CHAPTER 1

The Ambiguous Beginnings of Antislavery Constitutionalism: *Somerset*

Americans, for better or worse, are a peculiarly legalistic people. Moral or ideological pressures alone, divorced from secular legal considerations, would not have accounted for the potency of antislavery in the United States. But slavery was, among other things, a legal institution, and attacks on its legitimacy were especially congenial to the American temperament. Abolitionists struck one of their most telling blows when they asserted that slavery had been established in America in violation of natural law, the common law, and the constitutional order of the British colonies.

The documentary bases of this legal attack were threefold: the Declaration of Independence, the constitutive documents of the American states and nation, and *Somerset v. Stewart* (1772), a decision handed down by William Murray, Lord Mansfield, Chief Justice of King’s Bench, the highest common-law court in England.¹ Read strictly and technically, the holding of *Somerset* was limited to two points: a master could not seize a slave in England and detain him preparatory to sending him out of the realm to be sold; and habeas corpus was available to the slave to forestall such seizure, deportation, and sale. But Mansfield’s decision, as reported by the young English lawyer Capel Lofft, contained utterances that imbued the holding with a much broader significance. As interpreted by American abolitionists and others, *Somerset* seemed to be a declaration that slavery was incompatible with natural law and that, in the

Anglo-American world, it could legitimately exist only if established by what Mansfield ambiguously termed "positive law."

Many contemporaries understood *Somerset* to have abolished slavery in England; a few thought it challenged slavery in the colonies as well. Mansfield's utterance had a plangent quality, suggesting that slavery was of dubious legitimacy everywhere. Though Mansfield later disavowed the broad implications imputed to *Somerset*, the decision took on a life of its own and entered the mainstream of American constitutional discourse. It furnished abolitionists with some of the most potent doctrinal weapons in their arsenal; even slave-state jurists at first accepted its antislavery premises and then later worked out a justification of slavery, as it were, around or in spite of *Somerset*. The case therefore became a cloud hanging over the legitimacy of slavery in America, a result that would have surprised Mansfield.

The long-continued existence of slavery anywhere in the world would sooner or later have presented problems to be resolved by English jurists, but the fact that Englishmen commanded slavers by the mid-sixteenth century and soon peopled English New World colonies with African slaves made the intrusion of such problems into English jurisprudence only a matter of time. When English courts did begin taking cognizance of slavery cases in the seventeenth century, they turned up an array of novel questions that had to be resolved by the familiar forms of the common law, with little guidance from Parliament or the Privy Council.

I. Could A "own" B as a slave in England?
   A. What did he own? The body of B? The right to B's services?
   B. How could the master enforce whatever rights he had?
   C. What was the legal source of A's claim? There were numerous possible theoretical bases: captivity in war; conviction of crime; voluntary self-sale; sale by the slave's parents or sovereign; status inherited from a slave parent; sale by the slave's owner; wrongful force (kidnapping, captivity in an unjust war, rapine, etc.); prescription; custom, either immemorial or recent; Mosaic law or Christianity; positive law, English, English colonial, or foreign, including statutes that regulated the incidents of slave status; the *jus gentium*; villeinage; implied quasi contract; Roman or civil law as expounded by the continental jurisprudents.
II. Could A "own" B as a slave in English colonies?
   A. What rights could A or B claim while either or both were in England?
   B. Could the metropolis establish, regulate, or abolish slavery in the colonies? What was the constitutional status of the colonies within the empire?
   C. Did colony slave laws have extraterritorial force? In England? In other English colonies? In non-English jurisdictions?
   D. Were the rights of slaves (or their masters) on English soil varied depending on whether they were: brought there by their master for permanent residence? Temporary residence (sojourners)? Runaways (fugitive slaves)? In transit?

III. How far would common-law courts recognize the legal incidents of slave status adhering to slaves in England?
   A. What were its essential incidents? Hereditable status? Lifetime slavery? Absolute dominion of the master, except as restrained by positive law? Could the common law accommodate the discipline necessary to slavery?
   B. Did slavery depend on racial distinction? Non-Christian religious status?
   C. Would English courts enforce a contract for the sale of a slave?
   D. Could a slave commit a tort or a criminal act? Could he be the victim of either? Who was responsible for his act or for injury to him, and to whom?
   E. Did the master have rights against third parties who interfered with his control over the slave (as, e.g., by impressment)?

