BANKRUPTCY IN EARLY MODERN ENGLAND:

Bankruptcy and insolvency in the early modern Court of Chancery, 1543-1628

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Abstract

This thesis presents a detailed analysis of the Chancery practice in relation to both bankruptcy and insolvency between 1543 and 1628. The aim of the thesis is to improve our understanding of the foundations and early development of bankruptcy and insolvency law in England. The methodology of the thesis is primarily doctrinal, but it uses historical methods to trace and understand unexplored cases and other legal archival materials in Chancery records, and together with additional historical and literary sources puts the law into a social and economic historical framework.

The thesis shows that the Court of Chancery had two functions in relation to bankruptcy and insolvency. The survey of the records shows that the Court of Chancery exercised a review function in relation to the decisions of the commissions of bankrupts which were authorised to deal with bankruptcy matters in the first instance, including declaring debtors bankrupt. This meant that the Court of Chancery effectively worked as an appellate court for the decisions of commissions of bankrupts.

In addition to the review function, the Court of Chancery also had an equitable function in relation to insolvency matters. In its equitable function the Court of Chancery dealt with issues concerning insolvent debtors that were not regulated by statutory bankruptcy or the common law. This thesis breaks with conventional scholarship and shows that the Chancery practice in this area appears to have been very humane, with special care for the most vulnerable in society, and that 'modern' bankruptcy principles and ideas, such as the concept of insolvency by misfortune, voluntary bankruptcy, debt settlements (compositions), majority control and the discharge of debts, which have generally been attributed to the bankruptcy statutes of 1705 and 1711, were already applied in the Court of Chancery in this earlier period.

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TABLE OF ABBREVIATIONS

AALT	Anglo-American Legal Tradition
C 33	Chancery entry books of decrees and orders
C 38	Chancery master's reports
C 78	Chancery decree rolls
C 2	Chancery pleadings
CUP	Cambridge University Press
EL	The Bridgewater and Ellesmere manuscripts
ER	English Reports
f.	folio number
IL and P	Tolley's Insolvency Law and Practice
[IMG_]	image number on the AALT website
Insolv LJ	Insolvency Law Journal
JLH	Journal of Legal History
KC	Surrey History Centre manuscript
Ky LJ	Kentucky Law Journal
LC	lord chancellor
L & Hist Rev	Law and History Review
LK	lord keeper
LQR	Law Quarterly Review
m.	membrane number
ODNB	Oxford Dictionary of National Biography
OHLE	Oxford History of the Laws of England
OUP	Oxford University Press
PC	Acts of the Privy Council
PROB	Prerogative Court of Canterbury and related Probate Jurisdictions: Will Registers
Ref	Reference to the dockets of Coventry LK
REQ 1	Public records for the Court of Requests
SP	State Papers
SS	Selden Society
SSRN	Social Science Research Network

TABLE OF CASES

The page numbers in bold refer to cases cited in the main text; the page numbers in ordinary type refer to cases cited in the footnotes.

TABLE OF STATUTES

The page numbers in bold refer to cases cited in the main text; the page numbers in ordinary type refer to statutory provisions cited in the footnotes.

CONVENTIONS

Spelling and capitalization from contemporary manuscripts and printed sources have been rendered into modern spelling in all quotations, unless indicated otherwise. Punctuation has been modernised, unless the original meaning of the quote would be altered. Round brackets are original punctuation, while square brackets and ellipses indicate editorial alteration. Blank spaces in manuscripts are marked by two brackets [].

Pinpointed references are given for the folio number (for The National Archives class C 33s) or membrane number (for The National Archives class C 78s) and for the Anglo-American Legal Tradition (AALT) website image number, abbreviated as [IMG_X]. The images at http://aalt.law.uh.edu/ were last accessed on 10 November 2021.

Thomas Egerton is referred to as such for the period of his lord keepership of the Great Seal (1596-1603), and as Lord Ellesmere for the period of his lord chancellorship (1603-1617).The year is taken to have started on 1 January.

'…What makes you standers by to smile.

and laugh so in your sleeve:

I thinke it is, because that I

to Ludgate[1] nothing geve.

I am not now in case to lye,

here is no place of iest:

I dyd reserve, that for my selfe,

yf I my health possest.

And ever came in credit so

a debtor for to bee.

When dayes of paiment did approch,

I thither ment to flee.

To shroude my selfe amongst the rest,

that chuse to dye in debt:

Rather then any Creditor,

should money from them get.

Yet cause I feele my selfe so weake

that none mee credit dare:

I heere reuoke: and doo it leave,

some *Banckrupts* to his share...'

Isabella Whitney (1548–1573) – Will and Testament[2]

[1] Ludgate was a debtor's prison in London.

[2] <https://www.poetryfoundation.org/poems/45991/will-and-testament> accessed 10 November 2021. Isabella Whitney is believed to have been the first Englishwoman to have written original secular poetry for publication.

Introduction

Sandys v Gresham (1589) was decided by Lord Chancellor Christopher Hatton on 28 November 1589.[3] This extraordinary case dealt with the petition of Edwyn Sandys, a former law student, for a debt settlement, because he had incurred debts of £7,000 (about £1.2 million in today's money) due to his extravagant lifestyle.[4] Originally educated at Eton College, Edwyn went to London to study law at the Middle Temple.[5] He was placed in the same Chambers as his father, Sir Miles Sandys,[6] a barrister, who had provided Edwyn with sufficient pocket money to maintain himself. Edwyn had initially lived a pleasant life, devoted himself to his studies and surrounded himself with the 'best students'.[7]

However, after a time the young Edwyn fell into a bad crowd and his new 'friends', various 'deceitful' creditors 'in gentlemanlike appearance', persuaded him to adopt a more lavish lifestyle.[8] Edwyn's allowance was insufficient for this extravagance, but as the eldest son of Sir Miles Sandys, who was rumoured to be unlikely to live long due to his age, Edwyn was expected to inherit his father's estate within a reasonable period, and so he was able to purchase goods on credit. Guided by the 'persuasions' and 'glossing speeches' of his 'friends' Edwyn started buying expensive silks, gold buttons, jewels and other luxury items.[9] His debts soon accumulated to £500 (about £86,000 in today's money).[10]

When Edwyn's father discovered his son's extravagance, he paid off his debts and gave every creditor a special charge that they were not to deal with his son again. In return, his father ordered Edwyn to confess all his debts and threatened that if Edwyn dealt with these people again or

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[3] *Sandys v Gresham*, 28 November 1589 C 33/80 f. 271 [IMG_0234].
[4] <https://www.nationalarchives.gov.uk/currency-converter/#currency-result> accessed 23 February 2021.
[5] A Harding, 'Sandys, Edwin I (c.1564-1608), of Eaton Bray, Beds.' in PW Hasler ed., *The History of Parliament: the House of Commons 1558-1603* (Boydell and Brewer 1981) <https://www.historyofparliamentonline.org/volume/1558-1603/member/sandys-edwin-i-1564-1608> accessed 14 August 2020. See more about Edwyn Sandys in chapter 4.
[6] Sir Miles Sandys of Iselhamstead-Latimers, Buckinghamshire.
[7] *Sandys v Gresham*, 28 November 1589 C 33/80 f. 272 [IMG_0235].
[8] ibid.
[9] ibid.
[10] ibid. See for the conversion, <https://www.nationalarchives.gov.uk/currency-converter/#currency-result> accessed 23 February 2021.

incurred such debts once more, he would be disinherited.[11] Some of Edwyn's creditors, however, persuaded him not to reveal all his debts to his father. Knowing that Edwyn could be disinherited at any moment for this breach of confidence, these creditors blackmailed Edwyn into usurious obligations for other jewels and luxury wares, ultimately resulting in the debts of £7,000.[12] Miles Sandys discovered his son's renewed financial problems and disinherited him.[13] Without his inheritance, Edwyn had no prospect of repaying his creditors.

As illustrated by Isabella Witney's poem 'Will and Testament', Edwyn might have fled the country or risked spending his life in debtor's prison. Not keen on either of these prospects, he petitioned the Chancery for a debt settlement, so that there might be 'equal satisfaction and payment of the said due debts'.[14] In *Sandys v Gresham* Hatton LC confirmed that Edwyn had no prospect of paying his debts, but decided that Edwyn, being only 25 at the time of the suit, could still contribute to society if given a fresh financial start.[15] Hatton LC awarded Edwyn Sandys a composition. Edwyn had to repay the honest creditors (presumably pro rata), but was discharged from all the debts incurred upon the usurious obligations. In some respects *Sandys v Gresham* (1589) is an unusual case, because it dealt with usurious creditors and extreme facts, but it also illustrates how insolvent debtors might obtain relief from their debts at the end of the sixteenth century. In *Sandys v Gresham* (1589) the Court of Chancery gave relief to the insolvent Edwyn and his creditors by exercising its equitable function.

Since the enactment of the Statute of Bankrupts 1543, the first English bankruptcy statute, the Court of Chancery had had two procedures to deal with insolvent debtors: the procedure set out in the bankruptcy statutes, and an equitable procedure, applied in the Court of Chancery, and also in the Court of Requests and the Privy Council.[16] A 'bankrupt' was an insolvent debtor who fell

[11] ibid f. 272v [IMG_1105].
[12] ibid.
[13] ibid f. 273 [IMG_0236].
[14] ibid f. 271 [IMG_0234].
[15] He had, in fact, already been member parliament for Andover, Hampshire, in 1586.
[16] This thesis only deals with the equitable procedure in the Court of Chancery.

within the bankruptcy statutes. For most of the period this meant that the debtor was (and had to be) a trader or merchant, who had defrauded his or her creditors and by law could not be discharged of his or her debts. Bankruptcy was a criminal procedure and provided a method for collective debt collection, with the aim to distribute the proceeds of the property of the bankrupt pro rata amongst all the bankrupt's creditors.[17] If a debtor did not fit the requirements of the bankruptcy statutes, the debtor was considered an 'insolvent' debtor. The insolvent debtor and his or her creditors needed the equitable procedure, which was aimed at the same outcome, namely the pro rata distribution of the assets of the insolvent debtor amongst the creditors, but also took the interests of the debtor into account. This thesis presents a detailed analysis of the Chancery practice in relation to both bankruptcy and insolvency between 1543 and 1628.[18]

I. The traditional ways of dealing with insolvent debtors in England

The expanding economy in the sixteenth century meant that credit was often no longer given on a local, face-to-face, basis, turning upon trust and reputation.[19] The economy had become more impersonal, which had led to an explosive increase of debt litigation.[20] Most debts in the period 1543 to 1628 were incurred by entering into an obligation, more commonly known as a bond or a specialty.[21] A bond was a deed containing an acknowledgement that a sum of money was owed by the 'obligor' to the 'obligee'. Before the introduction of the Statute of Bankrupts 1543, if a debt was not repaid, creditors had the option to choose from four writs of execution in order to get relief from their debtor.[22] Two writs were non-statutory, the writ of *fieri facias* (*fi. fa*) and the writ of *levari facias* (*lev. fa*).[23] The writ of *fieri facias* instructed the sheriff to sell the debtor's goods and

[17] The Statute of Bankrupts 1543 (34 & 35 Hen VIII, c. 4); Bankrupts Act 1571 (13 Eliz I, c. 7); Bankrupts Act 1604 (1 Jac I, c. 15); Bankrupts Act 1624 (21 Jac I c. 19).
[18] This period is chosen because it corresponds with the enactment of the first bankruptcy statute and the subsequent three amendments in 1571, 1603 and 1624. See, the research methodology below.
[19] JC Muldrew, *The economy of obligation: the culture of credit and social relations in early modern England* (Macmillan 1998) 7.
[20] ibid.
[21] This is a finding in the survey conducted for this thesis. This corresponds with the observations of Sir John Baker. JH Baker, *An Introduction to English legal history* (OUP 2019) 345-346. See for secured lending in the period, DP Waddilove, 'The mendacious common-law mortgage' (2018) 107 *Ky LJ* 425.
[22] Waddilove, 'The mendacious mortgage' (n 21) 433.
[23] ibid 434-435.

chattels for the benefit of the creditor and the money raised had to be paid into court before payment to the creditor. In contrast, *levari facias* ordered the sheriff to levy the required sum from both the debtor's chattels and the profits of his or her land and pay the sum directly to the creditor. The two other writs were provided by statute, namely the writ of *elegit* and the writ of *capias ad satisfaciendum* (*ca. sa*).[24] The writ of elegit was introduced in the Statute of Westminster II 1285.[25] The writ of elegit gave the creditor the 'election' to have a either a writ of *fieri facias* or to have the debtor's goods (except his oxen and the beasts of his plough) and half of his lands delivered as a security. Finally, there was the option of *capias ad satisfaciendum*, which gave the sheriff the power to seize the body of the debtor, meaning that the sheriff could keep the debtor in debtor's prison until the debt was satisfied.[26] A creditor who chose *capias ad satisfaciendum* could not elect any other remedy at law.[27] This constraint meant that *capias ad satisfaciendum* was a more general method of execution in England than were the equivalents in many other European countries.[28]

Apart from the bond, recognizances, statutes and mortgages were other methods of secured lending in the period.[29] All these methods of secured lending provided creditors with more security than a bond, but were much less commonly used.[30] A recognizance was made when a debtor recognized a debt in court.[31] The acknowledgement of the debt was enrolled in the court's record and included a judgment.[32] Parliament enacted special forms of recognizance by statute, commonly known as 'statutes': statutes merchant and statutes staple.[33] With a statute merchant or statute staple execution could take place against all or any of the debtor's chattels, lands and body, and

[24] ibid 435-440.
[25] The Statute of Westminster 1285, also known as the Statute of Westminster II (13 Edw 1 st.1).
[26] The Statute of Westminster 1352 (25 Edw 3 st. 5 c. 17).
[27] WS Holdsworth, *A history of English law,* vol. VIII (Methuen 1925, reprinted Sweet and Maxwell 1992) 231.
[28] ibid 231.
[29] Waddilove, 'The mendacious mortgage' (n 21) 442-448.
[30] See chapter 4 of this thesis.
[31] Waddilove, 'The mendacious mortgage' (n 21) 442-448.
[32] ibid 442-448.
[33] Statute of Acton Burnell 1283 (II Edw I); the Statute of Merchants 1285 (13 Edw I, stat. 3, c. 1); Statute of the Staple 1353 (27 Edw III, st. 2, c. 9); the Statute of the Staple 1532 (23 Hen VIII, c. 6). See also, P Brand, 'Merchants and the Legislative Process in Thirteenth Century England: The Making of the Statutes of Acton Burnel (1283) and Merchants (1285)' in L Gullifer and S Vogenauer (eds), *English and European Perspectives on Contract and Commercial law: Essays in Honour of Hugh Beale* (Bloomsbury 2014) 3-14; Waddilove, 'The mendacious mortgage' (n 21) 442-448.

such statutes were therefore a combination of the four traditional ways of dealing with debts.[34] Finally, a mortgage was any arrangement whereby a loan was secured by a conveyance of real property.[35] By the failure of payment, the debtor lost the title to the property forever to the creditor.[36] Creditors with these 'higher' securities were generally able to get repayment of their debts. However, if a creditor had merely a bond or was an unsecured creditor, the traditional remedies for debt were highly inefficient. They only served one creditor at a time and if there was a run for the assets of the debtor, most of the creditors were at risk of not getting any debt relief at all.

Before the introduction of the Statute of Bankrupts 1543, *capias ad satisfaciendum* was the most common way used by creditors to get repayment from their debtor.[37] However, it should be stressed that *capias ad satisfaciendum* did not help a creditor if a debtor was unable or unwilling to pay his or her debts.[38] It also meant that the unfortunate debtor often lived on charity or at their own expense in debtor's prison, or even died of starvation, whereas the dishonest debtor could live in prison relatively comfortably and could often force his creditors into a composition.[39]

From the early fourteenth century onwards debtors had become more strategic in avoiding debtor's prison, for example, by keeping their house, taking sanctuary or fleeing the country.[40] The common law forbade entry into a man's house for the purpose of executing civil process, ostensibly on the basis of the maxim that 'a man's house is his castle', providing the debtor with

[34] See also, Brand (n 33) 3-14.
[35] Baker, *Introduction* (n 21) 330.
[36] This was subject to equitable intervention. Baker, *Introduction* (n 21) 332-333.
[37] Holdsworth, *History* vol. VIII (n 27) 231.
[38] ibid 231.
[39] ibid 231-233. For example, dishonest debtors might convey their assets away to a relative or friend, and then pretend to be insolvent for their creditors. The idea was to lead the creditors believe that there was no point in keeping the debtor in prison, so that the creditors would accept their losses and stop pursuing the debtor to recover their debts. The relatives or friends of the debtor could provide for the debtor's costs in prison in the meantime.
[40] J Cohen, 'The history of imprisonment for debt and its relation to the development of discharge in bankruptcy' (1982) 3-2 *JLH* 155.

the option of keeping house.[41] Taking sanctuary, basically hiding in a sanctified place, enabled the debtor to save himself from arrest and imprisonment by remaining within a protective enclave.[42] Finally, the most drastic way to avoid creditors was to flee the country all together. These methods to avoid payment were very detrimental for creditors, because as a result their debts were often not repaid. Overall, the traditional ways of dealing with debt proved to be insufficient, and the introduction of the Statute of Bankrupts 1543 addressed some of these shortcomings.

II. Origins of bankruptcy law in England

The Statute of Bankrupts 1543 introduced collective debt collection into English law and gave unsecured (or equal) creditors pro rata relief for the debts due to them.[43] The statute allowed more property of the debtor to be seized than the traditional methods and applied to land, chattels and debts.[44] The State Papers reveal that the enactment of a bankruptcy statute had been considered ten years earlier: a 'bill of bankrupt[s]' was twice read in 1533.[45] After the two readings the bill did not progress further. However, the exact origins of bankruptcy law in England remain unknown, because no other evidence in relation to the parliamentary background of the Statute of Bankrupts 1543 has survived. There are various theories and myths about the origins of bankruptcy law in England.[46] The most convincing theory in the literature is that the Statute of Bankrupts 1543 was a legal transplant from the continent that originated from Roman law.

[41] Cohen (n 40) 155; CG Paulus, 'Antwerp 1515 – A big bang in European Bankruptcy Law' (2018) 22 *Legal History eJournal* SSRN-id3250320 9 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3250320> accessed 3 November 2021. The maxim 'a man's house is his castle' was later formalised by Coke in *Semayne's Case* 5 Co Rep 91a, 77 ER 194.
[42] Cohen (n 40) 155.
[43] The Statute of Bankrupts 1543 (34 & 35 Hen VIII, c. 4). The act was passed in the second session held at Westminster on 22 January 1543. J Gairdner and RH Brodie, *Letters and papers, foreign and domestic, of the reign of Henry VIII. Vol 18: Part I: 1543* (Her Majesty's Stationary Office 1901) 44.
[44] See for a full list of property that could be seized, The Statute of Bankrupts 1543, s. 1.
[45] SP 1/74 f. 129; SP 2/n f. 16. It is not known how similar the terms of the bill were to those of the statute of 1543.
[46] The origins of bankruptcy in England are unclear and more research is needed to examine this question.

a.) Roman bankruptcy and insolvency law

It is clear that the idea of bankruptcy law was nothing new in 1543. It is generally accepted that the ideas behind modern bankruptcy and insolvency law originated in Roman law.[47] The Romans provided creditors already with a so-called *bonorum venditio*, a collective involuntary insolvency procedure which enabled the estate of the debtor to be sold at an auction under the authority of the praetor by a *magister bonorum*.[48] The *bonorum venditio* was only granted if the debtor absconded, hid from his creditors, left a judgment unsatisfied for thirty days or took no steps to pay a debt.[49] The estate would go to the person who offered the creditors the highest percentage of their claims, the creditors being paid pro rata.[50] After the sale the debtor became infamous and would be treated as a criminal.[51]

If the debtor wanted to avoid execution and the infamy, he could apply for a *cessio bonorum*.[52] This procedure in the *lex Iulia (de bonis cedendis)* allowed a debtor, who had become insolvent due to misfortune, to seek permission from the praetor or other magistrate to surrender all his property to his creditors in a debt settlement.[53] If the debtor's request was accepted he would be entitled to a *beneficium competentiae*.[54] This remedy granted the debtor an opportunity to pay his creditors only as much as he reasonably could, and the debtor, after assigning his property to his creditors, was allowed to retain enough to keep himself alive.[55] Towards the end of the Roman Empire, insolvent debtors would frequently petition the emperor for a moratorium, during which time creditors were

[47] Issues of debt and insolvency are much older than Roman law. Early references to insolvency can, for example, be found in old Jewish laws. OO Vroom, 'Origin and history of the bankruptcy law' (1932) 37 *Commercial Law Journal* 127.
[48] Holdsworth, *Vol VIII* (n 27) 229. WW Buckland, *A textbook of Roman law. From Augustus to Justinian. Third edition revised by Peter Stein* (CUP 2007) 402-403.
[49] LE Levinthal, 'The early history of English bankruptcy' (1919) 67 (1) *University of Pennsylvania Law Review* 235.
[50] In contrast, Obenchain argues that the creditors had to divide the proceeds amongst themselves. R Obenchain, 'Roman law of bankruptcy' (1928) 3-4 *Notre Dame Law Review* 185. In Jewish law nearly all creditors were paid in the order of time in which their debts were created. Levinthal (n 49) 233.
[51] MW Frederiksen, 'Caesar, Cicero and the problem of debt' (1966) 56 (1-2) *The Journal of Roman Studies* 135.
[52] ibid.
[53] ibid.
[54] ibid.
[55] ibid.

prohibited from suing the debtor.[56] If successful in his petition, the debtor would be granted letters of respite.[57] In addition, compositions were invented, 'concordia', whereby the amount of debt was reduced upon certain conditions.[58] In the later Empire the law of bankruptcy had become so lenient that debtors could be discharged of their debts merely by taking an oath that they were honest and insolvent.[59] In this way, the Romans had introduced another system for insolvent debtors by misfortune.

b.) Transplant theory

It has been argued that the first bankruptcy statute in England, like every bankruptcy statute established in northern Europe during the sixteenth century, was ultimately derived from the statutory system created in the late-medieval northern Italian towns.[60] It seems a possibility, however, that rather than being directly transplanted from northern Italy, bankruptcy law was transplanted into English law from Antwerp in the 1540s.[61]

Creditors in northern Italian towns traditionally went after the insolvent debtor's assets on a first come, first served basis, regardless of any priorities. This was a problem, because only the most connected and well-informed creditors were able to get debt relief.[62] The bankruptcy legislation in these Italian towns, heavily relying on the Roman system, provided a remedy for that practice.[63] It was in these northern Italian towns that the term 'bankrupt' was introduced, derived from the Italian word *banca rotta*, which means broken bench, supposedly because it was a custom in the Middle Ages to break the benches and counters of merchants who failed to pay their debts.[64]

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[56] I Treiman, 'The law and the insolvent debtor' (1927) 12 (3) *Washington University Law Review* 193.
[57] ibid.
[58] ibid.
[59] ibid.
[60] E Kadens, 'The myths of the customary law merchant' (2012) 90 *Texas Law Review* 1162.
[61] Paulus (n 41) 10.
[62] Kadens, 'The law merchant' (n 60) 1175.
[63] Kadens, 'The law merchant' (n 60) 1175; Holdsworth, *History* vol. VIII (n 27) 229.
[64] Vroom (n 47) 127.

It seems that a succession of similar bankruptcy legislation all over Europe followed after the first enactments in northern Italy.[65] It was suggested by contemporaries, such as Malynes and other 'mercatorists', that the influence of the law merchant had contributed to this process.[66] However, modern scholarship suggests that merchants had merely encouraged local governments to pass bankruptcy legislation.[67] Bankruptcy statutes are national laws and have very little to do with international trade customs.

Despite the similarities in legislation between England and these Italian towns, it seems that the bankruptcy laws of northern Italy were not a direct transplant into English law.[68] It has been suggested that rather than being directly influenced by the bankruptcy laws of northern Italy, English bankruptcy legislation in 1543 might have been more immediately inspired by various ordinances in Antwerp and other ordinances that were applied in the Low Countries more broadly. These ordinances enacted by the emperor Charles V were largely replicated from the Roman and Italian bankruptcy systems: the Ordinances of 1515, 1531 and 1540 dealt with criminal bankruptcy, whereas the Ordinances of 1536 and 1541 dealt with the *cessio bonorum*, the voluntary bankruptcy proceeding of insolvent debtors by misfortune.[69] It has been suggested that in particular the wording of the Statute of Bankrupts 1543 is very similar to that of the early ordinances of Antwerp, and both dealt primarily dealt with fleeing debtors.[70] The economic connections between the England and the Low Countries in the 1540s were very strong, and even if the Dutch law was not transplanted directly into England, it seems a possibility that there was an indirect influence.[71]

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[65] Kadens, 'The law merchant' (n 60) 1175.
[66] G Malynes, *Consuetudo, vel lex mercatoria, or the ancient law-merchant diuided into three parts: According to the essentiall parts of trafficke. necessarie for all statesmen, iudges, magistrates, temporall and ciuile lawyers, mint-men, merchants, marriners, and all others negotiating in all places of the world* (Adam Islip 1622) 221; Kadens, 'The law merchant' (n 60) 1168, 1173. See also, J Sgard, 'Courts at work: bankruptcy statutes, majority rule and private contracting in England (17th-18th century)' (2016) 44 *Journal of Comparative Economics* 452-453.
[67] E.g. Kadens, 'The law merchant' (n 60) 1173-1175.
[68] Paulus (n 41) 5.
[69] ibid 5-8.
[70] More research is needed to ascertain whether this claim is correct. However, the question of the origins of the Statute of Bankrupts 1543 fall outside the scope of this thesis.
[71] Paulus (n 41) 10.

c.) Other explanations of the origins of the Statute of Bankrupts 1543

There are various other explanations of the origins of bankruptcy law in England. It has been put forward that the introduction of the Statute of Bankrupts 1543 was directly linked with the new recognizance in the nature of a statute staple, introduced in 1532.[72] This statute eroded the jurisdiction and independence of the Staples, which had once exercised a nearly exclusive jurisdiction over merchants and trade. As a consequence, the mercantile community needed a new remedy to deal with insolvent debtors.[73] In contrast, another explanation suggests that the Statute of Bankrupts 1543 was merely introduced to deal with a flood of writs of *capias ad satisfaciendum*: too many people were at risk of being confined to debtor's prison and these debtors tried to escape their creditors by fleeing the country, keeping house and taking sanctuary in order to avoid debtor's prison.[74] Finally, it has been suggested that the earliest kind of English bankruptcy was exercised within the probate jurisdiction of the ecclesiastical courts, that is, the probate bankruptcy jurisdiction.[75] On this view, English bankruptcy practice has antecedents and perhaps even has roots in the canon law administered by the church courts. The last will of the decedent could not be carried out under canon law if this meant defrauding creditors, and the church courts provided the bankruptcy probate jurisdiction to anyone.[76]

III. Statutory bankruptcy law

Whatever the position in relation to the origins of bankruptcy law in England, in the period between 1543 and 1628 English bankruptcy law was an asset-stripping mechanism, designed only to recompense creditors pro rata, and ignoring the needs of the debtor.[77] An insolvent debtor had

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[72] WJ Jones, 'The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period' (1979) 69 (3) *Transactions of the American Philosophical Society* 11, 15.
[73] ibid 11.
[74] Holdsworth, *History* vol. VIII (n 27) 231.
[75] RH Helmholz, 'Bankruptcy and probate jurisdiction before 1571' (1983) 48 (2) *Missouri Law Review* 418, 427-429.
[76] ibid.
[77] E.g. Holdsworth, *History* vol. VIII (n 27) 229-245. Standard historical sources concerned with legislation in the period do not go into detail about bankruptcy. GR Elton, *Reform and Renewal* (CUP 1973) only mentions a failed bankruptcy bill and does not give further details. SE Lehmberg similarly does not specifically address the bankruptcy statutes. SE Lemberg, *The later parliaments of Henry VIII* (CUP 1977).

to commit an act of bankruptcy, a triggering event, such as fleeing the country or making a fraudulent conveyance, that enabled creditors to petition the lord chancellor for a bankruptcy proceeding.[78] The lack of sympathy for the bankrupt can be explained by the criminal nature of bankruptcy in this period. Bankrupts were assumed to have acted fraudulently and, in a similar fashion to Roman law, were therefore considered criminals. As a consequence, it seems that bankruptcy law was strongly associated with social stigmatisation.[79] It is stressed in the literature that before the enactment of the Bankrupts Acts 1705 and 1711 a bankrupt was generally not able to get a discharge of debts.[80] It seems that there was only one exception to this rule: commissioners of bankrupts could make a composition between the bankrupt and his or her creditors, and could discharge the bankrupt of his or her debts at the commission's mediation stage before an actual bankruptcy proceeding commenced.[81] The literature suggests that bankruptcy law had very little application in the common law courts,[82] and does not explain the relationship between statutory bankruptcy and Chancery practice in the period 1543 to 1628.[83] Commissions of bankrupts often dealt with bankruptcies,[84] but it has been suggested that the Court of Chancery did not review any such cases before Lord Nottingham's time in the 1670s.[85]

It has also been suggested that the annual average of bankruptcies for the late Elizabethan and Jacobean period may not have been much above ten, but that more commissions were probably

[78] E.g. Holdsworth, *History* vol. VIII (n 27) 237-238.
[79] Muldrew (n 19) 272-298. William Shakespeare emphasised the social stigmatisation of bankrupts in his play *As you like it* at 2.1.55. See, M Guilter, 'Shakespeare and bankruptcy' (2012) 20 *Insolv LJ* 109.
[80] Bankrupts Act 1705 (4 & 5 Ann c. 4); Bankrupts Act 1711 (10 Ann c. 15). Holdsworth, *History* vol. VIII (n 27) 229-230; E Kadens, 'The last bankrupt hanged: balancing incentives in the development of bankruptcy law' (2010) 59 (7) *Duke Law Journal* 1229-1319.
[81] JP Dawson, 'The Privy Council and Private law in the Tudor and Stuart Periods: I', (1950) 48 *Michigan Law Review* 393.
[82] Holdsworth, *History Vol. VIII* (n 27) 241. The search term 'bankr*' on the Justastat CD-Rom and Westlaw resulted only in 39 relevant printed reports, of which 10 were another report of the same case found in the same search. Most of the cases dealt with slander in relation to bankruptcy. The disputes were about whether calling someone a bankrupt was actionable in various situations. However, this is not relevant for the development of the Chancery practice in relation to bankruptcy matters.
[83] Chapter 1 and 2 of the thesis address this topic.
[84] Jones, 'Foundations of bankruptcy' (n 72) 33-35. See also, <http://xmera.co.uk/bankrupts.pdf> accessed 10 November 2021.
[85] DEC Yale, *Lord Nottingham's Chancery Cases* vol. I (SS 73) (Quarich 1957) cxiv-cxv. Considering that the lord chancellor was given the sole bankruptcy jurisdiction in 1571, this claim will be addressed in the thesis.

granted in the depression years,[86] and that the number of bankruptcy commissions was very low before 1652 due to the high costs involved.[87] Nevertheless, it seems that bankruptcy law played an important role in English law and society in the period 1543 to 1628, during which parliament supplemented the first bankruptcy statute three times, in 1571, 1603 and 1624.[88] In addition, bankruptcy law appealed very much to the imagination in contemporary culture, most notably in the plays of William Shakespeare.[89] Shakespeare uses the idea of bankruptcy in 14 separate works, namely in three poems and 11 plays.[90] In the plays bankruptcy is used as an event in a scene, for example, in *The Merchant of Venice* and *The Life of Timon of Athens*,[91] but bankruptcy is also used metaphorically.[92] In *Romeo and Juliet*, when Juliet falsely believes that Romeo is dead, she proclaims 'O, break, my heart, poor bankrupt, break at once! To prison, eyes; ne'er look on liberty'.[93] It seems that Shakespeare assumed that his audience understood the hopelessness that came with bankruptcy when comparing Juliet's breaking heart with a bankruptcy. Juliet sees her situation as hopeless, and like a fraudulent bankrupt, she has no alternative to debtor's prison.[94]

IV. Insolvency law

As in Roman law, England had a legal mechanism to deal with insolvent debtors by misfortune, probably since the enactment of the Statute of Bankrupts 1543.[95] It has been argued that before

[86] Jones, 'Foundations of bankruptcy' (n 72) 5.
[87] Muldrew (n 19) 283. Muldrew's book mainly deals with bankruptcies in the later seventeenth century, and mainly relies upon manuscript evidence from local courts, rather than material relating to the Court of Chancery or other national courts.
[88] The Statute of Bankrupts 1543 (34 & 35 Hen VIII, c. 4); Bankrupts Act 1571 (13 Eliz I, c. 7); Bankrupts Act 1604 (1 Jac I, c. 15); Bankrupts Act 1624 (21 Jac I c. 19). This seems to be a large number of amendments for something that was happening very rarely.
[89] E.g. Guilter (n 79) 105. Thomas Middleton is another example of a playwright inspired by bankruptcy. See, T Middleton, *A mad world, my masters and other plays* (1627, reprinted OUP 2009). Amanda Bailey deals with credit and debt in English literature in the early modern period. However, she does not focus on bankruptcy law. A Bailey, *Of Bondage, Debt, property, and personhood in early modern Englan*d (University of Pennsylvania Press 2013).
[90] Guilter (n 79) 119.
[91] W Shakespeare, *The Merchant of Venice* (1596-1597, reprinted OUP 2008). See for example the following scene: 4.1.120-122; W Shakespeare and T Middleton, *Timon of Athens* (1606, OUP 2008). See for example the following scene: 4.1.8.
[92] W Shakespeare, *Romeo and Juliet* (1595, reprinted OUP 2008). See the following scene: 3.2.57.
[93] ibid.
[94] Guilter (n 79) 108. It is possible that Shakespeare mixed up the terminology of bankruptcy and insolvency. Bankrupts were after all always fraudulent. Insolvent debtors could be fraudulent or honest.
[95] See chapter 3.

1705 English law did not make a distinction between honest and fraudulent debtors.[96] This is correct in relation to statutory bankruptcy, however, the insolvent debtor and his or her creditors could get equitable relief in the Privy Council, the Court of Requests and the Court of Chancery. The lord chancellor, similar to the praetor in Roman law, was able to exercise his equitable jurisdiction in the Court of Chancery.[97] The equitable procedure seems to have existed in parallel to the bankruptcy statutes. England seems to have been unusual in northern Europe in the period by not legislating in relation to insolvent debtors,[98] and it seems that insolvency law in the equitable courts has therefore largely been ignored in the literature.[99]

It has been suggested that a practice of granting protections to insolvent debtors existed in England in the sixteenth century.[100] Protections were, it seems, injunctions issued by the Privy Council against proceedings at common law, which in some cases were expressed to be issued on behalf of the Queen (called royal protections).[101] Treiman has argued that litigants might seek a protection from the Privy Council, before starting proceedings in the Court of Chancery.[102] The equitable courts were also able to make compositions or debt settlements between an insolvent debtor and his or her creditors.[103] At least from the reign of James I, there was a procedure in England in which the majority of creditors could be bound to a so-called bill of conformity, a debt settlement

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96 E.g. Holdsworth, vol. VIII (n 27) 229-230; Kadens, 'The last bankrupt hanged' (n 80) 1229-1319.

97 Jones, 'Foundations of bankruptcy' (n 72) 35-36. Jones does not mention the Court of Requests. See for this function in the Court of Requests, DA Smith, 'The error of young Cyrus: The bill of conformity and Jacobean Kingship, 1603-1624' (2010) 28 (2) *L and Hist Rev* 307-341.

98 J Sgard, 'The history of market discipline: bankruptcy, renegotiations, and debt discharge in England and France (sixteenth-nineteenth century)' (EHES Conference Geneva, 2009).

99 Holdworth is one of the few scholars who draws the distinction between statutory bankruptcy and the activities of the Privy Council. Holdsworth, *History* vol. VIII (n 27) 233-234.

100 Smith, 'The error of young Cyrus' (n 97) 311-313. The protections, almost always for the period of a year, were sometimes granted on the unanimous requests of the creditors. JP Dawson, 'The Privy Council and Private law in the Tudor and Stuart Periods: II' (1950) 48 *Michigan Law Review* 631 n128.

101 Cadwallader argues that *Ramsey v Brabson* (1583-84) Choyce Case 174, 21 ER 101 was a bill of conformity. FJJ Cadwallader, 'In pursuit of the merchant debtor and bankrupt: 1066-1732. Vol II' (Doctoral thesis, University of London 1965) 500-501. However, chapter 3 will show that this claim is incorrect. Dawson also states that protections could also be awarded by the Privy Council. Dawson (n 100) 631 n128.

102 I Treiman, Majority control in compositions: Its historical origins and development' (1938) 23 (5) *Virginia Law Review* 507-527.

103 It seems that the *Johnson Case* of 1553 is an early insolvency case. Kadens, 'The law merchant' (n 60) 1175 n79. This case was not part of the survey used for this dissertation. The survey showed a settlement as early as 1551. However, it possible that *Johnson v Wolmer* (1551) dealt with the same Johnson as in the *Johnson Case* of 1553. See chapter 3 of this thesis.

to which only a majority of creditors agreed. English law was more relaxed in this respect than the Roman system, which demanded the full consent of all creditors for a debt settlement.[104] It has been suggested that bills of conformity were first awarded in the Privy Council, then the Court of Requests and eventually ended up in the Court of Chancery.[105] It has also been argued that a discharge of debts for insolvent debtors by misfortune only became available after the enactment of the Bankrupts Act 1705 and 1711.[106] However, most existing scholarship fails to consider that litigation involving bankruptcy and insolvency matters did not take place in the common law courts, but in the Privy Council, the Court of Requests and the Court of Chancery, as well as before commissions of bankrupts.[107] This thesis aims to fill this gap in the literature in relation to the Chancery practice.

V. Research methodology

It seems that the lack of reported cases decided in the Court of Chancery involving bankruptcy or insolvency is one of the reasons why not much is known on the subject.[108] There are only seven substantive 'reports' of this type decided in the period between 1543 and 1628. Most of these reports are merely summaries or partial accounts of the cases, and do not give a report of the full decision. Six of these accounts are published in Ritchie's *Reports of Cases decided by Francis Bacon.*[109]

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[104] Treiman, 'Majority control in compositions: Its historical origins and development' (1938) 23 (5) *Virginia Law Review* 520.

[105] DA Smith, 'The error of young Cyrus' (n 97) 307-341. See also chapter 3 of this thesis.

[106] Bankrupts Act 1705 (4 & 5 Ann c. 4); Bankrupts Act (10 Ann c. 15). See for bankruptcy and insolvency law after 1705 also E Kadens, 'The last bankrupt hanged' (n 80) 1229-1319; E Welbourne, 'Bankruptcy before the era of Victorian reform' (1932) 4-1 *Cambridge Historical Journal* 51-62; IPH Duffy, 'English bankrupts, 1571-1861' (1980) 24 (4) *The American Journal of Legal History* 283-305; IPH Duffy, *Bankruptcy and insolvency in London during the Industrial Revolution* (Routledge 1985); J Hoppit, *Risk and failure in English business. 1700-1800* (CUP 1987).

[107] For exceptions, see DA Smith, 'The error of young Cyrus' (n 97) 307-341; Jones, 'Foundations of bankruptcy' (n 72) 40-48; I Treiman, 'majority control' (n 102); Sgard, 'The history of market discipline' (n 98); Cadwallader (n 101) 499-507.

[108] See for the sources of reported cases from the period, H Horwitz, *Chancery Equity Records and Proceedings. 1600-1800. A guide to documents in the Public Record Office* (2nd edn, HMSO 1998) 111. Bryson's Selden Society volumes *Cases concerning Equity* were published after the publication of Horwitz's book.

[109] These cases are *Ryder v Turner* (1617), *Tyffin v Hart* (1619), *Brooke (or Little) v Goode* (1619), *Bourne v Ironmonger* (1619), *Finch v Hicks* (1620) and *Overman v Wright* (1620). J. Ritchie, *Reports of cases decided by Francis Bacon, baron Verulam, viscount St. Albans, lord chancellor of England, in the High Court of Chancery* (1617-1621) (Sweet & Maxwell 1932) 161-164. Apart from *Ryder v Turner* (1617) all these cases are also included in Tothill. See for a concise summary of these cases, D Graham and J Tribe, 'Bacon in debt: The insolvency judgments of Francis, Lord Verulam' (2006) 22 *IL and P* 11.

All six cases deal with bills of conformity in one way or another. Byson's Selden Society edition *Cases concerning equity and the courts of equity* includes a transcription of a manuscript report of one bankruptcy case, *Allen's case* (1614).[110] Bryson's edition also includes three very short reports of decisions involving bankruptcy.[111] Finally, there are eight references to cases dealing with bankruptcy or insolvency in Tothill's reports.[112] One of these cases, *Wood v Hayes* (1606) deals with statutory bankruptcy, all the others deal with insolvent debtors.[113] All the conformity cases mentioned in Tothill were decided between 1610 and 1620.[114]

The four readings from the Inns of Court on bankruptcy have been consulted. There are two readings on the Bankrupts Act 1571 and two readings on the Bankrupts Act 1624.[115] However, all four readings provide nothing more than a literal explanation of the respective bankruptcy statutes, which does not give any information about the Chancery practice in the period.

This dissertation therefore uses the manuscript record of the Court of Chancery, previously unexplored for this purpose, in order to examine the Chancery practice involving bankruptcy and insolvency matters between 1543 and 1628. The time period 1543 to 1628 has been chosen for its

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[110] WH Bryson, *Cases concerning equity and the courts of equity 1550-1660* SS vol 117 387-391. The case is discussed in chapter 2 of the thesis.

[111] *Whall [and] Neve [v] Denny* (1588), *Peart's Case* (1591) and *Holmden v Allen* (1597). WH Bryson, *Cases concerning equity and the courts of equity 1550-1660* SS vol 118 187, 190, 219. All three cases are bankruptcy cases, one is procedural and the other two deal with who would be considered a bankrupt under the statute of bankrupts. *Whall [and] Neve [v] Denny* (1588) sets out that all conveyances after one becomes a bankrupt are void under the statute of bankrupts. *Peart's Case* (1591) sets out that someone who would appear and put in bail to actions at law and does not keep his house or yield himself to prison is not within the scope of the statutes of bankrupts. *Holmden v Allen* (1597) explains that 'withdrawing of a man's self or voluntary yielding to prison' made someone a bankrupt.

[112] Tothill has been studied from the Jutastat-CD Rom.

[113] One of the cases referred to in Tothill, *Johnson v Pudicot* (1612), is referred to as *Johnson v Endicott* in the record.

[114] Furthermore, there is a testimonial of character and certificate of Master Sir Eubule Thelwall in Monro's *Acta Cancellariae*. These documents relate to the cases *Rogle v Rogle* (1608) and *Tassel v Shelly* (1620). Both cases deal with statutory bankruptcy. The testimonial relates to the character of a certain George Ruggell, or Rogle, who was accused of being a bankrupt. *Tassel v Shelly* dealt with the interpretation of the statute, namely whether the defendant could be considered a bankrupt. It was established that Ruggell was a trader of iron and therefore within the scope of the bankruptcy statutes. C Monro, *Acta Cancellariae, or selections from the record of the Court of Chancery, remaining in the office of reports and entries* (William Benning 1847).

[115] Reading on 13 Eliz I, c. 7 by Nicholas Fuller BL MS Hargrave 398 ff. 173-170 (reversing); reading on 13 Eliz I, c. 7 by 'John Stone of Grey's Inn' BL MS Harley 4506 f. 107; BL MS Harley 7191 f. 81. Sir John Baker argues that this reading is wrongly attributed to John Stone. JH Baker, *Readers and readings in the inns of court and Chancery* (Selden Society 2000) 288, 611-612; reading on 21 Jac 1, 19 (1628 LI) by John Barkesdale BL MS Additional 25231 ff. 49-59v; Harvard Law School MS 1089, also published on microfiche IDC, H1777/85-89); reading on 21 Jac I, 19 (1629) by Philip Jermyn Cambridge University Library MS dd 5.51 818 ff. 81-87v.

significance in relation to statutory bankruptcy. The first bankruptcy statute in England was enacted in 1543. In the period 1543 to 1628, parliament supplemented this statute three times, in 1571, 1603 and 1624.[116]

The dissertation uses the Chancery Entry Books of Decrees and Orders, The National Archives (TNA) class C 33; the masters' reports, TNA class C 38; and the Chancery Decree Rolls, TNA class C 78. Photographs of most of the archival materials are available on the Anglo-American Legal Tradition (AALT) website, and the originals are held in The National Archives in Kew. In addition, the Bridgewater and Ellesmere manuscripts, class EL, have been consulted in the Huntington Library (CA, USA), as well as treatise literature, printed law reports, manuscript reports, and legal and historical secondary literature to put the findings of the survey of the Chancery record into a broader context.

This dissertation is primarily based on a sample of the Chancery entry books of decrees and orders (class C 33) and the Decree Rolls (class C 78). There is no subject index of cases in the Chancery entry books. In order to cover the period 1543 to 1628 the following Michaelmas terms in the entry books have been examined: C 33/37 (Michaelmas 1568-69); C 33/77 (Michaelmas 1588-89); C 33/97 (Michaelmas 1599-1600); C 33/111 (Michaelmas 1606-07); C 33/119 (Michaelmas 1610-11); C 33/127 (Michaelmas 1614-15); C 33/135 (Michaelmas 1618-19); C 33/139 (Michaelmas 1620-21); C 33/143 (Michaelmas 1622-23); C 33/157 (Michaelmas 1627-28). The decision to focus on the Michaelmas terms was based on the fact that the Court of Chancery tended to decide more cases in Michaelmas term than in the other terms.[117] The focus of the survey was on the lord chancellor/keeperships from Ellesmere onwards, because the literature suggested that bankruptcy was very rare before that time.[118] This was confirmed by the survey of Michaelmas 1568-69 which

[116] The Statute of Bankrupts 1543 (34 & 35 Hen VIII, c. 4); Bankrupts Act 1571 (13 Eliz I, c. 7); Bankrupts Act 1604 (1 Jac I, c. 15); Bankrupts Act 1624 (21 Jac I c. 19).
[117] However, for the year 1599-1600 all terms have been examined. This year was surveyed first, after which it was decided to focus on the Michaelmas Terms only.
[118] However, all the entry books from 1543 and 1550 have been examined: C 33/1 (1543-44 and 1544-45); C 33/2 (1545-46, 1546-47 and 1547-48); C 33/3 (1548-49 and 1549-50) in an attempt to find the first bankruptcy case.

resulted in no bankruptcy cases, and of Michaelmas 1588-89 which produced four cases. A large number of the cases discovered in the entry books have been followed up in full. This means that the entire case was traced through the records (by using the alphabets of the entry books) and that the pleadings and masters' reports, where available, were also consulted. Some cases were not followed up, if the main dispute and outcome of the case was clear from the outset.

The Chancery decree rolls (C 78's) were surveyed by using and relying on the calendars between 1543 and 1628 provided on the AALT website. The search term used to search the calendars was 'bankrupt', which would include both 'bankrupt(s)' and 'bankruptcy', as well as 'conformity' and 'settlement'. The search term 'settlement' resulted in many results, as this not only includes settlements after insolvency, but also, for example, land disputes. Only the summary of the cases given in the calendar were examined to decide whether to read a case in full or not.

The Bridgewater and Ellesmere manuscripts in the Huntington Library were also consulted, in particular the official legal papers (XXXII) of Thomas Egerton, catalogued in the second part of the Calendar of the Bridgewater and Ellesmere Manuscripts Volume Before 1617. For this thesis the dockets of Privy Seals have been consulted (EL 3034-5646), which are part of that collection.

Finally, the Acts of the Privy Council and State Papers have been consulted with the aim of providing contextual material.[119]

VI. Argument of the thesis

This thesis presents the first detailed doctrinal analysis of the Chancery practice in relation to both the bankruptcy and insolvency between 1543 and 1628. The thesis shows that the Court of Chancery had two functions in relation to bankruptcy and insolvency. The survey shows that the

[119] All volumes of the Acts of the Privy Council dating between 1543 and 1628 have been read. The State Papers from that period have been consulted by search terms, bankr*, insolvent, bill of conformity and debt settlement. The terms trade, merchant, conformity, debt settlement, debtor and fugitive had provided too many entries. Petitions to the Crown to issue commissions of bankrupts found in the State Papers have been deliberately excluded from the analysis, because it is not clear whether such petitions were dealt with by the Court of Chancery, the Privy Council or Parliament.

Court of Chancery exercised a review function in relation to the decisions of the commissions of bankrupts which were authorised to deal with bankruptcy matters in the first instance, including declaring debtors bankrupt. This meant that the Court of Chancery effectively operated as an appellate court for the decisions of commissions of bankrupts. In addition to the review function, the Court of Chancery also had an equitable function in relation to insolvency matters. In its equitable function the Court of Chancery dealt with issues concerning insolvent debtors that were not regulated by statutory bankruptcy or the common law.

This thesis breaks with conventional scholarship and shows that the Chancery practice in the foundation years appears to have been very humane, with special care for the most vulnerable in society (e.g. widows, orphans and the elderly). The horror stories of debtor's prison as described by Charles Dickens in *Little Dorrit* (1855-57) and elsewhere,[120] seem not to have been as prevalent in the earlier period. The thesis shows that the Chancery practice in the period in relation to bankruptcy and insolvency was more evolved than the bankruptcy statutes suggest. 'Modern' bankruptcy principles and ideas, such as the concept of insolvency by misfortune, voluntary bankruptcy, compositions, majority control and the discharge of debts, which have generally been attributed to the bankruptcy statutes of 1705 and 1711, were already applied in the Court of Chancery in this earlier period. The Court of Chancery was discharging debts in a liberal, humane, debtor-focused fashion as early as 1551.[121] Political struggles in 1621, unrelated to bankruptcy, involving the impeachment of Francis Bacon, and fraudulent practices by certain debtors unfortunately ended this highly pragmatic, liberal and useful practice.

Bankruptcy and insolvency law are extremely useful tools to rehabilitate debtors back into the financial world. Despite its economic importance, not much is known about the early foundations and early development of bankruptcy and insolvency law in England. This thesis helps to provide

[120] Charles Dickens writes about debtor's prison in his novels *Little Dorrit, The Pickwick Papers* and *David Copperfield.* <https://media.nationalarchives.gov.uk/index.php/the-real-little-dorrit-charles-dickens-and-the-debtors-prison/> accessed 14 February 2021.
[121] *Johnson v Wolmer,* 3 November 1551 C 78/6/28 m. 13 [IMG_0027].

such an understanding, and shows how the Court of Chancery tried to navigate debtor-creditor problems in an emerging credit economy.

VII. Structure of the thesis

This thesis sets out the Chancery practice in relation to bankruptcy and insolvency between 1543 and 1628, and is structured in two parts. Part I deals with the review function of the Court of Chancery in relation to bankruptcy cases. Chapter 1 sets out bankruptcy law at first instance. It sets out the provisions of the bankruptcy statutes of 1543, 1571, 1603 and 1624,[122] as well as the practice of commissions of bankrupts, which dealt with bankruptcy in the first instance. Chapter 2 sets out the Chancery practice involving bankruptcy.

Part II deals with the equitable function of the Court of Chancery involving insolvent debtors. Chapter 3 sets out a chronological overview of debt settlements, considering the details of the different types of settlements, and also examines judicial and parliamentary interference with 'bills of conformity'. Chapter 4 sets out the Chancery practice in relation to insolvent debtors. It examines both substantive rules and the procedure and practice of the court. Chapter 5 puts the findings of the survey into a contextual framework. Ultimately, it will be shown that in relation to bankruptcy matters the Court of Chancery was mainly a review court and often referred cases back to commissions of bankrupts. However, in some circumstances the Chancery would apply more discretion, especially if a case involved orphans. The Chancery practice involving insolvent debtors showed even more discretion, and the Court of Chancery developed a consistent practice which balanced the interests of the debtor and the creditors. Overall, before 1620 the Court of Chancery seems to have been a humane, debtor-friendly court, which already applied principles found in

[122] The Statute of Bankrupts 1543 (34 & 35 Hen VIII, c. 4); Bankrupts Act 1571 (13 Eliz I, c. 7); Bankrupts Act 1604 (1 Jac I, c. 15); Bankrupts Act 1624 (21 Jac I, c. 19).

modern bankruptcy law, which have previously generally been attributed to the later bankruptcy statutes of 1705 and 1711.[123]

[123] Bankrupts Act 1705 (4 & 5 Ann c. 4); Bankrupts Act (10 Ann c. 15).

PART I

THE REVIEW FUNCTION

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PART I

THE REVIEW FUNCTION OF THE COURT OF CHANCERY

I. Introduction

The survey shows that the Court of Chancery exercised a review function in relation to the decisions of the commissions of bankrupts which were authorised by the Bankrupts Act 1571 to deal with bankruptcy matters in the first instance, including declaring debtors bankrupt.[1] This meant that the Court of Chancery effectively worked as an appellate court for the decisions (or 'certificates') of commissions of bankrupts.[2]

David Yale has argued that the review function was a development under Nottingham LC in the 1670s.[3] Yale acknowledged that there was control by the Chancery of misconduct by commissions of bankrupts before Lord Nottingham's time,[4] but argued that the practice of reviewing decisions or proceedings of commissioners was only established during the chancellorship of Nottingham.[5] However, the survey shows that the Court of Chancery already exercised this function in the Elizabethan period.[6] S*tonehurst v Griffith* (1587) was the first bankruptcy review case to appear in the survey.[7] The case dealt with the review of the substantive question of whether a plaintiff was

[1] Bankrupts Act 1571, s. 2. It seems that parliament could also declare debtors bankrupt by a private Act. See, e.g. An Act for relief of the creditors of Sir Wm. Dillon Knight, and Robert Dillon Esquire, his son, and heir apparent, and for the sale of their lands, for payment of their debts. 'House of Commons Journal Volume 1: 02 May 1614', in *Journal of the House of Commons: Volume 1, 1547-1629* (London 1802) 470-471. *British History Online* <http://british-history.ac.uk/commons-jrnl/vol1/pp470-471> accessed 23 February 2021; An Act to make Rich. Pigott, the elder, liable under the Statutes touching Bankrupts, to the intent, that his creditors and sureties may be relieved against him for their just debts and engagements. 'House of Commons Journal Volume 1: 05 June 1626', in *Journal of the House of Commons: Volume 1, 1547-1629* (London 1802) 866-867. *British History Online* <http://www.british-history.ac.uk/commons-jrnl/vol1/pp866-867> accessed 23 February 2021.

[2] Yale uses 'review' and 'appellate' function interchangeably. DEC Yale, *Lord Nottingham's Chancery Cases* vol. I (SS 73) (Quarich 1957) cxiv-cxv.

[3] ibid.

[4] This view is likely to have been based on the information provided in Tothill's reports. *Wood v Hayes* (1606) is the only bankruptcy case listed in Tothill, and deals with the misconduct of commissioners. See chapter 2.

[5] Yale (n 2) cxv.

[6] No decided bankruptcy cases were found in the survey before the enactment of the Bankrupts Act 1571.

[7] *Stonehurst v Griffith*, 14 November 1587 C 33/75 f. 163v [IMG_0165a]. The first case found in the survey involving a bankrupt was *Comye v Denale* (1580). *Comye v Denale*, 25 October 1580 C 78/68/16 m. 24 [IMG_0180]. The case was not a regular review case. It dealt with a petition by the children of George Comye, a musician to Queen Elizabeth, seeking recovery against Augustine Denale, a bankrupt, who had owed money to their late father. The case had already

considered a 'buyer or seller', and whether a commission of bankrupts had therefore been lawfully sued out against him.[8] It seems that the review function emerged following the Bankrupts Act 1571, by which the lord chancellor was granted the sole bankruptcy jurisdiction.[9]

The survey shows that the Court of Chancery exercised a review function in relation to: (1) questions of substantive law based on the bankruptcy statutes; (2) evidential matters and procedural issues; (3) corruption and fraud by others than the bankrupt; and (4) compositions. Reviews of compositions included enforcement, as well as correction, of decisions of commissions of bankrupts.

The survey shows that in general the Court of Chancery would apply the rules of the bankruptcy statutes and refer the case back to a commission of bankrupts or one of the masters of the court. In exceptional circumstances the Court of Chancery referred the case to another court. However, in the case of corruption and fraud by others than the bankrupt, or compositions, the Court of Chancery often seems to have decided the case itself.[10] The survey shows that in that instance, the Court of Chancery showed more discretion than would have been available in statutory bankruptcy proceedings and would often take the circumstances of the bankrupt and their descendants into account.

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been dealt with in the Privy Council in 1578. See [Meeting], 16 November 1578 PC 2/12 f. 309. It seems that there was no interaction between the Privy Council and the Court of Chancery in relation to this particular case.

[8] *Stonehurst v Griffith*, 14 November 1587 C 33/75 f. 163v [IMG_0165a].

[9] Bankrupts Act 1571, s. 2. It seems that before the Bankrupts Act 1571 committees (consisting of members of the Privy Council, lord chancellor, chancellor of the Exchequer and judges of the King's Bench and Common Pleas) would deal with the tasks that were later executed by commissioners of bankrupts. It is unclear whether the Court of Chancery had a review function in relation to decisions of committees before the 1571 Act. The lord chancellor did not have the sole bankruptcy jurisdiction before the 1571 Act and no review cases were found in the survey before the enactment of the 1571 Act. Further research should be conducted to find a conclusive answer as to whether the review jurisdiction predated the 1571 Act or whether the exercise of the function was a consequence of subsequent interpretation of the statute.

[10] The sample shows a relatively small number of cases of this type, so it is possible that the Court of Chancery referred cases of this type back to the commissions of bankrupts in other instances.

II. Structure of Part I

Chapter 1 will set out the contemporary law of bankruptcy as applied by commissioners of bankrupts at first instance, starting with the provisions of the bankruptcy statutes of 1543, 1571, 1604 and 1624. It will also set out the practice of commissions of bankrupts based on the dockets of Puckering LK and Coventry LK. Chapter 2 will set out the detail of the Chancery practice in relation to the review function. The first part of the chapter deals with the general characteristics of review cases involving bankrupts. The second part of the chapter deals with various matters that the Court of Chancery reviewed: (1) substantive law; (2) evidential and procedural matters; (3) corruption by others than the bankrupt; and (4) compositions. The second part deals with the outcomes of the Chancery review process. The Court of Chancery could either refer the case back to a commission of bankrupts, refer the case to another court, or decide on the matter itself. The third and final part of the chapter will deal with a contextual analysis of the Chancery practice in relation to its review function.

Chapter 1

Bankruptcy law at first instance

Commissions of bankrupts dealt with bankruptcy matters at first instance. When commissioners of bankrupts made a decision or 'certificate' of a bankruptcy, they applied the law as set out in the various bankruptcy statutes. WJ Jones suggested that the annual average number of bankruptcies in the late Elizabethan and Jacobean periods may not have been much over ten, allowing for the increase in the number of commissions of bankrupts granted in the depression years.[1] However, it seems unlikely that parliament would have supplemented a statute three times if it was only applicable in a few cases a year. It seems probable that more bankruptcy cases were decided by commission of bankrupts, which might also have resulted in mediation. It appears that evidence to that effect has not survived,[2] though a list of bankruptcies in the Lansdowne Papers shows that in 1571 forty bankruptcies took place in various parts of England.[3]

This chapter will set out the bankruptcy statutes that were passed between 1543 and 1628 and applied by the Court of Chancery in reviewing the decisions of commissions of bankrupts. The chapter will also consider the practice of commissions of bankrupts during the time of Puckering LK and Coventry LK.

I. The bankruptcy statutes

The first bankruptcy statute in England was enacted in 1543. In the period 1543 to 1628, parliament supplemented this statute three times, in 1571, 1603 and 1624.[4] The most radical

[1] WJ Jones, 'The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period' (1979) 69 (3) *Transactions of the American Philosophical Society* 5. Jones himself accepts that the number might be an underestimate. Jones, 'Foundations of bankruptcy' (n 1) 6. The total number of bankruptcy cases reviewed by the Court of Chancery would not provide evidence of the total number of bankruptcies, because it seems likely that only a small proportion of the decisions of commissions of bankrupts would be reviewed.
[2] See the introduction of this thesis.
[3] BL MS Lansdowne 13 f. 54. These bankruptcies mainly took place in London, but also in towns, such as York and counties, such as Devon. The debts owed were mainly between a few hundred and a few thousand pounds.
[4] The Statute of Bankrupts 1543 (34 & 35 Hen VIII, c. 4); Bankrupts 1571 (13 Eliz I, c. 7); Bankrupts Act 1604 (1 Jac I, c. 15); Bankrupts Act 1624 (21 Jac I c. 19).

change for the Court of Chancery in relation to bankruptcy was that the lord chancellor was given the sole bankruptcy jurisdiction in the Bankrupts Act 1571 and was empowered to grant commissions of bankrupts. The involuntary bankruptcy proceeding, by suing out a commission of bankruptcy, was a private action, which could only be initiated by the creditors of the debtor. Bankruptcy was considered a crime in this period. Two attempts were made to make bankruptcy a felony,[5] but it remained a misdemeanour in the statutes. The 1604 and 1624 Acts made provision for corporal punishment in certain circumstances.[6] Fraud and intent were explicitly part of the bankruptcy statutes. In the early years of bankruptcy law it was not possible for there to be an 'honest' bankrupt. A person who was insolvent by misfortune was not within the scope of the various bankruptcy statutes, and had to seek relief with the support of the majority of his creditors in the Privy Council, Court of Requests or Court of Chancery.[7] A discharge of the bankrupt was never part of the bankruptcy statutes in this period (although, it could be achieved by mediation by the commissions of bankrupts at first instance), and all remedies remained available to the creditor to satisfy his debt.[8] Common law bankruptcy was entirely aimed to relieve creditors; the position of the debtor was not taken into account in any way. This section will set out the bankruptcy provisions of each Act.

a.) The Statute of Bankrupts 1543

The Statute of Bankrupts 1543,[9] or 'An act against such persons as do make bankrupt', was the first bankruptcy statute in England.[10] The main purpose of the Act was to facilitate execution against debtors who left their usual dwelling place ('flee to parts unknown') or stayed in their houses ('keep their houses') in order to avoid paying their creditors their due debts, 'but at their

[5] Provision for this was part of the bill for the Statute of Artificers (1559) and the bill for the Bankrupts Act 1624. See below for details.
[6] Bankrupts Act 1604 (1 Jac I, c. 15), s. 4; Bankrupts Act 1624 (21 Jac I, c. 19), s. 6.
[7] See part 2 of this thesis.
[8] See the introduction of this thesis.
[9] There is some debate about whether the Statute of Bankrupts 1543 was passed in 1542 or 1543. SE Lehmberg, *The Later Parliaments of Henry VIII, 1536–47* (CUP, 1977) 162, 181.
[10] Statute of Bankrupts 1543 (34 & 35 Hen VIII, c. 4).

own wills and pleasures consume the substance obtained by credit of other men, for their own pleasures and delicate living, against all reason, equity, and good conscience'.[11] As has been seen, it seems that this legislative intervention was necessary because the common law was not able satisfactorily to deal with these kinds of debtors.[12]

The Act conferred the bankruptcy jurisdiction upon various public officials: the lord chancellor or lord keeper, lord treasurer, lord president, lord privy seal, and other members of the Privy Council, as well as the chief justices of either bench.[13] Every creditor could make a complaint in writing against their debtor (who had fled to 'parts unknown' or kept his house) to a committee of at least three of these public officials, whereof the lord chancellor or keeper, lord treasurer, lord president or lord privy seal had to be one.[14]

The Statute of Bankrupts 1543 provided various punitive remedies for the creditor to enforce the payment of debts by the bankrupt. After all, bankruptcy was considered a crime, a misdemeanour.[15] The committee had the authority to imprison debtors, and to seize and sell property in order to distribute 'to every of the said creditors a portion, rate and rate alike, according to the quantity of their debts'.[16] The authority of the committee also extended to individuals who were believed to have the assets of the bankrupt 'in his or their custody, use, occupation, keeping or possession'.[17] The committee was authorised to summon and examine these people, as well as witnesses.[18] If the concealment of property was proven, the committee could forfeit double the value of these goods as a penalty for the benefit of the creditors. The committee had the same authority in relation to creditors who obtained a fraudulent preference from the bankrupt.[19] The committee was also authorised to set aside collusive recoveries of debts and chattels against debtors who defrauded

[11] ibid preamble.
[12] See the introduction of this thesis.
[13] Statute of Bankrupts 1543, s. 1.
[14] ibid.
[15] See above, page 27.
[16] Statute of Bankrupts 1543, s. 1.
[17] ibid s. 2.
[18] ibid.
[19] ibid s. 3.

their creditors.[20] In addition, the committee had the power and authority to award proclamations against debtors who fled the country, commanding these debtors to return to the realm.[21] These debtors could be outlawed upon failure to obey a command to return and all the goods, lands, tenements and debts of the debtor would be distributed pro rata amongst the creditors.[22] Individuals who helped the debtor in fleeing the county could be imprisoned or fined.[23]

Finally, the Statute of Bankrupts 1543 explicitly excludes the possibility of a discharge of debts, even after the distribution of all the property of the bankrupt. The statute provides that 'the said creditor and creditors and every of them shall and may have their remedy for the recovery and levying of the residue of their said debts… in like manner and form as they should or might have had before the making of this Act'.[24]

b.) The Bankrupts Act 1571 or the Statute of 13 Elizabeth

The Statute of Bankrupts 1543 proved to be insufficient to deal with fraudulent debtors:[25] the preamble of the Bankruptcy Act 1571 states that despite the Statute of Bankrupts 1543, 'those kind of persons [bankrupts] have and do still increase into great and excessive numbers'.[26] Parliament had tried and failed to deal with bankrupts on two occasions after 1543 before the enactment of the Bankrupts Act 1571. In 1559 it was suggested in the bill for the Statute of Artificers that bankruptcy should become a felony.[27] Another unsuccessful attempt to regulate

[20] ibid s. 4.
[21] ibid s. 5.
[22] ibid.
[23] ibid.
[24] ibid s. 6.
[25] Bankrupts Act 1571 (13 Eliz I, c. 7), preamble.
[26] ibid.
[27] The provision was part of the bill for the Statute of Artificers (1559). *An industrial programme*, nr.17. Hist. MSS Com MSS of the Marquis of Salisbury, Vol I, pp. 162-65 in RH Tawney and E Power, *Tudor Economic Documents, being select documents illustrating the economic and social history of Tudor History* vol. I (Longmans Green and Co. 1951) 328. It seems that Kadens, while referring to an unnamed parliamentary document, refers to the same proposal. See, E Kadens, 'The last bankrupt hanged: balancing incentives in the development of bankruptcy law' (2010) 59 (7) *Duke Law Journal* 1253.

bankruptcy was made in 1563.[28] English merchants still complained that they were defrauded by pretended bankruptcies in 1565.[29]

In 1571 a new bankruptcy statute was finally enacted, 'An Act touching orders for bankrupts'.[30] The statute of Elizabeth technically did not replace, but rather supplemented the Henrician bankruptcy statute of 1543. The Henrician statute was still relied upon in various bankruptcy cases after the enactment of the Statute of Bankrupts 1571.[31] Another statute dealing specifically with the invalidation of fraudulent conveyances, the Fraudulent Conveyances Act 1571,[32] was passed in the same parliamentary session, and should be read alongside the Bankrupts Act 1571.[33] In *The Case of Bankrupts* (1584), the leading case on the interpretation of the Bankrupts Act 1571, Wray CJ held that the intent of the statute 'was to relieve the creditors of the bankrupt equally, and that there should be an equal and rateable proportion observed in the distribution of the bankrupt's goods amongst the creditors, having regard to the quantity of their several debts'.[34]

The Bankrupts Act 1571 differed from the Henrician statute in various ways. The Bankrupts Act 1571 confined bankruptcy to traders and merchants ('any merchant or other person using or exercising the trade of merchandise by way of bargaining, exchange, rechange, barter,

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[28] The Bill for the Order of the Persons [*sic*] Lands and Goods, that shall be Bankrupt. 'House of Commons Journal Volume 1: 13 March 1563', 'House of Commons Journal Volume 1: 06 April 1563' in *Journal of the House of Commons: Volume 1, 1547-1629* (London, 1802), 69, 72. British History Online <http://www.british-history.ac.uk/commons-jrnl/vol1/p69a>; <https://www.british-history.ac.uk/commons-jrnl/vol1/p72> accessed 23 February 2021.

[29] 'Complaint by the English merchants' 30 March 1565 SP 70/77 f. 76.

[30] Bankrupts Act 1571.

[31] The Lansdowne Papers from 1571 set out two columns listing acts of bankruptcy. In the first column the following acts of bankruptcy were set out: departing the realm, beginning to keep house, absenting himself, taking sanctuary, suffering arrest for debt not due money not delivered or other good cause, suffering outlawry or yielding himself to prison or departing from his house. These acts of bankruptcy 'are judged by the first statute to be bankrupts. If they did it with intent to deceive and this intent is hard to be proved upon an issue and therefore now to be qualified with these words in the statute to the intent or whereby his creditors shall or may be defeated or delayed.' The second column set out other remedies under the Bankrupts Act 1571. BL MS Lansdowne Papers 13 f. 55. It is unclear who wrote this document or for what purpose, but it may have well have a connection with the Bankrupts Act 1571..

[32] Fraudulent Conveyances Act 1571 (13 Eliz I, c. 5). See also BJ Shapiro, *Law reform in early modern England. Crown, Parliament and the Press* (Hart Publishing 2019) 50.

[33] *Smith v Mills* '*The Case of Bankrupts*' (1584) 2 Co Rep 25a, 76 ER 441. See also, the short report in law French, *Smith v Mills* (1589) Moo 594 pl. 805, 72 ER 780.

