

PROTECTION OF FAMILY PROPERTY AGAINST CREDITORS IN THE ENLIGHTENMENT-ERA COURT OF CHANCERY

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The late eighteenth century English court of Chancery protected debtors, who held property in a non-business context, against their creditors. The court extended its policy of keeping family property in family hands far beyond conventional conjugal families: lonely widows and widowers, unmarried women and men, nephews, nieces and cousins of childless decedents, and even generic groups of "relatives" were all accorded a radical protection, which could go to the extent of the court purposely disappointing a testator's creditors, even where that testator expressly directed that his debts were to be paid before any sum was transferred to his surviving family members. All types of property were so protected: not only landed estates, but any type of personal property too. The recipients of Chancery's protection make a wide cross-section of British society, from the Nobility to humble merchants and professionals; it was not a predominantly aristocratic court.

The substantive work of Chancery during this period have been curiously understudied. Modern research has largely reproduced a traditional Victorian Benthamite discourse focused on the court's inadequate procedure. Most research of the substance of English law during the High Enlightenment has focused on the law of trade and the common law courts; a rivulet has focused on women's rights and property. This article attempts to redress this imbalance by studying one of Chancery's key substantive policies in the law of family property, then the most lucrative and best-developed area of English law, now little studied by modern legal historians except for questions of women's property. The Enlightenment-era Chancery's strong protection of families' property provides a useful comparative perspective on the present-day discourse of protecting families and the values associated with them.

The late eighteenth century English court of Chancery still suffers from what might be called an image problem. Ever since the close of the eighteenth century, the court under Chancellors Thurlow (1778-1792)¹ and Loughborough (1793-1801) has been described as a delay-ridden, costly den of iniquity. Most adverse comment has centered on the court's problematic procedure and institutional structure, largely operated by officers paid by the suitors of the court. That they were paid "by the piece"--often of parchment or paper--naturally created a powerful incentive to multiply costly technical hurdles through which the hapless suitor had to pass.² Other criticism of the court has focused on the unsatisfactory character of its judges: Thurlow was a foul-mouthed bully; Loughborough, a master political tergiversator, who has betrayed his political allies thrice over; of the two Masters of the Rolls, Pepper Arden is seen as a blatant appointment by Pitt the Younger of one of his close personal friends to high judicial office; and Lord Kenyon as a tight-lipped moralizer, a puritan after his time or a proto-Victorian. The judicial work of all except the undeniably painstaking Arden has been described as shallow, ad-hoc adjudication by busy, cynical politicians who were essentially throwaway judges. They are seen as uncaring; Loughborough, wrote Holdsworth with evident disapproval,

¹ With a brief hiatus in 1783 during the tenure of the precarious Fox-North coalition.

² Criticism of Chancery procedure dates from the seventeenth century at least; in the early nineteenth century it became part of the Benthamite critique of the court system as a whole: see, e.g., Joseph Parkes, *A History of the Court of Chancery* (London: Longman, 1828), who printed a foldout list of the numerous officers of the ostensibly one-judge court for his readers' horrified delectation. The victory of the Benthamite reformist perspective has perpetuated into our own time the focus of studies of the Chancery of the late eighteenth century on criticism of Chancery procedure, the most recent links in this particular chain, focusing mostly on a slightly later period, being Michael Lobban, "Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part I" *Law and History Review* 22 (2004): 389; id., "...Part II" *Law and History Review* 22 (2004): 565; and id., "Old Wine in New Bottles": the Concept and Practice of Law Reform, c. 1780-1830", in *Rethinking the Age of Reform: Britain 1780-1850*, ed. Arthur Burns and Joanna Innes (Cambridge: CUP, 2003) 114.

frequented the theatre and participated in high society when he should have been home with his caseload. No wonder the delays piled up.³

While some elements of this negative treatment by both historian and non-historian lawyers are hard to deny,⁴ that it has ever since the period under discussion held the stage to the virtual exclusion of any other point of view has led to some significant omissions. The key omission has been discussion of the substantive Chancery law of this period. While some cases have necessarily retained a place in the collective practical consciousness of English and commonwealth lawyers,⁵ there has been little in-depth discussion of the substantive law of this period as an epoch of legal history: it is mostly jumped over in the customary hurry from Hardwicke⁶ to the reviled Eldon.⁷ The leading legal historians to treat late eighteenth century English law, Patrick Atiyah and James

³ The locus classicus for criticism of the characters of the Chancery judges of this period is Lord Campbell's biographies, themselves the butt of much criticism, of both his fellow Chancellors: John Campbell, *Lives of the Lord Chancellors* (London: John Murray, 1846), Vol 5, 473-678 (Thurlow) and Vol 6, 1-366 (Loughborough). Earlier potent criticism can be found in Parkes, *History of the Court of Chancery*, 345-51. Campbell's work was a major influence on Foss's shorter biographies: Edward Foss, *The Judges of England* (London: John Murray, 1864), Vol 8, 374-85 (Thurlow) and 385-98 (Loughborough). Holdsworth continued this hostile tradition into the twentieth century in his *History of English Law*: see, e.g., as to Loughborough, William S Holdsworth, *A History of English Law*: Vol 12 (London: Methuen, 1938), 569-76, and Vol 13 (London: Methuen, 1952), 578-80. The same narrative still recurred in the 1980s: Daniel Duman, *The Judicial Bench in England, 1727-1825: The Reshaping of a Professional Elite* (London: Royal Historical Society, 1982) 89-90.

⁴ For a statistical study of the average delays in Chancery during this and other periods, see Henry Horwitz and Patrick Polden, "Continuity or Change in the Court of Chancery in the Seventeenth and Eighteenth Centuries?" *Journal of British Studies* 35 (1996): 54-55. That many modern courts experience similar delays does not, of course, excuse them in either eighteenth-century or present-day courts, but is a sobering lesson in the limited benefits of technological progress.

⁵ See two examples in note 13 below.

⁶ On whom see Clyde Croft, Philip Yorke, First Earl of Hardwicke, *An Assessment of his Legal Career* (PhD Thesis, University of Cambridge, 1982).

⁷ On whom see Rose Melikan, John Scott, Lord Eldon, 1751-1838: *The Duty of Loyalty* (Cambridge: CUP, 1999).

Oldham, have concentrated on the law of trade;⁸ in terms of personalities, they have focused on Mansfield and Buller, who are described as "progressives" while the Chancery judges are seen as either conservatives⁹ or simply as less-talented also-rans who were more focused on political than on legal achievement.

The research literature's focus on the law of trade is surprising in light of Chancery law--largely the law of families and their property--still being the most lucrative, best-developed area of English law in the late eighteenth century. Most of the leading lawyers inside and outside the judiciary built their careers--legal and sometimes political too--working in this area of the law, which was where the top fees and the best connections were to be got.¹⁰ One may detect in the recent literature's focus on the law of trade a certain projection backwards of the high status of business, its men and its law in today's society; this high status encourages an interest in the history of the law of trade.

One aspect only of late eighteenth century family property law has been adequately covered by recent research literature: the law relating to women's property, and even this area has mainly been studied by historians more social than legal.¹¹ The present article attempts to cover some of the large field left almost untouched. The area

⁸ Patrick S Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979); James Oldham, *The Mansfield Manuscripts* (Chapel Hill: University of North Carolina Press, 1992).

⁹ See Atiyah's description of Kenyon's conservatism: Atiyah, *Rise and Fall*, 362-66.

¹⁰ This is true not only of the Chancery judges studied in this article, but of Lord Mansfield too. For Kenyon's high earnings during this period see George T Kenyon, *The Life of Lloyd, First Lord Kenyon, Lord Chief Justice of England* (London: Longmans, 1873) 25, 136.

¹¹ Eileen Spring, *Law, Land, & Family: Aristocratic Inheritance in England, 1300-1800* (Chapel Hill & London: The University of North Carolina Press 1993); Susan Staves, *Married Women's Separate Property in England, 1660-1833* (Cambridge, MA: Harvard University Press, 1990). Amy Louise Erickson's important *Women and Property in Early Modern England* (London: Routledge, 1993) concentrates on the seventeenth century.

treated is one in which Chancery pursued a remarkable, far-reaching policy: the law of debtor and creditor.

One conventional account of the law of debtor and creditor in eighteenth century England stresses the "extensive powers" the law gave creditors.¹² Centering around the availability of imprisonment for debt on both mesne and final process, such an account fits snugly, despite appearances to the contrary, into the traditional story of the progress of English political liberty from Magna Carta on: English law bolstered Englishmen in their rights both against the state and their debtors. This conventional account leaves out equity,¹³ whose gloss upon the law often tended, as regards debtor-creditor relations, to counteract the common law's bolstering of creditors' position: equity was in many situations staunchly pro-debtor.¹⁴ It is this last policy that I shall trace in this article.¹⁵

¹² Such is the brief account given in the leading historical account of mid-eighteenth century England: Paul Langford, *A Polite and Commercial People: England 1727-1783* (Oxford: OUP, 1989) 76.

¹³ As was not uncommon among the most rhetorical of non-lawyer devotees of the heroic mythology of English liberty: see, e.g., Louis de Lolme's uncomprehending attack on Peter Thellusson's famous will and equity's decision to uphold it (*Thellusson v Woodford*, *Woodford v Thellusson* (1798-9) 4 Ves Jun 227, 31 ER 117); Jean Louis De Lolme, *General Observations on the Power of Individuals to Prescribe, by Testamentary Dispositions, the Particular Future Uses to be Made of Their Property...* (London: Richardson et al, 1798); see especially the second edition: *ibid*, *General Observations on Executory Devises...* (London: Richardson, 1800). Making up for his non-comprehension with violence, De Lolme seems to suggest, following a Rousseauian vision of the just society, that the virtues of English law should best be restored by the abolition of equity.

¹⁴ Contrastingly, the practice of testators outside of court often explicitly gave creditors priority to volunteer grantees, including family members. Furthermore, as Getzler and Macnair have noted (Joshua S Getzler and Michael RT Macnair, "The Firm as an Entity before the Companies Acts" in *Adventures of the Law*, ed. Paul Brand, Kevin Costello and W. N. Osborough (Dublin: Four Courts Press, 2005) 267, at text before footnote 6 and at footnote 21), and as we too shall see (see text to notes 139-148 below), some early modern equitable doctrines, such as that of bona fide purchase for value without notice, were used under some circumstances to prioritize creditors' claims on decedents' estates before those of voluntary grantees. Getzler and Macnair's assertion as to the late

Chancery saw the issue in larger terms than those of the relations between the two sides to a debt or credit. It in effect distinguished between two types of social contexts in which property was held: private contexts, often seen as family contexts, and business contexts. The crux of its policy was that Chancery decided many cases having to do with property held in a family, rather than a business, context so as to help family members keep their property as against their creditors. Much as the modern limited liability corporation has since the mid-nineteenth century made incorporated business a privileged context of property-holding, late eighteenth century equity made the family into such a privileged context.

seventeenth and early eighteenth centuries that "in this period it could be said that creditors are always to be paid before voluntary transferees" (ibid, text at footnote 21; my emphasis) cannot, however, in light of the materials analyzed in this article, be said to extend to late eighteenth century equity, which, as we shall see, practiced a wide-ranging policy of shielding private persons' non-business property from their creditors, often emphatically preferring the claims of family member voluntary transferees to those of a grantor's creditors. Whether equity became less sympathetic to creditors between the early and late eighteenth century must wait for future inquiry; see some hints in this direction at text at and after note 135 below.

Interestingly, A modern commercial lawyer's picture of early modern English law seems more accurate, overall, than that of the leading historical account mentioned above (Langford, *A Polite and Commercial People*): Philip R Wood in his *Maps of World Financial Law*, 5th ed. (London: Allen and Overy LLP, 2005) 71 classifies English law as having been "pro-debtor" since the seventeenth century. Wood treats this as a truism as to present-day English law as well, but there is no general consensus on this point: see the very reverse stated by, e.g., Iain D.C. Ramsay, "Functionalism and Political Economy in the Comparative Study of Consumer Insolvency: an Unfinished Story from England and Wales", *Theoretical Inquiries in Law* 7 (2006): 641.

¹⁵ The study encompassed the full corpus of Chancery law reports included in the English Reports for the period between Thurlow's appointment in 1778 and Loughborough's dismissal in 1801, as well as manuscript reports of the same cases preserved in Lincoln's Inn library, London, as parts of the great manuscript collections of Sargeant Hill (hereinafter: "Ms Hill") and of Charles Abbot, later Lord Colchester (hereinafter: "Ms Abbot"). Many manuscript reports added much to the printed reports: information on stages of proceedings not reported in print, comments by both court and counsel, as well as references they cited, which have been omitted from the printed reports, and variant versions of speeches by both. The practice of law reporting, consisting of taking speeches down by ear, permitted of wide variations.

That Chancery privileged property-holding in a family context does not necessarily mean that it focused on protecting aristocratic, or even landowners' interests alone, as some scholars allege.¹⁶ It were not landowners alone that Chancery strongly protected against their creditors: it protected virtually all holders of any type of property--rather than land alone--in a family, or private, context, excepting only a few specialized doctrinal contexts of property-holding, principally bankruptcy and contests with bona fide purchasers for value. As we shall see, the family context which Chancery privileged was wide-ranging: in addition to nuclear families and direct lineal successors, it included surviving spouses of both sexes, unmarried persons, and collateral inheritors of property from remote relatives. The portrayal of Chancery as a predominantly aristocratic court is convincingly falsified by Horwitz and Polden's finding that less than a third of all Chancery litigants in 1785 were "gentlemen and above", the lowest proportion of such litigants they found for any time between 1627 and 1819--and that nearly half were commercial men or artisans.¹⁷

¹⁶ For allegations that Chancery was at this period concerned primarily with aristocratic property see, e.g., Alain Pottage, "Proprietary Strategies: the Legal Fabric of Aristocratic Settlements", *Modern Law Review* 61 (1998): 164.

¹⁷ Horwitz and Polden, "Continuity or Change", 48. They checked the social composition of Chancery litigants in five sample years: 1627, 1685, 1735, 1785 and 1818/9. Note that their data regards all Chancery suitors in 1785 rather than just those litigating family property matters, and "gentlemen and above" might well have made a higher proportion of the latter group; though the significance of this fact should be seen in light of their classification of almost 70% of cases in Chancery that year as either estate, landholding or inter vivos trust cases (*ibid*, 35-37), the great majority of which must have been family property cases. One should further note that the practices of making wills and family settlements, which formed the background to most family property cases in this period, were not limited to "gentlemen and above", and certainly not to landowners: see, for the seventeenth and early eighteenth centuries, Amy Louise Erickson, "Common Law versus Common Practice: the Use of Marriage Settlements in early Modern England", *Economic History Review*, 2d ser., 43 (1990): 21-24; Lloyd Bonfield, *Marriage Settlements, 1601-1740* (Cambridge: CUP 1983) 91, footnote 19 (finding that settlements were prevalent

After a brief introductory section explaining the terms "estate" and "estate preservation", I discuss, in Part A, the major security and enforcement strategies available to creditors, the self-protective strategies available to debtors, and the rules and priorities applicable to the payment of decedents' debts. These provide the necessary background to my central discussion, in Part B, of the ways the court of Chancery bolstered family members' position against their creditors. This Part demonstrates the rich variety of judicial techniques the court used to protect private holders of wealth against the commercial and financial interests. Part C draws conclusions from both the previous Parts, explaining how late eighteenth century equity gave the family, as a context of property ownership, a privileged status not dissimilar from that given by later law to the limited liability company.

Estates and their Preservation: Semantics

The word "estate" had many meanings in the late eighteenth century. It could mean either of the following: (i) outside technical legal discourse, an area of land seen as the property of a family or individual; (ii) an estate in property, in the technical sense of the doctrine of estates, such as a life estate or fee tail; or (iii) the property left by a deceased person, or parts thereof, such as his "real estate" or "personal estate".¹⁸ The reader is normally left to identify the sense meant according to the context.

among Kentish yeomen from 1660-1740); and for the nineteenth century, Chantal Stebbings, *The Private Trustee in Victorian England* (Cambridge: CUP 2002), introduction (who found that by that time, settlements were common among large sections of the "middle class").

¹⁸ It could also be a synonym of "property" outside the context of the administration of decedents' estates, as in the Act to Prevent the Committing of Frauds by Bankrupts 1732 (5 Geo 2 c 30), where the bankrupt's property is repeatedly called his "estate".

Chancery attempted during the period under discussion to preserve family estates, in senses (i) and (iii) of the word, in family hands. There were three different variants of this estate-preservative policy:

(a) maintaining, and, as far as circumstances allowed, increasing, the aggregate value of all the property held in a family's hands, whether realty or personalty, whether held in one piece or several, and whichever family member held whichever piece;

(b) keeping the family land in family hands, if necessary at the price of dispersing family personalty away from the family: a motivation which explains the court's preference for both family members' debts and the legacies they left being paid out of their personalty, even where they clearly meant them to be paid out of their realty.¹⁹ This motivation is also one explanation of the stricter formality requirements for transfers of land compared to those for transfers of personalty.²⁰

(c) keeping families' property, and especially their land, together, in as few and as large pieces as possible, and unconverted, in its current state: for example, letting land stay

¹⁹ As in *Hale v Cox* (1791) 3 Bro CC 322, 29 ER 560, where Thurlow threw a mortgage, which the testator clearly envisaged as being paid out of his realty, on the personalty, in order to save the realty for his issue--grandchildren by the female line. The fact that had another testator's realty borne the legacies he left, his personalty would have gone to a family member rather than to the non-family legatees, did not dislodge Chancery's a priori preference for keeping family land in family hands by legacies being paid out of personalty: see, e.g., *Chitty v Parker* (1793) 4 Bro CC 411, 29 ER 963; 2 Ves Jun 271, 30 ER 629. The same policy was promoted by the rule that devises of land and legacies charged on land lapsed on a legatee dying before the date the testator had set for payment of the bequest: *Pearce v Loman*, *Pearce v Taylor* (1796) 3 Ves Jun 135, 30 ER 934. Notably, pure personal legacies survived such a death: see note 25 below. The two rules, combined, were preservative of family realty, in inducing testators desirous of the legacies they left being paid even on the legatee's dying before the date they set for payment, to leave legacies of personalty rather than bequests of realty or legacies charged on it.

²⁰ For discussion of these requirements during our period see, e.g., *Habergham v Vincent* (1787-93) 4 Bro CC 353, 29 ER 931; 5 TR 92, 101 ER 53; 2 Ves Jun 204, 30 ER 595.

land, even as between different family members. A good example of this policy is the operation of the doctrine of conversion, seeing, as between the heir at law and next of kin, money raised from land as still being land, and thus going, on an intestacy, to the former.²¹

Chancery had an estate-preservative policy in all three senses; it is this policy which will be described in this article, as it complemented and contrasted with debtors' own anti-creditor strategies and lenders' strategies of security and collection. The different variants of estate preservation could at times point at contrary solutions, as in the case where Thurlow construed a will so that legacies, some of which were to go to family legatees, would be charged on a testator's realty, which the testator devised to a non-family executor; a decision which, considering that the testator's personality was

²¹ *Ackroyd v Smithson* (1780) 1 Bro CC 503, 28 ER 1262; *Ms Abbot Vol V 22a*, the case that made John Scott, the future Lord Eldon's name as a barrister. This application of the principled preference for letting land stay land was made possible by both Scott and Thurlow assuming that the testator not having explicitly provided for the case of an undisposed-of residue being created by two of his legatees predeceasing him, general law, including the doctrine of conversion, applied as to the allocation of that residue. Buller J and Thurlow assumed so again in *Hutcheson v Hammond* (1790) 3 Bro CC 128, 29 ER 449, as did Loughborough in *Collins v Wakeman* (1795) 2 Ves Jun 683, 30 ER 841. Letting land stay land seems to have been less important for Sewell MR, who at first instance in *Ackroyd* saw the testator's entire class of legatees as joint-tenants, holding that the entire residue was to be equally divided, as money, among the surviving legatees. Only a year before *Ackroyd*, in *Fletcher v Ashburner* (1779) 1 Bro CC 497, 28 ER 1259, Sewell held that land which a testator directed to be sold, the proceeds of sale to be paid as legacies, was to be seen as money even before the sale despite of all the intended legatees dying before the time set for the sale; the land was thus to go to the next of kin of the last legatee to survive as against his heir at law. Both *Fletcher v Ashburner* and *Ackroyd v Smithson*, already seen as leading cases during our period (*Wheldale v Partridge* (1800) 5 Ves Jun 388, 396-97; 31 ER 643, 648) are still today mentioned as leading cases on conversion: see Meagher, Gummow and Lehane's *Equity: Doctrines and Remedies*, 4th ed. by Roderick Pitt Meagher, John Dyson Heydon and MJ Leeming (Sydney: Butterworth LexisNexis, 2002) 1079 and 1086 respectively.

insufficient to pay the legacies, preserved the family estate in sense (a) of estate preservation, at the expense of preserving it in sense (c).²²

While estate preservation in sense (a) was especially relevant to contests between family members and their creditors, estate preservation in the two latter senses was often relevant to contests amongst family members themselves: for example, between the family member who inherited the land and that who inherited the personalty.²³ In general, Chancery was, as we shall see, both firm and effective, procedural ills notwithstanding, in protecting families' estates against their creditors. It was far less effective in preserving the integrity of family estates against family members with individual claims on family assets, such as daughters' and younger sons' rights to receive portions. Two other contexts in which Chancery did not strive as strongly as elsewhere to preserve families' estates were those of bankruptcy and of contests between family members and purchasers for value.²⁴ Chancery's attitude towards claims on family property by non-family legatees and executors can be described as a medium between the two extremes of its attitude towards claims by family members and those by creditors.²⁵

²² *Minor v Wicksteed* (1792) 3 Bro CC 627, 29 ER 736; Ms Abbot Vol X 116a.

²³ See, e.g., the contest in *Lawson v Hudson* (1779) 1 Bro CC 58, 28 ER 982, affirmed *Lawson v Lawson* (1781) 3 Bro PC 424, 1 ER 1410.

²⁴ Both circumstances obtained in *Milsom v Awdry* (1800) 5 Ves Jun 465, 31 ER 684; and see discussion at text to notes 95-96, 141-149.

²⁵ An attitude exemplified in the rules concerning the payment of legacies of personalty, not charged on land, to non-family legatees in cases where a legatee survived the testator, but died before the time set for the payment of his legacy: where the testator had expressly given the legatee the interest on his legacy, the legatee's executor was to be paid the legacy immediately on the legatee's death. Where no interest was given, the legacy was only to be paid to the legatee's executor at the later time at which it was to be paid to the legatee himself: *Crickett v Dolby* (1795) 3 Ves Jun 10, 30 ER 866. These rules are estate-preservative in minimizing the amount payable in each of the two cases, but estate-destructive in still paying the legacies at all despite the legatee dying before the time set for payment of his legacy.

Some other terms need to be defined at the start. Intentionalism is an approach to judicial construction focused on identifying and giving effect to the intentions of the author of the document construed.²⁶ "Remote relatives" or "remote kin" are all persons removed from a donor by more than two degrees according to the canon law computation adopted by English law, and by more than four degrees according to the civilian computation, ie further than a first-degree cousin.²⁷

It can hardly be denied that in following an estate-preservative policy, Chancery was socially conservative: it crafted its doctrines and strained interpretatively so as to let the social distribution of property stay as it was. It was far, however, from being simply the protector of the male landed rich and their heirs. As we shall see, the group protected by its estate preservative policies ran the propertied gamut from the very rich to the modestly endowed, from landed heirs to lonely widows, young single women and even groups of unspecified "relatives". Their property, over which Chancery extended its protection, could be either real, personal or mixed. Chancery's overall policy can best be described as attempting to keep family property within the familial, domestic, private sphere, and prevent or postpone its exiting this sphere into the commercial or financial spheres. We shall return to these general evaluative questions in the conclusion to this article.

²⁶ For a modern definition of intentionalist construction see Parry and Clark: *the Law of Succession*, 11th ed. by Roger Kerridge (London: Sweet & Maxwell, 2002) 230, footnote 5 and text to it; and for a 20th century example, 239.

²⁷ For discussions of the degrees of kinship in civil, canon and English law see, e.g.: *Corpus Iuris Civilis*, Vol 1: *Institutiones*, ed. Paulus Krueger (Berolini: Apud Weidmannos, 1920) 3.1-6; William Blackstone, *Commentaries on the Laws of England*, 1st ed. Reprint, (Chicago: University of Chicago Press, 1979) Vol 2, 202-207; Samantha Worby "Kinship: the Canon Law and the Common Law in Thirteenth-Century England", *Historical Research* (2007) (forthcoming; copy on file with author).

Before discussing the court's protection of debtors holding their property for private or family enjoyment as against their creditors, we must lay out the background against which that protection was extended: the security and enforcement options enjoyed by lenders, the protective strategies available to debtors without resort to Chancery, and the rules and priorities governing the payment of decedents' debts. That background shall be laid out in Part A of this article.

A. THE QUEST FOR SECURITY: LENDERS' AND BORROWERS' STRATEGIES

1. Lenders' Security and Enforcement Strategies

Lenders had several types of security available to them. One was the conditional bond: the borrower's obligation to repay was put as a condition, he binding himself to perform some act should he not fulfill that condition. A typical such act was the payment of double the sum of the debt, a form of bond which came to be known as a "penalty bond". On the non-performance of the borrower's contractual obligation, the lender could bring an action of debt on the bond for the penalty. Such actions were common form at the Court of Common Pleas by the mid-fourteenth century. By the seventeenth century, however, Chancery "relieved against penalties" as a matter of course, and such relief spread to the common law in statutory form at the turn of the eighteenth century. The result was that debt on a conditional bond became an action for damages: the penalty

could only be enforced to the extent of the actual loss suffered by a creditor due to his debtor's non-performance of the condition.²⁸

A more effective security was the recognizance: an obligation or bond conditioned to repay the debt, acknowledged before some court of record or authorized officer, and afterwards enrolled in some court of record. Once a debtor has executed a recognizance, his creditor had only to levy execution: an action in debt was unnecessary. The same significant shortcut was achieved by the practice of obtaining, as security, a judgment enrolled confessing the debt, or a bond with a warrant of attorney to confess judgment for the debt.²⁹ In both cases, the creditor had direct access to the writs of execution, of which the most significant were *feri facias*, commanding the sheriff to levy the sum owed out of the debtor's goods and chattels, and *elegit*, commanding the sheriff to seize all of the debtor's chattels, save his oxen and beasts of the plough, as well as half his land, and deliver them to the creditor until the latter had levied the amount owed out of them.³⁰ Practice varied: while to obtain possession of debtors' land under an *elegit* creditors sometimes needed to sue their debtors in ejectment,³¹ the writs of execution could be dispensed with by way of a bill in Chancery, which could order execution by

²⁸ David J Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford: OUP, 1999) 21-22, 28-30, 150-51.

²⁹ Hrothgar J Habakkuk, *Marriage, Debt, and the Estates System: English Landownership, 1650-1950* (Oxford: Clarendon Press, 1994) 261.

³⁰ These writs were since 1285 granted explicitly by statute: Statute of Westminster II (1285) 13 Edw 1 c 18.

³¹ See, e.g., *Davidson v Foley* (1791) *Ms Abbot Vol VIII* 129a, 132b.

decree.³² A further, indirect enforcement mechanism available to creditors was imprisonment for debt on both mesne and final process.³³

A form of security which did not inescapably involve a visit to court was the eighteenth century mortgage, by which the title to an interest in land was conveyed by the borrower to the lender, subject to a condition to re-convey on payment of the mortgage money. While this skeleton of the common law mortgage approximates a type of pledge, by the seventeenth century equity turned it into an approximation of a civilian hypothec: mortgagors, despite having conveyed a term in the land or even the fee, were usually permitted to stay on the land. Their right to redeem the land after default--the equity of redemption--came to be seen as an equitable estate in land, devisable, descendable, grantable and barrable by equitable common recovery. Any attempts to contractually restrain the mortgagor's equitable rights were disallowed.³⁴ The triumph of the equity of redemption was merely the best-known instance of equity's wider pro-debtor policy, many other instances of which shall be exposed in this article.

³² See the cases discussed by Scott, appearing for plaintiffs in *Davidson v Foley*, at *Ms Abbot* Vol X 64b, 66b-68a.

³³ On debtors' imprisonment in this period see: Joanna Innes "The King's Bench Prison in the Later Eighteenth Century: Law, Authority and Order in a London Debtors' Prison", in *An Ungovernable People*, ed. John Brewer and John Styles (London: Hutchinson, 1980) 250-60; Ron Harris "Legitimizing Imprisonment for Debt: Lawyers, Judges and Legislators", in *The History of Law in a Multi-Cultural Society*, ed. R Harris and others (Dartmouth: Ashgate, 2002) 221-26.

³⁴ The equitable doctrines postponing foreclosure, which received much elaboration during the economic crisis precipitated by the American war of 1776-82, have been commented on by legal and other historians: Habakkuk, *Marriage, Debt, and the Estates System*, 516-22; David Sugarman and Ronnie Warrington, "Land Law, Citizenship, and the Invention of "Englishness": the Strange Story of the Equity of Redemption" in *Early Modern Conceptions of Property*, ed. John Brewer and Susan Staves (London: Routledge, 1995) 109.