IV. What rights did the slave have?
   A. Juridical capacity as witness or party? Right to own and dispose of property? To make contracts? To marry and control his children?
   B. Could a slave seek a writ of habeas corpus? Could he sue his master in quantum meruit?

V. Finally, was slavery delegitimated by:
   A. Natural law?
   B. The common law or the habeas corpus statutes?

English precedents on slavery before 1772 suggested several different directions in which the law of slavery might evolve. The early
English decisions seemingly accommodated the peculiar legal characteristics of property in slaves to the forms of English law; yet their precedential weight was problematical. Ambiguity and equivocal authority characterized most of the principal English authorities on slavery.

Between 1677, the date of the first reliably reported English decision on slavery, and 1729, when Crown lawyers delivered an authoritative and comprehensive opinion on some of slavery’s legal complications, the justices of King’s Bench handed down seemingly contradictory opinions on slavery’s status under common law. In *Butts v. Penny* (1677),2 the court acknowledged the existence of property rights in slaves and suggested two possible legitimating origins for slavery: “infidel” status and sale by merchants. But then the court, through Chief Justice Sir John Holt, seemingly reversed *Butts* in three decisions between 1697 and 1706. Holt rejected the use of forms of action for the recovery of property as an appropriate means for recovering slaves in *Chamberlain v. Harvey* (1697),3 recommending instead an old form of action used to recover for the loss of a servant’s services. In *Smith v. Brown and Cooper* (1701),4 Holt stated flatly that “as soon as a negro comes into England, he becomes free; one may be a villein in England, but not a slave.” Yet Holt insisted that a seller might recover for the value of slaves sold. Mansfield later pointed out in *Somerset* that no English court questioned the validity of a contract for sale of slaves, thus suggesting that at least some features of the law of slavery would be hospitably received in English courts. Finally, in *Smith v. Gould* (1705–1706),5 an ambivalent effort, the justices declared that *Butts* was “not law” and that humans cannot be “the subject of property,” yet refurbished old procedural devices to protect the title to a slave acquired by purchase. The English bar was understandably confused by these conflicting holdings, and sought an authoritative resolution of them. They got it in 1729.

5. This case was twice reported: 2 Salk. 666, 91 Eng. Rep. 567 (K.B. 1705), and 2 Ld. Raym. 1274, 92 Eng. Rep. 338 (K.B. 1706).
One evening over after-dinner wine at one of the Inns of Court, the members solicited Attorney General Philip Yorke and Solicitor General Charles Talbot for their opinions on the effect of baptizing Negro slaves in the plantations. Yorke and Talbot obliged with a joint opinion asserting the following points: (1) a slave coming to Great Britain from the West Indies, with or without his master, is not liberated; (2) the master's property right in such a slave in Great Britain is not "determined or varied"; (3) baptism does not liberate the slave or change his temporal condition; and (4) "the master may legally compel him to return again to the plantations." Whatever else may be said of this opinion, it was at least unambiguous on the points to which it was addressed. One of its authors, Yorke, enjoyed a high reputation for legal acumen, and the opinion survived long enough to haunt Granville Sharp and provoke him to his first great effort on behalf of the slaves forty years later.

Then Chancery intervened to blur the clarity briefly induced by the Yorke-Talbot opinion. Sensing that the informal circumstances of the opinion's delivery made it something less than authoritative, Yorke, ennobled and elevated to the woolsack, tried to buttress it in *Pearne v. Lisle* (1749), a decision he rendered as Hardwicke, Lord Chancellor.7 Sweeping away all Holt's handiwork through an insupportable construction of *Smith v. Brown and Cooper*, Hardwicke resurrected *Butts v. Penny*, saying trover will lie for a Negro slave: "It is as much property as any other thing." But Hardwicke's holding was reversed thirteen years later by his successor in Chancery, Lord Chancellor Henley (later Earl of Northington), in *Shanley v. Harvey* (1762),8 who grandly declared that "as soon as a man sets foot on English ground he is free: a negro may maintain an action against his master for ill usage, and may have a habeas corpus if restrained of his liberty." These two Chancery decisions had the effect of canceling each other out. Though Hardwicke is esteemed a greater equity judge than Henley, it was the latter who had the later say.

