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## LORD MANSFIELD REVISITED—A MODERN ASSESSMENT

BERNARD L. SHIENTAG†

EACH significant figure of history, it has been said, needs to be re-interpreted for every generation that has use for him. What does the judicial career of William Murray, Earl of Mansfield, mean to us today—to the modern lawyer, to the modern judge and to the progressive development of the law? How do his decisions and his conceptions of the nature of the judicial process help the administration of justice in our time? Of what does his greatness as a judge consist?

A distinguished English legal historian has said: "Now-a-days we may see the office of historical research as that of explaining and therefore lightening, the pressure that the past must exercise upon the present and the present upon the future. Today we study the day before yesterday, in order that yesterday may not paralyze today and today may not paralyze tomorrow."<sup>1</sup> Is it not also important to study the day before yesterday in order that the present may be illuminated and inspired by the past? Is there not ancient wisdom as well as ancient error?

To understand any great man of the past we must have before us a picture, in broad outline at any rate, of the age in which he lived. Mansfield's life covered practically the whole of the eighteenth century.<sup>2</sup> It was a century, for the most part, of acquiescence in the established

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1. 3 MAITLAND, COLLECTED PAPERS (1911) 439.

2. It was the period corresponding with what has become known as the age of Dr. Samuel Johnson. In literature, besides the great Cham himself, there were Swift and Blake and Pope; Gray with his "Elegy in a Country Churchyard" and Goldsmith with his burning zeal for social reform. Among the novelists were Fielding, Sterne, Defoe and Richardson. In history and in philosophy, we find Hume and Gibbon and Berkeley; in economics, Adam Smith with his "Wealth of Nations". In art, it was the time of Reynolds and Gainsborough; in the theatre, Garrick reigned supreme. It was the age of Wolfe leading his men to the heights of Quebec and of Clive in India. In politics great figures appeared upon the scene; Pelham, the two Pitts, Camden, Burke and Fox. It was the time of the American Revolution. Later came the French Revolution, the excesses of which stayed the hand of political reform for almost fifty years.

order of things. It was a time, as Augustine Birrell, a distinguished English essayist, points out, marked by the infamies of the slave trade, the horrors of the gaols, the barbarity of the Criminal Code, and the heathenism of the multitude. It was a period of rotten boroughs, of deserted villages with two representatives in Parliament, of Manchester with none; of the Civil List with pensions and sinecures that spread corruption through the land.<sup>3</sup> It was a time of religious intolerance, an intolerance based primarily on political rather than spiritual considerations, yet as Birrell observes, "the fact remains that all this time the British nation was stumbling and groaning along the path which has floated the Union Jack in every quarter of the globe." Trade was growing by leaps and bounds and around the middle of the century there began those inventions in industry which were destined to revolutionize the whole aspect of economic life. During this period, freedom of speech and of the press existed in England to an extent that won the admiration and aroused the envy of enlightened citizens of other countries.

The state of the law in the eighteenth century is clearly pictured for us by Sir Frank Douglas MacKinnon, now a Lord Justice of Appeal.<sup>4</sup> The Common Law and Equity were administered by separate, independent tribunals, each with its own rules of pleading and procedure, each with its own principles of substantive law. The Lord Chancellor and the Master of the Rolls were the only Chancery Judges; there were twelve Common Law Judges—on the King's Bench, Common Pleas and Exchequer. The profession, we are told, was a very small one. In 1783, "including 12 Serjeants and 17 King's Counsel, there were less than 350 men at the Bar."<sup>5</sup> Legal education was fragmentary. In 1753, with Mansfield's advice and encouragement, William Blackstone began his lectures at Oxford, the first ever given on English law at any university in the world. These lectures formed the basis of his celebrated *Commentaries on the Laws of England*, the prose epic of the Common Law, which had a far reaching influence on the development of the law and on legal education.<sup>6</sup>

Although poorly enforced, the criminal law was savage to an extreme.

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3. Birrell, *The House of Commons*, SELECTED MODERN ENGLISH ESSAYS (Oxford Press 1896) 103, 106, 107.

