was prepared to go, Alleyne's insistence that slavery was not a "natural" relation, that is, one consonant with natural law, was compelling, and was to be adopted by Mansfield as the heart of his opinion.

Wallace, counsel for the West India Interest, took a different tack and insisted that slavery could exist in England simply because no law forbade it. He was followed by Dunning, who, according to Lofft's recollection, relied chiefly on an *argumentum ad horrendum:* liberate the slaves in England, and Jamaica's 160,000 blacks will come to England, or rise in insurrection against their masters. He argued that slavery was a form of property relationship, recognized as such in England.

IV

As Easter term 1772 wore on, it must have become apparent to Mansfield that he could not evade the dilemma thrust on him by Sharp and Hargrave on one hand, and the West India Interest on the other. Serjeant Davy in argument bluntly stated the first horn of the dilemma: "If the Laws having attached upon him abroad are at all to affect him here it brings them all, either all the Laws of Virginia are to attach upon him here or none—for where will they draw the Line?"[64] Mansfield agreed: "[T]he difficulty of adopting the relation, without adopting it in all its consequences, is indeed extreme; and yet, many of those consequences are absolutely contrary to the municipal law of England."[65] He did not want to see the colonial tail wag the metropolitan dog by incorporating slavery into the English legal order.

On the other hand, he continued, "the setting 14,000 or 15,000 men at once free loose by a solemn opinion, is much disagreeable in the effects it threatens." Not only would this racially alien mass of humanity be set free of their masters' discipline and support; the masters' property rights would be shaken—no light matter to a conservative jurist like Mansfield. Furthermore, the law would be unsettled: "[H]ow would the law stand with respect to their settlement? their wages? How many actions for any slight coercion by the master?"

In rendering the decision Mansfield settled on a dual strategy to dispose of the unwelcome case. First, he reaffirmed one point

64. This is from the transcript of Davy's argument in *Sharp Trans.* NYHS.

65. Lofft at 17. An argument somewhat analogous to this one on the incompatibility of slave discipline with English law was hinted at in an untitled note in 34 GENTLEMAN'S MAG. 493 (1764).

of English law that he thought was well settled—"contract for sale of a slave is good here; the sale is a matter to which the law properly and readily attaches"—and hinted that the West India Interest should resort to Parliament (where they had considerable influence as well as a few members) to have other points of the law resolved by statute.[66] Second, he reduced the issue before him to the narrowest possible scope—the only question was whether any "coercion can be exercised in this country, on a slave according to the *American* laws?" Furthermore, this question was to be determined solely on the basis of the pleadings (that is, whether the return to the writ was sufficient).[67]

Yet the impact Mansfield so earnestly sought to restrict became uncontrollable as soon as he tried to explain the result he had reached, which was to discharge Somerset on the writ. He spoke to two points, one relating to conflict of laws, and the other to the opposition between natural and municipal law; and on both points, his utterances gave *Somerset* its lasting and reverberating influence.

On the conflicts question, Mansfield asserted that "so high an act of dominion [seizing a slave for sale abroad] 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." This statement laid down a general rule that the *lex domicilii* by which a person is held in slavery does not of its own force determine the slave's status in England, even though the *lex fori* and the *lex domicilii* are based on the same general corpus of statutory and common law, as was true of the metropolis and the colonies in the British empire.[68]

Mansfield's statement on natural and municipal law had an even greater impact.

> The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only

66. The planters did have a bill introduced in Parliament to legitimate the slave relation in England. Letter from Alleyne to Granville Sharp, Jan. 13, 1773, *Sharp Trans.* NYHS. Nothing came of it. *See* Fiddes, *supra* note 7, at 503.

67. According to a newspaper account in The Gazetter, May 26, 1772, *quoted in* F. SHYLLON, *supra* note 4, at 115, Mansfield had earlier framed the issue thus: "the only question properly before us is, whether the colony slave-laws be binding here, or if there be established usage or positive law in this country that sufficiently countenances the coercion here contended for."

68. So decisive was this determination that when Justice Joseph Story composed his magisterial *Commentaries on the Conflict of Laws* in 1834, he based a major portion of his argument against the "ubiquity" status of *leges domicilii* on the *Somerset* principle. J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 95-96a (2d ed. 1841). Story's position, in turn, complicated the workings of the American federal system.