In any event, the highest courts of both common law and equity had spoken on both sides of, and all around, the legal issues of slavery, and their opinions, reported sometimes poorly and always

---

6. The joint opinion is quoted in full in *Knight v. Wedderburn*, 8 Fac. Dec. 5, Mor. 14545 (Scotland Court of Sessions, 1778).
8. 2 Eden 126, 28 Eng. Rep. 844 (Ch. 1762).
long afterward, were more a matter of oral tradition than of cold print. The judges and counsel before them had canvassed some of the issues presented by the problem of incorporating ownership of man into a legal system that boasted its greatest glory as being *in favorem libertatis*, but the law of slavery was still unsettled when Granville Sharp challenged slavery in England.

By 1770, some fourteen to fifteen thousand slaves resided in the British isles. In addition to these, an unknown number of free blacks also lived in the realm, numerous enough to create a special group of London beggars known derisively as “St. Giles’ blackbirds.” Most of them were Africans or Creoles who had been brought to the metropolis via the island or mainland colonies as personal servants to West India planters. Their presence had been visible throughout the eighteenth century, and by the 1770s they had attracted the attention of men who had been active in efforts to abolish the British slave trade. Thus crossed the paths of an obscure black, James Somerset, and Granville Sharp, the first great English abolitionist.

Sharp was an unusual person, even in eighteenth-century England. A grandson of the Archbishop of York, but son of a poor archdeacon, Sharp was self-educated, having been employed first as a cloth merchant’s apprentice and later as a clerk in the Ordnance Department, a post he resigned in 1776 because he could not bring himself to make out orders for shipping munitions to the revolting colonies, whose cause he supported. Sharp became involved in antislavery activism by litigation in 1767 to free a slave named Jonathan Strong. Strong’s master, David Lisle, brought countersuit against Sharp for detainer of the slave. Sharp urged his lawyer to defend on the grounds that no action could be brought for detainer because the master could not have a property right in a slave, but counsel rejected this suggestion on the basis of the 1729 Yorke-Talbot opinion. Thus frustrated, Sharp determined to reexamine from scratch the entire question of slavery, personal liberty, and the right to habeas corpus in England.

Two years of research produced *A Representation of the Injustice ... of Tolerating Slavery* (1769), in which Sharp condemned

slavery as “a gross infringement of the common and natural rights of mankind” and as “plainly contrary to the laws and constitution of this kingdom” because no laws “countenance” it and others, according to his interpretation, made it actionable. On this point, Sharp imaginatively cited statutes ranging from the mid-fourteenth century down to the Habeas Corpus Act (1679). From these provisions, Sharp argued that all persons in England, including black slaves, had a statutory right to contest their restraints in the courts through the writ of habeas corpus. He thus constituted a link in a chain of descent from Magna Charta through the mediaeval Parliaments to the nineteenth-century American antislavery movement and the origins of the due process and equal protection clauses of the Fourteenth Amendment.

Having relied on one group of parliamentary statutes in favor of liberty, Sharp could not avoid others recognizing or condoning slavery: those regulating the slave trade, granting concessions to slavers, and confirming masters’ property rights in slaves. In the face of these, he argued in an afterthought that statutes creating an injustice should be treated by the courts as being superseded by statutes favoring liberty, which are of superior obligation.

Sharp unnecessarily suggested that a man might voluntarily enter into an agreement, for consideration, to become a slave, thereby conceding a contractual basis for slavery, but he denied any other source of legitimacy in the origins of slavery. “True justice makes no respect of persons,” he insisted, “and can never deny to any one that blessing to which all mankind have an undoubted right, their natural liberty.”

He thus introduced two themes that pervaded later constitutional antislavery: the appeal to natural or higher law to override mere mundane and unjust ordinances, and the idea that a sweeping explicit declaration, such as the all-men-are-born-free-and-equal phrase of the Declaration of Independence, admits of no implicit racial exceptions.

