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Texas Wesleyan Law Review

Volume 13 | Issue 2 Article 19

3-1-2007

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Recommended Citation
T.K. Hunter, *Transatlantic Negotiations: Lord Mansfield, Liberty and Somerset*, 13 Tex. Wesleyan L. Rev. 711 (2007).
Available at: https://doi.org/10.37419/TWLR.V13.I2.18

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TRANSATLANTIC NEGOTIATIONS: LORD MANSFIELD, LIBERTY AND *SOMERSET*

T.K. Hunter

"The *Somerset* case," as was noted by William Wiecek in his keynote speech at the June 2006 *Too Pure an Air* Gloucester conference, "is a great common law decision." The tendency of many interested in *Somerset*, however, is to concentrate exclusively on the arguments of the case, and, in particular the intricacies of William Murray, Lord Mansfield's decision. Though doing so is crucial to understanding the finer points of that legal action, it often fails to situate the case, in all of its variety, in an equally important larger historical context. While jurists cleave to the law as a crucial, enduring, non-partisan instrument of justice, it cannot be forgotten that they do so in the midst of the swirl of social, political and ideological currents: in short, they do so in space and time. Certainly Lord Mansfield was not exempt from those currents and as such, he rendered decisions in a complex social, political and ideological climate. Murray was a Scot—a frequently unsavory thing to be in mid-18th century England during a time of growing proto-nationalist English sentiment. Both his heritage and his affiliations (assumed and actual) made him undesirable to some. In addition, Mansfield, had a grand-niece of African descent—someone he not only acknowledged, but had living in his household. (He frequently heard cases throughout the 1760s and 1770s concerning Afro-British people who were putatively enslaved and who were in danger of being forcibly removed from England so that they might be placed upon the auction block in Britain's Caribbean plantation colonies.) Nevertheless, his abilities as a jurist managed to preserve his reputation so that William Murray was even called upon to decide cases concerning prominent individuals such as John Wilkes (a self-proclaimed champion of liberty and all around political and journalistic nuisance—or "freedom fighter" depending) who actively impugned powerful Scotsmen in England in general and Mansfield (along with Lord Bute) in particular. In that social and political climate, then, Mansfield decided such cases with remarkable fairness.[1]

1. William Wiecek is one of the foremost American legal historians writing about the case in detail. There is a lengthy history of English court cases involving Africans, beginning with *Butts* v. *Penny*, 1677. The decisions of these cases were regularly offered as precedent by subsequent legal counsel. While none of them decided the status of Africans in England definitively, they all had a bearing on the arguments employed in the *Somerset* trial. One in particular, *Chamberlain v. Harvey* (1697), is considered by Wiecek to be a direct predecessor to *Somerset*. *See* William M. Wiecek, Somerset: *Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86, 91 (1974).

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DOI: https://doi.org/10.37419/TWLR.V13.I2.18

It is the question of liberty that both lies at the core and runs like a leitmotif through many of the cases that Mansfield heard during this period. The importance of this question cannot be overstated: liberty was a foundational concept and one that can be considered probingly because of the way England was constituted ideologically—as a place predisposed to championing personal liberty. This ideological construction of liberty was reflected in English common law. Indeed, Francis Hargrave (counsel for James Somerset) argued as much throughout the *Somerset* case—specifically that the law of England conferred the gift of liberty in its entirety. This was an invocation of William Blackstone in his *Commentaries on the Laws of England,* who noted famously that slaves or strangers, upon setting foot on English soil, became *eo instanti*, free.[2]

Thus, transatlantic movement played an important role in the question of access to liberty particularly as that movement at the hands of Britons had the potential to bring people of African descent to England. Furthermore, as a member of the African diaspora, one's presence on English soil effectively allowed for more than an abstract discussion about the nature of slavery or the various possible processes of manumission (such as numerous gradual or immediate remedies often the topic of speculation in the American colonies). Rather, it had the potential to force a searing reexamination of something far more basic: natural rights—which was the province of all by virtue of their humanity—and liberty in the context of a country whose ideological foundations rested, in the main, on liberty.[3]

Wilkes was charged with libel as a result of the issue of *The North Briton*, No. 45 in April 1763. I have addressed the history of Wilkes's anti-Scottish magazine—founded in direct opposition to Tobias Smollett's pro-Scottish *The Briton* (with the direct support of Lord Bute) elsewhere. *See* T.K. Hunter, Publishing Freedom, Winning Arguments: *Somerset*, Natural Rights and Massachusetts Freedom Cases, 1772-1836 (2005) (unpublished Ph.D. dissertation, Columbia University) (on file with author). Mansfield's grandniece was both openly accepted, and, reputedly, raised with her white cousins without distinction – though it can be inferred that Mansfield did not advertise their relationship to him to all and sundry; she was the daughter of his nephew, John Lindsay. Thomas Hutchinson (then governor of Massachusetts) commented, in his diary, upon her presence at Mansfield's home when Hutchinson was in London visiting. "A black" young woman participated in an after-dinner gathering, even going so far as to take a turn around the gardens with the assembled group. Although the young black woman was clearly part of the household, Lord Mansfield didn't tell Hutchinson that the young woman was the daughter of his nephew and an African woman and thus his grandniece. *See* 2 JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 1238-40 (1992).

2. These references to free English soil are from Blackstone's *Commentaries* and were frequently invoked by anti-slavery legal counsel. Indeed, Hargrave was among a number of people who quoted Blackstone (first edition) on this. The first edition was unequivocal regarding natural rights and *eo instanti* freedom. Subsequent editions were more tempered, allowing, as they did, for the possibility of a master retaining the right of service of his slave. *See* WILLIAM BLACKSTONE, 1 COMMENTARIES *123.

