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Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*

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At Westminster on June 22, 1772, Lord Mansfield, Chief Justice of King's Bench, the highest common law court in England, delivered a brief oral opinion in the case of *Somerset v. Stewart.*[1] James Somerset, a black alleged to be the runaway slave of Charles Stewart, had sought a writ of habeas corpus to prevent Stewart from seizing and detaining him in England for shipment to Jamaica to be sold. As reported by Capel Lofft,[2] Mansfield held:

> [T]he only question before us is, whether the cause on the return [to the writ] is sufficient? If it is, the negro must be remanded; if it is not, he must be discharged. Accordingly, the return states, that the slave departed and refused to serve; whereupon he was kept, to be sold abroad. So high an act of dominion must be recognized by the law of the country where it is used. The power of a master over his slave has been extremely different, in different countries. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: It's 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

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1. Lofft 1, 98 Eng. Rep. 499 (K.B. 1772).

2. There is some question about precisely what Mansfield said. For purposes of this paper, I adopt Capel Lofft's version as canonical. My reasons for doing so are set forth in the Appendix, along with a survey of the variant reports of Mansfield's opinion and the attendant controversy. *See* text and notes at notes 224-40 *infra*.

> by the law of *England;* and therefore the black must be discharged.[3]

Mansfield thereby laid down a landmark opinion in Anglo-American jurisprudence, and one that epitomized many characteristics and problems of the judge-made law of slavery.

This law, as developed by English and American jurists, had a curiously indeterminate quality; it was more often than not ambiguous and equivocal. Grounded on shifting considerations of public policy or jurisprudential theory, enunciated by men whose opinions spanned the entire spectrum of pro- and antislavery beliefs, and above all misunderstood by contemporaries and later generations, the case law of slavery evolved in striking contrast with the statutes governing slaves. The latter generally consisted of clear and specific "thou-shalts" and "thou-shalt-nots" regulating the minutiae of behavior of whites and blacks alike. It is one of the paradoxes of slavery in the Anglo-American experience, however, that this iron structure rested on such an uncertain jurisprudential foundation.

No other decision so well illustrates the ambiguities of slave case law as *Somerset.* No other English decision on slavery has been so often quoted and almost as often misunderstood; no comparable opinion has proliferated such a case law progeny with such protean interpretations. *Somerset* best illustrates a legal world where things are not what they seem, a world of deceptive appearances and unforeseen consequences.

Technically considered, the judgment in *Somerset* settled only two narrow points of English law: a master could not seize a slave and remove him from the realm against the slave's will, and a slave could secure a writ of habeas corpus to prevent that removal. Yet many contemporaries, as well as historians,[4] thought *Somerset* abolished slavery in England; a few thought it challenged slavery in the colonies as well. Mansfield's utterances had a plangent quality, suggesting that slavery could not legitimately exist anywhere; or, less expansively, that where slavery was established it existed in derogation of natural rights. English writers, displaying

3. Lofft at 19, 98 Eng. Rep. at 510.

4. The contemporaries will be discussed below. For examples of historians' interpretations, see D. DUMOND, ANTISLAVERY: THE CRUSADE FOR FREEDOM IN AMERICA 5 (1961); Lynd, *Rethinking Slavery and Reconstruction,* 50 J. NEGRO HIST. 198, 201 (1965); Martin, *The English Slave Trade and the African Settlements,* in 1 THE CAMBRIDGE HISTORY OF THE BRITISH EMPIRE: THE OLD EMPIRE, FROM THE BEGINNINGS TO 1783, at 449 (J. Rose *et al.* eds. 1929). On the origins and prevalence of their misunderstanding, see F. SHYLLON, BLACK SLAVES IN BRITAIN ix-x (1974).

what Winthrop Jordan has called "that preening consciousness of the peculiar glories of English liberties,"[5] quickly adopted the more sweeping interpretation, leading Benjamin Franklin, in London at the time, to write home in disgust to Anthony Benezet about "the hypocrisy of this country, which encourages such a detestable commerce by laws for promoting the Guinea trade; while it piqued itself on its virtue, love of liberty, and the equity of its courts, in setting free a single negro."[6]

Though Mansfield and other jurists subsequently disavowed these broad implications, the decision as reported by Capel Lofft took on a life of its own and entered the mainstream of American constitutionalism. *Somerset* furnished abolitionists with some of the most potent ideological weapons in their arsenal. At first, even slave state jurists accepted its antislavery premises; when they could do so no longer, they worked out justifications of slavery that explained away or repudiated the case. Thus *Somerset* became a cloud over the legitimacy of slavery in America, a result that would have surprised and annoyed Mansfield.

Somerset is a fascinating milestone in Anglo-American legal history for reasons other than its tantalizing obscurity and protean potential. It had a lasting impact on American conflict of law theory. It reflected changing conceptions of the *jus gentium* and influenced the development of interstate relations in the American federal system. It revitalized notions of natural or fundamental law and infused them into American case law. It posed basic constitutional problems for the British imperial system, though these became irrelevant four years later with the declaration of American independence. It was a significant judicial expansion of the scope of habeas corpus and a benchmark in the development of the law of personal liberty.

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Since Englishmen commanded slavers by the mid-sixteenth century and soon peopled English New World colonies with African slaves, the early intrusion of slavery issues into English jurisprudence was certain. When English courts were first confronted with slavery cases in the seventeenth century, they turned up a broad array of questions that had to be resolved within the familiar

5. W. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812, at 49 (1968).

6. Letter from Benjamin Franklin to Anthony Benezet, Aug. 22, 1772, in 5 THE WRITINGS OF BENJAMIN FRANKLIN 431-32 (A. Smyth ed. 1907).