4. MacKinnon, *The Law and Lawyers* in 2 JOHNSON'S ENGLAND (1933) 287, 289, 303.

5. This compares, for example, with 288 King's Counsel and over 10,000 members of the bar in 1932.

6. MAITLAND, ENGLISH LAW AND THE RENAISSANCE (1901) 32; Thayer, *The Teaching of English Law at Universities* (1895) 9 HARV. L. REV. 170; Holdsworth, *Some Aspects of Blackstone and His Commentaries* (1932) 4 CAMB. L. J. 261, 262; Waterman, *Mansfield and Blackstone's Commentaries* (1934) 1 U. OF CHI. L. REV. 549.

This was due not so much to the brutality of the people or even to their indifference, but because there was no organized police system, the populace being at the mercy of criminals and marauders of all types.<sup>7</sup> In the reign of George III there were at least 160 capital offenses, including stealing in a dwelling house to the value of 40 shillings, stealing in a shop, privately, to the value of 5 shillings, stealing 1 shilling from a pocket, or stealing a horse or a sheep. To avoid the death penalty, a humane judge would encourage the jury to find that a valuable article stolen in a shop was only worth 4s 11d.<sup>8</sup>

Executions were cruel and public; punishment by pillory was in existence. One convicted of high treason was still, under the law, to be hanged, disemboweled and quartered. In that period (and up to 1870) the jury was starved and frozen into agreement. When they retired to consider their verdict, they were placed in charge of a bailiff who was sworn to "well and truly keep every person sworn of this Jury in some private and convenient room without Meat, Drink, Fire, Candle or Lodging. . . ." Unless the time was extended, the death penalty was carried out two days after sentence. Theobald Mathew says that "there was no real appeal open to the prisoner from verdict or sentence. On

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7. Lord Justice MacKinnon points out that the only salutary reforms in the criminal law before 1780 were the Act of 1730 which substituted English for Latin as the language of indictments, the Act of 1736 which abolished witchcraft as a crime, the Act of 1747 which allowed counsel to one impeached for high treason, and the Act of 1772 which abolished the application of *peine forte et dure* and provided that a prisoner who, upon his arraignment, stood mute, should, instead of being pressed with heavy weights until he either pleaded or died be deemed to say "not guilty". Maitland in his splendid essay, *The Outlines of English Legal History* 560 to 1600, 2 MAITLAND, COLLECTED PAPERS at 417, 456, *et seq.* gives a fascinating account of the displacement of the "appeal", the old private accusation with its judicial combat or ordeal of battle, by the indictment with its trial by jury. In order to obtain the defendant's consent to trial by jury, the slow action of starvation was quickened "by laying him out naked on the floor of the dungeon and heaping weights upon his chest until he says he will abide by the verdict of his fellows" *peine forte et dure*. As late as 1818, in England, in the case of *Ashley v. Thornton*, the defendant was acquitted of murder, but the brother of the dead girl resorted to an "appeal", to which the previous acquittal was no answer. Thornton demanded his right of ordeal by battle and in this was judicially declared to be within his rights. The brother had no mind to fight and that disposed of the problem. Then, says Maitland, "after this crowning scandal, Parliament at last bestirred itself and in the year of grace 1819 completed the work of Pope Innocent III by abolishing the last of the ordeals."

8. See MACKINNON, ON CIRCUIT 1924-1937 (1940) 8, 10, citing *Rex v. Beardmore*, 2 Burr. 792, 97 Eng. Rep. R. 564 (1759); for a very interesting account of the history of the Benefit of Clergy and of the origin of the question "Have you anything to say why sentence of death according to law should not be passed upon you?", see page 9 of this interesting volume.

the facts, none at all; on the law, only if the Judge chose to reserve a point for the consideration of his brethren. If he thought his ruling was wrong, a bloody-minded Judge might refuse to reserve the point. When a Judge consented to do so, the tribunal of appeal consisted of the other Judges of the Court of King's Bench, Common Pleas and Exchequer sitting—not in Court—but at Serjeants' Inn in Chancery Lane, where, after dining comfortably, they discussed the problem in hand at the port stage of the proceedings. Not till the middle of the nineteenth century was this farcical business ended by the establishment of the Court for Crown Cases Reserved; and it was only in 1907 that a real Court of Criminal Appeal was created.<sup>9</sup>

And now, briefly, let us fit Lord Mansfield into this world of two hundred years ago. William Murray (later Earl of Mansfield) was born at Scone, near Perth, Scotland, on March 2, 1705. He was the fourth son of Viscount Stormont, being one of fourteen children. Educated at the grammar school in Perth until he was fourteen, William was then sent to Westminster School in England. That circumstance occasioned Dr. Johnson's well known observation that "much may be made of a Scotchman if he be caught young." At Westminster, William gave evidence of fine, outstanding scholarship and went to Oxford in 1723.