In preparing the Representation and carrying forward the Somerset case, Sharp underwent the vexation of having William Blackstone, already recognized as an authoritative expositor of English law, modify his publicly and privately expressed opinions on slavery, thereby undercutting Sharp’s reliance on him. In the first edition of his Commentaries on the Law of England, published in 1765, Blackstone declared that slavery “does not, nay cannot, subsist in England” and repudiated three origins of slavery that continental writers had recognized as legitimating slavery (captivity in war, self-sale, inherited status). Citing Smith v. Brown and Cooper, Blackstone ventured the opinion that as soon as a slave comes into England, he becomes free, just the doctrine Sharp was striving for. Like Sharp, though, he suggested that slavery might have a contractual basis, and that whatever rights an English master derived from this basis continued in force and were unaffected by baptism.15

However, troubled by the potential antislavery uses to which the libertarian part of his writings were being put by Sharp and others, Blackstone cautiously modified the relevant passages in his third edition to remove the implication that a slave enjoyed “liberty” under English law.16 He stated that “whatever service the heathen negro owed to his American master, the same is he bound to render when brought to England and made a christian,” and revised an earlier statement that a slave becomes free upon coming to England to read that he merely comes under the “protection of the laws, and so far becomes a freeman: though the master’s right to his service may possibly still continue.”17 These were disastrous shifts of emphasis from Sharp’s point of view.

Sharp distributed copies of the Representation gratis to attorneys

to propagate the doctrines he had worked out, and simultaneously sought an appropriate case in which they might be argued before some competent court. Several presented themselves between 1770 and 1772, and according to Thomas Clarkson's recollections in each the black secured his liberty, but none gave an authoritative answer to the question whether a slave is free upon being brought into England. In one of these test cases promoted by Sharp, however, Mansfield made several tantalizing suggestions about the directions in which the law of slavery might be moving. In *Rex ex rel. Lewis v. Stapleton*, the defendant was prosecuted for assault and false imprisonment for having seized the runaway Lewis for transport and sale outside the realm (the same factual situation as in *Somerset*). In the course of argument, Mansfield stated that being black did not prove that Lewis was a slave, and that whether masters "have this kind of property or not in England has never been solemnly determined." In colloquy with John Dunning, counsel for Lewis, Mansfield gave voice to his uneasiness at the prospect of having to pass on these larger legal issues: "You will find more in the question then [sic] you see at present. . . . It is no matter mooting it now but if you look into it there is more than by accident you are acquainted with. . . . Perhaps it is much better it never should be finally discussed or settled . . . for I would have all Masters think they were Free and all Negroes think they were not because they wo'd both behave better." The "more" that Mansfield so enigmatically referred to might have been only the value of slave property in England, which, at a conservative valuation, was worth £700,000, or it might have been the legitimacy of slavery itself. Whichever it was, Mansfield was loath to touch the question.

But finally in 1771–1772, Sharp came upon a case that provided the vehicle he needed to have Mansfield consider the arguments of the *Representation*. James Somerset, according to the return made by John Knowles, master of the vessel that was about to transport him to Jamaica, was born in Africa, brought to Virginia by a slaver in 1749, and bought there by Charles Stewart. Stewart then removed to Massachusetts, where he was stationed as a customs officer, and

19. A transcript of arguments and other proceedings in this case is in Granville Sharp transcripts, N-YHS, from which all quotes in text are taken.
from thence went to England on business in 1769, taking Somerset along as a personal servant.20 In October 1771, Somerset fled, but was recaptured by Stewart, who consigned him to Knowles to be sold in Jamaica. Through the intervention of Sharp and others, Mansfield issued a writ of habeas corpus on Somerset's behalf and referred the matter for a hearing by the full bench. To represent Somerset and the cause of antislavery, Sharp secured the services of some of the most eminent legal talent of the day: Serjeants William Davy and John Glynn, and barristers James Mansfield21 and Francis Hargrave. The last of these, a young man in 1772, made his reputation with his arguments in this case. On the other side, representing Stewart, the West India Interest, and the cause of slavery, were the equally eminent barristers John Dunning, who had represented the slave Lewis the previous year, and William Wallace.

