IMG_0219].

¹¹⁴⁷ The bond was entered in 1634 (ibid); Theophilus, Earl of Suffolk was baptised in 1584 (Andrew Thrush, 'Howard, Theophilus, Lord Howard de Walden (1584-1640), of Audley End, Essex and Suffolk House, The Strand, Westminster' in *The History of Parliament: the House of Commons 1604-1629*, ed. Andrew Thrush and John P. Ferris (2010) at <<http://www.historyofparliamentonline.org/volume/1604-1629/member/howard-theophilus-1584-1640>> accessed 3 April 2019).

¹¹⁴⁸ Given that the plaintiff was the obligee, any such allegations would of necessity be contained in the defendants' answers. It may be that the defendants – the heir and trustees of the principal debtor – were at too far a remove from the details of the bargain to know of any such issues. Certainly the only substantive defence raised by the defendants' answer was that 'if any such debt was due and owing by the said Earl the same was long since paid and the bond forgotten to be taken up' (C 78/560, no. 7 [Membrane 2; IMG_0221]).

¹¹⁴⁹ Ibid [Membrane 1; IMG_0219].

¹¹⁵⁰ Ibid [Membrane 1; IMG_0219].

penal amount of £600, the lords commissioners awarded only the conditioned amount of £400, plus interest.¹¹⁵¹

A2.12 *Godshalke v Walker* (1665)

The suit of *Godscall v Walker* (1665)¹¹⁵² was brought by Sir John Godshalke's widow and executrix, after his untimely decease – he was apparently murdered in November 1660, at the Fleece Tavern in Covent Garden¹¹⁵³ – while still in his minority.¹¹⁵⁴ His widow, Anne, alleged that the defendants had taken advantage of Godshalke's youth and his 'easy and plausible condition',¹¹⁵⁵ and, knowing that he had a substantial estate, persuaded him to make the defendant Angier his guardian, and the defendants Wall and Bishop his attorneys.¹¹⁵⁶ Having achieved this, they procured judgments from Godshalke amounting to more than £4,000 for various goods valued by the master to whom the matter was referred as worth a little over £700.¹¹⁵⁷ Relief was granted on payment of that sum.¹¹⁵⁸

A2.13 *Williams v Smith* (1671)

It has not been possible to identify the plaintiff in *Williams v Smith* (1671),¹¹⁵⁹ and no pleadings or entry book entries have been located. For that reason, the only information available comes from the brief printed report. Heard by Bridgman LK in Hilary Term 1671, the suit was to be relieved against a mortgage and a recognizance, obtained from the plaintiff shortly after he came of age.¹¹⁶⁰ Although the report is not particularly clear it appears that repayment of the mortgage loan, with interest, was ordered, as there was no fraud practised by the defendant, and the plaintiff was found to be 'a sensible man'; the defendant, however, was prevented from taking action on the recognizance, presumably because it secured the amount due under the mortgage.¹¹⁶¹

A2.14 *Earl of Ardglass v Muschamp* (1684)¹¹⁶²

The reported Chancery cases concerning the financial activities of the third earl of Ardglass deal with bargains made with Henry Muschamp, and with George Pitt, esq.¹¹⁶³ The bargains,

¹¹⁵¹ Ibid [Membrane 2; IMG_0222].

¹¹⁵² C 78/746, no. 5. There are three very brief printed reports of an earlier hearing in the matter, which resulted in a reference to a master: *Godscall v Walker* (1663) 2 Freeman 169; *Godscall v Walker* (1663) Nelson 84; and *Godscall v Walker* (1663) 3 Chan. Rep. 10. Other variant spellings to appear in the record include Godschalke, Godsall and Godshall.

¹¹⁵³ Henry Benjamin Wheatley and Ralph Cunningham, *London Past and Present: Its History, Associations, and Traditions* (Cambridge, 2011), 51.

¹¹⁵⁴ C 78/746, no. 5 [Membrane 1; IMG_0172].

¹¹⁵⁵ Ibid.

¹¹⁵⁶ Ibid.

¹¹⁵⁷ Ibid [Membrane 5; IMG_0183].

¹¹⁵⁸ Ibid.

¹¹⁵⁹ *Williams v Smith* (1671) 3 Chan. Rep. 75.

¹¹⁶⁰ Ibid.

¹¹⁶¹ Ibid.

¹¹⁶² *Earl of Ardglass v Muschamp* (1684) 1 Vern. 237.