Originally intended for the Church, his ambition was for the Bar. What his father with his large family could not afford to do for him was accomplished by the generosity of Lord Foley, whose son was his classmate at Westminster. While at Oxford, Murray was entered at Lincoln's Inn in 1724. He continued at Oxford, devoting himself to the classics, and paid special attention to the orations of Cicero and Demosthenes and to the Ethics of Aristotle. He was made a B.A. at Oxford in 1724 and in 1727 he won the prize for his Latin poem, his close competitor being the elder Pitt, who was destined to become his bitter rival in the Houses of Parliament. In 1730 Murray received his M.A. at Oxford and the same year was called to the Bar.

In 1738 he married Lady Elizabeth Finch, daughter of the Earl of Winchelsea. They had no children. In 1742 he was made Solicitor General and entered Parliament. He served as Solicitor General for twelve years. His career in the House of Commons was a brilliant one. A splendid orator and unexcelled for his skill, his logic and his forcefulness in debate, he was the leader of his party during the administration of the Duke of Newcastle. In 1754 Murray was made Attorney General. In May, 1756, the office of Chief Justice of the King's Bench became

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9. MATHEW, FOR LAWYERS AND OTHERS (1938) 139, 140.

vacant by reason of the death of Sir Dudley Ryder. Despite the entreaties of Newcastle, whose ministry sorely needed Murray in the House of Commons, he took the definite stand that he would resign the Attorney Generalship unless he was made Chief Justice and created a Peer. He was appointed Chief Justice of the King's Bench and lifted to the peerage, as Lord Mansfield, on November 8, 1756.

He probably intended to divorce himself entirely from active politics, but the pressure on him evidently was too great, for in 1757 he consented to become one of the Cabinet and acted in that capacity for some years. That was the greatest mistake of his career. He actively defended partisan ministerial measures in the House of Lords. He supported the Stamp Tax and the right generally to tax the American colonies,<sup>10</sup> although he did say later that if he had been asked he would have advised against the expediency of the action taken. At the time when Edmund Burke delivered his famous speech "On Conciliation with America," Mansfield was pressing for the vigorous prosecution of the war with the colonies.

He presided with great distinction over the King's Bench for a continuous period of thirty-two years. On several occasions he refused the appointment as Lord Chancellor. In 1776 he was created Earl of Mansfield. At 81 years of age his infirmity prevented his regular attendance at Court. He withheld his retirement for two years, attempting in vain to persuade the younger Pitt to name as his successor Mr. Justice Buller, the senior of his puisnes and his most devoted colleague. For this he was never forgiven by Lord Kenyon, who was named to succeed him. Mansfield resigned in 1788 and died five years later.<sup>11</sup>

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10. It is interesting to read Lord Mansfield's peroration in his speech on American taxation, in the House of Lords, set forth in full in HOLLIDAY, *LORD MANSFIELD* (1797) 242 *et seq.*: "You may abdicate your right over the colonies. Take care my lords, how you do so, for such an act will be irrevocable. Proceed then, my lords, with spirit and firmness; and, when you shall have established your authority, it will then be a time to show your lenity. The Americans, as I said before, are a very good people, and I wish them exceedingly well; but they are heated and inflamed. The noble lord who spoke before concluded with a prayer; I cannot end better than saying to it, Amen; and in the words of Maurice, Prince of Orange, concerning the Hollanders, 'God bless this industrious, frugal and well meaning but easily deluded people.'" (250-251).