3. It is important to understand that I am not suggesting that England was a natural rights paradise where, "all would be well." The suggestion would be lud-

England, then, in some fashion, was a site specific not only in terms of its own geographic location, but in relation to other locations in the English Atlantic world, in which certain questions of liberty could be considered with an ideological single-mindedness—even as far as the liberty of Africans was concerned. Thus, it was that those enslaved Africans (their friends and their legal counsel) traded on the common law tradition that English soil was free. Their movement around the Atlantic as well as their arrival to England brought them to a place where their slave status (arguably in some circles an ontological state) did not necessarily inhere.

While strictly speaking, English soil did not automatically confer or restore a slave's freedom, the characterization of England's soil by Englishmen themselves as "free" meant that the presence of a person who challenged his/her continued state of bondage stood in tension with that description—a characterization that was an integral part of common law. That tension could have been ameliorated had there been a statute declaring all bound diasporic Africans unquestionably free. Instead, legal personnel invoked common law traditions, and Mansfield frequently ruled in favor of individual liberty on a case by case basis. Mansfield himself did not focus on the question of slavery (which was, at the end of the day, far too volatile given Britain's preeminence in the transatlantic slave trade in the 18th century). Rather, he focused on the question of liberty—a question that potentially privileged free English soil.[4]

In the context of the *Somerset* case, Lord Mansfield proceeded as was his wont, particularly as, having risen through the ranks from Solicitor General to Attorney General and finally to Lord Chief Justice of the court of King's Bench (a series of promotions that could not have been easily achieved by a Scot in England had Mansfield not been circumspect about both about his reputed Jacobite past, and about the company he kept), he was no political innocent.[5]

During the 1760s Lord Mansfield had occasion to cross swords with Granville Sharp—frequently described as a man of high moral charac-

crous, given England's role in the African trade and the wholesale destruction of generations, done essentially with impunity.

4. Oldham notes, "throughout his judicial career, however, Mansfield was incensed by acts of individual cruelty or oppression . . . . This effort to accomplish individual justice is evident . . ." *See* OLDHAM, *supra* note 1, at 1240.

5. In 1753, Murray was drawn into what can be referred to as the Fawcett Affair—an incident that was meant to effectively impugn Murray's character and cast doubt upon his loyalty to the King. Murray's Scottishness was on trial as he was accused of having made a toast to the health of the Old Pretender to the throne – Charles Stuart. Christopher Fawcett, an old school mate, with the encouragement of Lord Ravensworth, dredged up the incident. In the mid-18th century a climate of complex political alliances and tensions between King and Parliament prevailed. The accusations eventually crumbled and all concerned were exonerated. *See* 1 *id.* at 19.

ter and almost ascetic disposition who would stop at nothing when it came to the rights and liberties of Africans enslaved and free. In his endeavors Sharp was often assisted by his brother William, a physician who had a surgery in Mincing Lane. Located north of London Bridge and about a half a mile east from the Poultry Compter just off Fenchurch Street, the surgery regularly drew the East End poor of London in need of medical attention but unable to afford it. And it was there in 1765 that Granville Sharp had a heartbreaking chance encounter with Jonathan Strong—a young enslaved man who had been beaten to within an inch of blindness and brokenness, and subsequently turned out upon the London streets, left for dead. With the help of Sharp and his brother, Strong regained his health.[6]

More than seventy years and several court actions after *Butts v. Penny* (1677), the status and rights of Africans still remained unclear. However, Granville Sharp re-introduced the question with stunning single-mindedness, bringing the problem of slavery before the law—as represented by Mansfield—with vexing frequency. Often alerted to dire situations by the London Afro-British themselves, Sharp began assisting them regularly after the incident with Jonathan Strong. As a result, Granville Sharp's life continued to be intertwined with Black Londoners of whom James Somerset was one.

James Somerset had arrived in London from Massachusetts in November 1769 with his master Charles Stuart, a customs officer. Stuart had initially purchased Somerset in Virginia later removing him to Boston, then London. Life proceeded apparently without hindrance for nearly two years. There are no reported complaints or recorded incidents of Somerset's running away during that time—either to seek his freedom or to escape from possible brutalities. However, in view of the fact that it was only two years after Sharp's extra-trial assistance of Jonathan Strong struck a blow against slavery in England, James Somerset's absconding cannot be regarded in isolation. In running away, James Somerset may have taken his cue in part from Jonathan Strong's actions. Had he done so in the hopes that he too would be declared similarly free?[7]

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6. The description of events and the character of the people involved provided by Prince Hoare, Sharp's biographer, are slightly different. Hoare notes that David Lisle had two officers of the Lord Mayor join him at a public house from where Lisle sent a note to Strong indicating that someone wanted to see him. When Strong arrived at the public house, he was shocked to discover it was his erstwhile master who had sent for him; Strong was immediately taken into custody and brought to the Poultry Compter where he was summarily detained. *See* PRINCE HOARE, MEMOIRS OF GRANVILLE SHARP, ESQ. 50 (London, Henry Colburn 1828) [hereinafter MEMOIRS].