[34] *Smith v Mills* '*The Case of Bankrupts*' (1584) 2 Co Rep 25a, 76 ER 441 at 464-468.

chevisaunce[35] or otherwise, in gross or by retail, or seeking his or her trade of living by buying and selling').[36]

The 1571 statute was confined to 'subject[s] born of this realm or of any the Queen's dominions, or denizen[s]'.[37] This meant that, from 1571, debtors who were foreign merchants no longer fell within the scope of the bankruptcy statutes.[38] WJ Jones has argued that this was resented by the English merchants, because they were themselves subject to bankruptcy laws in the Low Countries and elsewhere.[39] The 1571 statute also set out that debtors had to be 'subject[s]' or 'denizen[s]', which meant that creditors of merchant strangers could not benefit from pro rata distribution based upon the statute.[40] The 1571 Act is the first occasion where female debtors are explicitly included in the bankruptcy legislation.[41] The list of 'acts of bankruptcy' was expanded, including not only those who 'depart the realm or begin to keep his or her house or houses, or otherwise … absent him or herself', but also, amongst others, those who 'take sanctuary, or suffer him or herself willingly to be arrested for any debt'.[42] The latter meant that a debtor would allow himself to be arrested, presumably by an associate, so as to be put in debtor's prison in order to avoid his or her other creditors (because *capias ad satisfaciendum* or imprisonment for debt was only available to one creditor at any given time).[43] However, the 'act of bankruptcy' had to have been committed with 'the intent or purpose to defraud and hinder any of his or her creditors' of the debt.[44]

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[35] Chevisaunce can mean several things, including money lending and lending goods for profit.
[36] Bankrupts Act 1571, s. 1.
[37] ibid. Denizens were foreigners who were made subjects by royal prerogative under letters patent of denizenation. Sir John Baker, *Oxford History of the Laws of England,* vol. VI, 1483-1558 (OUP 2003) 615-616. In 1593 the city of London counted 364 denizens out of a total of 5,545 strangers. "An extract of the whole', number of strangers, men, women, children and servant…according [to a] certificate made by the lord mayor of London', 15 May 1593 EL 2514.
[38] This assumes that foreigners were within the scope of the Statute of Bankrupts 1543, although this is not explicitly stated in that Act.
[39] Jones, 'Foundations of bankruptcy' (n 1) 17.
[40] Bankrupts Act 1571, s. 1.
[41] ibid. However, there is no reason to assume that a female debtor (a widow or *feme sole*) could not be considered 'bankrupt' before this time.
[42] ibid, preamble.
[43] JH Baker, *An Introduction to English legal history* (OUP 2019) 74.
[44] Bankrupts Act 1571, s. 1. See also FC Stolker, *The rise and fall of the reputed ownership clause* (MSt thesis, University of Oxford 2016) 54.

The statute of Elizabeth gave the lord chancellor the sole bankruptcy jurisdiction and the power to grant commissions of bankrupts.[45] The survey and the Acts of the Privy Council seem to suggest that the lord chancellor mainly exercised this jurisdiction in the Court of Chancery. However, on occasion the Privy Council still considered bankruptcy matters (possibly because the lord chancellor could also exercise the bankruptcy jurisdiction in this forum).[46] Sometimes bankrupts went both to the Chancery and to the Privy Council to seek relief, such as in *Comye v Danele* (1580), which the Privy Council had considered two years before it was heard in Chancery.[47]

The appointment of commissioners was in the control of the lord chancellor, but once he had appointed them the lord chancellor could no longer exercise any direct power over their decisions.[48] These commissions had the power to take 'the body' of the debtor, which meant that the commissioners could take the debtor from his or her house, out of their sanctuary or elsewhere, as well as having power to imprison the debtor.[49] The commissioners had the power to examine the debtor and witnesses in order to value the assets of the debtor. They also had the power to seize and sell all the real and personal property of the debtor in order to distribute the profits rateably amongst the creditors according to the quantity of their debts.[50] After the distribution of assets to the creditors, the commissioners had to pay out any surplus of the proceeds of the sale to the bankrupt.[51] Like the 1543 Act, the Bankrupts Act 1571 did not discharge the bankrupt from

[45] ibid s. 2.
[46] E.g. [Meeting], 27 September 1577 PC 2/12 ff. 25-26; [at] Windsor, 21 October 1577 PC 2/12 ff. 48-49 (kerseys and other goods were sold for the benefit of the creditors, after the bankrupt fled the town); [at] Windsor, 29 October 1577 PC 2/12 f. 53 (four people are chosen by the Queen to examine the debts of various creditors); At Whitehall, 17 December 1591 PC 2/19 f. 101 (the fraudulent suing out of commission of bankrupts); a letter to Thomas Fowler, Sir Edmond Bowyer, and Sir George Paule, knights, or to any two of them, 28 September 1619 (PC 2/30 f. 287).
[47] E.g. *Comye v Danele* was already dealt with by the Privy Council two years prior to the Chancery case. [Meeting], 16 November 1578 PC 2/12 f. 308; *Comye v Denale*, 25 October 1580 C 78/68/16 m. 24 [IMG_0180]. Francis Allenson went to both the Court of Chancery and the Privy Council because he argued that a commission of bankrupts was sued out against him without good reason. A letter [from the Privy Council] to Thomas Fowler, Sir Edmond Bowyer, and Sir George Paule, knights, or to any two of them [to authorise them (as commissioners) to deal with the matter], 28 September 1619 PC 2/30 f. 287; *Allenson v Clearke*, 23 September 1620 C 33/137 f. 1700 [IMG_1237].
[48] WS Holdsworth, *A history of English law*. vol. I (7th edition, Methuen 1956) 471.
[49] Bankrupts Act 1571, s. 2.
[50] ibid. This explicitly included copyhold and customary land. See also, Bankrupts Act 1571, s. 3.
[51] ibid s. 4.

his or her debts.[52] Future property of the bankrupt was explicitly made available for the payment of the creditors.[53] However, the statute excluded *bona fide* conveyances of land, not to the use of the bankrupt or his heirs, that had been made by the bankrupt before committing an act of bankruptcy.[54]

Penalties for matters such as refusing to be examined and the concealment of the bankrupt's assets by others than the bankrupt were still part of bankruptcy law.[55] The 1543 provision for outlawry of debtors who fled the country was not replicated in the Elizabethan statute, however the commissioners had the authority to award five proclamations in the queen's name, by which those who 'withdraw him or themselves out or from his or their usual mansion house or houses' were summoned to appear before the commissioners.[56] If the bankrupt did not appear, then the bankrupt would be out of the queen's protection.[57]

c.) The Bankrupts Act 1604 or the first statute of James

After a failed attempt in 1581, the Bankrupts Act 1571 was supplemented again in 1604.[58] The first Statute of James or 'An Act for the better relief of the creditors against such as shall become bankrupt' has largely been ignored in current scholarship, despite the fact that it shows some important additions to bankruptcy law.[59] The Act was introduced 'for that frauds and

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[52] ibid s. 9.
[53] ibid s. 10.
[54] ibid s. 11.
[55] ibid s. 5-7.
[56] ibid s. 8.
[57] ibid s. 8. The statute provided that these debtors, as well as the people who helped them to withdraw, could be imprisoned.
[58] Bill for Exposition of the Statute of Bankrupts. 'The third Reading; and dashed, upon the Question'. 'House of Commons Journal Volume 1: 16 March 1581', in *Journal of the House of Commons: Volume* 1, 1547-1629 (London, 1802) 134. British History Online <http://www.british-history.ac.uk/commons-jrnl/vol1/p134a> accessed 23 February 2021. 'Mr. Serjeant Shirley bringeth in, from the Committee, the Bill for the better Execution and Explanation of the Statute of Bankrouts [*sic*], with a new Title, viz. For the better Relief of the Creditors against such, as shall become Bankrout; with other Amendments; and the Amendments read; and, upon the Question, ordered to be ingrossed'. 'House of Commons Journal Volume 1: 11 June 1604', in *Journal of the House of Commons: Volume 1, 1547-1629* (London 1802), pp. 236-237. *British History Online* <http://www.british-history.ac.uk/commons-jrnl/vol1/pp236-237> accessed 6 March 2021. According to Jones, the Act was less harsh than the original bill. Jones, 'Foundations of bankruptcy' (n 1) 19.
[59] E.g. WS Holdsworth, *A history of English law,* vol. VIII (Methuen 1925, reprinted Sweet and Maxwell 1992) 238; Kadens, 'The last bankrupts hanged' (n 27) 1253; Jones, 'Foundations of bankruptcy' (n 1) 19 only marginally discuss the 1604 Act.

deceits…daily increase amongst such as live by buying and selling, to the hindrance of traffic and mutual commerce, and to the general hurt of the realm, by such as wickedly and wilfully become bankrupts; and for that the description of a bankrupt in former statutes is not so fully expressed'.[60] The parliamentary debates show that the Act was aimed to give financial relief to clothiers, especially those in Surrey, by putting more emphasis on remedying the practice of fraudulent conveyances.[61] This seems to suggest that debtors deliberately conveyed their assets away to associates, and then let themselves be declared bankrupt. Clothiers, who acted as creditors in the credit network were thereby deceived of their full entitlement, receiving only a pro-rata share of the debts due to them.

The Act still confined bankruptcy law to traders and merchants, but extended the jurisdiction to deceased bankrupts.[62] If the debtor died after the suing out of a commission of bankrupts, the statute gave the commissioners the authority to proceed to execution, 'as they might have done if the party offender were living'.[63]

The Act introduced the term 'act of bankruptcy' into the law, which enabled a commission of bankruptcy to be sued out (and a bankruptcy proceeding initiated) by one or more of the creditors. These acts of bankruptcy were almost identical to the acts mentioned in the 1571 Act and included leaving the realm, keeping house, allowing oneself to be unduly arrested for debt, being outlawed, and departing from one's home.[64] The 1604 Act added to the list making fraudulent conveyances

[60] Bankrupts Act 1604 (1 Jac I, c. 15), preamble. The State Papers include a letter from George Lowe to John Quarles dating from 1594 in which it was claimed that 'bankruptcies frighten men from lending even at 12 per cent; money is scarce through buying corn for France, Spain, Portugal, Italy and London; price of Italian silk has risen by 20 percent'. 8 November 1594 SP 46/19 f. 98. See for the bill, 'Bill against cozening bankrupt and lewd apprentices and factors' 14 December 1601 SP 12/283 f. 45.

[61] 'House of Commons Journal Volume 1: 27 March 1604 (2nd scribe)', in *Journal of the House of Commons: Volume 1*, 1547-1629 (London, 1802) 154, *British History Online* <http://www.british-history.ac.uk/commons-jrnl/vol1/27-march-1604-2nd-scribe> accessed 23 February 2021.

[62] For debtors living in London, with debts below 14 shillings, a separate Act was enacted in the same parliamentary session. A commission, consisting of two aldermen and four citizens of London, heard the cases in the Court of Requests. An Act for recovery of small debts and relieving of poor debtors in London (1 Jac. I , c 14). 'House of Commons Journal Volume 114 May 1604', in *Journal of the House of Commons*: Volume 1, 1547-1629 (London, 1802) 208. *British History Online* <http://www.british-history.ac.uk/commons-jrnl/vol1/p208> accessed 23 February 2021.

[63] Bankrupts Act 1604, s. 12.

[64] ibid s. 1.

and being arrested and remaining in debtor's prison for six months,[65] all with the intent to defeat the creditors, or with the effect that they be defeated.

The authority of the commissioners to grant commissions under the Bankrupts Act 1571 and the proceedings based on that Act, including the pro rata distribution of debts amongst the creditors, was extended to bankrupts as defined by the 1604 statute.[66] The Bankrupts Act 1604 gave the commissioners the explicit possibility of examining the bankrupt upon oath,[67] and provided that in case of 'wilful or corrupt perjury tending to the hurt or damage of the creditors of the said bankrupt to the value of ten pounds', a bankrupt who had lawfully been convicted on indictment in a court of record of being a bankrupt, was to 'stand upon the pillory in some public place by the space of two hours, and have one of his ears nailed to the pillory and cut off'.[68]

The Bankrupts Act 1604 gave commissioners the power to convey, transfer and distribute land, goods and debts, which had been fraudulently conveyed by the bankrupt.[69] Receivers of fraudulent conveyances could be imprisoned if they did not cooperate with the commission of bankrupts.[70] Non-cooperative witnesses could be convicted on indictment of perjury.[71]

Only creditors could recover the proceeds of forfeitures under the Act.[72] This seems explicitly to exclude the Crown as a beneficiary in bankruptcy proceedings. Creditors had up to four months to join a commission of bankrupts and partake in the distribution of assets.[73] After these four months, the commission had the power to distribute the assets, and further claims by creditors would be excluded.[74] The Act gave the commissioners the power to assign debts owed to the

[65] ibid.
[66] ibid s. 2. If an action of trespass or other suit was brought against the commissioners authorised by the statute, the commissioners could plead not guilty based on the statute. A jury trial would follow. Bankrupts Act 1604, s. 11.
[67] ibid s. 4
[68] ibid.
[69] ibid s. 3.
[70] ibid s. 5.
[71] ibid s. 6.
[72] ibid s. 7.
[73] ibid s. 2.
[74] ibid.

bankrupt, but the distribution could be delegated to a separate person or persons, the assignee(s) in bankruptcy.[75] A debtor of the bankrupt only had to pay out if he or she had notice of the bankruptcy.[76]

d.) The Bankrupts Act 1624

Other failed attempts to reform the bankruptcy laws were made by parliament in 1614 and 1621.[77] Both parliaments were dissolved, due to conflicts between King James I and parliament over matters not related to the bankruptcy laws, and no legislation, relating to bankruptcy or otherwise, was passed in either parliament.[78] The parliamentary debates show that parliament in 1621 was concerned with the financial crisis in the cloth trade and 'the great number of bankrupts that deceitfully and fraudulently breaks [sic] to the overthrow of divers clothiers'.[79] Parliament had proposed 'to make some strict law for punishing such bankrupts and to help the creditor to his debts'.[80] It was not only parliament that had concerns about the state of the bankruptcy laws at this time. For example, the contemporary Richard Burton was particularly worried about the frequency of perjury and false witnessing of bankrupts and creditors.[81] A petition to King James I shows that some people were also concerned about usury by bankrupts. The petition sets out that

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[75] ibid s. 8.
[76] ibid s. 9.
[77] The Act for the discovery of fraudulent practices of bankrupts and for the relief of creditors against bankrupts, 'House of Commons Journal Volume 1: 12 May 1614', in *Journal of the House of Commons: Volume 1*, 1547-1629 (London, 1802) 481-483. *British History Online* <http://www.british-history.ac.uk/commons-jrnl/vol1/pp481-483> accessed 23 February 2021. See also, Shapiro (n 32) 70. An Act for the further Description of a Bankrupt, and Relief of Creditors against such as shall become Bankrupts; and for inflicting corporal Punishment upon the Bankrupts, in some special Cases. 'House of Commons Journal Volume 1: 05 March 1621', in *Journal of the House of Commons: Volume 1*, 1547-1629 (London, 1802), pp. 537-539. British History Online http://www.british-history.ac.uk/commons-jrnl/vol1/pp537-539> accessed 23 February 2021. In Scotland, an Act of the lords of Council and Session against unlawful dispositions and alienations of bankrupts was made in 1620 and ratified in 1621. Jones, 'Foundations of bankruptcy' (n 1) 20.
[78] A Thrush, 'The Parliament of 1614' in A Thrush and JP Ferris, The History of Parliament: the House of Commons 1604-1629 (CUP 2010) *British History Online* <https://www.historyofparliamentonline.org/volume/1604-1629/survey/parliament-1614> accessed 7 March 2021; A Thrush, 'The Parliament of 1621' in A Thrush and JP Ferris, The History of Parliament: the House of Commons 1604-1629 (CUP 2010) *British History Online* <https://www.historyofparliamentonline.org/volume/1604-1629/survey/parliament-1621>accessed 7 March 2021; See also, C Russell, *Parliaments and English Politics 1621-1629* (Clarendon Press 1979) 85-203.
[79] W Notestein, FH Relf and H Simpson, *Commons Debates* 1621, vol. 5 (Yale University Press 1935) 457. See chapter 5 for more information about the crisis in the cloth trade.
[80] ibid 457.
[81] Shapiro (n 32) 85. Shapiro refers to the text of the edition of 1800. The first edition was published in 1621.

'trade, traffic and credit' was affected by 'many breakings and bankrupts'.[82] These bankrupts were not only 'Lombards or brokers', but also 'many other unconscionable persons'. They would target the 'mechanical and poorer sort of people, to undoing and overthrow, causing them to pay for the loan of money upon pawn 32 · 40 · 60 and 100 upon the hundred, yes one penny for one shilling for one week, which is about 400 upon the hundred for a year, and many times with the loss of the pawn in the end also, which intolerable usury is not only taken [*sic* in the provinces of the Low Countries, but also in your Majesties Kingdom and dominions'.

Another bankruptcy statute was finally passed in 1624.[83] The statute was introduced 'as daily experience shows that the number and multitude of bankrupts do increase more and more', as well as the 'frauds and deceits invented and practised for the avoiding and deluding the penalties' of the existing bankruptcy statutes.[84] These bankrupts were a 'hindrance of traffic and commerce', and a cause of 'the great decay overthrow and undoing of many clothiers.[85] The textile industry was of particular concern for the legislator, because 'many thousands of the natural born subjects of this realm be from time to time in all parts of this kingdom set on work' in this industry.[86]

The new bankruptcy Act did not replace the previous ones; it was stated 'that all and singular the aforesaid statutes and laws heretofore made against bankrupts and for relief of creditors, shall be in all things largely and beneficially construed and expounded for the aid, help and relief of the creditors'.[87] The Bankrupts Act 1624 largely clarified the previous bankruptcy laws, but also put more emphasis on the criminal punishment of the bankrupt, as well as the punishment of creditors who helped the bankrupt to defraud the other creditors.

[82] 'Petition of Henry Autonison Wissel, and others, to the King, against the frequency of bankruptcy and the oppression of usurers', [undated] 1608 [date marked as uncertain] SP 14/40 f. 20.
[83] Bankrupts Act 1624 (21 Jac I c. 19).
[84] ibid preamble.
[85] ibid.
[86] ibid.
[87] ibid s. 1.

The Bankrupts Act 1624 provided that obtaining a protection or petitioning the king for a composition became an act of bankruptcy for traders, and for scriveners who received 'other men's money or estates into [their] trust or custody'.[88] The Act also provided that a trader who was 'indebted to any person or persons in the sum of one hundred pounds or more' and did 'not pay or otherwise compound for the same within six months' committed an act of bankruptcy.[89] The Act extended the bankruptcy laws to 'strangers born, as well aliens as denizens', which meant that foreign merchants became liable under the Act, but also provided that foreign creditors could sue out a commission of bankrupts.[90]

The Bankrupts Act 1624 still authorised commissions of bankrupts, with bankruptcy jurisdiction, and the commissioners had the same rights as in the previous statutes.[91] The Act also gave some additional rights, which were largely clarifications of previous practice. The statute explicitly allowed the commissioners to examine 'any person or persons for the finding out and discovery of the truth and certainty of the several debts due and owing to all such creditor or creditors as shall seek relief by such course of commission to be sued forth…'.[92] It was provided that those with securities who had not proceeded to execution before the bankruptcy were not to be privileged but were to have no more than a rateable part with the other (unsecured) creditors, and should not recover any penalty.[93] This was already established practice, but was enacted for the purpose of clarity and avoidance of potential suits by creditors in Chancery.[94] The Act clarified that commissioners were allowed to examine the wife of the bankrupt. The previous statutes had excluded the examination of wives of bankrupts, but bankrupts often fraudulently conveyed their

[88] ibid s. 2.
[89] ibid s. 2.
[90] ibid s. 14.
[91] ibid s. 3, s. 4, s. 9, s. 11.
[92] ibid s. 8.
[93] ibid s. 8.
[94] Alford Papers, Harl. 7608 ff. 40v-41 in W Notestein, FH Relf and H Simpson, *Commons Debates* 1621, vol. 7 (Yale University Press 1935) 300-302.

property to their wives, who in turn conveyed it to another party.[95] Commissioners were allowed to break open the house or shop of a debtor who had committed an act of bankruptcy and seize their bodies and goods.[96] The commissioners were also allowed to sell entailed land and were given the benefit of the redemption of mortgaged land, chattels and goods.[97] This latter provision was introduced to spare creditors from 'long and tedious suits in the Court of Chancery'.[98] If a conveyance was made after an act of bankruptcy was committed, a purchaser for good and valuable consideration could not be challenged, unless a bankruptcy commission was sued out within five years of the act of bankruptcy.[99]

The Bankrupts Act 1624 put more emphasis than earlier legislation on punishment of bankrupts and fraudulent creditors. Corporal punishment was no longer available only in the case of perjury, but became available for all declared bankrupts who had wilfully defrauded or deceived their creditors for £20 or more.[100] The corporal punishment required the bankrupt to 'stand upon the pillory in some public place for the space of two hours, and have one of his or her ears nailed to the pillory and cut off'.[101] This was less harsh than the provision discussed in parliament in 1624 and set out in the 'brief of the bill exhibited against bankrupts',[102] which would have made bankruptcy a felony, with the possibility of capital punishment.[103] However, the capital punishment

[95] ibid; Bankrupts Act 1624, s. 5. It is not clear how the property was conveyed to the wife, because a wife could not hold property independently of her husband at common law. It is assumed that the fraudulent conveyance of the property of the wife was only a physical conveyance, alternatively the conveyance might have taken place in the form of a trust.
[96] Bankrupts Act 1624, s. 7.
[97] ibid s. 11, s. 12.
[98] Alford Papers, Harl. 7608 ff. 40v-41 in Notestein, Relf and Simpson, *Commons Debates* 1621, vol. 7 (n 94) 300-302.
[99] Bankrupts Act 1624, s. 3.
[100] ibid s. 6.
[101] ibid s. 6.
[102] 'Mr. Louther reports the Bankrupts Bill. Amendments twice read. A Proviso tendered from the Committee, to make it Felony, if the Bankrupt stand out Six Months, and come not in after Proclamation. The Proviso, upon Question, rejected. The Bill ordered to be ingrossed'. 'House of Commons Journal Volume 1: 29 April 1624', in *Journal of the House of Commons*: Volume 1, 1547-1629 (London, 1802), *British History Online* <http://www.british-history.ac.uk/commons-jrnl/vol1/29-april-1624> accessed 23 February 2021; An Act for the further Description of a Bankrupt, and Relief of Creditors against such, as shall become Bankrupts; and for inflicting corporal Punishment upon the Bankrupts, in some special Cases : - Upon Question, passed. 'House of Commons Journal Volume 1: 03 May 1624', in *Journal of the House of Commons*: Volume 1, 1547-1629 (London, 1802), *British History Online* <http://www.british-history.ac.uk/commons-jrnl/vol1/03-may-1624> accessed 23 February 2021.
[103] Alford Papers, Harl. 7608 ff. 40v-41 in Notestein, Relf and Simpson, *Commons Debates* 1621, vol. 7 (n 94) 300-302. One suggestion was for the bankrupt to be whipped to death. Jones, 'Foundations of bankruptcy' (n 1) 20.

never made it into the final Act. The statute also introduced the reputed ownership clause, a provision that included within the bankruptcy proceedings goods in the estate of the bankrupt that were in his apparent possession, rather than in his ownership.[104] This meant that, in practice, people other than the bankrupt could end up paying for the bankrupt's debts. This was justified on the basis that these creditors had enabled the bankrupt to give a misleading appearance of wealth, and were implied to be fraudulent on that basis.[105]

II. The commissions of bankrupts

Commissions of bankrupts were instructed by the lord chancellor to deal with bankruptcy matters in the first instance for most of the period.[106] The lord chancellor was given the exclusive bankruptcy jurisdiction, which included the power to grant commissions of bankrupts, in the Bankrupts Act 1571.[107] The general procedure was that one or more of the creditors of the bankrupt requested the lord chancellor to issue a commission of bankrupts, which suggests that the bankruptcy procedure was involuntary and a private law matter in the period.

The creditors of the alleged bankrupt could nominate a number of commissioners of bankrupts of whom the lord chancellor generally appointed about three to five to act as commissioners.[108] It seems that the bankrupt could approve or disagree with this election, but it is unknown if this could occur before the appointment of the commission of bankrupts or whether the bankrupt

[104] Bankrupts Act 1624, s. 10.
[105] FC Stolker (n 44) 12.
[106] Very little is known in detail about the commissions of bankrupts. The Bankruptcy Commission Docket Books held at The National Archives only go back to the early eighteenth century. Only the manuscripts of the dockets of Puckering LK have been used for the thesis, see below. The dockets of Coventry LK are held in the Croome Collection at the Worcestershire Record Office. However, due to the travel restrictions caused by the COVID-19 pandemic they could not be consulted. Some information from the dockets of the commissions of bankrupts granted by Coventry LK between 1625 and 1628 can be found in J Broadway, R Cust and SK Roberts (eds), *A Calendar of the Docquets of Lord Keeper Coventry 1625-1640*, Part 3 (List & Index Society, Special Series 36, 2004) 487-489. See also J Broadway, 'The overthrow of estate and credit: Bankruptcy Commissions in Chancery 1626-1640' at <http://xmera.co.uk/bankrupts.pdf> accessed 27 February 2021. The dockets of the other lord chancellors and lord keepers could not be found. They seem not be held in The National Archives and the dockets of Ellesmere LC seem not to held in the Ellesmere Papers at the Huntington Library, San Marino, California, USA.
[107] Bankrupts Act 1571 (13 Eliz I, c. 7), preamble.
[108] E.g. *Cornellius v Blackmore,* 15 October 1614 C 33/127 f. 25 [IMG_0026]; *Edwards v Hubberstye (Allen's Case)*, 3 February 1614 C 378/125/11 m. 1 [IMG_0002].

could put forward his or her own commissioners of bankrupts. The commissioners of bankrupts were not acting as judges, but, as has been seen, under the Statute of Bankrupts 1571 the lord chancellor delegated an administrative power to imprison the bankrupt, and to seize and sell real and personal property in order to distribute the profits rateably to the creditors according to the quantity of their debts.[109] After the bankruptcy proceeding, but before the execution of the bankruptcy, one of the creditors was generally appointed to act as an assignee in bankruptcy, effectively acting as a custodian of the bankrupt's property until the commissioners of bankrupts were able to sell the property of the bankrupt.[110] Once a commission of bankrupts was instructed, the lord chancellor lost the authority to deal with the matter. Only when the commission of bankrupts had finalised the process could the case be reviewed or reheard by the lord chancellor by petitioning the Court of Chancery.[111]

Commissions of bankrupts had to establish whether a debtor was a bankrupt by considering two questions of fact: (1) whether the debtor was a trader within the statutes; and (2) whether he or she had committed a fraudulent act of bankruptcy. It seems that, apart from the Standing Orders of the Court of Chancery of 29 January 1618/19, there were no formal rules in the period in relation to commissions of bankrupts.[112] However, the dockets of the granting of commissions of bankrupts by Puckering LK between 1592 and 1596, as well as some extracts from the dockets of Coventry LK between 1626 and 1628, show some common patterns.[113]

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[109] Bankrupts Act 1571, s. 2. It is unclear how often commissioners would imprison a bankrupt.
[110] E.g. *Tomlinson v Ryche*, 18 June 1596 C 33/91 f. 185v [IMG_4513a].
[111] The powers of bankruptcy commissioners ended with the death of the sovereign. Jones, 'Foundations of bankruptcy' (n 1) 29.
[112] GW Sanders, *Orders of the High Court of Chancery and Statutes of the Realm relating to Chancery. From the earliest period to the present time.* vol. I, part I (Maxwell & Sons 1845) 122.
[113] Dockets are preparatory documents of a pending court case. The dockets of Puckering LK are held in the Huntington Library. They can be found in the Egerton family papers, Part I. Lord Chancellor Ellesmere, up to 1617, Domestic and Personal Papers, Official Papers. The relevant dockets used are EL 3076; 3241; 3258; 3397; 3414; 3421; 3481; 3522; 3523; 3543; 3558; 3566; 3583; 3853; 3854; 3991; 3998; 4036; 4072; 4092; 4093; 4098; 4270; 4271; 4279; 4395; 4640; 4732; 4799; 4871; 4973; 5313; 5370; 5392; 5521; 5525; 5579; 5608; 5610. It is possible that this list is not complete. For some information from the dockets of Coventry LK, see Broadway, Cust and Roberts (n 106) 487-489.

a.) Commissions of bankrupts granted by Puckering LK (1592-96)

The Ellesmere Papers include 39 dockets of commissions of bankrupts granted by Puckering LK between 1592 and 1596.[114] The dockets give information about the name, trade and place of residence of the bankrupt(s); the date of bankruptcy;[115] the amount of the debts; the names, profession and residence of the creditors; and the names, profession and residence of the commissioners. It seems that the bankrupts were often chapmen and merchants, but also, for example, haberdashers (traders in household goods), carpenters, ironmongers, felt makers, drapers, vintners (wine merchants), mercers (merchants of fine textiles) and merchant tailors (tailors who were members of the Worshipful Company of Merchant Taylors). Sometimes a commission of bankrupts was granted against more than one bankrupt, for example when the bankrupts were partners or if the bankrupts were part of a family business.[116] It seems that Puckering LK granted commissions of bankrupts against bankrupts from towns across England and Wales,[117] although most of the bankrupts were from London. The dockets generally show two to four (but up to seven) specific names of creditors, who sued out the commission of bankrupts with other creditors (who are not named in the docket). It seems that often most or all of the creditors were resident in London, even if the bankrupt was an inhabitant of another town.[118] However, in one docket the

[114] It seems that 13 commissions of bankrupts were granted in 1592; two in 1593; 11 in 1594; eight in 1595; and five in 1596. It is possible that the Ellesmere Papers do not include all the dockets of commissions of bankrupts granted by Puckering LK. The dockets of Puckering were included in the collection of Ellesmere's state papers because Ellesmere LC suspected that Puckering had acted fraudulently in relation to these commissions and took the papers home for review (information kindly provided by Dr Vanessa Wilkie, curator of the Ellesmere Papers at the Huntington Library). It is therefore possible that the 39 dockets are just a selection of cases of a particular type and thus not fully representative of all of Puckering's commissions.

[115] The standard formula of the dockets is 'A commission of bankrupts against [bankrupt's name] of [place of residence] in the county of [county of place of residence], [trade], broken about [date] last past, for the sums of [amount of debt (or thereabouts/or upwards of)] [day of the granting of the commission]'.

[116] EL 3258; EL 5525; EL 3998. A widow and her son were clothworkers in the family business. The widow is the only female bankrupt found in the dockets of Puckering.

[117] E.g. Marlborough, Wiltshire (EL 4072), Southampton, Hampshire (EL 3481), Ripon, Yorkshire (EL 3417), King's Lynn, Norfolk (EL 3558), York (EL 3522, EL 5313), Wickham, Suffolk (EL 5521), Colchester, Essex (EL 3523) and Abergavenny, Monmouthshire, Wales (EL 4973).

[118] E.g. a commission of bankrupts against a chapman from Wales was sued out by creditors in London and Bristol (EL 4973), and creditors from London sued out a commission of bankrupts against a bankrupt mercer (EL 4640) and a bankrupt felt maker, who were both from Ludlow, Shropshire (EL 4732).

commission of bankrupts against a chapman in York was sued out by seven creditors who were all resident in York.[119]

In one docket, the commission of bankrupts was explicitly granted on the Statute of Bankrupts 1543, despite the fact that the Bankrupts Act 1571 was the most recent bankruptcy statute during Puckering's lord chancellorship.[120] This commission of bankrupts was sued out by 'merchant strangers' and 'merchant Englishmen'.[121] The debts that the bankrupts owed to their creditors ranged from £47 to £4,000, but a debt of a few hundred pounds was most common.[122] The dockets show the 'commissioners for the creditors' and suggest that a commission was generally made up of three to five commissioners, chosen from a list of seven potential commissioners,[123] but, for unknown reasons, the list of potential commissioners sometimes consisted of five, nine or even twelve commissioners. The commissioners were often aldermen, knights, gentlemen, and traders of the same or similar trade as the bankrupt. If the bankrupt did not reside in London, it seems that at least two aldermen or the mayor of the local town were represented on the list for the commission of bankrupts.[124] It does not seem that every commissioner was local to the area of the bankrupt. Only five dockets show the presence of a lawyer in a commission of bankrupts.[125] From 1618 it was a requirement that a lawyer sat in the commission of bankrupts, but in these instances, well before 1618, the presence of a lawyer was not required, and it seems that the

[119] EL 5313.
[120] EL 5525.
[121] EL 5525. It is unclear why the merchant strangers were listed on the docket, as aliens were explicitly excluded from the Statute of Bankrupts 1571. It is possible that, because the commission was sued out on the basis of the Statute of Bankrupts 1543, which did not exclude aliens, merchant strangers were able on this basis to sue out a commission. However, it is also possible that merchant strangers could be included in the docket if Englishmen were also included.
[122] Most of the amounts of the debts were given in pounds sterling, but a few amounts were given in marks.
[123] The dockets show clearly that the commissioners were for the creditors. It is unclear whether the bankrupt could have his or her own commission of bankrupts. However, it seems that the creditors initiated the bankruptcy procedure and in an involuntary bankruptcy system it seems likely that the bankrupt would not have his or own commission of bankrupts. The Standing Orders of the Court of Chancery show that from 1619 the lord chancellor would appoint the commissioners himself, see Sanders (n 112) 122.
[124] E.g. two aldermen from Southampton were commissioners in a commission of bankrupts of a bankrupt from Southampton, Hampshire (EL 3481).The mayor of Marlborough was a commissioner in a commission of bankrupts of a bankrupt from Marlborough, Wiltshire (EL 4072).
[125] EL 3558; EL 3991; EL 5370; EL 5525; EL 5610.

presence of lawyers in these cases was a matter of chance.[126] William Danyell, a serjeant-at-law, was listed as a potential commissioner in three commissions of bankrupts granted by Puckering LK.[127] The names of the creditors and commissioners of bankrupts do not correspond in the dockets, and, with the exception of William Danyell, neither do the same names consistently reappear among the commissioners, which seems to suggest that the commissioners were independent and asked to perform their task on an *ad hoc* basis. One document shows that John Dean, a scrivener, requested Puckering LK to alter the constitution and renew the commission of bankrupts sued out against him.[128] It seems that in response Puckering LK replaced some of the commissioners with two lawyers from the Middle Temple,[129] because the original commissioners, including an alderman, were too busy with other business or could not easily ('well') attend.[130]

b.) Commissions of bankrupts granted by Coventry LK (1626-28)

The information in the index book of the List & Index Society for the dockets of Coventry LK shows the granting of commissions of bankrupts, or their suspension (*supersedeas*), continuation (*procedendo*), or renewal.[131] The index book gives the name, occupation and place of residence of the bankrupt, as well as the date on which the commission was granted. Unfortunately, the index book does not show the amounts of debts of the bankrupt or details of the individual members

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[126] Four different lawyers were listed as potential commissioners of bankrupts in Puckering's dockets (excluding two lawyers who replaced an original commission of bankrupts). William Danyell, a serjeant-at-law, Sir John Croke, recorder of London, John Clench, a justice of the Queen's Bench and William Lewis, recorder of King's Lynn, Norfolk, were listed as commissioners of bankrupts. William Danyell had been a member of Gray's Inn from 1556. He was created serjeant in 1594, and joined Serjeants' Inn, Fleet Street. He was knighted in 1603 and was a justice of the Common Pleas from 1604 until his death in 1610. Sir John Baker, *The Order of Serjeants at Law: A Chronicle of Creations, with Related Texts and a Historical Introduction* 1984 5 *SS* 26 at 63, 508; Sir John Croke was elected as recorder of the City of London in 1595. See, JH Baker, 'Croke, Sir John (1553x6–1620)' *ODNB* <https://doi.org/10.1093/ref:odnb/6733> accessed 2 March 2021; John Clench was justice of the Queen's Bench from 1584 until his death in 1607. JH Baker, 'Clench, John (*c.* 1535–1607)' *ODNB* <https://doi.org/10.1093/ref:odnb/5608> accessed 2 March 2021; William Lewis was recorder of King's Lynn from 1589 until his death in 1592. See, NM Fuidge, 'Lewis, William II (d.1593), of King's Lynn, Norf' in PW Hasler, *The history of Parliament: the House of Commons 1558-1603* (Boydell and Brewer 1981) <http://www.histparl.ac.uk/volume/1558-1603/member/lewis-william-ii-1593> accessed 2 March 2021.

[127] EL 5525; EL 5610; EL 5370.

[128] EL 5392.

[129] Edward Cromber esquire and Roberte Cassye esquire from the Middle Temple.

[130] EL 5392.

[131] Broadway, Cust and Roberts (n 106) 487-489. Due to the travel restrictions caused by the COVID-19 pandemic the dockets could not be consulted, see above, page 40 n106.

of the commission of bankrupts.[132] The index book shows that Coventry LK dealt with 15 commissions of bankrupts (11 grants of commissions, 2 suspensions and 2 renewals) in 1626, 47 (39 grants of commissions, 2 suspensions and 6 renewals) in 1627 and 27 (23 grants of commission, 2 suspensions, 1 continuation and 1 renewal) in 1628.[133] Commissions of bankrupts were renewed due to the death of James I, or if the name of a commissioner had to be altered.[134] Most bankrupts were chapmen, mercers and other traders in relation to the textile industry. However, other traders, such as grocers, butchers, fishmongers, a stationer and an apothecary also went bankrupt. The bankrupts resided all over England, and were not overwhelmingly from London. Of the bankrupts, 34% resided in London,[135] 12% in Norfolk, and 3% in Surrey, Lancashire, Kent, Hampshire and Yorkshire. The remaining bankrupts came from 13 other counties in the Midlands and eastern, southern and southwestern England.[136] It seems that six partnerships and one woman, a widow, were amongst the bankrupts.[137] Based on the dockets of Coventry LK,[138] Broadway has argued that most bankrupts owed £150 to £400 to their creditors.[139] It seems that there is a relation between the amount of debts and the trade of the bankrupt. It seems that merchants and brewers owed more substantial debts than other traders. Of the merchants, 30% owed more than £1,000, and 24% of the brewers also owed more than £1,000.[140] Broadway has argued that a debtor with creditors in London was more likely to have a commission of bankruptcy issued against him.[141]

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[132] This information should be among the manuscripts in the Croome Collection at the Worcestershire Record Office. However, as indicated above, these manuscripts could not be consulted. Unfortunately, it is therefore also not possible to say whether the commissions of bankrupts dealt with by Coventry LK complied with the rules of the Standing Orders of the Court of Chancery of 1618/19.

[133] The dates of two dockets are unknown, but they are referenced before the dockets of 1626. Broadway, Cust and Roberts (n 106) 487.

[134] E.g. Ref 602107/45; Ref 603107/56.

[135] Broadway has noted that the proportion of bankrupts from London was far greater at the start of the eighteenth century. J Broadway, 'The overthrow of estate and credit' 3 <http://xmera.co.uk/bankrupts.pdf> accessed 10 November 2021.

[136] Oxfordshire, Suffolk, Cambridgeshire, Devon, Gloucester, Norfolk, Berkshire, Warwickshire, Essex, Somerset, Derbyshire, Wiltshire, Herefordshire, Rutland, Cheshire, the county of Bristol, Worcestershire and Leicestershire.

[137] Ref 602107/62.

[138] J Broadway's analysis goes beyond the period dealt with in the thesis and covers commissions of bankrupts between 1626 and 1640.

[139] J Broadway, 'The overthrow of estate and credit' 5 <http://xmera.co.uk/bankrupts.pdf> accessed 10 November 2021.

[140] ibid.

[141] ibid 3.

This is consistent with the data found in the dockets of Puckering LK, in which most bankrupts had creditors in London. [142]

c. Regulation of commissions of bankrupts

It seems that until 1619 no formal regulation in relation to commissions of bankrupts existed. In 1619 Bacon LC introduced Standing Orders for the Court of Chancery in relation to commissions of bankrupts.[143] The Standing Orders of 29 January 1619 set out that a commission of bankrupts could only be granted if the lord chancellor was petitioned in the first instance.[144] The petition had to include the names of nominated commissioners. One of these commissioners had to be learned in the law. Care had to be taken 'that the same parties be not too often used in commissions', perhaps in an attempt to safeguard the variety of people that acted as commissioners.[145] The petitioner also had to take a bond with good security of at least £200 to prove the debtor a bankrupt. Another order set out that a certain Edward Hawkins had been sworn in as an officer of the Court of Chancery, authorised by letters patent under the Great Seal for the taking and safe keeping of depositions, examinations and other proceedings before commissioners of bankrupts.[146] In his capacity as officer of the Court of Chancery, Edward Hawkins had to be present at all times,[147] and therefore was allowed his privilege in the court by reason of his office.[148]

[142] See above, section II a of this chapter.
[143] Sanders (n 112) 122.
[144] ibid.
[145] ibid.
[146] ibid 141.
[147] ibid.
[148] ibid.

Chapter 2

Chancery practice

This chapter sets out the Chancery's practice in relation to its review function. The survey shows that immediately after the enactment of the Statute of Bankrupts 1543 no litigation took place in the Court of Chancery involving bankruptcy.[1] However, the Acts of the Privy Council suggest that the Privy Council instructed various people to intervene in bankruptcy matters between the enactment of the Statute of Bankrupts 1543 and the Bankrupts Act 1571.[2] The survey shows that the Court of Chancery exercised the review function by reviewing the decisions of commissions of bankrupts from the enactment of the 1571 statute onwards. As has been seen, these commissions were authorised by this statute to decide bankruptcy cases in the first instance.[3] In addition, the Court of Chancery could grant commissions of bankrupts in its equitable function to examine and establish facts involving insolvent debtors, although only one review case in relation to such a commission was found in the survey.[4] Apart from a handful of cases, all other cases dealt with reviews of decisions of commissions of bankrupts involving bankrupts.[5] This chapter will therefore focus on the review function in relation to bankruptcy matters, providing a detailed analysis of over 40 cases of that type found in the survey.[6]

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[1] No entries were found in the entry books from 1543 to 1550: C 33/1 (1543-44 and 1544-45); C 33/2 (1545-46, 1546-47 and 1547-48); C 33/3 (1548-49 and 1549-50).

[2] The Acts of the Privy Council show six letters from the Privy Council involving bankrupts between 1543 and 1571. See, [Meeting] at Salisbury, 9 August 1552 PC 2/4 f. 600 (a letter to the Mayor of Exeter to ask for the execution of the Statute of Bankrupts against someone who is keeping house); [Meeting] At Westminster, 8 April 1553 PC 2/4 f. 703 (to ask the lord chancellor to intervene on behalf of a creditor against John Johnson (possibly the clothier of *Johnson v Wolmer* (1551), see part II of the thesis); [Meeting] at Greenwich, 26 January 1555 PC 2/7 f. 364 (instructions to Sir John Baker to verify a bankruptcy in the cloth trade and then to report to the lord chancellor concerning the punishment of the bankrupt's deceit, and to return the cloths to the rightful owners if the allegations are true); [Meeting] at Croydon, 28 August 1556 PC 2/7 f. 499 (a letter to the Mayor of London to ask him to make an inventory of two French bankrupts); [Meeting] at Westminster, 21 January 1558 PC 2/8 f. 234 (to stay to pay a sum of money to someone who kept his house and defrauded his creditors).

[3] Bankrupts Act 1571, s. 2.

[4] See part 2 of the thesis. *Disley v Leman*, 30 August 1621 C 33/140 f. 1275 [IMG_1302]. Leman, the insolvent debtor in the case, became a bankrupt during the course of the litigation. See below, page 61-62.

[5] Details of these cases can be found below in section III on other issues observed in the Chancery records.

[6] Other cases involving bankrupts have been found in the Chancery records. However, cases in which the bankruptcy was not material to the case have not been included in this chapter. E.g. *Curtopp v Ormeston*, 12 March 1558 C 78/13/3 m. 2 [IMG_0005]; *Rowlands v Devisher,* 13 December 1622 C 33/143 f. 357 [IMG_0360].

As has been seen, a bankruptcy case could only be reviewed or reheard by the lord chancellor by petitioning the Court of Chancery when the commission of bankrupts had finalised the case in the first instance.[7] The cases in the survey show that if the Court of Chancery dealt with a review involving a bankruptcy, the court often referred the case to a commission of bankrupts, rather than dealing with it themselves. The Court of Chancery either referred the case back to the original commission of bankrupts that had decided the case in the first instance, or granted a new commission of bankrupts.[8] The referral to a commission of bankrupts generally occurred when the Court of Chancery reviewed whether someone had been lawfully declared a bankrupt or when questions were raised involving evidence or procedural issues.[9] Rather than referring the case back to the original commission of bankrupts, a new commission of bankrupts would be awarded if a commission of bankrupts was proved to have been unlawfully or fraudulently procured.[10] By referring the case to a commission of bankrupts, whether the original commission or a new commission, the case was effectively referred back for handling in accordance with the bankruptcy statutes. After all, commissions of bankrupts applied the law set out in the bankruptcy statutes, which were solely aimed at the relief of creditors, and did not normally exercise an equitable discretion.[11] Reviews of compositions included enforcement, as well as correction, of decisions of commissions of bankrupts.

The survey suggests that the Court of Chancery only decided review cases itself in a limited range of circumstances: (1) matters involving the interpretation of the statute of bankrupts; (2)

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[7] It is not clear from the Chancery records how much time would normally pass between the decisions of commissions of bankrupts and the review by the Court of Chancery. This is mainly due to the fact that most of the certificates and dockets of the commissions of bankrupts have not been found in the archives. The dockets examined in chapter 1 have not been followed up in the decree and order books. More research should be done on this matter.

[8] E.g. *Martyn v Hollyer*, 14 May 1601 C 33/99 f. 509 [IMG_9484]. It seems a new local commission of bankrupts was ordered in the case.

[9] The commissions of bankrupts were often asked to determine evidential matters. This was not necessarily the main point of review in all cases. E.g. in *Moseley v Alsoppe* (1620) Moseley wanted to have his evidence heard, because the commissioners had only taken evidence that Moseley was a bankrupt by affidavit. The main point of review was that a debtor was accused of committing an act of bankruptcy, see below, section 2 of this chapter. *Moseley v Alsoppe*, 9 October 1620 C33/139 f. 14v [IMG_0018a]; 28 October 1620 C33/139 f. 310v [IMG_0304a].

[10] E.g. *Wood v Hayes*, 9 February 1606 C 33/111 f. 436v [IMG_9003a].

[11] See chapter 1.

corruption and fraud by others than the bankrupt; and, on occasion, (3) the review of compositions of bankrupts. The Court of Chancery exercised more discretion in these circumstances than the strict application of the bankruptcy statutes would suggest: the court interpreted the bankruptcy statutes more leniently and in most cases also took the interests of the bankrupt, and sometimes even the interests of their descendants, into account.

This chapter consists of five parts. The first part sets out the general characteristics of the bankrupts in review cases decided in the Court of Chancery. The second part shows the various areas that the Court of Chancery reviewed. The third part sets out other issues observed in bankruptcy review cases in the Chancery records. The fourth part sets out the various outcomes of the cases that the Court of Chancery reviewed. The fifth and final part deals with a contextual analysis of the Chancery practice in relation to its review function.

I. General characteristics of review cases involving bankrupts

The general characteristics of review cases involving bankrupts are similar to the bankruptcy cases decided by commissions of bankrupts in the first instance: after all, it was those cases that the Court of Chancery reviewed. The cases in the survey sometimes show details of the bankrupt, including: the occupation of the bankrupt; the debt owed; the place of residence of the bankrupt; the act of bankruptcy committed; the names and residences of the lead creditor(s) who sued out the commission; and the names of commissioners.[12] However, often most of this information is missing in the records of the decisions of the Court of Chancery.[13] Nevertheless, some general characteristics of review cases involving bankrupts can be identified from the cases found in the

[12] The decree rolls (C 78's) give more information about the bankruptcy proceedings, including information relating to the certificates of the decisions by commissioners of bankrupts in the first instance, than do the decree and order books (C 33's).

[13] The information found in the cases in the survey often do not give as much detail about the bankrupt as has been seen in the dockets of the commissions of bankrupts during the tenure of Puckering LK or Coventry LK. This seems to suggest that most of the information about the bankrupt and the bankruptcy procedure was recorded in the dockets. Unfortunately, as has been seen, not all dockets could be found or consulted in the archives.

survey, though it is unclear from the cases found in the Chancery records why the Court of Chancery reviewed these specific cases and not others.

As has been seen, the first bankruptcy case to appear in the survey was decided in 1587.[14] This case was decided after the enactment of the Bankrupts Act 1571, which restricted bankruptcy to traders and merchants. This means that all the bankrupts in the survey were traders or merchants. The survey shows examples of an ironmaster, an ironmonger, a grocer (who was also a chapman), a merchant (who was also a mayor of Southampton), aldermen of London and a shopkeeper in Britain's Burse.[15]

However, most of the bankrupts in the survey were traders involved in the cloth industry.[16] For example, in *Baker v Francis* the bankrupt was in a 'co-partnership of the trade of a woollen draper'.[17] This observation is consistent with the economic historical literature about the financial crisis in the trade in woollen cloth between 1620 and 1624,[18] which had a great negative impact on the general economy at large.[19] The survey shows that bankruptcies also occurred in the trade in other

[14] *Stonehurst v Griffith*, 14 November 1587 C 33/75 f. 163v [IMG_0165a].
[15] *Michell v Mynyffee,* 10 February 1590 C 78/96/13 m. 17 [IMG_0034] (ironmaster); *Chamberlen v Smith*, 23 February 1603 C 78/108/9 m. 32 [IMG_0065] (ironmonger); *Allen v Edwards*, 20 October 1608 C 78/172/13 m. unknown [IMG_0009] (grocer/chapman); *Cornellius v Blackmore* 15 October 1614 C 33/127 f. 25 [IMG_0026] (merchant and mayor of Southampton); *Jacobson v Potkyns*, 17 October 1616 C 33/133 f. 68 [IMG_0070] (alderman of London); *Scott v Wallthall*, 19 October 1610 C 33/119 f. 37 [IMG_0017] (alderman of London); *Mathewe v Courtman*, 27 October 1618 C 33/135 f. 129a [IMG_1295a] (shopkeeper of Britain's Burse). Britain's Burse was the early modern equivalent of a luxurious shopping centre or department store. The building was situated in Westminster, along the Strand. The formal opening of this 'New Exchange' happened in April 1609. The purpose of the building was to provide arcades of luxurious shops. Britain's Burse counted around a hundred shops, described as 'small chests'. Merritt writes that shop leases were limited to haberdashers, stocking-sellers, linen-drapers, seamsters, goldsmiths, jewellers, milliners, perfumers, silk mercers, tiremakers, hood makers, stationers, confectioners, girdlers and those dealing in china, pictures, maps or prints and booksellers. Initially the shops were difficult to let. However, the shops were largely successful, but suffered during the trade depression in 1621, only to recover again in the 1630s. JF Merritt, *The social world of early modern Westminster. Abbey, court and community, 1525-1640* (Manchester University Press 2005) 157.
[16] E.g. *Cartwright v Vaccari*, 21 October 1616 C 33/131 f. 49 [IMG_0051]; *Baker v Francis*, 10 October 1622 C 33/143 f. 42 [IMG_0044]; *Aldworth v Lambe*, 20 December 1624 C 33/147 f. 390v [IMG_0393a]; 1 July 1625 C 33/149 f. 1024 [IMG_1009]; *Moseley v Alsopp,* 25 April 1627 C 78/426/2 m. 37 [IMG_0258]. The cloth industry was focused on the trade in woollen cloth.
[17] *Baker v Francis*, 10 October 1622 C33/143 f. 42 [IMG_0044]; *Aldworth v Lambe*, 20 December 1624 C 33/147 f. 390 v [IMG_0393a]; 1 July 1625 C 33/149 f. 1024 [IMG_1009]; *Moseley v Alsopp,* 25 April 1627 C 78/426/2 m. 37 [IMG_0258].
[18] There was a surge of cloth trade bankruptcy cases in this period, but occasional bankruptcies in the cloth trade occurred before and after this period. E.g. *Phelpes v Allen*, 17 October 1604 C 33/108 f. 46v [IMG_1129]; *Moseley v Alsopp*, 25 April 1627 C 78/426/2 m. 37 [IMG_0258].
[19] See chapter 5 of the thesis.

fabrics. For example, in *Colcocke v Handford* (1617) the bankrupt 'became indebted to [a certain] Valentyne Langton for linen cloth in diverse sums of money'.[20] Similarly, in *Jacobson v Potkyns* (1616) a widow of a bankrupt owed various creditors 'several sums of money for commodities of silk'.[21]

Almost all of the bankrupts in the survey traded solo, though, as has been seen, in *Baker v Francis* (1622) the bankrupt traded in a partnership in the wool trade.[22] This is consistent with the analysis of the dockets of Puckering LK and Coventry LK,[23] which, as seen above, show that acts of bankruptcy were mostly committed by individual traders, rather than by traders in partnerships.[24] The survey shows no examples of female bankrupts. However, this is likely the chance of the survey, because females (*femes sole* and widows) were explicitly included in the bankruptcy statutes from the Bankrupts Act 1571 onwards.[25] It seems that the bankrupts in the survey were all 'subject[s] born of this realm or of any the Queen's dominions, or denizen[s]'.[26] In various cases, such as in *Chamberlen v Smith* (1603), it was explicitly set out that the bankrupt was 'a subject born within this realm of England'.[27] In *Comye v Denale* (1580), the bankrupt, Augustine Denale, was a merchant from Ragusa.[28] It seems likely that Denale was a denizen of the realm, which would have allowed him to trade in England and subjected him to the Bankrupts Act 1571.[29]

In order to be considered a bankrupt, a debtor had to commit an act of bankruptcy.[30] Most of the cases in the survey set out the specific act of bankruptcy committed by the bankrupt, but the act

[20] *Colcocke v Handford*, 26 May 1617 C 33/ 132 f. 872 [IMG_0893].
[21] *Jacobson v Potkyns*, 17 October 1616 C 33/133 f. 68 [IMG_0893].
[22] *Baker v Francis* 10 October 1622 C33/143 f. 42 [IMG_0044]. *Andrewes v Jackson* (1601) deals with two bankrupts. It seems likely that these two bankrupts were business partners, but this is not specifically mentioned in the order. See, *Andrewes v Jackson*, 28 January 1601 C 33/99 f. 287v [IMG_9266a].
[23] See chapter 1.
[24] ibid.
[25] Bankrupts Act 1571, s. 1.
[26] ibid s. 1.
[27] E.g. *Chamberlen v Smith*, 23 February 1603 C 78/108/9 m. 32 [IMG_0065]*; Allen v Edwards*, 20 October 1608 C 78/172/13 m. unknown [IMG_0009].
[28] *Comye v Denale*, 25 October 1580 C 78/68/16 m. 24 [IMG_0180]. The Republic of Ragusa comprised the city of Ragusa (now Dubrovnik, Croatia) and surrounding areas.
[29] Bankrupts Act 1571, s. 1.
[30] Statute of Bankrupts 1543, preamble; Bankrupts Act 1571, preamble; Bankrupts Act 1604, s. 1; Bankrupts Act 1624, s. 2.

of bankruptcy was often not the reason for review.[31] The bankrupts in the survey had all committed one or more acts of bankruptcy: the bankrupt had kept his house, absented himself from public life, been outlawed, fled the country or made a fraudulent conveyance to one or more of his creditors.[32] For example, in *Mathewe v Courtman* (1618) the bankrupt was accused of 'departing secretly into Ireland'.[33] Sometimes, a trader had initially been merely insolvent, but subsequently absented themselves from public life, thereby committing an act of bankruptcy.[34] It was fairly common that a trader was accused of having committed two or more acts of bankruptcy. The bankrupt in *Allen's Case* (1614) had been outlawed upon a judgment at common law, kept his house and secretly moved to various places over the course of several weeks.[35] In *Lambe v Shakespeare* (1622) the bankrupt was accused of making fraudulent conveyances and fleeing the country.[36] In *Michell v Mynyffee* (1590) the bankrupt was accused of having fallen behind in paying some of his creditors 'by means of bad debtors and other casual misfortunes', as well as absenting himself from public life.[37] Similarly, in *Holden v Allen* (1595) the bankrupt had been accused of having absented himself from public life, but also that he had made a deed of gift of all his goods in order to defraud his creditors.[38]

The debts incurred by the bankrupts found in the survey were often of a few or several hundred pounds.[39] This is similar to the value of the debts found in the dockets of the commissioners of

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[31] E.g. *In Michell v Mynyffee* (1590) an act of bankruptcy was committed by a trader, but the review dealt with the non-compliance with a composition by one of his creditors. *Michell v Mynyffee,* 10 February 1590 C 78/96/13 m. 17 [IMG_0034].

[32] E.g. *Larmite v Somerman*, 21 October 1624 C 33/147 f. 98v [IMG_0101a] (keeping house); *Allen v Edwards (Allen's Case)*, 20 October 1608 C 78/172/13 m. unknown [IMG_0010]; *Allen's Case* in WH Bryson, *Cases concerning equity and the courts of equity 1550-1660 vol I* SS 117 387 (outlawed); *Grenewell v Harbottle*, 27 November 1599 C 78/109/6 m. 8 [IMG_0639] (absenting himself from public life).

[33] *Mathewe v Courtman*, 27 October 1618 C 33/135 f. 129a [IMG_1295a].

[34] E.g. *Samuel v Dunscombe*, 30 January 1605 C 33/107 f. 375 [IMG_5389]; *Cartwright v Vaccari*, 21 October 1616 C 33/131 f. 49 [IMG_0051].

[35] *Allen v Edwards (Allen's Case)*, 20 October 1608 C 78/172/13 m. unknown [IMG_0010]; *Allen's Case* in Bryson, SS 117 (n 32) 387.

[36] *Lambe v Shakespeare*, 18 October 1622 C 33/143 f. 81 [IMG_0083].

[37] *Michell v Mynyffee,* 10 February 1590 C 78/96/13 m. 17 [IMG_0034] at m. 17 [IMG_0034].

[38] *Holden v Allen*, 25 October 1597 C 33/ 93 f. 279 [IMG_6412]; 16 March 1599 C 33/95 f. 569v [IMG_6474a].

[39] E.g. *Michell v Mynyffee,* 10 February 1590 C 78/96/13 m. 17 [IMG_0034]; *Wood v Hayes*, 9 February 1606 C 33/111 f. 436v [IMG_9003a]. The debt could also be less than £100. E.g. *Taylor v Coleman*, 24 October 1614 C 33/127 f. 73 [IMG_0072] (debt of £60).

bankrupts.[40] For example, in *Michell v Mynyffee* (1590) the bankrupt owed debts totalling £600.[41] This was a substantial sum, and equivalent to the estate of an average tradesman in London in the Elizabethan period.[42] Most debts of the bankrupts in the review cases were considerably smaller than the amounts owed by insolvent debtors in conformity cases, which often amounted to thousands of pounds.[43] The survey shows examples of review cases of bankrupts with relatively small debts. For example, in *Taylor v Coleman* (1614) the bankrupt owed £60. The survey also shows some examples of bankrupts who had acquired very large amounts of debt. For example, in *Oxwick v Wiseman* (1628) the bankrupt owed debts totalling around £4,499.[44] Similarly, in *Cornellius v Blackmore* (1615) the bankrupt owed debts totalling around £17,000 to about twenty creditors.[45] £4,499 would be equivalent to a low to median estate of a tradesman in the Jacobean period and £17,000 to the estate of an alderman in the same period.[46] However, it seems that review cases in the Court of Chancery involving debts of bankrupts of over £1,000 were the exception and not the rule.[47]

The survey shows various examples of bankrupts from London,[48] but it equally shows examples of bankrupts from other parts of the country.[49] It was often the bankrupt or their descendants who exhibited a petition to the Court of Chancery for review of the decision of a commission of bankrupts, but sometimes one or more creditors would petition for a review.[50] The survey shows

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[40] See chapter 1.
[41] *Michell v Mynyffee,* 10 February 1590 C 78/96/13 m. 17 [IMG_0034].
[42] R Grassby, *The business community of seventeenth-century England* (CUP 1995) 249.
[43] See part 2 of the thesis.
[44] *Oxwick v Wiseman*, 21 January 1628 C 33/153 f. 403 [IMG_2140].
[45] *Cornellius v Blackmore,* 15 October 1614 C 33/127 f. 25 [IMG_0026].
[46] Grassby (n 42) 247-249.
[47] Due to lack of information it is not possible to say whether or in what way, if at all, if the amount of the debt was relevant in the review process.
[48] E.g. *Mathewe v Courtman*, 27 October 1618 C 33/135 f. 129a [IMG_1295a]; *Tomlinson v Rych,* 18 June 1596 C 33/91 f. 185v [IMG_4513a]; *Morsely v Alsopp*, 25 April 1627 C 78/426/2 m. 37 [IMG_0258].
[49] E.g. in *Michell v Mynyffee* (1590) the bankrupt was an ironmaster from Llanwynno, Glamorgan, Wales. *Michell v Mynyffee*, 10 February 1590 C 78/96/13 m. 17 [IMG_0034]. In *Aldworth v Lambe* (1624) the bankrupt traded in cloth in Hanborough, Oxfordshire. *Aldworth v Lambe*, 20 December 1624 C 33/147 f. 390v [IMG_0393a]; 1 July 1624 C 33/149 f. 1024 [IMG_1009]. In *Cornellius v Blackmore* (1615) the bankrupt was a mayor and merchant from Southampton. *Cornellius v Blackmore*, 15 October 1614 C 33/127 f. 25 [IMG_0026].
[50] E.g. *De Gozze v De Mensa*, 14 November 1599 C 33/97 f. 115v [IMG_7725-1] (descendant of an alleged bankrupt); *Edwards v Hubberstye (Allen's Case)*, 3 February 1614 C 78/125/11 m. 1 [IMG_0002] (descendants of a bankrupt);

one example, *Comye v Denale* (1580), in which a monarch had initiated the case:[51] here Queen Elizabeth had, by her 'express commandment given to him by her own mouth' required Egerton LK to end the cause'.[52] Members of the Comye family were musicians to Queen Elizabeth, which could explain her interest in this case.[53] The survey shows that the bankrupt often did not reside in the same town as the creditors who sued out the commission of bankrupts, except when the bankrupt and his creditors both resided in London.[54] For example, in *Grenewell v Harbottle* (1599) the bankrupt resided in Ravensworth, County Durham, whereas the creditors who sued out the commission were from Newcastle upon Tyne.[55] Similarly, in *Edwards v Hubberstye* (1614), commonly known as *Allen's Case*, the bankrupt resided in York, whereas the creditors who sued out the commission 'were persons dwelling in London'.[56] The commissioners often had a link with London and the survey suggests that on rare occasions the Court of Chancery referred the matter under review to local commissioners of bankrupts.[57]

The Chancery records usually only give the names of the commissioners and generally do not mention their trade or social status.[58] However, it seems that the commissioners of bankrupts were generally people of standing in the place of residence of the (alleged) bankrupt.[59] *Cornellius v*

Moseley v Alsopp, 25 April 1627 C 78/426/2 m. 37 [IMG_0258]; *Riche v Jones*, 7 October 1599 C 33/97 f. 703 [IMG_8287] (petition by creditors).

[51] *Comye v Denale*, 25 October 1580 C 78/68/16 m. 24 [IMG_ 0180].

[52] ibid.

[53] The Comyes (or Comeys) came from Portugal or Italy. See, P. Holman, 'The English Royal Violin Consort in the Sixteeth Century' (1982-83) 109 *Proceedings of the Royal Musical Association* 39. The royal interest might possibly be a reason why Denale's case was handled in the bankruptcy procedure despite his being from Ragusa (though, as suggested above, it also seems possible that he was a denizen).

[54] E.g. *Barkesteed v Dentlan*, 10 October 1611 C 78/181/14 m. unknown [IMG_ 0024].

[55] *Grenewell v Harbottle*, 27 November 1599 C 78/109/6 m. 8 [IMG_0639]. This case was eventually dismissed by the Court of Chancery, because it had already been exhibited in the Council of the North.

[56] *Edwards v Hubberstye (Allen's Case)*, 3 February 1614 C 378/125/11 m. 1 [IMG_0002]. See more about *Allen's Case,* below.

[57] E.g. *Martyn v Hollyer*, 14 May 1601 C 33/99 f. 509 [IMG_9484].

[58] E.g. *Peers v Ward*, 21 October 1614 C 33/127 f. 49 [IMG_0051]; *Michell v Mynyffee*, 10 February 1590 C 78/96/13 m. 17 [IMG_0034].

[59] E.g. in *Michell v Mynyffee* (1590) at least two out of three of the commissioners in the original commission of bankrupts, whose decision was under review, were gentlemen of distinction in Glamorgan. One of them, Sir Edward Stradling, was high sheriff in 1574, 1583 and 1596. One commissioner was a member from a prominent family in Wales, and the final commissioner could not be identified. W Llewellin, 'Sussex Ironmasters in Glamorganshire', (1863) 34 *Archaeologia Cambrensis* 95 n1. The new commission of bankrupts, which reviewed the case, also consisted of important people, including Thomas Lewis, who was high sheriff, Gabriel Lewis, who was an under-sheriff and

Blackmore (1615) shows an example in which a 'common commissioner' was brought in from London to be part of a commission of bankrupts in Southampton.[60] The language of the order suggests that the commissioner was especially brought in to declare Richard Cornellius a bankrupt and that this commissioner might have done this on a regular basis. It also may suggest that if a bankrupt resided in the country a commissioner was brought in from London, possibly to safeguard the independence of the commission or to ensure that standard procedure was complied with, though, this does not seem to have been the reason for the involvement of a commissioner from London in this case.[61] *Edwards v Hubberstye* (1614) shows that Ellesmere LC had the option to choose from a list of seven commissioners of bankrupts,[62] and that he 'authoris[ed] them [the commissioners] or any four of them, one being learned in the laws, to execute the said commission'.[63] In this particular commission, Ellesmere LC required that a lawyer be among the commissioners who executed the commission of bankrupts.[64] However, as has been seen, it seems that there was no general requirement for a lawyer to be included in commissions of bankrupts until Bacon LC introduced this in the Standing Orders of the Court of Chancery of 29 January 1619.[65]

II. The areas of the review function of the Court of Chancery

As noted above, the Court of Chancery would review decisions of commissions of bankrupts in relation to (1) points of substantive law based on the bankruptcy statutes; (2) evidential matters and procedural issues; (3) corruption and fraud by others than the bankrupt; and (4) compositions.

Edward Jones, a county clerk. Llewellin (n 59) n1. *Michell v Mynyffee,* 10 February 1590 C 78/96/13 m. 17 [IMG_0034]. Similarly, in *Cornellius v Blackmore* (1615) the original commission consisted of the 'commissioners Francis Milles and George Freeman esqs. men of quality and worth'. They were 'both dwellers in the same town' as the (alleged) bankrupt. *Cornellius v Blackmore*, 15 October 1614 C 33/127 f. 25 [IMG_0026] at f. 25v [IMG_0026a]. In *Holden v Allen* (1597) the commissioners were the mayor and several other people residing in Coventry. *Holden v Allen*, 25 October 1597 C 33/93 f.279 [IMG_6412].

[60] *Cornellius v Blackmore,* 15 October 1614 C 33/127 f. 25 [IMG_0026] at f. 25v [IMG_0026a].

[61] It appears that the commissioner was brought in with the purpose of compromising the bankrupt.

[62] *Edwards v Hubberstye (Allen's Case)*, 3 February 1614 C 378/125/11 m. 1 [IMG_0002].

[63] ibid.

[64] ibid.

[65] GW Sanders, *Orders of the High Court of Chancery and Statutes of the Realm relating to Chancery. From the earliest period to the present time.* vol. I, part I (Maxwell & Sons 1845) 122.