Other effective securities still ostensibly available were known as "statutes", meaning the remedies granted by the medieval Statutes Merchant and Staple. The former statutes gave merchants, and merchants alone, a type of glorified recognizance, where a merchant who had made his debtor acknowledge the debt and the time set for payment before a public officer could obtain, on default, the whole of the debtor's land as security; the latter statute extended a similar security to any creditors for debts acknowledged in the Courts of the Staple. In the late eighteenth century "statutes" were still on the statute books, still occasionally used, and appearing in the new legal treatises.³⁵

A further apparently-formidable weapon in the creditor's arsenal were the two imposing "Statutes of Elizabeth". The Act of 13 Eliz declared any disposition of either realty or personalty intended to defraud "creditors and others"³⁶ void against them,³⁷ excepting dispositions to bona fide purchasers for value without notice.³⁸ The Act of 27 Eliz held any disposition of land or interests therein intended to defraud those purchasing the same or any interest therein for good consideration either before or after the disposition, void against the purchasers and all claiming under them, even if the latter had notice of the earlier voluntary disposition.³⁹ Dispositions to purchasers bona fide for value and similarly-made mortgages were excepted.⁴⁰ While the remedy offered by the

³⁵ Statutes Merchant: Statute of Acton-Burnel 1283 (11 Edw 1); Statute of Merchants 1285 (13 Edw 1 Stat 3). Statute Staple: Statutum de Stapulis 1353 (27 Edw 3 Stat 2). Mentioned in 1799 treatise as still in force: John Joseph Powell, *A Treatise on the Law of Mortgages*, 4th ed. (London: J Butterworth, 1799) Vol 1, 349.

³⁶ An Act against Fraudulent Deeds, Alienations etc. 1571 (13 Eliz 1 c 5) s 1.

³⁷ *ibid*, s 2.

³⁸ *ibid*, s 6.

³⁹ An Act against Covinous and Fraudulent Conveyances 1585 (27 Eliz 1 c 4) ss 1-2.

⁴⁰ Dispositions to purchasers: *ibid* s 4; mortgages: s 6. In 1800 the two statutes received a long-winded treatise to themselves: William Roberts, *A Treatise on the Construction of*

statutes might seem powerful, their exclusive focus on intent to defraud, as well as the special exceptions for those purchasing against the notoriously open-ended "consideration", hint at some of the ways open to debtors to minimize their impact, ways which, as we shall see, were enthusiastically and effectively taken.

Finally, creditors of a debtor who was a merchant,⁴¹ scrivener,⁴² banker, broker or factor,⁴³ could resort to bankruptcy proceedings. Specialty creditors lost their priority in such proceedings, which treated secured and unsecured debt alike: all creditors shared ratably in proportion to the sums owed.⁴⁴

This battery of remedies reflected the urgency with which the "middling sort"--the lender class - depended on the security of credit, and the ability to put pressure on delinquents.⁴⁵ It was not a clear-cut situation of higher oppressing lower; witness the numerous aristocratic debtors whose hardships are mentioned in this article. It was,

the Statutes... Relating to Voluntary and Fraudulent Conveyances (London: A. Strahan, 1800); see also Getzler and Macnair, "The Firm as an Entity", at text to fns 12-19.

⁴¹ An Act Touching Orders for Bankrupts 1570 (13 Eliz c 7) s 1; An Act for the Better Relief of the Creditors Against Such as Shall Become Bankrupts 1604 (2 Jac 1 c 15) s 2.

⁴² An Act for the Further Description of a Bankrupt 1623 (21 Jac I c 19) s 2.

⁴³ An Act to Prevent the Committing of Frauds by Bankrupts, s 39; this was the comprehensive bankruptcy code in force in the late eighteenth century, replacing two earlier ones of 1705 and 1720.

⁴⁴ An Act for the Further Description of a Bankrupt, s 9. The principle of ratable distribution, received from Roman law through the law of medieval Italian city-states, was established as early as the first English bankruptcy statute of 1543: An Act Against Such Persons As Do Make Bankrupts 1543 (34 & 35 Hen 8 c 4) s 1. See accounts of early English bankruptcy law in V Markham Lester, *Victorian Insolvency* (Oxford: Clarendon Press, 1995) 13-21; Ian PH Duffy "English Bankrupts, 1571-1861", *American Journal of Legal History* 24 (1980): 283. The same principle is still seen today as "the basic principle of insolvency law": Gerard McCormack, *Secured Credit Under English and American Law* (Cambridge: CUP, 2004) 5.

⁴⁵ Lawrence Stone and Jeanne Fawtier Stone, *An Open Elite? England 1540-1880* (Oxford: Clarendon Press, 1984) 414.

furthermore, often possible for debtors to evade many or all of these remedies, as we shall now see.

2. Debtors' Protective Strategies

a. Bypassing the "Statutes of Elizabeth"

Debtors enjoyed a large menu of protective strategies with which to protect themselves against lenders' security and enforcement techniques. A key strategy useful for evading personal debts, not charged on any specific asset, was giving property to family members, thus subtracting it from the fund available to the disponent's creditors. The drastic Statutes of Elizabeth were in practice fairly easily evaded. One way to escape such a disposition being held void as against the disponent's creditors was to give for consideration rather than voluntarily. To establish that a conveyance was made for consideration, one needed to show "that the transaction or treaty on which the conveyance was founded, virtually contained some conventional stipulations, some compromise of interests or reciprocity of benefits, that point out an object or motive beyond the indulgence of affection or claim of kindred, and not reconcilable with the supposition of intent to deceive a purchaser".⁴⁶

There were many ways to fulfill these criteria. Marriage, of course, was a valuable consideration--Lord Hardwicke called it "the best consideration that can be"⁴⁷--which rendered the conveyances in a marriage settlement valid against both the disponent's creditors and purchasers, with or without value, of the conveyed property.⁴⁸ While some judges saw the marriage consideration as validating only those limitations in the marriage

⁴⁶ Roberts, Construction, 66.

⁴⁷ Lord Townshend v Windham (1750) 2 Ves Sen 1, 5; 28 ER 1, 4.

⁴⁸ Roberts, Construction, 105.

settlement which conveyed interests to the husband, wife and children of the marriage, there were also judicial statements to the effect that "every person claiming under a marriage settlement is a purchaser for a valuable consideration".⁴⁹ Even the narrower view, which required further consideration, beyond the fact of marriage, to validate those "collateral" limitations conveying interests to disponees beyond the husband, wife or children, was in practice quite permissive: any consideration moving from the parent of one party to a marriage to his child was enough to support limitations in the settlement to the siblings of that child, even when those limitations were placed before limitations to the future issue of the marriage.⁵⁰ More generally, the joining of a blood relation of a party to the marriage as a party to the settlement has been held to raise a sufficient consideration to support even collateral, remote limitations out of "the path of the matrimonial consideration" (the issue of the marriage and their own issue after them) against subsequent purchasers, including mortgagees, of the same property from the settlor, as well as his other creditors.⁵¹

Even Settlements made after marriage (which could not strictly be seen as being made for consideration as between the spouses, who now shared one legal personality) were valid against creditors for subsequently-contracted debts where the settlor was not indebted at the time the settlement was made, or where his then-existing debts were secured.⁵² A settlement of one's property after marriage on one's wife and issue was valid

⁴⁹ *Countess Dowager Gower v Earl Gower* (1783) 1 Cox 53, 56; 29 ER 1059, 1060.

⁵⁰ *Roberts, Construction*, 147-48.

⁵¹ *ibid* 77.

⁵² *Stephens v Olive* (1786) 2 Bro CC 90, 29 ER 52; *Roberts, Construction*, 187, 191. By the end of our period the rule was relaxed further, holding that only where the settlor was insolvent at the time of making the settlement after marriage would that settlement be void against a subsequent creditor: *Lush v Wilkinson* (1800) 5 Ves Jun 384, 31 ER 642.

against subsequent purchasers of the settled property as well so long as one alleged in the settlement that a marriage portion has been received with the wife.⁵³ No proof that the portion has actually been paid was necessary, as "it is not the recompense but the inducement which imparts value to such family provision".⁵⁴ Even in the absence of a portion, other forms of parental involvement in marriage settlements made after marriage sufficed to render them valid against subsequent bona fide purchasers for value: where to settle a husband's property after his marriage his father's consent was necessary, as it was, for example, where the father was a life tenant in possession and the son a tenant in tail in remainder, the giving of that consent by itself supplied the necessary consideration.⁵⁵

Another way to escape the statutes was by relying on their exclusive emphasis on fraudulent intent: this provided an escape hatch in cases where the limitation creditors were seeking to have declared void could hardly be claimed to have been made against consideration, as where it was obviously voluntary, or where the settlor was already indebted at the time of the settlement. As Eyre CB noted in such a case, "[w]here a family settlement is conducted with fairness and propriety, though the consideration strictly considered does not extend to all, yet the Court revolts at the idea of its being void".⁵⁶

Similar arguments were available to protect family dispositions outside marriage settlements from being held void under the statutes. Advancements to children and voluntary settlements, other than at marriage, on wives or children, were in many cases

⁵³ Without such an allegation, the court could let subsequent purchasers with notice of the settlement enjoy the benefit of the Statute of 27 Eliz.: *Evelyn v Templar* (1787) 2 Bro CC 148, 29 ER 85, discussed in *Roberts, Construction*, 214-15.

⁵⁴ *Roberts, Construction*, 258, referring to *Russell v Hammond* (1738) 1 Atk 13, 26 ER 9.

⁵⁵ *Roberts, Construction*, 249-50.

⁵⁶ *Jones v Boulter* (1786) 1 Cox 288, 29 ER 1170; *Ms Abbot Vol III*(1) 116a (Exchequer).

held valid against the disponor's subsequent creditors, despite the statutes, where the disponor was not indebted at the time of the disposition, and especially where he had children in being at that time.⁵⁷ Another case in point were resettlements of family estates between fathers and sons intended to bring the father's indebtedness under control.⁵⁸ For that purpose, trusts of part of the property could be created for paying the father's debts, and perhaps his rights in and control of the property curtailed. The creation of such a trust fund could be seen as consideration, moving from the son, for the curtailment of the father's rights; alternatively, the general resuscitation of family fortunes could be seen as consideration for the son's sacrifice of family property to pay his father's debts. By such arguments were such resettlements inured against both the father's creditors⁵⁹ and the son's.⁶⁰ A settlement of separation made by a husband on his wife was also seen as made for valuable consideration and thus valid against his creditors, the consideration being the trustees of the settlement covenanting to indemnify the husband against debts which the wife might contract after the separation.⁶¹

⁵⁷ Lord Townshend v Windham, 10-11; 7; Roberts, Construction, 13-29.

⁵⁸ Though sons were not liable in law to the personal debts of their fathers, they were considered liable to them in honour. This extra-legal, "social" liability explains sons' readiness to resettle so as to make possible the sale or mortgage of settled family realty to raise money to pay their fathers' debts. See an example of such an agreement in Christopher Clay, "Property Settlements, Financial Provision for the Family, and Sale of Land by the Greater Landowners, 1660-1790", *Journal of British Studies* 21 (1981): 25.

⁵⁹ Myddleton v Lord Kenyon (1794) 2 Ves Jun 391, 30 ER 689; Francis Hargrave, *Juridical Arguments and Collections* (London: JJ and G Robinson, 1797-99), Vol 1, 293; Roberts, Construction, 149-52.

⁶⁰ Brown v Carter (1800-1801) 5 Ves Jun 862, 31 ER 898.

⁶¹ Stephens v Olive.

b. In Bankruptcy

The debtors' strategy of giving property to family members as a means to secrete that property from their creditors seems to have by the early eighteenth century enjoyed less scope for success in the bankruptcy context. Early seventeenth century legislation facilitated such a strategy, subjecting the key rule that assets conveyed by the bankrupt after bankruptcy stay distributable by his committee as if he has not conveyed them to an exception for dispositions on marriage of the bankrupt's adult children to an adult spouse, which were good against the bankrupt's committee if made against good consideration, such as marriage.⁶² The comprehensive bankruptcy code of 1732 was far more suspicious of gifts of marriage portions by insolvents to their children, disqualifying from all the benefits of bankruptcy--discharge, being granted an allowance, and release from prison--any bankrupt who gave, while insolvent, more than £100 on the marriage of his child.⁶³ We shall observe a similarly suspicious attitude towards bankrupts on the part of the court of Chancery.

c. Owning Nothing: The Foley Trust Scheme (i)

Many debtors tried to escape the levying of their debts out of their assets by appearing to own no, or not enough, assets. Sometimes the common law rules without more could be helpful in putting whole categories of assets beyond some creditors' reach, as in the rule that freehold land was not liable to simple contract debts without being charged with

⁶² An Act for the Further Description of a Bankrupt, s 5.

⁶³ An Act to Prevent the Committing of Frauds by Bankrupts, s 12. A full review of debtors' attempts to turn bankruptcy proceedings to their own benefit--what creditors regarded as abuse of such proceedings--is outside the purview of this study; for some such attempts see text to notes 96-97.

them. In other cases the creativity of debtors and their lawyers was tested. The practice of holding a beneficial, rather than a legal, estate in land was less useful for evading debt than it was before the Statute of Frauds, which made even a beneficial interest in land liable to the judgment creditor's writ of *elegit*.⁶⁴ Having less than a freehold estate in the family realty, such as a life estate or a power of appointment only,⁶⁵ could be useful, especially where the balance of rights in and control over family property were lodged with persons who could be counted on to cooperate with the debtor regardless of his extremely limited formal rights therein.

Extreme cases of indebtedness made for creative solutions. The father of the desperately indebted Thomas and Edward Foley⁶⁶ attempted to keep their creditors at bay by using not one but two consecutive protective trusts. Their life estates in family realty were postponed until after their deaths by first limiting long terms on trust for repaying their huge debts, leaving both the amount of rents used for, and the timing of, repayment in the absolute discretion of the trustees, who were also

according to their will and pleasure, and not otherwise, to allow yearly and every year, or oftener, to or for the use or benefit of [the] two sons, ... any sum or sums of money, not exceeding, in the whole, in any one year, the

⁶⁴ An Act for Prevention of Frauds and Perjuries 1676 (27 Char 2 c 3) s 10; giving an heir a beneficial, rather than a legal, estate remained useful for minimizing his future widow's rights, as there was no dower of a trust: Spring, Law, Land, & Family, 130-32.

⁶⁵ Powers of appointment, along with copyholds, were only made liable to writs of *elegit* by the Judgments Act 1838 (1 & 2 Vict c 110) s 11, the same section as made *elegit* extendable to the entirety of debtors' land.

⁶⁶ Who, according to one of their creditors, have defaulted on the annuities they granted to the latter to the extent of £300,000: Habakkuk, Marriage, Debt, and the Estates System, 305.

sum of £6000, until such the debts of the said [sons], as therein provided for, and should be due at [the father's] decease, were first paid and discharged, but so as [the] two sons, or either of them, should have no estate, right, title, claim, or interest in the rents, issues, and profits of [the] said [realty] comprised in the said terms, for and during the respective lives of [the] sons, and the life of the survivor of them, than the said [trustees], and the survivor of them, and the executors, administrators, and assigns of such survivor, should, in their absolute, free, and uncontrouled power, direction, and inclination, think proper and expedient...⁶⁷

Depriving the brothers of any non-discretionary entitlement to either capital or income for the duration of the terms of 99 and 101 years limited on parts of the family realty on trust for paying their debts rendered inefficacious the creditors' remedy of obtaining, by writs of elegit, possession of the debtors' land until the debts were satisfied: the brothers had at present no rights in any land for the writ to catch, and were not to have any such rights until the trust to pay their debts determined, when the debts were fully paid. The surviving trustee--a younger brother named Andrew--was thus given complete control over the pace of repayment. The case exemplifies the practice of protecting both a family and its property against creditors by allocating rights in that property so that the most heavily indebted family members will enjoy the least formal rights in, and control over, that property. Such an allocation was perfectly compatible with the brothers Foley

⁶⁷ Davidson v Foley (1787) 2 Bro CC 203, 206; 29 ER 115, 116-17; a second protective trust was limited after the sons' life estates. See reports of later stages of the case: (1792) 3 Bro CC 598, 29 ER 721; Ms Abbot Vol VIII 129a; Vol X 64b.

behaving, in every sense except that of formal legal entitlement, as if they owned their estates: living on the estates at the lavish standard made possible by their allowances of £3000 per annum each, and managing them, should they choose to do so.

The remaining relative advantage, for debtors, of owning property in equity only rather than at law is made clear by the contrast of the Foley family's attempt to protect their plate from a judgment creditor. By the same will which created the sophisticated trust of the realty, the family plate was to follow, like an heirloom, the limitations of the houses in which it was held. The attempt failed: the estate-tail in the realty limited in the will for Edward Foley's children vested in his son, and when the son died aged 14 days, in Edward as his administrator. This meant that the plate, too, vested in Edward, and was available to his creditors.⁶⁸

d. Statutes to Defeat Creditors

While Elizabeth's parliaments took the statutory route in the creditors' interest, those of the late eighteenth century took the same route in the debtors': statutes were enacted to create technical hurdles against which many creditors' securities would fail. An example was the Annuity Act of 1777, enacted to restrain the practice, popular since the 1760s, of borrowing against a grant of an annuity to the lender for the life of the borrower:⁶⁹ the Act made the validity of such grants conditional on the registration of their every

⁶⁸ *Foley v Burnell* (1783) 1 Bro CC 274, 28 ER 1125; *Ms Hill* Vol 15 361; (1785) 4 Bro PC 319, 2 ER 216.

⁶⁹ Habakkuk, Marriage, Debt, and the Estates System, 338; but see a 1739 example: Clay, "Property Settlements", 25. Where the grantee of such an annuity had notice, when contracting for it, that the borrower had no funds available to repay the loan or pay the annuity except realty settled in trust for his wife for her own use, Loughborough applauded the trustee's refusal to pay the annuity out of the income of that realty: *Mores v Huish* (1800) 5 Ves Jun 692, 31 ER 808.

particular.⁷⁰ It was an effective strategy: the Foley brothers defeated their annuitants not by the complex trusts in their father's will, but by successfully arguing that not only the bonds they gave them, but the warrants of attorney to confess judgment too, had to be registered in the court of Chancery under the Act; the warrants not having been so registered, the annuities were void.⁷¹

These debtors' strategies did not necessarily require resort to Chancery. On top of them came the manifestations of Chancery's determined pro-debtor strategy, described in Part B below.

3. The Payment of Decedents' Debts: Rules and Priorities

The points of doctrine discussed in most of the cases I shall mention dealt with the order in which a testator's different assets will be liable to his debts. These technical rules were often the focus of struggles between family members who were bequeathed different parts of a testator's estate, each trying to show that the debts were primarily, or exclusively, to be paid from assets bequeathed to others. Such struggles were a potent field for the manifestation of the court's policies, both by rules embodying these policies and by the direct application of policy to specific cases. We turn to a brief overview of the relevant rules.⁷²

⁷⁰ An Act for Registering the Grants of life Annuities; and for the Better Protection of Infants Against Such Grants 1777 (17 Geo 3 c 26).

⁷¹ See Thurlow's scruples and eventual decree in *Davidson v Foley* (1792) 3 Bro CC 598, 603-4; 29 ER 721, 723-24.

⁷² Many of them are mentioned with extreme brevity in a footnote by Fonblanque: [Henry Ballow?], *A Treatise of Equity*, 2nd ed. by Fonblanque (Lincoln's Inn: W. Clarke & Son, 1799), Vol 2, 287-88n. For their modern equivalents see Kerridge, *The Law of Succession*, 505-46.

As aforementioned, the freehold land of a debtor was not by common law generally liable to his simple contract (unsecured) debts.⁷³ To be liable to them on the administration of a decedent's estate, such land had to be charged with them in his will, expressly or by plain implication: equity held that the common form opening of many wills with a general direction that the testator's debts be paid was sufficient to charge any realty he devised later in his will with his debts.⁷⁴ Even then, "[t]he general rule of equity is to apply the personal estate first in the payment of all debts, both simple and specialty".⁷⁵ Pepper Arden set out the priorities: "there are four classes of estates to be applied to the debts: 1st, The general personal estate, unless exempted expressly or by plain implication: 2dly, Any estate particularly devised for the purpose, and only for the purpose, of paying debts: 3dly, Estates descended: 4thly, Estates specifically devised".⁷⁶

⁷³ Habakkuk, Marriage, Debt, and the Estates System, 306. This was true for freehold land in England; land in Scotland was liable to all debts (David M Walker, *A Legal History of Scotland* (Edinburgh: T&T Clark, 1998), Vol 5, 614-18), as was, by statute, land in certain colonies: An Act for the More Easy Recovery of Debts in His Majesty's Plantations and Colonies in America 1732 (5 Geo 2 c 7) s 4. I thank Claire Priest for alerting me to this statute.

⁷⁴ Loughborough's estate-preservative instincts first inclined him to deny this in *Williams v Chitty* (1797) 3 Ves Jun 545, 30 ER 1148, but he gave in when a decree by Hardwicke, stating this rule, was found. See also *Bradford v Foley* (1791) 3 Bro CC 351, 29 ER 577; *Shallcross v Finden* (1798) 3 Ves Jun 738, 30 ER 1247. An intention to charge the realty could also be inferred from an intention to exempt the personalty from the debts, or give the personalty as a specific legacy.

⁷⁵ Powell, *Mortgages*, Vol 2, 817-18.

⁷⁶ *Manning v Spooner* (1796) 3 Ves Jun 114, 117-18; 30 ER 923, 924. The same four categories were enumerated by Thurlow in *Donne v Lewis* (1787) 2 Bro CC 257, 29 ER 142. There, a testator charged the realty he devised to his children with payment of his debts, in case the trust fund he had specifically bequeathed for that purpose should prove insufficient. The realty devised fell into category (ii), and was thus liable to the debts before an estate the testator bought after making his will, which later descended to his eldest son and thus fell into category (iii). The priority of category (iii) to (iv) was confirmed by Thurlow in *Davies v Topp* (1780) 1 Bro CC 524, 28 ER 1276 and Loughborough in *Williams v Chitty*.

It should be emphasized that to fall even into categories 3 or 4, freehold land had to be charged with the testator's debts; unless so charged, it was completely exempt from them. The situation of specialty (secured) creditors was better than that of simple contract creditors: the Statute of Fraudulent Devises made all devises of a testator's land void as against his specialty creditors.⁷⁷ This meant that as against such creditors, land devised for a purpose other than paying debts would fall into the fourth category, rather than be exempt, even without the testator having charged it with his debts. Even where, however, both a testator's realty and his personalty were liable for repaying debts, either by the realty being expressly or impliedly charged with them or by operation of the Statute, the balance of the realty passing to the testator's heir and the personalty to his executor, the heir could call for exoneration of the realty out of the personalty: sums paid out of the realty in discharge of the testator's debts would be refunded by the executor to the heir out of the personalty.⁷⁸ Only an heir who has "made the debt his own" could not call for such exoneration, and Chancery was loath to infer that an heir had done so.⁷⁹

For the realty to be the estate *primarily* liable to the testator's debts, the personalty had to be discharged from them, though an express discharge was not necessary:⁸⁰ a discharge could be inferred from the whole of the will⁸¹, from the

⁷⁷ Act for the Relief of Creditors against Fraudulent Devises 1691 (3 Will & Mary c 14) ss 1-2, discussed by Fonblanque, *Equity*, Vol 2, 282-85. Chancery wavered regarding its construction during the 1780s; see text to notes 123-24.

⁷⁸ Fonblanque, *Equity*, Vol 2, 285-86.

⁷⁹ So, for example, the personal covenants to repay which many heirs, on being pressed by their ancestor's mortgagee, had to execute in order to have the mortgage assigned to a person willing to lend them further monies, were held not to extend to their making their ancestor's debt their own: *Woods v Huntingford* (1795-6) 3 Ves Jun 128, 132; 30 ER 930, 932.

⁸⁰ See a case between two non-family-members: *Duke of Ancaster v Mayer* (1785) 1 Bro CC 454, 28 ER 1237, where Thurlow regretted precedent made it too late to insist on an

personalty being given as a specific legacy,⁸² from the trustee for sale of the realty and the executor being different people, from the charging of funeral expenses on a trust fund where that fund was not given to the executor, or from the non-existence of an appropriate person who could take and hold the realty.⁸³ The level of inference required was defined by Pepper Arden in *Brummel v Prothero* as such as will leave no doubt in the mind of the judge. He promptly used this discretionary formula to throw the debts in that case on the personalty, despite the presence of several of the abovementioned indicia of intention to exempt it. Estate-preservative policy in the senses dedicated to keeping a family's realty in its hands, if necessary at the expense of its personalty, trumped in that

express discharge. Some early cases of Thurlow's seem to uphold either less or more demanding criteria: according to Brown's report of *Samwell v Wake* (1782) 1 Bro CC 144, 28 ER 1043; *Dick* 597, 21 ER 403, Thurlow seems to have there insisted on an express discharge, while according to the generally clear and reliable Dickens, he held that "striking circumstances" may exempt the personalty without such a discharge. In *Lawson v Hudson* Thurlow held the express charging of a testator's realty with his debts to make the realty primarily liable to his debts without either an express or an implied discharge of the personalty, a position conflicting with his own telling of Chancery policy: in *Donne v Lewis* he explained how, when following the enactment of the Statute of Fraudulent Devises, common law courts gave creditors remedies against testators' devisees, Chancery countered by directing their debts to be first satisfied out of the personalty, even when charged generally on the realty. See text to note 110 for a possible policy explanation of Thurlow's position in *Lawson v Hudson*, a position denied by Fonblanque: *Equity*, Vol 2, 286n.

⁸¹ *Williams v Bishop of Landaff* (1786) 1 Cox 254, 29 ER 1153, *Ms Abbot* Vol VI 172a; *Webb v Jones* (1786) 2 Bro CC 60, 29 ER 33; 1 Cox 245, 29 ER 1149; *Ms Abbot* Vol VI 167b; *Tait v Lord Northwick* (1799) 4 Ves Jun 816, 31 ER 423.

⁸² *Gray v Minnethorpe* (1796) 3 Ves Jun 103, 30 ER 916; *Burton v Knowlton* (1796) 3 Ves Jun 107, 30 ER 919; and see *Coxe v Basset* (1796) 3 Ves Jun 155, 30 ER 945, where the effect of five contradictory codicils, at the end of the last of which the testator noted "[t]his is my will and the quibbling lawyers must be prevented from torturing my true meaning", was held to be a specific legacy of nearly all of his personalty for the widow, which because specific, exempted it from the testator's debts.

⁸³ *Burton v Knowlton*.

case the interest in a coherent case-law.⁸⁴ Such a discharge, whether express or implied, only *postponed* the personalty to the realty as a fund from which the debts would be paid. Whether testators could *absolutely exempt* their personalty as against their creditors seems to have been controversial: Powell, in his *Treatise on the Law of Mortgages*, thought that they couldn't,⁸⁵ but Kenyon clearly thought that where another *sufficient* fund was substituted, they could.⁸⁶ Where the realty was charged with the debts, the personalty not having been discharged from them, and the specialty creditors took so much of the personalty that not enough of it was left to pay the simple contract debts or the legacies, simple contract creditors first⁸⁷ and legatees second⁸⁸ could receive that part of what was due to them which the personalty was insufficient to pay, out of the realty.

The repayment of mortgage debts followed somewhat different rules. When a debtor mortgaged realty, it was his personalty that was primarily liable to discharge the debt thus secured; but where in his will he explicitly discharged his personalty from his mortgage debt, while the realty passed to his heir or devisee still charged with that debt, the debt was to be repaid out of the mortgaged realty alone, all of the testator's other assets being exempt from it.⁸⁹ Where the testator's personalty was not discharged from

⁸⁴ (1796) 3 Ves Jun 111, 30 ER 921. In another case on the same point he saw himself as bound by precedent to disappoint what he was sure was the testator's intention: *Hartley v Hurle* (1800) 5 Ves Jun 540, 31 ER 727.

⁸⁵ Powell, *Mortgages*, Vol 2, 817-18.

⁸⁶ *Webb v Jones*; *Williams v Bishop of Landaff*.

⁸⁷ *Williams v Whinyates* (1788) 2 Bro CC 399, 29 ER 224.

⁸⁸ *Webster v Alsop* (1791) 3 Bro CC 352, 29 ER 578; *Davies v Topp*.

⁸⁹ *Earl of Tankerville v Fawcett* (1786) 1 Cox 237, 29 ER 1145; *Shafto v Shafto* (1786) 1 Cox 207, 29 ER 1131; *Ms Abbot Vol VI* 148b. The same rule was applied without an explicit discharge of the personalty in *Lawson v Hudson*, but later such a discharge was essential: *Philips v Philips* (1787) 2 Bro CC 273, 29 ER 150. The rule might have been different in cases where husbands mortgaged their wives' estates. In one such case, in which the mortgaging husband had only a life estate and a distant reversion in fee in his

his mortgage debt, equity permitted the devisees of his encumbered realty to discharge the encumbrance from the land they received, and shift the burden to the testator's personalty, as against the heir-at-law, other devisees, and residuary legatees, but not against creditors, specific or pecuniary legatees.⁹⁰ Purchasers of an equity of redemption had to repay the secured debt out of the mortgaged realty; the mortgagee did not have access to their other assets.⁹¹

Most of these rules clearly expressed an estate-preservative policy in the senses especially protective of families' land, sometimes balancing it with other policies. For example, the last-mentioned rules for the repayment of mortgage debts follow such a land-focused estate-preservative policy during the mortgagor's lifetime: they throw the mortgage debt on his personalty as the estate primarily liable to that debt, despite the mortgagor's having charged realty with it, thus increasing the likelihood of the mortgaged realty passing to the mortgagor's issue unencumbered. In cases where the equity of redemption in mortgaged realty had passed to its next holder without having been disencumbered, however, Chancery's intentionalism⁹² overcame its protection of families' realty: the rules applicable to that situation furthered the testator's presumed intention,

wife's estate, having covenanted to repay the mortgage debt out of his personalty, he later by his will explicitly discharged his personalty from that debt, devising the estate, still charged with the mortgage, to his heir. Scott argued for the heir that under such circumstances the personalty was still the estate primarily liable to the mortgage debt: *Astley v The Earl of Tankerville* (1784, 1792) 3 Bro CC 545, 29 ER 691; 1 Cox 82, 29 ER 1072. Scott won the case, which was quickly decreed for the heir by Thurlow just before his 1792 resignation. As no reasons for Thurlow's decision appear in either report, it is unclear whether Thurlow's decision is to be taken as an adoption of Scott's argument.