Mansfield deferred decision for a year, and ordered five separate hearings. He repeatedly urged Stewart to moot the matter by voluntarily liberating Somerset, but Stewart refused, causing Mansfield to remark in exasperation after the last argument, "If the parties will have judgment, 'fiat justitia, ruat coelum.' " ["Let justice be done though the heavens fall." ] Whatever Mansfield's feelings in the matter may have been, the stubbornness of Sharp and the West India Interest, who both saw the suit as a climactic test case, left him little room to maneuver. Both tried to move the decision along by publishing legal arguments in the matter. Hargrave published *An Argument in the Case of James Sommersett, A Negro . . .* (1772), a carefully drawn lawyer's brief arguing that slavery was antithetical to English laws and the constitution.22 On the question of the imperial relation and slavery, Hargrave argued that the parliamentary statutes protecting the Royal African Company, even if construed most favorably to the interests of the slaveholders, only permitted slavery to be introduced into the colonies, not into the metropolis.

To counter Sharp and Hargrave, the West India Interest procured publication of several pamphlets defending the legitimacy of slavery

20. The Massachusetts residence of Somerset and Stewart, overlooked by many writers, is discussed in George H. Moore, *Notes on the History of Slavery in Massachusetts* (New York: Appleton, 1866), 117.

21. No relation, of course, to Lord Mansfield.

22. [Francis Hargrave], *An Argument in the Case of James Sommersett, a Negro. Wherein It Is Attempted to Demonstrate the Present Unlawfulness of Domestic Slavery in England. To Which Is Prefix'd, a State of the Case. By Mr. Hargrave, One of the Counsel for the Negro* (London: For the Author, 1772).
in England. They appealed most forcefully to Mansfield in Samuel Estwick’s *Considerations on the Negroe Cause . . .* (1772). Relying heavily on the 1729 Yorke-Talbot opinion, Estwick insisted that the property relationship in slaves was recognized as legitimate by Parliament in the Royal African Company statutes. Even though this was a form of property “established by power and maintained by force,” it was legitimate both in the metropolis and in the colonies. Thomas Thompson defended the slave trade and slavery against Sharp’s natural-law arguments by admitting that all persons are free under natural law. “But absolute freedom is incompatible with civil establishments. Every man’s liberty is restricted by national laws and natural privilege [sic] does rightly yield to legal constitutions.”

As 1772 wore on, it became 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?” Mansfield agreed: “The 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.” He did not want to see the colonial tail wag the metropolitan dog in the matter of incorporating the law of slavery discipline into the English legal order. On the other hand, Mansfield 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.


25. Transcript of Davy’s argument in Granville Sharp transcripts, N-YHS.

26. The quotations from counsels’ arguments and Mansfield’s exchanges with them are from the report of *Somerset v. Stewart*, Loft 1, 98 Eng. Rep. 499 (K.B. 1772), reprinted at 20 Howell’s State Trials 2. There is some disagree-
Hence Mansfield settled on a dual strategy to dispose of the unwelcome case before him. First, he reaffirmed one point of English law concerning slaves that he thought was well settled—"Contract for slave of a slave is good here; the sale is a matter to which the law properly and readily attaches"—and threw out several hints that the West India Interest resort to Parliament (where they had considerable influence as well as a few members) to have other points of the law resolved by statute. (They did so, but without success.) 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"; and this was to be determined solely on the basis of the pleadings.

Yet the impact Mansfield so earnestly sought to restrict got out of bounds as soon as he tried to explain the result he 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 of natural and positive law, and on both his utterances gave the Somerset opinion its lasting and reverberating influence. On the conflicts question, Mansfield asserted that "so high an act of dominion [i.e. 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." Inconclusive though this statement seems, standing alone and out of context, it nonetheless 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. This complicated the workings of the American federal system.

Mansfield's statement on natural versus positive 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 [by] 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." 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 so contrary to natural law, could even positive law establish it? 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 his contemporaries were at pains to point out.29 Somerset notwithstanding, a qualified form of slavery continued to exist in England until final emancipation in 1833.30 Far from abolishing slavery in toto, Mansfield merely held 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 such a threatened deportation.

