A SCOTSMAN CAUGHT YOUNG: THE INFLUENCES WHICH SHAPED WILLIAM MURRAY, FIRST EARL OF MANSFIELD

I should like to start by recording what an honour it is to have been invited to deliver this the fifth annual lecture in the Selden Society and Four Inns of Court series It is also an honour to follow in the footsteps of the four former distinguished lecturers, my former friend and colleague, the late and very much lamented Igor Judge, my friend and former colleague, the very much alive Brenda Hale, John Baker from whose outstanding works on English legal history I have learnt so much, and the American expert on civil litigation and procedure, Professor Jay Tidmarsh.

I turn then to my rather less contemporary but at least influential subject, namely, William Murray, later the First Earl of Mansfield. Given his enormous and lasting contribution to the common law some 250 years ago, and his own command and invocation of past legal practice and learning, I believe he is a very appropriate subject for a lecture in a series aimed at demonstrating to the profession, scholars and the general public the importance of legal history in its broadest sense to the development and understanding of the Common Law – and I am most grateful to Dunstan Speight, the estimable librarian of Lincoln's Inn, for suggesting the subject and providing me with so much support in connection with this talk.

Murray was born in 1705 at his ancestral home near Perth into a staunchly Jacobite family. Indeed, as a result of his support for the short-lived attempt of James II's son, James Stuart (aka The Old Pretender) to gain the throne from the newly installed George I in 1715, his father, Viscount Stormont, was to spend a year in an Edinburgh prison.

The young William Murray, as he then was, attended Perth Grammar School, where it appears that a combination of natural ability and good teaching ensured that he developed an early reputation for acute intelligence and application[1], which he never lost. Maybe because they thought that his unusual intellectual abilities would be better developed in England, but maybe because they were disheartened by the political situation in Scotland, his parents arranged for William to finish his education in England. Accordingly, in 1719, he travelled by pony on his own to London. In those days of poor roads and no trains, the trip apparently took him seven weeks[2]. And, having left Scotland in this memorable way, he never returned – and apparently never saw his parents again.

His future career may well have been the basis for Dr Johnson's observation that "*much may be made of a Scotsman if caught young*"[3]. Whether the 14-year old Murray when riding towards Hadrian's Wall would have agreed with a more famous dictum of Dr

[1] J Edgar, *The Boyhood of Great Men: Intended as an Example to Youth* (1861-2), pp 88-100 (not the most reliable source, I suspect)

[2] John, Lord Campbell, *The Lives of the Chief Justices of England*, (1849–57), Vol2, p244

[3] A comment made by Johnson about Mansfield *James Boswell's Diary*, Entry for 24th April 1772

Johnson, namely that "the noblest prospect which a Scotchman ever sees, is the high road that leads him to England"[4] is a matter of conjecture. But it is hard to believe that the future Lord Mansfield would have done as well as he did had he not taken the high road to England as a young teenager.

Having arrived in London, Murray enrolled at Westminster School, possibly arranged by his father because the Dean of Westminster, Francis Atterbury, was a strong supporter of the Stuart cause[5] - so much so that he was later exiled for leading a Jacobite plot[6]. At any rate by all reports, the young Murray continued to shine as an exceptionally hard-working and intelligent pupil.

After four years at Westminster, he went on to Christ Church Oxford. His rivalry with William Pitt the Elder, later Lord Chatham, appears to have originated from then, when Murray won a University competition for a Latin verse composition on the death of George I in 1727, beating Pitt into second place for which Pitt never forgave him. Murray may have won the prize but 150 years later, another Lord Chief Justice, Lord Campbell, described his poem as "*a very wretched production*"[7].

At some point when at Oxford, Murray decided that he wanted a career in the law. Given his relative impecuniosity, this seemed impossible. However, his intelligence so impressed the father of one of Oxford friends, Lord Foley, that he offered to fund Murray while he trained for the Bar[8]. Murray joined Lincoln's Inn, where his commitment to serious study continued, extending to being schooled in oratory by the poet Alexnder Pope. It is also credibly reported[9] that while at Lincoln's Inn, Murray translated Cicero into English and back into Latin to improve his rhetorical style. In many ways, it was a very different world from today: the Inn called an average of seven students a year to the Bar, fewer than Middle or Inner Temple. But it still was reputed to dominate the legal profession.[10]

At school, at university, and when reading for the Bar, Murray was, as I have intimated, brilliant and hard-working; he was also seriously interested in history and jurisprudence. This is borne out by four letters he wrote in later life[11] giving advice to those thinking of embarking on a career in the law. Three of those letters recommended the study of "*antient*" history, modern history, and English history "*previous to entering upon the study of law*". The width of Murray's own reading is apparent from these letters. To take one example, he suggested that only one work of the reign of King Louis XI of France

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[4] *James Boswell's Diary*, Entry for (entry for 6th July 1763).
[5] See e.g. Eveline Cruickshanks and Howard Erskine-Hill, *the Atterbury Plot* (2004), p. 223.
[6] *Encyclopædia Britannica* (11th ed.). Vol 2. pp. 880–882.
[7] Campbell, *op cit*, Vol 2, pp. 235-236.
[8] Norman S Poser, *Lord Mansfield, Justice in the Age of Reason* (2013), p. 37.
[9] The European Magazine, June 1791, p. 418.
[10] David Lemmings, *Professors of Law: Barristers and British Legal Culture in the Eighteenth Century* (2000), p. 6.
[11] Published in *A Treatise on the Study of Law* (1797).

need be studied, at least initially[12]. And he wrote that he had "*a view of your keeping up and improving your knowledge of latin*", saying that "*[t]his plan will be a trial, whether you have genius and resolution enough to persevere in a course of study for four months*" and "*if you break the thread of this, the whole utility will be lost*"[13]. But his advice also involved a light touch – e.g. "*sometimes a single pamphlet will give us better the clue of a transaction than a volume in folio*"[14].

The fourth letter set out "*a [recommended] course of law studies*", which particularly concentrated on studying "*the law of nations which is partly founded on the law of nature*", especially the works of two seventeenth century legal philosophers, Hugo Grotius and Samuel Pufendorf. Their influence on the future Chief Justice is plain. Grotius believed that everyone had a natural right, and therefore a legal right, to protection of their person and their property, which included the right to acquire and retain assets[15]. Pufendorf, no doubt with the memory of the horrendous Thirty Years' War, was a strong advocate of freedom of religion, and its protection by the law[16]. But Murray also recommended more contemporary writers, including John Locke, who died the year before Murray was born and whose writings exerted a great influence on Murray's generation, and on Murray in particular.[17]

The fourth letter also required an in-depth study of what Murray called "*municipal law*", and in particular the domestic laws of England, Scotland and France. He observed "*You will begin of course with Roman law*", which included reading Justinian's *Institutes*, largely limiting oneself to the text itself as "*[l]ong comments would only confound you and make your head spin round*". He then suggested moving to an understanding of "*feudal law*" without which "*it is impossible to understand modern history*", commending the now almost completely forgotten "*Giannoni's history of Naples [as] one of the ablest and most instructive books that ever was written*"[18].

Murray's emphasis on Roman law and civil law was out of step with the then-current view of judges and lawyers[19], as he himself recognised saying that "*civil law has long been rejected both as a rule of government and of property*", although he added "*yet so*

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[12] *Ibid*, p. 23.
[13] *Ibid*, p. 4.
[14] *Ibid,* p. 47.
[15] See e.g. H. Grotius, *On the Laws of War and Peace* (1625).
[16] See e.g. S. Pufendorf, *On the Duty of Man and Citizen According to Natural Law* (English language edition, 1991), pp. 34-6.
[17] N. S. Poser, *Lord Mansfield – The Reasonableness of Religion* in *Great Christian Jurists in English History*, ed M Hill and RH Helmholz, pp. 188 and 194-7.
[18] Mansfield's assessment was not shared by everyone. Wikipedia's entry on Giannone records that his "*style failed miserably to rise to the contemporary standards of literary style; he is often inaccurate as to the facts, for he very seldom made use of original documents (see A. Manzoni, Storia della colonna infame)*"
[19] Philip C. Yorke, *The Life and Correspondence of Philip Yorke, Earl of Hardwicke, Lord High Chancellor of Great Britain* (2013 edition), Vol. 2, p. 488, note 1.

much good sense and such sound maxims of jurisprudence are conspicuous in the institutes of Justinian".