1. Review of points of substantive law

The survey suggests that the Court of Chancery reviewed decisions in relation to points of substantive law. These reviews were based upon the interpretation and application of the provisions of the various bankruptcy statutes. As has been seen, commissions of bankrupts had to establish whether a debtor was a bankrupt by considering two questions of fact: (1) whether the debtor was a trader within the meaning of the statutes; and (2) whether he or she had committed a fraudulent act of bankruptcy within the meaning of the statutes. Therefore, it is not surprising that decisions by commissions of bankrupts relating to these questions were reviewed by the Court of Chancery. The Court of Chancery also reviewed whether merchant strangers could be considered creditors within the bankruptcy statutes so as to benefit from the provisions of the statutes.

a. Trader

The survey shows that the Court of Chancery could review decisions of commissions of bankrupts declaring debtors bankrupt based on the question of whether these debtors could be considered traders within the various bankruptcy statutes. The survey shows only one example of a review of this kind. In *Stonehurst v Griffith* (1587), Dr Carew, one of the masters of the court, had to consider whether the plaintiff was 'no such common buyer and seller as a commission of bankrupts might lawfully be granted against him'.[66] Carew's report showed that the plaintiff 'had not been any such buyer and seller' and that the commission of bankrupts had been unlawfully sued out against him.[67] The infrequency of review cases in the survey in relation to the question as to whether a debtor was a trader can potentially be explained by the fact that this was a relatively straightforward factual question to answer: it could be easily tested against the words of the various bankruptcy statutes

[66] *Stonehurst v Griffith*, 14 November 1587 C 33/75 f. 163v [IMG_0165a].
[67] ibid.

whether a debtor was 'exercising the trade of merchandise…or seeking his or her trade of living by buying and selling'.[68]

b. Act of bankruptcy

The survey suggests that it was more common for the Court of Chancery to review decisions in relation to the act of bankruptcy committed by the bankrupt. As has been seen, the bankruptcy statutes set out that a trader committed an act of bankruptcy by keeping house, absenting him- or herself, not paying a debt of £100 or more within six months, fleeing the country or making fraudulent transfers.[69] As observed above, almost all cases found in the survey set out the act of bankruptcy committed, but it was often not the explicit reason for review.[70] The survey shows examples of reviews of the fraudulent conveyance that was said to constitute the act of bankruptcy, as well as disputes in relation to acts of bankruptcy committed by a debtor absenting himself or not paying a debt of £100 or more within six months.[71]

As has been noted, the survey suggests that the Court of Chancery dealt with reviews in relation to fraudulent conveyances which were said to constitute an act of bankruptcy.[72] The requirements of a fraudulent conveyance in this period were laid out in the Fraudulent Conveyances Act 1571.[73] The Act set out that conveyances, involving both real and personal property, made by a debtor with the 'purpose and intent' to 'hinder, delay or defraud creditors' were to be 'utterly void,

[68] Bankrupts Act 1571, s. 1. The Ellesmere papers include a list of trades exercised by strangers in 1593. It is unrelated to bankruptcy, but sheds light on the contemporary perception of who were traders. See 'The several names of traders used and frequented by the strangers before expressed'. EL 2514. The list shows trades such as jewellers, shoemakers and silk dyers. The more controversial trades on the list are surgeons, scriveners or notaries. In modern times surgeons would not be classified as traders, but as medical professionals. Surgeons in this period, however, (often called barber-surgeons) provided services, such as hair cutting, going beyond what might be regarded as the medical sphere. The position of scriveners may have been controversial at the time: scriveners were explicitly included as falling within the scope of the bankruptcy statutes in the Bankrupts Acts 1624. Bankrupts Act 1624, s. 2.
[69] See chapter 1.
[70] See section I of this chapter.
[71] *Whall v Denny,* 14 October 1588 C 33/77 f. 31v [IMG_0034a]; *Lowe v Stockden*, 23 January 1588 C 33/75 f. 333 [IMG_0338]; *Moseley v Alsopp,* 25 April 1627 C 78/426/2 m. 37 [IMG_0258]; *Lamott v Eyre*, 10 December 1624 C 33/147 f. 359 [IMG_0362]; *Napper v Edwardes*, 12 September 1621 C 33/140 f. 1280v [IMG_2620]. It is possible that this list is not complete, because not all entries of all the cases have been followed up.
[72] *Lowe v Stockden*, 23 January 1588 C 33/75 f. 333 [IMG_0338].
[73] Fraudulent Conveyances Act 1571 (13 Eliz. I, c. 5).

frustrate [*sic*] and of none effect', unless the transfers were made with good consideration, *bona fide* and without notice.[74] The bankruptcy statutes gave the commissioners of bankrupts power to set aside fraudulent conveyances, so that the proceeds of the relevant property could be distributed amongst the creditors.[75] In *Lowe v Stockden* (1588) the Court of Chancery reviewed the certification of a commission of bankrupts, which had decided that a conveyance made to the defendant by a certain Smith, the bankrupt, was 'covinous' in order to 'defraud the creditors of the said Smith'.[76] During the suit it was noted by Hatton LC that the bargain and sale of goods in question was sealed by Smith and that the decision of the commission of bankrupts appeared to be based on 'nothing but presumptions and allegations' against the validity of the sale. It was therefore ordered that the matter be considered further.[77]

The Court of Chancery also dealt with reviews involving the timing of the act of bankruptcy.[78] For example, in *Lambe v Shakespeare* (1622), Lambe was not found a bankrupt by a commission of bankrupts and subsequently mediation took place between him and his creditors and a composition was made between them.[79] Following the composition, Lambe conveyed divers lands and goods to the plaintiffs (likely his sureties) and his creditors in satisfaction of these debts. However, some of the creditors (including Thomas Shakespeare) were unwilling to conform and sued out another commission of bankrupts, whereupon Lambe fled the country. A second commission of bankrupts found Lambe a bankrupt, and by the appointment of the defendant, without giving notice to Lambe, sold the land and goods to Shakespeare, who then started various

[74] ibid s. 1 and s. 5.
[75] However, section 11 of the Bankrupts Act 1571 excluded *bona fide* conveyances of land, not to the use of the bankrupt or his heirs, that had been made by the bankrupt before committing an act of bankruptcy. As has been seen, the Bankrupts Act 1604 and Bankrupts Act 1624 have similar provisions.
[76] *Lowe v Stockden*, 23 January 1588 C 33/75 f. 333 [IMG_0338].
[77] ibid.
[78] E.g. *Lambe v Shakespeare*, 18 October 1622 C 33/143 f. 81 [IMG_0083]; *Carpenter v Leaman*, 10 November 1620 C 33/139 f. 338 [IMG_0332a]; 21 November 1620 C 33/ 139 f. 452 [IMG_0446a]; *Colcocke v Handford*, 26 May 1617 C 33/ 132 f. 872 [IMG_0893]; *Baker v Francis*, 10 October 1622 C 33/143 f. 42 [IMG_0044].
[79] *Lambe v Shakespeare*, 18 October 1622 C 33/143 f. 81 [IMG_0083].

actions at law against Lambe. However, Williams LK ordered that because Shakespeare had had notice of the bankruptcy at the time of the sale to him, all proceedings at law should be stayed.

The Court of Chancery also reviewed cases in relation to the act of bankruptcy of a debtor absenting him- or herself. In *Moseley v Alsopp* (1627), Moseley was accused of being a bankrupt, the creditors who sued out the commission of bankrupts having alleged that he had absented himself from public life. Some of Moseley's creditors claimed that he 'did begin to keep his house wherein he dwelt in London', and 'after that had absented himself from the house to the intent to defraud [his creditors]'.[80] However, Moseley argued that he had only gone to a farm at Hooton Roberts in Yorkshire for business and had 'also frequent[ed] fairs and markets thereabouts and also in that time came to London and there walked openly about his affairs'.[81] The Court of Chancery decided that the accusations against Moseley were fraudulent and declared that the bankruptcy proceeding was void.[82]

Finally, the survey shows examples of review of cases involving the act of bankruptcy of not paying a debt of £100 or more within six months. In *Lamott v Eyre* (1624), Thomas Eyre, a debtor, was accused of being a bankrupt.[83] However, Eyre argued that he had long paid a great part of his debts to several of his creditors, whereof John Lamott, who had sued out the commission of bankrupts, had a great share, and that Eyre for the past years had been a 'man of good and public employment in the commonwealth'.[84] Eyre's other creditors certified in his favour and stated that they did not see a cause for a commission of bankrupts to be proceeded with against him, and nor did 'they desire it'.[85] However, in turn, Lamott accused Eyre of fraud and collusion with some of his other creditors.[86] Thereupon, 'his lordship [William LK] moved the said defendant to repair to the said

[80] *Moseley v Alsopp,* 25 April 1627 C 78/426/2 m. 37 [IMG_0258].
[81] ibid.
[82] ibid m. 39 [IMG_0264].
[83] *Lamott v Eyre*, 10 December 1624 C 33/147 f. 359 [IMG_0362].
[84] ibid.
[85] ibid.
[86] ibid.

Lamott and show what his estate is'. In the meantime it was ordered that the commission of bankrupts sued out against Eyre should be suspended. Similarly, in *Napper v Edwards* (1621) a commission of bankrupts was sued out against Robert Napper for the recovery of debts long due.[87] However, the allegations appeared to be false, as indicated by certain depositions taken in that cause annexed to the petition.[88]

c. Creditors

The Court of Chancery decided on various occasions that merchant strangers could be considered as creditors and benefit from pro rata distribution as set out in the various bankruptcy statutes. The Statute of Bankrupts 1543 did not contain specific provisions for foreign creditors.[89] Such provisions were not introduced until the enactment of the Bankrupts Act 1624.[90] As has been seen, the Bankrupts Act 1624 explicitly set out that it extended to 'strangers born as well aliens as denizens' so as 'to make [strangers] capable of the benefit or contribution as creditors by those laws'.[91] The 1624 Act extended the application of this provision to all the previous bankruptcy Acts.[92]

It had been argued in 1580 that merchant strangers could not benefit from the existing bankruptcy statutes.[93] The rationale behind this was that merchant strangers in London had explicitly negotiated that they would not be liable as bankrupts within the 1571 statute, and why should they have the 'advantage to take the benefit and not be subject to the pain'.[94]

[87] *Napper v Edwardes*, 12 September 1621 C 33/140 f. 1280v [IMG_2620].
[88] ibid.
[89] Bankrupts Act 1571, s. 1.
[90] ibid s. 13.
[91] Bankrupts Act 1624, s. 13.
[92] ibid s. 13.
[93] 'Opinion on the right of strangers to partake of bankrupts goods rateably with English creditors' by an unknown source, 1580 SP 12/146 f. 232.
[94] ibid.

Nevertheless, it seems that the Court of Chancery already allowed merchant strangers to benefit from the bankruptcy statutes on various occasions before 1624.[95]

While this was not a review case, in *Certain merchant strangers creditors v Pope* (1597) Egerton LK granted a commission of bankrupts upon the Statute of Bankrupts 1543.[96] The commission was sued out by a petition of merchant strangers against an English merchant who was now 'beyond the seas'.[97] The merchant strangers were indebted to the English creditors, and had assigned to the English creditors bills representing debts owed by the bankrupt to the merchant strangers to satisfy what the merchant strangers owed to the English creditors. This meant that the English creditors were owed the money which the bankrupt had originally owed to the merchant strangers. The merchant strangers were not granted the commission of bankrupts themselves, but it was granted to the English creditors to enable them to recover money which had originally been owed to the merchant strangers, but which by assignment was now owed to the English creditors. It was ordered 'by his lordship that if the said merchant strangers will not satisfy to the English merchants such debts as they had assigned as aforesaid that then the said English merchants shall have a commission of bankrupts thereby to be satisfied their full debts so assigned before the said merchant strangers shall have satisfaction of any part of their debts'.[98]

Disley v Leman (1621) shows that merchant strangers could also directly benefit from pro rata distribution under the bankruptcy statutes.[99] The creditors, who were English merchants, had sued out a commission of bankrupts. However, the commissioners of bankrupts had refused to admit four merchant strangers to participate in the commission of bankrupts against a certain Peter Leman, a 'non-solvent'.[100] Bacon LC ordered that these four foreign merchants be admitted into

[95] *Certain merchant strangers creditors v Pope*, 2 September 1597 C 33/93 f. 182 [IMG_6310].
[96] ibid. It is unclear why the commission of bankrupts was sued out on the basis of the Statute of Bankrupts 1543. It seems possible that this statute was chosen because it was not expressly confined to 'subjects and denizens'.
[97] *Certain merchant strangers creditors v Pope*, 2 September 1597 C 33/93 f. 182 [IMG_6310].
[98] ibid.
[99] *Disley v Leman*, 30 August 1621 C 33/140 f. 1275 [IMG_1302]. The case seems to involve the same parties as in *Carpenter v Leaman*, 10 November 1620 C 33/139 f. 338 [IMG_0332a]; 21 November 1620 C 33/ 139 f. 452 [IMG_0446a].
[100] *Disley v Leman*, 30 August 1621 C 33/140 f. 1275 [IMG_1302].

the commission.[101] The commissioners admitted the merchant strangers but then sought authority from the Court of Chancery before the merchant strangers were given the benefit of their dividends. Williams LK, who had by then replaced Bacon LC, ordered that 'it is agreeable to all equity and former precedents that the plaintiffs ought to have their shares upon an equal distribution in such sort as the other creditors ought to have they being admitted to the said commission'.[102] Williams LK referred to 'divers precedents in the time of the Lord Chancellor Egerton of this nature which were also confirmed afterwards in this very cause by the opinion of the late Lord Chancellor Bacon'.[103]

The debate as to the state of the law concerning merchant strangers and the bankruptcy statutes continued in *Larmite v Somerman* (1624),[104] which seems to be a continuation of *Disley v Leman* (1621).[105] The case dealt with the same Peter Leman as in *Disley v Leman* (1621), who by this time had become a bankrupt. The creditors of Leman claimed goods which they argued had been sold to them by the commissioners of bankrupts. The defendant argued that these goods had been delivered to him by the bankrupt's wife towards the payment of the debt owed to the defendant. However, the defendant confessed that after the date on which the commissioners declared the bankrupt to be bankrupt, but before the delivery of the goods to the defendant, the defendant had heard that an act of bankruptcy had been committed, and that he had subsequently sold the goods. The defendant also alleged that two of the plaintiffs were aliens born and were therefore unable to take the benefit of the statute. The plaintiffs replied that the commissioners had been ordered to admit the plaintiffs on 30 August 1621 (in *Disley v Leman*), and that the sale was not by way of distribution to the plaintiffs but to the intent that they might recover the value of the goods which might then be distributed amongst the creditors, not all of whom were aliens.[106] Williams LK

[101] *Disley v Leman*, 25 January 1621 C 33/140 f. 593 [IMG_0601].
[102] *Disley v Leman*, 30 August 1621 C 33/140 f. 1275 [IMG_1302].
[103] ibid.
[104] *Larmite v Somerman*, 21 October 1624 C 33/147 f. 98v [IMG_0101a]. The name 'Larmite' also appears as 'Lamill' and 'Larmyte' in the Chancery records. See also the pleadings of the case *Larmite v Somerman*, 5 May 1624, C 3/364/93.
[105] *Larmite v Somerman* refers explicitly to the order of 30 August 1621 in *Disley v Leman*, C 33/140 f. 1275 [IMG_1302].
[106] The entry says 'the same', which likely refers to the value of the goods.

ordered Sir Eubule Thelwall, one of the masters of the court, to examine the truth of the cause and report what he thought fit to be done.[107] In his report Thelwall stated his belief that foreign creditors could not be given a pro rata share of the property of the bankrupt prior to the enactment of the Bankrupts Act 1624:[108] 'I confess that before the said order [of 30 August 1621 in *Disley v Leman*] was produced before me, I did conceive that aliens were not by law, nor any act of Parliament to have any share of the benefit upon the Statute of Bankrupts, until the late act made in the last session of parliament.'[109] He nevertheless acknowledged that in the order 'there is mention made of precedents both in the Lord Ellesmere and Lord St Albans' times whereupon the said order is grounded'.[110] Unfortunately, the exact precedents are not specified. However, Thelwall accepted that the law had been settled in the order of 30 August 1621 and therefore held 'it fit rather to be silent than to deliver any opinion of my own'.[111] Overall, it seems that in practice the Chancery allowed foreign creditors to benefit from the statutes of bankrupts, in some cases at least, before the bankruptcy statutes explicitly allowed it in the Bankrupts Act 1624.

2. Review of evidence and procedure

The Court of Chancery reviewed decisions of commissions of bankrupts based on evidential shortcomings or procedural issues.[112] The survey suggests that evidential shortcomings or procedural issues were rarely the main points of review in a bankruptcy case decided in the Court of Chancery, but that issues arising from evidence and procedure were very often part of the litigation involving the review as a side issue.

[107] *Larmite v Somerman*, 21 October 1624 C 33/147 f. 98v [IMG_0101a].
[108] ibid.
[109] *Larmite v Somerman* by Thelwall, 1 February 1624 C 38/48.
[110] ibid Lord St Albans is Bacon LC.
[111] ibid.
[112] It seems that in theory this would involve both cases involving bankrupts and those involving insolvents. After all, the Court of Chancery would authorise commissioners of bankrupts in conformity and other settlement proceedings since the Bankrupts Act 1571. See part 2 of this thesis.

a.) Evidence

Levison v Bradley (1620) is an example of a review in relation to evidence.[113] John Bradley had sued a commission of bankrupts against William Levison, which decided that Levison was a bankrupt. William Levison petitioned the Court of Chancery arguing that none of his witnesses were heard who could prove that he was not a bankrupt. Some of the commissioners (as appeared by affidavit) said that 'they were not to examine the plaintiff's witnesses, alleging they should examine none but such as made for to prove the plaintiff a bankrupt'.[114] The Court of Chancery ordered a change in the composition of the commission of bankrupts to deal with the matter.[115]

b.) Procedure

The survey suggests that it was more common that the Court of Chancery reviewed issues relating to the procedure adopted by commissions of bankrupts than evidential shortcomings. The survey shows examples of reviews of the validity of the grant of commissions of bankrupts, questions concerning subscription by additional creditors to commissions of bankrupts, and matters of account by commissioners of bankrupts.[116]

The Court of Chancery exercised a jurisdiction to review the validity of the grant of a commission of bankrupts by the lord chancellor.[117] For example, in *Riche v Jones* (1599) the commission of bankrupts was found to have been sued out without just cause.[118] William Riche and Richard Warde, on behalf of themselves, as well as for all the other creditors, sued out a commission of bankrupts against George Jones.[119] Riche and Warde both put in a bond as security to prove that Jones was a bankrupt. However, Warde had since dissolved the petition and argued that he had

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[113] *Levinson v Bradley,* 11 October 1620 C33/139 f. 17v [IMG_0021a]; 7 November 1620 C33/139 f. 349v [IMG_0343a].
[114] *Levinson v Bradley,* 11 October 1620 C33/139 f. 17v [IMG_0021a].
[115] *Levinson v Bradley,* 11 October 1620 C33/139 f. 17v [IMG_0021a]; 7 November 1620 C33/139 f. 349v [IMG_0343a].
[116] E.g. *Riche v Jones,* 7 October 1599 C 33/97 f. 703 [IMG_8287]; *Allenson v Clearke*, 23 September 1620 C 33/137 f. 1700 [IMG_1237]; 24 October 1620 C 33/139 f. 465v [IMG_0459a]; *Andrewes v Jackson*, 28 January 1601 C 33/99 f. 287v; *Phelpes v Allen*, 17 October 1604 C 33/108 f. 46v [IMG_1129].
[117] E.g. *Riche v Jones,* 7 October 1599 C 33/97 f. 703 [IMG_8287].
[118] *Riche v Jones,* 7 October 1599 C 33/97 f. 703 [IMG_8287].
[119] ibid.

been drawn in to put in the petition by Riche and all of Jones's other creditors.[120] Warde and the other creditors appeared in person in the Chancery and openly affirmed that the commission of bankrupts had been procured without any just cause and was a practice of Riche to defeat them of their debts. The Court of Chancery decided in favour of Jones. It seems to have been assumed that if the accusations of Jones being a bankrupt were shown to be false, Jones might proceed against Riche and Warde on the bond, but not against the other creditors.[121] There may have been a desire in this case on the part of Warde (and perhaps the other creditors) to avoid liability on the bond by blaming the false suing out of the commission of bankrupts on the malpractice of Riche.

The Court of Chancery also dealt with reviews seeking the temporary suspension of commissions of bankrupts. In *Perrott v Tawkey* (1622) Perrott, the bankrupt, requested a *supersedeas* of the commission of bankrupts.[122] After two years imprisonment he was still paying his creditors in respect of outstanding debts, and wanted to pay the remainder of his creditors by selling his land. However, because his creditors had sued out a commission of bankrupts against him, no chapman wanted to deal with him 'fearing the commission of bankrupts', which made it impossible to sell his land.[123] The Court of Chancery ordered that 'for the better making of the plaintiff to relieve himself of his debt that the said commission may be suspended and that the said lands may be sold for the payment of the rest of the plaintiff's creditors'.[124] Similarly, the Court of Chancery dealt with reviews in which the court was requested to continue the proceedings of a commission of bankrupts after it had granted a *supersedeas*.[125] For example, in *Howse v Lea* (1591) the Court of

[120] The reason why Warde dissolved his petition is not set out in the order. There are various possibilities as to why Warde disavowed his involvement in obtaining the commission. For example, it is possible that Riche had misled Warde to sue out a commission of bankrupts, and that Jones was in fact not a bankrupt. Being a bankrupt could lead to reputational damage, and Riche might have been a rival trader. Another possibility might be on the basis that if there were no commission of bankrupts Riche and Warde would be in a position to recover the whole of the debt at common law, whereas if there were a commission they might end up with no more than a pro rata distribution. For other instances in which the validity of the grant of a commission of bankrupts was called into question by the fraudulent conduct of the creditors who had sued out the commission, see below.
[121] Likely because only Riche and Warde put in a bond to prove that Jones was a bankrupt in the first place.
[122] *Perrott v Tawky*, 5 December 1622 C 33/143 f. 331v [IMG_0333a].
[123] ibid.
[124] ibid.
[125] E.g. *Howse v Lea*, 2 December 1591 C 33/83 f. 255 [IMG_0247].

Chancery dealt with a review with a request that a new commission of bankrupts should be granted, or that the old commission be pursued by *procedendo.*[126] The plaintiff had sued out a commission of bankrupts against the bankrupt, but when the commission was stayed, he tried to pursue the bankrupt at common law.[127] After that had failed, he requested to sue out a new commission of bankrupts, or to continue the old one.

The survey also shows that creditors asked the Court of Chancery to be added to a commission of bankrupts which had already been issued.[128] Before the enactment of the Bankrupts Act 1624 creditors had to subscribe to the commission of bankrupts in order to benefit from the bankruptcy statutes.[129] *Andrewes v Jackson* (1601) is an example of this kind found in the survey. [130] It seems that Andrewes and Stubbs had sued out a commission of bankrupts against two bankrupts, Jackson and Atkinson, with a view to drawing the whole estate of the bankrupts to themselves at the expense of the other creditors. However, Andrewes and Stubbs were willing to cease their suit on being paid their costs by the other creditors, and to join with the other creditors in suing out a commission of bankrupts. Ellesmere LC 'ordered that said plaintiffs shall or may from henceforth relinquish and give over their said suit so depending in this court so…that they do join with the rest of the creditors that will sue forth the said commission of bankrupts without any impeachment unto them or either of them in that behalf'.[131] It is unclear why the plaintiffs were willing to cease their suit in the Court of Chancery at the requests of the other creditors,[132] as it would not seem to be in their interests to share the proceeds of the commission of bankrupts with more creditors. It might be possible that the other creditors were vulnerable people in society, such as widows and orphans, and that the two plaintiffs ceased their suit for charitable reasons.[133] Finally, the Court of

[126] *Howse v Lea*, 2 December 1591 C 33/83 f. 255v [IMG_0247a].
[127] It is unclear from the order why the bankruptcy proceedings were stayed at this stage. For more about *procedendo*, see below.
[128] *Andrewes v Jackson*, 28 January 1601 C 33/99 f. 287v [IMG_9266a].
[129] Bankrupts Act 1624, s. 8.
[130] *Andrewes v Jackson*, 28 January 1601 C 33/99 f. 287v [IMG_9266a].
[131] ibid. See also, *Andrewes v Jackson*, 28 January 1601 C 33/100 f. 260v [IMG_1027].
[132] If it was simply an action for the debts owed to the two plaintiffs that would seem to be a common law matter.
[133] There is no evidence of this in the entry.

Chancery dealt with reviews in relation to accounting by commissioners of bankrupts.[134] The Bankrupts Act 1571 introduced a requirement that commissioners of bankrupts account to the bankrupt and pay to him any surplus from the proceeds of sale of his goods.[135] This meant that a trader could be declared bankrupt, even if he had sufficient resources to pay his debts after the sale of his assets, and that any surplus would be paid out to the bankrupt. In *Phelpes v Allen* (1604) John Phelpes owed a debt of £35 2s. by bill for linen cloth to Richard Allen and various other merchants. Phelpes paid £7 to a certain John Mokell, Allen's partner, as well as £14 to Allen directly. Nevertheless, a commission of bankrupts was sued out against John Phelpes by his creditors, his land was sold for £150, and the other defendant, Willis, by warrant from Allen, received £35 2s. upon the bill from the commissioners. This meant, however, that Phelpes had paid Allen twice, and had thus been overpaid, having received £21 from the payment to Allen and Mokell (as Allen's partner) and £35 2s from the commissioners.[136] The Court of Chancery ordered that unless Allen showed cause to the contrary he was to repay £21 to the plaintiff without further motion.[137]

3. Review based on corruption and fraud by others than the bankrupt

The Court of Chancery dealt with reviews concerning corruption and fraud by others than the bankrupt from the Elizabethan period onwards. The survey shows examples of reviews concerning (a) fraudulent commissioners of bankrupts and (b) the involvement of one or more fraudulent creditors in a bankruptcy proceeding.[138] The main concern of the Court of Chancery was to protect the general creditors, rather than the bankrupt. However, in case of the fraudulent suing out of a commission of bankrupts the bankrupt seems to have been able to be compensated with damages

[134] *Phelpes v Allen*, 17 October 1604 C 33/108 f. 46v [IMG_1129].
[135] Bankrupts Act 1571, s 4. See also Bankrupts Act 1571, s. 7 and Bankrupts Act 1604, s. 10.
[136] *Phelpes v Allen*, 17 October 1604 C 33/108 f. 46v [IMG_1129]. While this explanation seems likely, the reasoning of the court in the entry is not sufficiently detailed to be certain.
[137] *Phelpes v Allen*, 17 October 1604 C 33/108 f. 46v [IMG_1129]. It is unclear what happened to the remaining debt of 2s.
[138] E.g. *White v Ryley*, 19 April 1597 C 33/91 f. 756 [IMG_5080]; *Wood v Hayes*, 9 February 1606 C 33/111 f. 436v [IMG_9003a]; *Moseley v Alsopp*, 25 April 1627 C 78/426/2 m. 3 [IMG_0264]; *Aldworth v Lambe*, 20 December 1624 C 33/147 f. 390v [IMG_0393a]; 1 July 1625 C 33/149 f. 1024 [IMG_1009].

and costs, and in some cases a new commission would be awarded to consider the case afresh.[139] In the case of non-performance of a composition made by commissioners of bankrupts, which might in some cases show elements of fraudulent conduct, the Court of Chancery generally ordered the refractory creditors to comply with the original agreement certified by the commission of bankrupts.

a.) Corruption or fraud by commissioners of bankrupts

The Court of Chancery dealt with reviews involving corruption or fraud by commissioners of bankrupts.[140] Yale has argued that following the introduction of the bankruptcy jurisdiction in the Bankrupts Act 1571, the lord chancellor 'made and unmade commissioners and saw that the commissioners did not abuse their position but he did not review their decisions'.[141] He argued that 'it was Lord Nottingham who first entertained appeals'.[142] However, as has been seen, the lord chancellor dealt with reviews of commissions of bankrupts on a regular basis from the Elizabethan period, which included, but were not limited to abuse of position by commissioners of bankrupts. Yale appears to have relied in his analysis on the brief and uninformative report of *Wood v Hayes* (1606-07) in Tothill,[143] however, the entry of *Wood v Hayes* (1606) in the entry book of decrees and orders clearly shows that while the case was based on abuse of power by the commissioners, Ellesmere LC handled that point in the context of a review of a decision which included checking whether an act of bankruptcy had been committed by Luke Mills, the alleged bankrupt, and what

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[139] *Wood v Hayes*, 9 February 1606 C 33/111 f. 436v [IMG_9003a].
[140] E.g. *White v Ryley*, 19 April 1597 C 33/91 f. 756 [IMG_5080]; *Wood v Hayes*, 9 February 1606 C 33/111 f. 436v [IMG_9003a]; *Moseley v Alsopp*, 25 April 1627 C 78/426/2 m. 3 [IMG_0264].
[141] DEC Yale, *Lord Nottingham's Chancery Cases* vol. I (SS 73) (Quarich 1957) cxv.
[142] ibid cxv. Yale uses the same definition of review of a case as that adopted in this thesis, namely the review of decisions of commissions of bankrupts. Yale (n 85) cxv. Yale refers to a definition from Maddock's book on Chancery practice:…'The issuing of commissions of bankruptcy and all questions arising upon the issue are matters of original jurisdiction…But all the proceedings of the commissioners are liable to revision by the Chancellor and so far his jurisdiction in bankruptcy is appellate…'. Yale (n 85) cxiv. See also, H Maddock, *A treatise on the principles and practice of the High Court of Chancery. Vol II Equity jurisdiction of the chancellor* (W Clarke and Sons 1815) 452.
[143] Tothill states the following: 'A decree made to relieve one which had double taken from him (as a concealer) by virtue of the Statute of Bankrupts, upon indirect dealing by commissioners, in the execution of the commission, Wood contra Hayes, 4 Jac. [1606-7]'. See, Tothill 59, 21 ER 123.

the conduct of the commissioners had been in the first instance.[144] It seems, however, that reviews based on fraud by commissioners of bankrupts were relatively uncommon.[145]

In *Wood v Hayes* (1606) the goods of Thomas Woods had been levied by Sir Thomas Hayes and some other defendants based on a fraudulent warrant issued by a commission of bankrupts, consisting of William Wyatt and other commissioners.[146] The commission of bankrupts had been sued out against Luke Mills based upon the statutes of bankrupts, 'for sale of goods upon supposed concealments', an act of bankruptcy.[147] The entry states that 'it was the first warrant that had been made upon [the] statute for sale of goods upon supposed concealments and so the first cause which had been questionable in this court of this nature.'[148] Ellesmere LC, therefore, asked the master of the rolls and the masters of the court to advise. Together, they were all present at the hearing and reached a joint decision.[149]

Mills had indeed agreed to deliver some of his wares to Woods, his most substantial creditor, but the delivery of these goods was made by deed and manifestly published and made known in Worcester, Mills's the place of residence. [150] The entry states that 'it was apparent that the said Mills was no bankrupt when he made the said agreement with the said Wood and delivered him wares as aforesaid'.[151] This meant that Mills had never made a fraudulent conveyance, and without having committed an act of bankruptcy Mills could not be classified as a bankrupt. Nevertheless, William Dale and some other creditors without any cause sued out a commission of bankrupts. Wyatt and the other commissioners did not find that Mills was a bankrupt, but nonetheless,

144 *Wood v Hayes*, 9 February 1606 C 33/111 f. 436v [IMG_9003a]. The case also dealt with corruption of creditors in a bankruptcy procedure, see below.
145 *Wood v Hayes* (1606) seems the only clear review case in the survey based primarily on the misconduct of the commissioners. *Wood v Hayes*, 9 February 1606 C 33/111 f. 436v [IMG_9003a].
146 ibid.
147 ibid.
148 ibid.
149 ibid ff. 437, 438v [IMG_9004], [IMG_9005a].
150 ibid f. 437 [IMG_9004].
151 ibid.

> contrary to all conscience and equity (without any judgment or decree by them first pronounced or set down in writing or certified into this court that the said Mills was a bankrupt and the said Wood was a concealer) did make a warrant to the said Sir Thomas Hayes and some others of the defendants, affirming thereby that the said plaintiff was a concealer of the said Mills his goods.[152]

Interestingly, one commissioner, a certain Sheldon, by deposition testified that he had refused to join with the other commissioners in the warrant because 'he saw no cause to charge the said plaintiff with the penalty of the statute [of bankrupts]'.[153] Some of the commissioners of bankrupts were not even present at the examinations, but nevertheless subscribed their names to the warrant, and neither Mills nor Wood were allowed to subscribe to their examinations.[154] Nevertheless, the bankruptcy proceeding went ahead.[155] The lord chancellor and the Court of Chancery were 'of clear opinion that in the handling of this cause from the beginning to the ending thereof the said commissioners have dealt very partially and indirectly and without any respect of equity and good conscience'.[156] Two of the fraudulent commissioners (Hayes and Stiles) were sheriffs of London.[157] The Court of Chancery ordered that the commissioners pay 'the principal sum of £692 and Wood's damage for the forbearance thereof, the sum of £750 together with £120 for his costs suffered in their suit, all which amounting to the sum of £870'.[158]

The Court of Chancery also dealt with cases in which a commission of bankrupts could not come to a definite conclusion. For example, in *Levison v Bradley* (1620) 'it was desired (and in regard the

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[152] ibid.
[153] The description of the statute of bankrupts as imposing a penalty is noteworthy. The statutes of bankrupts are generally not referred to statutes to penalise, despite the fact that the early bankruptcy statutes were all criminal statutes. It is rare to see such a reference to the criminal nature of bankruptcy. References mostly seem to relate to private law.
[154] *Moseley v Alsopp*, 25 April 1627 C 78/426/2 m. 3 [IMG_0264].
[155] Sheldon's testimony may suggest that it was thought that commissioners of bankrupts should not execute a bankruptcy proceeding without the consent of all the commissioners of bankrupts, though it seems that the execution went ahead, despite the fact that one commissioner did not agree with the decision, and Sheldon's view on the question may have been peculiar to him.
[156] *Wood v Hayes*, 9 February 1606 C 33/111 f. 436v [IMG_9003a] at f. 438 [IMG_9005].
[157] ibid at f. 438v [IMG_9005a].
[158] ibid at f. 439 [IMG_9006].

plaintiff is willing to pay all his creditors their just debts according to his ability and in regard the commissioners refuse to examine the said plaintiff's witnesses) that some other commissioners might be joined with the former commissioners or the greatest number of them', and that they 'examine the cause on both sides and end and determine the difference between the plaintiff and his creditors if they so can or else…certify unto this court their doings and proceedings together with their opinion what they think meet to be done in the cause'. [159] Bacon LC thereupon ordered that if the commissioners had not already made an end in the cause, 'Serjeant Finch, Mr Noy of Lincoln's Inn and Alderman Hollidaie be named with the said former commissioners and they to hear and determine the cause as is desired'.[160]

b.) Corruption or fraud by one or more creditors

In *Wood v Hayes* (1606) not only had the commissioners of bankrupts acted fraudulently, but the creditors had also fraudulently sued out the commission.[161] The survey shows various other examples of reviews of bankruptcy cases in which the creditors sued out a commission of bankrupts without just cause.[162] In addition, the Court of Chancery reviewed cases based on the fraudulent conduct of one or more creditors relating to the non-performance of compositions made by commissioners of bankrupts in the first instance.[163] The survey suggests that when the Court of Chancery reviewed cases involving fraud by others than the bankrupt, the court acted as an extension of the commission of bankrupts and was mainly concerned with the interests of the general creditors of the bankrupt. However, if those affected by the fraud included the bankrupt,

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[159] *Levinson v Bradley,* 11 October 1620 C33/139 f. 17v [IMG_0021a].
[160] ibid. Serjeant Finch was Henry Finch, king's serjeant. See part 2 of the thesis for more biographical details. For William Noy, see JS Hart Jr, 'Noy [Noye], William (1577-1634)' *ODNB* <https://doi.org/10.1093/ref:odnb/20384> accessed 18 September 2021.
[161] *Wood v Hayes*, 9 February 1606 C 33/111 f. 436v [IMG_9003a].
[162] E.g. *Wood v Hayes*, 9 February 1606 C 33/111 f. 436v [IMG_9003a]; *Riche v Jones,* 7 October 1599 C 33/97 f. 703 [IMG_8287]; *Cornellius v Blackmore*, 15 October 1614 C 33/127 f. 25 [IMG_0026]; by Julius Caesar, 10 March 1614 C 38/20; by Julius Caesar, 19 July 1614 C 38/ 20; by Julius Caesar, 8 December 1614 C 38/20 May 1615 C 33/127 f. 1048v [IMG_1041a]; *White v Ryley*, 19 April 1597 C 33/91 f. 756 [IMG_5080]; *Allenson v Clearke*, 23 September 1620 C 33/137 f. 1700 [IMG_1237]; 24 October 1620 C 33/139 f. 465v [IMG_0459a].
[163] E.g. *Wood v Hayes*, 9 February 1606 C 33/111 f. 436v [IMG_9003a]; *Moseley v Alsopp*, 25 April 1627 C 78/426/2 m. 3 [IMG_0264]; *Allen v Edwards*, 20 October 1608 C 78/172/13 m. unknown [IMG_0009]; *Allen v Hubberstye*, 3 February 1614 C 78/125/11 m. 1 [IMG_0002].

the Court of Chancery also took the interests of the bankrupt into account. It seems that in that situation the Court of Chancery was willing to award the bankrupt compensation of damages and costs, as well as attachments against the creditors.

i.) The fraudulent suing out of a commission of bankrupts

As has been seen, *Wood v Hayes* (1606) not only dealt with fraudulent conduct by commissioners of bankrupts, but also with the fraudulent conduct of the creditors who had sued out the commission of bankrupts against Mills. After all, because Mills had never committed an act of bankruptcy, his creditors had no basis to sue out the commission of bankrupts, but sued out a commission anyway. Ellesmere LC and the court suspected 'an inclination to corruption of the same creditors in the prosecution of the cause'.[164] The creditors had 'greatly abused' the commission, 'and wrested against all justice, equity and conscience to the dishonour and discredit of this court…upon violent and strict construction of some words in the said statute and commission contrary to the true intention of the same'.[165] The court ordered that these creditors, like the commissioners, were to pay damages, interest and costs.[166]

Similarly, in *Moseley v Alsopp* (1627) Alsopp had unduly sued out a commission of bankrupts against Moseley, who was held in debtor's prison in London for a debt owed to Alsopp.[167] The commissioners 'by colour of the said pretended debt or bond of a thousand pounds did find him a bankrupt'.[168] After the execution of the commission of bankrupts, Alsopp's servant, with the authorisation of a warrant of the commissioners, went to Moseley's farm and in the night seized and took away draught oxen and other cattle, worth a great amount of money.[169] The servant subsequently sold them for Alsopp's use. The Court of Chancery was not impressed with this

[164] *Wood v Hayes*, 9 February 1606 C 33/111 f. 436v [IMG_9003a] at f. 438 [IMG_9005].
[165] ibid at ff. 438v-439 [IMG_9005a-9006].
[166] ibid at f. 439 [IMG_9006].
[167] *Moseley v Alsopp*, 25 April 1627 C 78/426/2 m. 1 [IMG_0258].
[168] ibid at m. 3 [IMG_0264].
[169] ibid.

conduct, 'all which kinds of dealing and practices of the said Alsopp this court did utterly dislike and held to be fraudulent'.[170]

The whole bankruptcy proceeding, indeed, turned out to be fraudulent. Firstly, it appeared that Alsopp was the 'sole procurer of the said commission'.[171] As has been seen, prior to the enactment of the Bankrupts Act 1624, creditors had to subscribe to the commission of bankrupts in order to benefit from the bankruptcy statutes.[172] However, the suing out of a commission of bankrupts by only one creditor was pointless before the Bankrupts Act 1624, as it would have a similar outcome to a debt action at common law and would not serve the underlying purpose of the bankruptcy statutes to enable collective debt collection and pro rata distribution of the assets. After the enactment of section 8 of the Bankrupts Act 1624 this was no longer an obstacle, as all creditors could benefit from the bankruptcy statutes, regardless of whether the commission was sued out by only one creditor, all creditors or any number of creditors in between.[173] Secondly, it was proved that Moseley was not a debtor of Alsopp, but had in fact acted as Alsopp's surety.[174]

The Court ordered that 'the commission of bankrupts and all proceedings thereupon should be void and of no validity',[175] that Alsopp should pay damages to Moseley for what Moseley had already paid to commission of bankrupts,[176] and that Moseley should be discharged 'of and from all sums of money wherein he stands bound for [Alsopp] as surety and then unpaid'.[177] The favourable outcome for Moseley was not surprising, because sureties were generally not within the

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[170] ibid.
[171] ibid.
[172] Bankrupts Act 1624, s. 8.
[173] Emily Kadens has explained that by the early nineteenth century most bankrupts 'breezed through the bankruptcy' because most commissions of bankrupts were sued out collusively. A friendly creditor could arrange to be the elected assignee, and he could see that he, the bankrupt and his concealed goods were protected. These creditors would often use bribes, treats and persuasions to influence the other creditors to sign the certificate. E Kadens, 'The last bankrupt hanged: balancing incentives in the development of bankruptcy law' (2010) 59 (7) *Duke Law Journal* 1253, 1301-1302. It is unclear whether this kind of fraud occurred on such a large scale in the period 1543-1628. However, the Chancery records and parliamentary debates of the period do not show many cases of this kind.
[174] *Moseley v Alsopp*, 25 April 1627 C 78/426/2 m. 3 [IMG_0264]. See below for more details about sureties in a bankruptcy proceeding.
[175] ibid.
[176] ibid.
[177] ibid.

scope of the bankruptcy statutes and were treated more leniently by the Court of Chancery in insolvency proceedings.[178]

However, the Court of Chancery would not necessarily award damages and costs where a commission of bankrupts had been unjustly sued out by fraudulent creditors. In *Cornellius v Blackmore* (1615) Ellesmere LC initially tried to conform the creditors who had fraudulently sued out the commission of bankrupts against the bankrupt and later, when that had failed, awarded a new commission of bankrupts to decide the case.[179] Richard Cornellius, a merchant in the shipping business and mayor of Southampton, had petitioned the Court of Chancery to contest a finding that he was a bankrupt. Cornellius had incurred a debt of £17,000 to twenty creditors 'by reason of his great trading and losses of shipwrecks and pirates and other ways'.[180] As this debt was incurred by misfortune, Cornellius would have been an insolvent debtor and as such not within the scope of the bankruptcy statutes.[181] However, the creditors who had sued out the commission of bankrupts argued that Cornellius had fled the country and had therefore become a bankrupt. In turn, Cornellius argued that he had gone to France 'only to sue for restitution of a ship and goods worth £3,000 or thereabouts taken by French pirates',[182] and 'had returned to his house within two days after the Commissioners had proclaimed [him] bankrupt'.[183]

Cornellius argued that William Crackplace, one of the creditors and a rival trader, with the help of some friends (presumably other creditors and other rival traders), including a certain Arthur Blackmore, the defendant, had used 'practices and plots' with the aim of overthrowing Cornellius's trade and creditors and getting the whole trade for himself and his friends. In addition, Cornellius argued that Crackplace had carefully chosen the commissioners of bankrupts, who then colluded

[178] See chapter 4.
[179] *Cornellius v Blackmore*, 15 October 1614 C 33/127 f. 25 [IMG_0026]; by Julius Caesar, 10 March 1614 C 38/20; by Julius Caesar, 19 July 1614 C 38/ 20; by Julius Caesar, 8 December 1614 C 38/20 May 1615 C 33/127 f. 1048v [IMG_1041a].
[180] *Cornellius v Blackmore*, 15 October 1614 C 33/127 f. 25 [IMG_0026] at f. 25 [IMG_0026].
[181] See part 2 of the thesis.
[182] *Cornellius v Blackmore*, 15 October 1614 C 33/127 f. 25 [IMG_0026] at f. 25v [IMG_0026a].
[183] ibid.

with the rival traders with the aim of putting Cornellius out of business. Crackplace had Cornellius arrested for debt and held him eight days in prison, which had meant that Cornellius could not attend the commission of bankrupts.[184] Cornellius, however, while he was willing to attend the commission of bankrupts, was not heard by the commission for more than two years.

In addition, seventeen creditors certified that they did not think that Cornellius was a bankrupt. Instead they were 'willing to forgo the benefit of the statute of bankrupt[s] and the proceedings thereupon',[185] and were willing to give Cornellius liberty for two years so that he could pay his debts, and upon good security would even allow him 'four years delay of payment of their principal debts, without exerting anything for their forbearance and charges in suit which (as they alleged) does amount to far more than the principal itself'.[186] Ellesmere LC ordered that Crackplace and his friends attend the master of the rolls to explain why they were unwilling to conform like the other seventeen creditors, and that if they did not conform,[187] a *supersedeas* should be awarded to stay the proceedings upon the commission of bankrupts.[188] The refractory creditors did not conform and a new commission of bankrupts was awarded to determine whether Cornellius was a bankrupt or not.[189]

ii.) The fraudulent conduct of one or more creditors relating to the non-performance of compositions

Allen's Case (1614) also dealt with a fraudulent creditor in a bankruptcy, but in this case one of the creditors of the bankrupt was unwilling to conform to a composition, and in that way abused the commission of bankrupts and defrauded the bankrupt (and his descendants), as well as the other

[184] ibid f. 26 [IMG_0027].
[185] *Cornellius v Blackmore* by Julius Caesar, 8 December 1614 C 38/20.
[186] ibid.
[187] See for conformity, chapter 3.
[188] *Cornellius v Blackmore*, 15 October 1614 C 33/127 f. 26 [IMG_0027].
[189] *Cornellius v Blackmore*, 21 May 1615 C 33/127 f. 1048v [IMG_1041a]. The order of 21 May 1615, which sets out that a new commission should be appointed, refers to an order in March 1614, rather than the order of 15 October 1614. However, based on the parties and the content of the order, it is assumed that the reference is to the relevant order of 15 October 1614. The final outcome of *Cornellius v Blackmore* by the new commission of bankrupts is unknown.

creditors of the bankrupt.[190] The basis for the litigation was the bankruptcy of Laurence Edwards, a grocer from York.[191] A commission of bankrupts was sued out against him by William Allen, a fishmonger, George Hubberstye, a leather seller and several other creditors from London. The commission sold Edwards's land at undervalue to Allen, who paid only £400 for the land, despite its value of £2,400. The low price was acceptable because the land was encumbered with a mortgage, statute and lease. All these encumbrances 'were made before he [Edwards] was bankrupt, and became indebted to Allen or any of the Londoners which sued out the commission'.[192] After the sale, a composition was made by the commissioners between Edwards and his creditors. The creditors, including Allen, agreed to take 10 shillings in the pound for their debts. Two creditors of Edwards, who did not join in the commission, stood bound for Edwards for the payment to the creditors. The commission agreed to convey the land to Allen on condition that if the value of the land increased beyond £400 within three years, then the surplus would be divided pro rata amongst all the creditors. However, Allen did not want to conform and instead tried to sue Edwards for his full debt at common law. Eventually, Allen was able to have the Court of Chancery clear the encumbrances from the lands, which drastically increased the value of the land. Ellesmere LC ordered that Allen share the surplus with the other creditors.[193] Allen did not comply with the decree and the litigation continued.[194] The case ended when Ellesmere LC gave Allen the choice of either keeping the land and paying its increased value to the commissioners or departing from the land and receiving its value. By seeking to keep the land that he had bought at an undervalue,

[190] See for a summary of the case, JH Baker, 'The common lawyers and the Chancery: 1616', in *Collected Papers*. vol. I (OUP 2013) 492. *Allen's Case* (1614) BL. MS. Stowe 298 f. 212. See for a transcription of the manuscript report in the British Library, Bryson, SS 117 (n 32) 387-391. Another copy of the same transcription of the report, not mentioned in Bryson, is held in the Ellesmere Papers in the Huntington Library, CA, USA, EL 5935. In the C 78's the full case is listed under *Allen v Edwards* (1608) and *Allen v Hubberstye* (1618). *Allen v Edwards*, 20 October 1608 C 78/172/13 m. unknown [IMG_0009] and *Allen v Hubberstye*, 3 February 1614 C 78/125/11 m. 1 [IMG_0002]. Allen and Hubberstye were both creditors of Edwards. Hubberstye is referred to in the report printed in Bryson as Hubersly. The masters' reports of Allen's case could not be consulted, because the manuscripts are in conservation.

[191] Edwards is also referred to as being a chapman and former sheriff of York.

[192] Bryson, SS 117 (n 32) 389.

[193] *Allen v Edwards*, 20 October 1608 C 78/172/13 m. unknown [IMG_0020].

[194] *Allen v Hubberstye*, 3 February 1614 C 78/125/11 m. 1 [IMG_0002]. Edwards and his wife had since died of the plague. The composition was revived for the benefit of the creditors, and the surplus could provide for the maintenance of the orphans. See below.

Allen had defrauded his fellow creditors.[195] After all, they were deprived of the pro rata share that they would otherwise have received from the proceeds of the lands.

Finally, similarly to *Allen's Case*, *Aldworth v Lambe* (1625) dealt with fraudulent creditors who did not want to perform a composition after they had already agreed to it with the bankrupt after several meetings with a commission of bankrupts.[196] They not only failed to perform the composition, but also actively deprived the rest of the creditors of their pro rata distribution of assets. Williams LK considered that Lambe's creditors had agreed to accept ten shillings in the pound for their just debts to be paid over five years,[197] but instead these creditors had 'attached certain debts, clothes and kerseys[198] of the said Lambe at Hanborough in the companies hands there and [did] endeavour to condemn the same at undervalue and to give it all to themselves to the frustrating of the rest of the creditors of their debts'.[199] The court ordered that the creditors who had initially agreed to the composition were bound by the composition and that the creditors who had not subscribed previously should attend the court at a later date to explain why 'they should not submit to the said agreement and abide to the order'.[200]

Whereas the bankruptcy statutes were mainly concerned with protecting the interests of the general creditors, the approach of the Court of Chancery in *Aldworth v Lambe* (1625) shows that it also took the position of the bankrupt into account. Namely, when the court reconvened it stated that 'some of the creditors did endeavour to arrest the defendant and thereby to disable him from attending the commissioners and so to frustrate him from the benefit of the former orders'.[201] The

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[195] In addition, Ellesmere LC found that Allen defrauded the orphans of Edwards by stripping them of their maintenance. Bryson, SS 117 (n 32) 391.
[196] *Aldworth v Lambe*, 20 December 1624 C 33/147 f. 390 v [IMG_0393a]; 1 July 1625 C 33/149 f. 1024 [IMG_1009]. It is not completely clear from the entry whether Lambe was an insolvent or bankrupt.
[197] The order shows a detailed plan of payment.
[198] Kersey is a type of woollen cloth used for work clothes.
[199] *Aldworth v Lambe*, 20 December 1624 C 33/147 f. 390v [IMG_0393a] at ff. 390v-391 [IMG_0393a]-[IMG_0394]. The 'company's hands' seem to mean a group of people, rather than a company in the commercial sense of the word and may refer to those of the creditors who refused to conform to a composition. 'Hanborough' probably refers to Church Hanborough or Long Hanborough, both in Oxfordshire.
[200] *Aldworth v Lambe*, 20 December 1624 C 33/147 f. 391 [IMG_0394].
[201] *Aldworth v Lambe*, 1 July 1625 C 33/149 f. 1024 [IMG_1009].

court ordered that if certain creditors did not comply with the order, an attachment against these creditors would be awarded, so that the defendant could attend the commissioners.[202] However, ultimately the Court of Chancery had the creditor in mind, because if the bankrupt was not able to perform a composition this ultimately also frustrated the benefit for the general creditors of receiving their pro rata share in accordance with the repayment plan.

Overall, the survey suggests that the Court of Chancery had a safeguarding role in ensuring that statutory bankruptcy provisions were not abused and that certificates were properly awarded by the commission of bankrupts in the first instance. Corruption and fraud mainly manifested itself in the fraudulent suing out of commissions of bankrupts, but also in relation to non-performance of compositions. The main purpose of the Court of Chancery seems not to have been to protect the bankrupt, but rather to secure the main aim of the bankruptcy statutes that the general creditors not be 'hindered and delayed' from their pro rata share of the assets of the bankrupt. The survey shows that the Court of Chancery rarely used an equitable discretion by applying 'equity and conscience' in relation to bankruptcy matters. The Court of Chancery did exercise an equitable function, by balancing the interests of insolvent debtors and their creditors,[203] but it seems that the Court of Chancery generally did not exercise this function in relation to bankrupts. The Court of Chancery was generally not very concerned with the interests of the bankrupt, but in exceptional circumstances the Court of Chancery could award damages and costs, and attachment against the creditors. This seems to only have happened in relation to the suing out of a fraudulent commission of bankrupts, and not in the case of fraud involving the non-performance of a composition, which suggests that the fraudulent suing out of a commission of bankrupts was perceived as more serious.[204]

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[202] ibid.

[203] See part 2 of this thesis.

[204] Bankrupts might also sue these fraudulent creditors for defamation at common law. E.g. *Flound v Perrott* (1585) 1 Leonard 29, 79 ER 27.

4. Review of compositions

The Court of Chancery reviewed compositions made by commissions of bankrupts in the first instance that were not performed by one or more of the creditors.[205] As has been seen, the Court of Chancery dealt with reviews in which fraudulent conduct exacerbated the non-performance of compositions.[206] However, the survey also shows examples of reviews of cases in which creditors simply did not perform their bargain under the terms of the composition without any additional fraudulent conduct. It seems that the Court of Chancery generally held creditors to the compositions which they had originally made with the bankrupt and which had been certified by the commissioners of bankrupts.[207] This can be distinguished from the Court of Chancery conforming creditors on the basis of a bill of conformity, because in that context the court conformed creditors who had not wanted to conform to a composition in the first place.[208]

In *Michell v Mynyffee* (1590) Hatton LC dealt with a review and the subsequent confirmation of a composition after mediation involving the bankruptcy of Anthonie Morley, an ironmaster, certified by a commission of bankrupts.[209] The plaintiffs, Morley's brother-in-law, widow and children, exhibited their bill of complaint into the Court of Chancery against the commissioners.[210] As has been seen, Morley was accused of falling behind with his payments to his creditors and absenting himself from public life.[211] The commissioners, led by a certain Edward Stradling, had declared Morley a bankrupt, and had sold all of his property, which included lands, tenements, goods, chattels personal and leases, to Thomas Mynyffee for £1,600. The proceeds of the sale of

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[205] E.g. *Michell v Mynyffee,* 10 February 1590 C 78/96/13 m. 17 [IMG_0034]; *Aldworth v Lambe*, 20 December 1624 C 33/147 f. 390v [IMG_0393a]; 1 July 1625 C 33/149 f. 1024 [IMG_1009]; *Tomlinson v Ryche*, 18 June 1596 C 33/91 f. 185v [IMG_4513a]; *Allen v Edwards*, 20 October 1608 C 78/172/13 m. unknown [IMG_0009] and *Allen v Hubberstye*, 3 February 1614 C 78/125/11 m. 1 [IMG_0002].

[206] *Aldworth v Lambe*, 20 December 1624 C 33/147 f. 390 v [IMG_0393a]; 1 July 1625 C 33/149 f. 1024 [IMG_1009]; *Allen v Edwards*, 20 October 1608 C 78/172/13 m. unknown [IMG_0009] and *Allen v Hubberstye*, 3 February 1614 C 78/125/11 m. 1 [IMG_0002]. See the section II.4 in this chapter above.

[207] Conformity also occurred in relation to insolvent debtors. However, the Court of Chancery would initiate these compositions (with the help of commissioners of bankrupts). See part 2 of the thesis.

[208] See part 2 of the thesis.

[209] *Michell v Mynyffee,* 10 February 1590 C 78/96/13 m. 17 [IMG_0034].

[210] ibid m. 19 [IMG_0039].

[211] ibid m. 17 [IMG_0035].

Morley's estate exceeded his debts, and the commissioners decided that the surplus of the sale amounting to £500 to £600 would be used 'for the relief, succour, aid and maintenance' of Morley's widow and four children.[212] The money was not to be paid out in a lump sum, but in yearly instalments of £40 over the course of eight years.[213] However, after Morley died, Thomas Mynyffee stopped making the yearly payments. Thomas Mynyffee then died and his widow Elizabeth – who by the time of the litigation had remarried with a certain Robert Martyn – likewise, for several years, did not pay the money set aside for the maintenance of the Morley family.[214] Morley's widow had in consequence been forced to borrow money from her brother in order to provide for the livelihood of her family.[215]

The Morleys exhibited two bills in the Court of Chancery.[216] The first was addressed against Mynyffee's widow, seeking to conform her to the composition made between Anthonie Morley and Thomas Mynyffee, and the second was addressed against the commissioners of bankrupts on the basis that they had not performed the execution of the composition properly.[217] The parties were heard in the Court of Chancery and the commissioners attested that they had made a certificate of the composition after they had declared Morley a bankrupt. Mynyffee's widow initially seems to have tried to get out of the making the payments on the basis that neither she nor her late husband were mentioned in the certificate, but she later argued that she was 'ready and willing to perform and keep the same as far further as her poor ability would stretch, but for that her ability was but weak', she 'humbly' asked the Court of Chancery to give her a delay for the

[212] ibid m. 17 [IMG_0035].
[213] *Michell v Mynyffee,* 10 February 1590 C 78/96/13 m. 17 [IMG_0034]. It is unclear why Morley's widow did not get the full amount of the surplus of the sale of £600 pounds (another £400 is also unaccounted for in the order). After all, annual payment of £40 for eight years amounts only to £320.
[214] *Michell v Mynyffee,* 10 February 1590 C 78/96/13 m. 20 [IMG_0041].
[215] ibid m. 17 [IMG_0035]. Edmund Michell, the brother of Morley's widow, lent his sister money to save her and the children from destitution, and as result seems to have become a party to the litigation. This seems somewhat peculiar, because he became a creditor of his sister, not of the Mynyffees directly.
[216] Based on the survey this seems uncommon.
[217] It is noteworthy that the Morleys did not only petition against the Mynyffees. The Morleys seem also to have petitioned against the commissioners, because the commissioners 'according to their own voluntary agreement made upon great and good consideration…had utterly refused and denied [the composition] and still did refuse and deny contrary to their said pains and agreement and contrary to all equity and good conscience and to the said complainants' extreme hinderance and utter undoing'. *Michell v Mynyffee,* 10 February 1590 C 78/96/13 m. 18 [IMG_0036].

payment.[218] However, Hutton LC ordered that Mynyffee's widow should be kept bound to her husband's composition agreement as set down in the certificate from the commission of bankrupts, and that with the consent of all parties the Morleys should be paid the money that they were owed.[219]

Similarly, in *Tomlinson v Ryche* (1596) Ellemere LC reviewed another case involving a composition.[220] The creditors had agreed to take around thirteen shillings in the pound for their just debts, with the aim of satisfying all the creditors. However, contrary to the agreement, Ryche, one of the creditors, arrested the bankrupt in London and compelled the bankrupt to become bound to him in a statute of £100 for the payment of his whole debt. This happened before Tomlinson had the time to get the commission of bankrupts to seize certain goods towards the satisfaction of the debts of the general creditors.[221] Tomlinson seems to have been another creditor of the bankrupt and an assignee of the bankrupt. In addition, Ryche procured a writ of extent based upon the statute and offered thereby to extend the said goods and have them taken away with force from the bankrupt. Tomlinson petitioned the Court of Chancery because he did not want a liberate to be granted upon the extent, which 'was so erroneously procured'.[222] Ellesmere LC ordered that no liberate should be granted, unless Ryche could in his answer show cause to the contrary. While it is unclear from the order how the case ended, it seems that Ellesmere LC was in principle favourable to upholding the composition.

Overall, the survey seems to suggest that the Court of Chancery expected parties not to go back on their promise to abide by a composition after the commission of bankrupts had certified its decision. In almost all cases the Court of Chancery decided in favour of the bankrupt and the general creditors. The reasoning behind this seems to have been that if the bankrupt only repaid

[218] *Michell v Mynyffee,* 10 February 1590 C 78/96/13 m. 19 [IMG_0040].
[219] *Michell v Mynyffee,* 10 February 1590 C 78/96/13 m. 19 [IMG_0040].
[220] *Tomlinson v Ryche*, 18 June 1596 C 33/91 f. 185v [IMG_4513a].
[221] ibid.
[222] ibid.

one debtor in full, the other creditors would miss out on their pro rata share in what should have been a collective debt collection in the bankruptcy proceeding.

III. Other issues observed in the Chancery records

The Chancery records show additional points of interest in relation to bankruptcy law. Not all of these matters are necessarily related to the review function of the Court of Chancery. Observations can be made in relation to (a) rules applied by the Chancery in relation to evidence; (b) matters in relation to the bankruptcy procedure; (c) the interaction of the Court of Chancery with other courts and judicial bodies in relation to bankruptcy matters; and (d) matters involving vulnerable people in society, especially orphans.

a.) Rules in relation to evidence of facts

The Court of Chancery applied rules in relation to evidence of facts in reviews involving bankruptcy, although it seems that most rules were not necessarily specific to bankruptcy law.[223] As has been seen, the court re-examined the certificates of commissions of bankrupts that had dealt with the bankruptcy proceedings in the first instance. The survey shows that the factual question of whether a trader had committed an act of bankruptcy almost always appears in the reviews, but was often dealt with as a side-issue. For example, in *Lowe v Stockden* (1588) evidence as to the validity of a bargain and sale was required in order to determine whether covin or fraud had been committed by the alleged bankrupt, and therefore, whether he had a committed an act of bankruptcy.[224] The Court of Chancery also examined other questions of fact, such as what payments a bankrupt had made, or what damages a falsely-accused bankrupt had sustained which were caused by a fraudulent commission of bankrupts. [225]

[223] See for evidence in equity in early modern England more generally WJ Jones, *The Elizabethan Court of Chancery* (Clarendon Press 1967) and MRT Macnair, *The law of proof in early modern equity* (Dunker & Humblot 1999).
[224] *Lowe v Stockden*, 23 January 1588 C 33/75 f. 333 [IMG_0338].
[225] E.g. *Moseley v Alsopp*, 25 April 1627 C 78/426/2 m. 3 [IMG_0263]; *Grenewell v Harbottle*, 27 November 1599 C 78/109/6 m. 9 [IMG_0642].

The lord chancellor generally instructed the masters of the Court of Chancery to examine questions of fact. For example, in *Colcocke v Handford* (1617) the dispute dealt with the bankruptcy of Valentyne Langton, a cloth trader. Allan Colcocke became indebted to Valentyne Langton 'for linen cloth in divers sums of money'.[226] He repaid most of it, but on Valentyne's request, became indebted to William Langton, Valentyne's brother, for the residue. After the assignment of the debt, Valentyne became a bankrupt. Some of the general creditors then tried to recover the outstanding debt from Colcocke at common law, but Colcocke explained that he had already paid and asked for a stay of proceedings against him at common law.[227] Bacon LC ordered that Mr Moore, one of the masters of the Court of Chancery should consider 'the plaintiff's bill and defendant's answer and make report to this court whether this information was true or not'.[228]

In order to establish facts the masters of the court generally examined witnesses under oath from both sides.[229] That the Chancery masters examined witnesses can be illustrated by the master's report of Nicholas Roberts in *Cartwright v Vaccari* (1614).[230] The report shows that the master had examined five witnesses on behalf of the plaintiff to establish whether Milituti (co-plaintiff with Cartwright) was a bankrupt or not (Milituti was accused of absenting himself from public life after becoming insolvent).[231] The master's report sets out the names of the witnesses. It is unclear why these people testified, but is likely they testified that Milituti was not a bankrupt. It is assumed that the witnesses were fellow traders. The survey shows that sometimes the commissioners of bankrupts who had decided the case in the first instance were themselves examined as witnesses in Chancery to testify as to what they had done in the bankruptcy proceeding in the first instance and what the outcome of the case was.[232] The Court of Chancery did not admit all testimonies.

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[226] *Colcocke v Handford*, 26 May 1617 C 33/132 f. 872 [IMG_0893].
[227] ibid f. 872v [IMG_4142].
[228] ibid f. 872v [IMG_4142].
[229] E.g. *Moseley v Alsopp*, 25 April 1627 C 78/426/2 m. 2 [IMG_0263].
[230] *Cartwright v Milituti* by Nicholas Roberts, 3 October 1614 C 38/20. *Cartwright v Milituti* is also entered as *Cartwright v Vaccari* and *Cartwright v Vacari* in the entry books. Roberts set out in his report that he had started to examine some more witnesses for Milituti, but they had not so far returned to the master to continue their witness statement.
[231] *Cartwright v Milituti* by Nicholas Roberts, 3 October 1614 C 38/20.
[232] E.g. *Larmite v Somerman*, 21 October 1624 C 33/147 f. 99 [IMG_0102].

This can be illustrated by *Wood v Wade* (1619), in which Bacon LC decided that he could not accept the witness statement of a certain Maude, who was testifying that Wood had paid his debts. Bacon LC observed that Maude had been a witness to a bond relevant to the litigation 'for two other witnesses have deposed the copy thereof in which copy Maude's name is so used with those two', and therefore took the view that he could not in his 'own judgement give any credit to the said Maude's testimony'.[233]

Moseley v Alsopp (1620) sets out that Moseley, the alleged bankrupt, wanted to have his evidence heard by the Court of Chancery, because the commissioners in the first instance had only taken evidence that Moseley was a bankrupt by affidavit.[234] This suggests that Moseley thought it was arguable that evidence had to be taken in person. However, in the absence of evidence of the court's response to this argument, it is impossible to be certain whether this was in fact the case. That the Court of Chancery generally examined witnesses in person, rather than by affidavit, can be illustrated by *Lowe v Stockden* (1588).[235] A certain Smith was accused of being a bankrupt, because he had supposedly made a fraudulent bargain and sale to Stockden in order to defeat the other creditors. However, Stockden argued that the bargain and sale was properly sealed and subscribed. Hatton LC ordered that the matter be proceeded in, and that both parties be given liberty 'to examine witnesses touching the validity or invalidity of the said bargain and the said covin and fraud supposed to be committed'.[236]

b.) Other issues in relation to procedure

The Court of Chancery dealt with certain procedural issues in relation to bankruptcy proceedings.[237] The survey shows, amongst other things, examples of reasons why bankruptcy proceedings might be ended prematurely; contempt of court cases; what happened if a commission

[233] *Wood v Wade*, 1 February 1619 C 78/216/5 m. 4 [IMG_0060].
[234] *Moseley v Alsoppe,* 9 October 1620 C33/139 f. 14v [IMG_0018a]; 28 October 1620 C33/139 f. 310v [IMG_0304a].
[235] *Lowe v Stockden*, 23 January 1588 C 33/75 f. 333 [IMG_0338].
[236] ibid.
[237] This list is not exhaustive, but gives an idea of the procedural issues in the Court of Chancery involving bankrupts.

of bankrupts could not make a decision; and how proceedings in Chancery concerning one particular creditor interacted with the subsequent activities of the commission of bankrupts.