⁹⁰ *Hamilton v Worley* (1793) 2 Ves Jun 62, 30 ER 523, *sum nom* *Hamilton v Worloy* 4 Bro CC 199, 29 ER 849.

⁹¹ *Tweddell v Tweddell* (1786) 2 Bro CC 101, 29 ER 58; *Tweddel v Tweddel* (1787) 2 Bro CC 152, 29 ER 87.

⁹² As to which see note 26 above.

having discharged his personalty from the mortgage debt, that the next holder take the mortgaged land subject to the mortgage debt. In making that land exclusively liable to that debt, the rules protected the takers of the testator's other assets. Naming the likely takers of testators' different assets, this last-mentioned policy meant, where the mortgaged estate was the main family estate which passed to the eldest son, while portions for daughters and younger sons were directed to be paid out of the mortgagor's personalty, the protection of younger sons' and of daughters' entitlements at the expense of the eldest son. The rule limiting the liability of purchasers of an encumbered estate to the debt secured on it to that estate alone was estate-preservative in protecting the purchasers' other assets--both real and personal--from the indebtedness they took upon themselves by purchasing an equity of redemption.

The order in which an executor should pay a testator's debts, out of whichever parts of his estate were liable thereto and in whatever order they were so liable, was by the end of the eighteenth century clear: debts due to the King upon record were first, followed by several specific types of debt given priority by statute, properly docketed judgments, "statutes" (merchant and staple) and recognizances, specialty debts by bond or bill, and simple contract debts.⁹³

⁹³ Fonblanque, *Equity*, Vol 2, 400-406.

B. CHANCERY'S ESTATE-PRESERVATIVE POLICIES

Chancery materially contributed to families' keeping their property as against their creditors. It did so by a complex mixture of rules of equity and construction techniques. This part of the article lingers on the details of many rules and techniques Chancery deployed so as to help debtors retain as much of their property as was feasible under the circumstances of each case. To underline the application of this Chancery policy to every type of property-holding for private, non-business enjoyment, including property holders far removed from the archetypical family made up of an adult male and his dependants, we shall classify and discuss the various iterations of this key Chancery policy by the type of family member(s) or family structure protected, passing from the archetypical patriline-centered family to other family units such as lonely widows, unmarried men and women and anonymous groups of "relatives".

1. Estate Preservation for Husbands and Sons

a. The Foley Trust Scheme (ii)

Returning to the Foley family's trust scheme, Thurlow was delighted with it as salvaging at least part of the family estate despite the sons' catastrophic indebtedness: though part had to be sold to pay their debts, other parts were protected from their creditors by the trust scheme providing, on the one hand, for the sons' livelihood, and denying them, on

the other, any formal right in the estate: any such right would have been accessible to their creditors.⁹⁴

b. In Bankruptcy

Chancery was less protective than usual of family capital in the bankruptcy context, populated by merchants and providers of financial services--to whom alone was bankruptcy available at this period--rather than landowners.⁹⁵ A husband entered, on his marriage, into a bond, the condition of which bound him to pay a sum in trust for his wife and issue, the trustees to become creditors for that sum in case of his bankruptcy. While ostensibly intended for the wife and issue, the trust fund was probably intended as an emergency fund for the husband too, to be available to him in case of his bankruptcy. He went bankrupt. The trustees filed a petition to be admitted as creditors in the bankruptcy. Thurlow rejected it, explaining that the debt was bad, since it only arose, according to the condition of the bond, after the bankruptcy. Instead, he recommended a protective trust-style model, where the husband's rights in the property would determine on his bankruptcy, and a limitation in trust for the family fall into possession instead.⁹⁶

⁹⁴ Davidson v Foley, 213, 120; though the Foley brothers were finally saved from their judgment-cum-annuity creditors by the Annuity Act rather than their trust scheme: note 71.

⁹⁵ See notes 41-43 and text thereto.

⁹⁶ Ex parte Hill (1786) 1 Cox 300, 29 ER 1176. For a similar emergency fund for a possible bankruptcy see Studdy v Tongcombe (1800) 5 Ves Jun 695, 31 ER 810. Thurlow again rejected an attempt to create such a fund in Stratton v Hale (1789) 2 Bro CC 490, 29 ER 269, where a large fund of money to which a wife was entitled was paid, on marriage, to her husband, in consideration of his bond to repay with interest; the interest was stipulated to only be payable--to the husband--once the husband would stop his trading activities. The idea seems to have been to make the trustees of the marriage settlement specialty creditors for the capital sum on a possible bankruptcy--one event on which the husband would cease trading--while securing the interest for the husband and

c. Discretionary Trusts

The clear trend of Chancery's favouring discretionary trusts was continued by Loughborough, who noted that trustees who were given discretion by a father to pay over a fund to his son once the consequences of the son's business failure were completely discharged, were not to be indemnified should the son, having received the fund, later go bankrupt after all.⁹⁷ In so ruling, Loughborough not only approved the father's "second chance" arrangement for his son and the son's family, but in effect gave them potential access to an additional fund, that of the trustees' personal assets, in case the trustees should pay the emergency fund over too early. Chancery-approved protection of family capital against creditors was thus extended beyond land and landowners to families owning mainly personalty.⁹⁸

d. "Impecunious Young Heir" Cases

Another context in which Chancery followed a definite policy of protecting male heirs' rights in their family's property against their creditors was that of the well-known expectant young heir cases, in which equity relieved against extortionate contracts based on inadequacy of price alone, rather than stand on the further requirement, applied in

his family as an emergency fund out of the creditors' reach. The fundamental flaw in this arrangement, constructed behind a trust, was that any non-discretionary entitlement under a trust would have been available to the husband's creditors in his bankruptcy: *An Act Touching Orders for Bankrupts*, s 2.

⁹⁷ *De Mierre v Turner* (1800) 5 Ves Jun 306, 31 ER 601.

⁹⁸ On the extension of settlement culture to personalty see Michael R Chesterman, "Family Settlements in Trust: Landowners and the Rising Bourgeoisie" in *Law, Economy and Society*, ed. Gerry R Rubin and David Sugarman (Abingdon: Professional Books, 1984) 124, 145ff.

other cases, of there being fraud of some kind.⁹⁹ The extortionate contracts in question were dispositions by young heirs, currently impecunious but expecting to inherit riches, of a part or the whole of their expectancies against a present loan. That the court's estate-preservative approach wasn't conditional on the existence of a realistic prospect of

⁹⁹ The "young heir" cases of this period are *Gwynne v Heaton* (1778) 1 Bro CC 1, 28 ER 949; *Norris v Rodd* (1779) 3 Bro CC 119, 29 ER 444, 2 Cox 258, 30 ER 120; *Barker v Vansommer* (1782) 1 Bro CC 149, 28 ER 1046; *Fox v Mackreth*, *Pitt v Mackreth* (1788) 2 Bro CC 400, 29 ER 224; (1788, 1791) 2 Cox 320, 30 ER 148; (1789) *Ms Abbot* Vol VII 240a; (1791) 4 Brown PC 258, 2 ER 175; Hargrave, *Juridical Arguments*, 553; *Crowe v Ballard* (1790) 3 Bro CC 117, 29 ER 443; 2 Cox 253, 30 ER 118; 1 Ves Jun 215, 30 ER 308; *Wharton v May* (1799) 5 Ves Jun 27, 31 ER 454 (the "young heir" category extended to include a 27-year-old married man with much property--though expecting more--to counter the worst fraudulent scheme in the equity reports of the period). Contrast the following cases where similar relief was denied: *Henley v Axe* (1786) 2 Bro CC 17, 29 ER 9; *Lord Portmore v Morris et al* (1787) 2 Bro CC 219, 29 ER 122; *Hare v Shearwood and Others* (1790) 3 Bro CC 168, 29 ER 470; 1 Ves Jun 241, 30 ER 322. The court of Exchequer required more to rescind contracts and set judgments (entered up as securities for the lender) aside on a usury point than did Chancery to do the same on an undue influence or breach of trust point; thus even a characteristic "young heir" case was rejected despite the lender making a profit of nearly 200% on his loan: *Matthews v Lewis and Another* (1792) 1 Anst 7, 145 ER 783. On the "young heir" cases see Fonblanque, *Equity*, Vol 1, 133-38; LA Sheridan, *Fraud in Equity* (London: Pitman & Sons, 1957) 132-35. Michael Lobban discussed some of these cases in a contract law context: "Contractual Fraud in Law and Equity, c1750-c1850" *Oxford Journal of Legal Studies* 17 (1997): 455-56. Such contracts with young expectants were the last of the five types of fraudulent contracts against which equity would relieve, mentioned by Lord Hardwicke in the classic case of *Chesterfield v Janssen* (1751) 2 Ves Sen 125, 157; Sheridan (this note) 7. For the rule obtaining in non-"young heir" cases, that undervalue alone is no ground for setting transactions aside, see *ibid.*, 127-28 and cases cited there. During the first two-thirds of the nineteenth century, until the Sales of Reversions Act 1867 (31 Vict c 4), the setting aside of sales of expectancies based on undervalue alone was extended beyond "young heir" cases to any sale of a reversion, and the burden shifted to the purchaser to prove he had paid a "full" or "fair" price: *ibid.*, 135-38. This ill-fits Atiyah's thesis that nineteenth century contract law was less paternalistic than that of the previous century: Atiyah, *Rise and Fall*, *passim*. At *ibid.*, 450 he presents the nineteenth century evolution of the law on sales of reversions as fitting his thesis, ignoring both the extension of the category of contracts liable to be set aside on undervalue alone and the shifting of the burden of proof to the purchaser; and while he admits that nineteenth century "personal morality" conflicted with nineteenth century "commercial morality" by insisting on a high moral standard in relationships of an intimate or confidential character (*ibid.*, 477), it is difficult to classify sales of reversions as constituting such relationships.

continuous enjoyment of the property by future generations of the family which currently held it was shown in the notorious case of James Fox, a terrible young spendthrift with no family to speak of beyond a mother, who sold his Surrey estate to Robert Mackreth, edifyingly described by Thurlow as a "dealer in the distresses of mankind". Mackreth gave Fox 31 years' purchase for his estate (a sum equal to the annual revenue of the estate times 31). The sale took place in 1778, when because of an agricultural depression and the attractive prices of government securities, selling land was, according to Habakkuk, "more difficult than at any other time in the Century": the common years' purchase of land dropped from about 30 to 22 or less.¹⁰⁰ Fox's bargain, then, was quite good for the time when it was made.¹⁰¹ Despite this fact, the sale was set aside by Kenyon, whose decree was affirmed by both Thurlow and the House of Lords, and Mackreth declared a trustee for Fox of the realty Fox had conveyed to him, including the extra value Mackreth was able to obtain by reselling it to a neighbouring landowner who put an especially high price on it.¹⁰² Lobban notes that the young heirs in these cases were usually complicit in the attempt to defraud their own family. Where they were, the

¹⁰⁰ Habakkuk, Marriage, Debt, and the Estates System, 516-22.

¹⁰¹ My calculations go some way to justify barrister and reporter Charles Ambler's ardent defence, in a pamphlet published after Thurlow's decree was affirmed by the House of Lords, of Mackreth's conduct in the affair: Charles Ambler, *A Review of the Proceedings and Arguments in a Cause in Chancery, between James Fox, Esq. and Robert Mackreth, Esq.* (London: 1792); for Ambler's own calculations see *ibid.*, 47-49.

¹⁰² *Fox v Mackreth*. This was a much better remedy than that given in those young heir cases where the lender was not held to be a trustee--rescission of the contract coupled with the repayment by the borrower to the lender of what was really advanced, with interest; see, e.g., *Wharton v May*. The latter remedy was also given in a case of an adult borrower where Pepper Arden saw nothing wrong in the behaviour of the lender, a widow, emphasizing that lending money against an annuity for the life of the borrower wasn't a per se immoral bargain: *Hoffman v Cooke* (1800-1) 5 Ves Jun 632, 31 ER 772. The contract in this case would not have been set aside had it not been void for failing to fully comply with the Annuity Act (note 69 and text), which required every particular of such bargains to be registered.

court, insofar as it was aware of their complicity or assumed it, showed, in following its estate-preservative policy nonetheless, that policy as an *a priori* one of preserving family property in family hands regardless of the conduct or wishes of any family members, rather than a simple protection of innocent, swindled young borrowers.¹⁰³

e. The Utility of Fictional Children

Sometimes protecting a family's property from its creditors necessitated an extensive use of fictions: in one case, Pepper Arden had to pretend he was preserving it for nonexistent children. The children whose remainder in tail the court claimed it was protecting from their father's creditors were future, presumptive children, whose birth was highly unlikely, considering that their father was 52 years old, that his wife had separated from him and emigrated to America, and that not having obtained a parliamentary divorce,¹⁰⁴ he could not remarry until her death.¹⁰⁵ Pepper Arden piled fiction upon fiction in protecting this debtor, the presumptive "father", from the attempt of his creditors to invalidate the resettlement made upon his coming of age, wherein, as was usual in such resettlements, he gave up the estate tail he had in the family land according to a pre-existing settlement in return for a life estate in the same land, postponing the estate tail to his unborn children. A central purpose of this resettlement was raising money out of the

¹⁰³ In the exceptional case of *Myddleton v Lord Kenyon*, the court preserved an estate for a frugal young heir as against his extravagant father, who having married for the third time, tried (and failed) to impeach as fraudulent a settlement trust of the family estates, on which father and son agreed a few years before in order to discharge the estates of the tremendous debts previously charged on them by the father. Lord Kenyon was among the trustees.

¹⁰⁴ The only way in this period to obtain a complete divorce, entitling the divorcees to remarry: Stuart Anderson "Legislative Divorce--Law for the Aristocracy?" in Rubin and Sugarman, *Law, Economy and Society*, 412.

¹⁰⁵ *Brown v Carter*.

land for paying the debts of the debtor's own father. The creditors of the debtor himself now argued that the resettlement was a conveyance made without consideration moving from the father, and thus void under the "Statutes of Elizabeth" as presumptive fraud on themselves.¹⁰⁶ In marrying, answered the court, the debtor had performed an act which entitled persons unborn--the children--to rights; and the court thus may not, in the absence of these children, "indeed, before their birth, interfere to have the legal estate taken out of them".¹⁰⁷ To justify his declining to exercise his jurisdiction under the Statutes of Elizabeth Pepper Arden noted that the creditors' insistence that he exercise this jurisdiction was fraud on the wife and putative children. The report does not say to whom would the debtor's estate go once his direct line would peter out at his death. One must assume that it went to members of his kin.

2. Estate Preservation for Widows

The protection of widows' economic well-being was an important Chancery policy. With families increasingly opting out of the common law dower regime, and the statutory abolition of widows' customary right to a third of their husband's personality,¹⁰⁸ widows'

¹⁰⁶ See discussion of these statutes at text to notes 36-40.

¹⁰⁷ *Brown v Carter*, 879, 907. It is unclear whether such heavy reliance on fiction was strictly necessary to save the resettlement from being held invalid as against the debtor's creditors under the Statutes of Elizabeth, as Roberts comments (Construction, at 250) that "where a father and his son join in a family settlement, it is a bargain for a good and valuable consideration, and has been so held in several cases", not, however, naming them.

¹⁰⁸ On the decline of widows' rights see Spring, Law, Land, & Family, 40-65; Staves, Married Women's Separate Property, chs 2-4; Henry Horwitz, "Testamentary Practice, Family Strategies, and the Last Phases of the Custom of London, 1660-1725" *Law and History Review* 2 (1984): 223.

need for the courts' paternalistic protection was increasing.¹⁰⁹ The Chancery judges of our period were often ready to provide such protection, sometimes at the cost of failing to preserve some of the family property, especially land, in the family.

This motivation may have been what made Thurlow, in a case where a widow was the legatee of her husband's personalty, hold, unusually, the express charging of the husband's realty with his debts to itself make that realty the estate primarily liable to them, without any other hint, as was commonly required, of an intention to discharge the personalty. The policy of providing for the widow trumped in that case estate preservation in the senses especially protective of a family's land. The fact that the testator devised his realty to remote relatives, he having no direct issue and even his brother's line being about to end, may have contributed both to Thurlow's departure from conventional doctrine and to his deemphasizing of both preservation of the family's realty and intentionalism.¹¹⁰

¹⁰⁹ There were, of course, exceptions: some testators took exemplary care of their widows, a case in point being the testator in *Bixby v Eley* (1788) 2 Bro CC 324, 29 ER 181, sub nom *Bixly v Eley* Dick 698, 21 ER 443, who left his wife a freehold estate in fee, the residual personalty, and remainders in other estates. Thurlow, in fact, nearly wrecked this testator's careful arrangement through carelessness, ordering the freehold to be sold to pay the testator's debts in aid of his personalty, not noticing that he had specifically devised his copyhold to this end. According to Dickens' self-serving account, it was the careful Registrar who alerted Thurlow to his mistake. Anecdotal evidence has it that some dutiful sons took upon themselves even debts contracted by their mothers themselves rather than by their late husbands; so did Samuel Johnson, who took upon himself, when in extreme poverty, his mother's debt to the mortgagee of the family bookshop: his letter to the mortgagee is quoted in James Boswell, *Life of Johnson* (Oxford: OUP, 1980) 117.

¹¹⁰ *Lawson v Hudson*: the arguments as to the testator's intentions made, on appeal to the House of Lords, on behalf of the devisee of a life-estate in the realty seem convincing. A similar case of Chancery protecting the provision a testator made for his widow, consisting of his personalty, at the price of exposing his realty as the primary fund for payment of his debts and legacies was *Coxe v Basset*; the losers by this decision were the testator's daughters and nephew. While these were much closer family members than

In another, factually similar case, the doctrinal difficulty Thurlow surmounted in the last was absent, as the testator's personalty, left to the widow, was explicitly discharged from his debts; but as the realty he has left on trust for the payment of these debts was insufficient for that purpose, some other part of his estate had to be made liable to them. Thurlow chose to make the realty left to the issue liable to the debts rather than the personalty, noting that the testator probably did not contemplate the possibility of the trust estate being insufficient, and that had he contemplated it he would probably have charged his personalty, rather than the realty he devised to his issue. Both intentionalism and the preservation of the family's land were thus again trumped by the policy of protecting the provision made for the widow.¹¹¹

The extent to which this policy could trump estate preservation in any sense, especially in cases where there was no direct issue of the testator, was exemplified in a case where Thurlow thought the surviving child not to be the son of the testator: Thurlow let the widow take both her dower and an annuity charged on the rents and profits of the other two-thirds of the testator's land, construed the will as charging that land with the testator's debts, let the legatees recoup from the produce of the sale of the land any part of the personalty which was absorbed by the creditors, and permitted any remaining land to be divided, according to the will, between five cousins.¹¹²

In another case of a testator who had left a widow but no issue, Kenyon enforced the same policy of providing for the widow by a startling display of judicial activism: by

were the losers in *Lawson*, the two cases were similar in there being no male issue of the testator.

¹¹¹ *Morrow v Bush* (1785) 1 Cox 185, 29 ER 1120.

¹¹² *Foster v Cook* (1791) 3 Bro CC 347, 29 ER 575; discussed, on the dower point, in *Staves, Married Women's Separate Property*, 110.

interpretation, he transferred the produce of sale of part of the testator's land, which the testator had clearly designated as the primary fund to bear his debts, into the residual personalty, bequeathed to the widow.¹¹³ Kenyon pointed out that the testator, who in his will directed his trustees to sell that piece of land, had later sold it himself, and held this to signify the testator's intention to reallocate the produce of sale to the widow instead of it serving as the primary fund to bear his debts. It appears far likelier, however, that the testator was simply himself realising his intention of selling the estate, still intending the produce to satisfy his debts. Like the last decision discussed, this one too was highly destructive of the testator's estate, as Kenyon made his other major piece of land, which he devised to takers who were directed to take his name on coming into possession, the estate primarily liable to his debts. Kenyon displayed his religious moralism (or "great attachment to moral principle"¹¹⁴) by describing the possibility of the residual personalty being insufficient to support the widow as the testator "sinning in his grave".¹¹⁵ Such moralism, and judicial activism in isolated cases, were surely less effective, however, in protecting the interests of widows as a group than the forced share regimes English law had suppressed.

¹¹³ *Williams v Bishop of Landaff*.

¹¹⁴ Douglas Hay, "Kenyon, Lloyd", in *Oxford Dictionary of National Biography*, web ed. (OUP, 2004-6) <<http://www.oxforddnb.com/view/article/15431?docPos=8>> accessed 16 July 2006.

¹¹⁵ *Williams v Bishop of Landaff*, 257, 1155.

3. Estate Preservation in the Female Line

a. Who Was to Bear Arrears of Interest on Mortgages? (i)

To preserve a family's property for daughters and sisters who were the last survivors of their parental families, Chancery created rules of law which were otherwise questionable and construed statutes against their obvious intendment. An example of the former was the rule that a life tenant of a landed estate was liable for the arrear of interest on debts charged on the fee--not on his life estate--which has accumulated before his life estate fell into possession.¹¹⁶ This rule tended to estate preservation, by protecting the tenants in remainder from liability to the arrear of interest: potentially at least, it could preserve the family property in all three senses of estate preservation. Pepper Arden applied it in favour of a remainderwoman, a sister of a financially irresponsible life tenant;¹¹⁷ he ruled that the arrear of interest on a mortgage which the life tenant has taken out will be borne, out of the income of the estate, by the mortgagee, who had purchased from the life tenant both the life estate and the reversion (to come after the sister's remainder), rather than by the sister, despite much of the arrear having been accumulated before the purchase by the mortgagee. The decision was estate-preservative only in the abstract sense of enlarging the absolute share of the property which was to stay in family hands: as the mortgagee was foreclosing on the estate, the decision did not effectively preserve the family estate

¹¹⁶ Thurlow seems to have invented this rule in *Tracy v Viscountess Dowager of Hereford* (1786) 2 Bro CC 128, 29 ER 75, discussed at text to note 128.

¹¹⁷ *Lord Penrhyn v Hughes* (1799) 5 Ves Jun 99, 31 ER 492. The life tenant was not supposed to be such, the testatrix in that case having made him just an object of a discretionary trust; but the trustees she appointed having failed to act, the intended object acted as if he was a life tenant, with both the creditors and the court seemingly conceding him this status.

as land in family hands, but it did enlarge the share of the produce of that sale to be enjoyed by the sister and her family.¹¹⁸

b. Thurlow Contravenes the Statute of Frauds

A decade earlier it was a daughter's equitable remainder in personalty that was saved from the consequences of her father's financial irresponsibility. According to a settlement made after her parents' marriage, the daughter, an only child, was entitled, after the deaths of both parents, to the capital of her late mother's entitlement under her own father's will to a certain amount of government stock. The creditors of her father challenged the validity of the marriage settlement, relying on the fourth section of the Statute of Frauds, which provided that no action shall be brought under any "agreement made upon consideration of marriage", unless that agreement be in writing and signed by the person to be sued.¹¹⁹ They claimed that marriage settlements made after marriage were void, as no consideration could move between two natural persons who were one in law; they further claimed that the settlements were void as against them under the Statutes of Elizabeth.¹²⁰ Thurlow ruled, in direct contravention of the Statute of Frauds, that having by parol promised before marriage to make a settlement, and having presumably obtained the marriage based on that promise, the father was bound by his promise, and that the settlement executed in fulfillment of that promise was not fraudulent despite having been executed after marriage, and thus not void under the Statutes of Elizabeth.¹²¹

¹¹⁸ She seems to have been married.

¹¹⁹ An Act for Prevention of Frauds and Perjuries, s 4.

¹²⁰ See discussion at notes 51-54 above; Roberts, Construction, 213-17.

¹²¹ *Dundas v Dutens* (1790) 2 Cox 235, 30 ER 109; 1 Ves Jun 196, 30 ER 298; *Ms Abbot* Vol V 147a. Instructively, some years later, Grant MR expressly denied that a parol

To completely secure the daughter her remainder, Thurlow joined his daringly activist conclusion on the Statute of Frauds point to the supreme formalism of holding that even were the settlement void, the father's creditors had no equity against his late wife's entitlements, under her father's will, to stock, which have become the father's property on their marriage; as choses in action, these belonged to a category of assets which was not yet at the time liable to their owner's debts, either at law or in equity.¹²²

c. Loughborough Guts the Statute of Fraudulent Devises

Like Thurlow, Loughborough was prepared, in order to preserve a family's property as against its creditors, to construe a statute against its obvious intendment. In a case which came before him when briefly Lord Commissioner of the Great Seal under the Fox-North coalition, a testator directed his debts to be paid out of the income of his estate. His debts, however, were so large that they could not be repaid either out of the income or by mortgaging the estate. Sale of the estate might have produced a sufficient sum, but Loughborough prevented it, holding that the will containing any provision whatsoever for the payment of debts took it out of the Statute of Fraudulent Devises, and thus the creditor could only be repaid, as he could before the statute, in the way the testator designated for repayment: in this case, out of the income. Loughborough's construction of the statute was counter to its obvious intendment. The statute makes any devise of realty or the income thereof void against the testator's specialty creditors, and then excepts any such devises directed for the payment of debts from this rule; it does not

promise before marriage could be valid, or that a written obligation after marriage could give it validity: *Randall v Morgan* (1805) 12 Ves Jun 67, 33 ER 26; Grant referred to Thurlow's statements in *Dundas* as to these points as dicta.

¹²² *Dundas v Dutens*.

provide that the entirety of any will containing any provision whatsoever for the payment of debts will be wholly excepted from the rule. The decision left most of the testator's creditors, including specialty and annuity creditors, empty handed, leaving the family estate itself in family hands and protecting both the widow's jointure and a sister's annuity, which were limited on the estate income before the limitation for the repayment of debts thereout.¹²³ Thurlow, when back in office under Pitt, corrected the extreme estate-preservative bias of Loughborough's construction of the statute, holding that a provision to pay debts which doesn't actually answer that purpose effectively certainly doesn't take a will out of the Statute of Fraudulent Devises; such a provision would itself be fraudulent.¹²⁴

d. Fast-Forwarding Family Property to Successor Families

A strong estate-preservative policy was applied in the abovementioned case where Pepper Arden's intentionalism gave out before the estate-preservative precedents restricting the discharge of testators' personalty from the payment of their debts to cases of express discharge, or of an inference which will leave no doubt in the mind of a judge.¹²⁵ Absent a strong enough inference, Pepper Arden saw himself as bound to hold a testator's personalty to be the estate primarily charged with the payment of his debts, funeral expenses, and legacies. This holding made all of the testator's real and a part of his personal estate go, free of debt, to a granddaughter, his sole heiress, who was to receive them as the capital of a trust fund on either her majority or marriage. The effect of

¹²³ *Lingard v Earl of Derby* (1783) 1 Bro CC 311, 28 ER 115.

¹²⁴ *Hughes v Doulben* (1789) 2 Bro CC 614, 29 ER 338, sub nom *Hughes v Doulbin* 2 Cox 170, 30 ER 78.

¹²⁵ *Brummel v Prothero*.

the trust fund, on this construction of the will, was to channel a large part of the testator's estate, free of his debts, directly to his successor family, the family to be started by his granddaughter. Contrastingly, on the construction which Pepper Arden was sure the testator had actually intended, the trust fund should have served as the principal fund for the payment of debts: this would have meant that less of the testator's realty might have arrived intact into the hands of his successor family, and that more of his personalty (now free of his debts) would have been held by his widowed son-in-law, to whom it was bequeathed, and in case the latter would have remarried, might possibly have passed out of the testator's line.¹²⁶ This precedent-bound decision was estate-preservative both in the sense of keeping maximum value in the testator's line, in the sense of keeping a maximal part of his land in that line, and in the sense of keeping that land intact and unconverted.