7. By asking this question, I am not indulging in idle speculation. By the time of Granville Sharp's encounter with Jonathan Strong in 1765, Sharp was no stranger to the moral dilemmas engendered by the practice of holding men as slaves. Prior to Sharp's intervention on Strong's behalf, he had already become aware of the plight of enslaved Africans in England. One year after Strong's liberty was granted, Sharp assisted an Afro-British man named John Hylas. (Strong, for his part has brought

James Somerset had a short period of uneasy freedom—doubtless anxious and euphoric by turns. It ended on board the *Ann and Mary*, a vessel captained by John Knowles, where Somerset had been secured belowdecks awaiting his unwilling departure to Jamaica. There, as a result of a transatlantic relocation to the plantation auction block, James Somerset would have stood at the intersection of bondage and liberty, brought there by forces that thought nothing of determining him unfree. Here, it is clear that such transatlantic travel affected the possibility of liberty. However, Somerset's London capture, and the thwarting of his removal, would lead him to a radically different future. For standing at that crossroads of ideology was Lord Mansfield, and his decision would chart a different path for Somerset and for liberty.

By the time James Somerset came to Sharp's attention, a well-experienced Granville Sharp (he had been involved in a number of cases in the years between 1765 and 1771), familiar with the inside of Chief Justice Mansfield's courtroom, stood ready to marshal for Somerset all of the moral and legal resources at his disposal. Though there are suggestions that both Sharp and Mansfield had somehow privately agreed that the *Somerset* case would be the deciding action on the status of Africans in England, no such evidence appears to corroborate that notion—though it must be admitted that Chief Justice Mansfield had, on several occasions, refused to rule definitively on the matter of the legality of slavery in England. In any event, the *Somerset* case proved to be crucial regardless of prior arrangements made or not made between Mansfield and Sharp.[8]

Hylas's situation to Sharp's attention.) Certainly Hylas's protests to Sharp about his impending separation from his still-enslaved wife suggests that Sharp's activities were well known to the London Afro-British population—regardless of whether they were enslaved or free. *See* F.O. SHYLLON, BLACK SLAVES IN BRITAIN 40-43 (1974).

So the question arises: is it possible James Somerset knew of Jonathan Strong's circumstances, occurring only two years earlier, and that if he ran away and was caught he would quite likely be released on the basis of "wrongful detainment" having not been involved in any criminal act or circumstances? Such knowledge and such a strategy would certainly prove useful for obtaining one's freedom and James Somerset could have been alive to that possibility.

8. *See* MEMOIRS, *supra* note 6, at 104. Prince Hoare's biography of Sharp suggests the prior arrangement between Mansfield and Sharp, but Shyllon notes that no such evidence has been found. Hoare's description: "At length, the important case of James Somerset presented itself; – a case which is said to have been selected, at the mutual desire of Lord Mansfield and of Mr. Sharp, in order to bring to a final judgment a subject of contest, which, from the benevolence of the latter, so frequently occupied, and, from his legal researches and abilities, so much embarrassed, the courts of judicature." Unfortunately, Hoare gives no indication of where he got his information. In addition, it is a curious assertion when one considers that only a few pages later Prince Hoare notes that Sharp "felt that he should have to contend with all the force that could be brought against him. But his resolution was not to be shaken; though his naturally unobtrusive character, and his knowledge of human nature, taught him thenceforward to avoid the appearance of regular attendance in the court, and indeed of any degree of interference whatever in the cause itself, that he

Lord Mansfield issued a writ of *habeas corpus* directing Captain Knowles to present his captive and state the reason for detaining him. Responding to the writ, Knowles asserted Charles Stuart's right in Somerset by stating that James Somerset had "without any lawful authority whatsoever, departed and absented himself from the service of the said Charles Steuart [sic], and absolutely refused to return into service. . ." The coy use of "service" suggested a volitional relationship between Stuart and Somerset: one that resembled that of an employer and employee. Being "in service" assumed a lawful, contractual relationship, thus the very act of running away could be characterized as a deed done without lawful authority—without the slightest presence of irony. During the trial, Francis Hargrave (for Somerset) pointedly distinguished between slavery and the domestic service so well known in England—hoping to lay to rest the euphemistic use of "servant" and "service."[9]

When Counsellor William Wallace for Charles Stuart presented a line of reasoning in favor of Stuart's claim to James Somerset, Wallace employed that same contract argument. Lord Mansfield, after hearing the claim, questioned Wallace closely: Mansfield found the idea of contract between master and slave "utterly repugnant and destructive of every idea of a contract between parties." Such a statement did not necessarily demonstrate Mansfield's sympathy for the enslaved *per se*, but it did indicate a fierce, literal approach that foiled euphemisms—euphemisms that were employed to cloud the issue of slavery and liberty.[10]

Lord Mansfield heard a nearly identical case during the course of the *Somerset* trial—as James Somerset's trial extended over several months. *Rex* v. *Stapylton* (1771) determined that Thomas Lewis, an enslaved man who had been seized and secured belowdecks on board a ship bound for Jamaica, was not the slave property of Robert Stapylton; as such, Thomas Lewis had been bound, gagged, and imprisoned

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might in no wise irritate a Judge whom he conceived to be prepossessed against his attempt." *See* MEMOIRS, *supra* note 6, at 104, 107; *see* SHYLLON, *supra* note 7, at 80. In addition, Mansfield and Sharp had something of an antagonistic relationship—though one cannot necessarily conclude that the two men were on opposite sides of the slavery issue.