The survey shows that bankruptcy proceedings could prematurely be ended for various reasons. As has been seen, prior to the Bankrupts Act 1604, bankruptcy proceedings could not continue against a deceased bankrupt.[238] This can be illustrated by the case of *Gozze v De Mensa* (1599).[239] In this case the bankrupt, Nicholas De Mensa died during bankruptcy proceedings against him, and Egerton LK therefore ordered the dismissal of the bankruptcy proceedings against De Mensa. However, De Mensa's goods were still in possession of Marma De Gozze, presumably the assignee in bankruptcy, because distribution of the goods had not yet taken place. Ellesmere LC ordered that Marma De Gozze should hand over the books, bonds, bills and writings remaining in the commissioners' hands to Jeronimo De Mensa, presumably the heir of Nicholas, unless good cause to the contrary could be shown.[240] The case shows that bankruptcy proceedings were stayed against deceased bankrupts. Similarly, *Holden v Allen* (1597) shows that bankruptcy proceedings were stayed when a fraudulent commission of bankrupts was sued out.[241] In this case Egerton LK ordered that the commission 'deliver back to the plaintiff for the better satisfaction of his other creditors all such his books of accounts, goods and other things which they have gotten into their hands by colour of the said commission of bankrupts'.[242]

The Court of Chancery dealt with contempt of court cases involving bankrupts. For example, in *Holden v Harvey* (1598) the lord keeper ordered the release of the bankrupt, Thomas Holden, from custody at common law by a writ of *corpus cum causa*, so that he could settle his financial affairs.[243] Holden was then arrested by one of his creditors, when he was returning home from a visit to one

[238] Bankrupts Act 1604, s. 12.
[239] *De Gozze v De Mensa*, 14 December 1599 C 33/97 f. 115v [IMG_7725_1].
[240] It is not clear from the entry what the exact relationship was between Nicholas and Jeronimo De Mensa.
[241] *Holden v Allen*, 25 October 1597 C 33/ 93 f. 279 [IMG_6412]; 16 March 1599 C 33/95 f. 569 [IMG_6574].
[242] *Holden v Allen*, 16 March 1599 C 33/95 f. 569v [IMG_6574a].
[243] *Holden v Harvye*, 28 February 1598 C 33/93 f. 631v [IMG_6768a].

of the Chancery masters with certain documents, and carried to the counter in London.[244] Therefore it was ordered that 'a writ of *corpus cum causa* be awarded to the sheriff of London to remove the body of the said Holden and the cause of his arrest unto the said lord keeper'.[245] It was also ordered that the pursuivant attending the Chancery find the creditor who had carried out the arrest and bring him before the lord keeper to answer for this 'misdemeanour'.[246] A question of contempt of court likewise arose in *Allen v Edwards* (1606).[247] Laurence Edwards, the bankrupt, had been sent to prison.[248] Edwards did not want to answer the plaintiff's bill directly, nor did he want to pay the 20 shillings costs imposed on him by the court. The Court of Chancery ordered that he should remain in prison until he had properly answered the bill. Edwards was bankrupt, so it is possible that he was not able to pay the costs to the court.

c. Interaction with other courts and judicial bodies

The survey shows that, in addition to commissions of bankrupts, the Court of Chancery often also interacted with other courts or judicial bodies in relation to bankruptcy matters. The survey shows, amongst others, examples of cases being referred to other courts, the dismissal of cases because they had already been heard in another court, as well as injunctions to stay proceedings at common law.[249]

As has been seen, the Court of Chancery interacted with commissions of bankrupts on a regular basis.[250] The Court of Chancery sometimes explicitly ordered that a case should be tried 'at the common law', which meant by a commission of bankrupts. For example, in *Howse v Lea* (1591) the

[244] ibid ff. 631v-632 [IMG_6768a]-[IMG_6769].
[245] ibid at f. 632 [IMG_6769].
[246] ibid.
[247] *Allen v Edwards*, 19 November 1606 C 33/111 f. 86 [IMG_8657]. This is an entry of *Allen's Case* (1614), as discussed above.
[248] ibid.
[249] E.g. *Hobson v Stradling*, 13 October 1591 C 33/83 f. 22v [IMG_0014a]; *Cornellius v Blackmore,* 15 October 1614 C 33/127 f. 25 [IMG_0026]; by Julius Caesar, 10 March 1614 C 38/20; by Julius Caesar, 19 July 1614 C 38/20; by Julius Caesar, 8 December 1614 C 38/20 May 1615 C 33/127 f. 1048v [IMG_1041a]; *Carpenter v Leaman*, 10 November 1620 C 33/139 f. 338v [IMG_0332a].
[250] See all the review cases above in section II of this chapter.

creditors of John Edgcombe, the bankrupt, exhibited a bill for an equal distribution of all Edgcombe's goods and money. It is was alleged that these goods and money had come to the hands of Lea, Glanvile and Stone by a gift from Edgcombe, not sufficiently warranted by law, and that the commission of bankrupts which was stayed by *supersedeas* ought to have been continued. However, the Court of Chancery (the great seal being in commission after the death of Hatton LC) decided that this request 'seemed more meet to be tried by the course of the common law then this court'.[251] Therefore, the Court of Chancery referred the plaintiffs 'to take what remedy they can there [at common law] and sue out a new commission of bankrupts or proceed upon the old commission by [*procedendo*] if they may by law and proceed to trial with effect'.[252]

Grenewell v Harbottle (1599) shows that the Court of Chancery would sometimes refer matters to the Council of the North, which exercised a similar jurisdiction to the Star Chamber, Court of Chancery and the Court of Requests in Yorkshire and beyond.[253] However, in *Grenewell v Harbottle* the Council of the North was merely instructed to investigate damages, which would be generally more a task for a commission of bankrupts. Grenewell had lent large sums of money to Harbottle, as well as various other people, all of whom he had not paid back. Grenewell procured a commission of bankrupts against Harbottle. The commissioners of bankrupts assigned Harbottle's lands to Grenewell in satisfaction of the debts and Grenewell was given the quiet possession.[254] Harbottle and some others then came to the house in Ravensworth, broke open the walls and doors of the house, entered with 'great force and violence' and 'wrongfully took and kept the possession thereof'.[255] Various suits followed in the Council of the North to contest the

[251] *Howse v Lea*, 2 December 1591 C 33/83 f. 255 [IMG_0247]. See for Christopher Hatton, WT MacCaffrey, 'Hatton, Sir Christopher, (c. 1540–1591)' *ODNB* <https://doi.org/10.1093/ref:odnb/12605> accessed 12 January 2021.
[252] ibid. Lea, Glanvile and Stone were all to bring their moiety of their goods and money into the Court of Chancery until further order.
[253] *Grenewell v Harbottle*, 27 November 1599 C 78/109/6 m. 8 [IMG_0639]. Baker writes that the Council of the North had no jurisdiction in Lancaster and Durham. However, the defendant in the *Grenewell v Harbottle* (1599) resided in Ravensworth, in County Durham, and the Council of the North took jurisdiction in the case. Baker, *An Introduction* (n 43) 130.
[254] The final decree does not mention whether other creditors received a pro rata share of the proceeds.
[255] *Grenewell v Harbottle*, 27 November 1599 C 78/109/6 m. 9 [IMG_0640].

conveyance to Grenewell. The case eventually ended up in the Court of Chancery. The masters of the court decided that Grenewell had the right to the lands, and Grenewell asked the court for damages for the loss sustained by the entering of his premises contrary to the conveyance, and for the loss of profits taken from the land and withheld by Harbottle. The Court of Chancery did not decide on this matter, but instead referred the case to the Council of the North to determine the amount of the loss.[256]

Hobson v Stradling (1591) shows that the Court of Chancery stayed proceedings in Chancery if a case was already pending in the Court of Requests.[257] *Hobson v Stradling* (1591) was connected to *Michell v Mynyffee* (1590), which, as has been seen, dealt with the non-performance of the composition made by the commissioners of bankrupts after Morley's bankruptcy.[258] In the meantime, Mynyffee had never received the appropriate deeds and leases relating to Morley's property, which should have been provided by a certain Constance Relfe.[259] Mynyffee's widow subsequently remarried with a certain Robert Martin, who petitioned the Chancery to hand over the deeds and leases of Morley's land.[260] Constance, now remarried to James Hobson, denied that there had been an agreement between her and the late Thomas Mynyffee.[261] *Hobson v Stradling* (1591) dealt with a request from Hobson, who wanted the commissioners of bankrupts, led by Stradling, to assign a bond in his name for payment of Morley's debts.[262] Hobson meant 'to touch the said Martin by the said bond' and argued that the bond should not remain in the Court of Chancery, so that Mynyffee could, *inter alia*, no longer enjoy a farm and other things of value of Morley's estate. The Court of Chancery decided that the parties should attend a master of the court and for the time being the bond was to remain in the Court of Chancery and not be assigned as Hobson

[256] ibid m. 10 [IMG_0642].
[257] *Hobson v Stradling*, 13 October 1591 C 33/83 f. 22v [IMG_0014a]. See more about the Court of Requests in part 2 of the thesis.
[258] *Michell v Mynyffee,* 10 February 1590 C 78/96/13 m. 17 [IMG_0034].
[259] *Hobson v Stradling*, 13 October 1591 C 33/83 f. 22v [IMG_0014a]. See also, J Morley, 'Reflections on the role of the Sussex ironmasters in Elizabethan Glamorgan (2010) 54 *Journal of Glamorgan History* 11.
[260] Morley (n 262) 11.
[261] ibid.
[262] It is unclear what exactly was set out in the bond. It is assumed it related to the estate of Mynyffee.

had requested. However, in the meantime, Martin had petitioned the Court of Requests in the same matter (likely to stop the assignment of the bond), and therefore the Court of Chancery ordered that all proceedings in the Chancery should be stayed in the meantime.[263] It does not seem unlikely that proceedings would be started in both the Court of Chancery and the Court of Requests, as both had a very similar equitable jurisdiction.[264] However, *Hobson v Stradling* (1591) suggests that review proceedings would not be allowed to run in both courts at the same time.[265]

Finally, in relation to bankruptcy matters, the Court of Chancery awarded injunctions against proceedings at common law. Injunctions were awarded on a very regular basis when a creditor of a bankrupt sued at common law for their full debts, rather than joining a commission of bankrupts and accepting a pro rata share of the proceeds.[266] The Court of Chancery did not approve of creditors who interrupted Chancery proceedings to pursue the bankrupt individually at common law, or who went back on a composition. The survey shows that in these instances the Court of Chancery always decided in favour of the bankrupt (so that he or she could repay the general creditors) or directly in favour of the general creditors. The Court of Chancery seem to have awarded injunctions to protect the pro rata distribution to creditors. For example, in *Colcocke v Handford* (1617) the plaintiff asked the Court of Chancery for an injunction for stay of proceedings at common law. As has been seen, some of the creditors of Colcocke had tried to recover the outstanding debt from Colcocke at common law, but Colcocke explained in the Court of Chancery that he had already paid.[267] An injunction was awarded by the Court of Chancery upon condition that the information which the parties provided to the court was true and that the plaintiff brought the sum of £36, which he owed to the defendant, into court. Mr Moore, one of the masters of the

[263] *Hobson v Stradling*, 13 October 1591 C 33/83 f. 22v [IMG_0014a].
[264] The Court of Requests had a bankruptcy jurisdiction, but nothing is known about the details of the practice of this court in relation to bankruptcy matters. Further research should be conducted into the practice of the Court of Request in relation to bankruptcy matters in order to make any claims in this regard. See for proceedings in the Court of Requests in relation to insolvent debtors chapter 4 of this thesis.
[265] Due to time restrictions the outcome of the case in the Court of Requests has not been followed up.
[266] E.g. *Colcocke v Handford*, 26 May 1617 C 33/ 132 f. 872 [IMG_0893]; *Carpenter v Leaman*, 10 November 1620 C 33/139 f. 338v [IMG_0332a] .
[267] *Colcocke v Handford*, 26 May 1617 C 33/132 f. 872 [IMG_0893].

court, was ordered to verify the information.[268] Similarly, in *Carpenter v Leaman* (1620) an injunction was awarded against Costeel, the defendant, to prohibit him from proceeding any further at common law in an action on the case in a dispute over a bond of £60.[269] Finally, as has been seen, in *Allen's Case* (1614), Allen did not want to conform to a composition and instead tried to sue Edwards for his full debt at common law.[270] The Court of Chancery awarded an injunction against Allen and stayed all proceedings at common law.[271]

d.) Matters involving orphans

The Court of Chancery reviewed various cases involving matters relating to orphans and often adopted a humane approach in considering these cases. The survey seems to suggest that both the commissions of bankrupts and the Court of Chancery took a special interest in the financial welfare of orphans, which included all fatherless children.[272] The Court of Chancery not only considered the interests of widows and orphans of the bankrupts, but also took the interests of creditors in that position into account.

The survey shows that in various bankruptcy proceedings a surplus was set aside for the maintenance of widows and orphans of the bankrupts.[273] The survey suggests that this could be done by the commission of bankrupts in the first instance or by the Court of Chancery in the review process. For example, as has been seen, in *Michell v Mynyffee* (1590) Hatton LC dealt with a review and the subsequent confirmation of a composition involving the bankruptcy of Anthonie Morley. Morley had died shortly after his bankruptcy and had left 'nothing for or towards the

[268] ibid.
[269] *Carpenter v Leaman*, 10 November 1620 C 33/139 f. 338v [IMG_0332a]. This case is connected to *Larmite v Somerman* (1624) and *Disley v Leman* (1621). *Larmite v Somerman*, 21 October 1624 C 33/147 f. 98v [IMG_0101a]; *Disley v Leman*, 25 January 1621 C 33/140 f. 593 [IMG_0601]; 30 August 1621 C 33/140 f. 1275 [IMG_1302].
[270] *Allen's Case* (1614) Bryson, SS 117 (n 32) 387-391. *Allen v Edwards*, 20 October 1608 C 78/172/13 m. unknown [IMG_0009].
[271] *Allen's Case* (1614) Bryson, SS 117 (n 32) 387-391. *Allen v Edwards*, 20 October 1608 C 78/172/13 m. unknown [IMG_0009].
[272] This meant that children who still had their mother would also be considered orphans. See also Part 2 of this thesis.
[273] E.g. *Michell v Mynyffee,* 10 February 1590 C 78/96/13 m. 17 [IMG_0034]; *Allen's Case* (1614) Bryson, SS 117 (n 32) 389; *Allen v Hubberstye*, 3 February 1614 C 78/125/11 m. 1 [IMG_0002].

maintenance, supportation or stay of living' of his widow and four underage children.[274] The widow and the orphans were evicted from their 'dwelling house' after the sale of Morley's property by the commissioners of bankrupts. However, the sale of the property left a surplus, which the commissioners of bankrupts decided should be used for the maintenance of the Morleys, who were promised an annuity of £40 annually for eight years for their maintenance.[275] As has been seen, litigation was commenced in the Court of Chancery when this allowance had not been paid out. Hatton LC ordered that the composition should be honoured and that Mynyffee's widow should pay the missed yearly instalments, as well as paying the remaining amount. One half of the money was for the widow and her new husband, and the other half was to be paid out to the widow and her new husband 'to or for the said children equally to be divided amongst the said children by even portions', until the children reached the age of eighteen years or were married before the end of the payment plan.[276] If one of the children died or married before the age of eighteen, 'then his, her or their portion so dying shall remain and come to the residue then living to be equally divided amongst them'.[277]

Similarly, in *Allen's Case* (1614) the surplus after the sale of the assets of Laurence Edwards, a bankrupt, was used after his death for the maintenance his orphans.[278] As has been seen, Edwards had been imprisoned in the Fleet and declared bankrupt by a commission of bankrupts. A composition had been made between Edwards and his creditors, which included the sale of Edwards's land to Allen. However, Allen did not want to comply with the agreement or to share the increased value of the land with the other creditors.[279] Edwards and his wife had died of the

[274] *Michell v Mynyffee,* 10 February 1590 C 78/96/13 m. 17 [IMG_0035].
[275] ibid.
[276] mm. 19 [IMG_0040] - m. 20 [IMG_0041].
[277] ibid m. 20 [IMG_0041].
[278] *Allen's Case* (1614) Bryson, SS 117 (n 32) 389; *Allen v Hubberstye*, 3 February 1614 C 78/125/11 m. 1 [IMG_0002]. The manuscript report of Allen's case states that Allen subsequently evicted Edwards, his wife and six children 'in frost and snow' despite a tearful plea for compassion from the under-sheriff. Bryson, SS 117 (n 32) 388.
[279] Allen was sent to prison for not performing the decree. Allen tried to fight his case at law. He did this by a bill of indictment for the offence of *praemunire* against Serjeant Moore and Master Tyndall. Allen apparently had two judgments at common law relating to the debts, but according to Baker he had instituted the Chancery suit himself

plague *pendente lite*, and had left seven orphans, the youngest one 'still suckling at nurse'.[280] When it 'appeared that the children of the said Lawrence Edward were then left fatherless and motherless without anything to maintain them', the Court of Chancery thought it fit that Allen and the other parties to the agreement should accept 'only ten shillings in the pound for their true and honest debts without interest', in the hope that a surplus could be created for the maintenance of the children.[281] Ellesmere assigned Serjeant Francis Moore to be the guardian and legal counsel for the children *in forma pauperis*, and referred the case to Sir John Tyndall, one of the masters of the court. Eventually, Ellesmere LC ordered that the creditors had to pay £200 for the maintenance of Edwards's eldest son and £100 for every other child to be paid from Edward's assets.[282]

Not all the creditors were understanding in relation to using the assets of the bankrupt for the benefit of orphans. In *Mathewe v. Courtman* (1618) Thomas Jones, a bankrupt, had fled the country and left his children behind in England (his children seem to have been considered orphans from this point). Nothing was left of his estate, but 'certain wares in his shop and moveable goods in his house'.[283] His creditors argued that he had owed debts of £700.[284] The parish where Jones had lived was overburdened with poor people and was struggling to provide for the children. Bacon LC therefore thought it fit that one Matthew, presumably the guardian of the children, should sell the wares and goods for the maintenance of Jones's children. The wares and goods were sold openly for around £40 and the money was delivered to a certain Elizabeth Gray 'upon security by her given to the said parish that the said children should be well brought up and the parish no

and had previously agreed to the composition. Baker, 'The common lawyers and the Chancery (n 190) 389. It was difficult to find any ground for his *habeas corpus* application, and the King's Bench refused to deliver him. The Chancery eventually decided that Allen should convey over the land, because he had defrauded the creditors and poor orphans by buying the land at undervalue and so had abused the commissioners of bankrupts and the Court of Chancery.

[280] *Allen v Hubberstye*, 3 February 1614 C 78/125/11 m. 1 [IMG_0002]-[IMG_0003].

[281] ibid m. 3 [IMG_0006]. The manuscript report states: 'the pitiful cries of the father and mother dying, as is aforesaid, and of the poor orphans do call to God for relief, and moved the heart of the chancellor to take compassion upon them and to take such order as he has done'. Bryson, SS 117 (n 32) 390.

[282] ibid m. 6 [IMG_0011].

[283] *Mathewe v. Courtman*, 27 October 1618 C 33/135 f. 129a [IMG_1295a]; 14 October 1619 C 33/137 f. 59v [IMG_0063a]; 13 December 1619 C 33/137 f. 469v [IMG_0476a].

[284] *Mathewe v. Courtman*, 14 October 1619 C 33/137 f. 59v [IMG_0063a].

further charged with them'.[285] However, after the sale, a commission of bankrupts was sued out against Jones. Two of the creditors, who had sued out the commission, sued Matthew at common law for the goods. They argued that the goods had been sold without the consent of the commissioners of bankrupts and that the mother of the children, as well as their grandmother, who was 'of great estate', could take care of them.[286] Whereas the Court of Chancery generally seems to have decided in favour of the creditors of the bankrupt in accordance with the bankruptcy statutes, Bacon LC did not automatically do so in this instance. He considered, 'in as much as this cause concerned poor children', that Matthew should 'be admitted to prosecute the suit *in forma pauperis*', and assigned Mr Gerard and Mr Michell 'to be of their counsel and Mr Saunders their attorney'. An injunction was awarded for proceedings at common law until Bacon LC had considered the case and taken order therein.[287]

The survey also shows examples of cases in which creditors who were widows with orphan children received special consideration in a bankruptcy.[288] For example, in *Scott v Walthall* (1610) a widow with several children got priority in a bankruptcy proceeding. The circumstances were slightly different than in a standard procedure. Anthony Walthall had become bankrupt in 1581 and his goods and household stuff worth £150, held by his late brother William, were supposed to be distributed amongst the general creditors. However, before distribution could take place, the goods were spoilt and decayed. William Walthall, 'in charitable consideration', gave £200 to the Masters and Wardens of the Company of Mercers for them to distribute amongst 'the poorer sort of creditors'.[289] The Court of Chancery ordered that William Walthall wishes should be honoured and that the £200 should be 'employed to the use of such poor creditors'.[290] Similarly, the master's

[285] *Mathewe v. Courtman*, 27 October 1618 C 33/135 f. 129a [IMG_1295a].
[286] *Mathewe v. Courtman*, 14 October 1619 C 33/137 f. 59v [IMG_0063a].
[287] The outcome of the case remains unknown. It was referred to a master of the court and the recorder of London, who had to determine the outcome. It seems that the timing of the suing out of the bankruptcy was an issue in this case, but this is not mentioned in the order. *Mathewe v. Courtman* 13 December 1619 C 33/137 f. 469v [IMG_0476a].
[288] *Scott v Walthall,* 19 October 1610 C 33/119 f. 37 [IMG_0017]; *Cornellius v Blackmore* by Julius Caesar, undated C 38/20.
[289] The entry speaks of masters in the plural.
[290] *Scott v Wallthall,* 19 October 1610 C 33/119 f. 37a [IMG_0017a].

report of *Cornellius v Blackmore* (1615) shows that the defendant argued 'that Lettice Heath, a widow, one of the defendants, deserved much more pity then the plaintiffs [Cornellius and his sureties], her just debts being £500, her estate being extremely poor and her charge [of] ten small children, whereof the eldest is but fourteen years of age, and this debt excepted, she not worth £20 in all the world'.[291] This suggests that the Court of Chancery took requests of this kind seriously, and balanced the interests of the bankrupt with those of the various creditors, giving additional consideration to widows with underage children.

IV. Outcomes

The reviews by the Court of Chancery could have various outcomes.[292] First, the Court of Chancery could order a new commission, or a suspension (*supersedeas*), continuation (*procedendo*) or renewal of the old commission of bankrupts.[293] The survey shows that the court also could order a change in the composition of the commission of bankrupts. Second, the review could be dismissed out of the Court of Chancery or referred to another court. Finally, the Court of Chancery could decide the case themselves. In that case, it seems that there were only five outcomes: (a) expansive application of the relevant statute of bankrupts; (b) pro rata distribution; (c) confirmation of compositions; (d) declaring a bankruptcy proceeding void and the subsequent awarding of damages, and sometimes also costs and interest; and (e) the granting of injunctions against proceedings at common law.

a.) Referral to a commission of bankrupts

The most common outcome of a review by the Court of Chancery was a referral to a commission of bankrupts. It seems that the Court of Chancery often, but not exclusively, referred cases to a commission of bankrupts if the review dealt with issues of a substantive, evidential or procedural

[291] *Cornellius v Blackmore* by Julius Caesar, undated C 38/20. The facts of *Cornellius v Blackmore* (1615) are set out above.
[292] Most of the cases in this section and their outcomes have been discussed above. This section is included to provide an overview and summary of outcomes for the convenience of a reader who is only interested in the outcomes of the cases.
[293] See the section II.2. of this chapter above about procedure.

nature.[294] As has been seen, the court could either order a new commission, a suspension (*supersedeas*), continuation (*procedendo*) or renewal of the commission of bankrupts.

The survey suggests that the Court of Chancery did not award new commissions of bankrupts frequently. *Wood v Hayes* (1606) illustrates that the Court of Chancery could award a new commission of bankrupts if the commission in the first instance had acted fraudulently.[295] As has been seen, in *Cornellius v Blackmore* (1615) a new commission was awarded to determine whether Cornellius was a bankrupt, after the previous suspension of a commission. Suspensions (*supersedeas*) were awarded by the Court of Chancery on a very regular basis.[296] The survey shows examples of both permanent and temporary suspensions of commissions of bankrupts. For example, in *Napper v Edwardes* (1621) a commission of bankrupts was permanently suspended, because the Court of Chancery discharged the commission after finding that the allegations concerning the bankruptcy of the trader were false.[297] In *Perrott v Tawky* (1622) the commission of bankrupts was temporarily suspended, because the bankrupt was unable to sell his lands and goods because chapmen feared the commission of bankrupts and did not want to deal with the bankrupt.[298] The commission of bankrupts was suspended to allow the bankrupt to sell his land, which would ultimately be in the interest of the general creditors. It seems likely that the bankruptcy proceedings were continued (by *procedendo*) after the sale of the land. Continuations (*procedendo*) of commissions would follow after suspensions of commissions of bankrupts,[299] except if the suspension of the commission of bankrupts had been permanent or the Court of Chancery preferred that a new commission of bankrupts determine the matter under review. *Napper v Edwardes* (1621) shows that a continuation could be awarded if a defendant produced a copy of the docket for the former commission of

[294] As has been seen, the Court of Chancery also reviewed cases based on corruption and fraud by others than the bankrupt or reviewed compositions.
[295] *Wood v Hayes*, 9 February 1606 C 33/111 f. 436v [IMG_90003a].
[296] E.g. *Holden v Allen*, 25 October 1597 C 33/ 93 f. 279 [IMG_6412]; 16 March 1599 C 33/95 f. 569v [IMG_6474a]; *Napper v Edwardes*, 12 September 1621 C 33/140 f. 1280v [IMG_2620]; *Perrott v Tawky*, 5 December 1622 C 33/143 f. 331v [IMG_0333a].
[297] *Napper v Edwardes*, 12 September 1621 C 33/140 f. 1280v [IMG_2620].
[298] *Perrott v Tawky*, 5 December 1622 C 33/143 f. 331v [IMG_0333a].
[299] E.g. *White v Ryley*, 19 April 1597 C 33/91 f. 756 [IMG_5080].

bankrupt and a certificate from the commission of their proceedings.[300] The dockets of Coventry LK show that renewal of commissions of bankrupts occurred and arose from a separate decision by the commission of bankrupts.[301] Renewals of commissions of bankrupts seem to have been very rare: no examples of this kind were found in the survey. It seems that in exceptional circumstances the Court of Chancery was able to change the composition of the commissions of bankrupts. In *Levinson v Bradley* (1620) the Court of Chancery held that the commissioners of bankrupts in the first instance had not examined the evidence properly, and with a change of commissioners the Court of Chancery aimed to get a fresh pair of eyes to look at the matter.[302]

In most cases the Court of Chancery worked as a safeguard for proper proceedings by commissions of bankrupts. In most instances the Court of Chancery operated as an intermediary between the original commission of bankrupts and the same or a new commission of bankrupts, which would finalise the matter of review. A referral to a commission of bankrupts meant that the Court of Chancery thought it best that the matter of review be decided at common law. For example, in *Howse v Lea* (1591) the Court of Chancery decided that the request for a review 'seems more meet to be tried by the course of the common law than in this court'.[303] Therefore, the Court of Chancery referred the plaintiffs 'to take what remedy they can there [at common law] and sue out a new commission of bankrupts or proceed upon the old commission by [*procedendo*] if they may by law and proceed to trial with effect'.[304] Commissions of bankrupts were guided by the various bankruptcy statutes, and there was no room for equitable principles in their decisions. However, commissions of bankrupts had the option to mediate between the bankrupt and the

[300] *Napper v Edwardes*, 12 September 1621 C 33/140 f. 1280v [IMG_2620].
[301] J Broadway, R Cust and SK Roberts (eds), *A Calendar of the Docquets of Lord Keeper Coventry 1625-1640*, Part 3 (List & Index Society, Special Series 36, 2004) 487-489.
[302] *Levinson v Bradley,* 11 October 1620 C33/139 f. 17v [IMG_0021a]; 7 November 1620 C33/139 f. 349v [IMG_0343a].
[303] *Howse v Lea*, 2 December 1591 C 33/83 f. 255 [IMG_0247].
[304] ibid.

creditors, and could grant compositions, including informal discharges of debts and alternative payment plans.[305]

b.) Dismissal out of the court and referral to another court

The Court of Chancery could dismiss a review out of the court and refer the case to another court. The survey shows two examples of referrals to other courts. As has been seen, in *Hobson v Stradling* (1591) the Court of Chancery stayed all proceedings in Chancery, because the matter was already under review in the Court of Requests.[306] Similarly, in *Grenewell v Harbottle* (1599) the Court of Chancery instructed the Council of the North to investigate damages, which would be generally more of a task for a commission of bankrupts. The reasoning behind the referral was that the Council of the North had previously dealt with the matter, and the litigating parties resided within the jurisdiction of the Council of the North.[307]

c.) Determination by the Court of Chancery

Finally, the Court of Chancery determined review cases itself. It seems that these reviews had a limited range of outcomes. First, as has been seen, the Court of Chancery could apply an expansive interpretation of the statute of bankrupts. This can be illustrated by *Disley v Leman* (1621) and *Larmite v Somerman* (1624), in which Ellesmere LC applied an expansive interpretation of the definition of a creditor in the Bankrupts Act 1571.[308] Second, *Oxwick v Wiseman* (1628) shows that the Court of Chancery could order pro rata distribution of the bankrupt's estate.[309] Deductions would take place for creditors who had already received more than the proportion to which they would be entitled under a pro rata distribution.[310] Third, the Court of Chancery could confirm a

[305] *Cornellius v Blackmore*, 21 May 1615 C 33/127 f. 1048v [IMG_1041a].
[306] *Hobson v Stradling*, 13 October 1591 C 33/83 f. 22v [IMG_0014a].
[307] However, commissions of bankrupts could also be instructed locally.
[308] Bankrupts Act 1571, s. 1; *Disley v Leman*, 30 August 1621 C 33/140 f. 1275 [IMG_1302]; *Larmite v Somerman*, 21 October 1624 C 33/147 f. 98v [IMG_0101a]. See also *Certain merchant strangers creditors v Pope*, 2 September 1597 C 33/93 f. 182 [IMG_6310].
[309] *Oxwick v Wiseman*, 21 January 1628 C 33/153 f. 403v [IMG_2140a].
[310] ibid.

composition, such as in *Cornellius v Blackmore* (1615) and *Aldworth v Lambe* (1625).[311] However, it seems that the Court of Chancery did not conform refractory creditors of bankrupts against their wishes.[312] Instead, alternative routes via a mediation or a new commission of bankrupts could be awarded.[313] Fourth, the Court of Chancery could declare a bankruptcy proceeding void.[314] This generally happened if the masters of the court had established that a commission of bankrupts had been sued out without cause, or that fraudulent conduct by commissioners of bankrupts or creditors had taken place.[315] The Court of Chancery would often compensate the trader who had unjustly been declared a bankrupt with 'damages', and sometimes would also award costs, and on rare occasions interest.[316] In *Moseley v Alsopp* (1627) the Court of Chancery also discharged Moseley, the alleged bankrupt, from all his debts, because he was merely a surety in the case.[317] Finally, the Court of Chancery was able to award injunctions against proceedings at common law.[318] As has been seen, injunctions were generally awarded if one or more creditors started proceedings at common law, either when a commission of bankrupts had already been awarded or when the bankrupt and the creditors had made a composition, and the creditor(s) in question went back on their promise.[319]

311 E.g. *Tomlinson v Ryche*, 18 June 1596 C 33/91 f. 185v [IMG_4513a]; *Cornellius v Blackmore*, 21 May 1615 C 33/127 f. 1048v [IMG_1041a]; *Aldworth v Lambe*, 20 December 1624 C 33/147 f. 390v [IMG_0393a].
312 *Cornellius v Blackmore*, 21 May 1615 C 33/127 f. 1048v [IMG_1041a].
313 ibid.
314 E.g. *Moseley v Alsopp*, 25 April 1627 C 78/426/2 m. 3 [IMG_0264]; *White v Ryley*, 19 April 1597 C 33/91 f. 756 [IMG_5080].
315 E.g. *Moseley v Alsopp*, 25 April 1627 C 78/426/2 m. 3 [IMG_0264].
316 E.g. *Grenewell v Harbottle*, 27 November 1599 C 78/109/6 m. 8 [IMG_0639]; *Wood v Hayes*, 9 February 1606 C 33/111 f. 436v [IMG_9003a]; *Moseley v Alsopp*, 25 April 1627 C 78/426/2 m. 3 [IMG_0264]. The cases do not show what the exact damages entailed.
317 *Moseley v Alsopp*, 25 April 1627 C 78/426/2 m. 3 [IMG_0264].
318 E.g. *Colcocke v Handford*, 26 May 1617 C 33/ 132 f. 872 [IMG_0893]; *Carpenter v Leaman*, 10 November 1620 C 33/139 f. 338v [IMG_0332a].
319 See above, section II.4 of this chapter.

V. Analysis

As has been seen, the first bankruptcy review case to appear in the survey is S*tonehurst v Griffith* (1587).[320] A total of 44 review cases were found in the survey, as well as three cases involving a bankrupt, in which the bankruptcy proceeding was not material to the case. Five review cases were decided by Hatton LC; twenty-five by Ellesmere LC;[321] six by Bacon LC; seven by Williams LK; and one by Coventry LK. This means that bankruptcy reviews occurred consistently throughout the period, albeit they were not very common. The survey shows three small peaks of bankruptcy review cases: four in each of 1599 and 1620, and five decided between August 1621 and December 1622. However, the number of cases found in the survey is too limited to reach substantial conclusions about the individual practice of each lord chancellor or lord keeper. Most bankruptcy cases were decided during the tenure of Ellesmere LC, but he was in office for 21 years, much longer than any other lord chancellor or lord keeper in the period 1543-1628, which could explain the larger number of bankruptcy cases during his chancellorship.

As has been seen, Chancery practice in relation to bankruptcy matters was mainly concerned with reviews of certificates of commissions of bankrupts, who had decided the case in the first instance. This included enforcement of compositions, as opposed to correction. It seems that the Court of Chancery mainly exercised this function to ensure that bankruptcy proceedings by commissioners of bankrupts were conducted properly. In relation to this safeguarding function, the Court of Chancery generally dealt with matters of a substantive, evidential or procedural nature.[322] The Court of Chancery generally did not overrule a decision of a commission of bankrupts, but instead would refer the case back to a commission of bankrupts. This practice can be observed consistently throughout the period. The commissions of bankrupts were guided by the statutes of bankrupts,

[320] *Stonehurst v Griffith*, 14 November 1587 C 33/75 f. 163v [IMG_0165a].
[321] This includes the period between 1596 and 1603 when Ellesmere was Sir Thomas Egerton, Lord Keeper, and the period 1616-17 when he was Viscount Brackley.
[322] As has been seen in section II.3 of this chapter, the Court of Chancery also reviewed cases involving fraud and compositions.

which were entirely designed to serve the needs of creditors. It seems to have been an active choice to put the creditor first, in order to strengthen the position of creditors in an emerging credit economy. It seems that before a certificate was awarded in the bankruptcy case in the first instance, mediation by commissions of bankrupts – generally resulting in a debt settlement – was the only way to circumvent the strict bankruptcy statutes. The decisions of the Court of Chancery involving bankruptcy reviews did not show any equitable interference by the Chancery and it seems that in review cases the court did not consider the interests of the bankrupt. On the basis of *Cornellius v Blackmore* (1615), it seems that the Court of Chancery therefore did not conform creditors to compositions with a bankrupt, whereas this occurred on a very regular basis in relation to insolvent debtors.[323] This observation seems to be consistent with the bankruptcy statutes which throughout the period prescribed that a discharge of debts was not allowed.

Bankruptcy was a misdemeanour in the period, and bankruptcy law was therefore a criminal procedure. However, bankruptcy proceedings would be initiated by private individuals, the creditors of the alleged bankrupt, rather than by the state. The creditors suing out these commissions were often traders from London. It seems to have been fairly common that commissions of bankrupts and the Court of Chancery were involved in bankruptcies caused by failing business relations between traders of different towns, mostly in the textile industry. Most bankruptcy review cases involved fraudulent conveyances or false accusations by rival traders that someone had committed an act of bankruptcy. In the modern context, conduct of this nature would largely be classified as financial crime. However, the punitive character of bankruptcy law is often not obviously noticeable in the Chancery records in the period, and it seems that bankruptcy was generally treated by the Chancery as a private law matter. Among the cases in the sample, the punitive language of the bankruptcy statutes can be explicitly be observed only in *Wood v Hayes* (1606), in which one of the commissioners did not see any reason to charge the bankrupt

[323] *Cornellius v Blackmore*, 21 May 1615 C 33/127 f. 1048v [IMG_1041a].

'with the penalty of the statute [of bankrupts]'.[324] The survey does not show reviews of cases in which the bankrupt had been convicted by a commission of bankrupts of one of the more severe offences in the bankruptcy statutes, for which the bankrupt could be punished with the pillory in some public place by the space of two hours, and have one of his ears nailed to the pillory and cut off.[325] However, this could be the chance of the survey. Debtor-friendly resolutions of disputes reached by the Chancery, such as the discharge of debts, could not be observed in the Chancery records in relation to these types of bankruptcy cases.

However, the Court of Chancery did exercise its equitable jurisdiction in relation to bankruptcy matters in a few instances. First, the Court of Chancery sometimes applied an expansive interpretation of the bankruptcy statutes. For example, the Court of Chancery extended the bankruptcy statutes to creditors who were merchant strangers, whereas the bankruptcy statutes, before the enactment of the Bankrupts Act 1624, did not make explicit provision that foreigners could benefit from them.[326] Second, the equitable jurisdiction can also be observed in the balancing of the interests of widows and orphans with those of the general creditors. The survey shows that while the Court of Chancery did not necessarily decide in favour of these vulnerable people, the court would always consider their financial position. This is noteworthy, because after all the bankrupt (the late father of the orphans) had committed a criminal offence, and the bankrupt himself does not seem to have been given such consideration. Third, the Court of Chancery showed sympathy for a trader if the trader was falsely accused of the being a bankrupt. It seems that the Court of Chancery regularly dealt with these kinds of reviews, and compensated such traders with damages, and, on occasion, with costs and interest. In the period between 1543 and 1628, the Court of Chancery exercised its equitable jurisdiction in relation to bankruptcy matters during the chancellorships of Hatton LC, Ellesmere LC and Bacon LC. These three lord

[324] *Wood v Hayes*, 9 February 1606 C 33/111 f. 437 [IMG_9004].
[325] Bankrupts Act 1604, s. 4.
[326] *Certain merchant strangers creditors v Pope*, 2 September 1597 C 33/93 f. 182 [IMG_6310]; *Disley v Leman*, 30 August 1621 C 33/140 f. 1275 [IMG_1302]; *Larmite v Somerman*, 21 October 1624 C 33/147 f. 98v [IMG_0101a].

chancellors were also lenient towards insolvent debtors,[327] and might have had a humane idea of bankruptcy law. However, it could equally be the chance of the survey.[328]

As has been seen, Jones has argued that the annual number of bankruptcies in the late Elizabethan and Jacobean periods may not have been much above ten, and that more commissions were probably granted in depression years (1620-24).[329] Jones based this estimate solely on the dockets in the Ellesmere Papers, in which 39 commissions were granted by Puckering LK during his four-year tenure.[330] However, the survey of the Chancery records and the additional findings in the dockets Coventry LK show that the number of bankruptcies must have been higher in the period. After all, only a sample of cases has been surveyed, which already revealed 47 bankruptcy cases, and the Court of Chancery seems to have mainly been involved in the review of cases of commissions of bankrupts in the first instance. It seems very likely that not all decisions of commissions of bankrupts were reviewed by the Court of Chancery.[331] Indeed, only one review case was found decided by Coventry LK.[332] However, as has been seen, 39 commissions were awarded during Puckering LK's tenure and 15 were granted by Coventry LK in 1626, 47 in 1627 and 27 in 1628. The depression years occurred during the tenure of Bacon LC and Williams LC.[333] During this time, the survey shows that the Court of Chancery dealt with 14 review cases. This number is relatively large, as it represents 32% of the total number of cases found in the survey. These larger numbers coincide chronologically with the failing of the Cockayne project and crisis in the cloth trade.[334] However, because only a sample of cases has been examined no firm conclusions can yet be reached on this matter.

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[327] See chapter 5.
[328] ibid.
[329] WJ Jones, 'The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period' (1979) 69 (3) *Transactions of the American Philosophical Society* 5.
[330] As has been seen in note 108 of this chapter, it is likely that these 39 dockets were not all the dockets of Puckering LK.
[331] Further research could be done to compare the known dockets with the Chancery records. For this thesis only the dockets of Puckering LK and Coventry LK have been examined.
[332] Puckering LK's tenure was not part of the survey.
[333] See chapter 5 for the economic history in the period.
[334] ibid.

PART II

THE EQUITABLE FUNCTION

OF THE

COURT OF CHANCERY

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THE EQUITABLE FUNCTION OF THE COURT OF CHANCERY

I. Introduction

It has often been argued that between 1543 and 1628, the period covered in the survey, insolvent debtors who could not be classified as 'bankrupt' could not be discharged from their debts.[1] They had to spend the rest of their lives in debtor's prison and their creditors might not get any satisfaction for the debts owed to them.[2] However, this is incorrect: in addition to the review function, the Court of Chancery also had an equitable function in relation to insolvency matters. This equitable function was not unique to the Court of Chancery, a similar equitable function was exercised by the Court of Requests and the Privy Council for most of the period.[3] However, this thesis only deals with the equitable function of the Court of Chancery, because there has effectively been nothing known about the Chancery practice in relation to bankruptcy and insolvency matters in the period.[4]

In its equitable function the Court of Chancery dealt with issues concerning insolvent debtors that were not regulated by statutory bankruptcy or the common law. In practice this meant that in this capacity the Court of Chancery would not deal with 'bankrupts' or 'fraudulent debtors', but with insolvent debtors who for one reason or another did not fall within the scope of the bankruptcy

[1] Most notably, WS Holdsworth, *A history of English law,* vol. VIII (Methuen 1925, reprinted Sweet and Maxwell 1992) 232-233.
[2] Holdsworth, *History* vol. VIII (n 1) 232-233. Originally, insolvent debtors were held in debtor's prison in the hope that others connected to the debtor would pay the debts in order to get the insolvent debtor out of prison. Baker, JH Baker, *An Introduction to English legal history* (OUP 2019) 74.
[3] Treiman and Cadwallader have explained that petitions for debt settlement in this early period were mainly dealt with in the Privy Council and not in the Court of Chancery. I Treiman, 'Majority control in compositions: Its historical origins and development' (1938) 23 (5) *Virginia Law Review* 512-516, FJJ Cadwallader, 'In pursuit of the merchant debtor and bankrupt: 1066-1732. Vol II' (Doctoral thesis, University of London 1965) 415-423.
[4] As has been seen, some work on the Privy Council has been done by DA Smith. DA Smith, 'The error of young Cyrus' The bill of conformity and Jacobean Kingship, 1603-1624 (2010) 28 (2) *L and Hist Rev* 316-324. Due to time restrictions, the thesis excludes deceased estates, unless the case was petitioned on the basis of a bill of conformity. See below in chapter 4.

statutes.[5] The survey shows that these insolvent debtors were always 'honest': insolvent debtors by misfortune, widows and children of insolvents, or sureties.[6] The contemporary Flemish merchant Gerard de Malynes in his treatise *Consuetudo, vel lex mercatoria*, dating from 1622, observed this legal difference between 'bankrupts' and 'honest' debtors in English law.[7]

In its equitable capacity, the Court of Chancery was particularly concerned with debt settlements of these insolvent debtors. The lord chancellor, or lord keeper, would balance the interests of insolvent debtors and their creditors based on 'equity and conscience'. The Court of Chancery seems to have avoided sending insolvents to debtor's prison and encouraged reasonable, and sometimes charitable, compromises between debtors and creditors throughout most of the period. The survey shows evidence of this equitable practice from 1551 onwards.[8] It is unclear from the survey whether the Chancery practice of debt settlements preceded the Statute of Bankrupts 1543, or whether the enactment of that statute originated the practice. In fact, it is even uncertain whether the two methods of debt relief originally had any direct link.[9]

II. Types of settlements

Contemporaries did not make nuanced distinctions, but the survey shows that the Court of Chancery dealt with two types of debt settlements: voluntary settlements and conformity settlements.[10] In a voluntary settlement all the creditors agreed to a composition with the debtor.

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[5] See the Statute of Bankrupts 1543 (34 & 35 Hen VIII, c. 6), Bankrupts Act 1571 (13 Eliz I, c. 7), Bankrupts Act 1603 (1 Jac I, c. 15) and Bankrupts Act 1624 (21 Jac I, c. 19).

[6] See chapter 4 for more information about debtors by misfortune. In theory insolvent debtors could be women, but no case of a female insolvent debtor was found in the survey.

[7] G Malynes, *Consuetudo, vel lex mercatoria, or the ancient law-merchant diuided into three parts: According to the essentiall parts of trafficke. necessarie for all statesmen, iudges, magistrates, temporall and ciuile lawyers, mint-men, merchants, marriners, and all others negotiating in all places of the world* (Adam Islip 1622) 223. In fact, Malynes, relying on the treatise *De Decoctoribus* of Benuenuto Straccha (Lvgdvni, Apud haeredes Iacobi Iuntae, 1558), could even distinguish four types of bankruptcy. See, Malynes (n 7) 225.

[8] *Johnson v Wolmer,* 3 November 1551 C 78/6/28 m. 13 [IMG_0027].

[9] The absence of decree and order books before 1544 makes it impossible to know for certain what the Chancery practice was before that date. Outside the scope of this thesis, the pleadings in Chancery in the class C 1 could potentially show whether debtors in that period would petition the Chancery in order to obtain a debt settlement.

[10] The names of the settlements are used here as labels, rather than being terms that were expressly used in the Chancery record. The term 'bill of conformity' did not appear in the survey before 1618. It seems that contemporaries from that time put all conformity settlements under that name. This chapter only deals with debt settlements of living

In a conformity settlement the Court of Chancery could force refractory creditors to conform to a composition. The survey shows that there were two different types of conformity settlements: individual conformity settlements and general conformity settlements.[11] There were two different routes for general conformity settlements: the Chancery bill of conformity and the royal bill of conformity. An individual settlement bound only one specific creditor to a composition with the debtor(s). If the Court of Chancery chose to use individual conformity settlements, a debtor would have a separate specific settlement with one of his creditors. Generally in such cases, the majority of creditors had already voluntarily agreed to a composition in an earlier stage of the settlement proceedings (generally the mediation stage).

In a general conformity settlement only a majority of creditors agreed to a general composition that applied to all the creditors. Refractory creditors, those who did not want to conform to the agreement, could be forced collectively by the Court of Chancery to accept this general composition. Originally, suits concerning general conformity settlements were commenced in Chancery, via a Chancery bill of conformity. However, between 1613 and 1621 it became more common to petition the king for debt relief, via a royal bill of conformity proceeding. The king could subsequently refer the royal bill of conformity to either the Court of Chancery or, until 1617, the Court of Requests.[12] The different routes followed seem to have been the only difference between the two. If the Chancery saw reason to exclude one creditor from a general conformity settlement, it could order and decree a separate individual conformity settlement for that particular

insolvent debtors. For reasons of time, deceased insolvent estates were deliberately excluded from the survey. However, if the particular circumstances of an insolvent deceased estate demanded inclusion, then this will be mentioned in the chapter. It looks as though insolvent estates were broadly treated in the same way as insolvent debtors, but more research is necessary to be certain of this.

[11] Individual settlements could be subdivided into primary individual settlements and secondary individual settlements. Primary individual settlements were used in the Elizabethan period to conform individual debtors. Secondary individual settlements were used together with general conformity settlements.

[12] For reasons of time, the thesis does not deal with cases that were solely dealt with in the Court of Requests. The survey shows that some cases were originally sent to the Court of Requests and then ended up in Chancery. They will be discussed below. As mentioned above, DA Smith has done primary research into bills of conformity in the Court of Requests, see DA Smith, 'The error of young Cyrus' (n 4) 316-324.

creditor.[13] The line between general conformity settlements and individual conformity settlements could then sometimes become unclear. All types of settlements could be initiated by the debtor and (conformable) creditors. While mostly not compulsory, mediation between debtors and creditors was an important feature of all types of settlements. Mediation in the period of the survey was almost always used before the final settlement was ordered and decreed by the Court of Chancery.[14]

III. Structure of Part II

Chapter 3 will start with a chronological overview of the Chancery practice in the period in relation to debt settlements of insolvent debtors. Chapter 4 will set out the detail of Chancery practice in this respect. The first part of the chapter deals with substantive rules used in the Court of Chancery. The second part deals with the formal practice and procedure. Chapter 5 deals with a contextual analysis of the Chancery practice found in the survey. It will focus on four possible factors of influence on the Chancery practice in insolvency cases: the possibility of the use of precedent; the effect of the debate of 1615 concerning the relationship between the Chancery's jurisdiction and the common law; the crisis in the cloth trade in the early 1620's, which potentially caused an increase in insolvencies; and social and economic factors.

[13] Secondary individual settlements could be used in relation to Chancery bills of conformity and royal bills of conformity.
[14] *Haddon v Foulds*, 16 December 1622 C 33/143 f. 354v [IMG_0357a]; 23 December 1622 C 33/143 f. 344 [IMG_0347]; *Rycroft v Hedd*, 20 November 1627 C 33/153 f. 319 [IMG_2055].

Chapter 3

Chronological overview of debt settlements

Malynes wrote in his treatise *Consuetudo, vel lex mercatoria*, that debt settlements of insolvent debtors were originally regulated by 'letters of licences'.[1] However, at least since the mid sixteenth century, debt settlements of insolvent debtors were part of English Chancery practice and they remained so throughout the entire period surveyed. The use of the two types of debt settlements, identified above, and the combination with mediation, altered over time. It seems that mediation became more important over the years. In relation to settlements, the Court of Chancery seems originally to have used voluntary settlements to deal with insolvent debtors.[2] In the Elizabethan period it became more common for the Chancery to use individual conformity settlements or Chancery bills of conformity. Royal bills of conformity seem to have been introduced in 1613, but they only become fairly common from 1618 onwards. However, 'bills of conformity' – conformity settlements – were banned from the Chancery practice by Proclamation in 1621. The Bankrupts Act 1624 set out that in a petition or bill, exhibited to King James I or his heirs, or to any of the king's courts, a creditor or creditors could no longer be forced to accept less than their just debts or to accept delay of payment.[3] The statute thereby abolished all conformity settlements, leaving voluntary settlements as the only remaining type of settlement.[4] The survey shows the use of a voluntary settlement after the Proclamation of 1621.[5]

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[1] G Malynes, *Consuetudo, vel lex mercatoria, or the ancient law-merchant diuided into three parts: According to the essentiall parts of trafficke. necessarie for all statesmen, iudges, magistrates, temporall and ciuile lawyers, mint-men, merchants, marriners, and all others negotiating in all places of the world* (Adam Islip 1622) 223. Malynes writes that letters of licences in the period were disused amongst merchants, but originally were used as a 'Pasport' for the body of the debtor and their goods. They were given by creditors, by way of covenant that they would not (for a time or term of years) trouble or molest the persons and goods of the said debtors.

[2] It is uncertain whether voluntary settlements were the norm in Chancery before 1620, as there is only one example of this kind found in the survey.

[3] Bankrupts Act 1624 (21 Jac I, c. 19) s. 2. See below for the exact text of the relevant section of the Bankrupts Act 1624 (section II d).

[4] Bankrupts Act 1624 (21 Jac I, c. 19) s . 2.

[5] *Haddon v Foulds,* 16 December 1622 C 33/143 f. 354v [IMG_0357a]; 23 December 1622 C 33/143 f. 344 [IMG_0347].

In this chapter the chronological development of the Chancery practice in relation to settlements of insolvent debtors, as well as leading and other key cases in relation to settlements of insolvent debtors before 1620, will be set out in more detail. The Standing Orders of the High Court of Chancery, as well as the interference by Parliament in the bills of conformity procedure will be discussed. Finally, this chapter will show that after the Proclamation of 1621 and the Bankrupts Act 1624 the Court of Chancery returned to its original practice of voluntary settlements. The aim of the chronological overview in this section is to allow the Chancery practice considered in the next section to be seen in the context of broader developments.

I. Debt settlements in the Court of Chancery before 1620

a.) Voluntary Settlements

Johnson v Wolmer (1551) was the first settlement case to appear in the survey.[6] The case dealt with the voluntary settlement of John Johnson, a clothier, who had become insolvent by misfortune. Johnson was effectively discharged from his debts by his pool of creditors. The Chancery settlement seems to have been a written confirmation of a more informal settlement between the parties. This voluntary settlement seems to have been very exceptional, because no other voluntary settlement of this kind appeared in the survey. *Johnson v Wolmer* is the first known example of a discharge of debts in any period in any English court, which occurred significantly earlier than was previously known.[7]

b.) Individual conformity settlements

While *Johnson v Wolmer* concerned a voluntary settlement, at the end of the sixteenth century and in the early seventeenth century, the Court of Chancery would generally use individual conformity settlements to give debtors relief and creditors the benefit of their pro rata share. There was no

[6] *Johnson v Wolmer,* 3 November 1551 C 78/6/28 m. 13 [IMG_0027]. No debt settlement cases have been found in the Chancery record classes C 33 and C 78 during the reign of Henry VIII.
[7] Bankrupts Act 1705. See also, E Kadens, 'The Pitkin affair: a study of fraud in early English bankruptcy' (2011) 84 *American Bankruptcy Law Journal*, 483-571.

royal involvement in individual conformity settlements in the cases in the survey: they were directly commenced in Chancery. An example of an individual conformity settlement may be seen in *Warren v Eldrington* (1601).[8] In this case only three, and later two, of the creditors were unwilling to conform to the composition. Eventually, the Chancery forced these refractory creditors to conform, as the other creditors had done in separate settlements. The earlier cases often show that creditors had originally all come to an agreement with the debtor about the debt repayment, but that one or two creditors would not keep to that agreement. The survey shows that in cases after 1613 individual conformity settlements were no longer used as a primary settlement method. However, they were still used alongside Chancery and royal bills of conformity. This occurred if one creditor or a group of creditors were not required to comply with the general composition for financial or personal reasons.

c.) General conformity settlements: Chancery bills of conformity

Chancery bills of conformity seem to have been introduced during the reign of Queen Elizabeth. Malynes confirms that conformity settlements, labelled in this thesis as Chancery bills of conformity, existed in Elizabethan times.[9] Petitions for debt relief via a Chancery bill of conformity were exhibited into Chancery (sometimes with a referral from the Privy Council), without royal involvement, generally after the debtor had been sued in an action of debt at common law. Debt relief could be in the form of paying less money to the creditors, but could also involve postponement of payment or an annual payment out of the debtor's land. *Sandys v Gresham* (1589) was the first Chancery bill of conformity to appear in the survey.[10] As has been seen, the case dealt

[8] *Warren v Eldrington*, 19 September 1600 C 33/97 f. 681v [IMG_8265a]; 20 February 1601 C 33/99 f. 380 [IMG_9355]; 15 July 1601 C 33/99 f. 728 [IMG_9703]. The first entry only lists as names the parties Anthony Warren, William Bowser, Gamaliell Woodford and his creditors, in the title of the entry. The entries are indexed in the alphabets to the entry books as Warren et Woodford (1600), Warren, Bowser et creditores sues (1601) and Warren v Harrison (1601). However, for clarity and consistency, the name of the first defendant, Eldrington, has been used in referring to the case here. Eldrington was no longer part of the litigation in the last entry. Nevertheless, for reasons of consistency the case name has been retained.

[9] Malynes (n 1) 223. Malynes only describes the settlement proceedings, which are labelled here as Chancery bills of conformity, without naming them.

[10] *Sandys v Gresham*, 28 November 1589 C 33/80 f. 271 [IMG_0234].

with the settlement of the debts of Edwyn Sandys, an insolvent student 'in the Temple in his father's Chamber', who had incurred his debts as an expectant heir.[11] Edwyn's father had already paid off his debts once, but after finding out that Edwyn had acquired debts again, his father disinherited him.[12] After losing his expected inheritance, Edwyn became immediately insolvent, and had no prospect of paying his debts.[13] The case can be distinguished from other conformity cases, because some of the creditors in the case had acted in a usurious and fraudulent manner. In most other cases in the survey the creditors had all acted honestly. The honest creditors of Edwyn Sandys had already been willing to compound, and were no obstacle to a reasonable composition.[14] The usurious and fraudulent creditors were not willing to conform, but the Court of Chancery conformed these refractory creditors, solely on the basis that they had been usurious and fraudulent.[15] The later case of *Browne v Dalby* (1614) is more conventional, as that case dealt only with one 'honest' refractory creditor, whom the Court of Chancery ordered to conform with the other creditors.[16] *Browne v Dalby* can therefore also be classified as an individual conformity settlement. Chancery bills of conformity seem to have co-existed alongside royal bills of conformity and were relatively commonplace between 1618 and 1620.[17]

[11] ibid f. 272 [IMG_0235]. The disinherited student was the future Sir Edwyn Sandys (II) (c.1564-1608), of the Middle Temple, Member of Parliament for Andover in 1586-87. He was the grandson of the Archbishop of York, also called Edwyn Sandys (I), and the eldest son of Miles Sandys, Treasurer of the Middle Temple (1588-95), and his first wife Hester Clifton. Edwyn Sandys (II) married Elizabeth Sandys, daughter of the 3rd Baron Sandys, who was said to have been no relation to Edwyn before their marriage. After a few years in the Middle Temple (where he had been admitted in 1589-90), Edwyn Sandys pursued a military career. He was knighted in Ireland for his military services in 1599. His biography in the History of Parliament does not mention his debts and his interactions with the Court of Chancery. A Harding, 'Sandys, Edwin I (c.1564-1608), of Eaton Bray, Beds.' in PW Hasler ed., *The History of Parliament: the House of Commons 1558-1603* (Boydell and Brewer 1981) <https://www.historyofparliamentonline.org/volume/1558-1603/member/sandys-edwin-i-1564-1608> accessed 14 August 2020.
[12] *Sandys v Gresham*, 28 November 1589 C 33/80 ff. 272v [IMG_1105], 273 [IMG_0236].
[13] ibid f. 273 [IMG_0236].
[14] ibid ff. 272 [IMG_0235] - 273 [IMG_0236].
[15] ibid f. 273 [IMG_0236].
[16] *Browne v Dalby*, 31 October 1614 C 33/127 f. 130 [IMG_0127].
[17] See the section I.d of this chapter, as well chapter 5.

d.) General conformity settlements: royal bills of conformity

Royal bills of conformity were petitions to King James I for debt relief.[18] Apart from the royal involvement, royal bills of conformity seem to have been identical to Chancery bills of conformity. The royal involvement meant that the route to Chancery was slightly different, following a petition to the king for debt relief by the debtor and the conformable creditors. The king would then make a reference to a committee or a commission of bankrupts to examine the debts and subsequently refer the case to the lord chancellor. The lord chancellor could deal with the royal bill of conformity in the Court of Chancery.[19] It seems that royal bills of conformity only existed during the reign of James I.[20] Royal bills of conformity can be distinguished from Chancery bills of conformity (see above) and (royal) protections (injunctions issued by the Privy Council), which were both used in the Elizabethan period.[21]

There is uncertainty when royal bills of conformity were introduced into English law. One of the problems in this respect is the inconsistency of terminology used by contemporaries. Sir Lionel Cranfield, a leading opponent of royal bills of conformity, argued in the parliamentary debates of 1621 on new legislation regarding 'bills of conformity', that they did not exist before 1605.[22]

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[18] Cranfield said in the parliamentary debates that 'bills of conformity are upon reference from the king'. It seems certain that contemporaries called royal bills of conformity 'bills of conformity'. *Commons Debates*, 14 March 1621 in W Notestein, FH Relf and H Simpson, *Commons Debates* 1621, vol. 2 (Yale University Press 1935) 221-222. There is a manuscript register in the British Library dealing with petitions received by the king from 1603 until June 1616. British Library Lansdowne MS 266. This manuscript has been transcribed and published as RW Hoyle, ed., *Heard Before the King: Registers of Petitions to James I, 1603–16* (Kew: List and Index Society, 2006). The manuscript must be supplemented for the year 1613 with British Library Additional MS 69910. For reasons of time, this register has not been consulted. See also DA Smith, 'The error of young Cyrus': The bill of conformity and Jacobean Kingship, 1603-1624' (2010) 28 (2) *L and Hist Rev* 309-324; Dawson, 'The Privy Council and Private Law in the Tudor and Stuart Period: I' (1950) 48 *Michigan Law Review* 419 n83.

[19] Until 1617 the king could also refer the petition to the Court of Requests. Smith, 'The error of young Cyrus' (n 18) 316.

[20] There is no evidence in the survey, parliamentary debates or literature that royal bills of conformity cases existed before 1613.

[21] With a royal protection debtors could be protected against being sued for their debts. Treiman writes that royal protections had become common practice amongst debtors. Once debtors were granted royal protections they would file them in the Court of Chancery, in order to bar suits against them. I Treiman, Majority control in compositions: Its historical origins and development' (1938) 23 (5) *Virginia Law Review* 507-527.

[22] The date of Cranfield's speech is not mentioned in Notestein *Commons Debates,* 14 March 1621 in Notestein, Relf and Simpson, *Commons Debates* 1621, vol. 2 (n 18) 221 n 24. The attack on bills of conformity (and Bacon LC) was led by Cranfield. JF Larkin and PL Hughes (eds), *Stuart royal Proclamations.* vol. I *Royal Proclamations of King James I 1603-1625* (OUP 1973) 506 n1.

However, Coke, another opponent, argued in his speech on 14 March 1621 that *Sir John Wentworth's Case*, also known as *Mildmay v Wentworth* (1613-1620), was the first bill of conformity case in Chancery.[23] It is noted in the diary attributed to Sir Thomas Belasyse that it had been said that Coke had stated that 'this course began in the Court of requests, but then they were stopped with prohibitions out of *Banco Regis* and Sir John Wentworth was the first ever relieved in Chancery in Egerton's time who was very wary of granting them'.[24] The survey supports this claim.[25] Eight cases involving a debt settlement were found during Thomas Egerton's tenure of the great seal, between 1596 and 1617.[26] None of the cases involved a general conformity settlement, either a Chancery or royal conformity settlement. Instead, they were either individual conformity settlements; insolvent debtors not performing their conformity agreement; or cases involving a

[23] *Mildmay v Wentworth (Sir Wentworth's Case)*, 15 July 1613 C 33/123 f. 907 [IMG_0919]; 27 July 1613 C 33/123 f. 911v [IMG_0923a]; 17 August 1613 C 33/123 f. 916 [IMG_0928]; 6 November 1613 C 33/125 f. 148 [IMG_0151]; 12 December 1613 C 33/125 f. 354 [IMG_0360]; 3 February 1614 C 33/125 f. 477 [IMG_ 0485]; 19 February 1614 C 33/125 f. 633v [IMG_0642a]; 19 February 1614 C 33/125 f. 634v [IMG_0643a]; 23 February 1614 C 33/125 f. 632v [IMG_0641a]; 14 November 1614 C 33/127 f. 229v [IMG_0227a]; 5 May 1615 C 33/127 f. 933 [IMG_0926]; 22 June 1615 C 33/127 f. 1398v [IMG_1394a]; 21 December 1615 C33/129 [IMG_0045a]; 18 June 1617 C 33/131 f. 879 [IMG_0870]; 22 June 1617 C 33/131 f. 1204 [IMG_1196a]; 22 December 1617 C 33/133 f. 452v [IMG_0455a]; 12 March 1618 C 33/133 f. 678 [IMG_0685]; 21 April 1618 C 33/133 f. 1266v [IMG_1280a]; 26 February 1618 C 33/133 f. 762 [IMG_077a]; 16 February 1619 C 33/135 f. 599 [IMG_1769]; 21 April 1619 C 33/135 f. 943 [IMG_0954a]; 1 July 1620 C 33/137 f. 1634 [IMG_1181]. Some of the masters' reports have survived. Unfortunately, they could not be accessed as they were in conservation (March 2020).

[24] Commons Debates, 14 March 1621 in W Notestein, FH Relf and H Simpson, *Commons Debates* 1621, vol. 5 (Yale University Press 1935) 39. The diary attributed to Sir Thomas Belasyse was actually written by Richard Dyott. See S Healy, 'Belasyse, Sir Thomas (1576/7-1653), of Newborough Priory, nr. Thirsk, Yorks.' In A Thrush and JP Ferris (ed) in *The History of Parliament: the House of Commons 1604-1629* (CUP 2010) <https://www.historyofparliamentonline.org/volume/1604-1629/member/belasyse-sir-thomas-15767-1653> accessed 11 August 2020.

[25] Not all of the claims about bills of conformity in the parliamentary debates seem to be supported by the survey and have to be taken with caution.

[26] For Thomas Egerton, see JH Baker, 'Egerton, Thomas, first Viscount Brackley' (1540-1617), *ODNB,* <https://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-8594?rskey=sqp0km&result=2> accessed 10 January 2021. See also WJ Jones, *The Elizabethan Court of Chancery* (Clarendon Press Oxford 1967) 78-99. The eight cases do not include *Sir John Wentworth's Case*, because that case was only decided in 1620 during the lord chancellorship of Bacon LC. The cases also do not include *Bolton's Case* (1615), because this case could only be found in the literature and not in the record. The survey included all terms of 1599-1600 and the Michaelmas Terms 1606-1607, 1610-1611 and 1614-1615, during the tenure of Egerton. However, it seems highly likely that Egerton decided more debt settlement cases during his tenure. Three of the eight cases were decided in 1614, but this could just be the chance of the survey. *Peers v Ward*, 21 October 1614 C 33/127 f. 49 [IMG_0051]; *Browne v Dalby*, 31 October 1614 C 33/127 f. 130 [IMG_0127]; *Wright v Jennings*, 28 November 1614 C 33/127 f. 141 [MG_0138].

debt settlement for which the record did not provide a clear final outcome.[27] The successful conformity cases in the survey are all individual conformity settlements.[28]

It is possible that *Sir John Wentworth's Case* was the first royal bill of conformity case commenced in Chancery. The survey shows no evidence to the contrary, but it was certainly not the first case decided based on royal bills of conformity.[29] The litigation in *Sir John Wentworth's Case* started in 1613 and lasted for seven years.[30] The case was not decided until 1620.[31] In 1613 the Court of Chancery had ordered Sir John to sell part of his land in order to satisfy his creditors, over 80 in number. The sale was not straightforward, because the land was held in fee tail. This meant that a private Act had to be passed by parliament to appoint the land for sale. While the Court of Chancery ordered one of the refractory creditors to conform in 1613, there was no final conformity of refractory creditors at that point.[32]

Sir John Wentworth's Case does not explicitly mention the term 'bill of conformity' in the decision, neither does it mention that Sir John ever petitioned the king. Instead, it says that 'it pleased the King's Majesty to commend to the care and discretion of the right honourable the lord chancellor the treaty and composition of the debts of the said Sir John Wentworth'.[33] It seems that a royal bill of conformity procedure just meant that there was royal involvement in a general conformity settlement. The treatise writer Fabian Phillips argued in 1671 that *Bolton's Case* (1615) was a case

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[27] *Rudd v Gamsall*, 23 January 1602 C 33/103 f. 288v [IMG_2501] dealt with a debtor who no longer wanted to conform to the agreement with his creditors. The outcomes of *Farmer v Clarke*, 9 August 1605 C 33/108 f. 1070v [IMG_ 2151] and *Browne v Dalby*, 31 October 1614 C 33/127 [IMG_0127] are unknown. All these cases involved individual conformity settlements.

[28] *Leecheland v James,* 15 November 1596 C 33/91 f. 444v [IMG_4773a]; *Ashbye v Richardson,* 15 April 1597 C 33/91 f. 770v [IMG_5094a]; *Warren v Eldrington*, 19 September 1600 C 33/97 f. 681v [IMG_8265a]; 20 February 1601 C 33/99 f. 380 [IMG_9355]; 15 July 1601 C 33/99 f. 728 [IMG_9703]; *Peers v Ward*, 21 October 1614 C 33/127 f. 49 [IMG_0051]; *Wright v Jennings*, 28 November 1614 C 33/127 f. 141 [MG_0138].

[29] *Mildmay v Wentworth (Sir John Wentworth's Case)* (1620) (n 23).

[30] *Mildmay v Wentworth (Sir John Wentworth's Case)*, 15 July 1613 C 33/123 f. 907 [IMG_0919]; 1 July 1620 C 33/137 f. 1634 [IMG_1181].

[31] *Mildmay v Wentworth (Sir John Wentworth's Case)*, 1 July 1620 C 33/137 f. 1634 [IMG_1181].

[32] The continuation of the litigation was caused by disputes about two incumbrances on the land by statute staple. *Mildmay v Wentworth (Sir John Wentworth's Case)*, 12 December 1613 C 33/125 f. 354 [IMG_0360]. These statutes were made when Sir John was still underage and unmarried. One statute was made with his father and another with his father-in-law, without any consideration, in order to guarantee that the land would stay in the family. *Mildmay v Wentworth (Sir John Wentworth's Case),* 19 February 1614 C 33/125 f. 633v [IMG_0642a].

[33] *Mildmay v Wentworth (Sir John Wentworth's Case)*, 6 November 1613 C 33/125 f. 148 [IMG_0151].

that dealt with a 'bill of conformity' proceeding, which was adjudicated by Lord Ellesmere.[34] Unfortunately, the case has not been found in the Chancery record,[35] but there is a possibility that this was the first decided royal bill of conformity case.

The survey shows that Bacon LC was the only lord chancellor in the period who allowed and decided royal conformity settlements. However, even during Bacon's tenure, royal involvement in general conformity settlements seems to have been relatively rare. Only seven conformity petitions to the king were found in the survey. Only five of these were successful.[36] As has been seen, in *Mitchell v Woodward* (1620) some royal involvement took place in the Court of Exchequer before the case ended up in the Court of Chancery.[37] It is unclear from the survey why King James I interfered with these particular cases. Smith has argued that James I was 'closely involved with conformity proceedings in Chancery', though the survey seems not to support that argument: during Bacon LC's tenure most of the bill of conformity cases were directly exhibited in the Court of Chancery and did not show any royal involvement.[38]

Based on the survey, royal bill of conformity proceedings became common around 1618. In fact, apart from *Sir John Wentworth's Case* (if the case is dated at 1613), the survey does not show any cases dealing with royal bills of conformity in the Court of Chancery before 1618. The rise of royal

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[34] F. Philipps, *Regale necessarium, or, The legality, reason, and necessity of the rights and priviledges justly claimed by the Kings servants, and which ought to be allowed unto them* (Christopher Wilkinson 1671) 572. Unfortunately, only the case name is mentioned in the treatise, no specific date or information about the case is given. Sir John Baker mentions a *Boulton's Case* (1616) Calth. MS. ii. 113 in his work on Magna Carta. The case dealt with an action of debt. This case was followed up in the British Library, but turned out to be dealing with another matter than *Bolton's Case* in equity. Sir John Baker, *The Reinvention of Magna Carta 1216-1616* (CUP 2017) 414 n 24.

[35] The case was not found in the alphabets of 1615. Search names used were, Bolton, Boulton and Lord Scrope of Bolton, under D (for Dominus), L (for Lord) and S (for Scrope). A search in the alphabets between 1610-1620 gave too many entries to follow up in the time frame of the thesis.

[36] *Kennedy v Ashfield*, 12 February 1619 C 33/137 f. 789 [IMG_0797a]; *Brooke (or Little) v Goode*, 2 July 1617 C 33/133 f. 1341v [IMG_1365a], 16 October 1618 C 33/135 f. 39v [IMG_1204a], 22 October 1618 C 33/135 f. 77 [IMG_1243], 23 October 1618 C 33/135 f. 186 [IMG_1351a], 22 September 1619 C 33/135 f. 1384 [IMG_2568a], 23 November 1619 C 33/137 f. 528 [IMG_0537], 1 February 1620 C 33/137 f. 813v [IMG_0821a]; *Tyffin v Hart*, 22 April 1618 C 33/133 f. 839 [IMG_0844]; 16 May 1618 C 33/133 f. 933 [IMG_0942]; 20 June 1618 C 33/133 f. 1229 [IMG_1241a]; 26 October 1618 C 33/135 f. 111 [IMG_1277]; 29 October 1618 C 33/135 f. 115 [IMG_1281]; 12 November 1618 C 33/135 f. 159v [IMG_1324a]; 5 December 1618 C 33/135 f. 301v [IMG_1469a]; 16 January 1619 C 33/135 f. 417 [IMG_1586]; 22 February 1619 C 33/135 [IMG_1869a]; 20 April 1619 C 33/135 f. 997 [IMG_2169]; 15 May 1619 C 33/135 f. 979 [IMG_2151]; KC4/1/27; *Finch v Hicks,* 19 January 1620 C 33/137 f. 770v [IMG_0778a]; *Mildmay v Wentworth (Sir John Wentworth's Case)* (1620) (n 23).

[37] *Mitchell v Woodward*, 2 February 1619 C 33/135 f. 505 [IMG_1675a].

[38] Smith, 'The error of young Cyrus' (n 18) 325.

bills of conformity in the survey between 1618 and 1620 can possibly be explained by prohibitions from the King's Bench that stopped royal bills of conformity in the Court of Requests in 1617.[39] This might even mean that royal bills of conformity only became common practice in the Court of Chancery after they were prohibited in the Court of Requests. Other possible explanations might be the death of Lord Ellesmere in March 1617, who was known to be 'very wary of granting them [general conformity settlements]',[40] and the financial depression in the cloth trade, which triggered an increase in bankruptcies and insolvencies.[41]

The leading case on royal bills of conformity, especially in relation to sureties, was *Tyffin v Hart* (1619), which dealt with the insolvent estate of Robert Tyffin, a brewer in Kingston-upon-Thames.[42] His two sons had acted as his sureties, and were sued for the debts in that capacity. Not all of their creditors wanted to conform. Some of the refractory creditors argued that they had not been heard by the committee dealing with the royal bill of conformity procedure, or that they had specialties, which would give them priority over other creditors. They were unsuccessful. Lord Chancellor Bacon conformed the refractory creditors in a general composition, though he excluded some creditors from the settlement. He, 'well weighting the nature of this cause and the honest disposition of the said Tyffins and their filial respect and piety to their death father',[43] and regarding the cause as being 'strengthened as well by the gracious recommendation of his Majesty and the power and authority of this court',[44] found 'good cause to single this cause from the ordinary cases of bankrupts and to give the said Tyffins and their conformable creditors relief',[45]

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[39] ibid 316.
[40] *Commons Debates*, 20 March 1621 in Notestein, Relf and Simpson, *Commons Debates* 1621, vol. 5 (n 24) 39.
[41] BE Supple, *Commercial Crisis and Change in England, 1600–1642: A Study in the Instability of a Mercantile Economy* (CUP 1964) 52–98. See chapter 5 for more detail about the financial depression.
[42] *Tyffin v Hart*, 22 April 1618 C 33/133 f. 839 [IMG_0844]; 16 May 1618 C 33/133 f. 933 [IMG_0942]; 20 June 1618 C 33/133 f. 1229 [IMG_1241a]; 26 October 1618 C 33/135 f. 111 [IMG_1277]; 29 October 1618 C 33/135 f. 115 [IMG_1281]; 12 November 1618 C 33/135 f. 159v [IMG_1324a]; 5 December 1618 C 33/135 f. 301v [IMG_1469a]; 16 January 1619 C 33/135 f. 417 [IMG_1586]; 22 February 1619 C 33/135 [IMG_1869a]; 20 April 1619 C 33/135 f. 997 [IMG_2169]; 15 May 1619 C 33/135 f. 979 [IMG_2151]. The final decree shows that Robert Tyffin was in the 'trade of brewing'. KC4/1/27. The final decree is held by the History Centre in Kingston-upon-Thames, Surrey.
[43] *Tyffin v Hart*, 20 April 1619 C 33/135 f. 997 [IMG_2169] at f. 998v [IMG_2170a].
[44] ibid.
[45] ibid.

'yet with this that there be a distinction of the nature and quality of the person viz those that are trusted on the behalf of other being orphans & have good security for their money [] the surety always in the eye of the lender'.[46] The result was that the Court of Chancery required that the Tyffin brothers be offered a rateable reduction of their debts and an alternative payment plan for some of the creditors, with the effect of giving them a new financial start in life.