Mansfield's labored efforts to restrict the impact of his holding did not satisfy the West India Interest, however. One of their publicists, Edward Long, promptly published a diatribe refuting all of Sharp's contentions and criticizing Mansfield's judgment for its lack of supportive reasoning.31 Long sarcastically predicted that "the name of **** M—— shall henceforth become more popular among the

31. "A Planter" [Edward Long], Candid Reflections upon the Judgment Lately Awarded by the Court of King's Bench, on What Is Commonly Called "The Negroe Cause" (London: T. Lowndes, 1772), iii. Quotations and arguments that follow are from pp. 3, 10, 55, 49, 58–59. The copy of this pamphlet in the Library of Yale University contains numerous indignant marginal annotations by Granville Sharp. See also the proslavery "A West Indian," "Considerations on a Late Determination in the Court of King's Bench on the Negroe Cause," Gentleman's Magazine (July 1772), 307–308.
Quacoes and Quashebas of America, than that of patriot Wilkes once was among the porter-swilling swains of St. Giles.” He argued that slavery was a “species” of villeinage, supported explicitly by parliamentary statutes protecting the African trade, and that the laws concerning personal liberty from Magna Charta down through the Habeas Corpus Act were properly applicable only to free men. Long concluded with an exaggeration that, though unfounded in the substance of Mansfield’s judgment, was strikingly predictive: all the West Indian colonial slave laws were nullified, implicitly, by Mansfield’s holding.

In spite of the restricted scope of the holding, and the efforts of Mansfield and others to emphasize how narrow it was and to foreclose more liberating possibilities that appeared in the interstices of Mansfield’s ideas, Somerset burst the confines of its author’s judgment. This occurred chiefly for two reasons. First, the judgment itself, discharging a black alleged to be a slave by a writ of habeas corpus, struck a telling blow at slavery. The mere fact that habeas corpus was available to any black to test the legitimacy of his putative master’s claim to him was in itself an extension of the scope of the Great Writ and a threat to the security of slavery in England. Second, Mansfield’s statements justifying the result had implications for the imperial relation, for conflict of laws, and for the future of natural law that Mansfield probably did not foresee, and that the defenders of slavery later had cause to regret.

British courts began almost immediately to wrestle with the ambiguities and potentialities of Mansfield’s opinion. Some English judges assumed that Somerset had worked an absolute abolition of slavery in England. In an unreported case, Cay v. Crichton (1773) decided in 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. In a Scottish case, Knight v. Wedderburn (1778), counsel cited Somerset only for its narrow and technically correct holding, but the Court of Sessions went further, stating that a master’s rights under Jamaican law were “unjust” in Scotland, so that a master could exercise no form of control whatever over a slave there. A writer in the Virginia Gazette commented

32. A report of the decision in this case appears in the Granville Sharp transcripts, N-YHS.
33. 8 Fac. Dec. 5, Mor. 14545 (Scot. Court of Sessions, 1778).
on the proposal to have Parliament enact a statute regulating the master-slave relationship in England by asking "Can any human Law abrogate the divine? The Laws of Nature are the Laws of God. By those Laws, a Negro cannot be less free than a Man of any other Complexion."

Such interpretations vexed Mansfield. In a private conversation with Thomas Hutchinson, the exiled American Loyalist, Mansfield insisted that "there had been no determination that [slaves] 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." Mansfield soon found an opportunity to lecture the English bar on the limits of the Somerset opinion in the case of *Rex v. Inhabitants of Thames Ditton* (1785), an action 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 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 and corrected him 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 implied 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 potentialities of the Somerset opinion that Mansfield was trying to restrain quickly proved irrepressible. Aphorisms about slaves being liberated once they set foot on English ground or breathed English air fired the imagination of the poet William Cowper, who wrote, inaccurately, that

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

34. Purdie & Dixon's *Virginia Gazette*, 20 Aug. 1772.
37. An unreported precedent, *Cartwright's Case* (1569), was said to have
Edward Christian, one of Blackstone's early American editors, observed with more accuracy 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."38