The same underlying policy of speeding family property to successor families was demonstrated when Thurlow refused to set aside a deed made between two sisters on whom the fee simple in the family estate descended. One sister had run away with a Frenchman, and was now married again, with no probability of issue, and deeply in debt, while the other was conventionally married with issue. At this point the deed was made: the conventional sister agreed to raise money to pay her sister's debts by sale of some of the family land, in return for the entire fee in the remaining land vesting in herself after the deaths of the childless couple. The childless sister argued in Chancery that her sister had surprised her while she was in necessitous circumstances. In refusing to set this deed aside, Thurlow noted that the consideration given by the conventional sister was inadequate, but that this in itself was never a ground for rescission, and that the indebted

¹²⁶ Hartley v Hurle.

couple were not surprised by the terms offered. This result complements the young heir cases, where inadequate consideration *was* a sufficient ground to set contracts and deeds aside, in supporting the same consistent policy of preserving the family property in the main family line: either that of the male heir, or, in a case of two co-heiresses, that most likely to run to further generations.¹²⁷

4. Estate Preservation for Nephews, Nieces, Cousins and Other Next Of Kin

a. Who Was to Bear Arrears of Interest on Mortgages? (ii)

Chancery's estate-preservative policy was maintained even where its beneficiaries were quite remote kin of the original grantor or testator. The abovementioned rule that a life tenant must dedicate up to the whole value of his interest in the property to keeping down the interest on the debts and legacies charged on the fee (rather than on his life interest), including arrears of interest accumulated before his life estate fell into possession, was first formulated in favour of a son of one of a testator's nieces. The son was, according to the will, the next remainderman in tail in the family estate, after his mother's life interest, the testator and all three of his brothers having died without male issue. Thurlow rejected the argument made by the leaders of the Chancery bar, Scott and Mitford, that each life tenant should only bear the interest accumulated during his possession of the estate, remarking that as the niece, the life tenant in that case, was the devisee of a contingent estate (her life estate was conditional on the failure of issue male of the testator and his three brothers), she couldn't complain about her estate having turned out to be unproductive, as contingent estates often do: had she wanted to ensure that her interest

¹²⁷ *Stephens v Lord Viscount Bateman* (1778) 1 Bro CC 22, 28 ER 96.

would be productive, she could have sold it as a contingency.¹²⁸ Thus keeping the remainder in the family estate as unencumbered as possible accorded special protection to the family realty; limiting the creditors' access to partial interests in that realty, which were of insufficient value to answer the debts and the interest on them, could contribute to preserving maximum value in family hands, especially where the family personalty was also insufficient to answer the debts, or was discharged from answering them.

b. Preferring Testators' Nephews by Daring Construction

On other occasions Thurlow could take the directly opposite attitude to contingent interests, construing instruments so as to pour value into such interests, in order to realize Chancery's policy of keeping family property in a family line as close as possible to the direct line decedents who died without issue might have had. This could mean, for example, transferring that property to a decedent's nephews rather than to remote kin, or non-kin, takers. To achieve this goal, Thurlow was in one case prepared to construe bequests to remote kin or non-kin legatees in the form "£500 stock in long annuities", contrary to the tradition of technical construction, as bequests of the amount of long annuities which could be purchased with £500 rather than of the amount which will produce £500 per annum. This strained construction ensured that a residue shall be left; the testatrix in that case having bequeathed her residual personalty, if any, to her nephews. To legitimize this construction, Thurlow pronounced the unique canon of

¹²⁸ *Tracy v Viscountess Dowager of Hereford*; contrast *Shafto v Shafto*, where a life tenant had an unusual power to satisfy arrears of interest accumulated before his life estate fell in, by selling so much of the fee as will clear the rest of such arrears.

construction that "[w]here the words used by a testator are sensible, they must be taken as they stand; if not, the construction must be taken aliunde".¹²⁹

c. Relaxing Formality Requirements for Wills of Land

Similarly, Pepper Arden directed a legacy to a testatrix's nephew rather than to a group of non-family charity objects, by holding that the formality requirements for wills of land do not strictly apply to mixed funds containing the produce of sale of both realty and personalty: such a fund having once been bequeathed in accordance with these requirements, the bequest may later be modified as to either the legatee or the property bequeathed without satisfying them again. This reasoning enabled Pepper Arden to hold a codicil revoking the bequest to the charity objects, and bequeathing the fund to the nephew, good, despite the codicil not having satisfied the formality requirements for wills of land. He also disregarded the fact that in the codicil, the testatrix had given as her reasons for revoking the original bequest that she did not know whether the charity objects--a group of children--were alive, and whether they were adequately provided for. Despite it having become clear that they were alive, and apparently necessitous--they were claiming their legacy before him--Pepper Arden held the revocation good, and so directed the legacy to the nephew.¹³⁰ Pepper Arden's solicitude for the next of kin also extended to construing a will so that a trust fund originally invested for the putative children of a childless marriage would be directed to those of the wider kin who were not

¹²⁹ *Fonnereau v Poyntz* (1785) 1 Bro CC 472, 28 ER 1247.

¹³⁰ *A-G v Ward* (1797) 3 Ves Jun 327, 30 ER 1036.

bankrupt, thus keeping the property in the wider family instead of sacrificing a part or the whole to the creditors of those who were.¹³¹

d. Preferring Substantively Closer Over Formally Closer Kin

Another aspect of estate preservation for such relatively remote kin was defining the extent of groups of legatees which testators described by such expressions as "my relations" so as to exclude even remoter kin, thus preventing a distribution of a family's property in minute fragments among a large group of people.¹³² Family estates could even on occasion be preserved for remote kin as against technically closer kin. So Pepper Arden ruled that a testator, Richard Hill Waring, who had exempted his personalty, which he bequeathed to his first wife, from the burden of a huge loan, has meant the exemption as a personal gift to her; when she predeceased him and her legacy lapsed, the personalty passed--charged with the loan--to his next-of-kin, the second wife he had married shortly before his death, and from her to the second husband she had taken shortly thereafter. This solution increased the value of Waring's realty, which passed to his heir at law and cousin, John Scott Waring, Warren Hastings' political champion in and out of Parliament during the 1780s. This seems to have been the testator's intention after his first wife's death, his cousin having saved him from financial ruin before through the access he had to the very deep pockets of Hastings' rich wife. In this case the cousin might be said to have substantively been a closer kinsman of the testator's than the latter's second wife,

¹³¹ *Jennings v Gallimore* (1796) 3 Ves Jun 146, 30 ER 940.

¹³² See, e.g., *Maitland v Adair* (1796) 3 Ves Jun 231, 30 ER 984 (the term "relations" does not include in-laws); *Devisme v Mellish* (1800) 5 Ves Jun 529, 31 ER 718 ("relations by blood or marriage" are only takers under the Statute of Distributions and those married to them).

especially after her remarriage,¹³³ and Pepper Arden's decision to have successfully married intentionalism and estate-preservative policy.

5. The Limits of Estate-Preservative Policy

a. Estate Preservation for Yet-to-be-specified "Relatives"

The strength of Chancery's estate-preservative policy was made clear by creditors even being postponed to a class of "relatives" among whom trustees were to choose beneficiaries at their discretion, before they have exercised that discretion. Thus held Thurlow in a case where such a discretionary trust of the residual personalty, after the payment of debts, was about to fail, the residue being insufficient to even answer the debts.¹³⁴ The testator having charged his realty with a sum to follow the trusts of the residual personalty, Thurlow saved this sum for the unspecified relatives against the creditors' unsatisfied claims, despite the trust of the residual personalty itself supposedly failing for lack of any trust property. His decision may have been influenced by all the takers under the will, except this class of "relatives", not being family members: had he not injected the sum charged on the realty into the failing trust, the testator's entire estate would have gone to non-family takers, as against his relatives. Compare a mid-eighteenth century case relied upon by counsel for the creditors in the case before Thurlow, where both a testator's realty and personalty were insufficient to discharge his debts. Lord

¹³³ *Waring v Ward* (1800) 5 Ves Jun 670, 31 ER 796; Biographical details from TH Bowyer "Hastings, Marian" and H Barker "Waring, John Scott", both in Oxford Dictionary of National Biography, web ed. (OUP, 2004-6) <<http://www.oxforddnb.com/view/article/63512?docPos=44>> and <<http://www.oxforddnb.com/view/article/24893?docPos=10>> respectively; both accessed 16 July 2006.

¹³⁴ *Killet v Ford* (1788) 1 Cox 442, 29 ER 1240; *Ms Abbot* Vol VII 84b.

Hardwicke saw a sum the testator had power to charge on his wife's estate, half of which he has already appointed to his two sisters, as liable to the creditors' claims.¹³⁵ It appears that some aspects of the strong estate-preservative policy found in the late eighteenth century Chancery cases may have been quite new.

b. The Legitimacy of Settlement Culture

A key instance of Chancery's estate-preservative policy was its legitimization, as against creditors, of the very practice of making family settlements, despite such settlements leaving some family members, from whom rights to family property had moved to other family members, without a corresponding gain, thus not *prima facie* receiving any consideration. Attempts by creditors of such family members to have settlements declared void, either at law under the Statutes of Elizabeth or in equity for undue influence, mistake, or misrepresentation, failed time and again, through the extension of the concept of consideration. Loughborough declared in one case that "the prospect of establishing an antient family" by derogation from the rights of the heavily indebted present tenant in possession was consideration enough as far as that tenant, or his creditors, were concerned.¹³⁶ Thurlow thought that "making a provision for a wife or child" was "meritorious" consideration.¹³⁷ More decisive than either in preferring the family interest to that of its creditors was Lord Mansfield, removing settlements for the

¹³⁵ *Bainton v Ward* (1741) 2 Atk 172, 26 ER 507.

¹³⁶ *Myddleton v Lord Kenyon*, 413, 700; see discussion on the consideration point at notes 44-45 above, and, on the considerations of blood, of marriage, and of love and affection, Roberts, *Construction*, ch 2, and especially 102, fn (a), 123-38, 149-52; Pottage, "Proprietary Strategies", 169-71.

¹³⁷ *Colman v Sarrell* (1789) 3 Bro CC 12, 29 ER 379; 1 Ves Jun 50, 30 ER 225; *Ms Abbot Vol III(2)* 243a; the quote is in Brown's report only, at 14, 380.

benefit of any members of the settlor's family completely out of the purview of the Statutes of Elizabeth.¹³⁸ Mansfield's support for the "dynastic spirit" far surpassed that of any Chancery judge.

c. Exceptions to Estate-Preservative Policy

Finally we turn to cases where even the late eighteenth century Chancery disappplied its policy of preserving family property in the family, or at least in the wider kin group. One context in which that policy could be disappplied (or trumped) was that of contests between remote relatives and testators' friends. One case in which a friend won property of his deceased friend over the rights of the latter's relatives in parts of his estate was the aforementioned one in which Pepper Arden interpreted nearly all of its circumstances as tell-tale signs of an intention to exempt the personalty from the testatrix's debts: the case was argued between the heirs at law of the testatrix's cousin, devisees of the part of her realty not sold to pay debts, and her friend, the residuary legatee.¹³⁹

Chancery's estate-preservative policy was also disappplied in cases of fraud on creditors,¹⁴⁰ and was very weak in the bankruptcy context,¹⁴¹ which applied to merchants,

¹³⁸ *Doe d Watson v Routledge* (1777) 2 Cowp 705, 98 ER 1318.

¹³⁹ *Burton v Knowlton*; see my analysis of what was there held to indicate an intention to exempt the personalty from a testator's debts at text to notes 80-83.

¹⁴⁰ Cases argued between two fraudulent parties gave rise to exceptions to this exception to estate-preservative policy; so estate preservation could be carried to the extent of protecting a husband, the initiator of a fraud in which his attorney participated, along with the defrauded father of the wife, against the attorney's claims: *Neville v Wilkinson* (1782) 1 Bro CC 543, 28 ER 1289; see also *Lord Irnham v Child* (1781) 1 Bro CC 92, 28 ER 1006; *Dick* 554, 21 ER 386, *Ms Hill Vol 15* 129.

¹⁴¹ Both circumstances obtained in *Hardwick v Mynd* (1792) 1 Anstruther 109, 145 ER 815; *Ms Abbot Vol X* 233b, a case in the Exchequer. For a further example of Chancery's reduced estate-preservative bias in the bankruptcy context, see *Wadley v North* (1797) 3 Ves Jun 364, 30 ER 1056.

factors and bankers rather than to the genteel core of the settlement-making population (though a nontrivial social group seems, in practice, to have been both making settlements and wills and liable to bankruptcy¹⁴²).¹⁴³ So monies reserved by an executor to pay a legacy which the testator has directed to be paid at a future date were held to be assets liable to the executor's creditors in his bankruptcy. Two of the main purposes of bankruptcy proceedings--concentrating all of the claims against the bankrupt's assets under his commission, and discharging him from all such claims, making him a "new man"--were promoted by regarding legatees as rank creditors in executor's bankruptcies.

¹⁴² As noted in note 17 above, the practice of making wills and family settlements penetrated in the eighteenth century, much like in the seventeenth, far below the gentry, and certainly included many merchants, bankers, and other financial men, who were liable to bankruptcy: see, e.g., cases cited in notes 96-97 above.

¹⁴³ Chancery had a separate policy protecting the wives of bankrupts, for which see, e.g., *Wilson v Foreman* (1782) Dick 593, 21 ER 402; *Worrall v Marlar* (1784) 1 Cox 153, 29 ER 1105; *Ms Abbot Vol VI 93a*; sub nom *Worsal v Marlar* Dick 647, 21 ER 423; *Burdon v Dean* (1795) 2 Ves Jun 607, 30 ER 801; *Oswell v Probert* (1795) 2 Ves Jun 680, 30 ER 839; *Pringle v Hodgson* (1798) 3 Ves Jun 617, 30 ER 1184; *Smith v Smith* (1800) 5 Ves Jun 189, 31 ER 539. Policies concentrating on married women's rights and remedies per se have been treated by many, including Spring, Law, Land, & Family, 112-121 and Staves, Married Women's Separate Property, passim; they are thus outside the main ambit of this article. Interestingly, doctrines considered by these writers as highly injurious for wives--such as the doctrine that an infant (ie minor) wife could validly contract out of her right to dower (*Earl of Buckingham v Drury* (1762) 3 Brown PC 492, 1 ER 1454; see comments in Spring (ibid) 59-62; Staves (ibid) 101-104)--could in the bankruptcy context be turned to wives' and children's favour: it was the very ability of infant wives to contract as to their property and declare valid uses of it which saved it for them and their children in their husbands' bankruptcy. The husband took the property as trustee for the uses declared on marriage, and so the property was trust property, immune to his creditors: *Durnford v Lane* (1781) 1 Bro CC 106, 28 ER 1015; William Cooke, *The Bankrupt Laws*, 4th ed. (London: E & R Brooke, 1797), Vol 1, 399-410. But see the case discussed in the text to the next note for property reserved by an executor to pay a legacy payable at a future date, being held to be assets in his bankruptcy, available to his creditors.

This tended to defeat legacies when legatees, imagining their legacies not to be assets in the executor's bankruptcy, neglected to prove them under his commission.¹⁴⁴

A related policy, also potentially running counter to the preservation of family property in the family, was the promotion of commercial certainty in purchases from executors: Thurlow held that purchasers, mortgagees and pledgees from executors had a complete title on sale and delivery, and did not bear the burden of ensuring that the executor used the price they paid for the purposes of the will. This rule and the promotion of commercial certainty implicit in it could be exploited by executors, purchasers from them, or a conspiracy of both, to defraud family legatees of their entitlements; where it was so exploited, Chancery reverted to its basic policy of protecting family members' rights in their property. Thurlow continued:

But fraud and covin will vitiate any transaction, and turn it to a mere colour.

If one concert with an executor, or legatees, by obtaining the testator's effects at a nominal price, or at a fraudulent under value, or by applying the real value to the purchase of other subjects for his own behoof, or in extinguishing the private debt of the executor, or in any other manner, contrary to the duty of the office of executor; such concert will involve the seeming purchaser, or his pawnee, and make him liable for the full value.¹⁴⁵

¹⁴⁴ *Walcott v Hall and Others* (1788) 2 Bro CC 305, 29 ER 167. The legatee in this case was a Godson of the testator rather than his natural son, which circumstance may have reduced the weight the court attributed to estate-preservative considerations.

¹⁴⁵ *Scott v Tyler* (1788) 2 Dick 712, 725-26; 21 ER 448, 453. This passage, taken from Thurlow's own notes of his judgment, was never delivered, as the parties compromised before Thurlow got to this point in his speech.

A similar estate-destructive position was followed in *Andrew v Wrigley*, another case featuring a contest between family legatees--the testator's niece and her heirs--and a non-family purchaser for value of the family land from the executor. Pepper Arden ruled for the purchaser on the general principles of supporting the security of bargains, protecting executors' and administrators' freedom of action in discharging testators' debts, and disappointing those having good claims to title who have slept on their rights. He ruled thus despite the purchaser having had notice that the family leasehold was being sold to him, in defiance of its having been bequeathed in the will to the niece and her heirs, to pay for the debts of the second husband of the testator's widow, who was also his executor; the purchaser was thus clearly "concerting" with the executor (the widow) to defraud the niece and her heirs. That he still won the case shows the strength of Chancery's support for purchasers and commercial certainty.¹⁴⁶ That the sums involved clearly show the family implicated in this case to be one of the poorest families whose affairs have reached a Chancery decree in this period may also be relevant to the result.¹⁴⁷

Claims filed by non-family bona fide purchasers for value to set aside conflicting voluntary dispositions of the same property to family members could move Chancery to

¹⁴⁶ Support for purchasers' claims despite their having notice of earlier dispositions was legitimised in the context of the second Statute of Elizabeth (An Act against Covinous and Fraudulent Conveyances); see another decision in favour of a purchaser with such notice in *Evelyn v Templar*.

¹⁴⁷ (1792) 4 Bro CC 125, 29 ER 812; *Ms Abbot Vol X 167a*; similar is *Bonney v Ridgard* (1784) 1 Cox 145, 29 ER 1101; *Ms Abbot Vol VI 85a*, where Kenyon, purely on the laches principle, let purchasers hold on to leaseholds sold to them by a widow and her second husband. The normally moralistic Kenyon thus let this widow disinherit her three daughters from the provision made for them under her late husband's will. The equity side of the Exchequer had a similar respect for bona fide purchasers' title, at seemingly any price: *Bedford v Woodham and Wyatt* (1790) 4 Ves Jun 40n. Where the doctrinal context in which a case was discussed was breach of trust by the trustee under a will rather than the impeachment of purchasers' title, the courts of equity were much quicker to protect families: see, e.g., *Dickenson v Lockyer* (1798) 4 Ves Jun 36, 31 ER 19.

enforce the Statutes of Elizabeth with more enthusiasm than usual. Thus Thurlow, at the very beginning of his chancellorship, set aside, under the Act to protect purchasers of 27 Eliz, a voluntary conveyance by a mother to her son, noting that the consideration of blood was not enough to save the conveyance from being held void against a purchaser for value. The decision may be further explained by the son in question having clearly been a grasping ingrate: he had repeatedly challenged his parents' dispositions of family property, both his father's will and his mother's sale of the real estate his father had devised to her. The first suit to set aside the conveyance to the son was instituted by the mother herself. These strong badges of fraud on the son's part must have weighed on Thurlow's mind.¹⁴⁸

The purchasers' exception to Chancery's normal estate-preservative bias did not, however, apply across the board: family vendors were often absolved from regretted sales, especially in situations with no hint of "fraud and covin". Even straightforward purchasers' bills for specific performance of the contract could be disappointed where Chancery thought the bargain insufficiently advantageous for the family vendors: Pepper Arden disappointed such a bill filed by a purchaser of family realty from a father and his six daughters. Arden seems to have been motivated by a desire to let the family obtain a better price: they having agreed to sell the realty to a relative of the husband of one of the daughters at a price an arbitrator would set, the price he set later appeared to be relatively low. Arden grasped at any available technicality to justify his refraining from granting the

¹⁴⁸ Though the text of the brief report gives no hint of this: *Parry v Cowarden* (1778) Dick 544, 21 ER 381.

prayer of the bill, leaving the purchaser to his action at law for damages for breach of contract.¹⁴⁹

6. Another Threat to Estate Preservation: Younger Children's Portions

Chancery not only intended to preserve family estates against family members' creditors: it was, as we have seen, both daring and effective in doing so. Chancery seems to have been less successful, if no less anxious, in preserving family estates in their integrity against a threat of another source: the portions parents charged on their estates for their younger sons and their daughters. These obligations to children obviously did not directly transfer family property outside the family, but they were often, if indirectly, harmful to the preservation of family property in the family: paying them often required borrowing, which often required encumbering the family realty. In other cases, portions were paid by selling some of that realty, often under a trust to do so for this purpose. Both ways hurt the family realty: either by increasing the burden of debt charged on it or by liquidating some of it. Giving money to daughters on their marriage without limiting it on trust for their own use meant giving it as a gift to their husbands, and thus away from the main family line (at least where there was such a line apart from those daughters' hoped-for progeny).

Parents and eldest sons had a clear interest in postponing the payment of such portions, since these portions, often charged on the same estate which was to pass to the eldest son, were to be paid either (i) out of estate income, (ii) by charging that income in return for a lump sum, (iii) by charging the fee in return for a lump sum, (iv) by

¹⁴⁹ *Emery v Wase* (1801) 5 Ves Jun 846, 31 ER 889.

purchasing, out of estate income, an insurance policy, or (v) by selling a part of the estate.¹⁵⁰ Early in the eighteenth century settlements came to be drafted so as to postpone payment of portions to the death of the father.¹⁵¹ Where settlements were unclear as to whether the portion had to be paid on the portioned child reaching the age of 21, or in the case of daughters, marrying, even if the father was still alive, or whether its payment could be postponed until the death of the father, the courts grasped at any interpretive technique that could lead to the latter result.¹⁵² After the consequences of postponing the raising of portions to the death of the father but not to that of the grandfather, who might well survive his son under eighteenth century mortality conditions, became clear at mid-century,¹⁵³ settlors started postponing their raising to the dropping of both of these lives.¹⁵⁴ A particularly impressive limitation for the raising of younger children's portions was included in the marriage settlement of Henry, Earl of Lincoln, in 1775: it postponed both the raising of the portions and their payment to the deaths of both the bridegroom and his father, the Duke of Newcastle, gave them a power to direct the trustees otherwise,

¹⁵⁰ Where an heir was more interested in his personal than in his real estate, and had no objections to the income of the latter being immediately diverted to pay portions, the court would facilitate this: *Reade v Litchfield* (1797) 3 Ves Jun 475, 30 ER 1113.

¹⁵¹ See examples from our period: *Blake v Bunbury* (1792) 4 Bro CC 21, 29 ER 758; 1 Ves Jun 514, 30 ER 464; *Ward v Baugh* (1799) 4 Ves Jun 623, 31 ER 321; *Crompe v Barrow* (1799) 4 Ves Jun 681, 31 ER 351.

¹⁵² See discussion of this point based on some earlier eighteenth century cases, in Fonblanque, *Equity*, Vol 2 200-1; Habakkuk, *Marriage, Debt, and the Estates System*, 121-26; and the discussion in Pottage, "Proprietary Strategies", 177-81, especially at text to footnote 94.

¹⁵³ See *Lyon v Chandos* (1746) 3 Atk 416, 26 ER 1040, where the court ordered the portion to be raised in the life of the grandfather, absent any interpretative straw the court could grasp at to hold the contrary.

¹⁵⁴ So the settlor in *Wilson v Piggott* (1794) 2 Ves Jun 351, 30 ER 668; *Ms Abbot* Vol XII 66b postponed the payment of the portions to be raised for his daughter's younger children to the deaths of himself, his wife, his daughter and her husband. In *Ward v Lord Dudley and Ward* (1788) 2 Bro CC 316, 29 ER 173 payment of the daughter's portion was postponed to both her parents' deaths.

gave the bridegroom a power to raise £5000 on the estate to advance any younger son in the world before that son's portion should become payable, and gave the trustees a power to raise, after the bridegroom's death, a sum equal to the interest on a portion for maintaining and educating a child until his or her portion should become due. When this limitation came to be construed by the court, Pepper Arden ruled that the raising and payment of the portions were indeed to be postponed to the deaths of both father and grandfather;¹⁵⁵ the case is thus referred to as entrenching an estate-preservative judicial policy, protective of the fee.¹⁵⁶

The reality of the case was, however, that the court signally failed to preserve the family estate. By the time the settlement reached the court, both the grandfather and the father to whose deaths the payment of portions was postponed were dead. The main parties to the cause were the only child of the bridegroom in the settlement--a daughter--and the then-current Duke, the son of that bridegroom's younger brother. The daughter won her case, being awarded a sum of at least £31,000, made up of her postponed portion under her father's marriage settlement and of the residue of the personal estate of her father's youngest brother, who bequeathed that residue to her. The portion was to be raised from the family estates, which were already extremely heavily encumbered. At the late date at which this limitation reached the court, the conditions therein postponing the payment of portions were no longer effective as protection against the estate being further encumbered, and neither was their reaffirmation by the court. Though the court's policy was in this case in harmony with the settlors' goal of postponing the payment of portions

¹⁵⁵ *Lady Clinton v Lord Robert Seymour* (1799) 4 Ves Jun 440, 31 ER 226.

¹⁵⁶ Habakkuk, Marriage, Debt, and the Estates System, 124.

so as to minimize the encumbrances on the estate, the actual result was everything that policy sought to prevent or postpone.

Contrastingly, the payment of portions was sometimes successfully postponed, not by formally entrenching, in a settlement or will, its postponement to certain set events, nor by the court seeking to protect the integrity of the family estate by any of the various judicial strategies we have discussed, but by simple non-payment and repeated informal postponements of the entitlement, whether based on agreement with the portioned person or not. One situation where this happened was where the portion was supposed to be paid on the portioned daughter's marriage, which never took place. In one case of this sort, a long-unpaid portion to a never-married aunt came at length to be seen as a simple debt to her, no longer conditioned on her marrying. When her youngest brother came to give his daughter in marriage, the aunt's unpaid portion was made an encumbrance on the realty passed to the daughter's husband. That husband then for 25 years refrained from paying the portion, unlike the other (non-family) encumbrance on the estate, which he paid immediately on marrying. The portion was still unpaid at the aunt's death, and her giving it by her will on trust to be laid out at interest, the interest paid first to the wife, then to the husband for life, makes clear that while she saw the money as due to her despite her not having married, she came to see its postponement as legitimate, giving the interest on it to the very persons responsible for its continuing non-payment.¹⁵⁷ Such informal practices, which operated without being codified in series of

¹⁵⁷ *Billinghurst v Walker* (1789) 2 Bro CC 604, 29 ER 332. For the deferment of the payment of portions in the eighteenth century see also Staves, *Married Women's Separate Property*, 116-18.

limitations, but rather by obligations being unfulfilled, repeatedly reformulated and postponed, doubtlessly contributed much to the preservation of family estates.

C. CONCLUSION: THE FAMILY AS CORPORATION

Chancery between 1778-1801 followed a wide-ranging, systematic policy of protecting families' property against their creditors.¹⁵⁸ The families to whose interests the interests

¹⁵⁸ Atiyah's (Rise and Fall, 694) claim for the "classical period", which he makes start at 1770, that the interests of debtors' family members were subordinated to those of their creditors, seems incorrect as to Chancery up to 1801: it was outside the court, in debtors' wills and in the administration of their estates by their personal representatives, that creditors were often preferred to family members, but once a contest between creditors and family over scarce family assets reached Chancery, family members were often preferred. Chancery was not, apparently, the only court in modern English legal history to implement such a policy: Cornish and Clark attribute a similar attitude to the judges of the County Courts created by the Small Debts Act 1846 (9 & 10 Vict c 95); William Rodolph Cornish and G de N Clark, *Law and Society in England 1750-1950* (London: Sweet & Maxwell, 1989) 39. American state legislatures and courts followed suit from the mid-nineteenth century by enacting and enforcing "homestead exemption" Acts, protecting land actually occupied as a home by a head of household and his or her family from being claimed by creditors for non-payment of debts. The protection extended both in the head of household's life and after his decease: Alison D. Morantz, "There's No Place Like Home: Homestead Exemption and Judicial Constructions of Family in Nineteenth-Century America," *Law and History Review* Summer 2006 <<http://www.historycooperative.org/journals/lhr/24.2/morantz.html>> (30 Jul. 2006). Though many of these Acts gave women significant power over family property, this was apparently used more for preserving family property against creditors than for asserting wives' independence against their husbands: *ibid*, pars 29-30. While estate preservation was the purpose attributed to such Acts, if not in these terms, by both the legislatures which enacted them and the courts which construed them, Morantz seems curiously unsympathetic towards such a policy, referring to it as credit fraud and casting husbands as its sole beneficiaries (*ibid*); surely wives and other family members could profit quite as much as husbands from the protective veil homestead exemption law drew over at least some family property as against the family's creditors. Hostility to doctrinal contortions intended to preserve family property, which is common to Morantz and to Claire Priest's forthcoming work on the exposure of realty held in fee simple to execution for debt in the American Colonies (Claire Priest, "Creating an American Property Law: Alienability and Its Limits in American History", *Harvard Law Review* (2007)

of creditors were postponed were various in structure. They included families focused around a male line--fathers and sons--but also families devoid of such a line, such as those consisting of widows without issue, of daughters with no brothers, of nephews or nieces of a person who died without issue, and even of remote kin only, including discretionary classes of yet to be specified remote kin.

Chancery's concept of the family, as expressed in its preference of family members of different sorts to creditors, was thus quite wide-ranging, going far beyond the nuclear family.¹⁵⁹ This might at first seem surprising to those who believe, following Stone, late eighteenth century English families, especially those of the upper bourgeoisie and "squirarchy", who were particularly prone to litigation in Chancery, to have been "closed domesticated nuclear families", focused around the conjugal couple and based on "affective individualism".¹⁶⁰ However, Davidoff and Hall have shown the continuing significance of the wider family and kin for both the urban and rural English middle class

(forthcoming; copy on file with author)), seems to run the risk of some anachronism: it reflects a merchant ideology, treating the repaying of debts as a major virtue. Such an ideology was not subscribed to with anything like such rigor by either late eighteenth-century English central court judges (as I've shown) or nineteenth-century American legislatures and judges (as Morantz has shown). It is thus problematic as an unquestioned background premiss for an historical study of the debtor and creditor law of either of these periods in either jurisdiction. A capital-centered merchant (and financier) ideology is certainly reflected in 20th century Anglo-American law's choice of corporate business as its key privileged context of property-holding, while late eighteenth century English law gave the family context this status: see text at and after note 170.

¹⁵⁹ It seems even wider than the family concept propounded by most nineteenth century American courts to construe homestead exemption statutes (for which see Morantz, "No Place Like Home", pars 59-67), though the chief difference--English judges' seemingly greater propensity for protecting persons lacking any dependants--may be explained by noting the American Acts' emphasis on protecting breadwinners' ability to care for their dependants. Chancery's estate-preservative policy applied across the entire family/commerce faultline, the family sphere being generally bounded only by its characteristic of property being held for non-commercial purposes.

¹⁶⁰ For Stone's terms and thesis see Lawrence Stone, *The Family Sex and Marriage in England 1500-1800* (New York: Harper & Row, 1977) 7-9.

of the early 19th century: business partners were taken from among the extended kin group, and marriages were used to provide business opportunities through access to another family's property and skills.¹⁶¹ It thus seems that while the conjugal relationships of at least some members of the middle and upper classes may have in the late eighteenth century followed an "affective individualist" code of practices and mutual expectations as regards the emotional content of the family bond, remote kin played a major role as regards the property, inheritance and business aspects of family life. My findings show that the late eighteenth century Chancery both recognised and respected this significance of the wider family and kin to the financial aspects of family life, by privileging the transfer of family assets to successor families in the female line (daughters, their husbands and issue), to nephews, to nieces and to remote kin, against the creditors of the transferor and of intermediate holders.