II. Judicial and parliamentary interference with 'bills of conformity'

Initially there were no strict rules for conformity settlements (hereafter: 'bills of conformity') in the Court of Chancery.[47] However, in October 1620 the Chancery set out specific rules in relation to them in its Standing Orders. In the cases in the survey these Standing Orders are referred to as the 'late rules' or 'additional rules' of the lord chancellor.[48] After the Proclamation of King James I abolishing 'bills of conformity', these Standing Orders were changed again in April 1621. The implementation of the Proclamation in the Standing Orders led the Chancery to stop its practice in relation to conformity settlements altogether. In the Bankrupts Act 1624 it was enacted that petitioning the king or any of the king's courts for a bill of conformity proceeding was considered an 'act of bankruptcy'.[49] This meant that from 1624 bills of conformity became part of statutory bankruptcy.

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[46] ibid.

[47] Contemporaries seem to use 'bill of conformity' for all types of conformity settlements. However, it is possible that until the enactment of section 2 of the Bankrupts Act 1624, bills of conformity only included general conformity settlements. As the distinction is unclear between the different types of settlements and for the simple reason that it reads more easily, the term 'bills of conformity' is used to set out the parliamentary developments in relation to conformity settlements.

[48] *Grant v Cotton,* 15 November 1620 C 33/139 f. 489 [IMG_0483]; *Cowell v Hill (or Thorndicke v Hill),* 30 October 1620 C 33/139 f. 399v [IMG_0393]; 4 December 1620 C 33/139 f. 332 [IMG_0326]; *Pollard v Reeve*, 18 November 1620 C 33/139 f. 224 [IMG_0218] at f. 224v [IMG_0218a]; *Dacombe v Brocke*, 25 November 1620 C 33/139 f. 339v [IMG_0333a] at f. 340 [[IMG_334]. It is an interesting point that in the survey only these three cases refer to the 'late rules' and one case to the 'additional rules', and that not all the conformity cases decided after 31 October 1620 test whether the case complies with the 'late rules' or 'additional rules'.

[49] Bankrupts Act 1624 (21 Jac I, c. 19) s. 2.

a.) The Standing Orders of the High Court of Chancery of 31 October 1620

On 31 October 1620, Lord Chancellor Bacon issued additional rules for the better governing of the Court of Chancery.[50] Five of these additional rules dealt specifically with the procedure of 'bills of conformity'. The first rule set out that no compulsory order for a composition would be granted if the suit or petition was exhibited by the debtor or insolvent himself. Instead, the creditors had to bring the suit or petition the king for a bill of conformity procedure. In addition, the order had to be 'according to the equity of the Statute of Bankrupts'.[51] David Ibbetson explains that the idea that a statute might be interpreted according to its 'equity' meant that the statute might be interpreted based on the underlying principle of the statute, its *ratio*.[52] This justified a slight analogical extension outside the express terms of the statute.[53] The second rule provided that where a suit was exhibited on behalf of the creditors it was not enough that the creditors were named in the bill or petition. The bill or petition had to be accompanied by an agreement of the creditors under their hands or marks, to show how many creditors had agreed with the recital of the sums and times of their particular debts. The third rule prescribed that relief could only be given if the debts owed to the conforming creditors represented at least 75% of the total amount of the debts, and 'not in those cases neither but sparingly by the discretion of the Court upon hearing what may be alleged on both sides'.[54] The fourth rule set out that before any order would be granted, the masters of the court or commissioners had to examine and certify what the debts were, their nature and upon what security for repayment. The masters or commissioners also had to hear the information and allegations of the creditors who did not want to compound. Finally, no proceedings at law in the case of a conformity suit would be stayed against any sureties of the

[50] 'Additional rules for the better governing of the Court of Chancery and Great Seal. Published in open Court 31 October 1620', see GW Sanders, *Orders of the High Court of Chancery and Statutes of the Realm relating to Chancery. From the earliest period to the present time.* vol. I, part I (Maxwell & Sons 1845) 129-131.
[51] ibid 129.
[52] DJ Ibbetson, 'A house built on sand: equity in early modern English law' in E Koops and WJ Zwalve (eds), *Law & Equity: approaches in Roman law and common law* (Brill 2014) 55-57.
[53] ibid.
[54] 'Additional rules for the better governing of the Court of Chancery and Great Seal. Published in open Court 31 October 1620', Sanders (n 50) 129.

insolvent, nor against any lands or goods of the insolvent himself in case of a recognizance, statute or judgment, but only against the person of the insolvent.

b.) The Proclamation of King James I of 31 March 1621

The 'late rules' of the lord chancellor ceased to be in force on 31 March 1621.[55] On this date King James I issued 'A Proclamation for abolishing of abuses, by bills of conformity'.[56] The Proclamation was published at the request of the House of Commons, on the basis that they had found that 'bills of conformity' were a grievance.[57] On 20 March 1621, James had sent the House of Commons a message that he felt that he had been abused in bills of conformity.[58] Those opposed to bills of conformity felt that they were an abuse of the common law, because the debtor could escape his full obligation by presenting a bill of complaint, and by paying a fee in Chancery would get a composition, instead of paying the full sum owed.[59] James had asked the Commons how to address the abuse: by Proclamation or by statute?[60] The Commons had replied that as a short-term solution they preferred by Proclamation.[61] The Proclamation was a very strong message against bills of conformity, 'his Majesty (of his blessed disposition for the weak[ness] of his subjects) being careful to stop the current of this growing evil, until upon mature deliberation, an exact and full remedy may be provided by parliament in that behalf'.[62] This indicated that the Proclamation was a temporary measure: James suspended all bills of conformity procedures until parliament had found a better solution. However, the result of the Proclamation was that it effectively abolished

[55] 'Proclamation of James the first against bills of conformity' in Sanders (n 50) 1044.
[56] Larkin and Hughes (n 22) 506.
[57] ibid 506 n2.
[58] ibid 506 n1.
[59] ibid.
[60] ibid.
[61] ibid.
[62] The text of the Proclamation is taken from Larkin and Hughes (n 22) 507.

bills of conformity.[63] The formal abolition of bills of conformity in their original form took place by statute in 1624, when they became 'acts of bankruptcy'.[64]

The Proclamation addresses three broad areas related to bills of conformity: the purpose and nature of bills of conformity, the harm that the bills supposedly caused to the economy, and the practical implications of the Proclamation. To start, the Proclamation set out four points in relation to the purpose and nature of bills of conformity. Firstly, the purpose of bills of conformity was to force creditors to accept less than their just debts and damages, or to require creditors to give their debtors longer during which to pay their debts than the creditors were actually willing to do.[65] The Proclamation was expressed as meeting the needs of all creditors, however the language used suggests that the Proclamation was designed to meet the wishes of unconformable creditors in a bill of conformity. After all, they were not willing to accept less than their due debts or to grant postponement of payment. In contrast, for the conformable creditors the cutting of losses had outweighed the disadvantages of not getting full payment on time. This relates to the second point in the Proclamation, namely that 'bills have been exhibited, sometimes by the debtors alone, & sometimes by the debtors and some of their creditors by consent, or consensus between them'.[66] This meant that the conformable creditors would have given consent to relieve the debtor in one way or another, because they had some interest in cutting their losses. The Proclamation is legally wrong on this point, because the 'additional rules' from 31 October 1620 had made the support of creditors in a bill of conformity proceeding compulsory. Thirdly, the Proclamation observes a difference between insolvency 'by reason of sudden and accidental loss and damage', 'suretyship', 'evil debtors', and other reasons that 'defeat or delay ... just and honest creditors of their due debts

[63] The Proclamation had been preceded by a speech by King James I on 26 March 1621, in which he made mention of criticism of the existence of bills of conformity. 'House of Lords Journal Volume 3: 26 March 1621', in *Journal of the House of Lords: Volume 3, 1620-1628* (London, 1767-1830) 68-72. *British History Online* <http://www.british-history.ac.uk/lords-jrnl/vol3/pp68-72> accessed 25 March 2019.
[64] Bankrupts Act 1624, s. 2. See for more information, section III of this chapter below.
[65] 'Proclamation of James the first against bills of conformity' in Sanders (n 50) 1044.
[66] ibid.

and damages'.[67] However, the Proclamation does not distinguish between the insolvency of honest and dishonest debtors: bills of conformity are not to be allowed in either case.[68] Finally, the Proclamation mentions that bills of conformity 'have of late years' been exhibited in the Court of Chancery and other courts of equity.[69] This suggests that bills of conformity were thought to be a recent phenomenon at the time of the Proclamation. According to the parliamentary debates, 'Sir Edward Coke was a practiser of law since the 3 of Elizabeth [1560-61]. He never heard of bills of conformity.'[70] However, it remains unclear when bills of conformity were introduced.[71]

Secondly, the Proclamation addresses the reasons why bills of conformity had to be abolished. The main reason was the economic harm that bills of conformity supposedly caused.[72] The Proclamation used very strong negative language to convey this message, asserting that decrees, orders and proceedings following bills of conformity were of 'great damage of the commonwealth'.[73] The bills were 'emboldening' debtors not to pay their debts on time, leaving many creditors 'disappointed' and 'not able to keep their credit with others'. The bills were supposedly encouraging 'wilful bankrupts, deceitful persons and the scarcity of money'.[74] Overall, they were a 'general hindrance of trade and traffique [*sic*] and [caused] many other inconveniences'.[75] The Proclamation was thus mainly concerned with the view that bills of conformity encouraged fraudulent debtors and that they put credit networks at risk.

Finally, the practical implications of the Proclamation were set out. First, it provided that

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[67] ibid.
[68] This seems to be contrary to the Chancery practice, as it seems that the Chancery was willing to relieve the debtor if he was an honest debtor.
[69] 'Proclamation of James the first against bills of conformity' in Sanders (n 50) 1044.
[70] *Commons Debates,* 14 March 1621 in Notestein, Relf and Simpson, *Commons Debates* 1621, vol. 2 (n 18) 221-223. The year 3 Elizabeth (1560-61) seems to be the copyist's mistake, as Coke was born in 1552 and called to the bar in 1578. *Commons Debates,* 14 March 1621 in Notestein, Relf and Simpson, *Commons Debates* 1621, vol. 2 (n 18) 223 n29.
[71] See discussion above.
[72] In the Proclamation it is set out that this had supposedly been concluded by an examination by the House of Commons.
[73] 'Proclamation of James the first against bills of conformity' in Sanders (n 50) 1044.
[74] ibid.
[75] ibid.

> all and every judge and judges in the said Courts of Equity, where such bills of conformity do depend, for so much of the matter in those several bills contained as concerned such conformity as aforesaid, and for and concerning all such persons, parties to those suits, which have not consented thereunto, shall forthwith, absolutely dismiss the same, and that the said Defendants in such suits be not bound or pressed to any further attendance in that behalf.[76]

This meant that all suits dealing with bill of conformity procedures, where any of the litigants did not agree with these procedures, had to be dismissed. Defendants involved in litigation in such cases were no longer obliged to attend court. Second, it set out that

> all orders, sentences, decrees, injunctions and other restraints or process whatsoever grounded upon any such bill or suit to the prejudice, hurt or hindrance of any creditor or creditors (not having consented as aforesaid) and the execution of the same, be from henceforth fully and wholly suspended, and not to be put in execution until order and provision by some Act of Parliament, for a perpetual reformation thereof be had and taken in that behalf.[77]

This meant that all pending cases dealing with bills of conformity had to be suspended, until parliament had reformed the bills of conformity procedure. Third, 'no bill or suit of the effect or nature aforesaid be hereafter received, accepted or allowed in the said Court of Chancery or other Court of Equity, until some such order as aforesaid be taken in parliament'.[78] This meant that the Court of Chancery and other courts of equity could also not accept future cases in relation to bills of conformity, until parliament had reformed the procedure. Fourth, the Proclamation set out that

[76] The text of the Proclamation is taken from Larkin and Hughes (n 22) 507.
[77] ibid.
[78] ibid.

> all and every person and persons now being in prison, or restrained of liberty, or standing upon bond, bail or mainprise, by or by reason of any such order, sentence, decree, injunction or other restraint, (and for no other cause) upon any bill or suit of the effect or nature aforesaid in any of the said Courts of Equity whatsoever, or by reason of any proceeding thereupon, be forthwith by the said judge and judges of the said Courts of Equity, set at liberty and freed from his and their imprisonment or restraint, and be discharged of his and their bonds, recognizances, bail or mainprise for appearance, without molestation, vexation or trouble for or by reason of any such order, sentence, decree, injunction, restraint, bond, recognizance, bail or mainprise until such further order be taken in parliament as aforesaid.[79]

Finally, the Proclamation set out that therefore,

> his majesty does authorise and require as well the lord chancellor of England, as all other his Majesty's judges and justices, and other persons whatsoever, having any place of judicature, and all and every his officers, ministers and subjects that now be or hereafter shall be, to see and cause this his Majesty's pleasure duly with all convenient expedition to be put in execution.[80]

A tract found in the State Papers setting out reasons concerning the decay of trade and shipping and the scarcity of money stated that the king was pleased with the Proclamation of 1621, but that in it the king had not provided solutions for the problem or an alternative to bills of conformity.[81] After the Proclamation debtors could no longer rely on Chancery to conform refractory creditors, but no alternative had been provided.

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[79] ibid.
[80] ibid 507-508.
[81] SP 14/123 f. 74 'Reasons concerning the decay of trade and shipping and the scarcity of money within the kingdom, collected out of the observations, and infallible rules of the merchants of best experience and judgment'.

c.) The Standing Orders of the High Court of Chancery of 18 April 1621

The final order in the Proclamation found its way into the Standing Orders of the High Court of Chancery on 18 April 1621.[82] The Standing Orders implemented the Proclamation, with particular emphasis on its practical implications. Remedies for debt now had to be mainly sought at common law instead.[83] The Standing Orders state that the Chancery had already 'endeavoured to limit and restrain the excess of those suits [bills of conformity]' before the Proclamation, 'yet nevertheless there had not [been a limitation of suits]'.[84] This can be illustrated by a case found in the survey, that of *Robinson v Cambell*,[85] decided in November 1620, just a few months before the Proclamation. In this case, the court refrained from a composition, and opted for a repayment plan instead. The case explicitly states that Bacon LC had made this decision, because '[of his] misliking of bills of conformity'.[86]

As set out above, the continuing changes to the Standing Orders of the High Court of Chancery, as well as the application of these rules by the Chancery, show that the Court of Chancery had become critical of bills of conformity by 1620. After all, as has been seen, in a case of that year Lord Chancellor Bacon had directly addressed his 'misliking [of] bills of conformity'.[87] Grievances against bills of conformity were also expressed in the parliamentary debates of 1621.[88] It seems that parliament had particular problems with the discharging of sureties via a bill of conformity procedure.[89] *Finch v Hicks* (1620) provides a good example of this and was explicitly mentioned in the debates.[90] The case dealt with a bill of conformity of two brothers, who stood bound as surety

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[82] Sanders (n 50) 132-133.
[83] The standing orders mention 'remedies and damages'. However, it is not clear what is meant by damages. Sanders (n 50) 133.
[84] ibid.
[85] *Robinson v Cambell,* 9 November 1620 C33/139 f. 185v [IMG_0179a].
[86] ibid at f. 186 [IMG_0180].
[87] ibid at f. 186 [IMG_0180].
[88] *Commons Debates*, 24 March 1621 in W Notestein, FH Relf and H Simpson, *Commons Debates* 1621, vol. 4 (Yale University Press) 67.
[89] ibid. See also section I of this chapter, above.
[90] *Finch v Hicks*, 19 January 1620 C 33/137 f. 770v [IMG_0778a]; *Commons Debates*, 14 March 1621 in Notestein, Relf, Simpson, *Commons Debates* 1621, vol. 4 (n 88) 153.

for their father, Henry Finch, Master of Chancery. The Court of Chancery awarded a full discharge.[91] The parliamentary debates of 1621 show that the king was not happy with the order in *Finch v Hicks* and in a context which was rather politically tricky for him – after all he had referred the petitions of the debtors to the Court of Chancery – he told parliament that 'he was very angry…and [he] protested that his intention was not to extend further than to a commendation of the petitioners to the conscience of the creditor, not for the staying of suites or the discharging of sureties'.[92] It was argued that these sureties should rely on the charity of the creditors if they desired a composition, rather than expecting that the courts would enforce it.[93] 'Mr Solicitor' stated that the king thought that no surety should be so privileged by such protections and that the king's recommendation of the case to the Chancery should be taken as a strong inducement, but not as compulsory.[94] In the parliamentary debates Cranfield argued that *Finch v Hicks* was the last bill of conformity case.[95] However, the survey shows that this was not correct.[96]

d.) Bills of conformity in the Bankrupts Act 1624

The main argument set out in the State Papers for abolition of bills of conformity was that they would harm trade.[97] The city corporation of London had petitioned the king in 1620, alleging that it had suffered great financial losses due to bills of conformity.[98] However, these losses were not

[91] *Finch v Hicks*, 19 January 1620 C 33/137 f. 770v [IMG_0778a]. In 1622 John Finch, one of the sons of Henry Finch, reappears in the Privy Council to petition for a protection for debts he acquired as surety for his father. See, [Meeting] At Whitehall, 24 February 1622 PC 2/31 ff. 594-595.
[92] Notestein, Relf and Simpson, *Commons Debates* 1621, vol. 4 (n 88) 154. Prest notes that *Finch v Hicks* was used to illustrate Bacon LC's corruption during his impeachment. W. Prest, 'Finch, Sir Henry' (ca. 1558-1625) *ODNB*. <https://ezproxy-prd.bodleian.ox.ac.uk:4563/10.1093/ref:odnb/9436> accessed 10 November 2021.
[93] Speech of Mr Solicitor [General], *Commons Debates,* 17 February 1621 in Notestein, Relf, Simpson, *Commons Debates* 1621, vol. 2 (n 18) 100-101. In the parliamentary sessions of 1621 Sir Robert Heath was solicitor-general. See, A Davidson and B Coates, 'Heath, Robert (1575-1649), of the Inner Temple, London and Mitcham, Surr.; later of Serjeants' Inn, Fleet Street and Brasted Place, Kent.' in A Thrush and JP Ferris (ed) in *The History of Parliament: the House of Commons 1604-1629* (CUP 2010) <https://www.historyofparliamentonline.org/volume/1604-1629/member/heath-robert-1575-1649> accessed 14 August 2020).
[94] Speech of Mr Solicitor (Sir Robert Heath), *Commons Debates*, 24 March 1621 in Notestein, Relf and Simpson, *Commons Debates* 1621, vol. 4 (n 88) 67.
[95] *Commons Debates,* 14 March 1621 in Notestein, Relf and Simpson, *Commons Debates* 1621, vol. 2 (n 18) 221 n24.
[96] See chapter 4.
[97] SP 14/123 f. 74, 'Reasons concerning the decay of trade and shipping and the scarcity of money within the kingdom, collected out of the observations, and infallible rules of the merchants of best experience and judgment'.
[98] See the speech of Mr Solicitor (Robert Heath), *Commons Debates,* 17 February 1621 in Notestein, *Commons Debates* 1621, vol. 4 (n 88) 67.

set out in detail in the debates. The king had apparently been very perplexed by the petition, and decided that the bill of conformity procedure needed to be abolished.[99] The tract found in the State Papers setting out reasons concerning the decay of trade and shipping and the scarcity of money suggested that bills of conformity had caused an interest rate of 10 percent in the money market and had been a reason for the decay of trade and shipping and the scarcity of money in the kingdom, though to what extent this was true, rather than propaganda on the part of creditors, is unclear.[100] These explanations differed from the reasons given in the Proclamation of 1621, as set out above.

Eventually, parliament enacted section 2 of the Bankrupts Act 1624, which set out that a debtor would commit an act of bankruptcy if he:

> shall either by himself or others by his procurement obtain any protection or protections other than such person or persons as shall be lawfully protected by the privileges of Parliament, or shall proffer or exhibit unto his Majesty, his heirs or successors, or unto any of the king's courts any petition or petitions bill or bills against his or her creditor or creditors, or any of them, thereby desiring or endeavouring to compel or enforce them or any of them to accept less than their just and principal debts, or to procure time or longer days of payment, then was given at the time of their original contract, or being indebted to any person or persons in the sum of one hundred pounds or more, shall not pay or otherwise compound for the same within six months next after the same shall grow due.[101]

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[99] *Commons Debates,* 14 March 1621 in Notestein, *Commons Debates* 1621, vol. 2 (n 18) 221-222. See for the development of statutory regulation of interest rates, DP Waddilove, 'Mortgages in the early-modern Court of Chancery' (Doctoral thesis, University of Cambridge 2015) 138-143.

[100] Further economic-historical research is needed to examine this. This is not within the scope of the thesis. SP 14/123 f. 74, 'Reasons concerning the decay of trade and shipping and the scarcity of money within the kingdom, collected out of the observations, and infallible rules of the merchants of best experience and judgment'. It is suggested that this paper is one of the reports requested by the Council from the outports. The paper is calendared as dating from October 1621, but this is not completely certain.

[101] Bankrupts Act 1624 (21 Jac I, c. 19) s. 2.

This meant that bills of conformity became part of statutory bankruptcy. If a debtor tried to conform his or her creditor(s), he or she would automatically be considered fraudulent. The debtor would thus no longer be considered as an insolvent debtor, even if he or she had acted in an 'honest' manner. However, section 2 of the Bankrupts Act 1624 was only applicable to traders and scriveners. This means that it is possible that other insolvent debtors, such as sureties, who did not fall within the scope of the statute, might still have been able to petition the king or the Chancery for conformity settlements and bills of conformity. However, it seems likely that the Proclamation of 1621 remained in force alongside the Bankrupts Act 1624, in order to exclude conformity from insolvent debtors. The survey shows no new conformity settlements after the enactment of the statute.

III. Voluntary debt settlements and mediation after the Statute of Bankrupts 1624

Rycroft v Hedd (1627) illustrates that the Court of Chancery would no longer enforce refractory creditors in a conformity procedure after the enactment of the Bankrupts Act 1624.[102] *Rycroft v Hedd* dealt with a settlement of a certain Rycroft, who had acted as a surety for Hedd. With help of mediation, a composition was agreed upon by most of the creditors. However, one of the creditors, a certain Sarah White, did not want to conform. Whereas the Court of Chancery used to conform such refractory creditors, Coventry LK now ordered that the refractory creditor be repaid in full.[103]

The Proclamation of 1621 and the Bankrupts Act 1624, however, did not end the Chancery practice of compositions. The Act set out that a debtor was not allowed to 'compel or enforce' the creditors. However, the statute did not apply if compositions were made out of charity by the creditors. *Haddon v Foulds* (1622), decided after the Proclamation of 1621, shows the Court of

[102] *Rycroft v Hedd*, 20 November 1627 C 33/153 f. 319 [IMG_ 2055].
[103] ibid. However, it is possible that the Court of Chancery excluded the refractory creditor because she was a woman. See chapter 5.

Chancery at that time using mediation to deal with refractory creditors.[104] Lord Keeper Williams did not conform the creditors, but instead used a binding voluntary settlement. Such compositions would not be compelled and enforced on the creditors, but would be voluntary. This way, the practice of the Court of Chancery seems, based on limited evidence, to return to the very first settlement case of the survey, *Johnson v Wolmer* (1551), in which agreement of the debtor and all the creditors led to the debt settlement.

A question arises as to whether creditors were better off with the abolition of bills of conformity. Creditors lost the opportunity to recover a pro rata proportion of the debts owed to them. In an insolvency there are generally not enough assets to cover all the debts. In the absence of the bill of conformity procedure, creditors would have to make sure that they recovered their debts before the other creditors did so and the assets ran out. In a composition on a pro rata basis, in contrast, all creditors were sure that they would get some of their money back. Without bills of conformity, the creditors willing to accept a pro rata payment could no longer rely on the Chancery to conform refractory creditors. Creditors had to rely on voluntary settlements and more primitive methods of debt enforcement, such as recovering debts at common law, actions upon statutes staple and statutes merchant, or imprisonment, and might end up with no relief at all.

[104] *Haddon v Foulds*, 16 December 1622 C 33/143 f. 354v [IMG_0357a]; 23 December 1622 C 33/143 f. 344 [IMG_0347].

Chapter 4

The Chancery practice

This chapter sets out the Chancery practice in relation to debt settlements of insolvent debtors. The chapter is an in-depth analysis of over 50 cases found in the survey relating to debt settlements in the period. In the period covered by the survey, the Court of Chancery seems only rarely to have made explicit reference to earlier decisions as guides to later ones in its dealings with insolvent debtors, but nevertheless showed clear patterns of consistent practice. This chapter consists of two parts. The first part of the chapter deals with substantive rules applied in the Court of Chancery. The second part deals with the formal practice and procedure of Chancery insolvency procedures. The chapter will show that debt settlements had effectively the same objective as statutory bankruptcy and its application at common law: both aimed to give creditors as much financial relief as possible. The interests of the debtor were taken into account. In its equitable function the Court of Chancery had more flexibility to achieve this goal than the bankruptcy statutes and their application at common law. This flexibility can be observed both in relation to substantive law and procedural issues.

I. Substantive rules

This part of the chapter considers the substantive rules of the Court of Chancery in relation to: (1) primary debtors; (2) sureties; (3) creditors; and (4) majority control. It will show that the Court of Chancery had more flexibility compared to the bankruptcy statutes. However, the Court of Chancery did not always base its decisions on substantive rules, but often balanced the financial and other circumstances of the debtor and their creditors against each other.[1]

[1] E.g. cases in relation to orphans' money, see below. See also cases in relation to the conduct and circumstances of the debtor, See section I.1.1.4 in this chapter below.

1. Primary debtors

In theory, anyone who did not fall within the scope of the bankruptcy statutes and was able to acquire debts could become an insolvent debtor. This included women, if they were *femes sole* or widows.[2] The survey shows examples of debt settlements of a disinherited 'young gentleman and heir apparent', gentry, merchants, a minister of religion, a yeoman, a mayor and a widow.[3] This seems to suggest the Court of Chancery dealt with debt settlements of insolvent debtors from various backgrounds, including the gentry and the 'middling sort'.[4]

Insolvent debtors could have acquired their debts in their own name or by suretyship.[5] *Lavington v Maton* (1595) shows that the Court of Chancery could award compositions if the insolvent debtor fell outside the scope of the bankruptcy statutes.[6] It seems that the main requirement for the Court of Chancery to award a composition was that the insolvent debtor had acted honestly. In addition, the Court of Chancery seems to have been more lenient towards a composition if insolvent debtors had been cooperative during the settlement proceedings and had tried to repay the creditors to the

[2] As set out earlier, women were explicitly mentioned in the bankruptcy statutes. This meant that if they did not comply with the requirements of the statute, they could be considered insolvent debtors. There were no cases in the survey in which the insolvent debtor was a *feme sole*.

[3] E.g. *Sandys v Gresham*, 28 November 1589 C 33/80 f. 271 [IMG_0234] (young gentleman and heir apparent/student); *Mildmay v Wentworth (Sir John Wentworth's Case)*, 15 July 1613 C 33/123 f. 907 [IMG_0919]; 27 July 1613 C 33/123 f. 911v [IMG_0923a]; 17 August 1613 C 33/123 f. 916 [IMG_0928]; 6 November 1613 C 33/125 f. 148 [IMG_0151]; 12 December 1613 C 33/125 f. 354 [IMG_0360]; 3 February 1614 C 33/125 f. 477 [IMG_ 0485]; 19 February 1614 C 33/125 f. 633v [IMG_0642a]; 19 February 1614 C 33/125 f. 634v [IMG_0643a]; 23 February 1614 C 33/125 f. 632v [IMG_0641a]; 14 November 1614 C 33/127 f. 229v [IMG_0227a]; 5 May 1615 C 33/127 f. 933 [IMG_0926]; 22 June 1615 C 33/127 f. 1398v [IMG_1394a]; 21 December 1615 C33/129 [IMG_0045a]; 18 June 1617 C 33/131 f. 879 [IMG_0870]; 22 June 1617 C 33/131 f. 1204 [IMG_1196a]; 22 December 1617 C 33/133 f. 452v [IMG_0455a]; 12 March 1618 C 33/133 f. 678 [IMG_0685]; 21 April 1618 C 33/133 f. 1266v [IMG_1280a]; 26 February 1618 C 33/133 f. 762 [IMG_077a]; 16 February 1619 C 33/135 f. 599 [IMG_1769]; 21 April 1619 C 33/135 f. 943 [IMG_0954a]; 1 July 1620 C 33/137 f. 1634 [IMG_1181] (gentry); *Dacombe v Brocke*, 25 November 1620 C 33/139 f. 339v [IMG_033a] (gentry); *Lavington v Maton*, 7 July 1595 C 78/ 115/6 m. 18 [IMG_0036] (yeoman); *Radclyef v Hey*, 9 May 1588 C 33/75 f. 548 [IMG_0554]; *Farmer v Clarke*, 9 August 1605 C 33/108 f. 1070v [IMG_ 2151] (merchant/partner in trade); *Wright v Jennings*, 28 November 1614 C 33/127 f. 141 [IMG_0138] (merchant); *Petre v Waterhouse*, 16 May 1621 C 33/139 f. 993 [IMG_0989] (minister of religion); 6 October 1621 C 33/140 f. 1286v [IMG_2626]; 23 October 1621 C 33/141 f. 53v [IMG_0055a]; *Brooke (or Little) v Goode*, 23 November 1619 C 33/137 f. 528 [IMG_0537] (mayor); *Palmer v Rudd*, 19 January 1619 C 33/135 f. 422a [IMG_1592a] (widow). This list is not exhaustive, because some cases in the survey do not give specific details about the debtor, other than their names.

[4] See for about the gentry and the 'middling sort', K Wrightson, *English society 1580-1680* (Routledge 2003) 26-31, 45.

[5] See section I. 1.1. below

[6] *Lavington v Maton*, 7 July 1595 C 78/ 115/6 m. 18 [IMG_0036]. See below for the interaction between the bankruptcy statutes and the Chancery practice.

best of their ability.[7] The survey shows that the Court of Chancery took the conduct and circumstances of the debtor into account, while balancing the interests of the debtor and his or her creditors.[8]

1.1. The legal basis upon which the debt was entered into

In most cases in the survey the insolvent debtor incurred debts in his or her own name.[9] Debts were most commonly formal and acquired by entering into a bond, but sometimes also by annuities, recognizances, statutes and mortgages.[10] To illustrate, Robert Tyffin in *Tyffin v Hart* (1619) had used bonds, annuities, statutes merchant and mortgages to acquire his debts.[11] It was also possible that the insolvent debtor owed money for commodities or wares, on occasion due to delay in the credit supply chain.[12] For example, in *Ashenhurst v Bartlet* (1623), William Ashenhurst owed £1,500 to 24 creditors for wares which he had bought at 'dear rates'.[13] He had subsequently sold these wares on to 'petty chapmen in the country', who failed to make payment.[14] This situation led

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[7] See below.
[8] See below.
[9] For examples of cases in which the debtor incurred the debts in his or her own name see: *Dacombe v Brocke*, 25 November 1620 C 33/139 f. 339v [IMG_ 0333a]; *Thornedicke v Hill*, 30 October 1620 C 33/139 f. 399v [IMG_0393], 4 December 1620 C 33/139 f. 332 [IMG_0326]; *Brooke (or Little) v Goode*, 23 November 1619 C 33/137 f. 528 [IMG_0537] (the case is also named *Cowell v Hill* in the alphabets).
[10] For example, *Sandys v Gresham*, 28 November 1589 C 33/80 f. 271 [IMG_0234]; *Mildmay v Wentworth (Sir John Wentworth's Case)*, 6 November 1613 C 33/125 f. 148 [IMG_0151] at 148v [IMG_0151v]; 12 December 1613 C 33/125 f. 354 [IMG_0360]; *Tyffin v Hart* (1619) (n 123). Not all the cases give details of the legal basis upon which the debt was entered into.
[11] *Tiffin v Creditores*, 'Ashedale [sic] of debts' C38/33, *Tyffin v creditors*, 'Schedule of debts' Trinity 1619 C 38/37 Q-Z. There are two versions of the schedules of debts of the Tyffin brothers. Most debts were classed as 'money on use', apart from a debt of £400 owed to five creditors. The debts owed to three creditors, Lady Hart, Elizabeth Dale and Stephen Peers, comprised 'orphans' money' (see below). One creditor had a statute merchant and another had portions of his children given by their grandmother. The schedules of debts of the unconformable creditors given by the brothers contained two debts of orphans' money, one annuity, two statutes merchant and two mortgages. Finally, the first version of the schedule also showed debts owed by the brothers as principal debtors; these are left out in the second version. The latter point is the main difference between the two schedules. After the report was made, Bacon LC ordered both the conformable and unconformable creditors to attend the court. A later masters' report shows a schedule of all the debts owed by the Tyffin brothers to the unconformable creditors as sureties. The debts that they incurred as principal debtors are not included. This schedule seems to be the version made by the masters after they gathered all the evidence of the debts. *Tiffin v Creditores,* 'Schedule of debts' Trinity 1619 C 38/37 Q-Z.
[12] E.g. *Mildmay v Wentworth (Sir John Wentworth's Case)*, 6 November 1613 C 33/125 f. 148 [IMG_0151]. *Kennedy v Ashfield*, 12 February 1619 C 33/137 f. 789 [IMG_0797a]. For money for wares in the credit supply chain, see *Ashenhurst v. Bartlet,* 23 December 1622 C 33/143 f. 335 [IMG_0337]; 12 February 1623 C 33/143 f. 531 [IMG_0533]; 27 April 1623 C 33/143 f. 724 [IMG_0726].
[13] *Ashenhurst v Bartlet,* 23 December 1622 C 33/143 f. 335 [IMG_0337]; 12 February 1623 C 33/143 f. 531 [IMG_0533]; 27 April 1623 C 33/143 f. 724 [IMG_0726].
[14] ibid.

Ashenhurst to be unable to pay his own creditors.[15] There are only a few examples in the survey that specifically mention informal debts.[16] In *Palmer v Rudd (or Palmer v creditors)* (1619) some of the debts were owed upon simple contract and shop books and not upon any specialty.[17] The debtor would generally give valuable and reasonable consideration.[18] If reasonable consideration was lacking in the agreement, for example, because the obligations were usurious, the Court of Chancery would not acknowledge these obligations in a debt settlement.[19] The survey shows that obligations of that kind were discharged by the court.[20] *Sandys v Gresham* (1589) illustrates this point. Edwyn Sandys had entered into some bonds, recognizances and bills obligatory at usury rates.[21] The student was an expectant heir and as such had not given land or goods for the security for these loans.[22] Hatton LC discharged Edwyn Sandys from all these usurious obligations.[23] In *Sir John Wentworth's Case* (1620) the debts were acquired on recognizances and statutes.[24] It is unclear what the security was for Sir John's recognizances, but for his statutes no valuable consideration was given.[25] However, these statutes were made when Sir John was still underage and unmarried.[26] One statute was made with his father and another with his father-in-law, without any consideration, in order to guarantee that the land would stay in the family.[27] In *Nicholls v Tryon* (1620) the refractory creditors had argued that Nicholls had not given any collateral assurance, and that the conformable creditors only had the plaintiff's and his son-in law's security.[28]

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[15] Ashenhurst offered to give good security to repay his creditors in three years' time. However, some of his creditors refused this offer. *Ashenhurst v. Bartlet*, 23 December 1622 C 33/143 f. 335 [IMG_0337].
[16] *Palmer v Rudd (Palmer v creditors)*, 1 February 1619 C 33/135 f. 480 [IMG_1650].
[17] ibid.
[18] E.g. *Nicholls v Tryon*, 9 November 1620 C 33/139 f. 525 [IMG_0519]; *Tiffin v Creditores,* 'Ashdale [sic] of debts' Hilary Term 1618 C 38/33: 1618 S-Z. *Tiffin v Creditores,* 'Schedule of debts' Trinity 1618 C38/37: 1619 Q-Z. The specific collateral security is not always mentioned in the decision.
[19] E.g. *Sandys v Gresham*, 28 November 1589 C 33/80 f. 277v-278 [IMG_1110-0241]; *Mildmay v Wentworth (Sir Wentworth's Case),* 12 December 1613 C 33/125 f. 354 [IMG_0360].
[20] *Nicholls v Tryon*, 9 November 1620 C 33/ 139 f. 525 [IMG_0519].
[21] *Sandys v Gresham*, 28 November 1589 C 33/80 f. 272v [IMG_1105] It also included wares at excessive rates. *Sandys v Gresham*, 28 November 1589 C 33/80 f. 277v [IMG_1110].
[22] ibid f. 271 [IMG_0234].
[23] ibid f. 277v [IMG_1110].
[24] *Mildmay v Wentworth (Sir John Wentworth's Case)*, 6 November 1613 C 33/125 f. 148v [IMG_0151v]
[25] *Mildmay v Wentworth (Sir John Wentworth's Case)*, 12 December 1613 C 33/125 f. 354 [IMG_0360].
[26] ibid.
[27] *Mildmay v Wentworth (Sir John Wentworth's Case)*, 19 February 1614 C 33/125 f. 633v [IMG_0642a].
[28] *Nicholls v Tryon*, 9 November 1620 C 33/139 f. 525v [IMG-0519a].

Nicholls v Tyron (1620) shows that insolvent debtors might have entered into obligations for debt in a partnership.[29] In *Nicholls v Tryon* the refractory creditors of the insolvent Christopher Nicholls contested the suretyship between Nicholls and his surety Humfrey Cleark, claiming that they were actually partners. *Nicholls v Tyron* seems to suggest that if Nicholls and Cleark had been partners, then 'their debts [would have been] joint and equal to them both'.[30]

1.2. The amount of debt

It is not always clear from the survey what the total amounts of debts were in a particular case. The record often does not give the total amount of debts or sometimes only gives the specific reduction in the debts owed.[31] It is therefore unclear what amounts of debt an insolvent debtor would generally owe or whether a minimum threshold had to be met in order to petition the Court of Chancery for a composition. However, it seems that, at least in practice, the Court of Chancery generally dealt with cases involving compositions of debts of large amounts. For example, in *Sandys v Gresham* (1589) the total amount of debts owed was £7,000.[32] For comparison, Richard Grassby has explained that a median estate for the greater London merchants was £3,345 in the Elizabethan period.[33] In *Rudd v Gamsall* (1602) the total amount of debts was £14,800 with another £8,000 in wares; in *Nicholls v Tryon* (1620) £6,000; in *Grant v Cotton* (1620) £2,600; in *Palmer v Rudd* (1620) £9,309; and in *Dacombe v Brocke* (1620) £25,000.[34] Grassby has argued that in the reigns of the early

[29] ibid f. 525 [IMG_0519].
[30] ibid f. 525v [IMG_0519a].
[31] *Browne v Dalby*, 31 October 1614 C 33/127 f. 130 [IMG_0127].
[32] *Sandys v Gresham*, 28 November 1589 C 33/80 f. 271 [IMG_0234] at f. 272v [MG_1105].
[33] R Grassby, *The business community of seventeenth-century England* (CUP 1998) 249.
[34] *Rudd v Gamsall*, 23 January 1602 C 33/103 f. 288v [IMG_2501]; *Nicholls v Tryon*, 9 November 1620 C 33/139 f. 525 [IMG_0519]; *Grant v Cotton*, 15 November 1620 C 33/139 f. 489 [IMG_0483]; *Palmer v Rudd* by Thomas Bernett and Edward Barkham, 27 November 1620 C38/40; *Dacombe v Brocke*, 25 November 1620 C 33/139 f. 339v [IMG_0333a]. It is often not clear from the survey whether these debtors were from a particular background. Only a few cases give this background. *Sandys v Gresha*m (1589) dealt with the debts of a disinherited student, *Nicholls v Tyron* (1620) dealt with the debts of a merchant, *Palmer v Rudd* (1620) with a widow and *Dacombe v Brocke* (1620) with the insolvent deceased estate of Sir John Dacombe, a member of the gentry. The backgrounds of the other debtors are not clear from the survey.

Stuarts a median estate of a Greater London merchant had increased to around £10,167.[35] The amounts of debts claimed in the survey were thus very high.

1.3. The conduct of the debtor

In its equitable function the Court of Chancery dealt with debt settlements of insolvent debtors who fell outside the scope of the bankruptcy statutes. The main requirement for the Court of Chancery to award such a composition was that the insolvent had become insolvent in a 'honest' manner.[36] This meant that the insolvency had occurred for reasons beyond the control of the debtor.[37] The commission of bankrupts or another committee in charge of the settlement proceedings would establish by witness statements and affidavits in what manner the insolvency had arisen.[38] In the cases in the survey the honest conduct of the debtor is almost never expressly referred to, but can generally be deduced from the facts of the cases.[39] These facts show that these debtors had become insolvent through circumstances beyond their own control, either due to the insolvency or conduct of others, or by their own misfortune. In addition, the Court of Chancery seems to have considered the cooperation of the insolvent debtor and whether he had showed willingness to try to pay the creditors.

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[35] Grassby (n 33) 249. Grassby identifies five different categories of estates of merchants in London. He also shows the incomes of estates of merchants in the country. For more information about the worth of these estates in the Elizabethan and Stuart reigns, see Grassby (n 33) 247-251.

[36] Indeed, when a merchant or trader had acted fraudulently and became insolvent, he or she would be considered a bankrupt.

[37] There are not many cases in the survey that show any fraudulent dealings. An exception is *Whorewood v Ambrosi* (1621). In this case two of the plaintiff's creditors had exhibited their bill of conformity against the defendants. Upon pretence that the late Queen Anne was indebted to them, the plaintiffs obtained an injunction for stay of the defendant's proceedings until the queen satisfied her debts to the plaintiffs. However, the queen did not owe them any money and the petition in *Whorewood v Ambrosi* was dismissed in the Court of Chancery. *Whorewood v Ambrosi*, 9 January 1621 C 33/139 f. 509 [IMG_0503].

[38] For example, in *Warren v Eldrington* (1601), Warren was accused by some of his creditors of being a bankrupt. This allegation was explicitly rebutted by the commissioners in the proceedings, who certified that these allegations were false. By doing so, they also implicitly excluded the application of the bankruptcy statutes of 1543 and 1571. Both these statutes were in force when *Warren v Eldrington* (1601) was decided. Instead, Ellesmere LC awarded various individual compositions to relieve Warren and his creditors.

[39] The only instance in the survey in which the honest conduct of debtor is directly mentioned is in *Tyffin v Hart* (1619). In this case, the masters of the court had established that the debts of Robert Tyffin, the late father of the brothers who acted as sureties, had been incurred *bona fide*. *Tyffin v Hart,* 12 November 1618 C 33/135 f. 159v [IMG_1324a]. However, the case is not about the father, but about the brothers, who acted as sureties.

a.) Insolvency due to the insolvency of others

Widowhood was a common way to acquire debts without any fault of the insolvent debtor.[40] For example, in *Palmer v Rudd* (1620), Susan Palmer, a widow, had become insolvent after she inherited her late husband's insolvent deceased estate.[41] Suretyship, considered in more detail below, was another common way to become insolvent beyond the debtor's own control. However, given that the surety had taken a risk by entering into the suretyship, this argument may only have been effective if the principal debtor had acquired the debts in a honest manner (assuming that the surety had himself not acted in a fraudulent manner). It seems that in considering the petition of a surety the Court of Chancery would take the conduct of the principal debtor into account. It seems that the practice was that, in effect, the surety could be regarded as at fault if he had become a surety for someone whom he knew had incurred debts dishonestly. In *Tyffin v Hart* (1619) Bacon LC explicitly mentioned in one of his orders that the debts of Robert Tyffin, the principal debtor, had been incurred *bona fide*.[42] *Pollard v Reeve* (1620) is another example of a petition of a surety of a honest principal debtor.[43] The case concerned Thomas Pollard, a surety, who became insolvent. Pollard had initially petitioned the Court of Requests for a composition, but the defendant had obtained a prohibition in the King's Bench.[44] The master's report by Richard Moore shows that Pollard argued that he was 'but a surety', but also that Wilmore, the principal debtor had become

[40] *Palmer v Rudd* (1620) is effectively a case concerning a deceased insolvent estate. Susan Palmer inherited the debts of her late husband, Robert Palmer. Deceased estates have generally been excluded from the survey and the research of this thesis. However, in *Palmer v Rudd* (1620) the deceased insolvent estate was part of a bill of conformity procedure. *Palmer v Rudd (Palmer v creditors)*, 19 January 1619 C 33/135 f. 422a [IMG_1592a]; 27 January 1619 f. 465v [IMG_1636a]; 1 February 1619 f. 480 [IMG_1650]. The certificate of the composition has survived. See, 27 November 1620 by Thomas Bernett and Edward Barkham C 38/40. Sir Edward Barkham was the lord mayor at the time of the proceedings. P Watson and S Healy, 'Barkham, Sir Edward, 1st Bt. (1591-1667), of Southacre, Norf. and Tottenham, Mdx' in A Thrush and JP Ferris (ed), *The History of Parliament: the House of Commons 1604-1629* (CUP 2010) <https://www.historyofparliamentonline.org/volume/1604-1629/member/barkham-sir-edward-1591-1667> accessed 15 December 2020.

[41] *Palmer v Rudd (Palmer v creditors)*, 19 January 1619 C 33/135 f. 422a [IMG_1592a]; 27 January 1619 f. 465v [IMG1636a]; 1 February 1619 f. 480 [IMG_1650]; 27 November 1620 by Thomas Bernett and Edward Barkham C 38/40.

[42] *Tyffin v Hart*, 12 November 1618 C 33/135 f. 159v [IMG_1324a].

[43] *Pollard v Reeve*, 18 November 1620 C 33/139 f. 224 [IMG_0218]. See also the two master's reports of this case. *Pollard v Reeve* by Richard Moore, 28 November 1620 C 38/40; by Richard Moore, 5 December 1620 C 38/40.

[44] ibid.

insolvent by reason of some casualty by 'inundation' of the River Thames because of which he had lost cattle.[45]

b.) Insolvency due to the conduct of others

In contrast, it was also possible that a debtor had become insolvent due to the fraudulent conduct of others. In that scenario the insolvent debtor could be regarded as blameless. The survey shows two clear examples of leniency by the Court of Chancery on that basis. In *Sandys v Gresham* (1589), Edwyn Sandys had acquired his excessive debts by usurious loans.[46] His 'wicked' creditors had caused these excessive debts by charging high interest rates, and had even blackmailed Edwyn Sandys into some of these usurious obligations.[47] In *Brooke (or Little) v Goode* (1620), Francis Brooke had incurred debts caused by the misconduct of others.[48] Brooke was decayed in his estate, because of law suits unjustly brought against him, bad debts and 'evil' servants.[49] In both cases, the Court of Chancery awarded a composition to the insolvent debtor. Edwyn Sandys was discharged of those of his debts that were based on usurious obligations, not the other debts.[50] Brooke was awarded delay of payment and was ordered to repay his creditors in four years' time.[51]

c.) Insolvency due to misfortune of the debtor

The survey shows that the Court of Chancery was also willing to grant compositions to insolvent debtors by misfortune.[52] There was nobody to blame for debts by misfortune. They were incurred

[45] *Pollard v Reeve* by Richard Moore, 28 November 1620 C 38/40. Wilmore was 'a man of discharging debts', which presumably meant that he usually paid off his debts.
[46] *Sandys v Gresham*, 28 November 1589 C 33/80 f. 271 [IMG_0234].
[47] ibid at f. 274 [IMG_0237].
[48] *Brooke (or Little) v Goode*, 2 July 1617 C 33/133 f. 1341v [IMG_1365a], 16 October 1618 C 33/135 f. 39v [IMG_1204a], 22 October 1618 C 33/135 f. 77 [IMG_1243], 23 October 1618 C 33/135 f. 186 [IMG_1351a], 22 September 1619 C 33/135 f. 1384 [IMG_2568a], 23 November 1619 C 33/137 f. 528 [IMG_0537], 1 February 1620 C 33/137 f. 813v [IMG_0821a]. The order of 22 September 1619 refers to an order on 16 November 1618. This order could not be found in the alphabets of the A or B books. The alphabet of the B book seems not to be complete.
[49] *Brooke (or Little) v Goode*, 23 November 1619 C 33/137 f. 528v [IMG_0537a].
[50] *Sandys v Gresham*, 28 November 1589 C 33/80 f. 271 [IMG_0234] at f. 278 [IMG_0241].
[51] *Brooke (or Little) v Goode*, 1 February 1620 C 33/137 f. 813v [IMG_0821a].
[52] E.g. *Leecheland v James*, 15 November 1596 C 33/91 f. 444v [IMG_477a].

by the insolvent due to acts of God, such as flooding, 'casualties at sea' or simply 'great losses'.[53] This meant that merchants and traders could also qualify for a debt settlement.[54] After all, merchants and traders would only be classified as 'bankrupt' if they had been fraudulent and met the other criteria set out in the bankruptcy statutes.[55] This meant that merchants or traders who had acquired their debts without fraudulent dealings were outside the scope of the bankruptcy statutes.

It is not clear from the survey whether there was a direct link between the Chancery practice of discharging honest merchants and traders and the bankruptcy statutes. Nevertheless, the survey shows that honest merchants and traders could petition the Court of Chancery for a debt settlement. The survey shows various examples of merchants being expressly or impliedly treated as insolvent by misfortune.[56] For example, *Johnson v Wolmer* (1551), the first debt settlement case found in the survey, dealt with the composition of John Johnson, a clothier from Bocking, Essex.[57] By virtue of his profession, Johnson was a trader. However, while he had 'suddenly decayed and fallen into great poverty', nothing in the case suggests that Johnson had been fraudulent in his dealings or that he was qualified as a bankrupt.[58] Instead, his creditors had petitioned the Chancery and agreed on a composition, in which Johnson was discharged from most of his debts. In another example, in *Wright v Jennings* (1614), Thomas Wright, a merchant, successfully petitioned the

[53] E.g. *Pollard v Reeve*, 18 November 1620 C 33/139 f. 224 [IMG_0218]; by Richard Moore, 28 November 1620 C 38/40; by Richard Moore, 5 December 1620 C 38/40; *Smith v Ashton*, 12 May 1620 C 33/137 f. 1242 [IMG_0788]; 11 July 1620 C 33/137 f. 1642 [IMG_1190];17 October 1620 C 33/139 [IMG_0353]. See also one of the reports by the commissioners, *Smith v Ashton* by Thomas Middleton and Thomas Bennett, 19 June 1620 C38/40; *Nicholls v Tryon*, 9 November 1620 C 33/139 f. 525 [IMG_0519].

[54] E.g. *Wright v Jennings*, 28 November 1614 C 33/127 f. 141 [MG_0138]; *Dawley v West*, 11 January 1619 C 33/135 f. 406a [IMG_1574a], 23 January 1619 C 33/135 f. 438 [IMG_1609], 11 February 1619 C 38/30; *Bowland v Wynne*, 12 November 1618 C 33/135 f. 167a [IMG_1332a], *Bowland v Wynne* by James Hussey, 25 November 1618 C 38/30; *Nicholls v Tryon*, 9 November 1620 C 33/139 f. 525 [IMG_0519].

[55] See Chapter 1 for more detail on the bankruptcy statutes.

[56] E.g. *Wright v Jennings*, 28 November 1614 C 33/127 f. 141 [IMG_0138]; *Bate v Squire*, 28 October 1618 C 33/135 f. 133a [IMG1299a]. See for the pleadings of this case C2/Chas I/B170/78; *Smith v Ashton*, 12 May 1620 C 33/137 f. 1242 [IMG_0788]; 11 July 1620 C 33/137 f. 1642 [IMG_1190];17 October 1620 C 33/139 [IMG_0353]. *Smith v Ashton* by Thomas Middleton and Thomas Bennett, 19 June 1620 C38/40; *Organ v Cambell*, 27 October 1618 C 33/135 f. 133 [IMG_1299].

[57] *Johnson v Wolmer,* 3 November 1551 C 78/6/28 m. 13 [IMG_0027].

[58] ibid.

Chancery, because he had suffered 'great losses' and experienced financial difficulty as a consequence.[59]

Merchants and other debtors could also become insolvent by a combination of their own debts due to misfortune, and suretyship.[60] The survey shows that the Court of Chancery would be very lenient to these insolvent debtors and award them composition. For example, in *Bowland v Wynne* (1618), the conformable creditors of William Bowland, a merchant, petitioned the Court of Chancery because Bowland had suffered 'many losses and hard fortunes'.[61] The master's report of James Hussy set out that William Bowland was awarded a reduction in his debts and had to pay his reduced debts on specific days.[62] It is unclear from the report whether this meant that Bowland was also awarded delay of payment. Similarly, in *Smith v Ashton* (1620), Simon Smith had suffered 'many great losses, casualty of seas, suretyship and other hindering' which meant that Smith was 'decayed in his estate'.[63] After voluntarily delivering over his estate to his creditors, the Court of Chancery released Smith from prison and awarded him a rateable reduction in his debts.[64] In another case, *Nicholls v Tyron* (1620), Christopher Nicholls petitioned the king because of his 'utterly decayed estate' as a result of 'great losses at sea'.[65] Nicholls himself had argued that he was 'but a surety' and had acted only 'out of love and affection' for Humfrey Cleark and John Osborne, his sons-in-law.[66] Nicholls's petition was successful and he was granted a delay of payment. He was ordered to pay the principal debt in four years' time, to be paid in even portions upon good security.[67]

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[59] *Wright v Jennings*, 28 November 1614 C 33/127 f. 141 [IMG_0138].
[60] Sureties did not petition the Chancery directly in all cases in the survey; sometimes the situation of the surety is explained alongside the petition of the principal insolvent debtor. *Tyffin v Hart* (1619) is an example based on the first ground, the Tyffin brothers were simply insolvent because they were liable as sureties for the debts of their late father. *Nicholls v Tryon*, 9 November 1620 C 33/139 f. 525 [IMG_0519] is an example based on the second ground. Nicholls petitioned the Chancery because he was insolvent in relation to his own debts, because he had acted as surety.
[61] *Bowland v Wynne*, 12 November 1618 C 33/135 f. 167a [IMG_1332a].
[62] *Bowland v Wynne* by James Hussey, 25 November 1618 C 38/30.
[63] *Smith v Ashton*, 12 May 1620 C 33/137 f. 1242 [IMG_0788].
[64] *Smith v Ashton*, 17 October 1620 C 33/139 f. 359 [IMG_0353], *Smith v Ashton* by Thomas Middleton and Thomas Bennett, 19 June 1620 C38/40.
[65] *Nicholls v Tryon*, 9 November 1620 C 33/139 f. 525 [IMG_0519].
[66] ibid at f. 525v [IMG_0519a].
[67] ibid f. 525 [IMG_0519].

d.) Cooperation of the insolvent debtor and willingness to repay the creditors

In addition to the 'honesty' requirement, it seems that the Court of Chancery was more willing to award a composition if the debtor had been cooperative in the settlement proceedings. In *Tyffin v Hart*, Bacon LC explicitly compliments the Tyffin brothers for their cooperation in the debt settlement procedure.[68] The brothers were willing to subject their own estates 'to their very clothes' to payment of the debts.[69] Similarly, in *Smith v Ashton* (1620), Bacon LC decided in Simon Smith's favour, when he delivered over his estate to his creditors.[70]

The Court of Chancery also seems to have been lenient towards insolvent debtors if they made efforts to repay their creditors, or at least had no prospect of repaying their debts. In *Browne v Dalby* (1614), John Browne was awarded a composition by Ellesmere LC on the basis that the commissioners attested 'that the estate of the said Browne was such as that he would give no better satisfaction'.[71] In *Dawley v West* (1618), Bacon LC conformed the refractory creditors of Roger Dawley, because 'they refused to accept such reasonable contentment and satisfaction as the poor man is able to give to them'.[72] In *Steward v Mountford* (1620), Bacon LC awarded William Steward a reduction in his debts, despite the fact that he had a house the sale of which could pay for the debts.[73] However, 'his wife could not be drawn to join in the sale of the house, one of the said houses being her jointure before marriage'.[74] Finally, in *Middleton v Holt* (1620), the master's report states that Francis Middleton 'was directed to be discharged both of his imprisonment and bond upon payment of the third part of the said debt. This he [Middleton] announced to be the custom

[68] See further below in section I.1.2 in his chapter about sureties.
[69] *Tyffin v Hart,* 16 January 1619 C 33/135 f. 417 [IMG_1586].
[70] *Smith v Ashton*, 17 October 1620 C 33/139 f. 359 [IMG_0353].
[71] *Browne v Dalby*, 31 October 1614 C 33/127 f. 130 [IMG_0127].
[72] *Dawley v West*, 11 February 1618 C 38/30.
[73] *Steward v Mountford*, 10 October 1620 C 33/139 f. 75 [IMG_0080], *Steward v creditors* by Bowyer and Paule, 21 July 1620 C 38/40.
[74] ibid.

of London,[75] which was not denied and is also agreeable by general law', 'and of this third part he offered to make payment within a year because he must pay it by the sale of his land'.[76]

1.4. The circumstances of the debtor

a.) Imprisonment

The survey shows that it was not uncommon for incarcerated insolvent debtors to petition the Court of Chancery or the king for debt settlements.[77] The incarcerated insolvent debtors in the survey were held at the Counter in Wood Street, the prison of the King's Bench and the prison of the Fleet.[78] These prisons were all located in London.[79] Incarcerated debtors were given considerable freedoms and were allowed to leave the prison in the company of a warder.[80] However, the survey seems to show that the Court of Chancery in the period was reluctant to keep insolvent debtors in prison. In fact, the survey shows that all insolvent debtors who were incarcerated in debtor's prison were awarded a composition by the Court of Chancery.[81] Debtor's prison could also be used against insolvent debtors, generally by refractory creditors, in order to get full satisfaction of their debts.[82] For example, in *Smith v Ashton* (1620), Simon Smith handed

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[75] Francis Middleton was a tradesman living in London.
[76] *Middleton v Holt* by Haywarde, 15 August 1620 C 38/39. See for one of the entries of this case, *Middleton v Holt*, 28 October 1620 C 33/139 f. 355 [IMG_0349].
[77] For example, *Brooke (or Little) v Goode*, 23 November 1619 C 33/137 f. 528 [IMG_0537]; *Walton v Creditors of Walton*, 16 November 1618 C 33/135 f. 351a [IMG_1519a].
[78] E.g. *Hardy v Adams*, 18 November 1587 C 33/75 f. 181 [IMG_0183] (the Counter in Wood Street); *Dawley v West,* 11 January 1619 C 33/135 f. 406a [IMG_1574a] (the prison of the King's Bench), *Dawley v West* by Bowyer and Paule, 19 June 1619 C 38/30; *Middleton v Holt* by Haywarde, 15 August 1620 C 38/39 (the Fleet prison) W Thornbury, 'The Fleet Prison', in *Old and New London: Volume 2* (London, 1878), pp. 404-416. *British History Online* <http://www.british-history.ac.uk/old-new-london/vol2/pp404-416> accessed 14 August 2020. See Sir John Baker, *Oxford History of the Laws of England,* vol. VI, 1483-1558 (OUP 2003) 287 for discussion of some other debtor's prisons. Isabella Whitney sets out in her poem 'Will and Testament' from 1587 that Ludgate prison held insolvent debtors and bankrupts. <https://www.poetryfoundation.org/poems/45991/will-and-testament> accessed 10 August 2020.
[79] Baker, *OHLE* (n 78) 287.
[80] ibid.
[81] E.g. *Hardy v Adams*, 18 November 1587 C 33/75 f. 181 [IMG_0183]; *Ashbye v Richardson* (1597), 15 April 1597 C 33/91 f. 770v [IMG_5094a]; *Smith v Ashton*, 12 May 1620 C 33/137 f. 1242 [IMG_0788]. *Middleton v Holt* by Haywarde, 15 August 1620 C 38/39; *Dawley v West* by Bowyer and Paule, 19 June 1618 C 38/30; *Steward v Mountford* by Bowyer and Paule, 21 July 1620 C 38/40. However, this does not necessarily mean that the Chancery sought to avoid keeping people in prison, it could be just the chance of the survey.
[82] E.g. *Ashbye v Richardson*, 15 April 1597 C 33/91 f. 770v [IMG_5094a]. 'The defendant being one of the creditors who nothing will content but the arresting and imprisoning of the defendant with all extremity.' See also *Shippe v Underhill*, 17 October 1620 C 33/139 f. 47v [IMG_0052a].

over his entire estate to his creditors in order to be released from debtor's prison.[83] Commissioners would investigate and mediate with the creditors to agree to a reasonable composition with the prisoner.[84] Baker writes that commissions to settle prisoners' debts according to equity and good conscience existed already in 1539.[85] That meant that these commissions preceded the commissions of bankrupts. However, Dawson writes that commissions for the relief of poor prisoners ceased to exist with the accession of James I.[86] He argued that the work of these commissions was taken over by more general commissions.[87]

Sir John Baker has explained that debtor's prison was used as a mechanism to encourage people connected to the insolvent debtor to pay the debts to get the debtor out of prison.[88] However, the survey shows that this mechanism was not always effective. In *Steward v Mountford* (1620) the insolvent Steward had not been able to persuade his wife to sell the house because it was her jointure before marriage.[89] However, Bacon LC still awarded Steward a composition, in the form of a reduction in the debts owed, because Steward had assigned over the assets over which he had control, and had thereby done everything in his power to pay his debts to his creditors.[90] *Steward v Mountford* also seems to suggest that the Court of Chancery chose to give Steward a composition because without immediate prospects to repay the debts owed, there was no incentive to keep him in debtor's prison.

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[83] *Smith v Ashton*, 12 May 1620 C 33/137 f. 1242 [IMG_0788].
[84] The reports accompanying the decisions in *Dawley v West* (1619) and *Steward v Mountford* (1620) are signed by Bowyer and Paule. Edmond Bowyer was once a commissioner for the relief of poor prisoners. JEM 'Bowyer, Edmund (1552-1627), of Camberwell, Surr.' in PW Hasler ed., *The History of Parliament: the House of Commons 1558-1603* (Boydell and Brewer 1981) <https://www.historyofparliamentonline.org/volume/1558-1603/member/bowyer-edmund-1552-1627> accessed 14 December 2020. It is uncertain who Paule was. It is possible that he was Sir George Paule. 'Paule, Sir George (1563/4-1635), of Lambeth, Surr.' in A Thrush and JP Ferris (eds), The History of Parliament: the House of Commons 1604-1629 (CUP 2010) < https://www.historyofparliamentonline.org/volume/1604-1629/member/paule-sir-george-15634-1635> accessed 2 May 2022.
[85] Baker, *OHLE* (n 78) 288 n 101.
[86] JP Dawson, 'The Privy Council and Private law in the Tudor and Stuart Periods: I', (1950) 48 *Michigan Law Review* 416.
[87] ibid.
[88] JH Baker, *An Introduction to English legal history* (OUP 2019) 74.
[89] This also shows that the Court of Chancery was respectful towards property held in jointure, which was generally not considered to be part of the general asset pool. For jointure, see E. Spring, *Law, land and family. Aristocratic inheritance in England, 1300-1800* (University of North Carolina Press 1993) 49-58.
[90] See also the section above on cooperation of the insolvent debtor and willingness to repay the creditors.

Middleton v Holt (1620) shows that when a debtor was really poor, it did not make much sense to keep him in debtor's prison.[91] Francis Middleton's estate was proven to be so small that the Court of Chancery awarded him liberty out of the King's Bench prison in Southwark for a year to settle affairs with his creditors.[92] Similarly, in *Dawley v West* (1620) Roger Dawley, 'a poor man' and a trader imprisoned in the King's Bench prison, petitioned the Court of Chancery.[93] The commissioners established that his estate was so small that he was not able to give satisfaction at that time, but thereupon tried to give him some more time to pay his creditors.[94] Various of his creditors, knowing of the prisoner's poor estate, were happy to give him one year liberty from prison to settle his financial affairs.[95] They gave him four years to pay his debts, with the threat of imprisonment as a security.[96] In another case, *Steward v Mountford* (1620), William Steward, who was also imprisoned in the prison of the King's Bench, alleged that he should be discharged from prison, because his estate would not amount to much by reason of his long imprisonment.[97]

b.) Age

One of the reasons for the Court of Chancery to grant a composition could be the age of the insolvent debtor. The age of the insolvent debtor was not a stand-alone reason for the court, but would be contemplated alongside other factors. In *Sandys v Gresham* (1589) Edwyn Sandys, the disinherited student whose circumstances have been set out above, was spared debtor's prison.[98] Hatton LC was 'moved with compassion as well towards the plaintiff's unfortunate estate thus driven either perpetually to lie in prison or otherwise to fly the Realm, his native country, being a young gentleman who might have done good service therein'.[99] It is clear that Hatton LC

[91] *Middleton v Holt* by Haywarde, 15 August 1620 C 38/39.
[92] ibid. The assessment of Francis Middleton's estate was done by the commissioners.
[93] *Dawley v West*,11 January 1619 C 33/135 f. 406a [IMG_1574a]; *Dawley v West* by Bowyer and Paule, 19 June 1619 C 38/30. See also *Dawley v West* master's report by unknown, 11 February 1618 C 38/30.
[94] ibid.
[95] ibid.
[96] ibid.
[97] *Steward v Mountford* by Bowyer and Paule, 21 July 1620 C38/40.
[98] *Sandys v Gresham*, 28 November 1589 C 33/80 f. 271 [IMG_0234].
[99] ibid at 273 [IMG_0236].

established that the circumstances of Edwyn Sandys showed no prospects of paying his debts, but that due to his age, 25 at the time of the suit, Edwyn might still be able to contribute to society if he was given a fresh financial start in life. Being a young gentleman, as well having been defrauded by some of his creditors, were the reasons for which Hatton LC considered a composition for Edwyn Sandys.[100] In contrast, in his master's report in *Middleton v Holt* (1620), Haywarde took the old age of the insolvent debtor into account.[101] Francis Middleton was seventy years old at the time of his imprisonment in the prison of the Fleet.[102] Haywarde considered that 'partly also in consideration both of the age of the complainant, and his decay by means of his imprisonment', Francis Middleton should be let out of prison for a year to settle his affairs with his creditors.[103]

c.) Status in society

As seen above in *Cornellius v Crackplace* (1614) in relation to bankruptcy, the Court of Chancery also considered the position of the debtor in society in the settlement procedure.[104] It seems that the Court of Chancery was more lenient towards bankrupts and insolvents if they had meant something for the economy before. The court in *Brooke (or Little) v Goode* (1619) took into account that Francis Brooke had been the mayor of Abingdon, Oxfordshire, four times at the time of his insolvency, where 'he had many ways well deserved and done good for the town and hath heretofore had an estate able to support the reputation of the said place, which is now decayed'.[105] It seems that not only the economic status of an insolvent debtor was taken into account, but also the social status. In another case, *Palmer v Rudd* (1620), the Court of Chancery dealt with an

[100] ibid.
[101] *Middleton v Holt* by Haywarde, 15 August 1620 C 38/39. The order of 24 July 1620 was not found in the decree and order books. One entry of the case was *Middleton v Holt*, 28 October 1620 f. 355 C 33/139 [IMG_0349]. However, this entry does not give the detailed information which is given in the master's report of the case by Haywarde.
[102] *Middleton v Holt* by Haywarde, 15 August 1620 C 38/39.
[103] ibid. The composition had the additional advantage that Middleton's creditors agreed with this composition, before the Court of Chancery formalised it in a decree.
[104] See chapter 2.
[105] *Brooke (or Little) v Goode*, 23 November 1619 C 33/137 f. 528 [IMG_0537]. *Finch v Hicks* (1620) deals with the debts of master of the court Henry Finch. However, this case seems to lean towards fraudulent dealings. See chapter 3.

insolvent widow.[106] She had incurred the debts in question upon the death of her husband.[107] The Court of Chancery awarded Susan Palmer a composition based on the fact that she was a widow.[108] In *Petre v Waterhouse* (1621) the court noted that the plaintiff was 'only a poor minister'.[109]

d.) Reputation

It seems that the Court of Chancery considered the credit reputation of the insolvent debtor during the settlement procedure. For example, in *Nicholls v Tryon* (1620), Bacon LC considered that Christopher Nicholls 'was a good man of good estate and able to give satisfaction' before being accused by some of his creditors of being insolvent, and in *Steward v Mountford* (1620), William Steward was considered 'a tradesman, and in good credit' before his insolvency.[110] In *Nicholls v Tryon*, some of Christopher Nicholl's creditors were so confident of Nicholls' credit reputation that they had offered the committee a security of £2,000 should Nicholls flee the country to defraud his other creditors.[111] Similarly, in *Petre v Waterhouse* the Court of Chancery considered the 'good credit and reputation' of Henry Petre, a minister of religion, before Petre became insolvent.[112]

e.) Family responsibility

The survey shows that the Court of Chancery seems to have considered the family responsibilities of petitioners in the debt settlement procedure. In the cases in the survey the court often used to

[106] *Palmer v Rudd (Palmer v creditors)*, 19 January 1619 C 33/135 f. 442a [IMG_1592a]; 27 January 1619 C 33/135 f. 465v [IMG_1636a]; 1 February 1619 C 33/135 f. 480 [IMG_1650]. *Palmer v creditors* by Thomas Bernett and Edward Barkham, 22 November 1620 C 38/40.
[107] ibid.
[108] ibid.
[109] *Petre v Waterhouse*, 16 May 1621 C 33/139 f. 993 [IMG_0989]; 6 October 1621 C 33/140 f. 1286v [IMG_2626]; 23 October 1621 C 33/141 f. 53v [IMG_0055a]. *Petre v Waterhouse* by Hawarde, 29 July 1621 C 38/42.
[110] *Nicholls v Tryon*, 9 November 1620 C 33/139 f. 525 [IMG_0519]; *Steward v Mountford*, 10 October 1620 C 33/139 f. 75 [IMG_0080]; *Steward v creditors* by Bowyer and Paule, from the Borough of Southwark, 21 July 1620 C 38/40.
[111] *Nicholls v Tryon*, 9 November 1620 C 33/139 f. 525 [IMG_0519].
[112] *Petre v Waterhouse*, 16 May 1621 C 33/139 f. 993 [IMG_0989]; 6 October 1621 C 33/140 f. 1286v [IMG_2626]; 23 October 1621 C 33/141 f. 53v [IMG_0055a]. *Petre v Waterhouse* by Hawarde, 29 July 1621 C 38/42.

describe the petitioner as a 'poor' man.[113] The court seemed to be especially moved by petitions of insolvent debtors who could no longer sustain their families. For example, in the successful petition by Christopher Nicholls in *Nicholls v Tryon* (1620), it was argued that Nicholls was ruined and had no means left to take care for himself or his family unless some good course might be taken by his creditors.[114] In *Walton v Creditors of Walton* (1618), Walton, who was held in debtor's prison, petitioned the Court of Chancery for his liberty, so that he could take care of his family,[115] and in *Brooke (or Little) v Goode* (1619), Brooke was awarded a composition, because he was unable to maintain himself, his wife and seven children.[116]

f.) Financial circumstances and social class

The survey shows no cases of insolvent debtors who were members of the nobility, but also shows almost no cases of insolvent debtors who were completely destitute commencing litigation, or cases that were litigated *in forma pauperis*.[117] There could be various explanations for this. It is possible that the poorest in society did not or could not borrow on credit and therefore were not part of the litigation in the Court of Chancery. Another explanation could be that the court fees that litigants had to pay to have their case heard were too high for the lower incomes in society.[118] As seen above in relation to bankruptcy, the petitioners in bankruptcy procedures seem to have been of decent financial means to go to court.[119] The insolvent debtors in the survey could pay these fees, because they always still had property at the time of the start of the ligation. The property was insufficient to pay all the creditors, but was sufficient to pay the court fees. In theory,

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[113] E.g. *Dawley v West*, 11 January 1619 C 33/135 f. 406a [IMG_1574a]; *Dawley v West* by Bowyer and Paule, 19 June 1619 C 38/30; *Petre v Waterhouse*, 16 May 1621 C 33/139 f. 993 [IMG_0989]; 6 October 1621 C 33/140 f. 1286v [IMG_2626]; 23 October 1621 C 33/141 f. 53v [IMG_0055a]. *Petre v Waterhouse* by Hawarde, 29 July 1621 C 38/42.
[114] *Nicholls v Tryon*, 9 November 1620 C 33/139 f. 525 [IMG_0519].
[115] *Walton v Creditors of Walton*, 16 November 1618 C 33/135 f. 351a [IMG_1519a].
[116] *Brooke (or Little) v Goode*, 23 November 1619 C 33/137 f. 528 [IMG_0537].
[117] See for an exception, *Middleton v Holt*, 28 October 1620 C 33/139 f. 355 [IMG_0349]. See also *Middleton v Holt* by Haywarde, 15 August 1620 C 38/39. See more about this case below. See for litigation *in forma pauperis*, WJ Jones, *The Elizabethan Court of Chancery* (Clarendon Press Oxford 1967) 323-328.
[118] Jones, *The Elizabethan Court* (n 117) 308-309.
[119] JC Muldrew, *The economy of obligation: the culture of credit and social relations in early modern England* (Macmillan 1998) 283. Also see the introduction of this thesis.

there seems to have been the possibility for these poor debtors to litigate *in forma pauperis*.[120] No such case appears in the survey, though that might be a consequence of the chance of the survey.[121]

2. Sureties

In its equitable function, the Court of Chancery dealt with cases involving sureties as well as those involving insolvent principal debtors.[122] Sureties were outside the scope of the bankruptcy statutes, but they could still be sued at common law.[123] In the period, sureties would petition the Court of Chancery for debt settlements in two situations: (1) simply because they were liable on behalf of the insolvent principal as surety, or (2) because they were insolvent themselves by a combination of their own debts and suretyship.[124] Most cases in the survey concerning sureties deal with the second situation and these sureties were considered primary debtors. This has been considered in more detail above. If the principal debtor defaulted, and the surety was not able to satisfy the debts either, sureties could end up in debtor's prison (effectively as primary debtor).[125] This was a good incentive to petition for debt relief. However, the evidence of Chancery practice and the parliamentary history in relation to bills of conformity shows that, until 1620, when the Standing Orders of the Court of Chancery prohibited the staying of proceedings against sureties, the Chancery was extremely lenient towards insolvent sureties.[126] The Court of Chancery would often

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[120] Jones, *The Elizabethan Court* (n 117) 323-328. However, Jones argues that 'poor' litigants *in forma pauperis* could occupy a wide range of financial backgrounds. Jones, *The Elizabethan Court* (n 117) 323.