Given that then, as now, Scots law had strong elements of civil law, it is very likely that Murray's Scottish background was an important influence in his unfashionable taste for Roman law. Indeed, Holdsworth emphasises the importance of Scots law to Mansfield's thinking throughout his career[20]. Given the intensely practical and pragmatic approach which he adopted to the law when Chief Justice, the young Murray would presumably not have relished the then-intensely insular nature of English law, with its obsessive concentration on archaic technical rules, particularly as he was approaching it with the benefit of such wide and deep study of legal writings.

After completing his legal studies, Murray spent much of 1730 travelling in mainland Europe, which included staying with his brother, a staunch Jacobite undergoing self-imposed exile in Paris. It is apparent that at that time, and despite his subsequent denials, Murray was a Jacobite. In terms of circumstantial evidence, close family members were Jacobites, and the teachers at Westminster and the dons at Christ Church were notorious for their support of the Stuart cause. More specifically, there are two surviving letters which Murray wrote to The Old Pretender's advisers, specifically offering "*my duty and loyalty to the King*"[21]. However, when in England, the ambitious Murray appears to have appreciated that any overt expressions of Jacobite sympathy were to be avoided, and while at Oxford, he made it clear that he supported the Hanoverian succession, and proved a sad disappointment to the Jacobites given his family background[22]. Indeed, Murray's elegy on the death of George I, whose accession in 1714, precipitated the Jacobite rebellion supported by Murray's father, appears to have been, at least in part, prompted by his desire to distance himself from what may have been perceived to be his treasonous background[23].

On returning from his European journey, Murray was called to the bar and set up chambers at 5 Kings Bench Walk. His first two years appear to have been briefless[24], his practice then developed rapidly. Much of it came from Scottish clients who gave him briefs in House of Lords appeals. Indeed, he first attracted notice by his performance in one such appeal appearing for a client who was suing his broker for losses suffered as a result of the bursting of the South Sea Bubble[25]. He came to specialise in Chancery work, and was consulted on a number of boundary disputes, albeit at a rather grander level than those two words conjure up today. A quarrel over a six-inch wide strip along a suburban garage drive was not for William Murray: he was

[20] Sir William Holdsworth, *A History of English Law*(1938), Vol. 12, pp 555-556.
[21] Letter from Murray to Lord Inverness, 6 August 1725. And see Henrietta Tayler, *The Jacobite Court at Rome*, p. 230.
[22] E.G.W. Bill, *Education at Christ Church, Oxford, 1660-1800* (1988), p. 164, n.1.
[23] See the discussion in Poser, *Lord Mansfield: Justice in the Age of Reason* (2013), p. 33.
[24] Campbell, *op. cit.* Vol. 2, p. 333 and Holdsworth *op cit,* Vol. 12, p 465.
[25] Campbell, *op. cit.* Vol. 2, pp. 336-7. Nonetheless, he lost as the Lords held that his client only had his own greed to blame.

consulted about the location of boundaries such as that between what would become the states of Maryland and Pennsylvania[26]. He also had successes in other cases which had some press coverage. One such case involved his defending a man accused of adultery (or "criminal conversation" as it was then called) with another man's wife – establishing that the husband had actually arranged the adulterous tryst[27]. In another case, he managed to ensure that the City of Edinburgh paid only a nominal fine for failing to prevent the lynching of an officer who had ordered his troops to fire on an unruly crowd attending a public execution[28].

As his practice developed successfully, Murray was proving almost equally successful in managing his money.. He clearly enjoyed the style of life which money could buy. And some said that it was keenness for money as well as social aspiration which caused him in 1732 marry Lady Elizabeth Finch (who was the granddaughter of the great 17th century judge, Lord Nottingham, the so-called father of modern equity). But it was by all accounts a very happy, if childless, marriage, which lasted until she died in 1784. And it is clear that Murray's sense of propriety was greater than his enjoyment of assets. When the temperamental Duchess of Marlborough sent him the breath-taking sum of 1000 guineas simply as a retainer, he returned all but five guineas, which, he said, was his standard retainer[29]. When she wanted his advice, the Duchess visited him without notice, and would get angry if he was out and wait for his return. On one occasion, she tired of waiting, and when Murray finally got back, his clerk told him that a woman had called who "*would not tell me her name, but she swore so dreadfully that I am sure she must be a lady of quality*".[30]

Murray appears to have been both determined to succeed and confident about his ability. One of his biographers wrote that, as a barrister "*[h]e does not appear to have had a moment of self-doubt*"[31]. His determination and his success may have been in part due to his lonely journey from Scotland. There is evidence which indicates that those who lose a parent at a young age are more driven and consequently more successful[32], and in practice Murray lost both his parents when he was 14. He also had the advantage, as an immigrant, of having no worries about living up to his established place in society. But above all, his outstanding intellect, judgement and appetite for hard work, coupled with a facility for language, ensured his success.

However, in law and politics the mid-eighteenth century, who you knew and who you were could often be as important, even sometimes more important, than what you knew and what you were. As was memorably said "*[i]n the eighteenth century, patronage was*

[26] In the early stages of what eventually led to the famous *Penn v Lord Baltimore (*1745) Ridg t H 332, (1750) 1 Ves Sen 444.
[27] *Cibber, Theophilus*, Dictionary of National Biography, 1885-1900, Volume 10, by Arthur Henry Bullen.
[28] E. Heward *Lord Mansfield*, (1979), pp. 18-20.
[29] Campbell, *op. cit*. Vol. 2, p. 343.
[30] O. Spencer-Churchill, *Duchess Sarah* (1904), p. 293.
[31] *Murray, William, first earl of Mansfield*, Oxford Dictionary of National Biography, 2004, by James Oldham.
[32] See e.g. Malcolm Gladwell, *David and Goliath: Underdogs, Misfits, and the Art of Battling Giants* (2013).

power, and patronage scarcely bothered to wear a figleaf"[33]. In that connection, a crucial event occurred in 1739 when a friend from his schooldays, Andrew Stone, introduced Murray to the Duke of Newcastle, who has been described as "*the most notorious distributor of patronage in British history*"[34]. Shortly thereafter, the Duke instructed Murray to draft and negotiate some complex family arrangement to do with property and titles, and was very impressed with the result[35]. Newcastle was effectively number two to the then-Prime Minister, Robert Walpole, and, on the latter's resignation in 1742, arguably became the most powerful man in the government. He thought that Murray would be an ideal person to speak for the Government in the House of Commons. So, in 1742, he arranged for Murray to be elected to one of his "rotten boroughs". Murray made it clear that he was not prepared to be a mere backbencher, and he was appointed Solicitor-General two days later. The following year, he became a Bencher of Lincoln's Inn.