¹¹⁶³ Muschamp and Pitt were both familiar names to Richard Berney: see Chapter 3, above at 3.5 and 3.4.2.1 respectively.

made in 1675 when the earl was approximately 22 years of age, were identical: the granting of a rent-charge of £300 per annum to the defendant, from lands in Ireland worth £1,000 per annum, for consideration of £300. The element of contingency necessary to avoid the usury laws was that, firstly, the rent-charge became payable only after the earl's death; and secondly, that should the earl have male issue who lived until the age of 21, the grants became void.¹¹⁶⁴

Lord Keeper North did not grant relief on the first hearing, with the reporter stating that: '...though he declared there was a foul practice, yet he doubted it might be too great a violation upon contracts, to set it aside ...'¹¹⁶⁵ On a rehearing by the plaintiff's petition, however, North LK revised his initial opinion and did grant relief.¹¹⁶⁶ The plaintiff had argued that the earl was very young at the time of the bargain, and that he

... had forsaken his wife and her friends in Ireland, and lived [in London] in riot and debauchery, and for supply of his expenses had made this bargain, without the advice of any friends or counsel of his own; but relied wholly upon the defendant ...¹¹⁶⁷

It was also argued that the consideration given was inadequate, and the contingency was 'an artifice': it was alleged by the plaintiff that the defendant had been informed by the earl's surgeon that he was physically unable to have children.¹¹⁶⁸ In reply, Muschamp argued that the contingency was real. The earl had been in good health at the time the bargain had been made, and that accordingly Muschamp stood to lose the money advanced; further, there was no fraud entered into in obtaining the grant and the bargain had been affirmed by the earl three months after it had been made.¹¹⁶⁹

The relief granted was that the rent-charge was to be re-conveyed to the plaintiff¹¹⁷⁰ on payment of the £300 plus interest.¹¹⁷¹ On a rehearing brought by the defendant this decree was upheld by North LK in a very emphatic manner: he declared that 'he was fully satisfied in the decree, and that if he were to die presently, he would make it; and so confirmed it'.¹¹⁷²

George Pitt also made a bargain with the third earl of Ardglass. Identical to that made by Henry Muschamp, and apparently brokered by Muschamp, Jeffreys LC dismissed Pitt's argument that he had known nothing of the earl's circumstances, instead relying on Muschamp to arrange the whole transaction, and was therefore 'innocent and a fair purchaser'.¹¹⁷³ In granting relief, Jeffreys LC apparently did not believe that Pitt would have

¹¹⁶⁴ *Earl of Ardglass v Muschamp* (1684) 1 Vern. 237 at 237, 239.

¹¹⁶⁵ *Ibid*, at 237.

¹¹⁶⁶ *Ibid*, at 238.

¹¹⁶⁷ *Ibid*.

¹¹⁶⁸ *Ibid*.

¹¹⁶⁹ *Ibid*.

¹¹⁷⁰ At this stage of proceedings the plaintiff was the fourth earl of Ardglass.

¹¹⁷¹ *Earl of Ardglass v Muschamp* (1684) 1 Vern. 237 at 238.

¹¹⁷² *Ibid*, at 239.

¹¹⁷³ *Ibid*.

made a bargain of this kind without informing himself as to the ‘condition of the man he dealt with’.¹¹⁷⁴ Furthermore, Pitt’s insistence on his ignorance seemed to the lord chancellor to suggest that he expected to be questioned about the bargain, making such an insistence further evidence of fraud.¹¹⁷⁵ As for the bargain with Muschamp, the rent-charge was ordered to be re-conveyed to the fourth earl, on payment of £300 plus interest.¹¹⁷⁶

A2.15 Norton v Mascall (1687)

Although the bargains at the heart of the suit of *Norton v Mascall* (1687),¹¹⁷⁷ if the plaintiff’s allegations were true, appear to be archetypal in nature, the suit was not brought for the purpose of the kind of general relief with which this thesis is concerned. Rather, the plaintiff, Christopher Norton – who appears to have run up several thousand pounds’ worth of debt in a relatively short time, having been drawn in by the defendant Mascall to enter increasingly unreasonable bargains – sought to have an arbitrated award enforced against the defendant.¹¹⁷⁸ This was duly ordered.¹¹⁷⁹

A2.16 Bill v Price (1687)

The report of this 1687 case, heard before Jeffreys LC, is very brief, and little information is given concerning the circumstances of the plaintiff, the expectation, or the terms of the bargain.¹¹⁸⁰ The defendant is described as

... an exchange-man [who] had for many years past practised upon young heirs, by selling them goods at extravagant values, and to be paid five for one and more upon the death of their fathers ...¹¹⁸¹

More detailed information is provided in the pleadings. There appear to have been four co-obligors: Charles Bill, plaintiff in this suit, Thomas Playters, Roger Whitley,¹¹⁸² and one

¹¹⁷⁴ Ibid.

¹¹⁷⁵ Ibid.

¹¹⁷⁶ Ibid. In February 1687, Pitt sought a bill of review against the decree which failed on procedural grounds; in the opinion of the court the bill had no other purpose than to delay execution of the decree (*Pitt v Earl of Argyll* (1686) 1 Vern. 441 at 441).

¹¹⁷⁷ C 78/1609, no. 3.

¹¹⁷⁸ Ibid [Membrane 8; IMG_0072].