[121] As seen above in chapter 2, the bankruptcy case *Allen's Case* was partly litigated *in forma pauperis*.

[122] The survey shows that sureties were part of almost every debt settlement case, because the plaintiff and creditors often litigated together with their sureties. Sometimes sureties were explicitly mentioned as well. See for example, *Costeel v Newbold*, 2 December 1624 C 33/147 f. 413v [IMG_0416a]. In this section only cases are mentioned in which the surety is the insolvent debtor or explicitly mentioned as part of the litigation.

[123] E.g. *Tyffin v Hart* (1619) 22 April 1618 C 33/133 f. 839 [IMG_0844]; 16 May 1618 C 33/133 f. 933 [IMG_0942]; 20 June 1618 C 33/133 f. 1229 [IMG_1241a]; 26 October 1618 C 33/135 f. 111 [IMG_1277]; 29 October 1618 C 33/135 f. 115 [IMG_1281]; 12 November 1618 C 33/135 f. 159v [IMG_1324a]; 5 December 1618 C 33/135 f. 301v [IMG_1469a]; 16 January 1619 C 33/135 f. 417 [IMG_1586]; 22 February 1619 C 33/135 [IMG_1869a]; 20 April 1619 C 33/135 f. 997 [IMG_2169]; 15 May 1619 C 33/135 f. 979 [IMG_2151]; KC4/1/27.

[124] Sureties did not petition the Chancery directly in all cases in the survey, sometimes the situation of the surety is explained alongside the petition of the principal insolvent debtor. *Tyffin v Hart* (1619) is an example based on the first ground, the Tyffin brothers were insolvent because they were liable as sureties for the debts of their late father. *Nicholls v Tryon*, 9 November 1620 C 33/139 f. 525 [IMG_0519] is an example based on the second ground. Nicholls petitioned the Chancery because he was insolvent in relation to his own debts, because he had acted as surety.

[125] Baker, *An Introduction* (n 88) 74.

[126] See chapter 3.

give sureties debt relief, including a full discharge as has been seen in *Finch v Hicks*.[127] This meant that having sureties was not necessarily an effective safeguard for the creditors to secure repayment of debts.[128]

2.1. The legal basis on which the suretyship was entered into and discharged

If sureties were liable on behalf of the insolvent principal, they were either (a) named in the same bond, recognizance or statute, or (b) named in a separate legal instrument.[129] Waddilove explains that the substance of surety obligation depended on the language used in the legal instrument.[130] Obligations could be (i) joint, (ii) 'several' (separate) or (iii) both.[131] If sureties were jointly liable with the principal debtor, the debtor and the sureties had to be jointly sued at law, and the same type of execution had to be sued out against both principal and sureties. If sureties were jointly and severally liable, the creditors could choose to proceed either jointly or severally. In the case of sureties who were severally liable, the principal and the surety were individually liable. The creditor was not required to proceed against the principal first, and could sue different sorts of execution against each. Whether the instruments specified joint, joint and several, or several liability was not specifically mentioned in the compositions of sureties in the survey. It seems that at law sureties were treated as co-principals.[132] However, Waddilove argues that in equity the obligation of the surety was treated as only secondary to that of the principal.[133] The lenient treatment of sureties in

[127] See especially, *Finch v Hicks*, 19 January 1620 C 33/137 f. 770v [IMG_0778a]. The two Finch brothers were fully discharged of their debts, which they had acquired by their suretyship for their father. See for more details chapter 3.
[128] Malynes writes that if a creditor could not get satisfaction from one surety, he could go after another. Malynes G Malynes, *Consuetudo, vel lex mercatoria, or the ancient law-merchant diuided into three parts: According to the essentiall parts of trafficke. necessarie for all statesmen, iudges, magistrates, temporall and ciuile lawyers, mint-men, merchants, marriners, and all others negotiating in all places of the world* (Adam Islip 1622) 226. However, it was also possible that the surety would pay too much. In *Johnson v Endicott* (1618), one of the sureties delivered goods of a far greater than the value required for the satisfying of the debt. *Johnson v Endicott* by Moore, 9 November 1618 C38/32.
[129] DP Waddilove, 'Mortgages in the early-modern Court of Chancery' (Doctoral thesis, University of Cambridge 2015) 96.
[130] ibid.
[131] ibid.
[132] The imprisonment of an insolvent debtor in debtor's prison, based on *capias ad satisfaciendum*, did not count as satisfaction for the debts if there were other debtors also liable for the debts. Waddilove, 'Mortgages' (n 129) 96.
[133] ibid.

the Chancery practice in the cases in the survey seems to confirm Waddilove's argument in this respect.

The creditor was only entitled to get satisfaction of a debt once.[134] This meant the liability of a surety would end if the principal debtor agreed with his creditors to a composition. *Johnson v Wolmer* (1551) shows that a debt settlement with the debtor would prevent the creditors taking action against the surety. Borne, Johnson's surety, was in prison and in the process of being sued for the debts of Johnson.[135] The sheriff of London had a writ of extent to value his goods, which could then be seized.[136] However, because there was a debt settlement in place with Johnson, the principal debtor, the process against the surety was stopped by the Chancery and he was released from prison.[137] In contrast, Malynes writes that if the surety knew that the principal had agreed with the creditors for delay of payment in a settlement, the surety could still be liable.[138]

Tyffin v Hart (1619) seems to suggest that the type of credit relationship between the surety and his or her creditor could influence the Chancery practice. In *Tyffin v Hart* Bacon LC held 'that there be a distinction of the nature and quality of the persons viz those that are trusted on the behalf of others being orphans & have good security for their money [] the surety always in the eye of the lender'.[139] It is not completely clear what this means, but it probably set out that creditors who held money on trust for orphans, or creditors with security interests, should be able to trust their security. In *Tyffin v Hart* (1619) the Tyffin brothers had to repay these creditors in full, whereas the other creditors all had to conform to a pro rata distribution of debts.[140]

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134 ibid.
135 *Johnson v Wolmer,* 3 November 1551 C 78/6/28 m. 13 [IMG_0028].
136 ibid.
137 ibid.
138 'Whether a suretie can pretend to be discharged, if the creditors haue made or agreed with the principal for a longer time of payment, and the principal breaketh? The answer is, that if he knew of the new agreement of the said partie for a longer time, he is liable thereunto...' Malynes (n 128) 226.
139 *Tyffin v Hart*, 20 April 1619 C 33/135 f. 997 [IMG_2169] at 998v [IMG_2170a].
140 ibid. See section I.1.3 below for Chancery practice in relation to creditors.

2.2. Cases in which the surety was liable on behalf of the principal

The surety could end up being sued in lieu of the principal, if the principal defaulted, simply through being the principal's surety.[141] The survey shows three cases in relation to surety liability of this kind, *Hardy v Adams* (1587), *Tyffin v Hart* (1619) and *Finch v Hicks* (1620).[142] The case of *Finch v Hicks* is discussed above.[143] The other two cases deal with insolvent deceased estates. A brother and sons respectively were sued at law for their deceased relatives' debts as sureties, rather than as heir(s) to their late relatives, or as executor(s) of their estates. This shows that sureties could be liable for the debts incurred by the principal debtor, during the life time of the principal debtor, but also when the principal debtor had died.[144] At common law, creditors had a better chance of getting repayment of their debts if they sued the relatives as sureties, rather than as executors or heirs. Executors would only be liable to the extent of the assets of the estate, and would not be personally liable. The same was true for the heir, whose liability would extend only to the value of land descended to him.[145] If the creditors wanted to recover more than the value of the estate or assets descended to the heir, they had to sue the relatives as sureties, because the sureties' own assets would then be available to the creditors too.

In *Hardy v Adams* (1587), Hardy, a surety as well as the heir of his deceased brother, an insolvent debtor, was imprisoned in the Counter in Wood Street on the basis of his brother's debts.[146] Hatton LC expressed his desire for leniency towards the imprisoned brother.[147] The specific assets and debts in *Hardy v Adams* are unknown, but the case seems to imply that it was a condition in this

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[141] That is, in cases falling within category (1) above, in contrast to those in category (2) above, where the sureties were insolvent themselves by a combination of their own debts and suretyship. See e.g. *Finch v Hicks,* 19 January 1620 C 33/137 f. 770v [IMG_0778a].
[142] *Hardy v Adams*, 18 November 1587 C 33/75 f. 181 [IMG_0183]; *Tyffin v Hart* (1619) (n 123).
[143] See chapter 3.
[144] *Hardy v Adams*, 18 November 1587 C 33/75 f. 181 [IMG_0183]. If the liability was joint (only) then presumably the surety could not be sued alone but only with the executors, in which case, given the liability was joint, it would seem that recovery from the sureties would be limited (as that from the executors would be) to the value of the estate.
[145] See for the liability of executors and heirs in the fifteenth century, AWB Simpson, *A history of the common law of contract: the rise of the action of assumpsit* (Clarendon Press 1987) 82-84.
[146] *Hardy v Adams*, 18 November 1587 C 33/75 f. 181 [IMG_0183].
[147] ibid.

case of giving relief that no request had been made to the surety while the debtor was alive. This means that no relief for the surety would be granted unless he had not been called upon before the death of the principal.[148]

As set out above, *Tyffin v Hart* (1619) was the leading case on debt settlements and sureties.[149] The case was effectively dealing with the deceased estate of Robert Tyffin, a brewer from Kingston-upon-Thames, Surrey. [150] Robert Tyffin had been of 'good credit and estimation' during his lifetime, but at the time of his death he, as the principal debtor, had accumulated total debts of around £9,600 to 78 creditors.[151] However, he had only left £2,000 in landed property and £3,000 in chattels.[152] His sons, John and Thomas Tyffin, sometimes together with Thomas Haward, Thomas Clarke and Thomas Cleave, acted as his sureties.[153] Robert's estate combined with the estates of his two sons was only worth about £5,515.[154] The suretyship of the brothers was entered into shortly before the father's death. The case shows that the brothers were sued in their capacity as sureties of their father, rather than as executors of the estate or, in the case of the older brother, as heir. Robert Tyffin died insolvent, so his estate was unable to meet his debts. As such, his sureties were liable to pay the debts. It seems that the brothers, as sureties, were liable as co-principals with their father. The schedules of debts in the masters' reports of *Tyffin v Hart* show that most of the debts in this case were secured by common money bonds and that these debts

[148] The court considered the following when it ordered relief of Hardy: 'upon condition that no request was made unto the plaintiff during his brother's life which the plaintiff is assured there was not'. *Hardy v Adams*, 18 November 1587 C 33/75 f. 181 [IMG_0183].
[149] Robert Tyffin was a brewer. As such, he exercised the 'trade of living of buying and selling'. See Bankrupts Act 1571 (13 Eliz. I, c.7), Preamble, Bankrupts Act 1603 (1 Jac. I, c. 15), Preamble. Therefore, by virtue of his profession he could be considered as a trader and potentially be subject to the statutes of bankrupts. However, the statutes of bankrupts were not invoked or once mentioned in the decision. A possible explanation for this is that the court had established that Robert Tyffin had dealt honestly. This suggests that Robert Tyffin had not committed an 'act of bankruptcy' and that the bankruptcy statutes were therefore not applicable to his situation.
[150] *Tyffin v Hart* (1619) (n 123).
[151] *Tyffin v Hart*, 12 November 1618 C 33/135 f. 159v [IMG_1324a].
[152] *Tyffin v Hart,* KC4/1/27.
[153] *Tiffin v Creditores,* 'Ashdale [sic] of debts' Hilary Term 1618 C 38/33: 1618 S-Z. *Tiffin v Creditores,* 'Schedule of debts' Trinity 1618 C38/37: 1619 Q-Z.
[154] *Tyffin v Hart,* 22 April 1618 C 33/133 f. 839 [IMG_0844].

were mostly incurred in 1617, the year before Robert died.[155] As has been seen, the brothers combined had assets worth of £515.[156] This meant that the creditors would be able to claim £515 more at common law if they sued the brothers in their capacity of sureties. However, the problem in *Tyffin v Hart* was that the brothers, acting as Robert Tyffin's sureties, could not pay the debts either. This meant that the estate of the principal debtor as well as the sureties themselves were insolvent. The brothers, being but sureties, could not be held liable under the bankruptcy statutes in that capacity, even if they were also traders.[157] The court showed leniency multiple times by staying proceedings at common law, because of the brothers 'being but sureties'.[158]

a.) The conduct of the surety

As in the case of insolvent principal debtors, it seems to have been a requirement for insolvent sureties to have acquired their debts 'honestly' in order to qualify for a composition. In *Hardy v Adams*, *Tyffin v Hart* and *Finch v Hicks*, the plaintiffs had been liable as sureties for debts incurred by others, rather than acquiring the debts themselves. *Tyffin v Hart* is the most important decision in relation to compositions and sureties. Bacon LC seemed to feel for the brothers, declaring 'that the said Tyffins have dealt very honestly in the business' and that he did 'much commiserate their natural piety to their father'.[159] The sons had acted as their father's sureties 'partly in obedience to their father's command' and partly 'out of fear of being utterly disinherited'.[160] In fact, Bacon LC specifically distinguished the case of the brothers from ordinary bankruptcy. One of his reasons was 'the honest disposition of the said Tyffins and their filial respect and piety to their dead father'.[161] This suggests that the 'honest' conduct of the brothers and their 'filial respect and piety

[155] *Tiffin v Creditores,* 'Ashdale [sic] of debts' Hilary Term 1618 C 38/33: 1618 S-Z. *Tiffin v Creditores,* 'Schedule of debts' Trinity 1618 C38/37: 1619 Q-Z.
[156] See the discussion of the assets and debts in the Tyffin case above. The discovery was performed by ten of the creditors. *Tyffin v Hart,* 16 January 1619 C 33/135 f. 417 [IMG_1586].
[157] It is unclear from the case whether the brothers were traders at the time of the litigation. However, it is clear that Thomas Tyffin was a brewer at the time of his death. PROB 11/177/1. Nevertheless, the brothers were not considered to have acted fraudulently, having acted honestly throughout.
[158] *Tyffin v Hart,* 22 April 1618 C 33/133 f. 839 [IMG_0844].
[159] *Tyffin v Hart*, 16 January 1619 C 33/135 f. 417 [IMG_1586] at f. 418 [IMG_1586a].
[160] *Tyffin v Hart*, KC4/1/27.
[161] *Tyffin v Hart,* 20 April 1619 C 33/135 f. 997 [IMG_2169].

to their dead father' were considerations moving the court. An important consideration for the court in relation to the 'honesty' of the brothers was that they had not only been willing to discover their father's estate, but had also subjected their own estates 'to their very clothes' to give satisfaction to all the creditors, rateably according to their debts owed.[162] The fact that the 'honest' conduct of the brothers was of influence in the decision is noteworthy. It shows that the Court of Chancery made a distinction between honest insolvent sureties and fraudulent bankrupts.[163]

The second element in this order, referring to the brothers' 'filial respect and piety to their dead father', seems to refer to influence exercised by the father upon the brothers' decision to become his sureties. In the final decree the court even established for a fact that the brothers became sureties for their father 'partly in obedience to their father's command' and partly 'out of fear of being utterly disinherited'.[164] This seems to suggest that the Chancery might give relief if the sureties had not been acting out of their free will: the sons had acted as their father's sureties 'partly in obedience to their father's command' and partly 'out of fear of being utterly disinherited'.[165]

b.) The circumstances of the surety

It seems that the Court of Chancery was willing to make debt settlements if the surety was imprisoned or had the prospect of long-term incarceration for debts acquired by the principal debtor.[166] The brother in *Hardy v Adams* had 'yielded' himself to prison, but had nothing to give to the defendant.[167] This would have meant that the brother could never be released from debtor's prison. The Tyffin brothers petitioned the king, so that 'the said Tyffins might not be utterly

[162] *Tyffin v Hart*, 16 January 1619 C 33/135 f. 417.
[163] See below for more about the relation between debt settlements and the bankruptcy statutes.
[164] *Tyffin v Hart*, KC4/1/27.
[165] However, the court gives insufficient persuasive evidence and background to fully understand this reasoning. Muldrew has explained that in the early modern period credit relations would generally be between friends, neighbours, fathers and sons, etc. Muldrew (n 119) 97. One would expect that being disinherited would be a significant threat for any child. In addition, it was found that Robert Tyffin was of 'good credit and estimation' during his lifetime, which, if true, would have meant that being Robert's surety should have been a fairly safe operation before the insolvency. KC4/1/27. It is possible that the brothers were not aware of their father's true financial position. The fact that Robert Tyffin incurred large debts shortly before his death may give rise to questions as to his financial reputation, though it is not clear from *Tyffin v Hart* why the debts were incurred.
[166] See the section about principal debtors above.
[167] *Hardy v Adams*, 18 November 1587 C 33/75 f. 181 [IMG_0183]; 22 November 1587 C 33/75 f. 199 [IMG_0201].

undone and imprisoned'.[168] Other circumstances, such as age and potential contribution to society of the sureties, were issues the Court of Chancery took into account in relation to insolvent debtors more generally.[169] It is likely that the same was true for sureties.

c.) The amount of debt owed

It is unclear what amounts of debt sureties would generally owe as surety in order to petition the Court of Chancery. *Tyffin v Hart* (1619) is the only case in the sample that gives information on this point in relation to insolvent debtors who had been sued on the basis of being a surety of a principal debtor. The masters of the Court of Chancery established in the schedules of debts in the Tyffin case that the Tyffins owed £7,528 to 55 conformable creditors and £2,230 to the unconformable creditors. This meant, as has been seen, that the total amount of debts was £9,758.[170] The amounts of the debts in *Hardy v Adams* (1587) and *Finch v Hicks* (1620) are unknown.

2.3. Lenient treatment in equity towards sureties in general

As indicated above, the evidence of the Chancery practice in the sample shows that, until 1620, the court was extremely lenient towards insolvent sureties in general, and would often give sureties compositions, frequently explicitly referring to the insolvent debtor(s) as being 'but a surety' or 'but sureties'.[171] This certainly implies that the surety was held less responsible than a principal debtor. The Court of Chancery would give a range of debt settlements to insolvent sureties, or insolvent debtors who had acquired their own debts in combination with being a surety. The court

[168] *Tyffin v Hart*, 16 January 1619 C 33/135 f. 417.
[169] See also the section I.1. about principal debtors above.
[170] *Tyffin v Creditores* by Fynch and Thelwall, 17 February 1619 C 38/33. The schedules of debts of the conformable creditors and the unconformable creditors have survived, but are partly illegible. *Tiffin v Creditores*, 'Ashedale [sic] of debts' C38/33.
[171] This includes the situations of sureties in both category 1 and 2. E.g. *Farmer v Clarke*, 9 August 1605 C 33/108 f. 1070v [IMG_2151]; *Bate v Squire*, 28 October 1618 C 33/135 f. 133a [IMG_1299a]; *Organ v Cambell*, 27 October 1618 C 33/135 f. 133 [IMG_1299]; *Tyffin v Hart*, 22 April 1618 C 33/134 f. 894 [IMG_0906]; *Widdowers v Ironmonger* by Charles Caesar, 25 October 1619 C 38/37; *Pollard v Reeve* by Richard Moore, 28 November 1620 C 38/40. See especially, *Finch v Hicks,* 19 January 1620 C 33/137 f. 770v [IMG_0778a]. The two Finch brothers were fully discharged of their debts, which they had acquired by their suretyship for their father. See also the chronological overview above.

would, for example, grant a reduction of debts, delay of payment, an alternative payment plan or discharge of debts.[172]

In *Nicholls v Tryon* (1620), creditors, possibly aware of the lenient treatment of sureties by the Chancery, tried to contest Nicholls's claim to be a surety rather than a principal debtor.[173] Nicholls argued that he had acted as a surety 'out of love and affection' for a certain Cleark, who also happened to be his son-in-law. However, the refractory creditors claimed that Nicholls and Cleark were in a long-term partnership. They argued that therefore the sums due to them were owed jointly and equally by Nicholls and Cleark and that Nicholls's debts were pretended to be far greater than they actually were, with the purpose to defraud creditors and to force a composition.[174] The refractory creditors were unsuccessful with their claim, although no substantial legal reasoning was given in this decision.[175]

Muldrew has explained that in the late sixteenth century acting as surety to secure a loan for someone was considered as an act of hospitality and neighbourliness.[176] The tensions created between the social duty of suretyship and the risks involved were matters of concern in the period.[177] Indeed, as has been seen, in *Tyffin v Hart* (1619) Bacon LC, while granting the composition to the Tyffin brothers, explicitly referred to the 'piety' of the brothers towards their late father, shown by acting as his sureties, thereby seeming to refer to some sort of duty on the part of the brothers to act as sureties for their father.[178] An explanation for leniency in equity towards sureties might be that debtor's prison for someone who had not incurred the debts themselves, and thus effectively being subjected to a criminal procedure, would have been

[172] See below.
[173] *Nicholls v Tryon*, 9 November 1620 C 33/139 f. 525 [IMG_0519] at f. 525v [IMG_0519a].
[174] ibid.
[175] ibid.
[176] Muldrew (n 119) 160. Waddilove noted in relation to mortgages that even when the surety was the co-principal, equity and society only understood the surety's liability as secondary. Waddilove, 'Mortgages' (n 129) 96.
[177] Muldrew (n 119) 160.
[178] *Tyffin v Hart*, 20 April 1619 C 33/135 f. 997 [IMG_2169] at f. 998v [IMG_2170].

considered too harsh by the Court of Chancery, though as indicated above, the court ended its lenient practice towards sureties in the Standing Orders of 31 October 1620.[179]

3. Creditors

If a debtor became insolvent, there were not enough assets to cover all the debts. If there were no legal regulation, creditors would have to make sure that they recovered their debts before the other creditors did and the assets ran out. As seen above, the main objective of bankruptcy law was debt relief for the creditors in the sense of enabling them to recover a pro-rata share of their debts, making sure that as many creditors as possible would get some satisfaction of their debts.[180] The equal distribution of assets in a bankruptcy procedure made sure that creditors ranked equally did not have to compete with each other.[181] Instead, they took a reduction in their debts, in return for the guarantee of receiving part payment.[182] The survey shows that through debt settlements the Court of Chancery achieved the same purpose. In doing so the Court of Chancery took the conduct and circumstances of the creditors into account.[183] The Court of Chancery applied rules of priority, prioritising secured creditors, while also considering the financial position of the most vulnerable in society, such as women and orphans.[184]

3.1. Creditors in general

In principle creditors could come from all classes of society, including women who were *femes sole* or widows, as long as they had provided the insolvent debtor with credit.[185] The survey shows

[179] The Standing Orders set out that no proceeding against a surety could be stayed. See chapter 3.
[180] See chapter 1.
[181] ibid.
[182] ibid. For example, in *Bowland v Wynne* (1618), a refractory creditor was eventually willing to a accept a reduction in his debts, because it meant that he would be paid first. *Bowland v Wynne*, 12 November 1618 C 33/135 f. 167a [IMG_1332a]. See especially the master's report, *Bowland v Wynne* by James Hussey, 15 November 1618 C 38/30.
[183] See below.
[184] See below.
[185] The survey shows no examples of creditors from the nobility, but mainly from the 'middling sort' and the gentry. However, it is very likely that members of the nobility would also act as creditors.

examples of creditors who were merchants, gentry and women.[186] Sometimes the creditors were represented by an agent, a factor or a servant.[187] The Court of Chancery generally dealt with creditors with a good financial background. However, on occasion creditors experienced financial difficulty themselves.[188]

The survey shows examples of cases in which the number of creditors in conformity settlements ranged between 15 and over 130 creditors.[189] This seems to suggest that the Court of Chancery had no specific rules on a minimum or maximum number of creditors for a debt settlement.[190] The number of creditors was similar for each type of debt settlement and did not change over time. In the earlier cases, *Johnson v Wolmer* (1551), *Lavington v Maton* (1595) *Leecheland v James* (1596) and *Rudd v Gamsall* (1602) the insolvent debtor had respectively 30, 22, 60 and 61 creditors.[191] Among later cases, in *Peers v Ward* (1614) the insolvent debtor had a minimum of 28 creditors; *Bowland v Wynne* (1618) counted 34 creditors; *Bate v Squire* (1618) 15; *Organ v Cambell* (1618) 21; *Palmer v Rudd* (1619) 32; *Tyffin v Hart* (1619) 78; *Smith v Ashton* (1620) 60; *Grant v Cotton* (1620) 26;

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[186] E.g. *Johnson v Wolmer,* 3 November 1551 C 78/6/28 m. 13 [IMG_0027]; *Mildmay v Wentworth (Sir Wentworth's Case)*, 15 July 1613 C 33/123 f. 907 [IMG_0919]; *Johnson v Endicott*, 13 November 1618 C 33/135 f. 165 [IMG_1330]. The survey shows that a certain Elizabeth de la Fontaine was a common female creditor of insolvent debtors in the period. She was a creditor in *Nicholls v Tryon*, 9 November 1620 C 33/139 f. 525v [IMG_0519a]; *Tiffyn v Creditores* by 'Ashedale (sic) of debts' C 38/33 Hilary 1619; *Tyffin v Creditores* "schedule of debts" C 38/37 Trinity 1619; *Tyffin v Delafontaine*, 19 October 1626 C 33/151 f. 58v [IMG_0063a]. However, the decisions in the survey do not often give extensive details of the creditors, apart from their names. Elizabeth de la Fontaine was the widow of Erasmus de la Fontaine, a Hugenot refugee who had settled as a merchant in London. See for some information about him pages 75n1, 77 and 82 at the following website: <https://www.le.ac.uk/lahs/downloads/2014/2014%20(88)%2075-84%20Fox.pdf> accessed 18 December 2020. Elizabeth de la Fontaine appears as his widow and executrix in Chancery litigation. In some of the cases Elizabeth may have been involved as her husband's executrix rather than in her own right, though it is possible that she carried on his business after his death and lent money on her own behalf.

[187] E.g. *Sandys v Gresham*, 28 November 1589 C 33/80 f. 271 [IMG_0234] at 274v [IMG_1107]. Some of the many creditors in *Sandys v Gresham* (1589) were represented by agents, factors and servants.

[188] *Smith v Ashton* by Thomas Middleton and Thomas Bennett, 19 June 1620 C 38/40. The financial difficulty of creditors could occur if these creditors were part of a larger credit network. Creditors often also owed money to others, and without payment, they could not pay their own creditors.

[189] It is not always clear from the entries in the survey how many creditors an insolvent debtor had.

[190] It seems to have been in the nature of conformity and other insolvency settlements that the number of creditors was greater than one or just a few. Nevertheless, the Court of Chancery also dealt with debt settlements of deceased estates and settlements between two individuals. E.g. *Fowkes v Banning*, 10 November 1591 C 33/83 f. 128 [IMG_0120]; *Greene v Reade*, 28 June 1596 C 78/87/9 [IMG_0045]. However, these settlements have been left out of the survey, because of time limitations and because they are less relevant for the narrative of early modern bankruptcy and insolvency.

[191] *Johnson v Wolmer,* 3 November 1551 C 78/6/28 m. 13 [IMG_0027]; *Lavington v Maton*, 7 July 1595 C 78/ 115/6 m. 18 [IMG_0036]; *Leecheland v James,* 15 November 1596 C 33/91 f. 444v [IMG_4773a]; *Rudd v Gamsall*, 23 January 1602 C 33/103 f. 288v [IMG_2501].

and in *Sir John Wentworth's Case* (1620) there were around 80 creditors.[192] Some cases in the survey only set out the number of conformable creditors. For example, *Johnson v Endicott* (1619) counted 60 conformable creditors, *Brooke (or Little) v Goode* (1619) counted 40 and *Mitchell v Woodward* (1619) 130.[193] On occasion, the survey shows the number of conformable creditors who subscribed to a petition for debt relief with the debtor. In *Mitchell v Wilcocks* (1618) 100 conformable creditors exhibited their petition on behalf of the insolvent debtor.[194] Finally, in *Shippe and Underhill* (1620) the insolvent debtor, together with 54 of his conformable creditors, petitioned the Court of Chancery.[195]

The Court of Chancery would generally categorise creditors as conformable or unconformable. Conformable creditors were the main players in the settlement proceedings. They often initiated the composition, with or without the insolvent debtor. The more creditors who agreed to a composition, the more likely it was that the Court of Chancery would conform the refractory ones. The survey shows that overall, conformable creditors were generally unsecured creditors or creditors who were owed small amounts of money. Secured creditors were often refractory creditors, and had little incentive to conform, because they were able to rely upon their securities at common law.

The survey shows various other examples of financial motivations for creditors to conform. One reason was that a settlement could save creditors the costs of an insolvency procedure. For example, in *Johnson v Wolmer* (1551) all the creditors, even the secured ones, had decided to agree

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[192] *Peers v Ward*, 21 October 1614 C 33/127 f. 49 [IMG_0051]; *Bowland v Wynne,* 12 November 1618 C 33/135 f. 167a [IMG_1332a]; *Bate v Squire,* 28 November 1618 C 33/135 f. 133a [IMG_1299a]; *Organ v Cambell,* 27 October 1618 C 33/135 f. 133 [IMG_1299]; *Palmer v Rudd,* 19 January 1618 C 33/135 f. 422a [IMG] 1592a]; *Tyffin v Hart,* 12 November 1618 C 33/135 f. 159v [IMG 1324a]; *Smith v Ashton*, 17 October 1620 C 33/139 f. 359 [IMG_0353]; *Grant v Cotton*, 15 November 1620 C 33/139 f. 489 [IMG_0483]. The entry mentioning the number of creditors in *Sir John Wentworth's Case* (1620) can be found at *Mildmay v Wentworth (Sir John Wentworth's Case)*, 6 November 1613 C 33/125 f. 148 [IMG_0151].

[193] *Johnson v Endicott*, 13 November 1618 C 33/135 f. 165 [IMG_1330]. The number of creditors is set out in the master's report. See, *Johnson v Endicott* by Richard Moore, 7 August 1618 C 38/32. *Brooke (or Little) v Goode*, 23 November 1619 C 33/137 f. 528 [IMG_0537]; *Mitchell v Woodward* by Thomas Ridley, 4 June 1619 C 38/30.

[194] *Mitchell v Wilcocks*, 15 October 1618 C 33/135 f. 42a [IMG_1206a].

[195] *Shippe v Underhill*, 17 October 1620 C 33/139 f. 47v [IMG_0052a].

amongst each other to a composition with a view to 'avoiding of further travail, costs and charges'.[196] *Palmer v Rudd* (1619) illustrates that some creditors conformed if they thought that the estate of the insolvent debtor would decay even further in the long run.[197] Occasionally, such as in *Smith v Ashton* (1620), creditors conformed because they wanted their own debts paid to them. As 'poor men' the creditors possibly needed immediate repayment in order to pay their own debts.[198] The commissioners stated in a report that they

have been moved by divers of the conformable creditors who are clothiers and poor men that they might in the mean [time] have their part delivered [to] them… We do therefore with in [*sic*] regard of their poor estates & their willingness to accept the same that those who will take their rateable part should in the meantime have the same forthwith delivered to them & not be hindered by the rest.[199]

Sometimes creditors would agree to a composition in the form of a delayed payment, because the insolvent debtor did not have sufficient assets to pay the debtors immediately. *Middleton v Holt* (1620) illustrates that the creditors sometimes had enough confidence to release an insolvent debtor from prison and give more time to repay the debts.[200] The creditors in *Middleton v Holt* released Middleton from debtor's prison and gave him a year to repay his debts. That way, Middleton had enough time to sell his land and repay his creditors.[201]

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[196] *Johnson v Wolmer,* 3 November 1551 C 78/6/28 m. 13 [IMG_0027]. The passage says literally 'avoiding of further travell [probably meaning travail], costs and charges'.
[197] *Palmer v Rudd,* 19 January 1618 C 33/135 f. 422a [IMG_1592a]. In the report in *Palmer v Rudd* (1619) by Thomas Bernett and Lord Mayor Edward Barkham it is stated that various attempts for a settlement were made and that the estate of Susan Palmer was worth less than at first offer and would be weakened daily if no composition was made. It is unclear from the report why the estate would be weakened daily. In this case it seems most plausible that a debt settlement and quick sale of the property of the insolvent debtor meant that the creditors were able to get the best market price for the assets of the insolvent debtor. *Palmer v Creditors* by Thomas Bernett and Edward Barkham, 22 November 1620 C 38/40.
[198] *Smith v Ashton* by Thomas Middleton and Thomas Bennett, 19 June 1620 C 38/40.
[199] ibid.
[200] *Middleton v Holt* by Haywarde, 15 August 1620 C 38/39.
[201] ibid. The confidence of the creditors was strengthened because Middleton had already repaid a third of his debts, based on the custom of London. See above.

On occasion, the Court of Chancery took the conduct of creditors into account in its final decision. In *Sandys v Gresham* (1589) Hatton LC made a distinction between honest and dishonest creditors.[202] Hatton LC considered that 'many of the said plaintiff's [honest] creditors have made very reasonable and charitable compositions'.[203] Hatton LC ordered that Edwyn Sandys repay these honest creditors, such as the linen draper and the grocer, in full.[204] In contrast, he cancelled all the security interests and bonds of the 'divers greedy and covetous persons' who had 'left the lawful and honest trade of merchandise and other due and lawful means of gaining seeking suddenly to be made rich by lending of money by shift of wares at extreme rates and other subtle and craft ways and means' by taking advantage of 'ignorant young gentlemen and especially such as are heirs apparent to their ancestors and like[ly] to inherit their lands'.[205]

3.2. Creditors and priorities

The survey shows that the Court of Chancery distinguished between unsecured and secured creditors, but in practice this was largely irrelevant because most creditors were secured, having bonds, and these shared pro rata. In the few cases with higher forms of security rules of priority appear to have been applied, giving priority to those with mortgages, statutes and recognizances, but also to trustees of some trusts and settlements for women and orphans.[206] These specific trusts and settlements are set out in more detail below.

a.) Unsecured creditors (creditors with informal debts or with bonds)

Unsecured creditors were creditors without any security. The Court of Chancery would rank these unsecured creditors all equally in a debt settlement, and all these creditors would receive a pro rata

[202] *Sandys v Gresham*, 28 November 1589 C 33/80 f. 271 [IMG_0234].
[203] ibid at f. 273 [IMG_0236].
[204] ibid at ff. 275, 277v, 278 [IMG_0238], [IMG_1110], [0241].
[205] ibid ff. 271 at 272, 277v [IMG_1110].
[206] In *Tyffin v Hart* (1619) Bacon LC held that the distinction between secured creditors and creditors given a pro-rata share was based on the 'nature and quality of the persons'. *Tyffin v Hart*, 20 April 1619 C 33/135 f. 997 [IMG_2169] at f. 998v [IMG_2170a]. It is not clear from all the cases in what form the debts of the insolvent debtor were entered into.

share of the assets of the insolvent debtor, once the creditors with higher priority had been satisfied. The survey shows that unsecured creditors were generally more willing to agree to a composition than secured creditors. They would benefit the most from a pro rata reduction in their debts, because without a composition they would risk having no debt relief at all.

The survey shows that the Court of Chancery treated secured creditors merely with specialties (bonds) as unsecured creditors.[207] It seems that in the period most of the debts of insolvent debtors were incurred on bonds.[208] They provided a quick and certain route to judgment at common law, but in a debt settlement in the Court of Chancery they seem to have given the creditors no security.[209] For example, *Johnson v Wolmer* (1551) and *Tyffin v Hart* (1619) illustrate that creditors with specialties were ranked on an equal footing with unsecured creditors.[210]

b.) Secured creditors

The survey seems to suggest that the mortgage was the highest in the hierarchy of security interests, followed by a statute merchant or staple, then the recognizance.[211] The overall hierarchy of securities observed in the survey is consistent with Waddilove's conclusions in his work on mortgages.[212] However, the survey suggests that the Court of Chancery only recognised mortgages, statutes and recognizances as securities in a debt settlement.[213] The survey shows that the Chancery aimed to give secured creditors of these types full satisfaction of their debts.[214] The survey also

[207] *Palmer v Rudd* (1620) shows that a distinction can be made between debts on simple contracts and shop books, but it is not clear whether the distinction drawn in that case related to priorities. No other evidence of a distinction being made between simple contract debts and specialty debts has been found in the survey. *Palmer v Rudd (Palmer v creditors)*, 19 January 1619 C 33/135 f. 422a [IMG_1592a]; 27 January 1619 f. 465v [IMG1636a]; 1 February 1619 f. 480 [IMG_1650]; 27 November 1620 by Thomas Bernett and Edward Barkham C 38/40.
[208] This is an observation from the Chancery record.
[209] Waddilove, 'Mortgages' (n 129) 98-99.
[210] *Johnson v Wolmer,* 3 November 1551 C 78/6/28 m. 13 [IMG_0027]; *Tyffin v Hart*, 20 April 1619 C33/135 f. 997v [IMG_1269a].
[211] *Johnson v Wolmer,* 3 November 1551 C 78/6/28 m. 13 [IMG_0027]; *Tyffin v Hart*, 15 May 1618 C 33/135 f. 970 [IMG_2151]; KC4/1/27; *Sandys v Gresham*, 28 November 1589 C 33/80 f. 271 [IMG_0234].
[212] DP Waddilove, 'The "Mendacious" Common Law Mortgage' (2019) 107 (3) *Kentucky Law Journal* 425. Waddilove also added the surety to the hierarchy of the security interests.
[213] See below.
[214] This was generally achieved by delay of payment if the debtor did not have sufficient funds available to repay his secured creditors upfront.

shows that, in addition to the traditional security interests, the Court of Chancery gave priority to trusts or settlements for the livelihood of vulnerable persons, such as orphans and possibly widows.[215] The Court of Chancery treated these trusts or settlements as being in the same position as creditors with security interests.[216]

Bacon LC explicitly set out this point in relation to orphans in *Tyffin v Hart* (1619) when he stated that 'yet with this that there be a distinction of the nature and quality of the persons viz those that are trusted on the behalf of others being orphans & have good security for their money'.[217] The distinction was drawn by the nature and quality of the persons that had lent the money, rather than the type of security used. These persons could subsequently be sub-divided into persons who lent money held upon trust for orphans or where the lender was protected by having good security. The rules of priorities can be clearly observed in *Johnson v Wolmer* (1551).[218] John Johnson, the insolvent clothier, owed £1,031 17s to no fewer than 31 creditors.[219] However, he only had goods of the value of £260. Johnson had three secured creditors. One of these creditors, Kelke, had a statute of £400 to secure a debt of £240. Two other creditors, Barbor and Marten, together had a statute of £300 securing a debt of £203. The remaining creditors, numbering no fewer than 28, were owed £500. The amount of debts meant that Johnson could not pay his creditors back in full, not even the secured creditors.

As a consequence, not only those creditors with informal debts or with bonds had to take a reduction in the debts owed to them, the secured creditors had to accept a cut as well. The creditors with statutes, Kelke, and Barbor together with Marten, were given £179 and £178 respectively for the full satisfaction of their debts.[220] Barbor and Marten were to be paid in a year's time, because

[215] It is not clear from the survey how trusts ranked in comparison to the traditional security interests, because the insolvent debtors in the cases involving trusts did have enough money to repay all the secured creditors. See for a discussion of widows, below.
[216] This applied to all the cases in the survey involving trusts, see further below.
[217] *Tyffin v Hart,* 20 April 1619 C 33/135 f. 997 [IMG_2169] at f. 998v [IMG_2170a].
[218] *Johnson v Wolmer,* 3 November 1551 C 78/6/28 m. 13 [IMG_0027].
[219] ibid.
[220] Kelke was given £115 or more in cloth and £24 in money and cloth before the dividing of the assets. In the settlement, he received a further £40. Barbor and Marten were bound together in one statute.

there were not enough assets to enable them to be paid immediately.[221] The other creditors, of whom some did have specialties and others did not, were all treated in the same way. They were required to 'charitably [divide] amongst themselves the sum of one hundred pounds being residue of the goods and chattels of the said Johnson as is aforesaid divided amongst them and to every of them portion and portion like according to the quantity of their several sums standing upon their several debts'.[222] Rich LC confirmed the voluntary agreement of the creditors.[223] *Johnson v Wolmer* (1551) thus shows that the Chancery was prepared to give creditors with statutes priority over the other creditors with lower security, at least where the creditors had reached a voluntary settlement to this effect.[224] The creditors with statutes were repaid relatively more in relation to the value of their debts, albeit they were not repaid in full. The creditors with informal debts or with bonds were both put into the pool of general creditors. In the much later case of *Tyffin v Hart* (1619), Bacon LC also dealt with the rules of priorities. In this case, the insolvent debtors did not have sufficient funds to pay the secured creditors immediately. However, the insolvent debtors were still required to repay in full the secured creditors with mortgages and statutes, and the trustees with a marriage portion and orphans' money, via an alternative payment plan.[225] This meant that the secured creditors were paid in full by delay of payment and were to be paid at periodic intervals. However, the creditors with specialties had to accept a reduction in their debts.[226] This shows that the Chancery gave priority to almost all creditors with security interests, but once again creditors with only bonds were given no protection in a debt settlement. These creditors were treated as being unsecured and had to conform to a reduction in their debts.[227]

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[221] *Johnson v Wolmer,* 3 November 1551 C 78/6/28 m. 13 [IMG_0028].
[222] ibid.
[223] See chapter 3.
[224] The settlement in *Johnson v Wolmer* (1551) was voluntary between the creditors, which could call into question whether the rules of priorities applied in that case were standard Chancery practice in the period. The survey seems to suggest that most debt settlements in the period were conformity settlements.
[225] *Tyffin v Hart*, 20 April 1619 C33/135 f. 997v [IMG_1269a].
[226] ibid.
[227] The bond gave quick judgment and execution at law, and seems to have worked effectively outside an insolvency procedure.

Finally, as seen above, the survey shows that creditors had to be *bona fide* and had to give reasonable consideration for their security interest to have priority.[228] This meant that usurious obligations would not get priority. In *Sandys v Gresham* (1589), Hatton LC cancelled a recognizance of £4,000 because it was based on a usurious agreement and not properly enrolled in the record.[229] Similarly, during the seven years *Sir John Wentworth's Case* (1620) was in the Chancery, Ellesmere LC cancelled two statutes because no valuable consideration was given for them.[230]

i.) Women's property in compositions

It seems that female creditors generally had to conform to compositions and were treated like any other creditor. For example, in *Johnson v Endicott* (1618), Elizabeth Endicott was ordered by Bacon LC to conform to the general composition.[231] It seems that she had already been paid by a surety of Johnson.[232] However, in the survey there is evidence of an argument that marriage portions should be excluded from general compositions.[233] Marriage portions were money for the sole and separate use of the wife.[234] *Leecheland v James* (1596) illustrates that litigants in the Court of Chancery tried to exclude that money from general compositions.[235] In this case a father litigated on behalf of his daughter for her portion of £600 that had been granted to her by her late grandfather. Her father was a refractory creditor among a total of 61 creditors and did not want to comply with the general composition, but wanted the money due on a conditional bond, together with reasonable damages and costs, to be paid speedily.[236] While it seems that the insolvent debtor in the case was

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[228] As seen above, valuable consideration was given for the obligation. However, the consideration was considered usurious.
[229] *Sandys v Gresham*, 28 November 1589 C 33/80 f. 277v [IMG_1110]. In addition, Hatton LC cancelled a bill obligatory. See *Sandys v Gresham*, 28 November 1589 C 33/80 f. 271 at f. 277v [IMG_1110].
[230] *Mildmay v Wentworth (Sir John Wentworth's Case)*, 12 December 1613 C 33/125 f. 354 [IMG_0360]. Litigation based on the statutes started in 1613. However, the final decision was not made until 1620.
[231] *Johnson v Endicott,* 13 November 1618 C 33/135 f. 165 [IMG_1330]. The exact legal position of Elizabeth Endicott is unclear. The master's report that mentions Elizabeth Endicott as a defendant is largely destroyed. Therefore, it impossible to tell whether she was a *feme sole*, *feme covert* or widow. *Johnson v Endicott* by Richard Moore, 9 November 1618 C 38/32. The decree of 13 November names John Endicott as the lead defendant.
[232] *Johnson v Endicott* by Richard Moore, 9 November 1618 C 38/32.
[233] *Leecheland v James,* 15 November 1596 C 33/91 f. 444v [IMG_4773a].
[234] See more about marriage portions, Spring (n 89) 54.
[235] *Leecheland v James,* 15 November 1596 C 33/91 f. 444v [IMG_4773a].
[236] ibid at 455 [IMG_4774].

awarded an injunction for stay of proceedings at common law, it is unclear from the entry whether the Chancery excluded the marriage portion from the composition. Another aspect of how the court responded to women in relation to insolvency, may be illustrated by the master's report of Richard Rich in *Dacombe v Brocke* (1620). This report shows that the Court of Chancery excluded one creditor, a certain Elizabeth Ireland, from the general composition.[237] The composition was made before the Proclamation of 1621, which means that refractory creditors still had to conform, unless it was in 'the nature and quality of the person' to be excluded from it.[238] While Elizabeth Ireland was a woman, it is unknown whether she was a widow and it is unclear why she was excluded from the composition.

ii.) Orphans' money

There were various conformity cases in the survey dealing with orphans' money. Orphans' money was a way for freemen of cities or boroughs, often merchants, to secure the inheritance for their children.[239] In this period, about a third of children lost a parent before reaching adulthood.[240] The term orphans' money is slightly misleading, as it was used for fatherless children, as well as those who had lost both parents.[241] Orphans' money was an important way to provide for the livelihood of children, especially for the daughter and younger sons in a family, who would not be the heir of their father's estate.[242] Younger sons would often use orphans' money to fund an apprenticeship.[243] The cases of *Tyffin v Hart* (1619), *Tyffin v Capper,* (1620), *Tyffin v Freshwater* (1620) and *Tyffin v Sutton* (1620) seem to indicate that orphans' money was considered to be held on trust

[237] *Dacombe v Brocke*, 25 November 1620 C 33/139 f. 339v [IMG_0333a]; *Dacombe v Brocke* by Richard Riche, 31 May 1620 C 38/40; Appendix on 31 May 1620 C 38/38.
[238] *Tyffin v Hart*, 20 April 1619 C33/135 f. 997v [IMG_1269a].
[239] C Carlton, *The Court of Orphans* (Leicester University Press 1974), Jones, *The Elizabethan Court of Chancery* (n 117) 387-389. See for the Court of Orphans after the Restoration, P Earle, *The making of the English middle Class: Business, society and family life in London 1660-1730* (Methuen 1989). Freemen were members of a city or borough who had full civic rights, such as the right to vote.
[240] Carlton (n 239) 10.
[241] ibid 33.
[242] ibid 10.
[243] ibid 42.

as a portion for the use of the orphan.[244] It seems that debts comprising orphans' money were treated differently to other debts, and could be excluded from general compositions.[245] *Tyffin v Hart* (1619) and *Robinson v Cambell* (1620) show that orphans' money could also be subject to a special repayment plan in a conformity case.[246]

Orphans' money was administered by one of the courts of orphans.[247] Carlton asserts that the Court of Orphans was not a charity, but a part of municipal government.[248] During the late sixteenth and early seventeenth centuries there were 18 local courts of orphans, each representing their own borough and jurisdiction.[249] The courts of London, Bristol and Exeter were the most important and successful local courts of orphans, and each of them had their own customs.[250] The customs of London in relation to orphans' money were recognised by parliament.[251] In London, the Court of Orphans was governed by the lord mayor and the Court of Aldermen.[252] The Court of Chancery exercised jurisdiction when the jurisdiction of a local court of orphans was too narrow.[253] In turn, the Court of Orphans would relieve the Court of Chancery from some of its workload in relation to cases dealing with estates, wills and orphans.[254] Carlton argues that around

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[244] *Tyffin v Capper*, 24 October 1620 C 33/139 f. 98v [IMG_0092a], *Tyffin v Freshwater*, 27 November 1620 C 33/139 f. 417v [IMG_0411a], *Tyffin v Sutton,* 20 November 1620 C33 139 f. 254 [IMG_0247]. However, it seems that *Tyffin v Capper* and *Tyffin Freshwater* deal with the same case under a different name.

[245] *Johnson v Endicott* (1618) also seems to deal with orphans' money. Some of the refractory creditors in the case were orphans. However, it is not completely clear what exactly happened in the case. The master's report by Richard Moore of 7 August 1618 is largely destroyed. It seems that the master concluded that some money should be paid towards the daughters of a creditor, who were orphans. However, it is not clear if this was also the final order. *Johnson v Endicott*, 13 November 1618 C 33/135 f. 165 [IMG_1330]; *Johnson v Endicott* by Richard Moore, 7 August 1618 C 38/32; *Johnson v Endicott* by Richard Moore, 9 November 1618 C 38/32; *Tyffin v Hart*, 20 April 1619 C33/135 f. 997v [IMG_1269a]; *Robinson v Cambell,* 9 November 1620 C 33/139 f. 185v [IMG_0179].

[246] *Tyffin v Hart*, 20 April 1619 C33/135 f. 997v [IMG_1269a]; *Robinson v Cambell,* 9 November 1620 C 33/139 f. 185v [IMG_0179].

[247] Jones, *The Elizabethan Court of Chancery* (n 117) 387-389.

[248] Carlton (n 239) 10.

[249] ibid 23.

[250] ibid 30.

[251] *Chamberlain and Thorps Case* (1588) 1 Leo 130, 74 ER 121.

[252] Jones, *The Elizabethan Court of Chancery* (n 117) 387. See more on the London Court of Orphans, pp. 387-389. The Court of Aldermen consisted of reputable men of London, worth at least £10,000, who were appointed for life. The aldermen could only be removed from office if they were convicted of a felony or were declared bankrupt. Carlton (n 235) 38-39.

[253] Carlton (n 239) 56.

[254] ibid. The local courts of orphans originated in medieval times. Carlton argues that these courts predated the Court of Chancery. Carlton (n 239) 13-22. WJ Jones argues that the lord chancellor always exercised jurisdiction over infants who were not affected by a royal claim. Jones, *The Elizabethan Court of Chancery* (n 117) 384.

1620 the London Court of Orphans was the safest place in the country to deposit an inheritance.[255] This in stark contrast with the Court of Orphans after the Restoration, when this court effectively became a risky financial institution.[256]

Carlton explains that in order to secure orphans' money, the executor of a deceased freeman father would enter into a recognizance with the chamberlain and produce an inventory of the dead man's personal estate within a couple of months of the father's death.[257] Subsequently, the common crier was responsible for making an accurate and honest inventory of the estate.[258] Usually four appraisers made two copies of the inventory, giving one to the executor and one to the Court of Orphans.[259] The custom of London prescribed that the recognizance also had to be enrolled in the Prerogative Court of Canterbury.[260] In the recognizance the executor or his sureties became bound to the chamberlain of the city or borough to pay the orphans' money. Reported cases show that not all sureties and executors were happy to honour this obligation.[261] In order to do the most justice to the orphans, almost every local court of orphans had an annual calling of recognizances to see whether the sureties were still financially viable.[262]

The function of the Court of Orphans was to ensure that the personal estate of a freeman of the city or borough would be equally divided between the children.[263] Carlton argues that a third of the personal estate would be available for orphans' money.[264] If an orphan died before the age of 21, the share of the deceased would be divided between the surviving siblings.[265] According to

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[255] Carlton (n 239) 82.
[256] Carlton and Earle argue that, probably because of the absence of banks, people could borrow money against the orphans' funds. The local courts of orphans, and the London court in particular, became effectively financial institutions. Both scholars argue that the London Court of Orphans played a large part in the financial crisis of the City of London at the end of the seventeenth century. Carlton (n 239) 90-102, Earle (n 239) 392 n25.
[257] Carlton (n 239) 42-43.
[258] ibid 43.
[259] ibid.
[260] *Luch's Case* (1618) Hob 247, 80 ER 393. A prohibition would lie because by the custom of London the jurisdiction over orphans' money was in the mayor and alderman, and could not be taken by an ecclesiastical court or the Court of Requests. See, *The Case of Orphans of London* (1592) 5 Co Rep 73b, 77 ER 165.
[261] *Fulwood's Case* (1590) 4 Co Rep 64, 76 ER 1031, *Byrd v Wilford* (1592) Cro Eliz 464, 78 ER 717.
[262] Carlton (n 239) 53.
[263] ibid 79.
[264] ibid 47-48, 79.
[265] ibid 48.

Carlton, real property was explicitly excluded from the orphans' third.[266] These portions had to be paid out when the orphan reached adulthood at the age of 21.[267] The portion of a female orphan became available sooner, if she was married before she came of age.[268] If the executors or sureties refused to exhibit true inventories and become bound to the chamberlain, they could be committed to the Fleet.[269] It was also lawful to imprison the executor until sureties were found.[270]

The cases in the survey show some interesting rules in relation to orphans' money and insolvency. Firstly, creditors of an insolvent debtor could be excluded from the general composition if they held money on trust for an orphan. In that case they could qualify for an orphanage rate. The debtor would be required to repay the creditor in full, contrary to the usual practice in an insolvency, where the creditors took a rateable cut their entitlements. The repayment of orphans' money might take place by means of a special repayment plan with repayment instalments lasting for several years. This approach seems to have been taken in *Tyffin v Hart* (see above) and *Robinson v Cambell* (1620) (see below).

Tyffin v Capper (1620), *Tyffin v Freshwater* (1620) and *Tyffin v Sutton* (1620) are other cases in the sample dealing with orphans' money.[271] They were all related to the case of *Tyffin v Hart*.[272] As set out above, *Tyffin v Hart* was a leading conformity case in which the Tyffin brothers, who acted as sureties for their father Robert, were discharged of their debts.[273] In this case the Chancery had ordered and decreed that the conformable creditors should be paid rateably. However, if the

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[266] Carlton (n 239) 47. See also *Concerning Orphans Portions* (1616) Calthrop, 80 ER 670.
[267] *Luch's Case* (1618) Hob 247, 80 ER 393, also reported as *Lashe's* Case 132, 124 ER 400. There is a possibility that *Concerning Orphans Portions* (1616) Caltrop, 80 ER 670 and *Luch's Case* (1618) Hob 247, 80 ER 393 are the same case.
[268] ibid.
[269] *Luch's Case* (1618) Hob 247, 80 ER 393; *George Andrews* (1619) Hut 30, 123 ER 1078. Carlton (n 239) 27.
[270] *Concerning Orphans Portions* (1616) Calthrop, 80 ER 670.
[271] *Tyffin v Capper*, 24 October 1620 C 33/139 f. 98v [IMG_0092a], *Tyffin v Freshwater*, 27 November 1620 C 33/139 f. 417v [IMG_0411a], *Tyffin v Sutton*, 20 November 1620 C33 139 f. 254 [IMG_0247]. However, it seems that *Tyffin v Capper* and *Tyffin Freshwater* are the same case under different names.
[272] *Tyffin v Hart*, 22 April 1618 C 33/133 f. 839 [IMG_0844]; 16 May 1618 C 33/133 f. 933 [IMG_0942]; 20 June 1618 C 33/133 f. 1229 [IMG_1241a]; 26 October 1618 C 33/135 f. 111 [IMG_1277]; 29 October 1618 C 33/135 f. 115 [IMG_1281]; 12 November 1618 C 33/135 f. 159v [IMG_1324a]; 5 December 1618 C 33/135 f. 301v [IMG_1469a]; 16 January 1619 C 33/135 f. 417 [IMG_1586]; 22 February 1619 C 33/135 [IMG_1869a]; 20 April 1619 C 33/135 f. 997 [IMG_2169]; 15 May 1619; C 33/135 f. 979 [IMG_2151].
[273] ibid.

unconformable creditors could prove that the money they lent was genuinely the money of orphans, then they would not have to compound to the same extent.[274] It was ordered that if it could be established that the creditors had lent orphans' money to the Tyffins, the brothers would be required to repay the principal debt to the creditors in question in full in four half-yearly instalments within two years. On this basis, Capper, Freshwater and Sutton did not wish to conform to the composition, arguing that they should get the orphanage rate, because the money they had lent was orphans' money.

The schedule of debts in the masters' reports shows that Capper and Sutton had lent 'money on use' to Robert Tyffin.[275] Thomas Tyffin and Haward were sureties in Capper's bond, and Thomas Tyffin and John Tyffin were sureties in the bond with Sutton. *Tyffin v Capper* shows a complicated legal construction, in which the defendant, Capper, essentially argued that the money he had lent to the Tyffins was actually the money of his niece Penelope Brampton, an orphan. Subsequently, Capper died, and the second husband of his wife, Freshwater, became the new creditor and claimant in the litigation. It was held that Penelope was an orphan at the time of the decree of *Tyffin v Hart* and that the money lent was actually orphans' money. Therefore, the Chancery ordered that the Tyffins should pay the money decreed, with damages, to Mr Freshwater 'to the use of Penelope'. The wording 'to the use of Penelope' suggests that the orphans' money was to be held by Freshwater as trustee for the orphan.

However, after *Tyffin v Capper* it was established in *Tyffin v Freshwater* that the same Capper had actually lent the money in his own name three years before.[276] It was established that he had taken the interest on the loan and had taken a bond in his own name for payment of the money he had lent to his own use, not mentioning it was orphans' money. It was alleged that Sutton had never

[274] *Tyffin v Capper,* 24 October 1620 C 33/139 f. 98v [IMG_0092a].
[275] *Tiffyn v Creditores* by 'Ashedale (sic) of debts' C 38/33 Hilary 1619; *Tyffin v Creditores* "schedule of debts" C 38/37 Trinity 1619. In this context 'money on use' probably means money at interest, although, the money was claimed to be held on trust for the benefit of orphans.
[276] *Tyffin v Freshwater*, 27 November 1620 C 33/139 f. 417v [IMG_0411a].

mentioned the money to be orphans' money until now that he had found by the decree that there was an advantage to be taken thereby.[277] It was proven that Sutton had made the loan in his own name, when he was 40 years old and that this money was not orphans' money.[278] However, Freshwater insisted that the money lent by him was orphans' money. It was therefore ordered that Freshwater should conform to the *Tyffin v Hart* decree, unless he could prove by witnesses, and not merely by the affidavit which he had provided, that the money was orphans' money. The court suspended its final decree until Sir Robert Riche, one of the masters of the court, had examined the matter.[279] However, Riche found that the general course of proceeding of a bill of conformity had been followed.[280] He argued that divers certificates had been made upon several references, including two from the king and two others from a committee. In addition, the matter had been heard by the lord chancellor.[281] At no point had the money been certified or made to appear to any of the committees to be money belonging to orphans.[282] He found that that there was no sufficient reason to certify the money as orphans' money, and that no further examination of witnesses was necessary.[283]

Robinson v Cambell (1620) is another conformity case and likewise seems to illustrate that orphans' money could be subject to a special repayment plan.[284] Unfortunately, most of the details of the facts which gave rise to *Robinson v Cambell* are unknown. It seems that *Robinson v Cambell* is not the main conformity case, but associated litigation between Robinson, the insolvent debtor and Cambell, one of the refractory creditors. Robinson had lent £105 to Cambell nine years before as the executor of Nicholas Walmesley. Cambell, the defendant, was one of five orphans of Nicholas

[277] ibid.
[278] *Tyffin v Sutton* 20 November 1620 C33/139 f. 254 [IMG_0247]; *Tyffin v Sutton* by Riche, [date illegible] November 1620 C 38/40 Michaelmas 1620 O-Z.
[279] ibid.
[280] *Tyffin v Freshwater* by Riche, 27 January 1621 C 38/40 Hilary 1621 O-Z.
[281] ibid.
[282] ibid.
[283] ibid.
[284] *Robinson v Cambell,* 9 November 1620 C 33/139 f. 185v [IMG_0179a].

Walmesley.[285] Before exhibiting the bill of conformity, Robinson was arrested for debt. In the absence of Cambell, Robinson offered to the person who arrested him that in return for a discharge of his debt, he would give good security to pay £100 to the orphans over five years, by paying £20 yearly.[286] Cambell was initially willing to accept this offer, because he did not want to bring the case to the court since Robinson had a reputation for being litigious and troublesome. However, Robinson, relying on a bill of conformity, refused to comply with his own offer. Most of the orphans were within age (infants) and had been forced to spend their own estates in defence of the suit. The defendant complied with the order of the court and accepted the £100 over five years, provided that the plaintiff would recompense the orphans for their charges spent in the suit. The court found the arrangement reasonable and ordered the plaintiff to conform to the order.

These cases suggest that the Chancery adopted a special treatment of orphans' money in relation to insolvency, and followed a policy of trying to keep the sum of orphans' money intact. The survey shows that orphans would be repaid in full with a special repayment plan. *Robinson v Cambell* is slightly different as the orphans' money was not completely restored in its original form, because Robinson was paying back £100 instead of the £105 he had lent.[287] However, the plaintiff was the beneficiary of the orphans' money and was willing to accept a little less himself.

4. Majority control

The survey shows that the Court of Chancery often applied the idea of majority control in debt settlements of insolvent debtors, and did so by enforcing a composition on the minority.[288] The reported case of *Ramsey v Brabson* (1583-84) is the earliest example of majority control known in

[285] The orphan does not have the same name as his father. There is no explanation for this in the entry. It might be possible that Cambell was adopted and changed his name by the time of the litigation.
[286] It is unclear why Robinson did not offer to pay the full amount of £105.
[287] *Robinson v Cambell,* 9 November 1620 C33/139 f. 185v-186 [IMG_0179a-0180].
[288] See above for examples of conformity cases.

the literature.[289] The case deals with debt, but it is not clear whether it involved a debt settlement.[290] As seen above, the Court of Chancery applied the practice of majority control in the various conformity settlements. However, specific rules and legislation in relation to majority control were absent until 1620, when the Court of Chancery introduced specific rules in its Standing Orders.[291] The survey shows a lack of details about the number of conformable and refractory creditors and the respective values of the debts owed in most of the decisions. Therefore, the details of the Chancery practice in relation to majority control remain largely unknown. From the limited information found in the survey, it seems most likely that the Court of Chancery applied majority control based on the value and nature of the debts owed to the creditor, rather than on the number of creditors.

4.1. Majority control: rules and legislation

Few legislative provisions in relation to majority control existed in the period. The Court of Chancery used its discretion 'upon hearing what had been alleged on both sides'.[292] It was only with the introduction the Standing Orders of the High Court of Chancery of 31 October 1620 that the Court of Chancery applied rules in relation to conformity settlements and majority control.[293] The Orders prescribed that conforming creditors had to represent 'at least to [a] full three parts in four to be divided of total the debt'.[294] In addition, 'there shall be always before any order granted a reference made to some of the masters of the court or other commissioners upon due examination to certify the court what the debts are and of what nature and upon what security'.[295]

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[289] I Treiman, 'Majority control in compositions: Its historical origins and development' (1938) 23 (5) *Virginia Law Review;* 518-519 and in FJJ Cadwallader, 'In pursuit of the merchant debtor and bankrupt: 1066-1732. Vol II' (Doctoral thesis, University of London 1965) 500.
[290] The report only says that with a royal protection 'they [the debtors seeking the royal protection] might be better able to pay their debts to all their creditors'. The refractory creditors were forced by the Chancery to conform to the injunction and the royal protection. *Ramsey v Brabson* (1583-84) Choyce Case Chancery 174, 21 ER 101.
[291] 'Additional rules for the better governing of the Court of Chancery and Great Seal. Published in Open Court 31 October 1620', GW Sanders, *Orders of the High Court of Chancery and Statutes of the Realm relating to Chancery. From the earliest period to the present time.* vol. I, part I (Maxwell & Sons 1845) 129. See also chapter 3.
[292] ibid.
[293] ibid.
[294] ibid.
[295] ibid.

This included 'information and allegations of such creditors as have not compounded', that is, the refractory creditors.[296]

As seen above, the Proclamation against bills of conformity in 1621 and the subsequent legislative reform in the Bankrupts Act 1624 prohibited majority control.[297] As a consequence, the Chancery had to resort to general contract law. In practice this meant that the insolvent debtor had to make a separate debt settlement with each individual creditor. The survey shows that the court used mediation to encourage creditors to join a composition, but that refractory creditors could also be omitted from a composition all together.[298]

Two centuries after the prohibition on majority control in the Bankrupts Act 1624, majority control was reintroduced into English law by statute. Treiman has explained that two unsuccessful attempts to reintroduce majority control by the English legislature were made in 1679 and 1698.[299] Finally, majority control became an established principle in bankruptcy law in the Bankrupts (England) Act 1825.[300] The operation of majority control in that Act required that 90% of the creditors in number and value of debts of a bankrupt debtor had to agree to a composition.[301]

4.2. Majority control in the Chancery record

As seen above, the survey shows that cases in which all of the creditors agreed to a composition, such as *Johnson v Wolmer* (1551) and *Haddon v Foulds* (1622), were very rare in the period.[302] If

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[296] ibid 129.
[297] 'Proclamation of James the first against bills of conformity' in Sanders (n 291) 1044; Bankrupts Act 1624 (21 Jac I, c. 19), s. 2.
[298] See for example, *Haddon v Foulds*, 16 December 1622 C 33/143 f. 354v [IMG_0357a]; 23 December 1622 C 33/143 f. 344 [IMG_0347]; *Rycroft v Hedd*, 20 November 1627 C 33/153 f. 319 [IMG_2055].
[299] See for a more extensive account on these failed attempts Treiman, 'majority control' (n 289) 521-523. Treiman cites the Calendar of the State Papers, Charles II nrs. 135 & 144 in order to show that the Bankrupts bill of 1679 was unsuccessful and was never introduced into English law. The bankruptcy statute of 1696 was repealed within a year. See, 8-9 Will II, c. 18 and 9-10 Will III, c. 29, Preamble. See also J Sgard, 'Courts at work: bankruptcy statutes, majority rule and private contracting in England (17th-18th century)' (2016) 44 *Journal of Comparative Economics* 453-454.
[300] Bankrupts (England) Act 1825 (6 Geo. 4 c. 16), s. 133.
[301] ibid.
[302] *Johnson v Wolmer* (1551) and *Haddon v Foulds* (1622) were the only cases found in the survey. In *Johnson v Wolmer* (1551) the Court of Chancery explicitly set out that the debt settlement was ordered by Lord Chancellor Rich 'by the assent as well of the said Johnson as by the agreement of all the said creditors'. *Johnson v Wolmer*, 3 November 1551 C 78/6/28 [IMG_0027].

creditors could not unanimously agree to a composition, majority control could be a useful way to reach compositions between the insolvent debtor and his or her creditors. The survey shows over 50 cases of compositions of insolvent debtors using majority control to conform refractory creditors.[303] This shows that majority control was not uncommon in the period.