The next fourteen years saw the forensic intellectual Murray and the passionate compelling Pitt, effectively fighting it out from opposing sides in the Commons. The two of them were "*beyond comparison the best speakers*" and "*you might hear a pin drop when either of them is speaking*" according to Lord Chesterfield[36]. But this was just part of Mansfield's working life, which involved arguing cases in court, normally for private clients[37] in the Court of Chancery in the morning, giving the government, often the Cabinet, legal advice in the middle of the day, appearing at the Bar of the House of Lords in early afternoon, and defending government policy, in every area, including foreign policy, treaties and war, in the House of Commons in the late afternoon[38] – and presumably reading briefs, requests for advice and government papers in the evenings. He also found time to give informal political advice on public issues, and informal legal advice on personal issues, to Ministers

His family's commitment to the Jacobite cause must presumably have caused some internal conflicts when, in 1746, as Solicitor-General, Murray was called upon to prosecute the leaders of the 1745 uprising seeking to replace King George II with the Old Pretender's son, Bonnie Prince Charlie, which had ended at Culloden. But he showed no signs of concern, and according to one source, he did "*his duty with firmness and moderation*"[39]. However, a few years later, in 1753, Murray's career was threatened when the Recorder of Newcastle, Christopher Fawcett, publicly accused him of having toasted the health of the Old Pretender some twenty years earlier. It is a measure of how

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[33] John H. Plumb, *The Growth of Political Stability in England 1675-1725* (1967), pp. 188-189, also attributed to Roy Porter, *English Society in the Eighteenth Century* (1991), p. 110.
[34] Poser, op. cit, p.131, and see Reed Browning, *The Duke of Newcastle* (1975), p. 183.
[35] George Harris, *The Life of Lord Chancellor Hardwicke* (1847), Vol. 1, pp. 522-3.
[36] *Lord Chesterfield's letters to his son*, Letter CCXl 111, 11 Feb. 1751. Horace Walpole was rather more partisan, describing Pitt as having "*confounded the audience*", leaving Murray "*crouched silent and terrified*" – H. Walpole, *Memoirs of the Reign of King George II* (1985 ed), Vol. 1, p. 408. But Walpole had no love for Mansfield and at best this appears to have been an exaggeration.
[37] Including sometimes against the Government – *R v Burgess* (1754) 96 ER 942.
[38] J. Holliday, *The Life of William, Late Earl Mansfield* (1797), p. 52.
[39] Campbell, *op. cit*. Vol. 2, p. 359.

sensitive the Government was even in the 1750's about the possibility of the Stuarts returning and replacing the Hanoverian monarchy that the allegation was formally investigated by the Cabinet, who exonerated him, as well as being debated in the House of Lords in a fairly futile fashion.

In 1754, the Attorney General, Sir Dudley Ryder, became Chief Justice of the King's Bench Division, and Murray succeeded him as Attorney General. In that post, he was consulted by the Excise Commissioners who wished to bring libel proceedings against Dr Johnson in connection with the definition of "excise" in his famous dictionary[40], namely "*A hateful tax levied upon commodities, and adjudged not by the common judges of property, but by wretches hired by those to whom excise is paid*". Surprisingly by present standards, Murray advised that this was a libel, but, more sensibly, suggested that the author should be invited to change the definition. In the end, Johnson was apparently neither invited nor indicted[41].

Murray was Attorney General for only two years, as Ryder suddenly died in 1756, and Murray was appointed Chief Justice in his place. He insisted on a peerage as a condition of accepting the post, and an initially unwilling George II was persuaded by the Duke of Newcastle to create him Baron Mansfield[42]. His meteoric career can be traced through the famous Black Books of Lincoln's Inn, which also record resolutions that his coat of arms *"be placed in the Hall*" in 1757 and, later on, that prints of Lord Mansfield "*be purchased and framed*" in 1768 and 1775.

Lord Mansfield's time as Chief Justice was not only remarkable for his legal decisions, of which more anon. It was also remarkable for the way in which it involved a wholesale breach of the notion of separation of powers, which was supposed to exist in Britain and was admired by contemporary writers such as Montesquieu[43] in France and Madison[44] in America. Although there were anomalous exceptions until the constitutional changes in 2005[45] (such as the Lord Chancellor's role, and the Law Lords taking active part in House of Lords debates and committees), in the past 200 years[46], serving judges could not be active members of the legislature let alone the executive[47]. Yet, in his first year as Chief Justice, Mansfield not only spoke on behalf of the Government in House of Lords debates. He also had important roles as a member of the executive. Thus, very early on, he played a somewhat inglorious part in the House of Lords and behind the scenes in deterring George II from granting clemency to Admiral

[40] S .Johnson, *Dictionary of the English Language*.
[41] Boswell's Johnson, *Ed Hill* (1887) Vol. 1, p. 294, n. 9.
[42] He apparently chose the title as it was the name of a manor owned by the Duke of Newcastle – *Campbell, op cit,* Vol. 2, p. 118.
[43] C de Secondat, Baron de Montesquieu, *The Spirit of Laws*, (trans. T Nugent), (1899), Book 11, pp. 151ff
[44] J Madison, *The Avalon Project* (1778) Federalist Paper. 51.
[45] The Constitutional Reform Act 2005.
[46] The last Chief Justice to sit in the Cabinet was Lord Ellenborough, who retired in 1818 – see J. Baker, *An Introduction to English Legal History* (5th ed, 2019), p. 180.
[47] A remarkable exception was Lord Reading, who, while still Lord Chief Justice, was (1917-1919) Commissioner and then UK Ambassador to Washington.

Byng who had been court-martialled for losing Menorca to the Spanish and was consequently shot on the quarterdeck of his ship – famously according to Voltaire, *pour encourager les autres*[48]. It was inglorious because Byng was a useful but unfair scapegoat for the Duke of Newcastle[49], who was being blamed for not supplying Byng with reinforcements.

Some three weeks after the wretched Byng was shot, the Chancellor of the Exchequer resigned, and the King appointed Mansfield to replace him albeit only for eight weeks – so, in April 1757, within 6 months of becoming Chief Justice, Mansfield was also Chancellor of the Exchequer. At the end of that year Mansfield became a member of the King's Cabinet, a body with some 20 members, which effectively ran the executive arm of government[50]; it was an *in personam* not an *ex officio* appointment[51], and Mansfield held the post for 20 years.

Over those two decades, although busy most days in court, Mansfield frequently spoke for the government in House of Lords debates. His antagonistic relationship with Pitt continued both in Parliament and behind the scenes. Even the admiring Lord Macaulay recognised that Chatham was a difficult character, referring to him as "haughty", "imperious" and "unreasonable"[52], and he captured his and Mansfield's contrasting Parliamentary performances in these terms:

> In the House of Commons, a flash of [Pitt's] eye, a wave of his hand sometimes cowed Murray; but in the House of Peers, his utmost vehemence and pathos produced less effect than the moderation, the reasonableness, the luminous order, and the serene dignity which characterised the speeches of Lord Mansfield.[53]

More broadly, in the political arena Mansfield attended many meetings with Prime Ministers and senior Government Ministers, and sometimes the King, discussing domestic and foreign policy issues and public appointments (both lay and clerical)[54].

A number of reports from different contemporaries consistently suggest that, in the political world, Murray was despised for being a timid in public on policy issues and a duplicitous manoeuvrer behind the scenes[55], while at the same time being admired – not infrequently by the same writer - as an outstanding Parliamentary orator and a wise perceptive counsellor in private[56]. His most recent and generally sympathetic biographer[57] finds it "*difficult to disagree with*" an earlier description of Mansfield the

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[48] Voltaire, *Candide ou l'Optimisme* (1759), Chapter 23.
[49] Reed Browning, *The Duke of Newcastle* (1973) p. 236.
[50] Edward Turner, *The Cabinet Council of England in the Seventeenth and Eighteenth Centuries, 1622-1784*, (1930) Vol. 2, pp. 10-11, 38 and 51.
[51] *Ibid*, p. 33.
[52] Lord Macaulay, *Second Essay on the Earl of Chatham* (American Book Club, 1892), pp 34,73, 102, 107.
[53] Macaulay, *op cit*, p 103.
[54] See e.g. Newcastle's memo for the King, Vanderbilt Papers at the Olin Library 32891, f.358.
[55] See e.g. what is said in Poser, *op. cit.,* pp. 140-141.
[56] *Ibid.*, pp. 141-145.
[57] Poser, *op. cit.,* p. 131.

politician as "*Machiavellian*"[58]. His opportunism bitterly upset the Duke of Newcastle when he shamelessly deserted to the Marquess of Bute, when it became clear that Bute was favoured over Newcastle by the newly installed George III; and his sagacity is illustrated by the fact that, after a couple of years, the Duke reverted to seeking Mansfield's counsel.