_Somerset_ had taken on a life of its own, independent of its factual circumstances and of its author's later construction. 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."39 In _Forbes v. Cochrane & Cockburn_ (1824)40 Justice Holroyd stated that when a slave "puts his foot on the shores of this country, his slavery is at an end" simply because there is no positive law of England that sanctions slavery. His colleague, Justice Best, went further, construing _Somerset_ to have held "on the high ground of natural right" that slavery is "inconsistent with the genius of the English constitution," and that human beings could not be the subject matter of property. Though Lord Chancellor Eldon disagreed, in the course of abolition debates in the House of Lords, and maintained that it was most unlikely that slavery was "contrary to the genius of the British constitution" in view of the Royal African Company statutes, William Holdsworth, premier historian of English law, considered Best's interpretation not only the "popular view," but also "substantially correct."41

Henry Pye, writing seventeen years after _Somerset_, went so far as to claim that slavery might be illegitimate in the islands as well as the metropolis because it was "not authorized by the common law of England" under which "every man is free" and entitled to an "equal distribution of justice." He advanced ideas later current among American abolitionists when he argued that every man in England, and in the islands as well, were "entitled to the full protection of the

---

laws as to his life, his property, and his liberty. These are fundamental principles of the constitution, which any provincial, and subordinate legislature must be incompetent to repeal in any part of the British dominions.” This view, however, was atypical in its time. Whatever the theoretical impact of *Somerset* on slavery in England, it was the clear consensus among English authorities that the opinion, and the whole sweep of the metropolitan law of personal liberty, left slavery in the islands intact. The law clerk of a House of Commons committee investigating colonial slavery at the time Pye was writing expressed this consensus: “the Privileges of England are so universally extensive, as not to admit of the least Thing called Slavery,” he conceded. But in the islands, “the Cases and Circumstances of Things were wonderfully altered,” and slavery existed with metropolitan and colonial sanction, deriving its legitimacy from the original sale of slaves by African chieftains.

*Somerset*'s libertarian implications remained, nonetheless, as a shadow across the legality and security of colonial slavery. Conservative jurists felt a need to ground such interpretive flights as Pye’s and Best’s, and were cheered by an opinion from William Scott, Lord Stowell, who presided over the High Court of Admiralty. This decision, known variously as the case of *The Slave Grace* or as *Rex v. Allen* (1827), was considered by contemporaries, including so eminent an authority as Justice Joseph Story of the United States Supreme Court, to be the definitive reinterpretation of the real meaning of *Somerset*. The circumstances of *Grace* were almost perfectly designed to test the implications of *Somerset*. Grace had been brought by her mistress from Antigua to England, where they resided for a year. They then went back to Antigua where the slave was seized by admiralty officials as illegally imported, the officials’ assumption being that she became free in England and was thus a free person being brought into slavery. Stowell affirmed a judgment for the mistress, on the grounds that the slave, on her return to Antigua,

42. *Doubts concerning the Legality of Slavery in Any Part of the British Dominions* (London: John Stockdale, 1789), 11–13. The attribution to Pye is made on the copy in the Library of Yale University.
43. “General View of the Principles on Which This System of Laws Appears to Have Been Originally Founded,” House of Commons *Accounts and Papers*, XXVI (1789), no. 646a, pt. iii (no pagination).
reassumed her status as a slave, which was only suspended, not terminated, during her stay in England. This has been called the "re-attachment" doctrine. Most of Stowell's long and elaborate opinion was an effort to prune the luxuriant growth of antislavery interpretation stimulated by *Somerset*. He insisted that slavery had a legitimate origin in "ancient custom," which is "generally recognized as a just foundation of all law." Here Stowell drew on a tradition of western law extending back beyond Justinian, whose compilers wrote in the *Institutes* that "ancient customs, when approved by the consent of those who follow them, are like statute."45 This was potentially a forceful legitimating basis for slavery. Though it did not exist in England, slavery did have a legal existence in the colonies; its incompatibility was only with English law, and even in England the incompatibility extended no further than to confer on the slave a "sort of limited liberty" that evaporated upon return to a slave jurisdiction.