However, the exact Chancery practice in relation to majority control in the period remains largely unknown. Almost all of the cases in the survey dealing with settlements of insolvent debtors do not give enough information about the number of conformable and refractory creditors and the values of the debts owed to them to see the exact reasoning of the court in applying majority control.[304] The lack of information can be observed in the entries in the decree and order books, as well as in the masters' reports accompanying the relevant cases. Therefore, it is impossible to give the precise details of the Chancery practice in relation to majority control and what triggered decisions to enforce conformity settlements.[305] Only two cases in the survey give specifics about the number of creditors in relation to the debts owed to them, *Tyffin v Hart* (1619) and *Grant v Cotton* (1620).[306] The masters' reports of *Tyffin v Hart* (1619) give extensive schedules of debts owed to the various creditors of the Tyffin brothers.[307] *Tyffin v Hart* counted 54 conformable creditors and 24 refractory ones.[308] According to the schedules of debts in the masters' reports, the debts were respectively £7,528 (77% of the total amount of debts) for the conformable creditors, and £2,230 (23% of the total amount of debts) for the refractory creditors, amounting to £9,758 (100%) in total.[309] At the time of *Tyffin* the majority control rules in the Standing Orders were not yet in force, but in fact the conformable creditors represented more than 75% of the debts. This meant

[303] *Johnson v Wolmer* (1551) and *Haddon v Foulds* (1622) were voluntary settlements.
[304] The only cases found in the survey that give the full financial information are *Tyffin v Hart* (1619) and *Grant v Cotton* (1620). See for more information below.
[305] Treiman has set out similar problems in relation to bills of protection, in that it is unclear in the early cases in the Court of Chancery what the court's reasoning was in relation to bills of protection. Treiman (n 289) 516.
[306] *Tyffin v Hart* (1619) (n 123); *Grant v Cotton*, 15 November 1620 C 33/139 f. 489 [IMG_0483].
[307] *Tyffin v Creditores* by Fynch and Thelwall 17 February 1619 C 38/33. The schedules of debts of the conformable and unconformable creditors have survived, but are partly illegible. *Tiffin v Creditores*, 'Ashedale [sic] of debts' C 38/33.
[308] ibid.
[309] ibid.

that they would have been within the rules of the Standing Orders of the Court of Chancery had those rules been in force.

Tyffin v Hart suggests that the proportion of the debts owed to conforming creditors, in this case 77%, was important for Bacon LC in conforming the minority of refractory creditors. However, in *Tyffin* the 'nature' of the debts seems to have just been as important. The refractory creditors claimed that their debts were different from those of the conformable creditors, because some were entered into upon specialties and others were orphans' money.[310] The remaining debts had allegedly been incurred mostly for wares and without specialties, which the unconformable creditors argued was the reason why the conformable creditors could not recover their money and would benefit from a composition.[311] The unconformable creditors also argued that they had not consented to the composition.[312] The masters of the Court of Chancery considered all of these claims and examined and certified the debts, and, as seen above, eventually decided that some of the refractory creditors should be excluded from the composition, namely if they had a security interest higher than a bond or orphans' money. The Court of Chancery ordered that these creditors had to be paid back in full. However, most of the creditors only had specialties and had to conform as the other creditors had already done and accept a pro rata payment.

Tyffin v Hart thus seems to suggest that the amounts of the debts owed to the creditors, as well as their 'nature' were the deciding factors in applying the idea of majority control, and that *Tyffin* was not decided 'by the discretion of the court upon hearing what may be alleged on both sides' as the Standing Orders of 1621 suggested.[313] The *Tyffin* case falls entirely within the terms of the Standing Orders that Bacon LC was to introduce a year later. However, the survey shows that *Tyffin* was likely an exception to general practice. The case was decided by Bacon LC in 1619 and it is possible

[310] *Tyffin v Hart*, 20 April 1619 C 33/135 f. 997 [IMG_2169] at 998v [IMG_2170a].
[311] *Tyffin v Hart*, 16 January 1619 C 33/135 f. 417 [IMG_1586].
[312] ibid.
[313] 'Additional rules for the better governing of the Court of Chancery and the Great Seal. Published in open Court 31 October 1620'. See Sanders (n 291) 129. The Standing Orders state that the Court of Chancery gave relief 'by the discretion of the court upon hearing what may be alleged on both sides'.

that it had been a test case for Bacon LC to regulate majority control before he implemented the 'additional rules' of the Standing Orders of 1621.

The second case in the survey dealing with majority control, *Grant v Cotton* (1620), was decided after the introduction of the Standing Orders.[314] In this case Bacon LC adopted a similar approach to that in *Tyffin v Hart* (1619) in relation to majority control. However, in this case all the specific rules set out in the Standing Orders were explicitly applied. Wintour Grant, the insolvent debtor, owed a total of £2,600 to 26 creditors. Of these creditors, 20 were conformable, and together were owed £2,100 (81% of the total amount of debts). The refractory creditors were owed the remaining £500 (19% of the total amount of debts). The case shows no sign that Bacon LC considered any of the debts as being of a special 'nature'. Therefore, since 81% of the total sum was owed to the conformable creditors, *Grant v Cotton* was well within the additional rules in the Standing Orders of the Court of Chancery and thereby complied with the rules of majority of the time.

II. Procedure and practice

The survey shows a recurring practice in relation to procedural issues in the Court of Chancery concerning insolvent debtors. Some of these procedural issues have been described more generally by WJ Jones in his work on the Elizabethan Court of Chancery. Based on specific case law in the period, this section will elaborate on Jones's work and show how the Court of Chancery dealt with insolvency matters from a procedural point of view. This section will consider various procedural issues: (1) how the bill seeking a composition was exhibited in the Court of Chancery; (2) the procedures and evidential rules used; (3) the relevance of mediation in the Court of Chancery in insolvency matters; and (4) the role of commissioners of bankrupts and the masters of the court. It will also consider (5) the various outcomes in debt settlement procedures; (6) the Chancery's interaction with other courts in such cases; and (7) the interplay with the bankruptcy statutes. It goes on to consider (8) the rehearing of cases, and finally (9) sets out the changes in the Chancery

[314] *Grant v Cotton*, 15 November 1620 C 33/139 f. 489 [IMG_0483].

practice in relation to particular events, such as the Standing Orders of 1620 and Proclamation of 1621.

1. References to the Court of Chancery

The survey shows that there were various ways for a bill of complaint or petition of an insolvent debtor to be heard in the Court of Chancery. They could either be exhibited directly in the Chancery or could be referred to the court, by either the monarch or the Privy Council.

a.) Directly exhibited into the Chancery

The survey shows that insolvent debtors often, with or without their conformable creditors, exhibited their bill of complaint or petition for debt relief directly into the Court of Chancery. A bill of complaint was a declaration in writing, setting out the wrong that was supposed to have been done against the plaintiff, the damage sustained and the desired redress.[315] The decree and order books often set out the relevant information from the bills of complaint.[316] For example, it appears from an entry in *Sandys v Gresham* (1589) that the bill referred to a commission, consisting of aldermen, gentlemen and citizens of London, which had previously been granted to investigate the evidence in relation to the debts of the plaintiff.[317]

The limited number of cases in the survey decided during the reigns of King Edward VI and Queen Elizabeth I shows that the bills in *Johnson v Wolmer* (1551), *Sandys v Gresham* (1589), *Ashby v Richardson* (1597), *Warren v Eldrington* (1601), *Rudd v Gamsall* (1602) were all directly exhibited in the Court of Chancery by the plaintiffs.[318] None of these cases contain any mention of royal involvement.[319] Based on this limited sample of cases, it seems, at least, that Edward VI and

[315] Jones, *The Elizabethan Court of Chancery* (n 117) 191.
[316] The bills of complaint in the cases found in the survey have been searched for in The National Archives. However, the bills of complaint were of very limited use. The pleadings of *Bate v Squire* (1618) C2/Chas I/B170/78 were the only ones that have survived, but gave no more material evidence than the entries in the decree and order books.
[317] *Sandys v Gresham*, 28 November 1589 C 33/80 f. 271 [IMG_0234]. See more about the investigation by commissioners below.
[318] The reign of Queen Mary falls outside the scope of the survey.
[319] *Ashby v Richardson* (1597), 15 April 1597 C 33/91 f. 770v [IMG_5094]; *Rudd v Gamsall*, 23 January 1602 C 33/103 f. 288v [IMG_2501]

Elizabeth I did not frequently initiate or interfere with litigation in the Court of Chancery in relation to these matters. This drastically changed during the reign of James I, where royal interference became the norm.

b.) Referred to the Court of Chancery by the king

During the reign of King James I it was common for insolvent debtors to petition the king for debt relief. In fact, this was standard procedure in a bill of conformity case.[320] The survey shows that upon receiving the petition, James I would generally refer the case to the lord chancellor or lord keeper, who would deal with the petition in the Court of Chancery.[321] *Tyffin v Hart* (1619) seems to suggest that if King James I interfered in the conformity procedure, which was thus strengthened 'by the gracious recommendation of his Majesty and the power and authority of this court', this would have a positive effect on the outcome of the case.[322] The survey shows that it was common that the lord chancellor or lord keeper would immediately refer the case to a commission of bankrupts or similar committee to deal with factual evidence concerning insolvent debtors. For example, in *Ashenhurst v Bartlett* (1623), the plaintiff Ashenhurst had petitioned the king, who referred the case to Lord Keeper Williams, who by his letters referred the case to Sir Francis Needham, Nicholas Brown and Ralph Bristow, who acted as commissioners of bankrupts.[323] *Tyffin v Hart* (1619) shows that insolvent debtors could petition the king multiple times during the litigation process. On the first occasion, in March 1618, the Tyffin brothers and their sureties petitioned the king for debt relief.[324] In the petition the brothers asked the king for a composition, effectively to discharge them of their debts.[325] The first bill of complaint was

[320] See chapter 3. The documents containing petitions for debt settlements to the king have not been consistently followed up for the purposes of the thesis. The petition of the Tyffin brothers seems not to have survived. Therefore, it is not certain what was included in the petition.
[321] Petitions were also heard in the Privy Council and Court of Requests. However, both these courts are outside the scope of this thesis.
[322] *Tyffin v Hart,* 20 April 1619 C 33/135 f. 997 [IMG_2169].
[323] *Ashenhurst v Bartlet*, 23 December 1622 C 33/143 f. 335 [IMG_0337]; 12 February 1623 C 33/143 f. 531 [IMG_0533]; 27 April 1623 C 33/143 f. 724 [IMG_0726].
[324] *Tyffin v Hart*, 22 April 1617 C 33/133 f. 839 [IMG_0844].
[325] ibid.

exhibited in Chancery on 26 March 1618.[326] The case was subsequently referred to a committee for review.[327] The case did not progress in favour of the brothers, and after they had exhibited another bill of complaint the brothers and other sureties petitioned the king again for debt relief on 6 November 1618. It seems that this time the case was directed immediately to the Court of Chancery, without the interference of a commission or committee.

c.) Referred to the Court of Chancery by the Privy Council

Leecheland v James (1596) and *Shippe v Underhill* (1620) show that a petition could be referred to the Court of Chancery by the Privy Council.[328] This could happen from the early stage of a commission of bankrupts. In *Leecheland v James*, 61 creditors of the insolvent debtor had attended 'certain committees in London authorised by letters from Her Majesty's most honourable Privy Council' to treat between the insolvent and all his creditors for a good composition.[329] It seems that the initial commission of bankrupts was sued out by the lord chancellor in the Privy Council. One of the creditors did not want to attend these committees. It seems that the case therefore ended up in the Court of Chancery for review. *Shippe v Underhill* (1620) dealt with an insolvent debtor with 54 creditors, of whom only 52 subscribed to the composition.[330] The bill of conformity case was

[326] *Tyffin v Hart*, 22 April 1617 C 33/133 f. 839 [IMG_0844]. The B book mistakenly names Robert Tyffin as Edward Tyffin. *Tyffin v Hart*, 22 April 1617 C 33/134 f. 894 [IMG_0906]; KC4/1/27. The entries do not provide evidence for the date of the bill. However, the date is mentioned in the final decree, and reference to this earlier date is made in various entries in the decree and order books. It is possible that the bill of complaint was not in the entry books because it was exhibited in Lent vacation. See *Tyffin v Hart*, 26 October 1618 C 33/135 f. 111 [IMG_1277].

[327] The committee included Sir Antony Benn, the recorder of London, who died during the litigation process (see also *Tyffin v Hart,* 29 October 1618 C 33/135 f. 115 [IMG_1281]). The other members of the committee were Sir John Suckling, a statesman, and two knights, namely John Stone and Robert Hatton. See for Sir Anthony Benn, C. W. Brooks, 'Benn, Sir Anthony' (1569/70-1618), *ODNB*. <https://ezproxy-prd.bodleian.ox.ac.uk:4563/10.1093/ref:odnb/70460> accessed 25 December 2020. For Sir John Suckling, see T. Clayton, 'Suckling, Sir John', *ODNB* <https://ezproxy-prd.bodleian.ox.ac.uk:4563/10.1093/ref:odnb/26757> accessed 25 December 2020. For Robert Hatton see <https://www.historyofparliamentonline.org/volume/1604-1629/member/hatton-robert-1582-1653> last accessed 26 December 2020. It is possible that John Stone is the person, to whom the reading on the statute of bankrupts 1571 in 1656 has been wrongly attributed. This John Stone was a bencher at the Inner Temple from 1612 and created serjeant in 1640, however it is not possible to be certain. See JH Baker, *Readers and Readings in the Inns of Court and Chancery* (Selden Society 2000) 95, 611-612; JH Baker, *The Order of Serjeants at Law: A Chronicle of Creations, with Related Texts and a Historical Introduction* 1984 5 *SS* 26 187, 538.

[328] *Leecheland v James,* 5 November 1596 C 33/91 f. 444v. [IMG_477a]; *Shippe v Underhill*, 17 October 1620 C 33/139 f. 47v [IMG_0052a].

[329] *Leecheland v James*, 15 November 1596 C 33/91 f. 444v [IMG_477a].

[330] *Shippe v Underhill*, 17 October 1620 C 33/139 f. 47v [IMG_0052a].

'referred by the Lords of the Council'.[331] This seems to suggest that the Privy Council referred conformity cases to be handled by the Court of Chancery.[332]

2. Evidence

The survey shows that the Court of Chancery employed various means of dealing with questions of evidence in insolvency procedures.[333] In a debt settlement procedure the Court of Chancery had to establish the amount of the debts owed, to which creditor, and whether or not there was proof of fraud.[334] The survey seems to suggest that the Court of Chancery mainly considered factual evidence concerning insolvency based upon statements by witnesses in depositions or by affidavit.[335] Most witness statements about the debts of the insolvent debtor came from the creditors. Witness statements as to the general reputation of the insolvent were generally made by merchants and aldermen in the town of residence of the insolvent.[336] In *Sandys v Gresham* (1589), the plaintiff, Edwyn Sandys was examined upon oath.[337] The survey shows that most witness statements were made by affidavit.[338] On some occasions the Court of Chancery would also consider depositions of witnesses and documents.[339] *Sir John Wentworth's Case* (1620) seems to suggest that the Court of Chancery tried to ensure that witness evidence was obtained from both

[331] ibid.
[332] It is not clear whether the conformity case was initiated with royal interference in the Privy Council. Due to time restrictions this has not been followed up. Possible further work would include reference to the Acts of the Privy Council. See <https://www.british-history.ac.uk/search/series/acts-privy-council> last accessed 31 December 2020.
[333] See for proof in the Chancery more generally, J Jones, *The Elizabethan Court of Chancery* (n 117) 236-263. See MRT Macnair, *The law of proof in early modern equity* (Dunker & Humblot 1999) for evidence in equity in early modern England more generally.
[334] This can often be observed in the masters' reports of the cases. This process can best be seen in *Tyffin v Hart* (1619) (n 123) *Tiffin v Creditores,* 'Ashdale [sic] of debts' Hilary Term 1618 C 38/33: 1618 S-Z. *Tiffin v Creditores,* 'Schedule of debts' Trinity 1618 C38/37: 1619 Q-Z.
[335] The only case in survey in which the creditors were examined upon oath is *Mildmay v Wentworth (Sir John Wentworth's Case)*, 6 November 1613 C 33/125 f. 148 [IMG_0151]. In the other cases the evidence was given by affidavit.
[336] E.g. *Nicholls v Tryon*, 9 November 1620 C 33/139 f. 525 [IMG_0519]. It seems that these statements were collected by the commission of bankrupts.
[337] *Sandys v Gresham*, 28 November 1589 C 33/80 f. 271 [IMG_0234].
[338] E.g. *Dacombe v Brocke* by Richard Riche, 6 May 1620 C 38/38; *Johnson v Endicott* by Richard Moore, 7 August 1618 C 38/32.
[339] See for an example of a deposition and interrogatories, *Mildmay v Wentworth (Sir John Wentworth's Case),* 15 July 1613 C 33/123 f. 911v [IMG_0923a]; for a copy of articles to be read in court, *Mildmay v Wentworth (Sir John Wentworth's Case),* 15 July 1613 C 33/123 f. 912 [IMG_0924].

sides.[340] The plaintiff in that case had provided witnesses. The defendant, however, had not done so, but was ordered to provide them.[341]

In most cases in the survey, the majority of the factual evidence was collected by the commissioners of bankrupts before the start of the Chancery proceedings. For example, in *Sir John Wentworth's Case* (1620), in order to establish the debts of Sir John Wentworth, the commission of bankrupts had examined upon oath all creditors, scriveners and others that had had any financial dealings with Sir John Wentworth.[342] *Warren v Eldrington* (1601) shows that the Court of Chancery could also refer factual evidential questions back to a commission of bankrupts during the Chancery proceeding.[343] This case dealt with a certain Eldrington, one of the creditors, who became bound during the settlement procedure to Lord Keeper Egerton in a bond of £200, with the condition to prove that Warren and one of his creditors, Woodford, had conveyed away goods worth £7,000 to defraud the other creditors. The lord keeper instructed a commission of bankrupts to decide on the debtor's alleged fraudulent dealings. The commission decided that the allegations were false, and the settlement proceedings continued without the fraud allegations. The masters' reports show that the Chancery masters would also examine factual evidence. For example, as has been seen, the schedules of debts in *Tyffin v Hart* (1619) were based upon the examination of the debts by Chancery masters.[344]

It seems that the Court of Chancery did everything in its power to get evidence from all the creditors of the insolvent debtor. For example, in *Sir John Wentworth's Case* (1620) Lady Unton, a material witness in the case, was resident in Berkshire. She was not fit to travel to the Court of Chancery in London. Therefore, one of the examiners of the Court of Chancery or his deputy was

[340] 15 July 1613 C 33/123 f. 911v [IMG_0923a].
[341] *Mildmay v Wentworth (Sir John Wentworth's Case),* 15 July 1613 C 33/123 f. 911v [IMG_0923a].
[342] *Mildmay v Wentworth (Sir John Wentworth's Case),* 6 November 1613 C 33/125 f. 148 [IMG_0151].
[343] *Warren v Eldrington*, 19 September 1600 C 33/97 f. 681v [IMG_8265a]; 20 February 1601 C 33/99 f. 380 [IMG_9355]; 15 July 1601 C 33/99 f.728 [IMG_9703].
[344] *Tiffin v Creditores,* 'Ashdale [sic] of debts' Hilary Term 1618 C 38/33: 1618 S-Z. *Tiffin v Creditores,* 'Schedule of debts' Trinity 1618 C38/37: 1619 Q-Z.

authorised to go to Berkshire and take the depositions of Lady Unton.[345] The masters' reports in *Dacombe v Brocke* and *Middleton v Holt* (1620) show that if a creditor did not appear for the hearing, an affidavit was sworn in order to prove that the creditor had had notice of the proceedings in the Court of Chancery.[346] On this basis the Court of Chancery could proceed in their absence and, if appropriate, could require them to conform. In his master's report in *Middleton v Holt* (1620) Haywarde explicitly states that 'an affidavit was made that the residue [of creditors] had notice of my appointment'.[347] *Sandys v Gresham* (1589) illustrates that if creditors were abroad or imprisoned their absence had to be noted in the final decision in the matter.[348] Hatton LC noted that the case might 'now more easily proceed to final determination'.[349] In *Browne v Dalby* (1614) it was stated that one of the refractory creditors was 'not well' and 'could not attend' and it was ordered that he should be given notice to show cause why he should not have to conform.[350] An entry dating from 1613 in Sir *John Wentworth's Case* (1620) suggests that if one of the creditors were to appear in the court after the commencement of the proceedings then a late affidavit would be annexed to the original petition.[351] In this instance, one of the creditors, Roger Walrond, gentleman, swore the affidavit, joining the other creditors, and Egerton LK annexed the affidavit to the original petition.[352]

3. Mediation in order to reach a composition

The survey shows that mediation was often used in order to achieve a composition between the insolvent debtor and his or her creditors.[353] Mediation often took place before the insolvency

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345 *Mildmay v Wentworth (Sir John Wentworth's Case)*,15 July 1613 C 33/123 f. 911v [IMG_0923a].
346 *Dacombe v Brocke* by Richard Riche, 31 May 1620 C 38/40; Appendix on 31 May 1620 C 38/38; *Middleton v Holt* 15 August 1620 C 38/39 by Haywarde.
347 *Middleton v Holt* by Hawarde, 15 August 1620 C38/39.
348 *Sandys v Gresham*, 28 November 1589 C 33/80 f. 271 [IMG_0234].
349 ibid.
350 *Browne v Dalby,* 31 October 1614 C 33/127 f. 130 [IMG_0127].
351 *Mildmay v Wentworth (Sir John Wentworth's Case),* 17 August 1613 C 33/123 f. 916 [IMG_0928].
352 ibid.
353 E.g. *Peers v Ward*, 21 October 1614 C 33/127 f. 49 [IMG_0051]; *Kippax v Dacombe*, 4 February 1617 C 33/131 f. 510v [IMG_0499a]; *Johnson v Endicott* by Richard Moore, 7 August 1618 C 38/32; *Walton v Creditors of Walton*, 16 November 1618 C 33/135 f. 351a [IMG_1519a]; *Smith v Alston* by Thomas Middleton and Thomas Bennett, 19 June

procedure, typically by commissioners, but it was also not uncommon that commissioners or Chancery masters mediated during the insolvency procedure, especially to conform refractory creditors.[354] As seen above, after the abolition of bills of conformity in the Proclamation of 1621 and later the Bankrupts Act 1624, it seems that mediation became an essential method to persuade (refractory) creditors to join in a composition.[355]

Mediation was a procedure in which the debtor and his or her creditors were assisted by a third party with the aim of reaching a composition. Mediation seems to have been mostly voluntary, but *Sir John Wentworth's Case* (1620) shows that mediation on occasion could be compulsory.[356] The Court of Chancery had awarded a writ of *subpoena* to mediate against Sir Moyle Finch, in which he had to show cause why he should not deliver up and discharge two statutes of £10,000.[357] As seen above, no valuable consideration had been given for either of the statutes.[358] WJ Jones has explained that mediation was very common in the early modern period and mediation was therefore not particularly associated with insolvency cases.[359] He argues that mediation was both necessary and convenient, because the number of cases to be dealt with in the Chancery was too great for the lord chancellor and the master of the rolls to handle, even with the assistance from common law judges sitting in the Chancery and from Chancery masters.[360]

Theoretically, a mediation should consider both sides in equal measure. In practice, the interest of the debtor seems to have been marginal in the mediation process. The survey shows no case in which the debtor seems to have had any influence in the mediation or the outcome of the

1620 C 38/40; *Nicholls v Tryon*, 9 November 1620 C 33/139 f. 525 [IMG_0519]; *Walton v Creditors of Walton*, 16 November 1618 C 33/135 f. 351a [IMG_1519a]. The survey did not show any references to arbitration, which were also common in the period. Jones, *The Elizabethan Court of Chancery* (n 117) 271.

354 E.g. *Ashbye v Richardson*,15 April 1597 C 33/91 f. 770v [IMG_5094a] (mediation by a committee); *Tyffin v Hart,* 22 April 1618 C 33/133 f. 839 [IMG_0844] (mediation by a committee); *Johnson v Endicott* by Richard Moore, 7 August 1618 C38/32 (mediation during the insolvency proceedings).

355 See Chapter 3.

356 *Mildmay v Wentworth (Sir John Wentworth's Case)*, 19 February 1614 C 33/125 f. 633v [IMG_0642a].

357 ibid.

358 ibid.

359 Jones, *The Elizabethan Court of Chancery* (n 117) 270.

360 ibid.

insolvency proceeding, not even if the livelihood of the debtor was at stake. However, this is not surprising considering that most of the debt settlement cases in the survey are conformity cases, and the conformable creditors had often already shown compassion to the insolvent debtor, for example, by proposing delaying payment or a reduction of debts. Instead, the main purpose of mediation seems to have been to persuade refractory creditors into a composition with the conformable creditors.

The survey shows that in insolvency cases mediation could take place before commencement, or during, the Chancery procedure. The survey shows that if mediation took place before the commencement of the insolvency procedure (but after the examination of witnesses), this was done by a committee or commission, generally consisting of aldermen.[361] The lord chancellor or lord keeper would instruct them after he received a petition or bill of conformity. For example, in *Tyffin v Hart* (1619) a committee was initially asked to 'mediate for a charitable end and composition' between the Tyffin brothers and the other sureties and the creditors of Robert Tyffin.[362] At this point, 10 creditors were willing to conform, but the committee found another 40 creditors willing to accept a composition in writing.[363] Similarly, in *Nicholls v Tryon* (1620), a committee of aldermen was asked 'to treat and mediate a composition'.[364]

During the insolvency proceedings mediation was generally the task of the masters of the court. For example, in *Kippax v Dacombe* (1617), Dr Hussy, Master of Chancery, tried to reach a composition between the litigating parties.[365] It was possible that multiple attempts at mediation were made. For example, one of the masters' reports in *Johnson v Endicott* (1619) shows that the

[361] E.g. *Nicholls v Tryon*, 9 November 1620 C 33/139 f. 525 [IMG_0519]; *Walton v Creditors of Walton*, 16 November 1618 C 33/135 f. 351a [IMG_1519a]. See for the possible difference between a committee and a commission of bankrupts below. WJ Jones has set out that it was not uncommon for the Chancery to award a commission to mediate between the parties (generally after examining witnesses). See WJ Jones, *The Elizabethan Court of Chancery* (n 117) 270. In one case these aldermen were from London, but in other cases the relevant urban corporation is not specified.
[362] *Tyffin v Hart,* 22 April 1618 C 33/133 f. 839 [IMG_0844].
[363] *Tyffin v Hart*, 16 January 1619; C 33/135 f. 417 [IMG_1586].
[364] *Nicholls v Tryon*, 9 November 1620 C 33/139 f. 525 [IMG_0519].
[365] *Kippax v Dacombe*, 4 February 1617 C 33/131 [IMG_0499a].

creditors attended the masters three times, who tried by mediation to reach a composition.[366] However, attempts to mediate during the insolvency proceedings were not always made by the Chancery masters. In *Palmer v Rudd* (1620), Sir Edward Barkham, the lord mayor of London was involved in the mediation between Susan Palmer, the insolvent widow, and her creditors.[367]

The survey only shows cases which were eventually directed to the Court of Chancery. It is therefore, based on the survey, impossible to tell if mediation between the insolvent debtor and his or her creditors without any court interference was a common occurrence. However, considering the costs of an insolvency procedure and the time the litigation took, it seems plausible that mediation was widely used in the period.[368] Most of the cases in the survey were conformity cases. In these cases early attempts at mediation had failed to conform all the creditors. If mediation was successful, the debt settlement would be decreed in the same manner as it had been decided and set down in open court.[369]

The evidence in the survey is limited, but it seems that after the Proclamation of 1621 and the enactment of section 2 of the Bankrupts Act 1624, mediation became an essential part of the insolvency procedure.[370] After all, as has been seen, this change in the law meant that creditors had to voluntarily agree to a composition, and mediation could be used to pressure creditors to agree to a composition. This can be illustrated by two cases in the survey, *Haddon v Foulds* (1622) and *Rycroft v Hedd* (1627).[371] In both cases the Court of Chancery resorted to mediation, because conformity of refractory creditors was no longer possible.

The survey shows, however, that after the enactment of section 2 of the Bankrupts Act 1624, mediation was still not binding on the parties. This can be illustrated by *Haddon v Foulds*, in which

[366] *Johnson v Endicott* by Richard Moore, 7 August 1618 C 38/32.
[367] *Palmer v Rudd* by Thomas Bernett and Edward Barkham, 27 November 1620 C38/40.
[368] This falls outside the scope of this thesis, but is a possible area for further research.
[369] Jones, *The Elizabethan Court of Chancery* (n 117) 270.
[370] Bankrupts Act 1624 (21 Jac I, c 19) s. 2. *Haddon v Foulds*, 16 December 1622 C 33/143 f. 354v [IMG_0357a]; 23 December 1622 C 33/143 f. 344 [IMG_0347]; *Rycroft v Hedd*, 20 November 1627 C 33/153 f. 319 [IMG_ 2055].
[371] *Rycroft v Hedd*, 20 November 1627 C 33/153 f. 319 [IMG_ 2055].

mediation took place in order to try to conform a refractory creditor, but after a failed attempt, the Court of Chancery eventually decided to exclude the refractory creditor from the composition.[372] This case also shows that mediation was not necessarily successful. Nevertheless, it seems that mediation could be an important method to resolve disputes between debtors and creditors following the Proclamation of 1621 and the enactment of the Bankrupts Act 1624.

4. The role of commissioners of bankrupts and the masters of the court

In a debt settlement procedure the lord chancellor or lord keeper was assisted by commissioners in a 'committee', 'commission' or 'commission of bankrupts' (hereafter: commissions) and the masters of the court. The survey shows that commissioners dealt with factual evidence and mediation. The role of the masters of the court was also to deal with factual evidence and mediation, but the masters sometimes in addition played a role in ending the litigation.

4.1. Commissioners of bankrupts

As has been seen above, commissioners of bankrupts dealt with the bankruptcy procedure in first instance. The survey seems to suggest that commissioners had a slightly different role in relation to debt settlements. It seems that in its equitable function the Court of Chancery had a more active role in instructing the commissioners for a specific task, rather than delegating the entire case to a commission of bankrupts. As has been seen, commissioners still dealt with factual evidence, and occasionally mediated between the insolvent debtor and his or her creditors in order to reach a composition.[373] Considering that most cases in the survey are conformity cases this meant in practice that in most of the cases in the survey commissioners examined the amount and nature of the debts of the insolvent debtor and investigated whether the refractory creditors had legitimate reason to disagree with a proposed composition of the majority of creditors. For example, in *Smith*

[372] *Haddon v Foulds*, 16 December 1622 C 33/143 f. 354v [IMG_0357a]; 23 December 1622 C 33/143 f. 344 [IMG_0347].
[373] See sections II. 2 and II. 3 above for details on evidence and mediation.

v Alstone (1620), the commissioners, Thomas Middleton and Thomas Bennett, had called the creditors of Simon Smith before them in order to mediate an agreement.[374] They investigated Smith's debts and subsequently gave advice as to what should happen with his estate.[375] However, a final agreement with all the creditors was not made, and the case ended up as a conformity case in the Court of Chancery.[376]

In addition, it seems that the Court of Chancery could instruct commissioners to investigate compositions made informally by creditors. For example, in *Browne v Dalby* (1614), 'a certificate was made by Sir Edmond Bowyer and Sir George Paule, knights, upon a commission unto them directed by the authority of this court [the Court of Chancery]'.[377] The certificate attested that the composition made by the creditors of Browne was *bona fide*, that Browne was not able to give better satisfaction to his creditors, and that all the creditors but one were willing to conform. Commissioners would normally be instructed by the lord chancellor or lord keeper, but it was also possible that one or more of the creditors of the insolvent debtor might themselves sue out a commission of bankrupts.[378]

It is unclear whether there was a substantial legal difference between a 'committee', a 'commission' or a 'commission of bankrupts', or whether these terms were all effectively the same and were used interchangeably. The latter interpretation seems most likely, because various cases in the survey show that a commission of bankrupts could be sued out even if the debtor was not a bankrupt.[379] For example, the master's report of *Johnson v Endicott* (1619) states that a 'commission of bankrupts was sued out' against the 'insolvent' Johnson.[380] Similarly, in *Steward v Mountford* (1620) a

[374] *Smith v Alstone*, 19 June 1620 C 38/40.
[375] ibid.
[376] ibid.
[377] *Browne v Dalby*, 31 October 1614 C 33/127 f. 130 [IMG_0127].
[378] ibid.
[379] E.g. *Warren v Eldrington*, 19 September 1600 C 33/97 f. 681v [IMG_8265a]; 20 February 1601 C 33/99 f. 380 [IMG_9355]; 15 July 1601 C 33/99 f.728 [IMG_9703]; *Johnson v Endicott* by Richard Moore, 7 August 1618 C 38/32; *Walton v Creditors of Walton*, 16 November 1618 C 33/135 f. 351a [IMG_1519a].
[380] *Johnson v Endicott* by Richard Moore, 7 August 1618 C 38/32.

commission of bankrupts was sued out against Steward.[381] Steward was indeed an imprisoned tradesman, but nothing in the case suggests that Steward was a bankrupt or had acted fraudulently.

Details about the membership of commissions dealing with debt settlements are largely unknown. *Sandys v Gresham* (1589) and *Nicholls v Tryon* (1620) are the only cases that give some details of the composition of the commission dealing with the debt settlement. The commission in *Sandys v Gresham* consisted of Sir Roland Heywarde and Sir Wolstan Dixey, two knights, and some aldermen, gentlemen and citizens of London,[382] whereas the commission in *Nicholls v Tryon* included various aldermen and merchants. Due to the lack of detailed information, it remains unclear whether these commissions were composed in the same way as commissions of bankrupts based upon the statute of bankrupts. The limited evidence is consistent with the findings of WJ Jones, who argues that commissioners in general were often neighbours or friends of litigants, and sometimes they were persons of a superior social status in the county or locality.[383]

In *Johnson v Wolmer* (1551) a reference was made to two individuals, but there is no mention of a commission at all in the decree.[384] The absence of a commission could be explained by the fact that commissions of bankrupts were only established in the Bankrupts Act 1571.[385] It seems that in *Johnson v Wolmer* there had been a dispute in Chancery and that the case was subsequently referred to a certain Robert Wolmer and William Venyall.[386] Lord Chancellor Rich had assigned Johnson's available assets into the hands of Wolmer and Venyall, so that they could divide them amongst the creditors.[387] William Venyall was not listed in the record as a creditor, but Robert

[381] *Stiaard (Steward) v Mountford*, 10 October 1620 C 33/139 f. 75 [IMG_0080]; *Steward v creditors* by Bowyer and Paule, 21 July 1620 C 38/40.
[382] Edwyn Sandys was a citizen of London, which explains why there were citizens of London on the committee. As seen above, it seems often to be the case, in standard commissions of bankrupts at least, that some of the commissioners were peers of the insolvent.
[383] Jones, *The Elizabethan Court of Chancery* (n 117) 270.
[384] *Johnson v Wolmer,* 3 November 1551 C 78/6/28 m. 13 [IMG_0027].
[385] Bankrupts Act 1571 (13 Eliz 1, c.7) s. 2.
[386] *Johnson v Wolmer,* 3 November 1551 C 78/6/28 m. 13 [IMG_0027]. It is unclear what the original dispute was. Further examination of the decree and order books might shed light on this.
[387] ibid.

Wolmer was himself a creditor of Johnson.[388] It is possible that because this settlement was voluntary, the other creditors had chosen Wolmer to represent all of them, and that William Venyall, as a non-creditor, was brought in to ensure the independence of the procedure, alongside Rich LC.

4.2. Masters of the court

The lord chancellor or lord keeper was assisted by twelve masters of the court, including the master of the rolls.[389] The masters were dealing with an exceedingly large amount of quasi-judicial work in the period, because the lord chancellor and master of the rolls, even with the help of common law judges, could not cope with the increasing amount of cases in the Court of Chancery.[390] References to the masters were therefore essential and standard.[391] As seen above, in relation to debt settlements, masters of the court were occasionally instructed by the lord chancellor or lord keeper to collect evidence and mediate during the debt settlement procedure.[392] Sometimes the masters were ordered to make an end to the litigation.[393] For example, in *Ashenhurst v Bartlet* (1623) concerning a composition, Williams LK ordered both parties to 'attend Sir James Wolveridge, one of the masters of the court within 3 days after who is to consider of the difference between the parties and end the same if he can'.[394] However, if the refractory creditor would not do so, then Wolveridge was 'to make certificate of his doings, proceedings and opinion therein and in the meantime the injunction heretofore granted is to stand in force'.[395]

[388] ibid.
[389] Jones, *The Elizabethan Court of Chancery* (n 117) 103.
[390] ibid.
[391] ibid 103.
[392] See sections II. 2 and II. 3 above for details on evidence and mediation.
[393] *Ashenhurst v Bartlet,* 27 April 1623 C 33/143 f. 724 [IMG_0726].
[394] Unfortunately, the master's report of Sir James Wolveridge in this case seems not to have survived. This means that most of the details of the case remain unknown.
[395] *Ashenhurst v Bartlet,* 27 April 1623 C 33/143 f. 724 [IMG_0726].

5. Outcomes

The general concept of a voluntary debt settlement or a bill of conformity was that the Court of Chancery would order the creditors to take a pro rata reduction in their debts, and would stay all proceedings at common law.[396] *Tyffin v Hart* (1619), discussed above, suggests that debtors would not be deprived of all their property. The Tyffins were allowed to keep all their goods, household stuff and debts owed to them.[397] They were not left destitute, and this provision could enable them to have a fresh financial start. Overall, this would effectively mean that insolvent debtors could be discharged of their debts after they had made the pro rata payment. A discharge of debts was possible neither at common law nor under the bankruptcy statutes, but the cases in the survey show that the Chancery would allow it. However, there were other, more common, options available to relieve the debtor than pro rata distribution of the assets. The Court of Chancery could order a full discharge, part discharge, postponement of payment or payment of the original sum owed in instalments, with or without interest. It was also possible that the Court of Chancery might order an alternative payment plan, which would be a mix of various outcomes. Overall, this gave more flexibility to relieve the creditors. The actual payment of creditors in accordance with the court's order could occur in various ways, namely in the form of money, interests in land, or in wares.

5.1. Outcomes of the decisions by the Court of Chancery

a.) Full discharge of debts

As seen above, in *Finch v Hicks* (1620), Henry Finch and his two sons were awarded a full discharge of debts.[398] *Finch v Hicks* (1620) is the only example of a full discharge of debts found in the survey. This seems to suggest that it was rare for the Court of Chancery to award a full discharge of debts.

[396] The creditors would be paid from the proceeds of the sale of the debtor's assets.
[397] *Tyffin v Hart,* 15 May 1619 C 33/135 f. 970 [IMG_2151], KC4/1/27.
[398] See chapter 3. *Finch v Hicks*, 19 January 1620 C 33/137 f. 770v [IMG_0778a].

b.) Part discharge of debts

A part discharge of the debts of the insolvent debtor was occasionally granted by the Court of Chancery. A part discharge of debts meant that the insolvent debtor had to repay at least some of his debts pro rata to his creditors. If there were sufficient assets the creditors with higher security than bonds could be paid in full or these creditors could decide to take less than they were due.[399] Debts of an insolvent debtor could also be discharged if the creditors in question had acted fraudulently.[400] In most part discharge cases, the Court of Chancery discharged the insolvent debtor to the value of the difference between the total amount of the debts and the value of the assets of the debtor available to satisfy the debts.

A part discharge could be conditional upon the conduct of the insolvent. This can be illustrated by the case of *Johnson v Wolmer* (1551). As seen above, this case dealt with a voluntary debt settlement of John Johnson, a clothier. All the estates' obligations and bills were cancelled and lost all their effect at common law. It was explicitly decreed that if it should be proved at a later date that Johnson had goods and chattels that had not been accounted for in the proceedings, whether he had hidden his assets or had defrauded his creditors in other ways, that then these assets would count towards the satisfaction of the debts owed to the general creditors. This meant that if Johnson had not acted fraudulently (or if fraud could not be proved), he would be partly discharged of his debts.

The fraudulent conduct of the creditor could also have an influence on the final decision of the Court of Chancery. A part discharge could also be awarded if there had been misconduct of the creditors. In *Sandys v Gresham* (1589) Hatton LC discharged the insolvent student from various obligations, because some of his creditors had deceived him.[401]

[399] *Johnson v Wolmer,* 3 November 1551 C 78/6/28 m. 13 [IMG_0027].
[400] *Sandys v Gresham*, 28 November 1589 C 33/80 f. 271 [IMG_0234].
[401] ibid.

c.) Postponement of payment

The Court of Chancery would sometimes order a postponement of payment of the debts of the insolvent debtor, either in instalments or the full sum at a later date. In *Ashbye v Richardson* (1597) the creditors were willing to take their debts proportionally by yearly payment.[402] In *Brooke (or Little) v Goode* (1619) the debt had to be paid in full after a few years.[403] *Brooke (or Little) v Goode* (1619) and *Robinson v Cambell* (1620) illustrate that it was possible that no interest would be charged for the delay of payment.[404] *Tyffin v Hart* (1619) suggests that the creditors who received full payment did not receive any interest.[405] However, *Tyffin v Lafontaine* (1626) shows that the Tyffin brothers paid interest to the Delafontaines, some of the Tyffin's unsecured creditors.[406]

Sometimes the Court of Chancery attached special conditions for postponed repayment. In *Johnson v Wolmer* (1551) Rich LC gave different time frames for the repayment of the debts owed to creditors with a statute staple.[407] One secured creditor with a statute staple was to be paid the reduced part of the debt within eight days, the other secured creditor with a statute staple was to receive his reduced part within a year's time.[408] It is possible that the difference in time can be explained on the basis that one creditor needed the money more urgently than the other.

d.) Alternative payment plan

The Court of Chancery would sometimes order alternative payment plans to relieve the debtor. An alternative payment plan ordered in a composition could be a combination of a part discharge of debts and postponement of payment of debts, often dependent on the financial position of the creditors. As seen above, in *Tyffin v Hart* (1619) Bacon LC conformed most of the creditors with

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[402] *Ashbye v Richardson*, 15 April 1597 C 33/91 f. 770v [IMG_5094a].
[403] *Brooke (or Little) v Goode*, 23 November 1619 C 33/137 f. 528 [IMG_0537].
[404] *Brooke (or Little) v Goode*, 23 November 1619 C 33/137 f. 528 [IMG_0537], *Robinson v Cambell*, 9 November 1620 C 33/139 f. 185v [IMG_0179].
[405] *Tyffin v Hart,* 18 May 1619 KC4/1/27.
[406] *Tyffin v Delafontaine*, 19 October 1626 C 33/151 f. 58v [IMG_0063a].
[407] Johnson had other creditors, but they did not have statutes staple.
[408] *Johnson v Wolmer,* 3 November 1551 C 78/6/28 f.13 [IMG_0027].

a pro rata composition, but he did not give relief or part relief of the debts of some particular creditors.[409] Instead, for these debts of secured creditors and creditors who held orphans' money on trust, the Chancery granted the brothers a special repayment schedule and ordered them to repay the secured creditors and orphans' money within two years in equal instalments at intervals of six months.[410]

5.2. Means of physical payment to creditors

The survey shows that the assets of the insolvent debtor could be distributed amongst the creditors in three ways, in money, in interests over land, or in wares.[411] It is assumed that most of the creditors in debt settlement cases, including conformity cases, were paid in money, after the assets had been sold. *Dackombe v Brocke* (1620) illustrates that insolvent debtors did not always have to sell their land.[412] In this case, the insolvent debtors paid their debts partly in money, but were allowed to pay the residue with a promise to pay £1,000 per annum out of the remainder (presumably income) of the debtor's land until all the creditors were satisfied.[413] It was also possible for creditors to be paid in wares. This can be illustrated by the case of *Johnson v Wolmer* (1551), in which Rich LC ordered that one of the creditors was to be paid in cloth, as well as in money.[414] The creditor had consented to have the value of the assets paid in cloth.[415] *Johnson v Wolmer* was the only example of payment in wares found in the sample. This suggests that the Court of Chancery would not normally order that creditors be paid in wares in a debt settlement. It is possible that the voluntary nature of the settlement played a role in Rich LC's decision to order payment partly in wares in *Johnson v Wolmer*. The payment in wares seems to have led to further

[409] *Tyffin v Hart*, 15 May 1619 C 33/135 f. 970 [IMG_2151], KC4/1/27.
[410] ibid.
[411] The survey shows no signs of the practice of set-off.
[412] *Dackombe v Brocke,* 25 November 1620 C 33/139 f. 339v [IMG_0333a].
[413] ibid.
[414] *Johnson v Wolmer*, 3 November 1551 C 78/6/28 m. 13 [IMG_0027]. It is not completely clear whether the 'clothes' in the decree mean 'clothes', in the sense of items of apparel, or 'cloths'. Whereas the text of the decree says 'clothes', it makes more sense that 'cloths' are meant, because Johnson was a clothier.
[415] ibid.

litigation. In *Johnson v Kelke* (1551), Kelke, one of Johnson's creditors, contested the settlement.[416] He had been paid his share of the debts set out in the voluntary settlement, but argued that these cloths were more worth than previously valued and that because of his recognizance of a statute staple he should be paid more. Thomas Goodrich LC ordered that that he should be paid a larger sum by Johnson and his sureties.[417]

6. Interaction with other courts and tribunals

The survey shows that when the Court of Chancery dealt with cases involving insolvent debtors, it interacted with other courts and tribunals: (1) the courts of common law; (2) Privy Council; (3) the Court of Requests; (4) the Court of Exchequer; (5) the Court of Wards; and (6) inferior courts.[418]

6.1. The common law courts: injunctions against proceedings at common law

The survey shows that injunctions against proceedings at common law were common for debt settlements of insolvent debtors.[419] With these injunctions the Court of Chancery stayed

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[416] *Johnson v Kelke*, 1 December 1551 C 78/6/1 [IMG_0003]. No entries of *Johnson v Wolmer* were found in the decree and order books. No other cases appear in the C78 calendar between 1548 and 1560 involving the clothier John Johnson. *Johnson v Kelke* seems to have one entry in the decree and order books (this entry was found by chance, it was not listed in the alphabets of C 33/7, but was on the same page as *Johnson v Wilford*.) The entry set out that the sureties of Johnson are bound of the writ of *audita querela*, or else a *supersedeas* be granted. *Johnson v Kelke*, 28 November 1551 C 33/7 f. 103 [IMG_8722]. C 33/1 and C 33/2 have been read in full, because these books have no alphabets. For C 33/3, C 33/5, C 33/7 the alphabets have been consulted. There are entries in the C 33's involving a plaintiff with the name of Johnson. However, the entries do not give enough information to be certain that these relate to the case about the clothier John Johnson and to gain more details about the case. E.g. *Johnson v Hobkynson*, 13 May 1544, C 33/1 f. 12v [IMG_3333], 3 February 1545 C 33/1 f. 197 [IMG_ 3463], unknown 1546 C 33/2 f. 27v [IMG_3596], *Rice v Johnson*, 8 February 1549 C 33/3 f. 73 [IMG_7582]; *Johnson v Wadham*, 28 April 1545 C 33/1 f/ 209 [IMG_ 3535], *Johnson v Suynefeld* 4 May 1545 C 33/1 f. 222 [IMG_ 3549], *Johnson v Bell*, 6 February 1549 C 33/3 f 73v [IMG_7583]; *Johnson v Metam*, 23 November 1550 C 33/5 f. 138v [IMG_8309]; *Johnson v Wilford,* 15 October 1551 C 33/7 f. 91 [IMG_8647], 7 November 1551 C 33/7 f. 136v [IMG_8683], 28 November 1551 C 33/7 f. 161v [IMG_8722]; *Johnson v Gower*, 23 October 1551 C 33/7 f. 103 [IMG_8659] (The case is crossed out). It is possible that John Johnson went bankrupt in 1533. See, 'Decree by the lord chancellor, lord steward, lord privy seal and chief justices'. 18 June 1557 SP 11/11 f. 20, 281. It seems that this is the same John Johnson because the decree sets out that Johnson went to the Chancery in the time of Edward VI.

[417] ibid.

[418] The survey also shows one case, *Lavington v Maton*, 7 July 1595 C 78/115/6 m. 18 [IMG_0036] in which the Star Chamber is mentioned. The matter was being litigated both in the Court of Chancery and in the Star Chamber. Considering this case was concerned with alleged fraud it is not surprising that the Star Chamber was involved. See below for more details on *Lavington v Maton*.

[419] Little is known about common injunctions in the period. Only WJ Jones and NG Jones have written on the subject. WJ Jones has noted that there were two types of injunctions, special injunctions and common injunctions. The

proceedings at common law until the court took order to the contrary. The Court of Chancery granted these injunctions either on a temporary or indefinite basis. It seems that temporary injunctions were extremely common in debt settlement proceedings: temporary injunctions were awarded in almost all the debt settlement cases in the survey.[420] The survey shows that these injunctions could be granted for all sorts of reasons. For example, they could be granted if the court needed to consider more evidence in order to reach a final decision, if a party failed to appear in the Chancery, or when one of the litigating parties was held in contempt.[421] In *Ashenhurst v Bartlet* (1622), for example, Williams LK set out that some of the creditors had appeared by affidavit, but a few of the creditors would not answer and were therefore held in contempt. Thereupon, Williams LK awarded an injunction against the refractory creditors for stay of all further proceedings by them at common law against Ashenhurst and his sureties until the creditors in question had answered the plaintiff's bill.[422] Temporary injunctions could be dissolved or could remain in force for a very long time and eventually become indefinite. For example, in *Mitchell v Woodward* (1619) a temporary injunction was dissolved, while in *Smith v Ashton* (1620) a temporary injunction was issued for an initial period of two years.[423] The latter case dealt with a bill of conformity procedure. The refractory creditors were given two years to prove that Simon Smith had been fraudulent. The

common injunction was relevant for the debt settlement proceedings. Common injunctions were directed against the person and his legal advisers, and had the effect of a stay of proceedings in another court and to prevent execution being sued out on judgments already handed down. Jones, *The Elizabethan Court of Chancery* (n 114) 183-184. See for more general procedural rules in relation to common injunctions Jones, *The Elizabethan Court of Chancery* (n 114) 184-186. Neil Jones has argued that common injunctions were very common in the Elizabethan and Jacobean period. He argues that these injunction were generally injunctions against proceedings at common law, but his survey also showed a handful of injunctions in respect of non-common law jurisdictions, including the Prerogative Court of Canterbury, the Council in the North and the Court of Requests. Neil Jones's work draws upon a sample of just under 200 common injunction cases from the registers' books for 1605, 1613 and 1626. NG Jones, 'Jacobean Chancery injunctions' (unpublished), presented at the British Legal History Conference at the University of St. Andrews, 2019.

[420] E.g. *Nicholls v Tryon*, 9 November 1620 C 33/139 f. 525 [IMG_0519]; *Mitchell v Woodward*, 7 May 1619 C 33/135 f. 840v [IMG_2011a].

[421] *Nicholls v Tryon*, 9 November 1620 C 33/139 f. 525 [IMG_0519]; *Smith v Ashton*, 17 October 1620 C 33/139 f. 359 [IMG_0353]. See also Jones, *The Elizabethan Court of Chancery* (n 117) 184-186.

[422] *Ashenhurst v Bartlet,* 23 December 1622 C 33/143 f. 335 [IMG_0337]; 12 February 1623 C 33/143 f. 531 [IMG_0533]; 27 April 1623 C 33/143 f. 724 [IMG_0726].

[423] *Mitchell v Woodward*, 7 May 1619 C 33/135 f. 840v [IMG_2011a] (it is not known after what period the injunction was dissolved); *Smith v Ashton*, 17 October 1620 C 33/139 f. 359 [IMG_0353].

court ordered that if the fraud was not proven, the injunction would be formally granted. This way the injunction would become indefinite and Smith would in effect be discharged of all his debts.

Sometimes a temporary injunction was awarded if that was necessary while awaiting payment of creditors in a credit network. In the atypical case of *Whorewood v Ambrosi* (1621), a case of fraud, the plaintiffs had petitioned for a bill of conformity and had pretended to be indebted to the late Queen Anne of Denmark, wife of James I.[424] An injunction was granted to the plaintiffs for stay of proceedings at law until the debts owed by the queen were satisfied. However, this particular bill of conformity procedure eventually proved unsuccessful, because the plaintiffs had acted fraudulently and the queen did not owe them any money.

As seen above, indefinite injunctions against creditors of insolvent debtors were not as common as temporary injunctions, but were still granted occasionally. Indefinite injunctions were granted, for example, in *Bate v Squire* (1618), *Organ v Cambell* (1618), *Tyffin v Hart* (1619), *Brooke (or Little) v Goode* (1619), *Hone v Braborne* (1620) and *Finch v Hicks* (1620).[425] In the case of indefinite injunctions the common law indebtedness remained but was permanently unenforceable because of the injunction, and the issuing of the injunction in effect discharged the insolvent debtor of his or her debts at common law.[426] In *Finch v Hicks* (1620) the debtors were in effect discharged of their debts completely.[427] However, it was more common that the Court of Chancery replaced the debts at common law with an alternative payment plan or delay of payment.[428] It was common in a bill of conformity procedure that all refractory creditors were stayed in their proceedings at common law by the same injunction. However, *Ashbye v Richardson* (1597) shows that an indefinite injunction

[424] *Whorewood v Ambrosi,* 9 January 1621 C 33/139 f. 509 [IMG_0503]. Queen Anne of Denmark had the reputation of spending a lot of money. See, M Meikle and H Payne, 'Anne [Anne of Denmark] (1574-1619), queen of England, Scotland and Ireland, consort of James VI and I', *ODNB.* <https://ezproxy-prd.bodleian.ox.ac.uk:4563/10.1093/ref:odnb/559> accessed 31 December 2020.
[425] *Bate v Squire,* 28 October 1618 C 33/135 f. 133a [IMG_1299a]; *Organ v Cambell*, 27 October 1618 C 33/135 f. 133 [IMG_1299]; *Tyffin v Hart* (1619) (n 123), *Brooke (or Little) v Goode*, 23 November 1619 C 33/137 f. 528 [IMG_0537], *Hone v Baker*, 28 October 1620 C 33/139 f. 111 [IMG_0115], and *Finch v Hicks,* 19 January 1620 C 33/137 f. 770v [IMG_0778a].
[426] See section II.5 above for the outcomes of the debt settlement procedures.
[427] *Finch v Hicks,* 19 January 1620 C 33/137 f. 770v [IMG_0778a].
[428] See section II.5. above for the outcomes of the debt settlement procedures.

could also be awarded against a single refractory creditor.[429] The other creditors had already conformed to a composition.

The survey also shows that if proceedings in the Court of Chancery had commenced, it was expected that the creditors wait for the outcome of the proceedings in the Chancery before suing at law. Nevertheless, it seems to have been a common occurrence that creditors would try to get satisfaction from their debtors at common law while they were awaiting the outcome of the Chancery proceedings. However, it seems that if creditors decided to start proceedings at law before the Chancery had finished its proceedings, this could negatively affect the outcome of a Chancery decision.

For example, in *Tyffin v Hart* (1619), one of the refractory creditors, Richard Clarke, had already started an action for debt at common law, just after the king had referred the case to the committee.[430] By not waiting for the committee's deliberations, Clarke did 'what this court mislikes'.[431] While there is no direct evidence of this in the entry books, it is possible that the Tyffin brothers were treated with more sympathy during the bill of conformity proceeding because some of their (refractory) creditors had behaved improperly in that way. It was ordered that the brothers 'being but sureties', an injunction should be granted against the proceedings at common law.[432]

Similarly, if the Court of Chancery had already awarded a composition in favour of the insolvent debtor, it would award an injunction if creditors would not comply with the composition. In *Radclyef v Hey* (1588) an injunction was awarded because John Hey, one of the creditors of Ralph Radclyef, made an attempt to recover his whole debt at common law.[433] However, the Court of Chancery had already awarded Ralph Radclyef a composition and John Hey had already received

[429] *Ashbye v Richardson*,15 April 1597 C 33/91 f. 770v [IMG_5094a].
[430] *Tyffin v Hart,* 22 April 1618 C 33/133 f. 839 [IMG_0844].
[431] ibid. The B book says 'misliketh'. *Tyffin v Hart*, 22 April 1618 C33/134 f. 894 [IMG_ 0906].
[432] ibid.
[433] *Radclyef v Hey*, 9 May 1588 C 33/75 f. 548 [IMG_0554].

part payment of his debts from Radclyef.[434] The Court of Chancery therefore awarded an injunction against Radclyef. Injunctions were not awarded by the Court of Chancery, at least in the 1620s, if there was already a common law judgment on the matter.[435] *Hone v Baker* (1620) is an example of a conformity case being dismissed by the Court of Chancery because the defendant had already obtained a verdict and judgment for his debts in a common law court.[436] In *Hone v Baker* this also included a judgment in the Exchequer.[437] Similarly, in *Smith v Ashton* (1620) the refractory creditors were not permitted to exhibit a bill of conformity, as they had already received the estate from the debtor in a common law judgment.[438] In cases such as these the Court of Chancery would stay all proceedings in Chancery.

6.2. Privy Council

In the survey appears one case, *Lavington v Maton* (1595*)*, in which the Court of Chancery considered a case already considered by the Privy Council in 1587.[439] This suggests that litigants could petition both the Privy Council and the Court of Chancery for relief. The case dealt with a petition of the creditors of Maton. They accused Maton of becoming bankrupt voluntarily and conveying away his assets, in order to defraud his creditors. The relevant entry in the Act of the Privy Council suggests that the case was never resolved in the Privy Council. This could explain why the case came before the Court of Chancery. However, it is equally possible that litigants tried their luck twice, and that if the Privy Council did not give relief, they could petition the Court of Chancery to deal with the same issue. The Chancery record of *Lavington v Maton* does not mention the Privy Council, which suggests that the Privy Council's consideration of the case had come to an end, before the Court of Chancery dealt with the same matter.

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[434] ibid.
[435] This was the key area of dispute between Coke and Ellesmere. See chapter 5.
[436] *Hone v Baker,* 28 October 1620 C 33/139 f. 111 [IMG_0115].
[437] ibid.
[438] *Smith v Ashton*, 17 October 1620 C 33/139 f. 359 [IMG_0353].
[439] [Meeting at the Star Chamber], 22 April 1586 PC 2/14 f. 67-6; *Lavington v Maton*, 7 July 1595 C 78/115/6 m. 19 [IMG_0038]. The record of the litigation in the Court of Chancery is much more detailed, and gives better insight in the reasoning of the court.

6.3. Court of Requests

The Court of Requests dated from the time of Henry VII and was originally derived from the Privy Council.[440] This explains why the Court of Requests had an equitable jurisdiction, similar to that of the Court of Chancery.[441] It has often been said that the Court of Requests was the 'poor man's Chancery'.[442] In theory, the Court of Requests was meant for poor litigants, such as widows and orphans, though Stretton has argued that in practice the court also heard cases of litigants of substantial means, including merchants.[443] Nevertheless, it seems that the Court of Requests dealt with more cases from litigants with an impoverished background than any other court in the period.[444] Stretton has also argued that the costs of initiating a suit in the Court of Requests were higher than in the Court of Chancery.[445] However, the legal costs of completed actions in the Court of Requests were relatively low.[446] The Court of Requests was never abolished, but in 1641 in practice ceased to operate due to the withdrawal of the Privy Seal during the Civil War.[447]

Smith has shown that like the Court of Chancery, the Court of Requests considered debt settlements and conformity cases.[448] Two full-time masters of requests presided over the court.[449] However, writs of prohibition from the King's Bench put a stop to debt settlements and conformity in the Court of Requests.[450] Smith and Sir John Baker suggest that common law courts had tried to prohibit proceedings in the Court of Requests since the late sixteenth century.[451] Smith argues that *Payne's Case* (1613) set out that prohibitions lay to the Court of Requests if there was

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[440] Baker, *An Introduction* (n 88) 128-130.
[441] T Stretton, *Women waging law in Elizabethan England* (CUP 1998) 75.
[442] Stretton (n 441) 72; L Flannigan, 'Litigants in the English "Court of Poor Men's Causes" or "Court of Requests, 1515-25', 38-2 *L and Hist Rev* (2020) 305.
[443] Stretton (n 441) 7.
[444] ibid.
[445] ibid 83-84.
[446] ibid 83-84.
[447] Baker, *An Introduction* (n 88) 129-130.
[448] DA Smith, 'The error of young Cyrus: The bill of conformity and Jacobean Kingship, 1603-1624 (2010) 28 (2) *L and Hist Rev* 316-324.
[449] Baker, *An Introduction* (n 88) 129.
[450] Smith, 'The error of young Cyrus' (n 448) 324. Baker, *An Introduction* (n 88) 127. Nevertheless, Stretton writes that despite the prohibitions the Court of Requests still heard cases for another forty years. Stretton (n 441) 73. Neither Baker nor Stretton specifically mention the connection with bills of conformity.
[451] Smith, 'The error of young Cyrus' (n 448) 322; Baker, *An Introduction* (n 88).

an adequate remedy at common law.[452] He illustrates the end of conformity cases in the Court of Requests with the case *Toft v Capleine* (1614).[453] This was a successful conformity case in the Court of Requests, in which an insolvent debtor had obtained a composition of 8s in the pound with his creditors. However, the defendants obtained a prohibition at common law, which was granted 'because otherwise the Statute of Bankrupts would be to little purpose'.[454] These prohibitions seem to have been part of a larger project to limit the scope of equity.[455] It seems that in theory the common law courts could prohibit the Chancery.[456] However, commentators at the time explained that the Chancery was never prohibited.[457]

Horton v Rosewell (1624) is a case in the survey that shows that the Court of Chancery, on one occasion at least, reheard an insolvency case that had previously been decided in the Court of Requests.[458] This meant that the Court of Chancery could effectively operate as an appeal court for cases from the Court of Requests. In *Horton v Rosewell* litigants retried their luck in the Court of Chancery because prohibitions of the King's Bench had put a stop to bills of conformity in the Court of Requests.[459] The speech of Thomas Mallet in the parliamentary debates states that 'where a bill of conformity had been begun in the Court of Requests and prohibitions out of the King's Bench then he applies himself to the Chancery where no prohibitions do lay'.[460] This seems to suggest that the example of *Horton v Rosewell* was not unusual. However, the rehearing of *Horton v*

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[452] Smith, 'The error of young Cyrus' (n 448) 322; *Payne's Case* (1613) Godbolt 216; 78 ER 13.
[453] Smith' The error of young Cyrus' (n 448) 322.
[454] *Caplin v Toft* in WH Bryson, *Cases concerning equity and the courts of equity 1550-1660 Vol I* SS 117 360.
[455] CM Gray, 'The Boundaries of the equitable function' (1976) 20-3 *The American Journal of Legal History* 196-197. See more in relation to the 1616 controversy, chapter 5 of this thesis.
[456] ibid.
[457] Gray (n 455) 197. *Commons Debates*, 14 March 1621 in W Notestein, FH Relf and H Simpson, *Commons Debates* 1621, vol. 6 (Yale University Press 1935) 64.
[458] *Horton v Rosewell*, 28 November 1623 C 33/145 f. 281 [IMG_0284]; 9 June 1624 C 33/145 f. 418 [IMG_0423]; 9 February 1624 C 33/145 f. 549v [IMG_ 0552a]; 10 November 1624 C 33/147 f. 154 [IMG_0157].
[459] This confirms the research findings of DA Smith based on the parliamentary history. Smith, 'The error of young Cyrus' (n 448) 322.
[460] Commons Debates, 14 March 1621 in Notestein, Relf and Simpson, *Commons Debates* 1621, vol. 6 (n 457) 64. See for Thomas Mallet, VCD Moseley and R Sgroi, 'Malet (Mallet), Thomas (c.1582-1665), of the Middle Temple, London and Poyntington, Som.; later of Serjeants' Inn, Chancery Lane, London' in A Thrush and JP Ferris (ed), *The History of Parliament: the House of Commons 1604-1629* (CUP 2010) at <https://www.historyofparliamentonline.org/volume/1604-1629/member/malet-thomas-1582-1665> accessed 5 January 2021.

Rosewell proved unsuccessful, because by 1624 the Court of Chancery was no longer willing to conform insolvent debtors.[461]

In *Horton v Rosewell* (1624) the Court of Chancery had to decide whether to hear a bill of complaint exhibited in Chancery would be 'to countenance a bill of conformity'.[462] Toby Horton had originally exhibited his bill of conformity on 10 February 1622 in the Court of Requests.[463] In that suit, known as *Horton v Hipesley* (1622), Horton owed debts to a total of about £2,000 to 25 creditors by way of mortgages, bonds, bills and other assurances.[464] He argued that they were 'for the most part…due by suretyship'.[465] Horton argued that he was 'desirous' to give his creditors satisfaction out of his own estate in land and leases worth about £5,000. In turn, he asked that the defendants should give him a reasonable rate, so that the surplus could go to Horton, his wife and children. However, the defendants refused to accept this offer. Neither did they want Horton to sell his own land, even though, by taking advantage of penalties and forfeitures upon mortgages, he would thereby have more than double the value of the debts for the relief of the creditors. Initially, the bill of conformity had gone directly from the king to the Privy Seal. The case was subsequently referred to Sir John Horner and others, who seem to have acted as commissioners, to end the matter.[466] After the commissioners had investigated the matter and made a certificate, the Court of Requests decided that the plaintiff's offer was reasonable and that there was no other option to pay off the debts without selling the land. The Court of Requests ordered the £5,000 to be levied

[461] See chapter 3. *Horton v Rosewell*, 28 November 1623 C 33/145 f. 281 [IMG_0284]; 9 June 1624 C 33/145 f. 418 [IMG_0423]; 9 February 1624 C 33/145 f. 549v [IMG_ 0552a]; 10 November 1624 C 33/147 f. 154 [IMG_0157].
[462] *Horton v Rosewell*, 28 November 1623 C 33/145 f. 281 [IMG_0284]; 9 June 1624 C 33/145 f. 418 [IMG_0423]; 9 February 1624 C 33/145 f. 549v [IMG_ 0552a]; 10 November 1624 C 33/147 f. 154 [IMG_0157].
[463] *Horton v Hipesley*, 10 February 1622 REQ 1/31 f. 288v [IMG_0148] at f. 289 [IMG_0598].
[464] ibid.
[465] *Horton v Hipesley,* 10 February 1622 REQ 1/31 f. 288v [IMG_0148].
[466] There is no direct reference to the fact that Sir John Horner was a commissioner, or that there was a commission involved. However, it seems that Sir John Horner was a commissioner in other cases at the time. The tasks he performed in *Horton v Hipesley* simulate a commission of bankrupts. For Sir John Horner see, <www.histparl.ac.uk/volume/1604-1629/member/horner-sir-john-1576-1659> accessed 5 January 2021.

for the benefit of the creditors, and, in turn, the plaintiff and his sureties would get an injunction under the Privy Seal against all proceedings at common law.[467]

Lord Keeper Williams and Haywarde MR both later considered that *Horton v Hipseley* (1622) was a bill of conformity case, decided in the Court of Requests. The record shows that the case had started with a petition to King James I.[468] None of the creditors had agreed with the composition made by the Court of Requests, which meant that the Court of Requests had conformed all of Horton's creditors. This went against the rules of the Proclamation at the time.[469] The fact that *Horton v Hipseley* (1622) was decided in favour of the plaintiff after the Proclamation seems to imply that the bills of conformity procedure in the Court of Requests was more lenient and less regulated in the early 1620s than its counterpart in the Court of Chancery. It seems, however, that Horton never got the remedy ordered by the Court of Requests. The reason for this was that prohibitions from the King's Bench had put an end to bills of conformity in the Court of Requests and therefore the proceedings were stayed.[470] Horton, however, still wanted his composition. Therefore, on 28 November 1623 he exhibited his bill of complaint against three of the creditors, John Rosewell, John Warren and John Warham, in the Court of Chancery.[471] As noted above, Lord Keeper Williams and Haywarde MR both acknowledged that *Horton v Hipesley* (1622) had been a bill of conformity case in the Court of Requests.[472] The question now was whether the case would also be considered a bill of conformity case in the Court of Chancery. After the bill was exhibited in Chancery, the defendants demurred, arguing that to hear the case would be 'to countenance a bill of conformity'. Haywarde MR was asked to investigate this claim. Haywarde conceived the case

[467] *Horton v Hipesley,* 10 February 1622 REQ 1/31 f. 288v [IMG_0148] f. 289 [IMG_0598].
[468] ibid.
[469] See chapter 3.
[470] *Horton v Rosewell*, 28 November 1623 C 33/145 f. 281 [IMG_0284]. *Horton v Roswell* by report of Haywarde 3 June 1624 C 38/49 G-P. See also, Smith, 'The error of young Cyrus' (n 448) 324.
[471] *Horton v Rosewell*, 28 November 1623 C 33/145 f. 281 [IMG_0284]. *Horton v Roswell* by report of Haywarde 3 June 1624 C 38/49 G-P. See also, Smith, 'The error of young Cyrus' (n 448) 324. Haywarde's report set out that Horton had exhibited his bill in Chancery on 18 November. However, Haywarde might have mistaken the date with 28 November 1623, because there is no entry of *Horton v Roswell* on 18 November 1623. *Horton v Rosewell*, by Haywarde 3 June 1624 C 38/49 G-P.
[472] *Horton v Rosewell*, 28 November 1623 C 33/145 f. 281 [IMG_0284]. *Horton v Roswell* by report of Haywarde 3 June 1624 C 38/49 G-P.