But while Chancery protected the "family interest" even where all that was left of the family were remote kin, its protection was skewed in favour of closer relatives generally and the direct line specifically. Where there was a son and heir, he was the focus of Chancery's protection. The "young heir" cases, where the interests of such sons were vindicated against those of their creditors despite the sons often being complicit in defrauding their family, show that Chancery was protecting an idealised "family interest" focused on the direct issue; it gave little weight to the conduct of the specific son and heir before the court. Not only past conduct but likely future conduct too was disregarded:

¹⁶¹ Leonore Davidoff and Catherine Hall, *Family Fortunes*, revised ed. (London: Routledge, 2002) ch 4; their data was derived from a sample of 622 early 19th century wills from Birmingham, Essex and Suffolk. The importance of the extended family, at a somewhat earlier period, was also emphasized by Levine and Wrightson: David Levine and Keith Wrightson, *The Making of an Industrial Society: Whickham 1560-1765* (Oxford: OUP, 1991) 338.

sons' interests were categorically preferred to those of their creditors despite the son being a proven spendthrift with no family to speak of. For daughters' interests to receive the same protection, there had to be no son; and married, fertile daughters were especially favoured, as they were likelier to prove the hinge between the parental and successor families. The protection of widows' interests, which frequently meant keeping the personalty, often bequeathed to them, free of their late husband's debts by throwing much of the debt burden on the family realty, tended to appear in full force where there was no direct issue to take that realty. Finally, only where there was no direct issue of a grantor or testator were remote members of his kin accorded Chancery's determined protection.¹⁶² In these fringe areas of the family or kin, the magnetic pull of the family interest was weaker, and could be defeated in favour of non-family takers, such as a testator's friends.

Should one choose to employ the now disputed category of class,¹⁶³ it can be said that Chancery applied its estate-preservative policy in favour of both upper- and middle-class families. In alternative terms, the policy was applied in favour of the nobility, the gentry, merchants and professionals. The policy seems to have been applied with remarkable consistency across most of the relevant reported cases, which, despite the

¹⁶² Chancery's strong preference for immediate kin, and in its absence, for remote kin, was identical to the preferences of testators in towns of Cheshire and southern Lancashire between 1700-1760, as they appear from Jon Stobart's massive sample of 2457 wills (though his conclusions as to the preferences of testators who did not mention either their wives or children in their wills were based on a small, random sub-sample of 25 wills): Jon Stobart, "Social and Geographical Contexts of Property Transmission in the Eighteenth Century", in *Urban Fortunes: Property and Inheritance in the Town, 1700-1900*, ed. Jon Stobart and Alastair Owens (Aldershot: Ashgate, 2000) 124-28.

¹⁶³ Edward P Thompson, author of the celebrated *The Making of the English Working Class* (London: Gollancz, 1963) has apparently "admitted" late in life that "the analytical category of class has reached its sell-by date": Dror Wahrman, *The Making of the Modern Self* (New Haven: Yale University Press, 2004) x.

incompleteness of the reporting system of the time, are varied enough to show it was applied ecumenically whichever social group did the litigants belong to. Only in the contexts of bankruptcy and fraud on creditors and in the rare case of a poor family to have reached a Chancery decree¹⁶⁴ does some negative bias seem to show, though the court's less estate-preservative attitude on these occasions may be explained otherwise (e.g., by the presence of a purchaser for value overwhelming Chancery's normal estate-preservative attitude¹⁶⁵).

Chancery's protection--the cumulative upshot of its three-pronged estate-preservative policy--extended to all types of family property, but where a family owned land, the land received special protection: the family's personalty was normally made the estate primarily liable to repayment of the family's debts. Where a family owned only personalty, however, Chancery did apply its estate-preservative policy to it. Even personalty owned by families who owned realty was protected where sacrificing it to protect the realty was unnecessary. In specific family situations the preference for realty over personalty could be reversed, as where a widow was bequeathed the personalty and there was no direct issue to take the family realty.

In terms of judicial technique, Chancery followed its estate-preservative policy both in cases where that policy realised the likely intentions of grantors and testators (which the court was quick to point out) and in cases where it clearly contradicted their intentions. The court's intentionalism was thus at least partly a rhetorical device, used to legitimate Chancery's estate-preservative policy, which was actually applied very nearly across the board: it were families as such that were protected, not necessarily the specific

¹⁶⁴ *Andrew v Wrigley*.

¹⁶⁵ *ibid.*

families before the court. Chancery protected family property as a principled policy. To enforce this policy, its judges were ready to contravene, evade, or put a skewed construction on statutes, though Pepper Arden was noticeably less ready to do so than the older Thurlow and Loughborough; he preferred the use of legal fictions. Concurrently, he had a more genuine and consistent respect for precedent than his elders, being happier to both set clear, determined precedents and to follow them.

The results of this concentrated doctrinal and interpretative effort, where successful, were to detain property in the hands of specific families for longer than it might otherwise have stayed in their hands. More of those families' members were provided for than might have been the case absent the court's protection. The property of families the direct male lines of which have ended was transferred, as wholly and as quickly as possible, to any available successor families, such as families started by daughters, or the families of remote kin. Chancery and its equity doctrines, by adding to debtors' menu of protective strategies,¹⁶⁶ helped families resist the forces of the market for just a little longer. While from a modern distributive justice point of view,¹⁶⁷ or indeed from that of Adam Smith,¹⁶⁸ this protection of the "family interest" of propertied families must be seen as "conservative" in the special sense of "harmful", from the perspective of late eighteenth century equity it was an ameliorative policy: while

¹⁶⁶ Pictorially illustrated by Innes, "The King's Bench Prison in the Later Eighteenth Century", 257-58.

¹⁶⁷ See, e.g., Joseph William Singer, "No Right to Exclude: Public Accommodations and Private Property" *Northwestern University Law Review* 90 (1995-96): 1466-73; and see very similar ideas propounded by Bramwell B in 1862: *Bamford v Turnley* (1862) 3 B&S 67, 84-5; 122 ER 27, 33.

¹⁶⁸ His opposition to entails might reasonably be extended to cover all legal techniques prolonging a family's control over property beyond what would promote its economically optimal exploitation: Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Oxford: OUP, 1976), Vol 1, 384-85.

admittedly not distributing property to propertyless families, it did make the family into a kind of corporation, granting its members some protection against the dangers of finance and commerce. The late eighteenth century Chancery's estate-preservative policy, much like the medieval use or the later limited liability company, was a complex of legal rules which granted to those employing, or subject, to them a certain level of protection against what would have been, absent these rules, the adverse financial and legal consequences of their actions. It made belonging to a family context into a status with positive economic incidents recognised by law: those belonging to such a context had a court at the ready¹⁶⁹ both to mould its rules and to use considerable discretion in order to limit their liability to financial failure and the resulting penury.

As we have seen, nearly any propertied person could, outside a clear trade or business context, be conceived by Chancery as belonging to a family context. The label "family property" was not limited to the property of married couples: it was extended to include that of surviving spouses as well as unmarried persons who were either in a direct family line or took indirectly the property of a family line which has ended. Anybody who had any family connection to a propertied person--including quite remote kin--could hope to be included in the charmed circle of "family", a belonging which meant increased protection against creditors. Seen in this light, Chancery's estate-preservative policy arguably put a relatively humane slant on the unequal early modern English regime of private property: while not redistributing property to have-nots as an explicit policy, Chancery drew many into the circle of the propertied by its generous construction of who

¹⁶⁹ Chancery's expensive, cumbersome procedure considerably compromised its readiness: Henry Horwitz, *Chancery Equity Records and Proceedings 1600-1800* (London: HMSO, 1995) ch 1.

counted as "family". The economists' and radicals'¹⁷⁰ condemnation of a court policy dedicated to letting propertied families keep their property can thus be answered by pointing out that in a legal system which permits privileged enclaves partly protected from the exigencies of the market, such as limited liability companies, limiting the availability of such privileges to commercial social contexts alone is unjustified. Chancery's protection of the family interest in property reinforced other social incentives for individuals to operate in a family context, to start families, support them in cooperation with other family members, and continue supporting them after one's decease by leaving them one's property. Such behaviour can hardly be seen as less meritorious, or less deserving of corporate-style privileges, than commercial activity.

Twentieth century ameliorative bankruptcy regimes, and the American "fresh start" regime most of all, protected consumers, including families, against the possible adverse consequences of their economic engagement in the market sphere, while regarding that engagement as *per se* desirable. Contrastingly, late eighteenth century equity saw the separation of the private and the market spheres as desirable, and attempted, by pursuing the estate-preservative policy outlined in this article, to preserve that separation, or at least to keep families' immersion in the market incomplete, so that some property could be saved in the event of failure, even in the teeth of the family's creditors.¹⁷¹ As the United States turns from its erstwhile pro-consumer bankruptcy law

¹⁷⁰ Such as Smith, "Wealth of Nations", and Singer, "No Right to Exclude"; Singer's distributive justice arguments, made in reaction to the jurisprudence of the American Supreme Court, could have comfortably fit into the late eighteenth to early nineteenth century English radical discourse.

¹⁷¹ Nineteenth century American 'homestead exemption' law can be seen as expressive of a similar philosophy: Morantz, "No Place Like Home".

to an approach primarily designed to meet creditors' concerns,¹⁷² it in effect abandons a value system which has been upheld by both the English and American systems throughout most of their history.¹⁷³

¹⁷² Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23; Jacob Ziegel "Facts on the Ground and Reconciliation of Divergent Consumer Insolvency Philosophies", *Theoretical Inquiries in Law* 7 (2006): 299.

¹⁷³ One can identify the pre-homestead exemption era of American debtor-creditor law, studied by Claire Priest ("Creating an American Property Law"), as a possible precursor of the 2005 Act.

2. FAMILIES, THEIR PROPERTY, AND THE COURT OF CHANCERY: HISTORICAL BACKGROUND

A. FAMILY PROPERTY IN LATE EIGHTEENTH-CENTURY ENGLAND: SOCIAL PRACTICE

1. *Socio-Economic Challenges Facing English Propertied Families*
2. *The Settlement System: a Technical Toolbox*
 - a. Marriage Settlements
 - b. Strict Settlements
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B. 'A SEAT OF HONOUR AND PROFIT': CHANCERY AND ITS JUDGES

1. *Chancery, its Suitors and Procedure*
 - a. The Court and its Social Function
 - b. The Litigation Decline
 - c. Who were the Suitors?
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2. *'The Moloch and Belial of the Bar': Chancellors Thurlow and Loughborough and the Late Eighteenth Century Chancery Judiciary*
 - a. Edward Thurlow
 - b. Alexander Wedderburn
 - c. Richard Pepper Arden
 - d. The Nineteenth-Century Rejection

Before we examine the Court of Chancery's policies regarding the allocation of family property between family members and its protection against their creditors, we must introduce the social practice in which the Court was called to interfere, as well as the Court itself. The two parts of the present chapter shall introduce that practice and the Court, respectively.

A. FAMILY PROPERTY IN LATE EIGHTEENTH-CENTURY ENGLAND: SOCIAL PRACTICE

1. *Socio-Economic Challenges Facing English Propertied Families*

In stratified societies where status is indexed to property-holding, such as eighteenth-century English society, the marriages made by the members of a family, their transfers of family property to other family members, and their decisions in managing and investing that property, can all be seen as strategic moves in a socio-economic struggle each family waged against all others. Each attempted to produce a younger generation and have it sustain, or, if possible, improve, the social status enjoyed by the current one.¹

¹ For the significance of lineal succession for supra-generational preservation of social status in Eurasian societies see Jack Goody, 'Strategies of Heirship' (1973) 15 *Comparative Studies in Society and History* 3,

A family's strategy included two basic elements. One was deciding how many children to have, looking for the balance of child quantity and child quality appropriate for the family's circumstances: having too many children compromised their 'quality' – the life prospects family funds sufficed to open before each.² This was a choice made under extremely unpredictable conditions: though the time before, during and after birth was in the late eighteenth century ceasing to be quite the deadly trap it was before for both mother and child, the average married woman's ten pregnancies still produced only an average of 2.5 children.³ Parents could not know, either, how successful each child will be at the social function allotted to it.

The second element of a propertied family's strategy was financial: the management, investment, and divestment of its property. Even when one or more family members controlled the distribution of part or all of the family's property between other family members, and were also empowered to alienate that property to non-family transferees, they were commonly expected to apply their power in the interests of the entire family rather than themselves alone. Since social status was indeed indexed to property-holding, a family had to preserve its property for its status to be preserved.

Eighteenth century English society attributed a high status value to a *rentier* lifestyle – living off of the income of family assets rather than pursuing a trade, profession, office or other remunerative occupation. Living on the rents from a landed estate was a prime constitutor of aristocracy and gentry status. Only a few remunerative occupations were thought more or less fit for a 'polite' person, a gentleman,⁴ and the places and opportunities available in some of these were few, were declining,⁵ or were taken. 'Polite' women were hardly permitted any income-generating activities at all.⁶ Family members' desire to live as *rentiers*, without making an independent contribution

6. See this struggle described as a Bourdieuan game by Alain Pottage, 'Proprietary Strategies: the Legal Fabric of Aristocratic Settlements' (1998) 61 MLR 162, 183-84. The struggle can also be seen as waged between lineages rather than families.

² This balance was discussed in theoretical economic terms by Jean-Marie Baland and James A Robinson, 'Rotten Parents' (2002) 84 J of Public Economics 341. For evidence that the English practiced prudential family planning, rather than simply obey the dictates of natural fertility (and mortality), from the early modern era on, see Simon Szreter and Eilidh Garrett, 'Reproduction, Compositional Demography, And Economic Growth: Family Planning In England Long Before The Fertility Decline' (2000) 26 Population and Development Rev 45, 50-52.

³ This reproduction rate made for population growth: English population increased to seven million persons by 1781, and to more than eight million by 1801. The fact of population increase was generally unknown and unconfirmable, however, until the nineteenth century censuses, the first of which was conducted in 1801. Some doubted that England's population grew at all: see Paul Langford, *A Polite and Commercial People: England 1727-1783* (OUP, Oxford 1989) 636. For the demographic data see EA Wrigley, 'British Population during the 'Long' Eighteenth Century, 1680-1840' in R Floud and P Johnson (eds), *The Cambridge Economic History of Modern Britain: vol 1, Industrialisation 1700-1860* (CUP, Cambridge 2004).

⁴ Staves noted how the younger children of landowners could successfully resist any occupations considered degrading for the genteel: Susan Staves, 'Resentment or Resignation? Dividing the Spoils among Daughters and Younger Sons' in J Brewer and S Staves (eds), *Early Modern Conceptions of Property* (Routledge, London 1995) 194, 204. The success of such resistance increased the pressure on a family's limited resources.

⁵ The number of active barristers, for example, declined throughout the eighteenth century, only turning up after 1790: David Lemmings, *Professors of the Law* (OUP, Oxford 2000) 73-74.

⁶ The late eighteenth century decline in employment opportunities open to women is discussed in Leonore Davidoff and Catherine Hall, *Family Fortunes* (rev edn Routledge, London 2002) 272-75.

to family finances, aggravated the scarcity of resources characteristic of all but the richest families; and even the richest had to make decisions allocating different family assets between family members.⁷ Both adults and children needed to be maintained, the latter had to be educated, and young adults needed to be provided with capital to fund either marriage and the foundation of a new household, career-launch costs (such as the cost of an apprenticeship or of attending the inns of court), or both. Meeting all of these needs out of the capital and income of existing family assets was the socio-economic challenge facing propertied families.

English propertied families' preferred way of allocating enjoyment of, and control over family property between family members was by self-regulation: rather than permit the common law of succession to intestates' estates and of the proprietary incidents of marriage to regulate their affairs, a majority of propertied families overrode that law, defining themselves the entitlements of each family member to different pieces of family property and his power to allocate entitlements in his turn. The two chief instruments made use of to allocate entitlements were the settlement, often made at marriage, and the will.

The challenge facing settlors and testators was aggravated by the presence of debt. The need to satisfy the demands of parents, children and children's spouses out of family property drove the development of the English credit system. Both land held in fee simple and terms of years (leaseholds) could be mortgaged or sold. Additional options included the sale of annuities, sums certain payable in future out of family assets, in consideration for a present lump sum,⁸ and purchasing life insurance, which first appeared in the eighteenth century. Easily available credit tempted many into debt, the servicing of which became a significant burden on many families: more eighteenth century landowners were in debt than had surpluses.⁹ A fundamental cause of increasing indebtedness was the expectation that the landed and other wealthy persons exhibit their wealth by conspicuous consumption. Lavish spending was a popular strategy for attaining social pre-eminence.¹⁰

⁷ The economic challenge facing Peerage families was aggravated by the marked increase in the life expectancy of their members from mid-century; see TH Hollingsworth, 'The Demography of the British Peerage' (1964) 18 *Population Studies*, suppl., cited in Langford (n 3) 596. Contrastingly, the life expectancy (at birth) for the population of England as a whole did not exhibit much change in the eighteenth century, despite hitting 40 for the first time in 1801: Wrigley (n 3) 64, table 3.1.

⁸ The 2nd Duke of Chandos, for example, was during the 1740s indebted on 26 such annuities, to be paid for the duration of his life, worth £33,430 at over 14% interest (PGM Dickson and JV Beckett, 'The Finances of The Dukes Of Chandos: Aristocratic Inheritance, Marriage, and Debt in Eighteenth-Century England' (2001) 64 *Huntington Library Quarterly* 309, 335).

⁹ See Hrothgar John Habakkuk, *Marriage, Debt, and the Estates System: English Landownership, 1650-1950* (Clarendon Press, Oxford 1994) 333-34. Habakkuk describes the emergence of a market in mortgages of different interests in land at *ibid* 17, the reasons for landowners' great indebtedness at *ibid* 243-71, and the appearance of personal life insurance at *ibid* 267 and 342-43. Staves noted that the eighteenth century upper classes were 'net debtors': Susan Staves, *Married Women's Separate Property in England, 1660-1833* (Harvard U Press, Cambridge MA 1990) 207.

¹⁰ It was, appropriately, energetically pursued by eighteenth-century *nouveaux riches* such as the banking family of Hoare (Christopher GA Clay, 'Henry Hoare, Banker, his Family, and the Stourhead Estate' in FML Thompson (ed) *Landowners, Capitalists, and Entrepreneurs* (Clarendon Press, Oxford 1994)) and the Dukes of Chandos, enriched and ennobled as a consequence of corrupt profiteering during the War of the Spanish Succession (Dickson and Beckett (n 8)). The ill-judged extravagance of the latter family led to crippling indebtedness, but ultimate disaster was for decades avoided by a fascinating variety of financial

A typical family thus had to simultaneously provide for the past (repaying old debts and mortgages and paying old annuities), the present (addressing the current needs of living family members) and the future (by putting aside funds necessary for future 'marriage portions' and for the future launching of children into the world), all from the same collection of existing assets. There was a limit to the number of ways parts of the same bloc of capital, or the income thereof, could be simultaneously exploited to satisfy cumulative appetites. Where the income from some capital, be it a bloc of land or a sum of money invested in the 'funds', the eighteenth century term for government securities, was dedicated to a certain use, such as the livelihood of the parents, the same income stream could not simultaneously be diverted to a mortgagee or annuitant in return for a lump sum to provide for a daughter on her marriage or a younger son; neither could it be diverted to an insurer, as a premium. Charging or selling the capital fund itself was obviously hazardous for families aspiring to *rentier* life.

One strategy English families have since the middle ages employed for meeting the socio-economic challenge before them was limiting fertility by postponing marriage.¹¹ Traditionally, scions of the propertied had married at a younger age than their poorer compatriots: while the former's marriage was a matter for inter-family parental planning and negotiation,¹² the latter did not generally marry until both bride and groom amassed some property with which they could start a new household.¹³ The late eighteenth century witnessed an unprecedented reversal: while labourers and artisans married earlier than before, the children of the propertied started marrying later.¹⁴ In line with the recent argument holding the late marriage practiced by all but a small elite and the resulting curb on fertility to have been the real bases of the strong growth of the English economy in the early modern era (roughly, 1500-1750) and 'long eighteenth century' (1688-1832),¹⁵ the propertied classes' postponement of marriage from the late eighteenth century may be seen as a strategy employed in countering the complex socio-economic challenge described above, which worsened steadily throughout the eighteenth century.¹⁶ Earlier marriage among the less affluent may be seen as reflecting the late eighteenth-century lull in the culture of abstinence and self-denial which has characterized long periods of English history, a culture which has been seen as a central

and matrimonial maneuvers: *ibid.* See also the story of the Thelluson family, amply told in Patrick Polden, *Peter Thellusson's Will of 1797 and Its Consequences on Chancery Law* (E Mellon Press, Lewiston, NY 2002).

¹¹ See Szeleter and Garret (n 2).

¹² For the way upper-class marriage was planned, negotiated and carried out, see, eg, Lawrence Stone, *The Family, Sex and Marriage in England 1500-1800* (Harper & Row, New York 1977) 180-91.

¹³ Mary S Hartman, *The Household and the Making of History: A Subversive View of the Western Past* (CUP, Cambridge 2004) 27-30.

¹⁴ Szeleter and Garret (n 2) 66-69.

¹⁵ Hartman (n 13) ch 1. For the choice of the 'long eighteenth century' of 1688-1832 as an appropriate frame for historical discussion see Frank O'Gorman, *The Long Eighteenth Century* (Arnold, London 1997) xi-xii.

¹⁶ For the growth in propertied families' indebtedness throughout the eighteenth century see Habakkuk (n 9) 338. Another strategy employed in countering that challenge was running a patriarchal, regimented family life. Quinlan and Shackelford describe how eighteenth- and nineteenth-century English families became more patriarchal in economically difficult periods, less so in more comfortable periods: DC Quinlan and JA Shackelford, 'Economy and English Families, 1500-1850' (1994) 24 *J of Interdisciplinary History* 431, 449-52.

enabling condition of the postponement of marriage by everyone except the Nobility and gentry throughout the span of English history since the middle ages, except the period from the second half of the eighteenth century until the end of the Napoleonic wars.¹⁷

2. The Settlement System: a Technical Toolbox

This section reviews the technical legal tools which eighteenth century Englishmen used to allocate family property and control over its future allocation between family members.

a. Marriage Settlements

While marriage prestations – gifts to newlywed spouses – are common to many cultures and legal systems,¹⁸ English law has extended mutual gifting at marriage into the major occasion for a formalized allocation of the property of the newly-created family between its members, both those actually living (the spouses) and potential family members such as the children the couple may have. Marriage settlements differed greatly in comprehensiveness and complexity. A settlement could amount to no more than a gift of property to the wife for her own use regardless of coverture. Other settlements were lengthy, ceremonious documents, recording gifts of property to the newly-created family from the kin of each spouse, and allocating rights in different parts of that property, control over it and the power to allocate it further to different family members that might exist at different future times. Such settlements often look like attempts to determine who shall enjoy and control each item of family property for several generations into the future, providing a separate distributory scheme for every conceivable composition of those putative generations.

The great majority of marriage settlements were made by those below the gentry.¹⁹ This fact offends against a well-known image of the settlement system as a primarily upper-class practice, largely subscribed to by leading scholars of English families' proprietary strategies such as Stone, Habakkuk and Eileen Spring.²⁰ Habakkuk,

¹⁷ For the increased fertility of this period and the hypothesis tying it to the temporary decline of Evangelism, see Wrigley (n 3) 70 (table 3.2), and Szreter and Garret (n 2) 58-65. The upturn in fertility was reversed by a 30% decline between 1816-46: Szreter and Garret (n 2) 57.

¹⁸ See Jack Goody, 'Marriage Prestations, Inheritance and Descent in Pre-Industrial Societies' (1970) 1 *J of Comparative Family Studies* 37; Jack Goody, 'Inheritance, Property and Women: Some Comparative Considerations' in J Goody, J Thirsk and EP Thompson (eds), *Family and Inheritance: Rural Society in Western Europe 1200-1800* (Cambridge, CUP 1976) 10, 22ff.

¹⁹ So according to Erickson's fundamental research of marriage settlements mentioned in probate accounts filed in the ecclesiastical courts of several English dioceses: AL Erickson, 'Common Law versus Common Practice: the Use of Marriage Settlements in Early Modern England' (1990) 43 *Economic History Rev*, 2d Ser 21, 21-24, 31-32. Erickson's data covered the seventeenth and early eighteenth centuries. Supporting evidence is found in Lloyd Bonfield's assertion that settlements were prevalent among Kentish yeomen from 1660-1740 (L Bonfield, *Marriage Settlements, 1601-1740* (CUP, Cambridge 1983) 91 fn 19) and in Chantal Stebbings' statement that by the nineteenth century, settlements were common among large sections of the middle class (C Stebbings, *The Private Trustee in Victorian England* (CUP, Cambridge 2002) 6).

²⁰ Stone (n 12); Habakkuk (n 9); Eileen Spring, 'The Family, Strict Settlement, and Historians' in GR Rubin and D Sugarman (eds), *Law, Economy and Society* (Professional Books, Abingdon 1984); E Spring,

for example, explicitly saw the system as limited to *rentiers*.²¹ That image was largely constructed by these scholars simply limiting their discussion to the proprietary practices of the upper class.²² Further, they did not always distinguish sharply enough between the popular practice of making marriage settlements per se and the rarer utilization of the technical legal tool called ‘strict settlement’, which we shall shortly describe.²³ The problem boils down to semantics. Erickson’s finding that approximately ten percent of all married men’s probate accounts filed in the ecclesiastical courts of Lincolnshire and Northamptonshire during the seventeenth and early eighteenth centuries mention marriage settlements for the wife’s benefit, which she says is an underestimation of the actual incidence of such settlements, should be read bearing in mind that for Erickson, a plain bond given by a husband before marriage, promising to leave his wife £40 at his death (the median amount of money involved in these settlements), was a ‘marriage settlement’.²⁴ *Rentiers* did not make up ten percent of English society.

Since the structure of a typical marriage settlement of the complex variety has been repeatedly explained in the literature,²⁵ a brief description should suffice here. Both the groom’s and the bride’s families typically contributed property to the newly-formed household. This property might be land; when it was personalty, the settlement might either direct that it be invested in land or in a secure personal form such as ‘the funds’. However it was to be invested, the family’s capital fund was often granted to trustees, with the limitations for specific family members all operating in equity; or the limitations could operate at law, with trustees only being employed for several more limited tasks, noted below.

One basic function of such settlements was designating an order of succession for the bulk of the new family’s property to follow. Such an order could vary, but typically the bulk of the property would first be limited for the groom for life, to pass at his death to the bride either for the rest of her life or until she remarries.²⁶ It would then be limited to the eldest son of the marriage in tail male, with remainders for his younger brothers, successively, each in tail male. The next remainders would give the property – whether an old family estate, an estate to be purchased with money contributed by either or both of the spouses’ families of origin, or some form of personalty – to the daughters of the

‘Law and the Theory of the Affective Family’ (1984) 16 *Albion* 1; E Spring, *Law, Land, & Family: Aristocratic Inheritance in England, 1300-1800* (The U of North Carolina Press, Chapel Hill 1993).

²¹ Habakkuk (n 9) 36.

²² As did Pottage (n 1).

²³ See, eg, Spring’s assumption that marriage settlements of property on the wife, dedicating it to her own use regardless of coverture, were only common among the very well-to-do: Spring, ‘Law and the Theory’ (n 20) 13. Erickson gives two further reasons for these leading scholars’ restriction of marriage settlements to the upper class: they based their historical studies mostly on private journals and family papers, which survive disproportionately for wealthy families; and they tended to equate wealth, or property, with land, while many who owned no land made marriage settlements: Erickson (n 19) 23.

²⁴ Erickson (n 19) 31-35.

²⁵ The best explanation is that by Habakkuk (n 9) ch 1. Other explanations are in L Stone and J Fawtier Stone, *An Open Elite? England 1540-1880* (Clarendon Press, Oxford 1984) 72-86; B English and J Saville, *Strict Settlement: a Guide for Historians* (Hull U Press, Hull 1983); MR Chesterman, ‘Family Settlements in Trust: Landowners and the Rising Bourgeoisie’ in *Law, Economy and Society* (n 20); and in Spring’s book and two articles cited in n 20, *passim*.

²⁶ I here omit the limitation to ‘trustees to preserve contingent remainders’, part of the technical mechanism called ‘strict settlement’, discussed separately at text to nn 33ff.

marriage to hold as tenants in common, then perhaps to each of the groom's brothers for life, each brother's remainder followed by remainders to his sons successively in tail, then his daughters as tenants in common, and finally to each of the groom's sisters for life, each sister's remainder followed by remainders to her sons successively in tail, then her daughters as tenants in common. At the end of a long series of remainders, the latter parts of which varied widely, came a limitation to the groom in fee.

It must be recollected that when such a settlement was penned, the young couple were about to marry, and had no children at all. The settlement was allocating future rights in family property to persons who might or might not exist. The length of a typical series of remainders was largely due to the attempt to provide for every possible fertility and mortality contingency which might befall the new family.

The limitation of the estate for the groom for life was normally either preceded, followed, or both by limitations of long terms of years on the property, granting these terms to one or more sets of trustees and directing them to raise certain sums of money out of the terms and use them for designated purposes. These purposes included paying the wife an annuity - either for her own use during marriage, despite coverture, or once she was widowed, for her jointure; paying lump sums, called 'portions', to all the children of the marriage except the eldest son (a group we shall call 'younger children'); and paying the groom's debts or those charged on the family estate. The trustees were empowered to raise the necessary money out of the terms, which could easily run to a thousand years, by one or more methods: paying them out of the income accrued on the capital fund during the term (such as the rents and profits of the land, or the interest earned on government stock), or raising them by selling or mortgaging the term. Trustees could also hold a separate capital fund for the wife, for her own use during marriage despite coverture, rather than pay her an annuity to the same end.²⁷

The limitation of a term on trust to raise portions for younger children called for several refinements.²⁸ As newlyweds could not know how many children they will have, allocating portions by ordinal number was inadvisable. Fixing a standard portion to be awarded to each younger child could, in case the marriage would prove to be unexpectedly fertile, severely endanger family finances. Any arrangement guaranteeing a fixed sum for each younger child deprived the parents of a useful instrument for disciplining their children. By the late eighteenth century a formula was developed which took account of both the latter problems. The threat of disobedience was met by fixing a sum total out of which younger children's portions were payable, leaving the distribution of this sum between these children to the parents in the form of a power of appointment.