> 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.[69]

These forceful assertions raised more questions than they answered. Did "positive law" include custom? Did it require that the legislative or executive authority actually establish slavery, rather than merely recognize its existence in slave codes? If slavery was contrary to natural law, could even positive law establish it?[70]

To the extent that Mansfield implicitly relied on natural law to establish the "odious" character of slavery, he seemed curiously out of step with contemporary legal developments. According to J. W. Gough,[71] the heyday of fundamental or natural law had apparently passed in England a century before *Somerset,* though it has persisted in the United States into our own times. Yet Mansfield's application of natural law may not have been as anachronistic as it seems. The conception of fundamental law that concerned Gough was that of a limitation on the power of Parliament, and that notion surely was passé in eighteenth century English constitutional thought. But natural law could also serve as a standard of justice against which exogenous institutions might be tested to determine their suitability for incorporation into English law. And that was precisely the use to which Mansfield put it. In this sense, natural law was not yet obsolete in English thought, though it lacked the force it was later to have in American constitutionalism.

Mansfield concluded his brief opinion on a note of "I-told-you-so" to the planters: "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."

Despite the sweep and implications of its language, this opinion did not abolish slavery even in England itself, as Mansfield and others[72] were later at pains to point out. *Somerset* notwithstanding,

69. Lofft at 19.

70. In this portion of his opinion, Mansfield's position was strikingly similar to provisions of the Cuban Slave Code, which derived ultimately from the *Institutes* of Justinian and which was influenced by the *Siete Partidas* (1265). The *Partidas* stated that slavery was *contra razon de natura,* and the Cuban code, in its introduction, declared slavery to be "the most evil and the most despicable thing which can be found among men." H. KLEIN, SLAVERY IN THE AMERICAS: A COMPARATIVE STUDY OF VIRGINIA AND CUBA 59 (1967).

71. J. GOUGH, FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY 174 (1955).

72. *See, e.g.,* D. BARRINGTON, OBSERVATIONS ON THE MORE ANCIENT STATUTES FROM MAGNA CHARTA OF THE TWENTY-FIRST OF JAMES I CAP. XXVII. . . . , at 312 (1775).

a qualified form of slavery continued to exist in England until final emancipation in 1833.[73] Far from abolishing slavery *in toto,* Mansfield had held merely that, whatever else the master might do about or with his claimed slave, he could not forcibly send him out of the realm, and that habeas corpus was available to the black to forestall the threatened deportation.

Masters soon learned to evade even this narrow holding of *Somerset,* exploiting Mansfield's hint that the master-slave relationship could persist on the basis of the *lex loci contractus* rather than the *lex loci domicilii.* Masters in the colonial jurisdictions who wished to take a slave temporarily to England could simply force him to sign or mark an indenture, under which he could be held while in England as an indentured "servant" and, presumably, forced to return, *nolens volens,* to the colonies, where his slave status would reattach.[74]

Despite the restricted scope of the holding, and the later efforts of Mansfield and others to clarify the case and foreclose its more liberating possibilities, *Somerset* burst the confines of Mansfield's judgment. This expansion occurred chiefly for two reasons. First, the judgment itself, discharging a black alleged to be a slave on a writ of habeas corpus, struck a more profound blow at slavery than the hasty and superficial opinion of Benjamin Franklin recognized.[75] The very fact that habeas corpus would allow a black to test the legitimacy of his putative master's claim to him was a great extension of the Great Writ and a threat to the security of slavery in England. Second, Mansfield's statements justifying the result, as reported by Capel Lofft, had implications that Mansfield probably did not foresee and that the defenders of slavery would have cause to regret.

English courts began almost immediately to wrestle with the ambiguities and potentialities of Mansfield's opinion. Some English judges assumed that *Somerset* had accomplished the complete abolition of slavery in England. In an unreported case, *Cay v. Crichton,*[76] decided in 1773, the year after *Somerset,* the presiding judge held that the determination had retroactive effect, so that slavery had never had a legitimate existence in England, at least

73. F. SHYLLON, *supra* note 4, at chs. x-xiii; M. THOMSON, A CONSTITUTIONAL HISTORY OF ENGLAND 1642 to 1801, at 420 (1938). For a general discussion of the status of blacks in Britain after *Somerset* see J. WALVIN, *supra* note 31, at chs. viii-xiii.

74. J. WALVIN, *supra* note 31, at 135.

75. *See* text and note at note 6 *supra.*

76. (Prerog. Ct. 1773). The decision in this case appears in the *Sharp Trans.* NYHS.

for purposes of including an alleged slave in a decedent's inventory. A Scottish case heard before the Court of Sessions, *Knight v. Wedderburn*,[77] further suggested that the impact of *Somerset* would be extensive. Counsel for a runaway slave claimed his client's freedom on the ground that slavery could not be upheld under Scottish law, and he cited *Somerset* only for its narrow and technically correct holding. But the court, without explicitly citing the case, held that the master's dominion over his slave, in reliance on the law of Jamaica, was "unjust" in Scotland and of no obligation. Not only could the master not send his slave out of the country; he had no right to exact services from him in Scotland either.