There was a deeper connection between *Somerset* and *Grace*, however. Under both metropolitan and colonial law, the slave was considered in the eyes of the law as a thing, something capable of being owned. Hence Mansfield's emphasis on the validity of contracts for sale of a slave. But in order to maintain a system of slavery like that in the island and mainland colonies, more was needed, a superstructure of laws regulating the conduct of slaves and the rights of masters. Where that was lacking, as in England, a slave seeking to assert his personal liberty in the forum jurisdiction had a good chance of success, there simply being no law supporting the master's authority. In the islands, however, where such a superstructure already existed, jurists were not about to overthrow the legal and social order simply out of devotion to the ideal of human liberty.46

Stowell expressed the reattachment principle of *Grace* in a striking metaphor. For slaves coming into England, English laws had "put their liberty, as it were, into a sort of parenthesis." Parenthetical or not, the liberty that slaves enjoyed in England was extended to them in the colonies by Parliament in the Abolition Act of 1833.47 Though colonial emancipation let loose a good deal of constitutional debate,

47. 3 & 4 Will. 4, c. 73.
few in the end doubted Parliament’s power to bind the colonies. But what was apparently a settled question by 1833 was not at all so before the American Revolution, and one of the most unsettling implications of Mansfield’s opinion was the possibility that slavery, being incompatible with the English constitution, might somehow be illegitimate in the colonies.

Mansfield’s premise that slavery was so contrary to natural law that it could be established only by positive law passed over into American constitutional development. In Robert Cover’s judgment, the case “gave institutional recognition to antislavery morality, incorporating that view of natural law as a common law and conflict-of-law principle.” This tenet had profound implications. Where no positive law established slavery, it did not exist. To jurists who assumed with Blackstone that no positive law could override the dictates of natural law, slavery could not be legitimate anywhere, even where it did enjoy the sanction of positive law. Hence radical abolitionists drew from the doctrines of Somerset the basis for their contention that slavery was everywhere unconstitutional in America. Moderate abolitionists did not go so far. Admitting with Mansfield that positive law could establish slavery, they nevertheless indulged no presumptions in favor of the peculiar institution, and insisted that when a slave leaves the jurisdiction under whose laws he was enslaved, and entered into a free state, he became free and could not again be reenslaved. They discarded the Grace reattachment doctrine.

The misunderstandings of the Somerset opinion became even more important. Though Mansfield had not said, or even implied, that slavery was incompatible with the British constitution or that a slave became free the moment he came into England, some American abolitionists followed the lead of Justice Best and assumed that either of these ideas was a necessary inference from Mansfield’s judgment. They thereby created a doctrine that we may call “neo-Somerset”: that slavery, being incompatible with the common law, did not have a legal origin in the United States and was incompatible with the Constitution. This too led in both radical and moderate directions.

Radicals maintained that slavery was illegal in the states, and that therefore the power of the federal government should be used to extirpate it there. Moderates, rejecting that view as an insupportable departure from the premises of the American federal system, upheld a more narrow doctrine. They claimed that, under natural law, freedom was the normal condition of man, and that slavery, where established by positive law, was an anomaly and an exception to this natural state. They therefore insisted that the federal government be divorced from any support for slavery. This gave way to the more comprehensive doctrine "Freedom national, slavery sectional," which moderates used in their effort to keep slavery out of the western territories.

*Somerset* thus passed into the constitutional thought not only of radical abolitionists, but into that of the moderates who first controlled the Liberty party, and who later adopted Free Soil doctrines and went on to constitute one of the nuclei of the Republican party. A direct line of expanding doctrinal influence stretches from Mansfield's reluctant concession to the abolitionist fire of Granville Sharp and Francis Hargrave, through the early jurisprudence of both northern and southern state courts that absorbed *Somerset* into American case law, on to the abolitionists who founded the American Anti-Slavery Society, and then to the radicals who wished to use federal powers to abolish slavery through judicial or legislative action, and to the moderates who meant only to contain slavery within the southern states.

Few English judicial decisions have figured so prominently in the growth of American constitutional law. Cited innumerable times by opponents and defenders of slavery, *Somerset* long held sway over the thinking of Americans concerned about the relationship between slavery and law. *Somerset* was emblematic of Justice Oliver Wendell Holmes's ambition for jurists: to Mansfield unwittingly was due "the secret isolated joy of the thinker, who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought."50