²⁷ As Staves, author of the major opus on married women's separate property (n 9) has noted, eighteenth century cases reveal no straightforward distinction between the two, supposedly distinct, forms of making provision for married women, pin money and property held on trust for their use; further, in *Bennet v Davis* (1725) 2 P Wms 316, 24 ER 746 Chancery upheld a bequest of land by a father to his married daughter for her own use, granted directly to her without interposing trustees, noting that in such cases the husband, who at common law had the use of the land for life, would in equity be held a trustee for his wife.

²⁸ Scholars have disagreed about whether the setting of younger children's portions in marriage settlements executed before they were born increased or decreased their portions compared to though they would have received had their portions only been set on a later occasion, such as on their own marriages or in their parents' wills. Habakkuk and Cooper thought the early definition of portions made them relatively more generous (Habakkuk (n 9) 126-31; JP Cooper, 'Patterns of Inheritance and Settlement by great Landowners from the Fifteenth to the Eighteenth Centuries' in *Family and Inheritance* (n 18) 192, 228), while Spring thought the reverse ('The family' (n 20) 177; 'Law and the Theory' (n 20) 7).

This solution, by fixing a ceiling for the sum to be raised to pay portions, also prevented the risk of a large family having dire financial consequences. Sophisticated settlements set a different ceiling for each possible fertility scenario, raising it for scenarios involving larger crops of children, but preserving the parents' power of allocation inside the group.²⁹

Portions were made payable at majority – the age of 21 – in the case of sons, the earlier of majority or marriage in the case of daughters. To provide for the children until their portions become payable, the trustees were often empowered to spend up to a certain sum on their maintenance and education; occasionally the power specifically permitted the trustees to do so out of the interest on each child's portion, or even to advance some of the capital. On the face of most settlements, the trustees appointed to raise such portions were empowered to take, on the death of the spouses, possession of the main family asset and stay in possession until the portions were raised out of the rents and profits of the land, or the interest on the personal fund. Such a course of action would have meant keeping the estate out of the possession of the heir,³⁰ most often the eldest son of the marriage, for a long time, possibly longer than his lifetime, an outcome at odds not only with the interests of the eldest son, but with one of the key purposes of the settlement system: having possession of the family estate move uninterruptedly from heir to heir down the (patri-)line. It was accordingly rarely taken: instead of taking possession of the estate for the duration of the term, the trustees mortgaged it. By this period, mortgagees permitted mortgagors to remain on the land; in this case, the trustees, by mortgaging the term, let the next limitation in the settlement, that for the eldest son, fall in. The portions were paid out of the borrowed lump sum, the immediate burden on the eldest son's enjoyment of the income of family capital being limited to interest payments on the loan.³¹ While advantageous for the eldest son's immediate interests, this way of simultaneously satisfying the demands of both eldest son and his younger siblings burdened family capital with long-term debt; there was no obvious source for the eventual repayment of loan capital. The burden was compounded when a similar mortgage was created a generation later.³²

b. Strict Settlements

The 'strict settlement' was a specific conveyancers' technique to be incorporated in settlements, whether made at marriage, at the heir's majority, by will or at another time, rather than a full settlement by itself. 'Strict settlement' was somewhat more of a preserve of the landed classes than the settlement system as a whole, appropriately promoting their ambition to have family land stay in the family for successive

²⁹ See, eg, the trusts of the 500-year term in the 1774 marriage settlement of Henry, Earl of Lincoln (later Duke of Newcastle) and Catherine Pelham: *Lady Clinton v Lord Seymour* (1799) 4 Ves Jun 440, 440; 31 ER 226, 226. This practice was mentioned as characteristic of nineteenth-century settlements in Spring 'The Family' (n 20) 173.

³⁰ That the term 'heir' was constantly used in the context of eighteenth century marriage settlements should not blind one to the fact that an eldest son taking an estate in the family land according to his parents', or his own, marriage settlement was not, strictly speaking, an 'heir' at all: that term was, in strict law, limited to persons taking an estate in realty by descent, while such an eldest son took his estate by purchase.

³¹ Habakkuk (n 9) 117-21.

³² *ibid* 62-65.

generations and not be alienated outside it. It was not, however, necessary to have owned green acres for a long time, or even to own them at all, in order to share in this ambition, which characterized new entrants to the landowning class and aspirants for such entry as much as established landowners. The strict settlement, too, has been extensively discussed in the literature.³³ It was intended to prevent the current or future tenant in possession of a family estate from collapsing the remaining limitations in the settlement under which he held and annulling the remaindermen's rights. In effect a form of protective trust, the strict settlement inserted a remainder to 'trustees to preserve contingent remainders' after the life tenant's estate. The device was only effective because equity held it to operate as follows: should the life tenant attempt to sell the fee, or otherwise seriously threaten the remaindermen's estates, his estate was said to terminate prematurely and the trustees' subsequent remainder to fall into possession, thereby frustrating the life tenant's disruptive plans and preserving the subsequent remainders.³⁴ As a protective limitation to such trustees could follow any life estate, several 'strict settlements' were often embedded in a single marriage or majority settlement.

The strict settlement as described in the last paragraph was effective in preventing the alienation of family estates until a tenant in tail of the estate came of age. As we have seen, under the typical marriage settlement, the newlyweds' eldest son would normally be made a tenant in tail.³⁵ Once one such tenant did come of age, he could, together with his life-tenant father, suffer a recovery of the land under settlement, disentail it and dispose of it freely. Once the life-tenant died and the estate-tail fell into possession, the tenant in tail could suffer a recovery by himself. Thus the 'strict settlement' only effectively secured the settlement for one generation or slightly less, from the parents' wedding until their son reached the age of 21.³⁶

Some landowners settled their land on the heir's majority rather than his marriage, adding provisions for the period until he marries: the father stayed in possession of the family estate, the heir receiving a generous rentcharge. In such cases, strict settlement kept the land inalienable for a full generation. A social practice not explicitly mentioned in such settlements could, however, help keep the estate in family hands for longer than a generation. According to this practice, involving settlement at the heir's majority rather than his marriage, once a life tenant under a family settlement had a son who came of age, and who would at his father's death become tenant in tail in possession of the estate, able to disentail it himself and destroy all of the limitations subsequent to his own, the father, or family solicitor, would suggest a deal. In consideration for economic support until marriage, the son would agree to a resettlement of the estate, in essence postponing the entire scheme a generation down the line: the son would give up his estate-tail and take a life-estate instead, postponing the estate-tail to his own son. A generation later the

³³ See Habakkuk (n 9) 6-14; JH Baker, *An Introduction to English Legal History* (4th edn Butterworths LexisNexis, London 2002) 293-96; Spring *Law, Land, & Family* (n 20) 124-25; Bonfield (n 19) 101-102.

³⁴ Equity could stand this way once the trustees' remainder itself was held to be vested rather than contingent, a non-obvious point, in *Parkhurst v Smith d. Dormer* (1740) 6 Brown PC 351, 2 ER 1127. Had their remainder been contingent it would have been swept away by the life tenant's attempt to undermine the settlement, rather than frustrate that attempt.

³⁵ As we shall see in chapter 4, Chancery frustrated attempts to postpone the estate-tail a further generation down the line.

³⁶ Spring 'The Family' (n 20) 190.

son, now a father, would try to repeat the same bargain with his own son. While this scheme, involving a crucial voluntary element, sometimes failed, it was often successful in cases where no crushing debt necessitated using the coming-of-age of a tenant-in-tail son for intentional disentailing to enable land to be mortgaged or sold to pay debts. Its success is measurable by the extent of land said to be effectively inalienable because under strict settlement: 1760s estimates talk of half the land in England; Disraeli, in 1853, mentioned nine-tenths.³⁷

c. Settlements by Will

In an aristocratic fantasy, where all of a family's property would be resettled every generation on either the majority or marriage of the heir, there would be nothing to leave by will. But reality rarely conformed to this fantasy.³⁸ A family member might have an income independently of family assets, or some of the income on those assets might be left unused; he might even buy a new piece of realty with such income. Land was sometimes intentionally left outside the existing settlement so that it could be easily sold, whether to pay debts or in search of a better investment. Under particularly meager fertility, and severe mortality, scenarios, all the putative remaindermen for life or in tail under a settlement might be either never-born or deceased, and the final reversion in fee to the groom, the heir or his father fall into possession. And among both the bourgeoisie and new entrants to the landed class, who normally made, rather than inherited, their fortunes, there would often be property free of settlement, eligible to be settled by will.³⁹

Settlements by will had their own peculiarities. Though many landowners made a will as soon as they came of age, the last will left by a father or mother of a family was often executed long after the births of at least some of the children. Bequests to living children known to the testator tended to be more personalized than the standard portion characteristic of non-testamentary settlements. Testamentary portions were often given to each child by name, their amount influenced by the testator's view of that child's conduct, prospects and needs, as well as by the existence of bequests to that child in any existing settlements which the will supplemented rather than replaced. As wills were more private documents than majority, and especially marriage, settlements, often executed in relative secrecy (despite the presence of witnesses), testator-settlors permitted themselves a freer rein at expressing their personal predilections, likes and dislikes, than did other settlors.⁴⁰

3. *The Settlement System in Theory and Practice*

Much of the existing literature divides the historical life of the settlement system into two contrasting archetypes.⁴¹ One is the landed families' dynastic settlement, seen as

³⁷ Habakkuk (n 9) 47-49.

³⁸ Spring, *Law, Land, & Family* (n 20) 128.

³⁹ Habakkuk (n 9) 5, 33-36. He believed settlements by will were on the whole declining in the eighteenth century, a measure of the increasing success of the strict settlement: *ibid* 336.

⁴⁰ *ibid* 34.

⁴¹ See Chesterman (n 25); Ron Harris, *Industrializing English Law: Entrepreneurship and Business Organization, 1720-1844* (CUP, Cambridge 2000) 150, 157; Graham Moffat, *Trusts Law: Text and*

continuous with pre-strict settlement and even pre-Statute of Uses perpetuities. On the stereotypical presentation, such settlements were principally used by the Nobility and gentry. The property settled consisted mostly of land. The purpose of settling the land was holding it in specie for generations; on a more psychological level, the purpose was satisfying what Habakkuk called the ‘dynastic instinct’⁴² and Stone the ‘dynastic spirit’.⁴³ Spring thought that the prime purpose of such settlements was varying the common law order of succession, promoting collateral males before the deceased’s daughters, so that it better approximated the order of succession to Noble titles, which for titles granted since the fourteenth century was always strictly patrilineal.⁴⁴ Stereotypically, the trustees appointed in such settlements were supposed to be no more than passive holders of the title to family estates and watchers over underage heirs.

With this picture of an Aristocratic landed settlement the literature contrasts a picture of a settlement serving as a set of guidelines for the future investment of family wealth. This is the sort of settlement which the middle classes are supposed to have employed. The property settled is supposed to have consisted of a mixed fund of both land and personalty, much of the latter being intangible, such as government stock and corporate shares. It having been principally conceived of as an investment rather than as an enduring symbol of, and platform for, the collective personality of a family,⁴⁵ the property was exchanged whenever better investment opportunities presented themselves. Its trustees are supposed to have been its active managers and investors. In short, this is a

Materials (4th edn CUP, Cambridge 2005) 48-54; Joshua Getzler, ‘Gentlemen do not Collect Rents’: Fiduciary Obligations and the Problem of Delegation’ (unpublished article on file with author) 3-5.

⁴² Habakkuk (n 9) 51-57.

⁴³ Stone (n 12) 29, 85, 243-44; Stone and Fawtier Stone (n 25) 69-72. This venerable theory of the psychological basis of settlement culture was already popular in the nineteenth century. See, eg, George Brodrick, *English Land and English Landlords* (Cassel, London 1881). See discussion of the dynastic impulse as the basis of some trusts in the mid-twentieth century United States in Lawrence Friedman, ‘The Dynastic Trust’ (1964) 73 Yale LJ 547.

⁴⁴ Spring ‘The Family’ (n 20) 187-80; Spring ‘Law and the Theory’ (same note) 4, 12; Spring *Law, Land, & Family* (same note) 18-21, 89, 144-47; David Spring and Eileen Spring, ‘The English Landed Elite, 1540-1879: A Review’ (1985) 17 Albion 149, 161. In her *Law, Land, & Family* Spring criticized Habakkuk’s argument that one cause of the development of the strict settlement was inter-dynastic competition regarding the amount of land owned, which increased families’ desire to hold on to the land they already held. This well-known thesis is, according to Spring, superfluous, as the desire to promote collateral males before the present life tenant’s daughters in the order of succession to his estates suffices, in her view, to explain the rise of the strict settlement (ibid 148-51). It is hard to see why one should insist on the primacy of any one of these two clearly linked motives: when a landowner’s daughters inherited his estate, that estate was in great risk of morcellization (because daughters took their father’s land as tenants in common), and when either his single daughter or several daughters inherited it, it was in an even greater risk of passing to another family, since on an heiress’ marriage, her land, though it did not become her husband’s by marriage alone, might well be so resettled that it effectively passed from her lineage to his. Both morcellization and the passing of its land to another family were near-deadly blows to a landed dynasty’s status and prestige. Cooper emphasized that so long as landowning elites saw perpetuating family glory as truly important, they could, and did, attain their dynastic landownership goals, given social and political power, whatever the formal rules of succession: Cooper (n 28) 295-96.

⁴⁵ For the investment of property with its owners’ personality see MJ Radin, ‘Property and Personhood’ (1982) 34 Stanford L Rev 957.

settlement approximating to the familiar modern trust fund, held as an abstract agglomeration of value rather than as specific assets.⁴⁶

This much-rehearsed story of the history of family settlements as a unidirectional arrow pointing from an Aristocratic age dominated by titled, landed families employing settlements to gratify their dynastic desires to a mercantile, industrial and financial age dominated by recently-enriched bourgeois entrepreneurs using trust and settlement as flexible investment vehicles is, however, far too simple and clear-cut. It is of a piece with the traditional telling of the social and economic history of England in the eighteenth and nineteenth centuries as an 'industrial revolution' accompanied by a radical transformation in both the relative dominance of different social groups (or classes)⁴⁷ and the leading social ethos. As the story of an 'industrial revolution' in the English economy between 1760-1830, characterised by surging productivity and growth, has been deeply questioned by recent economic historians,⁴⁸ the 'two-stage theory' of the socio-legal history of family settlements calls for revision and re-evaluation as well.

The present thesis, a micro-history of court policy, is not the right place to attempt such a revision; yet the prospect for one seems promising. The hundreds of eighteenth century family property arrangements which appear in reported Chancery cases of the period 1778-1801 show a variety of social practice belying the two-stage theory. Many middle-class and *arriviste* families of merchants, traders and professional men made use of settlements, and even of the strict settlement. They did indeed settle mixed funds of property, including both realty and personalty of different types, and seem to have often envisioned that property being exchanged as economic opportunities and family needs waxed and waned, as predicted by the second stage of the theory. But far from pursuing a determinedly 'middle class' settlement strategy simply focused on making the most desirable investments available, many middle-class settlers seem to have been bent on emulating the investment practices of established landowners, clearly desiring to promote their own absorption in that status group.⁴⁹ Many of those very landowners, meanwhile, were diversifying their property-holdings, investing in personalty such as the 'funds' and corporate shares, and exchanging them frequently as opportunity beckoned.⁵⁰

⁴⁶ Two other key purposes are mentioned in the literature as the motivations behind the settlement system. The purpose of marriage settlements of the simpler sort, mentioned in n 24 and text thereto, was protecting the wife's rights in her property despite coverture (Erickson (n 19)). Rather more dubious is Staves' view that increasing sibling solidarity and avoiding generational conflict were key purposes of the settlement system (Staves (n 4) 201, citing Randolph Trumbach, *The Rise of the Egalitarian Family* (Academic Press, New York 1978) 71, 94). In this view, the explicit fixing by settlement of the rights of each family member in the family property lessened both inter- and intra-generational conflict. In light of the large store of conflict of both types exposed in the Chancery cases discussed in chs 4 and 5 respectively, this view appears somewhat suspect, though one could always argue that had the same society allocated rights in family property without the benefit of the settlement system, even greater conflict would have ensued.

⁴⁷ The very term 'class' is to some extent implicated in this familiar story.

⁴⁸ See their work summarised in Joel Mokyr, 'Accounting for the Industrial Revolution' in *The Cambridge Economic History of Modern Britain* (n 3) 1, 1-13.

⁴⁹ Habakkuk dated the final decline of the power and prestige of the landed class as late as the aftermath of World War I: Habakkuk (n 9) 683-94.

⁵⁰ While, as Harris (n 41) relates at 152-53, the only assets Chancery throughout the eighteenth century permitted trustees to invest trust property in were land and 'consols' (a type of government security created in 1752 by consolidating a number of smaller stocks: Dickson and Beckett (n 9) 345), this restriction only applied where the court or its officers themselves prescribed which assets were appropriate investments for a family's money. Where investment decisions were made by private persons, such as the trustees a family

There seems to have been no sharp switch between ‘dynastic’ and ‘investment’ settlements, much like there was no such switch between eras of landed interest dominance and of commercial and industrial dominance, or between a non-industrialized and an industrialized economy. Many eighteenth century settlements seem to be of a mixed type between the two paradigms: their authors both empowered trustees to invest family wealth in intangible personalty, giving them large powers of sale and reinvestment, and used the quintessentially ‘landed’ device of trustees to preserve contingent remainders. A central purpose of these settlements was often entrenching the family in the land for generations, yet their authors could well be commercial or professional men, as well as men of surprisingly modest means, who nevertheless wished to follow a scaled-down version of great landed families’ vision of themselves as entrenched in the land, and employed the family arrangements and legal tools characteristic of those families.⁵¹ There was thus no simple correlation between the type of assets held, the social stratum holding them, the purpose for which they were held (dynastic or strictly economic) and historical chronology.

4. Family Property Practice Outside the Settlement System

The settlement system in its perfected form, according to which rights in and over families’ property were redistributed between their members every generation on the majority or marriage of the heir, was never adopted by the majority of English families. Historical studies of English families’ actual practice of inter-generational property transfer and reassignment show that the vast majority of settlements executed between the Statute of Wills⁵² and the mid-nineteenth century were settlements by will. Will-making itself was in the eighteenth century strikingly popular among all social groups except the utterly destitute. Convention still held that a man of property ought to make a will, though this social imperative was, apparently, weaker than it was in the middle ages, when dying intestate was counted disgraceful.⁵³ Many who held modest amounts of property also left wills.⁵⁴ Estimates for the early-to-mid-nineteenth century put the proportion of English decedents leaving wills at between five and eleven percent.⁵⁵ The

appointed in its settlement, acting according to a settlor’s instructions, rather than court officials, a far wider range of assets, including Bank stock, company stock, and mortgages, were seen as legitimate investment choices.

⁵¹ Trustees’ active managerial role seems to have been the last of the characteristics of the modern trust to develop; it was only just emerging in some of the eighteenth century family arrangements reviewed by Chancery between 1778-1801.

⁵² 1540 (32 Hen VIII c 1).

⁵³ Polden (n 10) 128-29.

⁵⁴ Vann speculated that the practice of making wills spread downwards through the ranks of society during the first quarter of the seventeenth century: RT Vann, ‘Wills and the Family in an English Town: Banbury, 1550-1800’ (1979) 4 J of Family History 346, 348. Under some circumstances, poorer decedents left more wills than their wealthier neighbours, not only in absolute numbers but proportionally also. This was the case in the fenland village of Willingham in the late sixteenth century; Spufford explained this finding by poor tenants’ landholdings being too small to be caught by the local customs of succession to land (M Spufford, ‘Peasant Inheritance Customs and Land Distribution in Cambridgeshire from the 16th to the 18th Centuries’ in *Family and Inheritance* (n 18) 156, 170-76).

⁵⁵ According to Owens and Stobart, between 5% and 10% of English decedents dying in the early nineteenth century left wills (A Owens and J Stobart, ‘Introduction’ in A Owens and J Stobart (eds), *Urban Fortunes: Property and Inheritance in the Town, 1700-1900* (Ashgate, Aldershot 2000) 1, 18). Owens cites

higher of these estimates bring the total of those leaving wills close to the total of those who on their death owned £5 or more in the country, or £10 or more in London.⁵⁶ Studies of will-making in particular localities give some strikingly higher figures.⁵⁷

Transferring family property by will was not, however, the socially preferred method of passing it to one's children or other heirs. Parents of all social ranks seem to have preferred passing their property to their children *inter vivos*, transferring it gradually when the children needed it and the parents could afford to give it up. Events such as a son or daughter marrying and establishing an independent household, or entering a profession or trade, typically occasioned a capital transfer among those not subject to the settlement system much as they did among those subject to it. In the former case, however, the transfer tended to be of full rights in the capital transferred, while the father of a family owning settled property might actually, as we have seen, use his son's marriage as an occasion for resettlement curtailing the son's rights in the family estate from a tenancy in tail to a life tenancy. Ideally, the property flowed gradually to the children during the later stages of their parents' lifecycle, the parents finally remaining with either what was effectively a 'retirement portion' or enjoyment rights in family property which has already been transferred to their children. Transfer by will was popular among those who did not live long enough, or could not afford, to reach this fully retired stage.⁵⁸

Most male English testators of any class or social group at any time between the later middle ages and the mid-nineteenth century, who left at least one son, seem to have given their land to their widow for life in case she survived them, then to their eldest

Camp's estimate of the proportion of decedents leaving wills in late eighteenth century England and Wales as 6% (A Owens, 'Property, Will Making and Estate Disposal in an Industrial Town, 1800-1857' in *Urban Fortunes* (this note) 79, 85, citing AJ, Camp *Wills and their Whereabouts* (published privately, London 1974) xxxviii). The higher figure of 11% is given by DR Green for 1850 (DR Green, 'Independent Women, Wealth and Wills in Nineteenth-Century London' in *Urban Fortunes* (this note) 195, 204-5).

⁵⁶ These were the sums accounted as *bona notabilia*. If a man died leaving *bona notabilia* outside the diocese in which he died, the Prerogative Court of the appropriate Archbishop, either that of Canterbury or York, had probate jurisdiction over his personalty instead of the ordinary of the diocese in which he died (Edward Coke, *The Fourth Part of the Institutes of the Laws of England* (Printed for E & R Brooke, London 1797) 334; E Burn *Ecclesiastical Law* (6th edn Cadell and Davies, London 1797) 154-56). Green gives the figure of 13.4% for decedents dying in England and Wales in 1841 leaving *bona notabilia* in any diocese (13.3% in 1850), and holds that this was the proportion of decedents who either left a will or had administrators appointed to administer their estates: Green (last note) 204-5.

⁵⁷ Stapleton found that of the 261 heads of households he identified in families who have been resident in Odiham, Hampshire, for three generations or more between 1525-1850, 104 left wills which survived to the late twentieth century (Barry Stapleton, 'Family Strategies: Patterns of Inheritance In Odiham, Hampshire, 1525-1850' (1999) 14 *Continuity and Change* 385). Stapleton's group of long-term residents in Odiham tended towards the impoverished, since the wealthier residents tended to move away from Odiham. Vann found that one-quarter of men and 10% of women in Banbury between the mid-sixteenth and mid-eighteenth centuries left wills (Vann (n 54) 352).

⁵⁸ *Inter vivos* transfers were preferred among early modern Cambridgeshire peasants (Spufford (n 54) 170-76), the inhabitants of Banbury between 1550-1800 (Vann (same note) 363) and middle class families in late eighteenth to mid-nineteenth century Essex, Suffolk and Birmingham (Davidoff and Hall (n 6) ch 4). A similar preference is reflected in the custom of London, which forced testators to leave a third or a half of their personalty, depending on whether the widow survived, among such of their children as has not been advanced *inter vivos*. As to this custom see Henry Horwitz, 'Testamentary Practice, Family Strategies and the Last Phases of the Custom Of London, 1660-1725' (1984) 2 *Law and History Rev* 223.

son.⁵⁹ Under the settlement system, the eldest son might receive a life estate only, and the widow a lump sum or annuity rather than the land; outside that system, the eldest son would eventually receive the fee. The same testators divided their personalty equally between their children, both sons and daughters.⁶⁰ If the widow survived her husband, she would normally receive most of the personalty he had left at his death (not including any he transferred to children *inter vivos*), either absolutely, for life, or until remarriage.⁶¹ Many, if not most, eighteenth century testators appointed their widow as their executor, who automatically took all personalty not expressly bequeathed to others.⁶² This 'residue' normally included most of a testator's personalty.⁶³

The typical English parent thus practiced a combination of unigeniture and equal division, the first regime applied to the family's realty, the second to its personalty. This combination was similar to the common law of intestate succession, which gave the deceased's realty to his eldest son under primogeniture, and distributed his personalty

⁵⁹ This was the practice among the middle class, including the lower middle class, in Odiham from 1525-1850 (Stapleton (n 57)); the peasant inhabitants of late-medieval Kibworth Harcourt (Cecily Howell, 'Peasant Inheritance Customs in the Midlands, 1280-1700' in *Family and Inheritance* (n 18) 112, 146); and villagers in the valley of the Yorkshire Ouse between 1660-1760 (MD Riley, 'Families and Their Property in Early Modern England: a Study of Four Communities on the Yorkshire Ouse, 1660-1760' (PhD Dissertation, University of York 1990) 194-201). It was also the practice most characteristic of families under the settlement system as a class, as well as the most prevalent among the totality of families the affairs of which came before the Court of Chancery between 1778-1801. Under eighteenth century mortality, most widows would have lost their husbands while their children were still minors, and would have died themselves not long after the eldest son's majority, so that giving the land to the widow for life did not create a lengthy waiting period when an adult son was waiting, landless, for his mother to die. The mother's tenancy functioned as a form of temporary trusteeship for the eldest son *durante minoritate*.

⁶⁰ Among all social groups having property to give their children, from aristocrats to peasants, the form of provision made for younger sons and daughters under unigeniture changed from distributing the parents' dwellings (in families owning more than one), goods or livestock among them to paying them money portions. Change was not sharp, as is evident in Riley (last note, 194-201) finding both forms of provision being simultaneously practiced among his Yorkshire villagers. It occurred gradually, its timing varying between communities (in Kibworth Harcourt, for example, it occurred by the sixteenth century: Howell (last note) 151-53). By leaving all of the means of production in the hands of the eldest son, the shift to cash portions stimulated long-term improvements in agricultural practices, and provided motivation for commercial, rather than subsistence, farming. The burden of providing such portions fell, in families not employing trustees and terms of years to raise them, on the eldest son, and was sometimes made a condition of his taking his entitlement (Riley, *ibid*).

⁶¹ This was the case among the Yorkshire families Riley studied, where dower was also usually respected: Riley (n 59) 194-201, 213-18, 236. In the industrializing Hinckley of the late eighteenth and early nineteenth centuries, nearly all married men who bequeathed realty gave their widows a life estate in that realty, or even the whole or a part of it in fee, as well as all or a part of their personalty (Penelope Lane, 'Women, Property and Inheritance: Wealth Creation and Income Generation in Small English Towns, 1750-1835' in *Urban Fortunes* (n 55) 172, 178-79).

⁶² The widow, if surviving, was normally appointed as her husband's executor in Riley's Ouse valley communities (Riley (n 59) 194-201). The same practice spread in Banbury from the late seventeenth century (Vann (n 54) 366-67). 84% of married male testators in nineteenth-century Stockport appointed their widows as their executors (Owens (n 55) 100), as did 56.6% of married male testators in Hinckley between 1750-1835 (Lane (last note) 178-79). For the rule that executors took any undisposed-of personalty beneficially see RSD Roper, *A Treatise Upon the Law of Legacies* (Printed for J Butterworth, London 1799) 219.

⁶³ See, eg, Green (n 55; 217-20) who found that where a will named two beneficiaries or more, the residuary legatee received on average approximately 84% of the total probated value of the personal estate.

among his widow and descendants according to the Statutes of Distribution,⁶⁴ the children taking equally *inter se*. Leaving the major family asset(s) to one descendant, normally, but not always, the eldest son, was almost a *de facto* requirement for retaining a family's social status during the next generation.⁶⁵ Unigeniture made likelier the retention of a family's major asset, normally realty. Partibility was destructive: it could reduce the children of middle-class parents to poverty, especially in periods of population growth, when more families had several children live to adulthood.⁶⁶ As we have seen, even the indirect partibility achieved under the settlement system by charging large portions for younger children on the major asset supposedly impartibly inherited by the eldest son was dangerous: it often led to the encumbering of the estate with an increasing burden of debt, only finally removable by sale of the estate with its concomitant loss of social status.

Over and above the continuing dominance of the combined succession scheme, there appear some more temporary trends, the importance of which should not be exaggerated. Impartibility generally, and primogeniture especially, became gradually more popular in Europe from the late middle ages through the early modern period, peaking in the seventeenth century. The principal legal manifestations of their rise were the increasing freedom of testators from customary shares, and among the socio-economic elite, the legitimization and popularization of the entail, whether fideicommissary or granted by the Crown, and its later variations such as the strict settlement.⁶⁷ The late seventeenth and eighteenth centuries saw the tide of primogeniture starting to turn in continental Europe, as entailed land was in several jurisdictions gradually subjected to the claims of widows and younger children. In late eighteenth century England, too, the practice of primogeniture was in some senses already declining: giving the eldest son the major family asset charged with younger children's portions of a

⁶⁴ An Act for the Better Settling of Intestates' Estates 1671 (22 & 23 Car 2 c 10); An Act for Reviving... Several Acts... 1685 (1 Jac 2 c 17 s 7).