Vexed by such interpretations,[78] Mansfield seized an opportunity in *Rex v. Inhabitants of Thames Ditton*[79] to lecture the English bar on the precise limits of the *Somerset* opinion. Though *Thames Ditton* turned on a question of statutory interpretation that did not necessarily involve the legitimacy of slavery in England, Mansfield engaged in some revealing dialogue with counsel. The action was to determine whether a parish was responsible for the support of a pauper under the poor laws; the pauper was a black who had been brought to England as a slave. In the course of an involved argument concerning interpretation of the poor laws, counsel suggested that King's Bench had never decided that a slave brought into England was bound to serve his master. Mansfield interjected reprovingly: "the determination got no further than that the master cannot by force compel him to go out of the kingdom"—a precise construction of the holding of *Somerset*. Counsel tried again, suggesting that the slave relationship imimplies a hiring, and again Mansfield cut short that line of argument: "The case of *Somerset* is the only one on this subject. Where slaves have been brought here, and have commenced actions for their wages, I have always non-suited the plaintiff."

The explicit doctrine of the Scottish courts notwithstanding, all but one part of the Yorke-Talbot opinion remained intact in England. The scope of habeas corpus for slaves and other unfree persons remained largely undefined, and the incompatibility of

77. 8 Fac. Dec. 5, Mor. 14545 (Scot. Ct. Sess. 1778).

78. Ex-Governor Thomas Hutchinson, the American loyalist, recalled that Mansfield remarked to him in conversation on August 29, 1779, "that there had been no determination that they were free, the judgment (meaning the case of Somerset) went no further than to determine the Master had no right to compel the slave to go into a foreign country, &c." 2 THE DIARY AND LETTERS OF HIS EXCELLENCY THOMAS HUTCHINSON, ESQ. 277 (P.O. Hutchinson ed. 1886).

79. 4 Doug. 300, 99 Eng. Rep. 891 (K.B. 1785).

earlier precedent was unresolved.[80] Yet loose aphorisms about slaves being liberated once they set foot on English ground remained unchecked and hence potent. *Somerset* fired the imagination of the poet William Cowper, who wrote exultantly but altogether inaccurately:

> Slaves cannot breathe in England, if their lungs
> Receive our air, that moment they are free
> They touch our country, and their shackles fall.[81]

Moreover, despite Mansfield's later construction, broad readings of *Somerset* persisted in the courts. Justices in both the Court of Common Pleas and King's Bench read it to mean that a black slave, at least while in England, was, in the words of Lord Chief Justice Alvanley, "as free as any one of us."[82] In *Forbes v. Cochrane & Cockburn*,[83] an 1824 King's Bench case, Justice Holroyd found slavery to be a "law *in invitum*," so that a slave escaping into free territory thereby liberated himself from any claim the master might have upon him. He went so far as to say that when a slave "puts his foot on the shores of this country, his slavery is at an end" simply because no municipal law of England sanctioned slavery. His colleague, Justice Best, went further, construing *Somerset* to have held "on the high ground of natural right" that slavery was "inconsistent with the genius of the English constitution," and that human beings could not be the subject matter of property. To be sure, Lord Chancellor Eldon took a different view during abolition debates in the House of Lords, maintaining that it was most unlikely that slavery was "contrary to the genius of the British constitution" in view of the Royal African Company statutes.[84] Yet William Holdsworth, premier historian of English law, considered Best's interpretation not only the "popular view," but also "substantially correct."[85]

80. A LETTER TO PHILO AFRICANUS, UPON SLAVERY . . . WITH THE SENTENCE OF LORD MANSFIELD, IN THE CASE OF SOMERSET AND KNOWLES, 1772, WITH HIS LORDSHIP'S EXPLANATION OF THAT OPINION IN 1786 (1788).

81. From *"The Task,"* a poem in 2 THE POETICAL WORKS OF WILLIAM COWPER 147 (H. Milford ed. 1926). Edward Christian, one of Blackstone's early editors, observed more accurately that "it is not to the soil or to the air of England that negroes are indebted for their liberty, but to the efficacy of the writ of habeas corpus. . . ." W. BLACKSTONE, COMMENTARIES 127, editor's note (E. Christian ed. 1822).

82. Williams v. Brown, 3 Bos. & P. 69, 71, 127 Eng. Rep. 39, 41 (C.P. 1802).

83. 2 Barn & Cres. 448, 107 Eng. Rep. 450 (K.B. 1824).

84. 14 PARL. DEB., H.L. (2d ser.) 1156 (1826).

85. 11 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 247 n.1 (1938).