9. *See* 20 T. B. HOWELL, HOWELL'S STATE TRIALS 22, 26 (London, T. C. Hansard 1816). Arguments on the basis of contract were not uncommon. But what is interesting is that in the return to the writ, Knowles combined a slightly veiled assertion of contract with the insistence that James Somerset's natural (and thus permanent) status was in fact that of a slave. Somerset had been brought from Africa where there had been (and still were) a great number of negro slaves. Moreover, there was still a trade "carried on by his majesty's subjects, from Africa to his majesty's colonies or plantations of Virginia and Jamaica in America, and other colonies and plantations belonging to his majesty in America . . . and that negro slaves brought in the course of the said trade . . . have been, and are saleable and sold as goods and chattels, and upon the sale thereof have become and been, and are the slaves and property of the purchaser thereof . . . ." *See id.*

10. *See* LONDON CHRON., May 14-16, 1772, at 466.

without legal authority. Lewis went free—and his freedom was attributable to Lord Mansfield's canny negotiation of the law. In effect, Mansfield nudged the jury towards a decision that satisfied the conscience without finally deciding the implications British New World slavery had for liberty when the enslaved were brought to England. For during Thomas Lewis's tribulations of being shuttled from one place to another throughout the Atlantic, he and his English merchant master were taken by a Spanish privateer—an incident that in essence broke the chain of English ownership. Whereas, in Lewis's case, severing of the chain of English ownership was what was ultimately stressed, it is crucial to relate such a break to transatlantic movement and the role it played in affecting the status of Africans in relation to the law. Had Thomas Lewis and his owner Robert Stapylton remained in Britain's New World colonies and not moved about the Atlantic, his status could not have been as effectively and successfully questioned. Instead, such a fortuitous disruption brought Lewis his liberty, enabling Mansfield to "[lay] stress upon the capture by the Spaniard" to the jury. Mansfield would use the same technique (*sans* jury) in Somerset's case to navigate the shoals between the legal disposition of the enslaved and the impact their freedom would have throughout Britain's empire.[11]

Believing that the weight of English law rested in their favor *vis à vis* moveable property, the West Indian merchants publicly registered their support of Stuart and pressed him not to compromise, but to allow the case to move forward. The compromise to which they referred was this: realizing that he could be tied up in court for a lengthy case that he might lose, Charles Stuart had the option to pre-empt the unwilling loss and to free James Somerset willingly. As reported in the *London Evening Post* "Mr. Stewart [sic] had it in his power to put an end to the question by *manumitting* his Negro. . . ." Had Stuart done so, he would have saved himself no small amount of trouble.[12]

Why, in James Somerset's case, were the West Indian merchants confident enough to believe that a true determination of the status of the enslaved of African heritage in England would be to the merchants' advantage—especially as numerous past cases had been determined in favor of the freedom of the enslaved person in question? The reason for the merchants' bravado is not clear, but it is quite likely that their familiarity with Justice Mansfield contributed to their confidence. As a man with sizeable property holdings and one

11. I use the phrase "nudged the jury" advisedly, full in the knowledge that jurists are not supposed to lead. Nevertheless, it is clear that Mansfield, with his tendency to favor individual liberty, frequently applied the law to that end—even if doing so meant that certain powerful groups would be "inconvenienced" as Mansfield himself once noted. *See* OLDHAM, *supra* note 1, at 1125-26, 1242-43.

12. *See* LONDON EVENING POST, May 21–May 23, 1772 at 3; *see* 2 OLDHAM, *supra* note 1, at 1228.

who was familiar with the way empire both fostered and was protected by such a regulatory body as the Commissioners for Trade and Plantations, Lord Mansfield's views might have been assumed to be predictably in favor of the powerful, who were invariably property-holders. Indeed, Mansfield himself had become a property-holder of note over the years.[13]

The West Indian merchants had "obtained a promise from Mr. Stewart [sic] not to accommodate the Negro cause, but to have the point solemnly determined," the *General Evening Post* reported on 28 May 1772. The reasoning for this was expressed clearly. "If the laws of England do not confirm the colony laws with respect to property in slaves, no man of common sense will, for the future, lay out his money in so precarious a commodity." In these latter days, one might counter that it would not have been tragic had men of common sense *not* laid out their money for the commodity of the enslaved. Nevertheless, the concern of West Indian merchants and their ilk demonstrates their acknowledgement that a transatlantic relocation to England engendered a reassessment of liberty and natural rights for the diasporic Africans who were brought there. These legal cases throughout the 17th and 18th centuries wrestled with at least two key underlying problems regarding the legitimacy, use, and continuance of slavery: the perennially unsolved question of the relationship of the New World colonies in England's periphery to England and the presence of Africans on England's soil. The former was a question that did not, by and large, concern the potential liberty of those who were part of the African diaspora, courtesy of England's participation in the slave trade. It was, rather, a question of colonial autonomy. However, that question of colonial autonomy (which had bedeviled colonists long before the Seven Years' War and the Parliamentary initiatives that were put in place as a result of Britain's victory over the French) had not been consistently answered. Thus, the movement of Africans to England at the hands of their colonial owners exacerbated the unanswered question. The presence of Africans on England's soil both complicated the question of colonial autonomy and highlighted several other problems: Would baptism into the Christian church be particularly efficacious (since part of the rationale for enslaving Africans was that they were heathens subject to various heathen kings); would a central pillar upon which English common law rested, i.e., the guarantee and protection of individual liberty, be upheld—even if the liberty in question pertained to non-English; and what would happen to the business of slavery, upon which rested the

13. In addition to being a legal personality, Mansfield was an astute businessman. His assets were substantial, and the income he received from his office holdings added to them. *See* 1 OLDHAM, *supra* note 1, at 27-29.

commercial interests of many English subjects, if courts legally recognized the liberty and natural rights of African strangers.