¹¹⁷⁹ Ibid [Membrane 13; IMG_0081].

¹¹⁸⁰ *Bill v Price* (1687) 1 Vern. 467.

¹¹⁸¹ Ibid, at 467. Despite the reference to ‘young heirs’ in the report of the case, the status of the plaintiff in this regard is not made explicit in the report. It seems likely that the plaintiff was the son of John Bill, one of the King’s Printers, who had died in 1680 (‘Kenwood’, in *Survey of London: Volume 17, the Parish of St Pancras Part 1: the Village of Highgate*, ed. Percy Lovell and William McB. Marcham (London, 1936), at 114-132: *British History Online* <<http://www.british-history.ac.uk/survey-london/vol17/pt1/pp114-132>> accessed 16 May 2018). John Bill left his business and Kenwood House, Hampstead, to his wife for her life, with reversion to Charles; the residue of his estate, both real and personal, came to Charles at John’s death, albeit in trust until he reached the age of 21 (Will of John Bill (8 October 1680) PROB 11/364/98). Given that in his bill Charles describes himself as being at the time of the bargain with Price ‘seised of an estate of inheritance of the value of about five hundred pounds per annum’ (*Bill v Price* (28 October 1685) C 6/277/15), he cannot be considered to be an expectant heir despite his reversionary interests.

¹¹⁸² Whitley brought his own suit against Price for the same bargain (see A1.24).

Glynn or Gleane.¹¹⁸³ The plaintiff, who was then under age, gave the defendant, Thomas Price, a warrant of attorney for judgment of £3,000, to secure a loan of £1,500.¹¹⁸⁴ The £1,500 provided by Price to the four co-obligors appears to have taken the form of £300 in ready money, and the rest in goods, but the plaintiff alleged that, rather than the quarter share of the £1,500 he was promised, he received from the defendant only £30 worth of silks.¹¹⁸⁵ The defendant, however, alleged in his answer that Bill was only ever a surety for Playters, and any division of the money and goods was made by Playters.¹¹⁸⁶ The relief granted was that the plaintiff's security be delivered up on payment of what had been paid to him alone, the matter being referred to a master to determine exactly what the plaintiff had received from the defendant.¹¹⁸⁷

A2.17 *Smith v Burroughs* (1696)

The plaintiff in *Smith v Burroughs* (1696)¹¹⁸⁸ appears to have been the eldest son and namesake of Erasmus Smith, merchant and educational benefactor.¹¹⁸⁹ Some years before the bargain complained of, the plaintiff had inherited a sizeable estate from his father of £3,000 per annum, although at this time this estate was being managed by trustees to ensure provision for Smith's siblings, leading to the plaintiff's need for ready money.¹¹⁹⁰ Initially wishing to mortgage premises in St Andrew's, Holborn, Smith was persuaded by one Pritchard Loader, a scrivener, instead to acknowledge a statute to secure a loan of £1000, said to be provided by a Martin Bassill, a country gentleman, but in reality coming from the defendant Edmund Burroughs, a vintner.¹¹⁹¹ Loader was a co-obligor in the statute, and indeed seems to have received the bulk of the money and goods provided: Smith received £300 in goldsmith's bills¹¹⁹² whereas Loader received the outstanding £700 in the form of £100 in cash, the discount of a debt he owed Burroughs, and wines valued by Burroughs at £400.¹¹⁹³ Evidence was given that the wines were worth only £200, and were in fact sold for only £150.¹¹⁹⁴ Smith was granted the relief he sought, with the granting of a perpetual injunction on the statute on payment of £300 and interest.¹¹⁹⁵

¹¹⁸³ *Bill v Price* (28 October 1685) C 6/277/15.

¹¹⁸⁴ *Ibid.*

¹¹⁸⁵ *Ibid.*

¹¹⁸⁶ *Ibid.*

¹¹⁸⁷ *Bill v Price* (1687) 1 Vern. 467 at 467.

¹¹⁸⁸ 2 Vern. 346; Prec. Ch. 81.

¹¹⁸⁹ Will of Erasmus Smith (9 October 1691) PROB 11/406/325; Toby Barnard, 'Smith, Erasmus', in *Oxford Dictionary of National Biography* (Oxford 2004) at

<<http://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-25796>> accessed 24 May 2018.

¹¹⁹⁰ *Smith v Burroughs* (1696) 2 Vern. 346.

¹¹⁹¹ This subterfuge was apparently in response to the plaintiff's declaration that he would only borrow from a gentleman: *ibid.*

¹¹⁹² A form of bill of exchange: James Steven Rogers, *The Early History of the Law of Bills and Notes: A Study of the Origins of Anglo-American Commercial Law* (Cambridge, 1995), 178.

¹¹⁹³ *Smith v Burroughs* (1696) 2 Vern. 346.

¹¹⁹⁴ *Ibid.*

¹¹⁹⁵ *Ibid.*

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