Throughout his time as a Law Officer in the Commons and Chief Justice the Lords, Mansfield was a keen supporter of the policy of the Government of the day, and he maintained in particular what his most recent biographer has referred to as a "*steadfast devotion to the monarchy*"[59]. His maiden speech in the Lords after becoming Chief Justice was characteristic in this connection. It concerned the publication of a parody of the King's speech when opening Parliament in 1756. George II himself saw the funny side, saying that he "*hope[d] the man's punishment will be of the mildest sort*" and that "*the spurious speech is better than the one I delivered*". But, addressing the House of Lords, Mansfield said that the parodist should be imprisoned and that his spurious version of the King's speech should be "*burned in the Palace yard by the common hangman*" for "*such an insult to the Crown*"[60].

Shortly thereafter, on a rather more significant issue, Mansfield was a keen supporter of a strongly aggressive approach in the very successful Seven Years' War[61]. Twenty years later, he was even more vocal and firm in his support of the rather less successful American War of Independence[62], saying in the House of Lords speech "*if you do not kill them, they will kill you*"[63]. The War started well, and Mansfield felt that his support for the Government should be rewarded by an Earldom, and when this was proposed to the King, George III replied saying that Mansfield's "*zealous support for near sixteen years ... seemed to entitle him very reasonably to ask the mark of favour that he did*". [64] And so an Earldom was conferred, and, as he was childless, his nephew, Viscount Stormont, being named as successor in the letters patent.[65]

The American War subsequently started to go wrong, but, despite this, Mansfield for a long time he fought against all proposals to settle with the Americans[66]. Chatham, a consistent opponent of the War, gave passionate ant-War speeches in the House of Lords to the discomfiture of Mansfield, who, according to one source, "*silently quailed under*" Chatham's oratory. and was "*afraid of being blasted by the lightning of his wrath*".[67]

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[58] J Sargeaunt, *Annals of Westminster School* (1898).
[59] Poser, *op. cit.,* p. 121.
[60] *Campbell,* op. cit., Vol. 2, pp. 447-448. It appears that the perpetrator was never apprehended – or even identified.
[61] Mansfield to Newcastle, Vanderbilt papers 20 August 1758, 32822, f.470 (VC).
[62] North to Mansfield, Mansfield Papers at Scone Palace, 3 September1781, Bundle 641.
[63] *Campbell*, *op. cit.*, Vol. 2, pp. 499-500.
[64] *Correspondence of George III from 1760 to 1783* (1927-8) Vol 3, pp. 392-393.
[65] *Morning Post,* 8 November 1776.
[66] *Ibid.*, p. 505.
[67] *Ibid*.

Chatham famously collapsed following one of those speeches and died a few days afterwards.

Britain's defeat in the American War effectively marked the end of Mansfield's political career, and he left the Cabinet in 1782. However, the War also produced an interesting sidelight on his character. When John Adams, later a US President, visited in London in 1783 to negotiate the Treaty which formally ended the War, he met Mansfield and "*found more politeness and good humour in him than in Richmond, Camden, Burke, or Fox*"[68], all of whom had supported the Americans. More generally, there are mixed reports of Mansfield's social manners. A civil servant, and writer who frequently met him described him in one case as having "*that happy and engaging art … of putting the company present in good humour with themselves*" and "*cheer[ing] the least attempt at humour with the prompt payment of a laugh*".[69] However, James Boswell, who liked to visit him apparently to rub shoulders with the great, referred to Mansfield's "*cold reserve and sharpness*", which he said was "*like being cut with a very, very cold instrument*" and "*chill[ing] the most generous blood*"[70]. Having said that, Boswell wrote later that, at the receptions he held for lawyers at Kenwood, Mansfield "*sat with his tye wig, his coat buttoned, his legs pushed much before him, and his heels off the ground, and knocking frequently but not hard against each other, and he talked neatly and with vivacity*".[71]

Mansfield's timidity, lack of personal loyalty and unswerving support of the monarchy and government in the political sphere contrast sharply with his reputation for boldness and adherence to principle as a Judge. A possible explanation arises from his early association with Jacobitism. While it appears that in his 20s Murray was a secret Jacobite, it is clear that by the time he was a successful barrister, he had genuinely changed his allegiance to the Hanoverian monarchy. It may well therefore be that his enthusiasm for the existing government was fuelled by the zeal of a convert. Quite apart from that, his family and other associations with the Jacobite cause must have made him anxious to demonstrate his loyalty to George II and George III and their governments. In particular, the accusation and investigation in 1753 must have weighed with him, as must have the fact that his Jacobite associations and supposed sympathies were invoked against him by his enemies throughout his career – often in scurrilous terms[72], most famously by the anonymous (to this day) author of the published *Letters of Junius*[73].

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[68] C.F. Adams, *the Works of John Adams… by his Grandson, Charles Francis Adams* (1850-1856), Vol. 1, p. 406.

[69] R. Cumberland, *memoirs of Richard Cumberland* (1807) Vol. 2, pp. 344-346.

[70] J. Boswell, Diary Entry for 11th April 1773.

[71] *Papers of Boswell*, 9.48.

[72] See e.g Earl Waldegrave, *Memoirs*, ed J.C.D. Clark (1988), pp 174-175, *Casca's Epistle to Lord Mansfield*, The Crisis No XVII (1775), pp 137-148, *Plea of the Colonies, on the Charges Brought against Them by Lord Mansfield and Others* (1775), and Campbell, *op. cit.* Vol. 2, p. 516.

[73] Junius, e.g. *Letter No XLI*, The Public Advertiser, 14 November 1770.

Turning now to Mansfield's judicial career, when sitting in court he was keen to minimise delays[74], albeit he did not give judgment until he felt that he had mastered all the details of the case[75]. He treated counsel who appeared before him firmly, but fairly[76], although he was believed by some to favour barristers who had been to Westminster or Christ Church[77]. He was on good terms with his judicial colleagues, who hardly ever dissented from his views[78], no doubt because he was such a formidable jurist, but also, I suspect, because he was such a strong character.

At that time, and for many decades after, not just criminal cases, but many first instance civil cases were tried with a jury. As Cecil Fifoot put it in his biography of Mansfield[79],

> The jury solved a particular problem, the judge rationalized the solution for future use. The jury revealed a fresh facet of human experience, the judge framed it in the general policy of the law. By insisting upon these complementary functions, Lord Mansfield maintained an equilibrium between stability and expansion, and determined the axis about which the mercantile world could revolve.

Although I have referred to Mansfield's conduct in politics as contrasting with his judicial reputation, his record as Chief Justice was in some respects consistent with his political stance. Thus, his rulings, directions and sentences in criminal libel cases were very much in favour of the government and the Crown, and could be said to be presaged by his advice when Attorney General about Dr Johnson's definition of "excise". In 1758, he tried a Dr Shebbeare, who had published letters criticising Government policy, and told the jury that this conduct "*approached high treason"*. When the jury found Shebbeare guilty, Mansfield sentenced him to stand in the pillory on three occasions and to be transported for three years[80].