⁶⁵ Where the inheriting son was not bound to sustain his siblings from estate income, that income might exceed the immediate demands on it by a margin which, with time, made possible the improvement of the estate and even purchase of further property. See the rationales for unigeniture discussed in Jean-Philippe Platteau and Jean-Marie Baland, 'Impartible Inheritance versus Equal Division: a Comparative Perspective Centered on Europe and Sub-Saharan Africa' in A de Janvry and others (eds), *Access to Land, Rural Poverty and Public Action* (OUP, Oxford 2001).

⁶⁶ Both the late sixteenth and eighteenth centuries were such periods. The poorer a family was, the smaller the extent of partibility required to sink it. Spufford discussed the pauperization of some poor sixteenth century Cambridgeshire peasants as a result of the modest extent of partibility achieved by charging the family land with portions, in a period of population growth: despite each younger child having been given a portion too small to sustain a family on, the eldest son had to have recourse to credit to be able to both sustain himself and his family and pay his siblings' portions. This often led to his losing his land to his creditors and becoming, along with his siblings, a landless labourer (Spufford (n 54) 157). Similarly grave consequences are apparently following from the retention of partibility and equal division under conditions of extreme land scarcity and population pressure in contemporary sub-saharan Africa (Platteau and Baland, last note). Stapleton also noted the economic benefit of impartibility for middle-class parents (n 57).

⁶⁷ Cooper (n 28) showed (198-233) how primogeniture and an unmitigated power of testation became gradually more popular among the English rich and titled from the mid-sixteenth and throughout the seventeenth century. One manifestation of this process was the weakening and final abolition of the customs of London, York and Wales; in the last 65 years before its abolition in 1725 the custom of London was widely ignored or evaded (Horwitz (n 58) 226). Cooper (n 28) also discussed the rise of the entail from the thirteenth to the seventeenth centuries in France (252-276), Italy (276-86) and Spain (233-252). His evidence is overwhelmingly focused on socio-economic elites.

size ultimately crippling for the asset's economic viability can be seen as a form of covert partibility. By the early nineteenth century some populations chose not to attempt unigeniture at all, many testators dividing their entire property equally between all of their children, sons and daughters alike, and even explicitly directing its liquidation after their death.⁶⁸

Looking at the practice of transferring family property from parents to children described in this section as a whole seems to confront one with several contradictions. How could a decedent father's personalty simultaneously go to his widow as executor and residuary legatee, and be divided between his younger children? How could his dwelling simultaneously go to the widow for life and to the eldest son? How could the income from the major family asset simultaneously provide the livelihoods of the eldest son, his family, his siblings and their families? There are two partial answers to these questions. One is that the contradictions are to some extent illusory: they are created by a listing of all practices commonly employed by English families in the period under discussion, while in reality each family only employed certain of them, according to its composition, its needs and its economic capabilities. Even in the late eighteenth century, the average English couple only had two children (and a fraction) live to adulthood, and so only had to provide one portion on top of transferring the main asset.⁶⁹ Mortality meant that family members whose requirements might potentially have conflicted enjoyed the same assets sequentially rather than competing for them. An example would be a widow taking both her husband's realty and personalty for life. Out of these assets she maintained her children and had them educated. By the time they needed their full shares in the family capital in order to start a new household or career, their mother was, more often than not, dead.

The other partial answer to the seeming implausibility of the family property practice described in this section is that in cases where enough family members were alive and needy to create truly conflicting demands, the practice was not in the long term sustainable without a large increase in the income extracted out of family assets, such as that sometimes realizable by industrial development, or injections of outside funds, such as those accompanying a lucky marriage. But most propertied Englishmen could not hope for such lucky strikes. The modest vision of the eldest son living on his father's land and providing his siblings with some funds, worth a small fraction of what he himself enjoyed, as they left their natal household, was often realizable, at least if portions were not overinflated out of a concern for their symbolic value as signs of the younger children's social status. Such a model forced at least the younger sons, if not their sisters, to give up the *rentier* life for a working one, which they were doing throughout the

⁶⁸ This group included middle class testators in Essex, Suffolk and Birmingham, who often directed that the entirety of their property be liquidated after their deaths and equally divided (though sons might get their shares in land, apparently newly-purchased, and daughters in money; Davidoff and Hall (n 6) ch 4); testators of various shades of middle-class in Stockport (Owens (n 55) 101); and middle-class testatrices in 1830 London, 73% of whom chose partibility (Green (n 55) 217-20). The resulting picture of partibility as a rising nineteenth century middle-class value is somewhat complicated by Polden's finding of a bias for partibility in the wills of the wealthiest decedents to die between 1797-1825 (Polden (n 10) 198).

⁶⁹ See the demographic data at n 3 and text thereto.

eighteenth century.⁷⁰ But the more ambitious model of family assets which supported a *rentier* couple coming to support their brood of children, each with his own family, all *rentiers* still, was high-unrealizable. Even the richest families often failed to realize it, as their larger resources were matched by larger expenses and expectations. The development of an active, sophisticated credit system from the seventeenth century enabled cautious families to postpone difficulties, and the less cautious to exacerbate them. As we shall see in the next chapter, the Court of Chancery contributed something to prolonging families' hold on their assets against the claims of their creditors. Before we describe the court's policies, however, we must introduce the court itself, its administrative structure, its judges and the way they were chosen, its procedures, and the social functions it fulfilled.

B. 'A SEAT OF HONOUR AND PROFIT'⁷¹: CHANCERY AND ITS JUDGES

1. *Chancery, its Sutors and Procedure*

a. The Court and its Social Function

The Court of Chancery was one of the four central courts of law at the heart of the pre-1875 English court system. Along with the Court of Exchequer,⁷² it operated the legal system known as equity. Chancery was always the more popular of the two with litigants.⁷³ Most of its caseload was made of family property cases,⁷⁴ some involving an actual conflict, the rest amicable invocations of the court's power to administer families' property. Though the three other central Royal courts, the ecclesiastical courts, and many local courts heard family property cases too, it was Chancery that was seen as 'the principal arbiter of [families'] property'.⁷⁵ The court was in the late eighteenth century staffed with two part-time judges: the Chancellor, who presided in Chancery subject to the requirements the political side of his office made on his time, and the Master of the Rolls, who could only hear causes when the Chancellor was not sitting, and whose judgments were subject to rehearing by the Chancellor.

The thinness of its judicial manpower set Chancery apart from the three common law courts, each of which was staffed with a Chief Justice (or Baron) and three puisne Justices (or Barons). So did the substance of its work: despite the powerful remedies,

⁷⁰ Habakkuk (n 9) 108-17. This 'sifting' process may be considered as the prime enabling condition for the continued existence of a *rentier* elite under socio-economic conditions like those of eighteenth century England.

⁷¹ William Hazlitt, *The Spirit of the Age* (Dent, London 1910) 312.

⁷² For the 'equity side of the Exchequer' see MRT Macnair, 'The Court of Exchequer and Equity' (2001) 22 *Journal of Legal History* 75; WH Bryson, *The Equity Side of the Exchequer* (CUP, Cambridge 1975); Henry Horwitz, 'Chancery's 'Younger Sister': The Court of Exchequer and Its Equity Jurisdiction, 1649-1841' (1999) 72 *Historical Research* 160.

⁷³ In 1785, about 3.5 bills were submitted to Chancery for every one submitted to the Exchequer. At other times between 1627 and 1819 the ratio was steeper in favour of Chancery (Henry Horwitz, *A Guide to Chancery Equity Records and Proceedings 1600-1800* (2nd edn PRO, Kew 1998) 40).

⁷⁴ Having examined a 10% sample of new bills submitted to Chancery in 1785, Horwitz categorized almost 70% of them as either estate, landholding or inter vivos trust cases (Horwitz (last note) 36, table 5), the great majority of which must have been family property cases.

⁷⁵ Langford (n 3) 299.

such as specific performance, it offered for contractual conflicts, suits based on a debt or bond, the bread-and-butter of the common law courts, made a distinct minority of Chancery's late eighteenth century caseload.⁷⁶ Instead it regulated the proprietary aspects of family relationships. While family members may have preferred to regulate these aspects of their relationship themselves by authoring, or hiring lawyers to author, settlements and wills, rather than submit to state-authored background norms such as the law regulating succession to intestates' estates, many of these attempts at self-regulation ended up in Chancery. Some family members asked the court to rule that instruments made by their relations were not well-executed and thus void; others asked it to interpret such instruments, or sought its advice in applying their directions to the varied situations of family life. For some families, recourse to Chancery was a failure of self-regulation; for others, it was part of the normal course of their proprietary affairs, signifying that full self-regulation was never intended. Many suits were initiated by executors, administrators and family trustees desirous of the court's guidance in the discharge of their complex and risky duties.

b. The Litigation Decline

Despite a contemporary perception that the eighteenth century was a litigious age,⁷⁷ reality was different: while the seventeenth century was the period of maximum litigiousness in all of English history,⁷⁸ including the twentieth century, in the eighteenth century Chancery suffered from a litigation decline, which started at about 1700, reaching its nadir sometime in the second half of the Century. A slight improvement started in the 1790s. The amount of cases being actively pursued in court fell by one-half compared to peak seventeenth century levels; the amount of new bills submitted, by three-quarters.⁷⁹ Litigation declined across the English court system, in both central and local courts,⁸⁰ as well as in France, Germany and Spain.⁸¹ One possible explanation of the decline offered by Brooks is that very slow population growth, relatively high wages and low food prices combined in the early eighteenth century to create a relatively prosperous period when more persons could pay their debts, hence the decline in debt litigation, which was previously the great mass of litigation.⁸² This theory fits with the rise of family property

⁷⁶ Such suits made, on the most generous computation, 30.1% of Horwitz's sample of new bills submitted to Chancery in 1785: Horwitz (n 73) 36, table 5. Compare to the incidence of such suits at the courts of King's Bench and Common Pleas, where actions of debt and actions on the case (which included a fair share of assumpsits) made about 70% of the 1750 caseload: CW Brooks, *Lawyers, Litigation and English Society Since 1450* (Hambledon Press, London 1998) 52, table 3.8.

⁷⁷ Langford (n 3) 299.

⁷⁸ Brooks (n 76) 29, 84-89.

⁷⁹ *ibid* 36-37. The data so far published makes determining the lowest point of the trough difficult, as each author only gives data for a small number of sample years during the eighteenth century. The lowest 'number of bills entered' given by Brooks (*ibid*) 32-33 is 1,023 bills, for 1752; while Horwitz (n 73, at 32, table 2) gives a higher average of 'bills of complaint exhibited' for 1750-54 – 1706 bills, and a lower total for 1785 - 1544 bills, and Lobban claimed that 1790-95 was the historical low point in the amount of bills filed in Chancery: Michael Lobban, 'Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part I' (2004) 22 L and History Rev 389, 399.

⁸⁰ Brooks (n 76) 94.

⁸¹ *ibid* 91, and see sources cited in his fn 124.

⁸² *ibid* 37.

suits, and suits regarding the administration and distribution of decedents' estates especially, as a proportion of all Chancery suits as the century wore on: conflicts between family members over the distribution of family assets are not likely to diminish with a general improvement in the discharge of monetary obligations, unlike debt litigation which is likely to decrease with such an improvement. Another probable cause of the decline was the increased costs of litigation: both lawyers' fees, court fees, such as those which formed the income of the many sinecurist office-holders in the court system, and taxes, such as the stamp duty on legal documents introduced in 1695, increased in the eighteenth century, perhaps in reaction to the litigation decline.⁸³

c. Who were the Suitors?

Suitors in the late eighteenth century Chancery were a varied group. Because cases involving the fortunes of rich landowners gave birth, due to the complex legal arrangements employed by such families and to the scale on which they were prepared to pay their lawyers, to many of the most elaborate arguments and judgments, it is easy to think of the Chancery of this era as predominantly a court for the gentry and aristocracy. But humbler suitors predominated numerically: in a recent statistical study of a sample of litigants in Chancery in 1785, Horwitz found that less than a third of all first-named male plaintiffs⁸⁴ were 'gentlemen and above', the lowest proportion of such litigants he found for any of his five sample years from 1627 to 1819. He found that nearly half were commercial men or artisans, the rest farmers or professionals.⁸⁵ The plebeian majority which has characterised the English court system, at both the central and local levels, from the mid-fifteenth century at least, was firmly in place in the late eighteenth century Chancery, as it was to be at all times since.⁸⁶ The social profile of those litigating family property matters in Chancery might have been somewhat more elevated than that of Chancery litigants as a whole; and that of those litigating family property matters which have reached the decree stage was certainly more elevated, since navigating a Chancery

⁸³ *ibid* 45-46, 93. Another reason Brooks gives (at 62) for the litigation decline, the security of the landed gentry's economic and social preeminence by 1750, which apparently rendered recourse to law less frequent than before, is irrelevant for suits over the distribution of family assets between family members. And though one could perhaps see Chancery's protection of family members' property against their creditors, discussed in the next chapter, as helping to secure propertied families' preeminence, that protection was applied to a social group far larger than the gentry, and was only available in, rather than out of, court, and thus could hardly have served to depress litigation, unless one assumes that strong Chancery protection of debtors made creditors loath to file a Chancery suit. Furthermore, Brooks' reason could only be relevant to a decrease in litigation by the gentry, which, as we shall immediately see, was a minority of Chancery litigation.

⁸⁴ In suits involving more than a single male plaintiff, only the first one was made part of the sample.

⁸⁵ Henry Horwitz and Patrick Polden, 'Continuity or Change in the Court of Chancery in the Seventeenth and Eighteenth Centuries?' (1996) 35 *J of British Studies* 24, 48; Horwitz (n 73) 43, table 8.

⁸⁶ Of litigants in the Court of Common Pleas in 1441, only 6% were 'gentlemen and above' (though the status of 32% is unknown): Brooks (n 76) 77, figure 4.4. Of litigants there in 1606, 69% were below the gentry (*ibid* 74). In 1640, still only 33% of litigants there were identified as 'gentlemen and above' (*ibid* 50, figure 3.7). Much of this significant growth in the percentage of 'gentlemen' litigants is probably due to the great increase during the early modern era and the 'long eighteenth century' in the numbers of those adopting that title. Erickson, too, concluded that most plaintiffs in Chancery suits from the early seventeenth century to the early eighteenth century appear to have been below the social status of the gentry: AL Erickson, *Women and Property in Early Modern England* (Routledge, London 1993), 31.

case to that stage was expensive. That the reporters were mainly interested in cases which have reached a decree explains the somewhat higher incidence of gentry, nobility and other wealthy families in Chancery case reports, which formed the data on which my research is based. Family property cases generally are also overrepresented in the reports, as they reached the decree stage more often than other cases, and reporters considered them to be of greater interest to the profession:⁸⁷ family property law was still in the eighteenth century the most sophisticated, high-status and remunerative branch of the law.

d. Chancery Procedure

A typical case in Chancery would begin with the submission by the suitor of a bill of complaint in English detailing his situation and asking for appropriate relief, often including injunctions. He would also secure the issuance of a subpoena ordering the defendant(s) to appear and to answer the bill of complaint under oath. The suitor's solicitor having chosen one of the Sworn Clerks of the court to file the bill with, that clerk would file the bill in the Chancery Lane office of one of the Six Clerks of the court. About one fifth of causes stopped at this point, due either to the defendants having been sufficiently impressed by the filing of the bill to reach an out of court settlement, or to the plaintiff desisting from pursuing his bill further for another reason, such as desperation, shortness of purse, or a low estimation of his chances of success.

The pleading stage proceeded with the defendant's response to the bill, either an answer under oath, a disclaimer, a demurrer, a plea, a cross bill, or some combination of them (though pleas and demurrers were in decline in the eighteenth century). Getting the defendant to file a sufficient answer, or even to respond to the bill in any way, was sometimes difficult, and the court possessed an array of powers to compel response, from the subpoena to appear and answer through imprisoning defendants until compliance and sequestering their property. The plaintiff could except to the answer, requiring the defendant to put in a further answer. Once an appropriate answer has been submitted, the plaintiff filed a short replication, formally closing the pleading stage.

In the minority (35 percent, in 1785) of causes to progress beyond that stage,⁸⁸ the parties would next proceed to proofs, unless prepared to go to a hearing on the strength of the pleadings alone. Witnesses were interrogated not directly by the parties' counsel, but by court examiners (for witnesses in London) or specially-appointed commissioners (in the provinces). Their role was limited to exhibiting to the witnesses lists of questions ('interrogatories') drawn up by the parties' counsel, and taking down their answers. There was no cross-examination in Chancery suits. Once all depositions were taken, a day would be set for the mutual exposure in court of those of each party's witnesses to the adverse party. Witnesses could be excepted to, and documentary evidence filed or sought from the adverse party. At any stage of the proceedings, the plaintiff could file a supplemental bill bringing additional facts. Bills could also be, with the court's permission, amended, especially to add parties. On the death of any party, or her passing into or out of coverture, a bill of revivor had to be filed to enable the cause to be carried

⁸⁷ Horwitz (n 73) 36, fn 14.

⁸⁸ Horwitz (n 73) 26.

on. This last could be a burdensome requirement in great family suits involving dozens of parties.

At this stage the cause could proceed to a hearing before the Chancellor in Westminster Hall or Lincoln's Inn Hall, or the Master of the Rolls at the Rolls Chapel in Chancery Lane. They reviewed the pleadings, witnesses' depositions and documentary evidence, heard argument *viva voce* and ruled in the cause. In the late eighteenth century, one of four bills reached a decree, a significantly higher rate than that of a century before. The decree was often in general terms, affirming or rejecting the points of law at issue at the hearing. The crucial detail of a Chancery decree, which could reach great heights of complexity in a family property cause concerned with the administration of a deeply encumbered estate, the interpretation and implementation of a will, saving an heir from the clutches of unscrupulous lenders, and other family disputes over the precise allocation of family resources, was left to one of the Masters in Ordinary of the court, to whom the cause was referred by the presiding judge. The Master, who was empowered to question the parties and their witnesses on oath, produced a report advising a detailed practical solution to the situation referred to him. The report having been laid before the court, the parties could except to it. After any exceptions having been resolved, the court incorporated the report in its final form into its decree. Even this was not necessarily the end of a Chancery cause: a party could move for a rehearing, file a bill of review, or appeal to the House of Lords. The enrolment of a decree narrowed, but did not eliminate, these possibilities for reopening a case; the decline of enrolment in the eighteenth century may have contributed to the interminable length of a minority of Chancery proceedings.⁸⁹

e. Chancery's Faults

That length was a key charge brought against Chancery by its many detractors, both before, during and after the late eighteenth century. There is no doubt that the situation deteriorated. Compared with the hyper-litigious seventeenth century, when nearly all cases being actively pursued in Chancery were within a year of their initiation, the proportion of such 'new bills' to all cases actively pursued dropped by 1785 to less than a half.⁹⁰ Ten percent of suits lasted over 5 years.⁹¹ The reasons for this development are fairly clear. Chancery cases were probably the most factually complex of the cases heard by any of the central courts.⁹² The court followed an ethos of resolving disputes thoroughly and finally, yet had far less judicial manpower than any other central court. Chancery procedure offered myriad opportunities for delay and protraction, which many parties tactically took. The resulting impossible situation was probably a central cause of the relative brevity of many of the judgments of Chancellors Thurlow and Loughborough between 1778-1801.

⁸⁹ This bare-bones account of late eighteenth century Chancery procedure was extracted mainly from the account in Horwitz (n 73) 8-29. For further detail, see that account, as well as the several late eighteenth century works on Chancery procedure, eg John Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery by English Bill* (2nd edn R Owen, London 1787).

⁹⁰ Horwitz (n 73) 33, table 4.

⁹¹ *ibid* 28, table 1.

⁹² See, as an example of a case with excruciatingly complex facts, *Wharton v May* (1799) 5 Ves Jun 27, 31 ER 454.

Along with the delays in Chancery, criticism focused on the great expenses involved in being a party to a suit, many of which were caused by the luxuriant growth of the court's staff: each procedural step taken, such as one of the many bills of revivor filed in the course of a long multi-party suit, necessitated paying a fee to one or more Chancery officers. Much of the expansion of staff originated in administrative positions in Chancery being for hundreds of years held by private persons as property, granted by the crown, bought and sold, while the substance of the job involved was either carried out by ill-paid deputies, or mysteriously disappeared, turning the position into a pure sinecure and necessitating the further enlargement of court staff to get the work done some other way. In many such cases, suitors still had to pay fees for procedural actions supposedly taken by the sinecurist or his deputies: and when a sinecurist borrowed money against his future income from such fees, running the income of his office into arrears, the government could always spring to his succour by imposing a new tax.⁹³ It were these qualities of Chancery that moved Charles Dickens to describe it as the 'most pestilent of hoary sinners' and claim that it 'gives to monied might the means abundantly of wearying out the right'.⁹⁴

As is well-known, criticism of Chancery, which started no later than the early seventeenth century,⁹⁵ escalated towards the end of the eighteenth, and eventually led in the nineteenth to increasingly drastic reform of the court's procedure and administrative structure, and to its jurisdictional fusion with the common law courts in the Judicature Acts.⁹⁶ Chancery's problems were mostly procedural, and their reform was largely procedural reform. Chancery's substantive work, a story of constant mutual approximation between social practice and the court's doctrine and normative standards, has received less historical attention. It will be described in chapters three to five; first we look at the personalities on the bench.

⁹³ An example of such a sinecure was the office of the Keeper or Clerk of the Hanaper, traditionally responsible for salary payments to legal officers and court staff, such as the Keeper himself, out of fees charged on legal transactions. During much of the eighteenth century, the office was held as property by the Dukes of Chandos; later Chancellors Northington and Thurlow secured it for the heirs of their respective titles. When the 2nd Duke of Chandos borrowed money against his future income from this office and became indebted to it, he procured the enactment of the Act for Making Good a Deficiency upon the Revenue of the Office of Keeper or Clerk of the Hanaper... 1750 (23 Geo II c 25), which, by renewing duties, which have lapsed in 1747, on legal proceedings in Chancery, increased the income of the office. See Dickson and Bennet (n 8) 320, fn 44 and text thereto, and 338, fn 103 and text thereto. The Act also directed that a large surplus of monies in the Bank be spent on making good the debts of the office to the 'creditors of the Hanaper', apparently including the Duke. These were monies raised by the same duties renewed by the Act, before they lapsed, to make good suitors' demands on the court following the embezzlement of their funds in court by some of the Masters in the early 1720s.

⁹⁴ Charles Dickens, *Bleak House* (Modern Library, New York 2002) 4-5.

⁹⁵ Horwitz (n 73) 30, fn 2.

⁹⁶ The course of criticism and reform has been amply studied, most recently by Lobban (n 79); M Lobban, 'Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery, Part II' (2004) 22 Law and History Rev 565; M Lobban, "'Old Wine in New Bottles': the Concept and Practice of Law Reform, c. 1780-1830' in A Burns and J Innes (eds), *Rethinking the Age of Reform: Britain 1780-1850* (CUP, Cambridge 2003). For a reforming tract see J Parkes, *A History of the Court of Chancery* (Longman, London 1828), who printed a foldout list of the numerous officers of the ostensibly one-judge court for his readers' horrified delectation.

2. *'The Moloch and Belial of the Bar':⁹⁷ Chancellors Thurlow and Loughborough and the Late Eighteenth Century Chancery Judiciary*

The late eighteenth century (1778-1801) Chancery operated in the shadow of two great judges of high renown: Chancellor Hardwicke, who presided between 1736-1756, a long tenure only made possible by the exceptional political stability of the 'Whig oligarchy' era,⁹⁸ and Lord Mansfield, Chief Justice of the Court of King's Bench, who used his 30-year tenure from 1756-1786 to revolutionize many areas of commercial law, presiding over a great expansion of that court's business.⁹⁹

Under that shadow worked the team of Chancery judges whose work is examined in this thesis: Edward Thurlow, Chancellor from 1778-1783 and again from 1783-1792; Alexander Wedderburn, Lord Loughborough, briefly Commissioner of the Great Seal in 1783, and later Chancellor from 1793-1801; the older Thomas Sewell, Master of the Rolls from the 1760s until 1784; Lloyd Kenyon, Master of the Rolls from 1784 until he replaced Mansfield as Chief Justice of the Court of King's Bench in 1788; and Richard Pepper Arden, Master of the Rolls from 1788-1801. Several other judges did some Chancery work during those years, the most prominent of whom were Sir James Eyre, an important equity judge as Baron, later Chief Baron, of the Exchequer, who served briefly as first Commissioner of the Great Seal after Thurlow's dismissal in 1792 before moving to the Chief Justiceship of the Court of Common Pleas, and Francis Buller, a puisne justice first of the Court of King's Bench and later of that of Common Pleas, and Mansfield's failed candidate for his own inheritance as Chief Justice of the former, who sometimes sat in for Thurlow. Kenyon also filled in for Thurlow in the mid-1780s during the latter's illnesses and periods when politics left him no time for disposal of his judicial duties.

⁹⁷ So WEH Lecky dubbed Chancellors Thurlow and Loughborough, respectively, in his *A History of England in the Eighteenth Century* (Longmans, London 1892) vol 4, 465.

⁹⁸ The late eighteenth century Chancery judges constantly referred to Hardwicke's cases and cited them. Reports of Hardwicke's decisions were gradually published during the late eighteenth century: Atkyns' reports of decisions from 1736-1754 were published in 1765-68, and Vesey Senior's reports of decisions from 1746-1755 in 1771-3. More Hardwicke decisions were later published by Ridgeway (1794) and West (1827; for the history of Chancery reporting see WS Holdsworth, *History of English Law* (Methuen, London 1938) vol 12, 124-25, 141-44). Though manuscript reports were still in use in the late eighteenth century, published reports reached a wider audience. For a long time, no reports of Chancery decisions of the post-Hardwicke era were published, and when they started to appear they were often at an inferior standard, such as Brown's reports of decisions from 1778-1794, published from 1785, and Ambler's reports of decisions from 1737-1783, published in 1790. Cases from 1789 on were reliably reported by Vesey Junior from that year on, but decisions from 1755-1789 were for a long time either ill-reported or not reported at all, at least in print. This encouraged reliance on Hardwicke's well-reported decisions, as well as providing an easy way of differing from them: one could always argue, as Pepper Arden MR did in *Ridges v Morrison* (1785) Ms Abbot vol VI 115b, that practice has since Northington C, that is, since reliable reports of that practice stopped, been different than that recorded in Hardwicke's cases.

⁹⁹ On Hardwicke see Clyde Croft, *Philip Yorke, First Earl of Hardwicke: an Assessment of His Legal Career* (PhD Dissertation, University of Cambridge 1983). On Mansfield see, first and foremost, James Oldham, *The Mansfield Manuscripts* (U of North Carolina Press, Chapel Hill 1992). For the great rise – more than 200% – in the caseload of the King's Bench between 1750-1800 see Brooks (n 76) 31, figure 3.3, and 97-98. Mansfield's 30-year-long tenure was not quite as remarkable an achievement as Hardwicke's twenty years, for judges of the common law courts were less liable than the Chancellor to be deposed due to political developments. Indeed, Mansfield preserved his seat on the bench by refusing several offers of the Chancellorship; his long tenure ran parallel to that of five Chancellors.

These were some of the most successful of a generation of talented lawyers, which also included John Dunning, the later Lord Ashburton,¹⁰⁰ John Horne Tooke, later a notorious radical, and the slightly younger John Scott, the later Lord Eldon, and John Mitford, the later Lord Redesdale. They formed a relatively tight-knit group in the 1760s, meeting frequently at Kenyon's¹⁰¹ or Dunning's,¹⁰² exchanging friendly professional favours and pushing each other up the ladder of success: Dunning, who was the first of the group to succeed at the bar, had his success fueled by Kenyon, who 'devilled' for him, much as he did later for Thurlow. Thurlow as Chancellor under the short-lived Rockingham administration of 1782 obtained the attorney-generalship for Kenyon as a favour.¹⁰³ Thurlow and Kenyon later helped Scott achieve professional success and political office. In a striking demonstration of the power of friendships to promote careers, group members achieved a truly sterling record of professional success, as one by one they reached the heights of the bar, entered Parliament, and were appointed to the highest legal offices. Thurlow, Wedderburn, Dunning, Kenyon, Pepper Arden, Scott and Mitford were all eventually granted Peerages on the strength of both their professional and political skill, and their friends in high places. Later Thurlow made Kenyon and Eldon his executors.¹⁰⁴

The shadow of earlier Chancellors such as Lords Nottingham and Hardwicke is felt in the late eighteenth century judges' significant respect for Chancery precedent. The cases are peppered with sayings like Pepper Arden's 'I cannot say, I quite agree to that doctrine [of an earlier pertinent case]: but I will not set up my own opinion upon it'.¹⁰⁵ Still, Thurlow, and especially Wedderburn, were willing to initiate dramatic change when they thought it appropriate.¹⁰⁶ Chancery's overall approach to precedent, walking a line between restraint and innovation, was exactly in what Karl Llewellyn called 'the Grand Style of the Common Law'.¹⁰⁷

Having risen to the very top of the late eighteenth century regime, most of these judges were condemned by historians of the period. Leaving aside Eldon, whose 24 years on the woolsack in the early nineteenth century fall outside the ambit of this work, and Kenyon, who has received relatively merciful treatment,¹⁰⁸ we shall concentrate on the three who were maligned the worst: Thurlow, Loughborough, and Pepper Arden, who did

¹⁰⁰ Author of the celebrated Parliamentary resolution, at the height of the American war in 1780, 'that the influence of the crown has increased, is increasing and ought to be diminished': *Cobbett's Parliamentary History of England* (R Bagshaw, London 1806-1820) vol 21, 347.

¹⁰¹ GT Kenyon, *The Life of Lloyd, First Lord Kenyon* (Longmans, London 1873) 25.