In the end, William Murray, Lord Mansfield, rendered a decision he was disinclined to on a case he would rather not have had fully tried before him. The court report revives for us a curious scene—that of a reluctant Lord Mansfield as a harbinger of unpleasant difficulties yet to come. His prefatory remarks bear that out.[14]

"In five or six cases of this nature," Mansfield began, "I have known it to be accommodated by agreement between the parties: on its first coming before me, I strongly recommended it here. But if the parties will have it decided, we must give it our opinion." This is not to say that Mansfield had pre-judged the situation thus compromising his impartiality. Rather it is to suggest that Mansfield saw where the weight of the law rested—and it did not necessarily guarantee the desires and the interests of the powerful by virtue of their power. Furthermore, it is an articulation of Lord Mansfield's reluctance to face squarely the problem of slavery especially when brought to England. In the case of Thomas Lewis, he left the decision to the jury in a gesture that both led the assembled company and transferred ultimate responsibility from him to them. In Somerset's case, Mansfield himself was the final arbiter. All present wondered what decision Lord Mansfield would hand down.[15]

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14. Mansfield was well aware of the effect of certain legal decisions beyond the law—they were essentially public issues raised in the context of the courts. Mansfield's reluctance to make decisions that would involve him in any sort of personal controversy took its toll on the candor of his judgment. *See* C.H.S. FIFOOT, LORD MANSFIELD 41 (1936).

15. Shyllon provides, as evidence of behavior by Mansfield worthy of condemnation, the following excerpt from Sharp's Memorandum about the *Somerset* case: "When the Plaintiff [Somerset] was first brought up before the Chief Justice who granted the Writ of Habeas Corpus, his Lordship (instead of binding the Defendant [Stewart] to answer for his notorious outrage) advised the Widow, who had been at the expense of the Writ, to purchase the Plaintiff [Somerset] of the Defendant [Stewart]; but he was answered very properly by the widow, that the same 'Would be an acknowledgement that the Defendant had a right to assault and imprison a poor innocent man in this kingdom, and that she would never be guilty of setting so bad an example.'" *See* SHYLLON, *supra* note 7, at 113. (Shyllon italicizes her response for emphasis). For Shyllon, Mansfield's suggestion was outrageous and, additionally, incontrovertible proof of Mansfield's questionable commitment to abolishing slavery. However, I would offer that Mansfield's suggestion that the widow purchase Somerset was made with the knowledge that she would then immediately free Somerset privately—an action Mansfield could reasonably surmise from his interaction with her. Her private behavior would not stand in obvious tension against the West Indian merchants cadre, nor publicly jeopardize mercantile concerns. After all, it was she who had applied for the writ that forced Capt. Knowles to produce Somerset before Mansfield in court—something she doubtless would not have done, or been in a position to do, had she not been aware of the general problem of the kidnapping of men of African descent with the goal of summarily removing them from England to the plantation colonies for sale. Having said that, Mansfield nevertheless was reluctant to

Though not insensible to what was at stake in the decision, Lord Mansfield stripped away the contingent questions about:

- Whether slaves were bought and sold, Whether slavery arose legitimately out of captivity in war,
- Whether slavery could be equated with the less morally reprehensible relationship of master and servant, among other things,
- Whether villeinage *en grosse* (a frequent conceptual stand-in for slavery) still obtained in England,
- Whether (colonial) municipal relations were valid and held sway regardless of location.

All of these dependent questions, in the end, masked a single, awkwardly persistent question: Was slavery legitimate in England? It was a question Mansfield dared not answer. And so, quite simply, he didn't.[16]

Lord Mansfield carefully picked his way through the various arguments heard on behalf of the plaintiff and defendant. Had Stuart discharged James Somerset, the difficulties could have been avoided. In that way, Mansfield would not have had to rule on the thorny issue, acknowledging as he did that he found the prospect of setting "14,000 or 15,000" men free a disagreeable one filled with complications. But "then a loss follows to the proprietors of above £700,000 sterling." How, Mansfield considered aloud, "would the law stand with respect to their settlement; their wages? How many actions for any slight coercion by the master?" In short, liberty for the enslaved literally would have come at a price.[17]

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decide unequivocally the issue of slavery. In the case of Thomas Lewis, prior to Somerset, the jury found the defendant guilty and Thomas Lewis was allowed to go on his way a free man and not the slave property of another. At the time of the verdict, Lord Mansfield said to John Dunning (counsel for Lewis): "You will see more in the question than you see at present. It is no matter mooting it now; but if you look into it, there is more than by accident you are acquainted with. There are a great many opinions given upon it; I am aware of many of them; *but perhaps it is much better it should never be finally discussed or settled.* I don't know what the consequence may be, if the masters were to lose their property by accidentally bringing their slaves to England. I hope it never will be finally discussed; for I would have all masters think them free, and all Negroes think they were not, because then they would both behave better." *See* MEMOIRS, *supra* note 6, at 91 (quoting minutes of the trial of Thomas Lewis, in the Court of King's Bench, on the 20th of February, 1771, in the possession of the African Institution); *See* (1772) 98 Eng. Rep. 499 (K.B.); Howell, *supra* note 9, at 79.

16. There was, of course, the bigger question: Was slavery legitimate, period. But that was not a question to be answered for all time in Lord Mansfield's court.

17. *See* Somerset v. Stewart, (1772) 98 Eng. Rep. 499, 499 (K.B.); *See* HOWELL, *supra* note 9, at 79-80. Contemporary estimates of the black population in Britain varied, and the lack of census data made ascertaining its certainty difficult. The estimates ran from a low of 3,000 to a high of 40,000. Mansfield accepted the 15,000 figure. *See* PAUL EDWARDS & JAMES WALVIN, BLACK PERSONALITIES IN THE ERA OF THE SLAVE TRADE 18-19 (1983). The slaves were valued at approximately £50 each. It is unclear how the price was determined and it seems remarkably low.