And in 1770, when a jury found Henry Woodfall not guilty of seditious libel by publishing Junius's letters[81], Mansfield refused to accept the verdict and ordered a re-trial[82]. Four years later, Woodfall was prosecuted before Mansfield for publishing a paper criticising the Glorious Revolution of 1688 and Willam and Mary who both had died more than 70 years earlier. Having been directed by Mansfield in strong terms that criticism of a dead king could be libellous, the jury found Woodfall guilty of publishing the paper, but expressly refused to find him guilty of libel, even after being pressed by

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[74] W. Seward, *Anecdotes of Some Distinguished Persons* (1795-1796) Vol. 4, pp. 491ff.
[75] As he made clear in *R v Wilkes* (1770) 4 Burr. 2527, at p. 2549.
[76] N. S. Poser, *Lord Mansfield: Justice in the Age of Reason*, *op cit*, p 204.
[77] This was alleged by John Scott, the future Lord Eldon, who however, acquitted Mansfield of conscious bias, adding that "*he was a good man*" – H. Twiss *The Public and Private Life of Lord Chancellor Eldon* (1844), Vol. 3, pp. 116-117.
[78] Apparently, in Mansfield's first 20 years on the bench, there were only two recorded cases of a colleague disagreeing (in each case Yates, J) – Poser, *op. cit*, p. 199.
[79] C.H.S. Fifoot, *Mansfield* (1936) p 84.
[80] H. Walpole, I op. cit., Vol. 2, p. 154, n. 2, and H. Almon, *Biographical, Literary and Political Anecdotes,* (1797), Vol. 1, pp 373-376.
[81] *R. v. Woodfall* 5 Burr. 2661.
[82] Campbell, *op cit*, Vol. 2, pp. 479-480.

Mansfield to do so. Mansfield then took it on himself to hold that the jury must have found Woodfall guilty of libel as they had concluded that he had published the paper, and fined Woodfall heavily.[83]

One must, of course, be careful not to judge actions in former times by current standards, but it does seem as if Lord Mansfield was seen by many contemporaries as tending unacceptably to restrict freedom of expression[84]. It is only fair to add that he upheld Lord Camden's famous ruling that general warrants were illegal, characteristically saying that they could not "*hold against clear and solid principles of law*".[85], and while he was very critical of the fearless, if disreputable, libertarian John Wilkes, Mansfield discharged him on a technicality, while making it clear that he thoroughly disapproved of Wilkes[86]. The disapproval was mutual, but in later life the two men became friendly, and Wilkes once remarked that to hear Mansfield's judicial colleagues give their judgments after Mansfield had concluded, "*was like a draught of hogswash after a bottle of champagne*".[87]

In somewhat similar vein, Mansfield could be a pretty harsh criminal judge, especially when it came to crimes which could undermine commerce. Thus, he seems invariably to have imposed the death penalty on forgers, going so far as to persuade the King not 'to pardon a forger who had pleaded guilty and had fully compensated his victim.[88] An equal dislike of crimes that undermined the justice system led Mansfield to be a stiff sentencer of perjurers[89], and indeed he supported a Bill which would have imposed capital punishment for perjury.[90]

While Mansfield was relatively unenlightened when it came to political freedom of expression and criminal sentencing, his judicial approach to women's rights and, even more, to religious freedom was very different. In a series of cases, he progressively widened the category of cases in which a married woman had the right to make contracts or to sue. Mansfield decided that, although the case law to date established the rule that the only circumstance when a married woman could make contracts or sue was when her husband had been exiled for life or had departed voluntarily swearing never to return, the rule should be extended, as he put it, to any case "*where a woman has a separate estate, and acts and receives credit as a feme sole*"[91].

In contrast with his normal keenness to obtain convictions in criminal cases, Mansfield did his best to ensure that any prosecution of an alleged Catholic priest for saying mass

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[83] *R. v. Woodfall* Lofft 776.
[84] See eg E. Fitzmaurice, *Life of William, Earl of Shelburne* (1875) Vol 2 pp 483-4, Another example is *R. v. Almon* 5 Burr. 2686.
[85] *Money v Leach* 3 Burr. 1741.
[86] *R. v. Wilkes* 4 Burr. 2527.
[87] A. Polson, *Law and lawyers, or, Sketches and illustrations of legal history and biography*, (1840) Vol. 1, p. 318.
[88] G. Howson, *The Macaroni Parson, The Life of the Unfortunate Doctor Dodd* (1973), p. 200.
[89] See e.g. the reports in the *Morning Chronicle* of 22 and 29 November 1784.
[90] J. Oldham, *The Mansfield Manuscripts* (2004), Vol. 2, p 1066.
[91] *Corbett v Poelnitz* 1 TR 4.

would end with an acquittal. Thus, in *R v Webb*[92], he took over the cross-examination of the main prosecution witness, and warned the jury that "*you must not infer that [the defendant] is a priest because he said mass, and that he said mass because he is a priest*", and that "*if you bring him in guilty, the punishment is very severe, a dreadful punishment indeed! Nothing less than perpetual imprisonment*". Unsurprisingly, the jury acquitted the defendant as they did in at least five other prosecutions of alleged Catholic priests for saying mass before Mansfield in the second half of the 1760s. It appears that as a result of Lord Mansfield's approach, there were no more such prosecutions after 1770.[93]

Mansfield's dislike of religious discrimination is also apparent from his decision in *Foone v Blount*[94], where the deceased's family were challenging a legacy to a Catholic of money which was to be got from the sale of land. Although a 1700 statute[95] provided that "*all … interests or profits whatsoever out of lands, for the use, or in trust for the benefit or relief of any [Catholics] should be utterly null and void*", Lord Mansfield interpreted the statute narrowly, holding it did not apply because the legatee "*can have nothing till the land is turned into money*" and there was no precedent to support the notion that "*a creditor should not be paid out of the assets, only because he happens to be of a different way of thinking from the established mode of religion*".

Among fanatical protestants, Mansfield was unpopular, with some even asserting that he was a secret Jesuit.[96] But he was equally disapproving of legislation which discriminated against dissenters. Indeed, he wrote of his "*desire to disturb no man for conscience's sake*" and that he had "*always reprobated attempts to molest [both Catholics and dissenters] in the celebration of their religious worship as unworthy*"[97].

In 1767, he effectively overruled a by-law which imposed fines on a person who declined to run for the office of a City of London sheriff on the ground that he would not take the sacrament, referring to the defendant's "*pretended election*".[98]

While Mansfield the judge was enlightened as when it came to religious toleration, Mansfield the politician seems to have been rather more timid. While he later stated that he had supported the aims of the 1780 Catholic Relief Act, he positively drew attention to the fact that he had been absent from the House of Lords during each of its stages.[99]

It is therefore unsurprising that views differ as to whether the destruction of Mansfield's London house in 1780 by the Gordon rioters was instigated by his perceived pro-Catholic sympathies or by his severity in criminal and libel cases. The destruction

[92] J. Oldham, *The Mansfield Manuscripts* (2004), Vol. 2, pp. 877-879, and J Holliday, *op cit*, pp. 176-179.
[93] E. Heward, *op. cit.,* p. 57.
[94] 2 Cowp. 463.
[95] 12 W III, cap. 4.
[96] *Campbell, op cit*, Vol 2, p 516.
[97] *Campbell, op cit*, Vol2 pp 529-530.
[98] C. Mullett, *The Corporations Act and Election of English Protestant Dissenters to Corporation Offices*, (1935), p. 664.
[99] J. De Castro, *The Gordon Riots* (1926), pp. 204-206.

extended to his library which included signed works by Jonathan Swift and Alexander Pope and over 200 of Mansfield's judicial notebooks[100]. The house was rented, and by then Mansfield had a country house, which still survives as Kenwood House, a lovely building in a lovely park (both thanks to Lord Mansfield) and a remarkable art collection (which has nothing to do with Lord Mansfield)[101].

Within a few days of having his house and possessions destroyed, Mansfield was back in the House of Lords, presiding over the proceedings characteristically bravely, but also characteristically pro-establishment: he stoutly justified the government's use of armed soldiers to quell the riot. In the course of his speech, he said somewhat piteously that "*I have not consulted books; indeed, I have no books to consult*".[102]

Given the present concerns about conflicts of interest, it is worthy of note that, despite having been a major victim of the riots, Mansfield had no compunction in presiding over the prosecutions of a number of those accused of responsibility. They included Lord George Gordon himself, who was acquitted of treason, despite a characteristically pro-prosecution, uncharacteristically rambling, summing-up by Mansfield which was frequently interrupted with corrections by Gordon himself, and which contained an extraordinarily wide definition of treason, which included an attempt to destroy all brothels[103].