¹⁰² *ibid* 46.

¹⁰³ *ibid* 88.

¹⁰⁴ Robert Gore-Browne, *Chancellor Thurlow: the Life and Times of an XVIIIth Century Lawyer* (Hamish Hamilton, London 1953) 294.

¹⁰⁵ *Rawlins v Goldfrap* (1800) 5 Ves Jun 440, 443; 31 ER 671, 673. For the late eighteenth century Chancery's respect for precedent see also Polden (n 10) 183; William Roberts, *A Treatise on the Construction of the Statutes... Relating to Voluntary and Fraudulent Conveyances* (A Strahan, London 1800) vii.

¹⁰⁶ See, eg, the cases discussed at ch 4, nn 25ff, and *Lytton v Lytton* (1793) 4 Bro CC 441, 29 ER 979, discussed there at text to n 124.

¹⁰⁷ Llewellyn misattributed this style to Mansfield, while admitting that he was not quite respectful enough of precedent to justify the attribution (Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown, Boston 1960) 36-38.

¹⁰⁸ Atiyah gave him five respectful pages, though dubbing him 'conservative': PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, Oxford 1979) 362-66.

most of the adjudication in Chancery between 1778-1801. It is their work that shall be central to our analysis of Chancery policy in the next three chapters.

a. Edward Thurlow¹⁰⁹

Thurlow was born in Norfolk in 1731 to a minor clergyman. He grew into a unique character, rebellious, gruff, prone to strong language, disdainful of etiquette, and something of a bully. Admitted to Cambridge as a scholar, his extreme indiscipline and disrespectful attitude towards college authorities obliged him to leave without a degree. Instead he entered the Middle Temple and became a solicitor's pupil. By practicing both in London and on the western circuit his oratorical talents gradually became well-known, until Lord Weymouth brought him into parliament in 1765. Having achieved a sterling professional victory in persuading the House of Lords to overturn the Scottish Court of Session's decision in the case over the disputed succession to the Douglas estates, he entered Lord North's government in 1770 as solicitor general, progressing to attorney general the next year. In parliament he maintained a firm line against the insurgent American colonists, supporting North's increasingly drastic measures to control them, up to and including the war of 1775. His uncompromising position drew to him the favourable attention of George III, who also noted his status as the undisputed leading lawyer in the House of Commons. In 1778 the King personally arranged Thurlow's appointment as Lord Chancellor, replacing the mediocre Lord Bathurst. Thurlow has become the King's personal friend. This friendship allowed him to support no party, and essentially follow his own judgment in the House of Lords, where he removed upon being made a peer. This house he by all accounts completely dominated from the moment he joined it, flaunting his humble roots and favourably comparing his merit-based peerage to the inherited ones of most of his colleagues. Thurlow achieved the top position in the English legal system by a combination of legal skills and an aggressive, intimidating rhetorical manner, disdainful of niceties and proud of his disdain. Having sneered at the hereditary aristocracy, he was a loyal adherent of the Royal prerogative.

Thurlow's total political independence and his personal connection to George III made him a disloyal member of the governments in which he took part, which was his eventual political undoing. This distancing of self worked well in the last, disastrous years of the North ministry; not so under the younger Pitt. The first few years of Pitt's premiership, until 1788, saw Thurlow's political high tide, government being effectively joint between them.¹¹⁰ But the regency crisis sowed the seed of his downfall, as he, while a member of Pitt's government, was known to have negotiated with the Prince of Wales

¹⁰⁹ This biographical sketch is based on the sensationalist biography of Thurlow, published in the mid-twentieth century for a popular audience (Gore-Browne, n 104), and on earlier biographical sketches, all hostile. The hostile tradition started with Lord Campbell's *Lives of the Lord Chancellors* (John Murray, London 1846) vol 5, 473-678, continued with Edward Foss' much shorter *The Judges of England* (John Murray, London 1864), vol 8, 374-85, heavily based on Campbell, and was carried into the twentieth century by Holdsworth (n 98) vol 12, 312ff. A more balanced treatment is that in the Oxford D.N.B.: GM Ditchfield, 'Thurlow, Edward, first Baron Thurlow (1731-1806)' *Oxford Dictionary of National Biography* (OUP, Oxford 2004) [<http://www.oxforddnb.com/view/article/27406>, accessed 20 Oct 2006].

¹¹⁰ Michael Duffy, *The Younger Pitt* (Longman, Harlow 2000) 52.

over a regency government, presumably with a large Foxite element.¹¹¹ Thurlow, backed by the King, Kenyon, Scott, and other lawyers, was until 1791 still regarded as untouchable, but his repeated obstruction and ridicule in the Lords of Pitt's most cherished legislative initiatives made Pitt present the King with an 'either me or him' ultimatum in May 1792, and the King let Thurlow go that June. Thurlow survived until 1806 in a lazy retirement.

For three and a half decades he lived openly with a mistress, Polly Humphries, a barmaid from Nando's Coffee House. She bore him three illegitimate daughters. Remarkably, he maintained this situation while responsible for great amounts of ecclesiastical patronage as Lord Chancellor.¹¹² While a knowledgeable lawyer, Thurlow was not the most industrious one; part of his work was done for him by Kenyon and lawyer-cum-legal historian Francis Hargrave. Thurlow acknowledged this shortcoming in explaining how he got through his workload: 'I do some, a good deal does itself and the rest is not done at all. It all casts up to much the same'.¹¹³ Still, much of his courtroom work, as shall be seen in the next few chapters, was able and sharp, showing a clear grasp of both the doctrines of equity and the social function of Chancery. He could stray from precedent, as well as interpret statutes against both their letter and spirit, to reach what he regarded as the socially desirable solution. During his lifetime, he was generally popular and respected, both in parliament, among lawyers and among the general public.¹¹⁴

b. Alexander Wedderburn¹¹⁵

¹¹¹ Thurlow's mid-twentieth century biographer, Gore-Browne, unconvincingly attempted (n 104, 264-65) to defend his conduct during the regency crisis against the accusations of duplicity made by Lord Campbell (n 109), Lecky (n 97) and Lord Stanhope, Pitt's relative and biographer.

¹¹² Not all were happy with this situation: see 'Cassandra', *A Letter to the Bishop of London. Containing a Charge of Fornication against Edward, Lord Thurlow...* (printed for the author, London 1788). But such complaints were ineffective.

¹¹³ Gore-Browne (n 104) 69.

¹¹⁴ See, eg, the poem written by William Cowper, who studied law with Thurlow in London before becoming a reclusive, but extremely successful poet, in celebration of Thurlow's appointment as Chancellor: William Cowper, 'On the Promotion of Edward Thurlow, Esq. to the Lord High Chancellorship of England' in *Poems* (printed for J Johnson, London 1782) 309. On Thurlow's 1792 dismissal, an anonymous writer describing himself as 'a loyal subject' published a *Remonstrance to the Right Hon. Lord Thurlow, upon the Report of his Intention to Resign the Great Seal* (printed for J Debrett, London 1792). Note also the extremely positive picture of Thurlow's skills given by George Chalmers in his *Parliamentary Portraits; or, Characters of the British senate* (printed by S Gosnell, London 1795) vol 2, 74, at 75: '[n]o one who ever held the office of attorney-general, ever possessed so much legal knowledge, with so many requisites to constitute one of the first orators in the British Senate. Not more a profound lawyer than a most ready and powerful debater... [s]ince his accession to the House of Lords his merit has shone with equal lustre.' After some high praise of Thurlow's rhetorical skills, Chalmers concludes his biographical sketch by quoting words spoken in Thurlow's praise by a political rival, Charles James Fox: Fox spoke of Thurlow's 'shining talents', which have 'justly entitled him to be considered as one of the greatest pillars of the state' (ibid 78). A few years later, an anonymous commentator, writing for a popular audience, wrote that '[f]ew men, while occupying that high post, have gained such a degree of popularity as Lord Thurlow' (Anon, *Public Characters of 1798-9* (printed for R Phillips, London 1799) 445, 452.)

¹¹⁵ There is no biography of Wedderburn. This biographical sketch is primarily based on Alexander Murdoch, 'Wedderburn, Alexander, first earl of Rosslyn (1733-1805)' *Oxford Dictionary of National Biography* (OUP, Oxford 2004) [<http://www.oxforddnb.com/view/article/28954>, accessed 31 July 2006]. The rest is hostility: Duffy (n 110) 59-61; Campbell (n 109) vol 6, 1-366; Fox (n 109) vol 8, 385-98;

Wedderburn was born in 1733 to an old Edinburgh legal family. His *entrée* into the social and cultural life of his home town was rapid and successful: having, at age 15, attended Adam Smith's lectures on language and rhetoric, he befriended Smith, Hume and Robertson, and adopted a 'moderate' agenda centered on Anglicization. At age 21 he chaired the first meeting of the Select Society, of which many of Scotland's intellectual elite were members. In 1755-56 he edited the short-lived *Edinburgh Review*, a periodical intended to review everything published in Scotland; the second and last issue of the *Review* carried Adam Smith's famous essay introducing Scot and English readers to Jean Jacques Rousseau.¹¹⁶ Simultaneously, he started practicing as a member of the Edinburgh Faculty of Advocates, and joined the general assembly of the Scottish Kirk. In the latter forum he played a central role in preventing Hume's being called before the assembly to be publicly shamed as a heretic. His burgeoning involvement in Scottish public life, much like his Scottish legal career, came to a sudden end in August 1757, when he clashed publicly in court with Alexander Lockhart, Jacobite dean of the Faculty of Advocates. Wedderburn left Scotland immediately for the Inner Temple, of which he had been a member for some years.

He now faced the difficult challenge of establishing himself as a lawyer in a foreign country, where he had none of the connections which smoothed his precocious rise in Edinburgh, and where Scots especially were mistrusted in the period which saw both the 'forty-five and the Earl of Bute's much-resented influence over the young George III. Wedderburn, however, entered parliament in 1761 through Bute's patronage and proved successful both there and in his legal career. From Bute he transferred his political allegiance to Robert Clive, newly returned from India, and spoke in support of Wilkes on the Middlesex election issue in 1769, having switched to a different seat under Clive's patronage. He soon tired of opposition and joined the North ministry as solicitor general. For seven long years he served alongside attorney-general Thurlow as two of North's principal parliamentary props, the two lawyers' rivalry and mutual dislike deepening all the while (though they seem to have ran rather deeper in Thurlow than in Wedderburn). He replaced Thurlow as attorney-general in 1778, then in 1780 was made a peer as Baron Loughborough and became Chief Justice of the Court of Common Pleas, then characterized by a particularly light caseload; the serjeants were often idle. Interestingly, he sounded Adam Smith on the American problem in 1778.¹¹⁷

In the 1780s he joined the Foxite camp, acting as the Prince of Wales' Chancellor-in-waiting. His hopes were dashed when the King recovered in February 1789; but Pitt's feud with Thurlow gave Loughborough another chance, as the prime minister had no other plausible candidate for the woolsack. After Thurlow's dismissal, Pitt's friends made many overtures to Loughborough, and finally lured him over from the Whig opposition to the Pittite government in January 1793. One month later the war with revolutionary France broke out, and the split among the Whigs between the moderates,

Holdsworth (n 98) vol 12, 569-76, and vol 13, 578-80; and Daniel Duman, *The Judicial Bench in England, 1727-1825: The Reshaping of a Professional Elite* (Royal Historical Society, London 1982) 89-90.

¹¹⁶ Smith's review is now available in his *Essays on Philosophical Subjects* (Liberty Fund, Indianapolis 1982) 242.

¹¹⁷ Adam Smith, 'Smith's Thoughts on the State of the Contest with America, February 1778' in *The Correspondence of Adam Smith* (Liberty Fund, Indianapolis 1987) 423.

led by Portland, who joined the government, and the hardened Foxite opposition, was soon complete. Loughborough was Pitt's Chancellor for the remainder of his first premiership; when Pitt's government fell in 1801 over the Catholic emancipation issue, he took Loughborough down with him. Loughborough was compensated by a rise in the peerage, being made Earl of Rosslyn. He died in 1805, twice-married but childless.

Wedderburn was acknowledged as a brilliant speaker both in court and in parliament. His political ability was demonstrated by the heights of success he achieved from an unpromising start as a suspicious foreigner, having wrung successive honours and appointments out of fundamentally unsympathetic colleagues. His frequent changes of allegiance, themselves a sign of his political virtuosity, were disapproved by many who preferred politicians with a stronger sense of ideological and personal loyalty.¹¹⁸ He saw himself as personally loyal to George III rather than to any party or political leader, an understanding well attuned to the conception of the Chancellor's role then prevalent, as the King's personal representative within a government's ranks. Much appreciated by his thankful clients,¹¹⁹ he was not generally loved, earning such nicknames as 'Starvation Wedderburn'.¹²⁰ In the courtroom he was a competent, workmanlike Chancellor, more daring than Thurlow both in construction of privately-authored documents and in sheer policy-making. His Scottish background furnished him with a strong knowledge of the civil law, which left him somewhat readier than Thurlow to apply general principles and broad policies directly, without enveloping them in a doctrinal point. On occasion he could admit in court that '[i]t will be easy to get a better authority than mine' upon a conveyancing point.¹²¹

c. Richard Pepper Arden¹²²

Arden was born in 1744, the second son of a Cheshire gentry family. A graduate of Cambridge, where he developed a convivial manner and a great capacity for friendship, his progress at the bar was smooth and rapid. He became recorder of Macclesfield in 1771 and a junior Welsh judge in 1776. At about 1780 he formed a friendship with Pitt the younger, with whom Arden shared a Lincoln's Inn staircase. This friendship made his career: in November 1783 he became solicitor-general in Shelburne's short-lived government, in which Pitt was Chancellor of the Exchequer. When the Fox-North

¹¹⁸ Wedderburn was not the only senior eighteenth century politician to change allegiance repeatedly: as Langford notes, the Earl of Shelburne was connected with Henry Fox, the Earl of Bute and Pitt *père* before heading his own short-lived administration, though his name 'became a byword for treachery' in the process: Langford (n 3) 371.

¹¹⁹ See the effulgent thanks penned by a Lady, late of Mitcham, in the County of Surry, 'Lines on Mr. Wedderburn' in *Flights of Fancy, or Poetical Effusions* (J Long, London 1791) 24.

¹²⁰ Gore-Browne (n 104) 44-46. Gore-Browne, Thurlow's biographer, aware that Thurlow and Wedderburn were often after their time condemned together as eighteenth century immorality incarnate, tried to present Thurlow in a positive light by dissociating him from Wedderburn. To achieve this goal he painted an especially black portrait of the latter, noting that his manner was 'affected' and that he was 'vain of his beautiful eyes' (*ibid*).

¹²¹ *Wakeman v the Duchess of Rutland* (1797) 3 Ves Jun 504, 506; 30 ER 1127, 1128.

¹²² The biographical sketch is based on Duffy (n 110) 5, 40, 57-58, 76, 117; David Lemmings, 'Arden, Richard Pepper, first Baron Alvanley (1744-1804)' *Oxford Dictionary of National Biography* (OUP, Oxford 2004) [<http://www.oxforddnb.com/view/article/634>, accessed 20 Oct 2006]; Gore-Browne (n 104) 224.

coalition assumed power he went into opposition with Pitt, only to become solicitor-general again in Pitt's own government. After the 1784 election he was promoted to attorney-general, much to Thurlow's resentment. Arden was one of Pitt's chief supports in the House of Commons, and was rewarded in 1788 by the Mastership of the Rolls, vacant on Kenyon's appointment as Chief Justice of the King's Bench. Thurlow, furious at Arden's nomination, delayed signing his patent until Pitt forced the issue in a tense interview.

It was widely perceived that Arden owed his advancement to personal friendship with Pitt. He was resented as a lightweight lawyer, as Thurlow and Wedderburn, who advanced based on their demonstrations of professional excellence, never were. He was indeed a regular dinner guest at Pitt's throughout the years of the latter's first premiership, taking the role of a court jester, laughing and being laughed at. Perhaps as a self-conscious response to allegations of insufficient professional ability, Pepper Arden's decisions as Master of the Rolls were long and painstaking, earning him some praise from legal historians. His 13 long years as the junior Chancery judge brought him formidable control of Chancery law. He stayed in office after Pitt resigned in 1801, and while Eldon was made Chancellor over his head, Arden was made Chief Justice of the Court of Common Pleas and Baron Alvanley. He died in 1804.

d. The Nineteenth-Century Rejection

Nineteenth and twentieth century biographers and historians have been largely condemnatory of Thurlow, Wedderburn and Pepper Arden. Thurlow has been described as a lazy judge who authored perfunctory decisions, and whose lifetime reputation for depth was mostly based on impressive oratorical bluster, with too little knowledge behind it. He has further been disapproved of as a belligerent prerogative politician, essentially a courtier, disloyal to his colleagues in government. His frequent use of strong language also drew criticism from straitlaced Victorians.¹²³ Legal writers have criticized Wedderburn, besides his condemnation as the greatest tergiversator of eighteenth century English politics, as a 'political Chancellor' absorbed in politics, who preferred mixing in fashionable society or frequenting the theatre to his caseload, thereby contributing to the notorious delays in Chancery.¹²⁴ Pepper Arden has been criticized as a 'creature of patronage', an insufficiently knowledgeable lawyer for his high posts, until his painstaking work of the 1790s largely put paid to most of these complaints.¹²⁵

This hostile historiographic tradition, flowing from Campbell's polemical biographies to Holdsworth's *History of English Law*, expresses Campbell's Whig politics and the victorious nineteenth century utilitarian reform agenda. It seems easily explained by nineteenth century reformists' dislike for successful eighteenth century politicians who worked the system of their time and did not transform it. Their favourite eighteenth century judge was Mansfield, whose reform of business law nineteenth century lawyers

¹²³ Sources cited in n 109; Lecky (n 97) 465-66.

¹²⁴ The gradual condensation of this account of Wedderburn from 366 pages in Campbell (n 115) to one in Duman (same note) greatly added to its stringency.

¹²⁵ Sources cited in n 122.

saw as a necessary preparation for their own age. His pro-dynastic conservatism in family property law was forgiven (or forgotten).¹²⁶

Another possible explanation stems from Thurlow and Wedderburn, especially, having been model representatives of mid-eighteenth century English elite culture, many elements of which were by the late eighteenth century strongly repudiated by the influential elements of English society who subscribed to Evangelical values. The two attained the woolsack in the late eighteenth century, but having been born in the early 1730s, their personalities were formed in the mid-century decades. Both Chancellors fit Wahrman's description of mid-eighteenth century English society as a masquerade society, where personal identities were fluid and social roles indistinct, exchanged frequently like masks; complex, extroverted personalities were tolerated, almost encouraged.¹²⁷ Dark-skinned Thurlow, the poor parson's son who rose to be Chancellor, was seen as socially and racially indistinctive.¹²⁸ He behaved as if granted a special exemption from conventional morality, swearing in genteel situations, delighting in publicly denying social rank (except that of the King), and living in sin with a coffeehouse barmaid, all while serving in the traditionally clerical office of Chancellor, the keeper of the King's conscience. His three illegitimate daughters fit into the late eighteenth century surge in illegitimacy, corrected in the nineteenth century,¹²⁹ much as his general conduct exemplified the eighteenth century lull in the normal predominance of abstemious values in England.¹³⁰ Thurlow's political power, specifically the King's high opinion of his abilities, enabled him to lead his personal life in disregard of the norms he was enforcing in his official role. Wedderburn's career evidenced indistinctiveness in many senses: he morphed from a Scot with an Anglicizing agenda to a Scottish-born English lawyer and statesman. His many changes of political allegiance resemble the progress of a masked actor, changing masks as required at every stage of his journey to the woolsack.

The late eighteenth century brought, according to Wahrman and Stone, a hardening of social roles.¹³¹ The mid-eighteenth century normative looseness which both Thurlow and Wedderburn exploited now gradually disappeared. A society shaken by the American war, then frightened by the French revolution, needed its leadership to unambiguously obey, or at least pretend to obey, its conventional morality and religion.¹³² There was, as Langford wrote, 'a lower threshold of tolerance in regard to

¹²⁶ For that conservatism see ch 4, text after n 63. The nineteenth century admiration for Mansfield has certainly endured: Llewellyn named him as second in the 'undying succession of Great Commercial Judges whose work across the centuries has given living body, toughness and inspiration to the Grand Tradition of the Common Law': Llewellyn (n 107) v, and admiration is also evident in Oldham's celebratory work on Mansfield (n 99). Arguably, its endurance reflects that of the social and economic supremacy of the monied interest in the West.

¹²⁷ Dror Wahrman, *The Making of the Modern Self* (Yale U Press, New Haven 2004).

¹²⁸ Richard Tickell, *An English Green Box; or, The Green Box of the R-t H-e E-d L-d Churllow*, (G Kearsly, London 1779) 100-101.

¹²⁹ Szreter and Garret (n 2) 59.

¹³⁰ For this lull, see *ibid* 58-65.

¹³¹ Wahrman (n 127) *passim*; Stone (n 12) 667-80.

¹³² For the late eighteenth century return of evangelism see Joanna Innes, 'Politics and Morals' in E Hellmuth (ed), *The Transformation of Political Culture* (OUP, Oxford 1990) 57; Davidoff and Hall (n 6) ch 1, who mainly discuss its influence on the social construction of gender; GM Ditchfield, *The Evangelical Revival* (UCL Press, London 2002).

religious heterodoxy'.¹³³ Much like effeminate men,¹³⁴ judges fulminating from the bench while flouting religion and morality as private men became unacceptable. The great fear of revolution principles made Wedderburn's personal connection to the Scottish Enlightenment an image liability.

By the time of these changes in English culture, Thurlow and Wedderburn were safely ensconced in the ruling elite, which preserved islands of eighteenth century permissiveness into the regency period. Their careers were unharmed; it were their posthumous reputations that suffered. The puritanical Kenyon did not think Thurlow a lesser lawyer than himself; yet later opinion has been much kinder to the Chief Justice than to the Chancellor. Thurlow and Wedderburn's bad posthumous reputations were, then, at least partly a reflection of prudish Victorian prejudice, and a result of nineteenth century reformers' impatience, bordering on disdain, for the eighteenth century culture over which they have prevailed.

¹³³ Langford (n 3) 470.

¹³⁴ A key phenomenon of the permissive mid-eighteenth century decades were the 'macaronis', effeminate young men dressed indulgently, on whom see Langford (n 3) 576-78; Wahrman (n 127) 60-65.

ש. מה כל זה משנה לנו היום? למה לעסוק בזה? מה זה תורם לחברה העכשווית?
ת. השאלה חשובה; התשובה מתחלקת לשתי הצדקות מרכזיות.

בראשי-תיבות:

(1) משום שראוי שחוקרי משפט, או אחדים מהם, יעסקו גם בחקר המשפט, על עומקו ההשוואתי וההיסטורי.

(2) משום שאחדים מממצאי מאתגרים באופן חשוב תפיסות-יסוד ערכיות שביסוד המשפט של ימינו, ובראשן הבחירה בהקשר העסקי כזה הראוי להגנה מיוחדת מפני סכנות השוק.

ובהרחבה:

1. קודם כל, לתפיסתי, אחד מתפקידיו של מלומד משפטי הוא ללמוד את המשפט. נדמה לי שאנו מסכימים שללימוד ולמחקר נודע ערך חברתי. אחת הדרכים לחקור את המשפט היא לנסות ללמוד אותו במלוא עושרו ועומקו כתופעה תרבותית מרתקת, מורכבת ועשירה. עורכי-דין אינם עושים זאת. הפרקטיקה המשפטית כפי שבאה לידי-ביטוי במקומות ובזמנים אחרים היא מושא-מחקר ראוי לחוקר המשפט, משום שלמידה יוצר חוקר פרספקטיבה רחבה על כל תופעה משפטית – עדכנית ואחרת. הלא כל מה שאנו עושים באקדמיה הוא הרחבת היריעה מעבר לשיח של אנשי-המעשה. כמו שהרחבת היריעה אל מעבר למשפט בכלל היא בת-ערך (לדוגמא: הערכת נורמות משפטיות על-פי אמות מידה כלכליות או ספרותיות), כך גם הרחבת היריעה אל עומקו ההשוואתי וההיסטורי של המשפט: שתיהן מעשירות את הפרספקטיבה של החוקר על הדין והמעשה המשפטיים של זמננו ומקומנו.

תפיסתי היא בעצם תפיסה של 'המשפט כתרבות', אך לשיטתי, אחד ממושאי המחקר המרכזיים של חוקר-התרבות המתעניין במשפט הוא – המשפט, ובין היתר, הרובד הדוקטרינרי, שבו מתרחשת הרבה מן העבודה התרבותית שבספירה המשפטית.

מעבר לכך, ההיסטוריה של המשפט מיוחדת בין הדיסציפלינות הטרנס-משפטיות בכך שאינה מעמידה את המשפט למבחן לפי אמות-המידה של דיסציפלינה אחרת. כמשפטן, יש לי יחס של כבוד לנורמות משפטיות ולתכני המשפט בכלל; אני מבקש לגלות בהן את הקסם ואת הטעם. האם תוצריה של מסורת המחשבה המשפטית כה נחותים בעינינו מאלה של מסורות מחשבה אחרות, עד שאינם מושא ראוי למחקר אלא בהשתברותם על דרכי-המחשבה של מסורות אחרות? האם צורת המחשבה המשפטית אכן תמימה יותר, מכנית יותר או מועילה או ראויה פחות מצורות-המחשבה הפילוסופית, הכלכלית או הספרותית? התשובה לשאלה האחרונה משתנה, כשמביאים בחשבון 'צורת המחשבה המשפטית' כמה שיותר מאוצר המחשבה שהושקע בשיח המשפטי בשלושת-אלפים השנים האחרונות.

פרויקט הדוקטורט שלי מבטא, קודם כל, רצון ללמוד את המשפט. האם אין לשאיפה זו מקום בפקולטה למשפטים (לצד שאיפות ראויות אחרות, ובראשן השאיפה לתיקון עולם)? נדמה שמוסד אקדמי למחקר המשפט הוא המקום, בין היתר, לחוקרים את המשפט.

2. מעבר לכך שלימוד עומקו ההשוואתי וההיסטורי של המשפט הוא, ככלל, דרך לגיטימית לחוקר משפט, המחקר שלי, ספציפית, נושא בחובו לקחים העשויים להועיל למשפט הישראלי היום. משפטנו היום פתוח להשפעות זרות – אך בעיקר מכיוון מסוים: מן הדין האמריקני העדכני. ההתמקדות במקור זה מבוססת על מספר הנחות שיש מקום לאתגרן. אחת החשובות שבהן היא ההנחה כי המודרנה היא סיפור ארוך של שיפור, ולכן, הדין החדש ביותר ייטה להציע פתרונות מוצלחים במיוחד (הנחה הקשורה לכך שהמשפטן בן-ימינו מכיר בעיקר את הדין העכשווי, ולעתים אף תרם לעיצובו: העניין בעיקר בדין העדכני מכיל מימד של הסתפקות במוכר, והנחה כי אנו ויצירי-רוחנו עולים על קודמינו). להנחה זו נוספת ההתכוונות הכללית לארה"ב המאפיינת את תרבותן של קבוצות מסוימות בחברה הישראלית היום.

מחקרי העלה מספר מסקנות המעמידות את ההנחה, כי הנורמות החדשות ביותר הן גם הראויות ביותר, בספק רב. כך למשל קשה לטעון כי בחירתה של ה-equity האנגלית של המאה ה-18 במשפחה כמוקד-הייחוס החברתי-כלכלי שההשתייכות אליו תקנה הגנה מסוימת מפני סכנות השוק, גרועה יותר מבחירתו של הדין העכשווי בחברה בע"מ כמוקד המעניק פריבילגיות מקבילות. לכל אחת מן הבחירות הערכיות הללו תוצאות חברתיות שונות.

במובן מסוים, העניין והרלבנטיות שבמחקר ההיסטוריה המשפטית תלויים בתחום המשפטי המסוים אותו כל היסטוריונית או היסטוריון משפטי בוחרים לחקור, כמו גם בפרספקטיבה שלה או שלו על הנחקר. רוב המחקרים הקיימים על הדין האנגלי של המאה ה-18 התמקדו בדיני החוזים ובמשפט המסחרי, ובדחיפה שנתן הלורד מנספילד לעיצובו של הדין המודרני. מחקרים אלה חוטאים במה שרבים בין ההיסטוריונים של המשפט כיום רואים כחטא קדמון: אלה מחקרים שבאים לספר how we got so wonderful. הם מקבלים את קדימותו הערכית של ההון, הנהוגה בחברת ימינו ובמשפטה, כעמדה ראויה, ומספרים כיצד התקרבו הדין בהדרגה לשקף עמדה זו. מחקר היסטורי-משפטי כזה אולי ניתן להאשים בכך שאין לו ערך מוסף נורמטיבי (אם כי לדעתי, גם לו יש מקום, במסגרת ההצדקה הראשונה). מחקר כשלי, לעומת זאת,

מחולל פרובלמטיזציה של העמדות הערכיות המופנמות בדין דהיום (כמו גם במקורות העיקריים מהם אנו רגילים לשאוב הסדרים ורעיונות לשם שיפור הדין שלנו): הוא מנכיח אותן, מראה כי אינן מובנות מאליהן, ומאפשר התלבטות קונסטרוקטיבית ביניהן לבין אפשרויות ערכיות אחרות. כך שככל שמחקר משפטי כלשהו יכול לתרום להתקדמותה של החברה, מחקר משפטי כמו זה שלי עשוי בהחלט לעשות כן: מחקר כזה יכול לשמש כלי רב-כוח להתגברות על המגבלות שהדין הנוהג והנורמות החברתיות, התרבותיות והמשפטיות הנוהגות בזמננו ובמקומנו שמות על חופש המחשבה שלנו במישורים הערכי, המוסרי והמשפטי כאחד.