Lord Mansfield acknowledged the 1729 Yorke-Talbot opinion wherein they pledged themselves to the British planters. Mansfield also acknowledged Lord Hardwicke's 1749 decision that trover would lie for a negro—even though he did not believe those earlier decisions were part of the true question before all present. (Allowing for trover certainly spoke to Mansfield's recognition of the commodification of African lives in service to the slave trade.) "The only question," Lord Mansfield began his often-quoted decision, "before us is, whether the cause on the return is sufficient? If it is, the negro must be remanded; if it is not, he must be discharged." He continued, stating in part that:

> The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law. . . . Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.

Mansfield's circumspection is evident though his task was to render a judicial decision with the authority of his office.[18]

Lord Mansfield did not proclaim that all slavery was at an end or that every master who brought his or her slave into England would immediately have the slave declared free by the law. The Chief Justice only ruled on the literal matter at hand which was the summary detention of James Somerset and the prospect of him being taken from the country against his will—though he had committed no crime. While Mansfield acknowledged the legitimacy of the master-servant

18. *See* HOWELL, *supra* note 9, at 82. JAMES Oldham, the reigning authority on Lord Mansfield points out that the exact meaning of what Mansfield said in reaching the narrow decision "has been the subject of microscopic examination." In so observing, Oldham directs the reader to William Wiecek's article "*Somerset*: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World," 42 U. CHI. L. REV. 86-146 (1974). It is in the appendix to the article that Wiecek reviews the variant reports. Further, Oldham notes that while the differences amongst the transcriptions are slight, and do not change Mansfield's ruling, they are enough to suggest different emphases on Mansfield's words. Oldham discovered two versions previously overlooked—in the papers of Serjeant Hill and Lord Ashhurst, and after careful comparison amongst the slightly differing versions determined the Serjeant Hill version to be the most dependable report of the *Somerset* case. By settling on the Hill version as the most dependable, Oldham notes that it revives David Brion Davis's argument (Davis favors the *Scots' Magazine* version) about how Mansfield's words ought to be construed. If David Brion Davis is correct, Oldham argues, Mansfield was not saying that slavery was so odious that it could only be supported by *positive law* but that the character of slavery is such that the law must be taken strictly. *See* James Oldham, *New Light on Mansfield and Slavery*, 27 J. BRIT. STUD. 54-62 (1988); DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770-1823, AT 496-498 (1975). It should be noted that Oldham covers this material in his two-volume *Mansfield Manuscripts* but says that his article covers it in greater detail. It predates the larger work. At all events, Oldham and Wiecek agree that the variances do not alter Lord Mansfield's fundamental decision: *Somerset* did not outlaw slavery in England.

relationship, he neither denounced the relationship nor declared it invalid.

The West Indian planters had lost—their interests damaged, their stock in pro-slavery ideology headed for a downturn—and, making the loss more acute, they had been defeated quite openly. Stuart's loss of Somerset shook the West Indian cause jeopardizing what they held dear. In the process of negotiating the competing claims that obtained throughout Britain's transatlantic empire, Lord Mansfield faced then avoided the question of the legitimacy of slavery in England. His carefully modulated equivocation notwithstanding, the uses to which Mansfield's decision were put expanded well beyond the decision's narrow confines.

One week after Mansfield's decision, the West Indian planters demonstrated their disagreement with the decision to free James Somerset, advertising as they did a pamphlet, directed at Mansfield, that addressed the "Negro Cause." Two weeks later, the *London Chronicle* carried the full text of the pamphlet in which a West Indian (as he referred to himself) who attended the trial offered his opposing opinion of Mansfield's decision. In it, the West Indian argued that even if slavery had ever been contrary to "the frame and constitution of this country," surely there were occasions when the principle had been disregarded. Besides, impressment was slavery, in effect, and the government routinely engaged in impressments—thus slavery did exist. Furthermore, he noted that numerous acts of Parliament existed relative to the Royal African Company which clearly assisted in the establishment and maintenance of African slavery. In addition, the West Indian urged his readers to recall the earlier opinions of Lord Chancellors Talbot and Hardwicke, both of whom admitted to the existence of slavery in England and found for the continued rights of the master, rather than the freedom of the slave.[19]

The West Indian continued his arguments without the use of the word "slavery" declaring that:

> [I]t is my intention to drop the term slavery. It is an odious word, that engendered this law-suit, and now feeds and supports it with the fuel of heated passions and imaginations. Instead then of such

19. "This Day were [sic] published, Price 1 s. Considerations on the Negro Cause, commonly so called addressed to the Right Hon. Lord Mansfield, Lord Chief Justice of the Court of King's Bench." *See* LONDON CHRON., June 30-July 2, 1772, at 7. The next issue carried the advertisement as well. *See* LONDON CHRON., July2-4, 1772, at 12. The *Chronicle* printed the full text of the pamphlet in the following issue. *See* LONDON CHRON., July 4-7, 1772, at 17-18. The Yorke-Talbot opinion was in 1729. Lord Chancellor Hardwicke's opion was in 1749. *See* JAMES WALVIN, BLACK AND WHITE 111–12 (1973).