As I hope is already clear, in his 32 years as Chief Justice, Mansfield presided over cases in almost every area of law, but his most lasting influence, indeed in the legal world at least, his lasting fame, arose from his decisions in the field of commercial law. He was passionately committed to encouraging and facilitating commerce and protecting businessmen, and was highly suspicious of any laws which impeded business, or, as his attitude to forgers showed, any actions which threatened commerce. Thus, when solicitor general, he opposed his own government's bill which prohibited British entities from insuring enemy ships in wartime[104], and would enthusiastically advise that patent applications should be granted.[105]. As a judge, he upheld[106] the common law right to perpetual copyright despite a statute which limited it to a fixed period (and he was in due course overruled on this by Lord Camden and colleagues[107]).

It is tempting to think that Mansfield was influenced by his fellow Scot, Adam Smith, but it is unlikely as *The Wealth of Nations* was only published in 1776. A much more likely influence on Mansfield in this connection was John Locke, whose famous *Second*

[100] W. Adams, *Learned in the Law* (1882), p. 207 and *Gazeteer* of 4th June 1780.
[101] The Iveagh Bequest.
[102] *London Courant*, 21 June 1780, *Campbell, op cit*, Vol. 2, pp. 527-530.
[103] *The Trial of Lord George Gordon for High Treason at the Bar of the Court of King's Bench* (1781), Vol. 2, pp. 63-65.
[104] Holliday *op. cit.*, pp. 90-96 and Heward, *op. cit.*, p. 90.
[105] Oldham, *op. cit.*, Vol. 1, p. 134.
[106] *Millar v Taylor* (1769) 4 Burr. 2303.
[107] *Donaldson v Becket* (1774) 2 Brown's Parl. Cases (2d ed.) 129.

Treatise on Government[108] favoured free trade. Having said that, in Smith, Mansfield and David Hume, Scotland produced three formidable supporters of commercial liberty.

Mansfield was probably the single person most directly responsible for the assistance given by the legal system to the industrial revolution at home in the late 18th and the 19th centuries, and to the pre-eminence of the common law, and in particular English law, even today, in cross-border, commerce.

Like all great reformers, Mansfield was lucky with his timing. Great Britain's overseas trade mushroomed over the 18th century, with the biggest leap being between 1745 and 1765, and at home industrialisation took hold thanks, in terms of financing, to the long term effect of the creation of the Bank of England in 1694, and in practical terms, to a plethora of inventions include the separate condenser steam engine in 1765[109] and the spinning jenny in 1764[110], and to canal-building which started in 1757[111].

Commercial law at the time that Mansfield became Chief Justice was devoid of coherent principles and did not take into account established market practice: juries were simply told to decide the case on the basis of the individual circumstances of the case as they saw them – a recipe for uncertainty and impracticality[112], which are two of the worst potential qualities of any legal process, and which, in the commercial world, inevitably operate to discourage investment and entrepreneurship. Mansfield appreciated this, saying in one case that "*nothing is more mischievous than uncertainty in mercantile law. It would be terrible if every question were to make a cause, and to be decided according to the temper of the jury*" and arguing for "*a rule [of law which] is intended to apply and govern a number of like cases*" [113]. In another case, he described "*[t]he great object in every branch of the law, but especially in mercantile law*" as being "*certainty*, *and that the grounds if decision should be precisely known*".[114] This fundamentally important principle has been echoed ever since in judgments delivered by highly distinguished judges (and indeed by less distinguished judges. Thus, Lord Bingham (one of the few judges of the past 250 years who could claim to be in the same league as Lord Mansfield) said in one House of Lords case that "*The importance of certainty and predictability in commercial transactions has been a constant theme of English commercial law at any rate since the judgment of Lord Mansfield*"[115]

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[108] (1689).
[109] H. Dickinson, *James Watt: Craftsman and Engineer* (1935), p. 36.
[110] R. Marsden, *Cotton Spinning: its development, principles and practice* (1884).
[111] With the Sankey Canal – J. Cumberlidge, *Inland Waterways of Great Britain* (7th ed. 1998).
[112] D. Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth Century Britain* (1989), pp. 102-103.
[113] *Medcalf v Hall* (1782), 3 Doug. 113.
[114] *Milles v Fletcher* (1779) 1 Doug. 231, 233 and see *Vallejo v Wheeler* (1774) 1 Cowp. 143, 153 to the same effect
[115] *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha (The Golden Victory)* [2007] 2 UKHL 12, [2007] 2 AC 353, [23], and the same point was made in the Supreme Court by Lord Hamblen in *JTI Polska sp z oo v Jakubowski* [2023] UKSC 19, [2024] AC 61, at [39] and (with Lord Burrows) in *RTI Ltd v MUR Shipping BV* [2024] UKSC 18,[2024] 2 WLR 1350, at [47].

Accordingly, Mansfield set about developing a coherent set of principles of commercial law as appropriate cases came before him. He frequently imported into English law principles from the *lex mercatoria*[116], or law merchant, the law developed by the major Italian City states which by then had spread throughout Europe, and if that did not provide an answer, he looked to Roman civil law and other sources whihc he had devoured in his youth, e.g. the works of Pufendorf and of Grotius[117]. As Holdsworth noted[118], some lawyers had already

> recognized that the legal principles underlying these commercial customs could be learned only from the writings of the foreign civilians. . . . But … it was not until the common law obtained in Lord Mansfield a judge who was a master of this learning that the rules deducible from the many various commercial customs which had come before the courts were formed into a coherent system, and completely incorporated with the common law.

Consistent with this, a more practical aspect of Mansfield's judicial approach was to adopt the system of special juries to commercial cases, and assemble a body of men experienced in the relevant business to decide the outcome of cases. Contrary to our ideas of the judge-jury relationship (but not so different from the approach to jurats in the Channel Islands) Mansfield would not only discuss the case with the jury, but would sometimes do so privately, even over dinner at his home[119]. And he not only discussed cases with other "*gentlemen of [relevant] experience*", but expressly said he had done so in the ensuing judgment[120].

Another feature of Lord Mansfield's thinking was to import ideas of morality and equity into commercial law. Typical of Mansfield's view of law and commerce was his statement that "*Where a man is under a legal or equitable obligation to pay, the law implies a promise though none was ever actually made*".[121] As the editor of the Mansfield papers put it, "*He also strove, though a common-law judge, to reach equitable solutions in cases that he tried, as long as he could do so without upsetting established legal principles or without offence to a higher value*" which "*anticipated the eventual merger of law and equity*".[122] A recent article[123] compared Mansfield's jurisprudence with that of his contemporary Lord Camden, successively Chief Justice of Common Pleas and Lord Chancellor:

> Camden's approach was methodologically conservative, more rigidly historical and more concerned about the potentially irreversible corruption of the law. Mansfield, in contrast, took a more open-textured approach to legal authority, which not only drew

[116] B. Shientag, *Lord Mansfield revisited: A Modern Assessment*, (1941) Fordham L. Rev. 345, p. 351.
[117] *Campbell, op. cit.*, Vol. 2, p. 404.
[118] W. S. Holdsworth, *A History of English Law* (1924 ed), vol. 5, p.147.
[119] F. Mackinnon *The Law and the Lawyers* in A. Tuberville, ed *Johnson's England* (1933), Vol. 2, p. 296.
[120] E.g. *Lewis v Rucker* (1767) 2 Burr. 1167, p 1168.
[121] *Hawkes v Sanders* (1782) 1 Cowp. 289.
[122] J. Oldham, DNB entry for Mansfield.
[123] T.T. Arvind and C. Burset *Partisan Legal Traditions in the Age of Camden and Mansfield* (2024) 44 OJLS 377, p 378.

on a wider range of sources, but also revealed a more optimistic view of doctrinal development. Mansfield wanted to improve English law by rebuilding it upon new foundations; Camden wanted to stop it from getting worse by making its first principles more secure.