'to be of the nature of a bill of conformity' and held that the demurrer was good. Lord Keeper Williams agreed with Haywarde's report and 'clearly and absolutely' dismissed the matter 'out of this court with costs to be paid by the plaintiff'.[473]

6.4. Court of Wards

Rosseter v Blague (1624) shows a reference to the Court of Wards, the court that dealt with the king's wards and the administration of their lands.[474] *Rosseter v Blague* was an unsuccessful bill of conformity case. The defendant had argued that the plaintiff had exhibited a bill in Chancery which was in the nature of a bill of conformity.[475] Rosseter failed to appear in the Court of Chancery three times in a row. Nevertheless, Lord Keeper Williams ordered three times in his favour. The last time Rosseter had appeared in the court, he had argued that the case could proceed in Chancery by reason of an order made in the Court of Wards, which only concerned Blague. Lord Keeper Williams 'being of opinion that the said bill is of the nature of a bill of conformity … therefore and for the causes aforesaid does order that the matter be from henceforth clearly and absolutely dismissed out of this court, but without costs howbeit there be former orders for the payment of costs'.[476] Unfortunately, no further facts of the case are known. *Rosseter v Blague* seems to suggest that orders from the Court of Wards could be brought into the Court of Chancery, when it dealt with bills of conformity procedures.

6.5. Court of Exchequer

Mitchell v Woodward (1619) is the only case in the survey that shows interaction between debt settlements by the Court of Chancery and the Court of Exchequer, a court mainly concerned with

[473] *Horton v Rosewell*, 10 November 1624 C 33/147 f. 154 [IMG_0157].
[474] *Rosseter v Blague*, 9 October 1624 C33/147 f. 3v [IMG_0006a]; 25 October 1624 C 33/147 f. 105 [IMG_0108]; 12 November 1624 C 33/147 f.230v [IMG_0233a]. See for the interaction between the Court of Chancery and Court of Wards more generally, Jones, *The Elizabethan Court of Chancery* (n 117) 383-387.
[475] *Rosseter v Blague*, 9 October 1624 C33/147 f. 3v [IMG_0006a]; 25 October 1624 C 33/147 f. 105 [IMG_0108]; 12 November 1624 C 33/147 f.230v [IMG_0233a].
[476] *Rosseter v Blague*, 12 November 1624 C 33/147 f.230v [IMG_0233a].

Crown business.[477] This is consistent with the findings of WJ Jones in his work on the Elizabethan Court of Chancery, in which he argues that the Exchequer was not very often referred to in Chancery cases.[478] The master's report by Thomas Ridley sets out that Jacob Pratt had become indebted to Woodward for £100 and had still not paid Woodward back well after the due date.[479] Jacob Pratt subsequently became insolvent and Woodward, as one of his creditors, sued out a commission of bankrupts with the rest of the creditors. In May 1618 Woodward came to an agreement with 130 other, conformable, creditors for 10s in the pound for satisfaction of their several debts.[480] In September 1618 Woodward became indebted to the king in a bond of £200 for the payment of £100. Thereupon an 'inquisition' went out of the Court of Exchequer, directed to the sheriffs of London to inquire what the assets of Woodward were in London. It was found that Woodward was owed £100 by Pratt. In enforcing the debts owed to the king, the Court of Exchequer ordered that the debt owed to Woodward be seized for the benefit of the king. This way, the king in effect took over from Woodward as creditor. In November of that year, Pratt's conformable creditors exhibited a bill of conformity in the Court of Chancery against Woodward and some other creditors, because they were refusing to accept a composition. However, Ridley concluded in his report that since the debt had been seized for the benefit of the king before the bill of conformity, the injunction issued in the bill of conformity procedure should not take effect against the debt against Pratt and should be dissolved.

6.6. Inferior courts

The survey also shows an example of the use of a writ of certiorari, in *Shippe v Underhill* (1620), where a writ of certiorari was issued during the bill of conformity procedure.[481] WJ Jones explains

[477] *Mitchell v Woodward,* 2 February 1619 C 33/135 f. 505 [IMG_1675a]; C 33/135 f. 840v [IMG_ 2011a]; 8 June 1619 C 33/135 f. 1100 [IMG_2281]. See for the interaction between the Court of Chancery and the Court of Exchequer, Jones, *The Elizabethan Court of Chancery* (n 117) 342-344. In relation to Exchequer injunctions, see especially Jones, *The Elizabethan Court of Chancery* (n 117) 344. WH Bryson, *The equity side of the Exchequer: its jurisdiction, administration, procedures, and records* (CUP 1975) 29, 30. However, Bryson's work deals with a later time period.
[478] Jones, *The Elizabethan Court of Chancery* (n 117) 342.
[479] *Michell v Woodward* by Thomas Tidley, 4 June 1619 C 38/30.
[480] ibid.
[481] *Shippe v Underhill*, 17 October 1620 C 33/139 f. 47v [IMG_0052a].

that certiorari was used by the Court of Chancery to remove proceedings from an inferior court.[482] There were two types of certiorari: general or common certiorari, and special certiorari. General certiorari was used by the Chancery to call up records or proceedings from courts of record or from public officials, such as a coroner or sheriff.[483] Special certiorari was usually requested in a bill of compliant.[484] It was directed to inferior courts. It did not matter whether they were of record, and it was directly related to proceedings in the Court of Chancery.[485] In *Shippe v Underhill* (1620), Underhill, who had subscribed to a composition via a bill of conformity procedure had the plaintiff Shippe imprisoned for his original debt due.[486] Thereupon, Shippe had proceeded with a writ of certiorari in order to remove the case before the lord chancellor, as the imprisonment was against the order of the court.[487] It seems that special certiorari was used in this case, though the inferior court in question is not mentioned in the decision.

7. Interaction with the bankruptcy statutes

As has been seen, the bankruptcy statutes only applied to 'bankrupts', insolvent traders or merchants, who had acted fraudulently to defraud their creditors. The aim of the bankruptcy statutes was to give the creditors relief through pro rata distribution of the assets of the bankrupt, which was in effect a debt settlement. The early bankruptcy statutes of 1543, 1571 and 1604 did not mention a possibility of debt settlements for insolvent debtors by the Court of Chancery.[488] The Bankrupts Act 1624 was the first and only statute in the period that explicitly referred to conformity compositions in the Court of Chancery, but this statute formally abolished them.[489] It might not be surprising that the Court of Chancery hardly explicitly referred to the bankruptcy

[482] Jones, *The Elizabethan Court of Chancery* (n 117) 499-500.
[483] ibid.
[484] ibid.
[485] ibid.
[486] *Shippe v Underhill*, 17 October 1620 C 33/139 f. 47v [IMG_0052a].
[487] ibid.
[488] Bankrupts Act 1624 (21 Jac I, c 19) s. 2.
[489] See chapter 3.

statutes.[490] However, the survey shows that the Court of Chancery dealt with cases in which debtors did not meet the requirements of the bankruptcy statutes. As seen above, the Court of Chancery dealt with composition of 'honest' insolvent debtors. In addition, the survey shows two cases, *Lavington v Maton* (1595) and *Tyffin v Hart* (1619), in which the bankruptcy statutes are explicitly mentioned in relation to debt settlements.[491] The Standing Orders of the Court of Chancery of 31 October 1620 also showed a direct link between the equitable function of the Chancery in relation to debt settlement and statutory bankruptcy, by prescribing that an order in a bill of conformity procedure had to be 'according to the equity of the Statute of Bankrupts'.[492] More generally, the cases in the survey suggest that the aim of debt settlements was similar to that of the bankruptcy statutes, namely to give the creditor as much debt relief as possible.

In *Lavington v Maton* (1595) debtors tried to get a composition by pretending to be insolvent, thereby trying to abuse the Chancery practice of debt settlements.[493] The case dealt with a certain Leonard Maton from Chisenbury, Wiltshire. Maton was a yeoman, 'a farmer of good wealth and substance to common account and estimation in the said county'.[494] *Lavington v Maton* is different from most other settlement cases in the survey, since Maton's creditors petitioned the Court of Chancery because they accused Leonard Maton, Matthew Grove (Maton's son-in-law), John Maton (Maton's nephew) and Alexander Staples of defrauding and deceiving them.[495]

The creditors argued that Leonard Maton had via Staples conveyed his assets away in trust to Grove to put them out of reach of his creditors and to make him appear insolvent.[496] The same issue had already been considered in the Privy Council in 1586, but no decision had been

[490] *Lavington v Maton*, 7 July 1595 C 78/115/6 m. 18 [IMG_0036]; *Tyffin v Hart,* 20 April 1619 C 33/135 f. 997 [IMG_2169].
[491] ibid.
[492] 'Additional rules for the better governing of the Court of Chancery and the Great Seal. Published in open Court 31 October 1620'. See Sanders (n 291) 129.
[493] *Lavington v Maton*, 7 July 1595 C 78/115/6 m. 18 [IMG_0036].
[494] ibid.
[495] *Lavington v Maton*, 7 July 1595 C 78/115/6 m. 19 [IMG_0038]. The case was complicated, because it seems that Maton was himself defrauded by his co-defendants.
[496] *Lavington v Maton*, 7 July 1595 C 78/115/6 m. 18 [IMG_0036], at m. 19 [IMG_0038].

reached.[497] In the Chancery case, Leonard's creditors argued that 'the said Leonard was become in the quality of a bankrupt though not such as was within the compass of the statute made against such offenders for that he was no merchant nor lived only by buying and selling as the purpose of the said statute is expressed'.[498]

Being a yeoman, Maton did not fall within the scope of the bankruptcy statutes, which meant that the creditors had to recover their debts with simple common law actions. Instead, the defendants tried to get the creditors to agree to a composition, assuming that the creditors would agree to a reduction of their debts rather than potentially ending up with no relief at all.[499] However, the creditors argued that Maton had sufficient assets to pay off his debts and petitioned the Court of Chancery seeking to recover the full debts owed to them.[500]

However, the defendants argued that Staples had given valuable consideration to Leonard Maton for the leases and stock transferred to Staples.[501] He had paid a part of the sum at the time of the conveyance, had become bound in a statute and, in addition, there was marriage consideration for the conveyance from the marriage between Grove and Johane, the only child of Leonard Maton.[502] Grove had the quiet enjoyment of the farm and even held sheep there.[503] Overall, the defendants argued that the conveyance was made *bona fide* and not by fraud or the intent to defraud.[504]

Sir William Brouncker, a Wiltshire man local to the dispute, was instructed as a commissioner and '…for that purpose had taken great care and pains as well for quieting of such suits as were or might be commenced for or abouts [*sic*] the premises as also for the relieving the said creditors'.[505] Brouncker found that the creditors were indeed being defrauded.[506] However, it was Grove and

[497] [Meeting at the Star Chamber], 22 April 1586 PC 2/14 f. 67-68.
[498] ibid.
[499] ibid.
[500] ibid mm. 19-20 [IMG_0037]-[IMG_0038]
[501] ibid m. 20 [IMG_0039].
[502] ibid.
[503] ibid m. 20 [IMG_0040].
[504] ibid
[505] ibid m. 22 [IMG_0044].
[506] ibid.

Staples who had deceived the creditors. Leonard Maton, the lead defendant, appeared to be unaware of their fraudulent conduct and had also been deceived by them. Brouncker did not award a standard composition with a reduction of payment, but recommended an alternative payment plan for Grove, based on a schedule which set out days of payment and sums of payment for a number of years in the future.[507] Puckering LK confirmed the settlement 'as if the whole matter of the same final end, order or award had been judicially pronounced and set down upon a solemn hearing in open court'.[508] The case is a clear example of debtors trying to get a reduction of debts, and so defraud the creditors, by pretending to be insolvent. However, the Court of Chancery would intervene if creditors were susceptible to fraudulent conduct, and it is not surprising that the Court of Chancery acted to relieve Maton's creditors on the terms that they wanted.

The other case in the survey that specifically refers to the bankruptcy statutes is *Tyffin v Hart* (1619).[509] As has been seen, this case dealt with a royal bill of conformity procedure, which eventually led to a composition between the Tyffin brothers and their creditors. In this case, Bacon LC explicitly distinguished the situation of the brothers from ordinary bankruptcy for two reasons. First, 'the honest disposition of the said Tyffins and their filial respect and piety to their dead father'.[510] Second, 'the gracious recommendation of his Majesty and the power and authority of this court'.[511]

The first element is not surprising, because the early bankruptcy statutes were all concerned with 'fraudulent' debtors. In fact, these bankruptcy statutes were all of a penal nature. If the fraudulent aspect could not be proved, the bankruptcy statutes did not apply. In that case creditors would not be able to get a composition under the bankruptcy statutes and would be unable to get debt relief at common law. The second element, that the case was recommended by the king to the Court of

[507] ibid m. 18 [IMG_0036] at [IMG_0051]. This included various sums for the creditors of Leonard Maton, but also a small sum to provide for the livelihood of Leonard Maton and his wife.
[508] ibid m. 18 [IMG_0036] at [IMG_0052].
[509] *Tyffin v Hart*, 20 April 1619 C 33/135 f. 998 [IMG_2169] at f. 998v [IMG_2170a].
[510] *Tyffin v Hart,* 20 April 1619 C 33/135 f. 997 [IMG_2169].
[511] ibid.

Chancery is another distinguishing factor, because, as has been seen, in a bankruptcy procedure the case would be put forward by one or more creditors when they sued out a commission of bankrupts. As seen above, this practice of recommendation by the king can be seen in many of the conformity cases in the survey.[512]

It seems that Bacon LC tried to reconcile the Chancery practice with the bankruptcy statutes in his Standing Orders in 1620.[513] As has been seen, the Standing Orders prescribed that an order in a bill of conformity procedure had to be 'according to the equity of the Statute of Bankrupts'.[514] The main aim of the statute of bankrupts was to relieve creditors, so the Chancery practice before the Standing Orders was already in line with what the Standing Orders required. Compositions were also beneficial for the insolvent debtor, especially if the creditors approved of any kind of discharge of debts. However, this seems to have been a positive side effect of the Chancery practice, rather than its main aim. Indeed, when the Court of Chancery balanced the interests of the debtor and his or her creditors, the vulnerable creditors would receive full repayment, implying that the interests of the creditors prevailed.

8. Reconsideration of cases

The survey shows that some litigants wanted to have their cases reconsidered in the Court of Chancery, after the final decree in the case was made. It seems that refractory creditors who had had to conform to a composition by the Court of Chancery tried to have their case reheard and the original decision reconsidered in their favour. All the cases on this point found in the survey are cases related to *Tyffin v Hart* (1619).[515]

[512] See chapter 3.
[513] *Tyffin v Hart,* 20 April 1619 C 33/135 f. 997 [IMG_2169].
[514] 'Additional rules for the better governing of the Court of Chancery and the Great Seal. Published in open Court 31 October 1620'. See Sanders (n 291) 129-131. See Chapter 3.
[515] *Tyffin v Hart* (1619) (n 123).

Tyffin v Hart concluded with a final decree on 28 May 1619. However, litigation related to the case continued for several years afterwards.[516] Various unconformable creditors, who were not excluded from the composition by the court, challenged the decree. For example, in *Tyffin v Willet* (1619) Willet, a creditor of the Tyffins, was successful in his attempt.[517] The masters' reports relating to this case show that under the composition the Tyffins had to pay £80 in full satisfaction of the original debt of £100.[518] It appeared that the Tyffins did not pay the £80, thereby failing to comply with the composition, and as a consequence Willet was now excluded from the general decree.[519]

In *Tyffin v Capper* (1620), *Tyffin v Sutton* (1620), *Tyffin v Freshwater* (1620) and *Tyffin v Garfield* (1621) the defendants were unsuccessful in arguing that the decree did not apply to them.[520] In the first three cases the defendants unsuccessfully tried to argue that they should be exempted from the composition on the basis that the money that they had lent to the Tyffins was orphans' money.[521] In *Tyffin v Garfield* (1621) a certain Bowden, a scrivener of London, had become a creditor of the Tyffins, on behalf of his depositor Garfield.[522] Effectively the scrivener was working like a bank, charging interest for the loan. Bowden had subscribed to the composition on behalf of Garfield. This meant that Garfield was bound by the decree. After the death of Bowden, Garfield tried without success to escape the decree on the basis that the decree applied to Bowden and not to him.

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[516] There are many more cases relating to the *Tyffin* case than are discussed in this section. This section only discusses the cases in the survey that were related to reconsideration of cases.
[517] *Tiffyn v Willet*, 6 November 1619 C 33/137 f. 400 [IMG_0407].
[518] *Tiffyn v Willett* by Thelwall, 2 June 1619 C 38/37 Q-Z.
[519] *Tiffyn v Willett* by Thelwall, 30 October 1619 C 38/37 Q-Z; *Tiffin v Willet*, 6 November 1619 C 33/137 f. 400 [IMG_0407].
[520] *Tyffin v Capper*, 24 October 1620 C 33/139 f. 88v [IMG_0092a], *Tyffin v Sutton*, 20 November 1620 C 33/139 f. 254 [IMG_0247], *Tyffin v Freshwater*, 27 November 1620 C 33/139 f. 417v [IMG_0411a].
[521] See above for orphans' money.
[522] *Tyffin v Garfield,* 8 June 1621 C 33/140 f. 1250 [IMG_1280]. See for scriveners in the period, RD Richards, *The early history of banking* (Routledge 2014) 16-17.

Tyffin v Delafontaine (1626) dealt with a dispute between Elizabeth de la Fontaine – a widow and one of the defendants in *Tyffin v Hart* (1619) – Erasmus de la Fontaine, and the Tyffin brothers.[523] Elizabeth de la Fontaine had been a creditor to the Tyffins for £300 at the time of the composition.[524] She was bound by the composition and had to accept 'her rateable part'.[525] However, she did not comply with the composition. Somewhat surprisingly, after the composition the Tyffin brothers had given her new security for the whole debt owed to her of £300 with interest of £70, instead of the reduced sum set out in the composition. The Tyffins argued that they had paid the whole debt as well as the interest. Erasmus de la Fontaine promised to acknowledge satisfaction upon the bonds.[526] However, the bonds were not delivered to the Tyffins, because it was alleged by Elizabeth de la Fontaine that some interest had not been paid. She acknowledged that the new debt of £300 had been paid, together with an additional £50. However, she argued that it had been promised that the interest upon the old bonds would be paid. She acknowledged that the Tyffins had paid £20 on top of the £50, but claimed that the money had not been paid in the right way. It was paid to one Snelling 'upon one Young's letter'. However, she had already desired a certain Sir Daniel Deligne to instruct the Tyffins not to pay any more money to the said Young. The court nevertheless ordered that unless the de la Fontaines could show the court arguments to the contrary, proceedings against the Tyffins upon the bonds at common law should be stayed until further order.[527]

Finally, in *Tyffin v Lawson* (1622), three of the refractory creditors of the Tyffins made an attempt to contest the decree in *Tyffin v Hart* (1619) once more.[528] These creditors argued that the Proclamation of 1621 against bills of conformity had changed their position. Under the new rules they would not have been forced to agree to the composition. In *Tyffin v Lawson* (1622) it was

[523] *Tyffin v Delafontaine*, 19 October 1626 C 33/151 f. 58v [IMG_0063a].
[524] ibid. See also *Tiffyn v Creditores*, 'Cert. 2' 2 May 1619 C 38/33.
[525] *Tyffin v Delafontaine*, 19 October 1626 C 33/151 f. 58v [IMG_0063a].
[526] See above for the family connection between Elizabeth and Erasmus De la Fontaine.
[527] *Tyffin v Delafontaine*, 19 October 1626 C 33/151 f. 58v [IMG_0063a].
[528] *Tyffin v Lawson,* 23 November 1622 C 33/143 f. 215 [IMG_0217].

decreed in January 1622 that decrees based on bills of conformity should stand in force if the creditors had already received part of their composition money.[529] The three creditors in question had already received some of the composition money. They refused to deliver up their specialties and also commenced proceedings at common law, contrary to the decree in *Tyffin v Hart*, arguing this was allowed following the Proclamation. However, Williams LK upheld the decree in *Tyffin v Hart* (1619) and ordered that an injunction be issued against the three refractory creditors, because the debt settlement of the Tyffins was already part performed.

9. Reactions to particular changes in the law

The survey shows that Chancery practice sometimes changed as a reaction to particular changes in the law or in the Chancery's own regulations, namely (1) the Standing Order of the High Court of Chancery of 31 October 1620; (2) the Proclamation of King James I on 31 March 1621 and the Standing Orders of the High Court of Chancery of 18 April 1621; and (3) section 2 of the Bankrupts Act 1624.[530]

9.1. The Standing Orders of the High Court of Chancery of 31 October 1620

The survey shows that the Chancery practice responded to the Standing Orders of the High Court of Chancery of 31 October 1620. The success rate of conformity cases dropped after 1620. It seems that there are two possible explanations for this decline. The first explanation is the decision of *Finch v Hicks* (1620) in January of that year.[531] As has been seen, this case played a vital role in the abolition of bills of conformity. The second explanation for the decline of the cases is the introduction of the 'additional rules' in the Standing Orders of the High Court of Chancery of 31 October 1620.[532]

[529] ibid..
[530] See chapter 3.
[531] *Finch v Hicks,* 19 January 1620 C 33/137 f. 770v [IMG_0778a].
[532] Sanders (n 291) 129. See also chapter 3.

Various cases refer to the 'late rules' and 'additional rules' of the lord chancellor. As has been seen, the case of *Grant v Cotton* (1620) illustrates the second rule, which set out that a bill or petition had to be accompanied by an agreement of the creditors, to show how many creditors had agreed with the details of the sums of money and when they had acquired their particular debts.[533] It was found that 'it was humbly prayed for that the number of creditors and the quantity of debts are within his lordship's late rules that those conformable creditors that are petitioners their names may be inserted as plaintiffs in the bill with the plaintiff against the unconformable creditors'.[534] The case was subsequently referred to commissioners to examine and certifying the debts, which is prescribed in the fourth rule.

Another case that mentions the 'late rules' of the lord chancellor is *Dackombe v Brocke* (1620).[535] In this case the insolvent debtor owed £15,000. He was now dead, and the plaintiffs were his executors. They had paid the creditors £8,000 up front, and offered to pay £1,000 a year with £5 per £100 extra, paid from the testator's land proportionally until the creditors were satisfied. It seems that the plaintiffs offered to pay interest, and in return sought to pay the debts at a later time. The reasoning of the case is not clear, as the facts are largely unknown. It is, for example, unknown how many creditors were conforming to the composition. Nevertheless, because 'the matter was upon a reference from his Majesty and the said plaintiff's bill was exhibited before his Lordship's late rules published in open court', it was ordered and decreed that the creditors, except one, had to conform and agree with the plaintiffs' offer.[536]

Cowell v Hill (1620) shows a fraudulent example of the evasion of the 'late rules'.[537] The reason for the dismissal of the case was that the plaintiff did not comply with the 'late rules'. It was found

[533] *Grant v Cotton,* 15 November 1620 C33/139 f. 489 [IMG_0483].
[534] ibid. It is unclear why the number of creditors is mentioned by Bacon LC. The number of creditors is not a requirement in the Standing Orders of 1620. 'Additional rules for the better governing of the Court of Chancery and Great Seal. Published in open Court 31 October 1620', see Sanders (n 291) 129-131.
[535] *Dackombe v Brocke,* 25 November 1620 C 33/139 f. 339v [IMG_0333a].
[536] ibid at f. 340 [IMG_03334].
[537] *Cowell v Hill,* 4 December 1620 C 33/139 f. 332 [IMG_0326].

that the defendant had a judgment against one Thornedike at common law, whereupon the principal debtor and the surety exhibited their bill of conformity into the Chancery, 'and about the time of the publishing of his lordship's late rules touching bills of conformity unduly got a compulsory order against the defendant directly contrary to the said rules which order [was] not gotten in open court but surreptitiously and abusively obtained'.[538]

It seems that this case deals with the first and third of the 'late rules', which set out that the creditors, who had to represent 75% of the total amount of debts, had to bring a bill of conformity procedure. The insolvent debtor in the case was given a compulsory order. However, the bill seems to have had no support of the creditors, as it was exhibited only by the debtor and his surety. In addition, the order was secretly obtained and not in open court. It is not clear how the plaintiff could get an order outside open court, but it is clear from the decision that it was fraudulently obtained.

Finally, *Pollard v Reeve* (1620) shows that a decision in a bill of conformity proceeding to stay proceedings at common law could be quashed if 'his lordship's additional' rules were not complied with.[539] The plaintiff had obtained an injunction for stay of proceedings at common law via a bill of conformity proceeding. However, it turned out that he had petitioned alone. This was contrary to the 'additional rules', and it was ordered that unless he could show good cause to the contrary, the injunction would be dissolved.[540]

9.2. The Proclamation of King James I of 31 March 1621 and the Standing Orders of the High Court of Chancery of 18 April 1621

As seen above, the Proclamation of King James I on 31 March 1621 set out that all bill of conformity proceedings were to be suspended, until parliament had found a better solution. The

[538] *Cowell v Hill*, 4 December 1620 C 33/139 f. 332 [IMG_0326] at f. 332-332v [IMG_0326]-[IMG_0326a].
[539] *Pollard v Reeve*, 18 November 1620 C 33/139 f. 224 [IMG_0218] at f. 224v [IMG_0218a].
[540] *Whorewood v Ambrosi*, 9 January 1621 C 33/139 f. 509 [IMG_0503] mentions 'his lordship's late published orders', but the case was completely fraudulent and did not comply with any of the rules set out by Bacon LC.

Proclamation was implemented in the Standing Orders of 18 April 1621. The Proclamation and the Standing Orders effectively ended the Chancery practice of conformity agreements.

The intention of the Chancery to limit bills of conformity following the Proclamation and Standing Orders can be illustrated by the case of *Robinson v Cambell*, which was decided in November 1620, just a few months before the Proclamation.[541] In this case, the court decided to refrain from a composition, and opted for a repayment plan instead. The case explicitly states that Francis Bacon LC had made this decision, because '[of his] misliking of bills of conformity'.[542]

Petre v Waterhouse (1621) illustrates that litigation arose based on the Proclamation.[543] In this case, the plaintiff disputed a decree. He argued that the decree was grounded upon a bill of conformity. The defendant disputed this. Lord Keeper Williams did not want to grant an order for dismissing the cause, but ordered the plaintiff's counsel to make themselves familiar with the Proclamation, and show that the decree was within it.[544]

9.3. Section 2 of the Bankrupts Act 1624

As seen above, section 2 of the Bankrupts Act 1624 formally ended the Chancery practice of conformity agreements. However, the Act did not end the practice of debt settlements by the Court of Chancery. As has been seen, *Rycroft v Hedd* (1627) shows that compositions could still be made, as long as they were voluntary for all the parties involved.[545]

[541] *Robinson v Cambell,* 9 November 1620 C33/139 f. 185v [IMG_0179a].
[542] ibid at f. 186 [IMG_0180].
[543] *Petre v Waterhouse*, 6 October 1621 C 33/140 f. 1286v [IMG_2626].
[544] ibid.
[545] *Rycroft v Hedd*, 20 November 1627 C 33/153 f. 319 [IMG_2055].

Chapter 5

Contextual analysis

As seen above, the first debt settlement case found in the survey, *Johnson v Wolmer*, was decided in 1551.[1] The survey seems to suggest that debt settlements appear earlier in the Chancery record than bankruptcy cases, because by 1551 no bankruptcy case had appeared in the survey.[2] From 1551 debt settlements occasionally appear in the survey.[3] However, most of the debt settlements in the survey were decided by the Court of Chancery between 1618 and 1620.[4] The survey suggests that the equitable function of the Court of Chancery aimed to give relief to creditors, similar to the bankruptcy statutes. However, the Court of Chancery had more flexibility in achieving this goal: it could not only order pro rata distribution of the property of the insolvent debtor, but could also order (part-) discharge of debts, postponement of payment and alternative payment plans. In a similar fashion to the bankruptcy statutes, the Court of Chancery showed extra leniency towards the more vulnerable members of society, such as orphans and widows. This chapter will put these findings of the survey into context. It will set out various possible factors that could have affected the Chancery's practice in debt settlement cases: (1) the possibility of the use of precedent; (2) the possible impact of the debate of 1616 about the relationship between the Chancery and the common law; (3) the possible correlation between the increase of conformity cases in the Court of Chancery and the trade depression of 1620-24; and finally (4) the possible effect of social and economic factors.

[1] *Johnson v Wolmer*, 3 November 1551 C 78/6/28 f. 13 [IMG_0027].
[2] There is a small chance that a bankruptcy case appeared in 1551, because that year was not part of the survey and not all the cases in the record of that year have been read, due to time restraints.
[3] E.g. *Hardy v Adams*, 18 November 1587 C 33/75 f. 181 [IMG_0183]; *Lavington v Maton*, 7 July 1595 C 78/ 115/6 f. 18 [IMG_0035]; *Leecheland v James*, 15 November 1596 C 33/91 f. 444v [IMG_477a]; *Warren v Eldrington*, 19 September 1600 C 33/97 f. 681v [IMG_8265a]; 20 February 1601 C 33/99 f. 380 [IMG_9355]; 15 July 1601 C 33/99 f.728 [IMG_9703]; *Peers v Ward*, 21 October 1614 C 33/127 f. 49 [IMG_0051].
[4] See below section I.d for debt settlements decided during the lord chancellorship of Bacon LC.

I. Precedent

As has been seen above, the survey shows consistent Chancery practice in relation to insolvency. However, only a few cases in the survey show an explicit reference to precedent.[5] This is consistent with observations in the literature dealing with precedent in Chancery cases in the period.[6] While precedent in Chancery only became a more established concept by the time of Lord Nottingham,[7] Macnair nevertheless argues that since the time of Egerton at the latest, precedents were used in the Court of Chancery, both in argument and in judicial decision-making.[8] The precedents which counted were decisions recorded in the decree and order books.[9]

Winder suggests that the use of precedent in Chancery dates back to the time of Bacon LC, arguing that the earliest reported cases show that Chancellors strove to be consistent with prior decisions and searched for them and followed them.[10] Bryson suggests that the fact that more precedents were not being cited before 1660 is a reflection of the lack of equity reports in print at the time.[11] In contrast, Winder argues that the lack of printed reports did not deter chancellors from an adoption of the case-law system.[12] He argues that cases existing only in manuscript have played a more important part in legal development in equity than at common law.[13] Indeed, Macnair claims that the approach to precedent in the Court of Chancery was more formal than at common law.[14]

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[5] Note that with 'precedential effect' does not mean that it was a binding precedent in the modern sense. The doctrine of precedent at this time was much less hard-edged than it became in the nineteenth century. JH Baker, *An Introduction to English legal history* (OUP 2019) 207-215.
[6] WH Bryson, *Cases concerning equity and the courts of equity 1550-1660 Vol I* SS 117 xlix.
[7] ibid. See also DEC Yale, *Lord Nottingham's Chancery Cases* vol. I (SS 73) (Quarich 1957) xxxvii-cxxiv.
[8] M Macnair, 'The nature and function of the early Chancery reports' in C Stebbings, *Law Reporting in Britain. Proceedings of the eleventh British legal history conference* (The Hambledon Press 1995) 128.
[9] ibid.
[10] However, Macnair argues that there are several collections of 'What Egerton said' dating from the 1590s and 1600s. M Macnair, 'The nature and function of the early Chancery reports' (n 8) 125. WHD Winder, 'Precedent in equity' (1941) 57 *LQR* 245, at 246.
[11] Bryson, SS 117 (n 6) l.
[12] Winder (n 10) 246.
[13] ibid.
[14] Macnair, 'The nature and function of early Chancery reports' (n 8) 128.

It is suggested that the search for precedents was carried out by officers of the court, who collected the decisions and indexed them.[15]

Five cases in the survey deal with references to precedent: *Finch v Hicks* (1620), *Tyffin v Hart* (1619), *Disley v Leman* (1621). *Petre v Waterhouse* (1621) and *Larmite v Somerman* (1624).[16]A reference to 'precedent' can be found in *Finch v Hicks* (1620), which directly refers to the decision in *Tyffin v Hart* (1619), in which the Tyffin brothers, who had acted as sureties for their late father, were discharged from their debts.[17] *Finch v Hicks* was slightly more controversial than *Tyffin v Hart*.[18] As has been seen, the case dealt likewise with two sons of an insolvent father. However, in *Finch v Hicks* the father was still alive. One of the sons had petitioned the Chancery for a composition. In *Finch v Hicks* the Finches wanted Bacon LC, 'for the better enabling of the … plaintiff in following his Majesties reference and the commissioners', 'to grant an injunction to the plaintiffs against all their creditors whatsoever to stay the defendants' suits at the common law, which his lordship had formerly done to others, where a precedent was now showed forth in the case of one Tiffin against his creditors'.[19] As seen above, Bacon LC granted the injunction.

The Chancery stayed all proceedings against the Finches at common law. Interestingly, the Finch trio do not seem to have been given a rateable reduction of their debts, which was the final outcome in the *Tyffin* case, but were effectively given a full discharge of debts by the stay of proceedings at common law. It is not surprising that *Finch v Hicks* subsequently sparked parliamentary debate about 'bills of conformity', ultimately leading to their abolition.

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[15] ibid. Tothill's reports are an example of one of those indexes in print, but there were other examples in manuscript.
[16] *Finch v Hicks,* 19 January 1620 C 33/137 f. 770v [IMG_0778a]; *Tyffin v Hart*, 16 January 1619 C 33/135 f. 417 [IMG_1586]; *Disley v Leman*, 30 August 1621 C 33/140 f. 1275 [IMG_1302]. *Petre v Waterhouse*, 23 October 1621 C 33/141 f. 53v [IMG_0055a]; *Larmite v Somerman*, 21 October 1624 C 33/147 f. 98v [IMG_0101a].
[17] *Finch v Hicks,* 19 January 1620 C 33/137 f. 770v [IMG_0778a]. Interestingly, the *Finch* case dealt with the finances of Serjeant Henry Finch, who incidentally had assisted Thelwell, a master of the court, by collecting evidence for the schedules of debt in *Tyffin v Hart*. See for more about Serjeant Henry Finch, W Prest, 'Finch, Sir Henry (c. 1558–1625)' *ODNB* <https://doi.org/10.1093/ref:odnb/9436> accessed 20 December 2020.
[18] *Finch v Hicks,* 19 January 1620 C 33/137 f. 770v [IMG_0778a].
[19] ibid at f. 771 [IMG_0779].

While deciding *Tyffin v Hart*, Bacon LC seems to have been fully aware of the case's possible precedential effect. During the proceedings he had felt reluctant to conform the refractory creditors, because these creditors had argued that their debts were made upon specialties or comprised orphans' and poor children's money.[20] He considered

> the said debts are of several natures and his lordship had not now time to enter into particulars which must be handled in a case of this nature which otherwise may prove to be a precedent and dangerous example to take away men's securities for their moneys and freeing of sureties, on whom perhaps they chiefly rely.[21]

Bacon LC ordered both the conformable and unconformable creditors to make schedules of their debts and securities and then attend a master of the court. In the final order and decree Bacon LC conformed the refractory creditors and discharged the Tyffin brothers of their debts.[22] In this case Bacon LC was conscious that his decision in this case might be referred to as a precedent, and for that reason wished to ensure that he could consider the case fully.

Disley v Leman (1621) and *Larmite v Somerman* (1624) also refer to precedent.[23] As has been seen, they are entries of the same case, which dealt with the question whether merchant strangers could benefit from the statutes of bankrupts. Williams LK explicitly referred to precedents, in the plural, in *Disley v Leman*, suggesting that there were other cases in the record that also dealt with this issue. He ordered that 'it is agreeable to all equity and former precedents that the plaintiff ought to have their shares upon an equal distribution such sort as the other creditors ought to have they being admitted to the said commission', referring to 'divers precedents in the time of the Lord Chancellor

[20] *Tyffin v Hart*, 16 January 1619 C 33/135 f. 417 [IMG_1586]. The refractory creditors alleged that the conformable creditors had a strong incentive to conform, because their debts were mostly incurred for wares and without specialties.
[21] ibid.
[22] *Tyffin v Hart*, 20 April 1619 C 33/135 f. 997 [IMG_2169] at f. 998v [IMG_2170a]; 15 May 1619 C 33/ 135 f. 970 [IMG_2151], KC4/1/27. As seen above, the creditors with specialties had lost their security. The creditors with debts made upon orphans' or poor children's money were exempted from the general composition, and got full satisfaction of their debts in an alternative payment plan.
[23] *Disley v Leman*, 30 August 1621 C 33/140 f. 1275 [IMG_1302]; *Larmite v Somerman*, 21 October 1624 C 33/147 f. 98v [IMG_0101a].

Egerton of this nature which were also confirmed afterwards in this very cause by the opinion of the late Lord Chancellor Bacon'. Considering the lack of law reporting in relation to Chancery cases in this time period, it seems most likely that Williams LK was referring to prior decisions that could be found in the Chancery record.

The issue was revisited in *Larmite v Somerman* (1624), when Williams LK instructed Sir Eubule Thelwall to look into the matter.[24] In his report Thelwall noted the role of precedents in *Disley v Lehman*, observing that: 'there is mention made of precedents both in the Lord Ellesmere and Lord St Alban's whereupon the said order [the order of 10 August 1621 in *Disley v Leman*] was grounded'.[25]

In contrast, *Petre v Waterhouse* (1621) shows an example of a case in which Williams LK expressly rejected the idea of creating a case that gave rise to a particular precedent.[26] The case dealt with Henry Petre, who was a minister of religion, as well as a creditor of a certain Sir Edward Waterhouse.[27] Petre was a beneficiary of a trust, held by the trustees Muskett and Rowe.[28] Edward Waterhouse, his uncle David Waterhouse, and a certain Milner stood bound for £200 to Muskett and Rowe for payment of about £100 to Petre's use together with damage for the long forbearance thereof.[29]

Sir Edward Waterhouse was relying on an earlier decree that he had obtained in the Court of Chancery against the trustees Muskett and Rowe, as well as the other creditors of David Waterhouse.[30] In that decree Ellesmere LC had discharged Sir Edward of all his debts, on the basis

[24] *Larmite v Somerman*, 21 October 1624 C 33/147 f. 98v [IMG_0101a].
[25] ibid.
[26] *Petre v Waterhouse*, 16 May 1621 C 33/139 f. 993 [IMG_0989]; 6 October 1621 C 33/140 f. 1286v [IMG_2626]; 23 October 1621 C 33/141 f. 53v [IMG_0055a].
[27] *Petre v Waterhouse*, 16 May 1621 C 33/139 f. 993 [IMG_0989]. See for some details about Sir Edward, <https://www.british-history.ac.uk/no-series/court-of-chivalry/688-waterhouse-holte> accessed 24 December 2020.
[28] *Petre v Waterhouse* by Hawarde, 29 July 1621 C 38/42.
[29] ibid.
[30] ibid.

that he had only acted as a surety of David Waterhouse.[31] In *Petre v Waterhouse*, which was decided in July 1621, Petre argued that this earlier decision by Lord Ellesmere was unjust, because it was based on a bill of conformity and they had been abolished earlier that year in March 1621.[32]

Williams LK was assisted by two masters of the court, together with Mr Justice Hatton and Mr Justice Chamberlain, when he 'did now declare the said decree not be within the Proclamation against bills of conformity and therefore thinks not fit to overrule the said demurrer or to impeach the said decree'.[33] This meant that Williams LK did not give the Proclamation retrospective effect. The decree upon which Sir Edward relied had, after all, been made during the time of Lord Ellesmere. However, Williams LK explicitly set out that he did not want this particular case to 'become a precedent for any others hereafter to impeach or question the said decree the same being grounded upon such certificate and approbation as aforesaid'.[34] Despite upholding the decree, Williams persuaded the defendant to give £50 to the plaintiff. This was what he did not want to be a precedent: it was not to be used as means of questioning the decree which Williams had upheld. Instead, Williams LK restricted the case to the specific circumstances of Petre. He gave two reasons for this decision. The first was of a social and economic nature, as it was established that 'the plaintiff was a poor minister'.[35] The second was of a legal nature, namely that the money had been lent by special order of the Court of Chancery with 'his majesty's special approbation'.[36] For these reasons, the Court 'by way of mediation and entreaty did move the

[31] *Petre v Waterhouse*, 6 October 1621 C 33/140 f. 1286v [IMG_2626]. For Lord Chancellor Ellesmere, see JH Baker, 'Egerton, Thomas, first Viscount Brackley' (1540-1617), *ODNB,* <https://www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-8594?rskey=sqp0km&result=2> accessed 25 December 2020.
[32] *Petre v Waterhouse*, 16 May 1621 C 33/139 f. 993 [IMG_0989]; 6 October 1621 C 33/140 f. 1286v [IMG_2626]; 23 October 1621 C 33/141 f. 53v [IMG_0055a].
[33] *Petre v Waterhouse*, 23 October 1621 C 33/141 f. 54 [IMG_0056]. The demurrer alleged that the decree for Sir Edward Waterhouse was made within the proclamation touching bills of conformity. *Petre v Waterhouse*, 23 October 1621 C 33/141 f. 53v [IMG_0055a].
[34] *Petre v Waterhouse*, 23 October 1621 C 33/141 f. 54 [IMG_0056].
[35] ibid.
[36] ibid.

defendant to give the plaintiff the sum of £50 in satisfaction of the said £100 principal debt and all demands thereupon'.[37]

Overall, the references to precedent in the survey seem not to reflect a doctrine of binding precedent, but rather to show employment of precedents as a guide to decision-making, and, this being so, the need to make decisions with due care and to set out their limits.[38]

II. The Coke and Ellesmere debate of 1616

Another possible factor in the increase of insolvency cases litigated in the Court of Chancery between 1618 and 1620 could be the outcome of the debate between Sir Edward Coke and Ellesmere LC in 1616.[39] It is well known that King James I decreed in that year that the Chancery jurisdiction prevailed over the common law.[40] Sir John Baker has argued that the debate has been perceived as a clash between the common lawyers and the Chancery, but that contemporaries seem to have perceived it as 'the battle over the absolute prerogative'.[41] However, he also argued that the debate was largely a clash between the personalities of Coke and Ellesmere.[42] This meant that when Sir Edward Coke was dismissed as chief justice in 1616 and Ellesmere LC died in 1617, the tensions seem to have calmed down.[43] However, as has been seen, this easing of tensions between the common lawyers and the Chancery was short-lived: parliament impeached Bacon LC for

[37] ibid.
[38] This seems to be consistent with the findings of Ian Williams in relation to the common law in the period. See, I Williams, 'Early modern judges and the practice of precedent' in P Brand and J Getzler (eds*), Judges and judging in the history of the common law and civil law. From antiquity to modern times* (CUP 2012) 51-66.
[39] There is extensive literature on the Coke and Ellesmere debate. See for example, JP Dawson, 'Coke and Ellesmere disinterred: the attack on the Chancery in 1616' 35 (1942*) Illinois Law Review* 127-152; LA Knafla, *Law and politics in Jacobean England. The tracts of Lord Chancellor Ellesmere* (CUP 1977) 155-181; JH Baker, 'The common lawyers and the Chancery: 1616' 4-2 (1969) *The Irish Jurist* 368-392 368-392; Sir John Baker, *The Reinvention of Magna Carta* (CUP 2017) 410-441; DC Smith, *Sir Edward Coke and the Reformation of the Laws. Religion, Politics and Jurisprudence, 1578-1616* (CUP 2014) 242; D Ibbetson, *'The Earl of Oxford's Case* (1615)' in C Mitchell and P Mitchell, *Landmark Cases in Equity* (Hart Publishing 2014) 1-32; M Fortier, 'Coke, Ellesmere and James I' 51-4 (1998) *Renaissance Quarterly* 1255-1281.
[40] E.g. Baker, 'The common lawyers and the Chancery' (n 39) 383-384; NG Jones, 'The English Court of Chancery' in AM Godfrey and CH van Rhee (eds), *Central Courts in Early Modern Europe and the Americas* (Duncker & Humblot 2020) 97.
[41] Baker, *The Reinvention of Magna Carta* (n 39) 410. Baker, 'The common lawyers and the Chancery' (n 39) 389-370.
[42] Baker, 'The common lawyers and the Chancery' (n 39); Baker, *An Introduction* (n 5) 370.
[43] Jones, 'The English Court of Chancery' (n 40) 97; Baker, *An Introduction* (n 5) 117-118.

bribery, and in relation to conformity settlements parliament put a stop to Bacon's practice.[44] Bacon LC himself had argued that his judgments were not affected by the bribery.[45] Macnair argues that there is some evidence that Bacon LC had made some 'undesirable innovations' in the Chancery practice established by Ellesmere LC.[46] He notes that law reporters in the seventeenth century did not deal with the decisions of Bacon LC, and suggests that contemporary views of Bacon's importance were less favourable than those of modern historians.[47] However, Powell has argued that Bacon LC's impeachment was highly political and largely a sequel to the outcome of the debate between Sir Edward Coke and Lord Ellesmere LC of 1616.[48] He argues that Bacon's impeachment was an attempt by parliament to regain a degree of dominance over the Chancery that had been lost when Coke was dismissed in 1616, upon the advice of Bacon, as chief justice of the King's Bench in 1616.[49] Coke, as one of the orchestrators of the impeachment, got his revenge on Bacon LC.[50] However, it seems probable that in the three-year time window of Bacon's lord chancellorship, there was a renewed confidence in the Chancery jurisdiction. This could have caused litigants to be more inclined to petition the Court of Chancery for debt relief. This, in combination with Bacon LC's more lenient attitude towards conformity settlements, might explain the increase of cases between 1618 and 1620.[51]

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[44] See Chapter 3 and see the section above on the individual practice of Bacon LC. Jones, 'The English Court of Chancery' (n 40) 98.
[45] M Macnair, 'Arbitrary chancellors and the problem of predictability' in E Koops and WJ Zwalve (eds), *Law and Equity : Approaches in Roman Law and Common Law* 86-87.
[46] ibid; Macnair, 'The nature and function of the early Chancery reports' (n 8) 126-128.
[47] Macnair, 'The nature and function of the early Chancery reports' (n 8) 126-128.
[48] M Peltonen, 'Bacon, Francis, Viscount St Alban (1561-1626)' ODNB <https://doi.org/10.1093/ref:odnb/990> accessed 14 January 2021; DX Powell, 'Why was Sir Francis Bacon impeached? The common lawyers and the Chancery revisited: 1621' (1996) 81 *History* 511-526. See for the debate of 1616 section II of this chapter, below.
[49] ibid.
[50] TFT Plucknett, *A Concise History of the Common Law* (Little Brown and Co. 1956, reprinted from 5th edition, Liberty Fund 2010) 244. Baker, *The Reinvention of Magna Carta* (n 39) 410.
[51] See above on the individual practice of Bacon LC.

a.) The tensions between the common lawyers and the Chancery

Knafla has argued that during the reign of Queen Elizabeth relations between the Chancery and the common lawyers had been amicable.[52] However, when the number of cases litigated in the Court of Chancery was rapidly increasing and the common injunction against proceedings at common law was used on a more regular basis, tensions between the common lawyers and the Chancery were rising.[53] The common lawyers had particular issue with the use of common injunctions after judgment at law, which had been a 'source of complaint for over a century'.[54] The result was that the common lawyers tried in various ways to re-affirm the jurisdiction of the common law courts as the highest law of the land.[55]

The relations between the common lawyers and the Chancery reached a low point when Sir Edward Coke was appointed as chief justice of the King's Bench in 1613.[56] Plucknett has argued that Coke issued writs of prohibition from the King's Bench to the Court of Chancery.[57] This method was used by common lawyers in respect of the prerogative courts.[58] As has been seen, the parliamentary debates seem to suggest that prohibitions occurred on a regular basis in conformity cases in the Court of Requests,[59] and litigants in the Court of Requests retried their luck in the Court of Chancery from 1617.[60] It seems, however, that despite Plucknett's claim, prohibitions from the King's Bench did not in practice lie against the Court of Chancery.[61] Baker has argued that Coke did not use the writ of prohibition against the Court of Chancery, although he did

[52] LA Knafla (n 39) 158. He illustrated this by the fact that common law judges often sat in the Chancery to assist in important decisions, and readers at the inns of court lectured on the antiquity of the Chancery. Knafla (n 39) 158.
[53] Knafla (n 39) 158. However, the common lawyers were involved in the Chancery and it was not possible to make a clear distinction between common lawyers and the Chancery in this period.
[54] Baker, 'The common lawyers and the Chancery' (n 39) 371.
[55] See for example, *Finch v Throckmorton* (1597) BL MS Harl 6686 f. 222v. Knafla (n 39) 159; Ibbetson, '*The Earl of Oxford's Case*' (n 39) 2.
[56] Baker, 'The common lawyers and the Chancery' (n 39) 373.
[57] Plucknett (n 50) 244.
[58] Baker, 'The common lawyers and the Chancery (n 39) 370, 373.
[59] See chapter 4, The interaction between the Court of Requests and the Court of Chancery.
[60] ibid.
[61] ibid.

consider the possibility of doing so, but instead used the writ of *habeas corpus* to question actions of the Court of Chancery.[62]

Coke released by *habeas corpus* prisoners who had been committed by Ellesmere for contempt.[63] He also unsuccessfully encouraged these prisoners to prosecute their opponents by *praemunire* for 'the crime of impeaching the judgments of the king's courts'.[64] King James I eventually ended the controversy between Coke and Ellesmere in the Star Chamber in 1616, when he issued a decree in favour of the Chancery: 'understand me aright; I mean not, the Chancery should exceed his limit; but on the other part, the King only is to correct it, and none else. And therefore sitting here in the seat of judgment, I declare and command, that no man hereafter presume to sue a premunire against the Chancery'.[65]

b.) Chancery practice

Smith has argued that whereas equity prevailed after 1616, 'the bill of conformity revealed the limits of equity's capacity for redress' and that the bill of conformity 'also revealed the failure of an advanced insolvency remedy that provided for the full rehabilitation of the debtor'.[66] However, this claim seems inconsistent with the Chancery practice almost immediately after King James I's decree and the subsequent appointment of Bacon as lord chancellor.[67] As has been seen, Bacon LC did give creditors relief and at the same time occasionally partly discharged the debtor.[68] Bacon LC seems to have been trying to reform the insolvency practice, until he was restrained by parliament in his efforts. It seems probable that in the short period between 1618 and 1620 litigants gained a renewed confidence in the Court of Chancery and became aware of Bacon's progressive

[62] Baker, 'The common lawyers and the Chancery' (n 39) 374.
[63] Baker, *An Introduction* (n 5) 117. One of these cases was *Allen's Case* (1610) which, as has been seen, was a bankruptcy case litigated in the review function of the Court of Chancery. The more famous case was *The Earl of Oxford's Case* (1616). However, neither case led to a final outcome. Baker, 'The common lawyers and the Chancery' (n 39) 376-377.
[64] Baker, *An Introduction* (n 5) 117.
[65] Quoted from NG Jones, 'The English Court of Chancery' (n 40) 97.
[66] DA Smith, 'The error of young Cyrus: The bill of conformity and Jacobean Kingship, 1603-1624 (2010) 28 (2) *Law and History Review* 331.
[67] See Chapter 3.
[68] ibid.

attitude towards insolvent debtors.[69] There is no concrete evidence that the increase of insolvency cases in Chancery between 1618 and 1620 is related to the triumph of equity in the debate of 1616, but Bacon LC's practice in relation to debt settlements fits exactly in this time frame.

III. The crisis in the cloth trade

Another possible factor in the rise of debt settlements in the Court of Chancery between 1618 and 1620 might be related to the trade depression in England in the period 1620 to 1624.[70] There has been much debate among economic historians about what caused this depression. Various economic historians have argued that the depression in England was an effect of the crisis in the cloth trade, which was caused by the failing of the Cockayne project (1614-17).[71] However, there are some alternative theories, including that the depression was caused by the outbreak of the Thirty Years War (1618-48).[72] Notwithstanding the cause of the financial decline, it is possible that the trade depression increased the number of insolvencies in England from 1620.

a.) The importance of the cloth trade and the failing of the Cockayne project

In the early seventeenth century the textile sector was the most advanced industry in England and cloth was the most important export product.[73] The cloth trade was not only important for cloth merchants and clothiers, but it also provided employment for the poor.[74] Supple argues that the cloth industry was highly concentrated and permeated entire localities, and that in all cases of an abrupt decline of export of cloth the country was faced with mass unemployment.[75] For its economic growth, England was therefore highly dependent on this sector. In the period England

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[69] ibid.
[70] BE Supple, *Commercial Crisis and Change in England, 1600–1642: A Study in the Instability of a Mercantile Economy* (CUP 1964) 52-64.
[71] ibid 33-49.
[72] E.g. CE Suprinyak, 'Merchants and councilors: intellectual divergences in early 17th century British economic thought' 21 (3) (2011) *Nova Economia Belo Horizonte* 459-482 at 464-466; JD Gould, 'The trade depression of the early 1620's' 7 (1) 1954 *The Economic History Review* 81-90, at 81. See more generally also, A Friis, *Alderman Cockayne's Project and the Cloth Trade: the commercial policy of England in its main aspects, 1603-1625* (OUP 1927).
[73] Supple (n 70) 6.
[74] ibid.
[75] ibid.

mainly exported unfinished 'white' woollen cloth, primarily to the Low Countries, where it was dyed and finished by local workmen for re-export at a much higher price.[76]

In a nutshell, Sir William Cockayne, a merchant and alderman and later mayor of London (1619-1620) proposed a project with the aim of stimulating the textile industry. Cockayne's project was designed to keep the entire cloth manufacturing process in England and permit only the export of finished cloths to the continent,[77] thereby creating more work for English clothworkers. The export of white cloth was forbidden by proclamation and only those who underwrote a specific amount to be exported in the next three years were given the right to export finished cloths.[78] The promoters of the scheme claimed that they had over one million pounds underwritten. However, it turned out that these promises were never fulfilled.[79] The English dyers and clothworkers did not have the capacity to finish the amount of cloth which was previously exported as 'white' cloth.[80] In addition, the small amounts of finished cloths became hard to export and, on top of everything, the Dutch started to boycott all English cloths.[81] Cockayne's original plan was soon modified, and the export of white woollen cloth was allowed again, alongside the finished cloth. In 1617 the Cockayne project was cancelled altogether. However, the cloth industry and the English trade at large did not recover and England fell into a trade depression, followed by a domestic economic crisis.[82]

b.) Alternative theories of the trade depression

Gould has argued that the financial depression was caused by the start of the Thirty Years War (1618-48), which had inevitably hindered the trade with the Continent.[83] He argued that England

[76] ibid 6, 33.
[77] ibid 34. For Sir William Cockayne, see V Aldous, 'Cokayne, Sir William (1559/60-1626)' *ODNB* <https://doi.org/10.1093/ref:odnb/5824> accessed 2 February 2021.
[78] Supple (n 70) 34.
[79] ibid 38-39.
[80] ibid 39.
[81] ibid 39.
[82] ibid 39.
[83] Gould (n 72) 81.

still experienced one or two years of reasonably good trade after the failing of the Cockayne project, which therefore could not have had any influence on the trade depression.

In contrast, Kindleberger has argued that due to the lack of financial data, it is impossible to say what caused the British economic crisis in the early 1620s.[84] Apart from the failed Cockayne project, he gives various other explanations for the depression, for example: the shortage of money due to the export of coin and bullion; the 'clumsy' adjustment of the prices of gold and silver relative to the ratio in Amsterdam; and the effect of a trial in the Star Chamber in 1617 and 1618 of 18 foreign merchants for smuggling coin out of England in an attempt to stop the flow of interest payments to Holland, which possibly led to a halt in Dutch lending to London.[85] He writes that the loss in exports of woollen cloth gets special mention in the contemporary sources, but that bad harvests, plague, or a disastrous loss of 11 ships, some filled with silver, could have been possible factors.[86]

c.) Chancery practice

Whatever the cause of the economic decline in England, the survey suggests that the number of insolvencies litigated in the Court of Chancery increased from 1620 onwards. As has been seen, the Bankrupts Act 1624 was enacted because of the increasing number of fraudulent practices in the cloth trade (and the increase in bankruptcies).[87] Smith has argued that there was a direct relation between the trade depression and the subsequent use of bills of conformity.[88] Indeed, the Proclamation of 1621 set out that bills of conformity were supposedly encouraging 'wilful bankrupts, deceitful persons and the scarcity of money' and that they were a 'general hindrance of trade and traffique [*sic*] and [caused] many other inconveniences'.[89] The cases in the survey do not give enough information about the insolvent debtors and their circumstances to make a direct link,

[84] CP Kindleberger, ' The economic crisis of 1619 to 1623' 51 (1) 1991 *The Journal of Economic History* 149-175, at 162.
[85] ibid 161-162.
[86] ibid.
[87] See chapter 1.
[88] Smith, 'The error of young Cyrus' (n 66) 326.
[89] 'Proclamation of James the first against bills of conformity' in GW Sanders, *Orders of the High Court of Chancery and Statutes of the Realm relating to Chancery. From the earliest period to the present time*. vol. I, part I (Maxwell & Sons 1845) 1044.

however, it seems likely that in an economy highly reliant on credit networks,[90] the trade depression had economic effects on the domestic trade and economy, leading to an increase of bankruptcies and insolvencies.

IV. The effect of social and economic factors on the Chancery practice

The survey suggests that debt settlements were a way for the middling sort to deal with financial failure. Whereas the number of petitions was small, they were almost all successful. The survey shows that the Chancery practice in relation to debt settlements showed a humane side, which was demonstrated in various ways: (1) the Court of Chancery consistently protected the financially weaker litigant, on the condition that the litigant had dealt honestly; (2) it avoided debtor's prison for insolvents; and (3) it applied the idea of the financial fresh start by (partly) discharging the debtor. The aim of the debt settlement was to relieve creditors, if the insolvent debtor did not fall within the requirements of the bankruptcy statutes. However, the survey shows that the Court of Chancery also to a certain extent considered the circumstances of the insolvent debtor. It is possible that the humane treatment of insolvent debtors by the Court of Chancery was only a side-effect of the practice, but nevertheless, these results from the survey should be emphasised, because the practice of the Court of Chancery seems to have been more progressive and advanced in the period than previous scholarship suggests, and also shows a more developed insolvency system in England than is known in later periods.[91]

All petitioners for debt settlements were from the middling sort. As has been seen, the survey shows no examples of petitions coming from members of the nobility or the 'real' poor.[92] Bankruptcy law was a privilege for the creditors of the bankrupt (the interests of the bankrupt were irrelevant), and it seems that the Court of Chancery in its equitable function extended this

[90] JC Muldrew, *The economy of obligation: the culture of credit and social relations in early modern England* (Macmillan 1998) 148-172.
[91] See for the standard literature on the subject, the introduction of this thesis.
[92] See chapter 4.

privilege to creditors of insolvent debtors who did not fulfil the requirements of the bankruptcy statutes. It is unclear whether the nobility was entirely absent from the practice of debt settlements, because, unlike in bankruptcy law, in theory there was no impediment in the law to prevent their involvement. It might be the chance of the survey that no example was found.[93]

[93] The number of peers in England was very small, however, in comparison with the total population.

CONCLUSION

This thesis deals with the Chancery practice in relation to bankruptcy and insolvency between 1543 and 1628. It is the first in-depth legal doctrinal study of bankruptcy and insolvency in England in this period. Prior historiography on the topic was primarily based on the bankruptcy statutes in the period, but by examining the unexplored Chancery records and other archival material, supplemented by contemporary treatises, poetry and plays, as well as secondary legal and historical sources, the thesis has sought to reveal a more complete picture of bankruptcy and insolvency in the period. Overall, the aim of the thesis is to improve our understanding of the foundations and early development of bankruptcy and insolvency law in England.

The thesis, based on an extensive survey of Chancery records shows that the Court of Chancery seems to have been a relatively humane court, which had two functions in relation to bankruptcy and insolvency: a review function and an equitable function. The Court of Chancery reviewed decisions of commissions of bankrupts, who decided bankruptcy cases in the first instance. At least since the enactment of the Bankrupts Act 1571, this function originated in, and was exercised by, the Court of Chancery, which gave the lord chancellor the sole bankruptcy jurisdiction and authority to grant commissions of bankrupts.[1] It seems straightforward that the lord chancellor exercised a review function over the commissions of bankrupts that he had granted and had authorized to examine a bankruptcy matter, though this conclusion differs from prior scholarship on the subject. The review function, according to David Yale, was an invention of Nottingham LC in the 1670s. However, this can clearly be disproved, both by the bankruptcy statutes of 1571, 1604 and 1624, and by the evidence in the survey of consistent review practice by the Court of Chancery. The survey did not show review cases before 1571, but the Acts of the Privy Council

[1] Bankrupts Act 1571, s. 2.

suggest that the Privy Council instructed various people to intervene in bankruptcy matters between the enactment of the Statute of Bankrupts 1543 and the Bankrupts Act 1571.[2]

Parliament tended to lean towards the protection of the interests of the creditors, constantly improving their position by widening the scope of the bankruptcy statutes with each new bankruptcy statute.[3] These statutes were entirely aimed at giving creditors as much pro rata relief as possible. In an emerging credit economy, highly dependent on investments of creditors, this creditor-friendly bankruptcy system seemed a pragmatic approach of the legislator. The practice of the Court of Chancery in relation to bankrupts did not widely differ from the procedure set out in the bankruptcy statutes. After all, the Court of Chancery did not have a bankruptcy jurisdiction in the first instance and only reviewed cases. The survey shows that the Court of Chancery only intervened in bankruptcy in certain circumstances, generally when a case involved fraudulent commissioners, non-performance of a debt settlement, or orphans.[4] On rare occasions, the Court of Chancery would apply the statute more widely than its letter would suggest. This thesis provides a detailed analysis of the considerations of the Court of Chancery in these review cases.

The dockets of Puckering LK and Coventry LK, as well as various examples in the Chancery records, show that bankrupts and creditors would often live in different places, except when both parties lived in London. This shows that credit relations between bankrupts and their creditors were often not local in the period. It is possible that the expansion of the economy in the sixteenth century, and the growth of interpersonal credit networks that evolved as a consequence, contributed to the increasing growth of fraudulent practices by debtors (and likewise by creditors), because debtors were no longer as much controlled by reputation and fraudulent practices were more likely to occur in the context of credit relations between strangers. The bankruptcy statutes gave (in theory) a criminal answer to that problem. The criminal nature of bankruptcy probably

[2] See the introduction of chapter 2.
[3] The Statute of Bankrupts 1543 (34 & 35 Hen VIII, c. 4); Bankrupts Act 1571 (13 Eliz I, c. 7); Bankrupts Act 1604 (1 Jac I, c. 15); Bankrupts Act 1624 (21 Jac I c. 19).
[4] See chapter 2.

also contributed to the stigmatisation of bankruptcy in the period (evidenced by the various cases dealing with slander for calling someone a bankrupt).[5]

It has been argued by Yale and Muldrew that the numbers of commissions of bankrupts were low in the period, but it seems surprising that the legislator would intervene four times in only 85 years if bankruptcy was not of more frequent occurrence. It seems, on the basis of plays and poetry in the period, that bankruptcy played a more prominent role in contemporary culture than the low numbers suggested by Yale and Muldrew might indicate,[6] and on the basis of the dockets of Puckering LK and Coventry LK it is likely that the number of commissions of bankrupts in the period was higher than previously thought.

The Court of Chancery also exercised an equitable function. In this capacity, the Court of Chancery could, similarly to the bankruptcy statutes, give relief to creditors of insolvent honest debtors, and as a consequential benefit could (part-) discharge the debtor of his or her debts. Based on the bankruptcy statutes, honest debtors could never be considered a bankrupt. They did not fall within the scope of the statutes, and also did not commit a crime. They were insolvent by misfortune, and for the criminal offence of bankruptcy one needed to have intent to defraud or delay creditors of the repayment of their debts.[7] It seems that the Court of Chancery was always able to exercise its equitable jurisdiction in a parallel procedure to the bankruptcy procedure in relation to honest insolvent debtors. In other northern European countries procedures for honest insolvent debtors were generally provided by legislation, but in England, similar to the position in Roman law, the

[5] See the introduction of this thesis.

[6] It seems that religious writings in the period often used bankruptcy as a metaphor. This became apparent by searching for bankruptcy writings in Early English Books Online. Indeed being morally bankrupt is still a modern use of the word bankrupt. See for example, J Dunster, describes someone as 'never run hit bankerupt beyonde the bounds of Gods commandements' in *A protestation against popery by way of a confession of Christian religion collected for the benefit of private friends* (Joseph Barnes, 1607) <https://www.proquest.com/books/protestation-against-popery-way-confession/docview/2240866160/se-2?accountid=13042> accessed 13 November 2021. Similarly, bankrupts were regularly mentioned and condemned in sermons. See for example, R Porder, *A Sermon of gods fearefull threatnings for Idolatrye, mixing of religion, retayning of Idolatrous remnaunts, and other wickednesse: with a Treatise against Usurie. Preached in Paules Churche the .xv. daye of Maye 1570. being Monday in Whitson weeke* (Henry Denham, 1570) <https://www.proquest.com/books/sermon-gods-fearefull-threatnings-idolatrye/docview/2248518548/se-2?accountid=13042> accessed 13 November 2021. Religious writings have not been examined in depth for this thesis.

[7] See Statute of Bankrupts 1543, s. 1; Bankrupts Act 1571, s. 1; Bankrupts Act 1603, s. 1; Bankrupts Act 1624, s. 1,

procedure remained uncodified. This seems to be the main reason why this area has been largely neglected in the literature.

This thesis is the first study of the various debt settlements used in the period, as well as the only study that shows the chronological development of these types of debt settlements based on political, historical and legal sources. As has been seen, the Court of Chancery seems to have consistently protected the financially weaker party in a debt settlement.[8] The protected party could be either the debtor or the creditor. In most cases, the weaker party seems to have been the debtor. However, the Court of Chancery also showed leniency to creditors if they, for example, held orphans' money or needed immediate payment to pay off their own debts. It seems that the leniency of the court was dependent on the honest conduct of the debtor or creditors.

As seen above, the Court of Chancery seems to have tried to release insolvent debtors from debtor's prison for all sorts of reasons. Interestingly, these reasons were not only financial: the Court of Chancery also seems to have released prisoners on more humane grounds. For example, the Chancery released prisoners if they were too old, sufficiently young that they could still contribute to society, or if the debtor simply had no prospect of ever repaying his creditors and therefore had no hope of being released. It seems that the early seventeenth-century Court of Chancery understood that there was nothing to be gained for creditors from continued imprisonment of certain debtors. The narrative of the Court of Chancery in the period is therefore much more compassionate than insolvency law in England in the eighteenth and nineteenth centuries – more commonly known from the harrowing scenes of debtor's prison from the novels

[8] See chapter 4.

of Charles Dickens[9] – when debtor's prison seems to have been much more commonly used for insolvent debtors and the prospect of release was more hopeless.[10]

The thesis has shown that bankruptcy principles and ideas, such as the concept of insolvency by misfortune, voluntary bankruptcy, compositions, majority control and the discharge of debts, which have generally been attributed to the bankruptcy statutes of 1705 and 1711, were already applied in the Court of Chancery in this earlier period. As has been seen, the Court of Chancery awarded (part-) discharges on a regular basis, and not only in conformity cases. *Johnson v Wolmer* (1551) is the earliest example in the survey in which a (conditional) discharge was awarded. It seems that all the lord chancellors or lord keepers examined in the survey applied the concept of the discharge (it was especially applied in cases involving sureties), and that it was a fully established principle in the Court of Chancery. This shows that the concept of a fresh financial start was much older than is known from the bankruptcy statutes, because it was only enacted in the Bankrupts Act 1705.[11] Whereas a discharge had a positive effect for the insolvent debtor, Kadens has explained that the main reason for the enactment of the provision for discharge was that if a discharge were possible, debtors would surrender their estates, rather than make fraudulent conveyances or flee the country to avoid their creditors.[12] It seems likely that the Court of Chancery discharged debtors between 1543 and 1628 ultimately for the same reasons, considering it was well known in that period that insolvent debtors fled the country to start afresh.[13] Political struggles in 1621, unrelated to bankruptcy, involving the impeachment of Francis Bacon, and

[9] Charles Dickens writes about debtor's prison in his novels *Little Dorrit, The Pickwick Papers* and *David Copperfield.* <https://media.nationalarchives.gov.uk/index.php/the-real-little-dorrit-charles-dickens-and-the-debtors-prison/> accessed 14 February 2021.
[10] See for debtor's prison's in the eighteenth century, T Paul, *The poverty of disaster. Debt and insecurity in eighteenth-century Britain* (CUP 2019) 31-66. See for debtor's prison in the Victorian period, V Markham Lester, *Victorian insolvency: bankruptcy, imprisonment for debt, and company winding-up in nineteenth-century England* (OUP 1995) 88-122.
[11] Bankrupts Act 1705 (4 & 5 Anne c. 17) s. 7.
[12] E Kadens, 'The Pitkin affair: a study of fraud in early English bankruptcy' (2011) 84 *American Bankruptcy Law Journal* 483-571.
[13] Fleeing the country was a considered an act of bankruptcy in all the bankruptcy statutes. See also the introduction of the thesis.

fraudulent practices by certain debtors unfortunately ended this highly pragmatic, liberal and useful practice.

Some conclusions in the thesis should be approached with some caution. After all, the thesis has largely been based on a sample survey of the Chancery records, rather than a study of all the Chancery records. There will inevitably be further conclusions to draw with a bigger sample or a complete examination of the records, however, it remains to be seen how significant such new discoveries would be. The emphasis of this thesis was focused on the early seventeenth century due to the prospect of more frequent cases in the Court of Chancery, but it is possible that Puckering LK and Hatton LC were also significant for the story. After all, the dockets of Puckering LK have shown that commissions of bankrupts were certainly granted during his tenure. One of the conclusions of the thesis, namely that the Court of Chancery was a humane court in relation to bankruptcy and insolvency also requires some caution, in that such a characteristic might be a consequence of the Chancery's general nature as a court of equity, rather than a feature of its handling of questions of bankruptcy and insolvency more specifically.

This thesis has opened further scope for future research. For example, it is unclear how the dockets of Puckering and Coventry correspond to the Chancery records in the period. Further research could trace the litigating parties in the dockets to the litigation in the Court of Chancery and analyse whether particular types of case were more susceptible for review. Furthermore, the Chancery practice involving bankruptcy and insolvency after 1628 could be explored. While this would not improve the understanding of the Chancery practice between 1543 and 1628, it would give a better understanding of the early development of bankruptcy and insolvency law in England and possibly reveal whether the Court of Chancery regained its more humane approach before the statutory intervention in 1705. It would also be useful to combine legal doctrinal research, with more political, economic, cultural and social history in the period. There is more literature available from the Restoration onwards, and it would be valuable to compare these historical findings with legal

ones. Finally, the records of the Court of Requests should also be explored to complete a definitive history of bankruptcy and insolvency law in England.

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