Impressment did indeed fall into the category of bound labor. The West Indian writer referred to it as if, as a method of securing labor, it was uncontested. Various actions on the part of seafaring men protesting impressment had occurred while the practice was in force. Those doing the impressing may have sanctioned impressments, but, like being enslaved, it was routinely resisted by those who fell prey to it. 722

> prejudiced and unpopular ground, whereupon their case has hitherto been made to stand, I shall take the liberty to remove its situation, to change its point of view, and to rest it on the land of Property from when, perhaps, it will be seen, not only in a less offensive light, but where also it may find a foundation more solid and substantial for its support.

By replacing the term "slavery" with "property", the West Indian believed that the true terms of discussion would be themselves radically altered. Personalities would be dispensed with and, along with those personalities, any attendant heated discussions revolving around slavery. What is worth remembering is that the relationship amongst Crown, Parliament, and colonists (respecting colonial rights) continued to be a source of tension and misunderstanding during this period. Were the colonies to be considered conquered territory or English settlements? At stake, of course, was the autonomy of the colonies and the "rights as freeborn Englishmen" of the colonists themselves—especially with regard to the creation of political structures and colonial laws that were to be considered on par with Parliament. The West Indian planter appeared to want the colonies' relationship to Parliament to be *both* that of a conquered territory (in which Parliament would unilaterally devise laws to be implemented without dispute) and that of an English settlement (in which the colonists would implement their own laws, customs, and practices which Parliament would honor.) Because the slave trade had been established and sanctioned by governmental bodies such as the Board of Trade, Britain's New World colonies, functioning as conquered territories, would be able to rely on the protection of the metropole for the institution of slavery and, in the process, guarantee Parliamentary authority. Alternatively, functioning as autonomous English settlements, the colonies would be able to claim the legitimacy of local laws and customs devised and instituted in the colonial periphery. The buying and selling of Africans in the New World was customary (a value-free term) and lucrative. There wasn't a soul in England who did not benefit from the bustling commercial networks that revolved around Africans and their forced labor. A situation that could be construed as a dangerous example of periphery/center tensions (that is, the disposition of the African slave trade) would then be resolved with either model. Slavery was a legitimate local colonial custom and, as such, could potentially be honored in the metropole. Likewise, Parliament clearly sanctioned the business of the slave trade. And, at the end of the day, the business of trade was predicated on the neutral concept of property—a concept whose existence was a core necessity for civil government. In short, everyone understood the necessity of property and its protection. What could be simpler?[20]

20. Sociologist Edward Shils' conceptual distinction between the center of imperial powers and its distant holdings has, of course, proved to be a useful tool to frame

The planter's willful dispensing of the word slavery demonstrated the West Indian property interests quite clearly, and, as he deftly pointed out, "whatever then. . . is a matter of trade, your Lordship knows must be a matter of property." In short, Parliament had already established the legal nature of Negroes; they were goods and chattels. Thus, "it would seem," as he said, "that I am fully warranted. . . in my idea, that the right which Mr. Stewart [sic] claims in the Negroe [sic] Somerset, is a right given him by act of parliament; and confirmed in my proposition, that this is a case of property." Finally, Parliament sanctioned and protected trade between the British subjects and African natives or inhabitants—a trade consisting of goods, wares, merchandise, and captive Africans. Therefore, did not British traders or merchants have an absolute property right in their merchandise?[21]

It was not enough simply to substitute "property" for "slave" the way one might substitute two non-sentient species of property for each other such as fence post and frying pan. That the enslaved were vendible was true. That they were living, sentient beings who objected to being bound to labor against their will was also true—and a truth that pre-empted any rationalization associated with their ability to be purchased. As far as Mansfield's decision was concerned, vendibility was not a factor, and he had repudiated the attempt to equate the business of enslavement with contractual servitude.

Shortly after the case was concluded, Charles Stuart, James Somerset's erstwhile master, received a letter from John Riddell, an acquaintance of Stuart's living in Bristol Wells. Dated a few weeks after the June verdict (10 July 1772), Riddell's letter noted:

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discussions about the tensions and misunderstandings that arise out of such situations. Thanks to Jack P. Greene's *Peripheries and Center*, in particular, it contributes mightily to our ability to better contextualize Britain's New World colonies over time as well as distance. *See* JACK P. GREENE, PERIPHERIES AND CENTER: CONSTITUTIONAL DEVELOPMENT IN THE EXTENDED POLITIES OF THE BRITISH EMPIRE AND THE UNITED STATES, 1607-1788, AT 11 (1986).

This awareness of Lockean arguments concerning Enlightenment articulation of natural rights, civil society, and property was, of course, widespread during the 18th century. While we, at this great remove, may tend to praise Locke for his insistence upon and systematic advancement of natural rights as it represents a fundamentally equalizing ideal, Locke also establishes a discourse concerning property—which people can acquire in unequal measure—and the importance of its protection by civil society and the legislative bodies established at the behest of its citizens. Although there is an Enlightenment structure that rests upon the foundational principle of natural rights, and without which Enlightenment ideology cannot function, property and its protection is an integral part of that structure. What happens when natural rights and the protection of property come to a point where they are competing imperatives?

21. *See* LONDON CHRON., July 4-7, 1772, at 17-18.

> But I am disappointed by Mr. Dublin who has run away. He told the Servants that he had rec'd [sic] a letter from his Uncle Sommerset [sic] acquainting him that Lord Mansfield had given them their freedom & he was determined to leave me as soon as I returned from London which he did without even speaking to me. I don't find that he has gone off with anything of mine. Only carried off all his own cloths [sic] which I don't know whether he had any right so to do. I believe I shall not give myself any trouble to look after the ungreatful [sic] villain. But his leaving me just at this time rather proves inconvenient. If you can advise me how to act you will oblige.