Whether Christian belief played a part in Mansfield's thinking is far from clear. He was a professing member of the Church of England, attending church every Sunday, but said nothing publicly about his religious beliefs, and did not bring Christian principles into his judgments[124].

Of his many contributions to commercial law, indeed to the common law generally, a few stand out as exceptional even by his high standards. In the fourth year of his judicial career he decided *Moses v MacFerlan*[125], which was described by the late Peter Birks[126] as "*the leading case in the Anglo-American law of restitution or ... unjust enrichment*", and in a 2015 UK Supreme Court case[127] as the "*corner-stone of common law restitution*" in which, in order to get round well-established, but technical and unjust, principles, "*Lord Mansfield grounded [an] obligation simply on 'the equity of the plaintiff's case' to recover back 'money, which ought not in justice to be kept'*[128] *and later described*[129] *it as "a liberal action in the nature of a bill in equity*".

Mansfield simplified and clarified the law on bills of exchange and other bills used as currency. In *Miller v Race*[130], he held that a promissory note was not like other assets, and so a bona fide holder in due course (or, as Mansfield put it, "*in the course of currency, and in the way of his business*[131]) of the note acquired ownership even if his seller did not have good title. He justified this revolutionary decision by the fact that if bona fide holder of a note could not rely on his ownership it would "*it would stop their currency*" [132].

Mansfield also effectively rewrote, simplified, and can almost be said to have codified, the law on insurance, paving the way for London to become the centre of the global insurance industry. Although referred to in statutes, the important concept of insurable interest was neither understood nor defined until Mansfield explained and developed the term[133]. And even more importantly in *Carter v Boehm*[134], he established the now very familiar principle of *uberrimae fidei*, utmost good faith, in insurance contracts.

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[124] N. S.Poser, *Lord Mansfield: the Reasonableness of Religion*, *op cit* , pp. 199-203.
[125] (1760) 2 Burr. 1005.
[126] In *English and Roman Learning in Moses v Macferlan*, Current Legal Problems 1984, ed. Ridout and Jowell, p. 1.
[127] *Zurich Insurance PLC UK Branch v International Energy Group Ltd* [2015] UKSC 3, [2016] AC 509, [70] per Lord Mance
[128] Quoting from *Moses* at pp. 1009 and 1012.
[129] Quoting from *Clarke v Shee* (1774) 1 Cowp. 197, 199.
[130] (1758) I Burr. 452.
[131] At p. 459
[132] *Peacock v Rhodes* (1781) 2 Doug. 634, p. 635.
[133] See e.g. *Le Cras v Hughes* (1782) 3 Doug. 81, at p. 99.
[134] (1766) 3 Burr. 1909.

And he also laid down the principle that an insurer was deemed to know the usual risks which accompany a particular adventure[135].

Thus, as early as 1787, Mansfield was described in a judgment[136] as the person who it "*may truly be said to be the founder of the commercial law of this country*", and more recently fifty years ago it was authoritatively said to be[137], "*due to Lord Mansfield's genius that the harmonisation of commercial custom and the common law was carried out with an almost complete understanding of the requirements of the commercial community*".

But it was by no means a story of unalloyed success. In *Pillans v van Mierop*[138] After saying that "*the law of merchants and the law of the land is the same*", and following civil and Scots law, he rejected the very well-established law that required consideration from each party before there could be a valid contract. This was overruled by the House of Lords 13 years later[139]. Mansfield did not take this reversal lying down, as he tried to get round this by holding that the assumption of a moral obligation, even if of no legal effect, could amount to sufficient consideration[140].

It is fair to say that there is a view that, as it was put by Professor Brian Simpson, "*Mansfield was no innovator in legal matters*" and "*his ideas commonly involved no more than a bold and striking affirmation of views expressed by others*"[141]. I rather suspect that all this really means is that Mansfield's contributions to the common law were not made in a vacuum, but represented developments and syntheses of previous judgments and writings. But that is precisely what one would expect of a common law judge, and it is indeed reflected by Mansfield's frequent citation of and respect for previous judicial decisions – at least when they established a rational principle[142]. I suggest that, if anything, this reinforces, rather than undermines, Mansfield's achievements.`

And, unattractively to contemporary thinking, but consistently with his assessment of the interests and importance of commerce, Mansfield held trade unions to be conspiracies which were illegal under the common law. When some employees refused to work unless their employer reinstated two of their colleagues, who had been dismissed for sexually harassing a maid, Mansfield successfully persuaded a jury to convict by saying "*all conspiracies are crimes, even if they are to do lawful acts*" and

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[135] *Pelly v Royal Exchange Insurance* (1757) 1 Burr. 341.
[136] *Lickbarrow v Mason* (1794) 5 Term Rep 683, p 693 per Buller J, admittedly a former protégé of Mansfield.
[137] C.M. Schmitthoff, *International Business Law, A New Law Merchant* in Current Law and Social Problems (1961) 137.
[138] (1765) 3 Burr. 1664, p. 1669.
[139] *Rann v Hughes* (1778) 7 TR 750.
[140] *Hawkes v Saunders* (1782) 1 Cowp. 289.
[141] AWB Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (1987), p. 618.
[142] See Mansfield's observations in *Jones v Randall* (1774) 3 Cowp. 37, at p. 39, and *Hodgson v Ambrose* (1780) 1 Doug. 337, at p. 341.

that the defendants could not "*conspire to prevent*" their employer from exercising his "*right [to] choose to employ a particular man*".[143]

Mansfield's passionate belief that the law should not interfere with property or freedom to trade clashed heavily with his humanity and moral beliefs when it came to what is, at any rate to non-lawyers, his most famous decision, namely in *Somerset's case*.[144] In the late 17th century there were conflicting judicial dicta as to whether slavery was recognised in English law[145]. This uncertainty persisted into the 18th century, with an opinion in 1729 from both Law Officers that a slavery contract would be recognised and enforced by an English court[146], while the first edition of Blackstone's famous *Commentaries* in 1765 took a different view[147] – although the second edition a year later qualified this in an incomprehensible way.[148]

Our disgust and abhorrence of slavery makes it impossible fully to understand how anyone, let alone an otherwise civilised educated person, could have had any truck with, let alone invested in and supported, slavery in the age of enlightenment. But the slave trade and the use of slaves in transatlantic sugar and tobacco plantations contributed very substantially to British prosperity and to the wealth of many of the country's most influential citizens. And it is extraordinarily easy for us human beings to equate what is in our interest with what is morally right, or at least with what is not morally wrong.

Yet even in the 17th century, it is fair to say that there were many impressive people who spoke and wrote against slavery. They included John Locke, who had written in 1690 that "*Slavery is so vile and miserable an estate of man, and so directly opposite to the generous temper and courage of our nation, that it is hardly to be conceived that an 'Englishman', much less a 'gentleman' should plead for it*".[149] Locke was of course a strong influence on Mansfield.

Although a few cases involving slaves had come before Mansfield, none of them required him to face up to the question whether slavery was lawful in England. And then in 1769, an application for *habeas corpus* was made on behalf of James Somerset. Somerset's master, Charles Stewart, had brought him from Boston Massachusetts to England, and when Somerset had escaped, Stewart had him apprehended and placed on board a ship with a view to sending him to Jamaica to be sold. Somerset's abolitionists godparents heard about this and made the application to Mansfield, who ordered the ship's captain to appear before him to see if he could justify holding Somerset against his will.

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[143] The case seems to have gone unreported save in a newspaper – *Daily Universal Register* of 26th May 1785.
[144] *Somerset v Stewart* (1772) Lofft 1.
[145] Compare *Butts v Penny* (1677) 2 Lev. 201 and *Chamberlain v Harvey* (1697) Carthew 397.
[146] Signed Opinion by P Yorke AG and C Talbot SG 14 January 1729, BM Egerton Manuscripts.
[147] W. Blackstone *Commentaries on the Laws of England* (1765) Book 1, chapter 1, 123.
[148] *Ibid*, (1766) Book 1, chapter 1, 127.
[149] J. Locke, *First Treatise on Government* (1690).