John Riddell's slave, Mr. Dublin, doubtless unrelated to James Somerset by blood, identified keenly with Somerset. Furthermore, the passage speaks eloquently to the question of the wide impact and application of Lord Mansfield's circumspect decision. Here was a tangible example of the inconvenience that Mansfield acknowledged: "the difficulty will be principally from the inconvenience on both sides." Here too, were Mansfield's fears in action—he had not wanted the question of slavery finally decided, concerned as he was of the financial losses involved and Mr. Dublin's departure certainly involved financial loss to Riddell, his master. However, the letter that the enslaved Mr. Dublin said he had received encouraged Dublin to believe that the question of his status had indeed been decided with indisputable finality; Dublin wasted little time in leaving. Furthermore, an item in the *London Chronicle* noted, erroneously, that "as Blacks are free now in this country, Gentlemen will not be so fond of bringing them here as they used to be. . ." Surely here was license—and widely disseminated at that—for all of the Mr. Dublins of England to pack up their belongings and leave those who had once enslaved them.[22]

Mansfield was not insensible to the impact his decision would have. There would be ripples on the other side of the Atlantic in the colonial periphery certainly, but the buying, selling, and use of the enslaved would not be affected. What would change would be this: Rather than traversing the Atlantic to England with an African slave in tow, one might simply sell the slave and collect the monetary proceeds. At face value, it would have been a simple matter to exchange one's slave for cash. (That, of course, assumes that owning an African was simply a matter of pounds and pence rather than a complex matter of desire for a visual status marker and consumption of the exotic.)

22. *See* 2 OLDHAM, *supra* note 1, at 1238. *London Chronicle*, June 22, 1772. This erroneous news brief was also reported in the American colonial press, making the information it contained all the more suggestive. *See* N. Y. J., Aug. 27, 1772, at 713; *see also* N. Y. J., Sept. 3, 1772, at 716; BOSTON GAZETTE, Sept. 21, 1772, p. 2. It is easy to imagine that gentlemen in England, America, and the West Indies, laying in bed contemplating their options and thinking themselves accursed for having to reconsider bringing slaves with them to such soil as was heralded free.

But the larger effect—and, one would argue, an effect primarily on status rather than on the ability to reap profits—would occur particularly as a result of transatlantic movement to the specific locale to which British subjects would return bringing with them their putatively legitimate commodity in the form of an African slave. Certainly as someone who had appeared before the Commissioners for Trade and Plantations in colonial boundary disputes along with having West Indian interests, Mansfield could not be considered insular or uninformed about the basic state of affairs in Britain's plantation colonies. In fact, it could be argued that Mansfield's reluctance to decide on the case was due to—in equal parts—his political awareness of exactly how a sizeable portion of Britain's wealth from trade and commodities was amassed and his personal uncertainty about the institution of slavery.[23]

In hearing arguments in the *Somerset* case, Lord Mansfield was forced to consider the far-reaching effects of slavery in the Empire. Concerned that a declaration of universal freedom of enslaved Afro-British would simultaneously plunge merchant interests into jeopardy and stir both merchants and enslaved into an uproar, Mansfield confined his decision to the strictest consideration of the matter before him—wrongful detainment. To his chagrin, Mansfield's equivocation did little to forestall a fundamental disturbance in the order of things: James Somerset was at liberty, and that liberty was published in newspapers both in Britain and her American colonies. That publication of liberty, if you will, contributed to the dissemination of the ideologies of liberty with respect to meaningful geographic relocations. Somerset's liberty—narrowly defined—would thus exceed its brief. Mansfield's decision would be willfully and cannily appropriated by members of the African diaspora in Britain, certainly, but in the American colonies as well.

In fact, Mansfield's decision had greater implications in Britain's New World colonies both because the numbers of enslaved were higher and because English civil servants who were posted to the colonies often returned to Britain with an enslaved person in tow—as was the case with James Somerset and his master, Charles Stuart. Private individuals, too, would engage in the same practice—sometimes returning to Britain permanently, and sometimes in Britain for a lengthy period of time—as was true in the case of the Slave Grace in later years.[24]

James Somerset's case can be seen as the pinnacle of the operation of transatlantic relocation in the history of English common law which

23. While denouncing it in individual circumstances, as mentioned earlier, Mansfield was ambivalent about the overall question of slavery and its relationship to men of property. *See* JAMES WALVIN, BLACK IVORY 11–12 (1992).

24. The case regarding the slave named Grace, heard in Admiralty court in 1827, was not decided in her favor.

began with *Butts v. Penny* in the late seventeenth century. The trajectory was neither smooth nor unswerving; that would suggest that each legal action unerringly built upon the previous one. The cases, while employing earlier decisions as precedent, were effectively decided in isolation. That is to say, no overarching decision was rendered that could be applied, uniformly, to each subsequent case. James Somerset's experience, therefore, cannot necessarily be seen as a "logical conclusion" to the cases that pre-dated his. However, as a result of a transatlantic relocation to a place that tended toward privileging personal liberty, and a Chief Justice who tended to be keen to champion individual liberty, James Somerset went free.[25]

25. Shyllon condemns Chief Justice Mansfield's decision and the month-long hesitation "to declare the obvious." He believes that Lord Mansfield "unnecessarily prolonged" the decision, thus placing James Somerset in a state of "intolerable suspense under which Somerset had been since he was released on bail in December 1771." Shyllon further states "It is the conduct of Lord Mansfield and his speeches in the course of the proceedings in the Somerset case that are astonishing and deserve strong condemnation." *See* SHYLLON, *supra* note 7, at 113.