It is clear that Mansfield was keen to avoid having to decide the case. He uncharacteristically failed to push the parties along for a hearing, and granted adjournments every time they were sought, even when for flimsy reasons. One could charitably suggest that he adopted a 21st century approach by trying to mediate a settlement. He told the parties that he had managed to persuade other parties in six previous such cases to settle. And more than once, he unsuccessfully encouraged the godparents to purchase Somerset from Stewart, and more than once unsuccessfully encouraged Stewart to grant Somerset his freedom. But the parties were being financed by abolitionists on one side and plantation owners on the other, and both groups wanted a decision.[150]

Eventually the case came on for hearing for a day February 1772 and argument continued for three days in May. At the end of the argument, Lord Mansfield indicated that judgment would be reserved, while "*strongly recommend[ing]*" that the case be "*accommodated by the parties*" in the meantime. He added that "*if the parties will have judgment, fiat justitia ruat coelum, let justice be done whatever be the consequence*", and emphasised that "*[c]ompassion will not, on the one hand, nor inconvenience on the other, be to decide; but the law*". Interestingly, he also said that a "*contract for sale of a slave is good here; the sale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement. But here the person of the slave himself is immediately the object of enquiry ; which makes a very material difference*.[151]

Five weeks later, Mansfield gave a short judgment, which, according to the most reliable contemporary record[152] concluded by saying that:

> Slavery is so odious that it must be construed strictly. No master was ever allowed here to send his servant abroad because he absented himself from his service or for any other Cause. No authority can be found for it in the Laws of this Country. And therefore we are all of the Opinion that James Somerset must be discharged.

A more eloquent version of wider scope can be found in Lofft's reports[153], but Capel Lofft[154] was a keen abolitionist[155], and one suspects that he was anxious to make Mansfield's words have as wide an appeal as possible.

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[150] F. O. Shyllon, *Black Slaves in Britain* (1974), pp. 113-117; A and R Blumrosen, *Slave Nation* (2005), p. 9; J. Oldham *New Light on Mansfield and Slavery* J. Brit. Studies XXVII(1985), p. 61.

[151] Lofft *op. cit.*, at p 18.

[152] Notes of Serjeant Hill of Lincoln's Inn (whose notes are in the Inn's library) as recorded by J. Oldham, *English Common Law in the Age of Mansfield* (2004), p. 315

[153] Lofft *op cit,* at p 20: "*The state of slavery is ... so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England ; and therefore the black must be discharged*".

[154] Also a member of Lincoln's Inn.

[155] Chapter 3: The Decision and Legacy of Stewart vs Somerset - Lincoln's Inn (lincolnsinn.org.uk)

The West Indian planters brough a Bill in Parliament to overrule the decision, but it failed[156]. The decision in *Somerset* was seen as significant at the time, but, as has been written, "*Ultimately neither the specter of freed slaves or the question of a slave contract was fully resolved by Somerset…. The larger mercantile question was more complicated*"[157]. And the notion that Mansfield regarded the decision as having a relatively narrow scope is supported by an interjection which he is recorded as making during legal argument in a later case[158] , where he said that *Somerset* and other cases "*go no further that that the master cannot by force compel [the slave] to go out of the kingdom*".

A case which he decided more than a decade later, *Gregson v Gilbert*[159], does Mansfield no credit in modern eyes. The *Zong*, a ship carrying hundreds of slaves from West Africa to Jamaica got lost and ran short of water. Sixty slaves died of thirst, forty slaves threw themselves overboard, and 150 were thrown overboard. The shipowner sought damages for loss of the slaves from his insurer, and the jury awarded the shipowner damages. On appeal, Mansfield ordered a retrial because there was "*no evidence of the ship being foul and leaky*" or that there was a "*necessity*" to throw any slaves overboard[160]. Mansfield for whom morality was such an important ingredient in commercial law, did not even suggest that there was anything more fundamentally questionable about this appalling claim.

In his private life, as a recent well-received feature film recorded[161], Mansfield and his wife took in Dido the illegitimate daughter of his nephew as a result of his relationship with a black slave in the West Indies. Mansfield's recent biographer describes Dido as having had "*an intermediate status*" at Kenwood, being "*neither a full member of the family nor a servant*".[162] Mansfield left her £500 in his will, in which, perhaps because he was unsure whether slavery existed in England, he also confirmed her freedom. To complete her story, she married after his death and had three children.[163]

During the first half of the 1780s Mansfield was still spry, but, in 1786, a year after his eightieth birthday and two years after his wife had died, Mansfield stopped sitting in court, although he continued as Chief Justice for another two years. After retiring in 1788, he enjoyed five years relaxation in Kenwood, being looked after by various unmarried female relatives, including Dido, and taking a keen interest in politics, especially the French Revolution[164]. He died peacefully and in full possession of his remarkable faculties on 17th March 1793.

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[156] Shyllon, *op cit*, p. 157.
[157] J Oldham, the *Mansfield Manuscripts*, Vol. 2, p. 1221.
[158] *The King v The Inhabitants of Thames Ditton* (1785) 4 Doug. 299, at p. 302.
[159] (1783) 3. Doug 233.
[160] *Ibid*. p 235.
[161] *Belle,* 2013.
[162] Poser, *op. cit.*, p. 299
[163] S Minney, *The Search for Dido,* History Today, LV, Issue 10 (October 2005).
[164] *Public Advertiser*, 30th August 1791, *Scots Magazine,* June 1793.

Like all judges, Mansfield was a creature of his time, his heredity and his upbringing; like almost all judges Mansfield was not entirely consistent in his jurisprudence; like many judges Mansfield was devoted to the law; and like a few judges, his judgments are regularly referred to long after his death. However, his contributions to the development of the common law mean that he stands out as one of the most, arguably the most, impressive English Judge of all time.

For a modern comparison, he had much in common with Lord Denning, also a Lincoln's Inn member, whose judicial tenure was even longer than that of Mansfield[165]. They were both brilliant legal scholars and outstanding judges, whose deep knowledge and love of the law, especially the common law, was combined with, and occasionally overwhelmed by, a strong moral and modernising drive. Lord Denning was more generally popular with the public, and was described by Lord Bingham as "*the best known and best loved judge in our history*"[166], whereas, no doubt partly because of his political involvement (an area barred to Lord Denning as a 20th century judge) Lord Mansfield's public standing was more controversial. Their moral and modernising approach meant that their decisions were often controversial with legal scholars and some fellow judges. Lord Denning often did not see eye-to-eye with the much more conservative Lord Chancellor, Viscount Simonds[167], and Lord Mansfield's judicial approach was very different from that of the much more traditional Lord Chancellor, Lord Camden. Yet, while they were both generally progressive in developing the law, Lord Denning and Lord Mansfield were politically conservative – and this meant that their decisions in some areas of law were reactionary rather than progressive. But such considerations serve to remind us that judges cannot, and indeed should not, leave their principles wholly out of account when sitting in the bench. An important quality of good judges is not merely that they have sound principles, but that they take account of their principles to an appropriate extent in appropriate circumstances. As with all other measures of good judging, Lord Mansfield generally scored very highly on that measure.

With legal giants like Lord Mansfield and Lord Denning, it is unsurprising that the reputation of English law and English lawyers has been so high across the world.

I am grateful to articles, books and other records published by a number of people, but I would like to express my special thanks to Norman S Poser for his comprehensive biography of Lord Mansfield from which much of the contents this talk has been taken.

David Neuberger

22nd October 2024

[165] 1944-1982.

[166] J Wilson, *Lord Denning: Life, Law and Legacy*, (2023), p. 237.

[167] See e.g. E. Heward, *Lord Denning: A Biography* (1990), p. 89.