11. The earliest life of Lord Mansfield was written by John Holliday in 1797. It is a panegyric by a devoted disciple, contains a wealth of anecdotal material, but is not always accurate. EVANS, *THE DECISIONS OF LORD MANSFIELD* (2 Vols. 1803) presents an interesting topical collection of his civil decisions, with little critique or perspective. The account of Lord Mansfield's life in 2 CAMPBELL, *LIVES OF THE CHIEF JUSTICES* (1849) 302, is the most readable to date, although far from satisfactory. FIFOOT, *LORD MANSFIELD* (1936) and 12 HOLDSWORTH, *A HISTORY OF ENGLISH LAW* (1938) 464 *et seq.* give a

When we come to study Lord Mansfield's judicial career we are confronted with a perplexing problem. To examine the minutiae of his hundreds of decisions would serve no useful purpose. Instead, there will be considered, generally, certain aspects of the judicial career of the man who had one of the greatest creative legal minds in the history of the Common Law. There will follow an analysis of his constructive decisions in selected branches of the law—decisions which still have the warm breath of life in our own time, and to which we turn today for inspiration and guidance; and finally, we will consider his conception of the nature of the judicial process and how it compares with that of enlightened jurists in the modern age.

*The Founder of the Commercial Law of England*

Long before Lord Mansfield, distinguished judges had been slowly incorporating the practices and customs of merchants into the common law of England. Lord Holt as Chief Justice of the King's Bench from 1689 to 1709 and Lord Hardwicke in the short time he held that office before he became Lord Chancellor did much along those lines. It was not, however, until Lord Mansfield that there appeared a judicial personality, capable of accomplishing the necessary reforms and achieving a lasting synthesis in the field of commercial law. He had the training, the viewpoint, the vision and the courage to deal broadly and liberally with the legal problems of his period. His knowledge and regard for Roman Law, his understanding of Scottish Law, his familiarity with history, ancient and modern, his absorption in the juridical writers of the Continent and his study of the then recently adopted French *Code de Commerce* all these tended, not to diminish his attachment and his devotion to the Common Law, but rather to make him resolve to improve it, to infuse it with new blood derived from the best in other legal systems and practices.

If, as Lord Macmillan has pointed out, there are two ways of legal thinking, one the method of the civil lawyer with its emphasis on general rules and principles, and the other that of the common lawyer with its reliance on the precedents of decided cases,<sup>12</sup> Lord Mansfield by edu-

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scholarly analysis of Lord Mansfield's decisions with an incidental biographical background. See also HOLDSWORTH, *SOME MAKERS OF ENGLISH LAW* (1938) 160-175; BIRKENHEAD, *FOURTEEN ENGLISH JUDGES* (1926) 99 *et seq.*; *William Murray, Earl of Mansfield*, FOSS, *THE JUDGES OF ENGLAND* (1870). The fact is that the definitive life of Lord Mansfield has yet to be written. John Buchan contemplated undertaking it. What a pity he did not yield to his impulse! BUCHAN, *PILGRIM'S WAY* (1940) 84.

12. MACMILLAN, *LAW AND OTHER THINGS* (1937) 76.

cation, experience, and inclination, combined and harmonized both methods. This, together with a natural tolerance and freedom of mind, set him apart from the narrow provincialism of the common lawyers of his day, and enabled him to carry out magnificently the task of fusing the law merchant with the common law so as to meet the needs and the changing conditions of the society of his time.

As Mr. Justice Story said: "He was one of those great men raised up by Providence, at a fortunate moment he became what he intended, the jurist of the Commercial World."<sup>13</sup> He laid down general rules of law applicable to mercantile transactions that served as precedents and in time created a body of systematic legal principles, in conformity with the realities of business needs, which constitute the foundation of our modern commercial code. His decisions in this field amounted to judicial legislation of the first order. Many of the problems of mercantile law with which he dealt were new to the common law. He found that law fluid and resilient; and he therefore had a freedom of judicial action, denied in some measure to modern judges. But the custom of merchants, while to him most persuasive, was not conclusive; it had always to square with the standards of morality, of honest dealing and of good faith.

So, briefly, to consider some of his decisions which still have a modern flavor, we find him virtually creating the law of Insurance, with emphasis on the contract involved;<sup>14</sup> with its obligation *uberrima fides*, requiring the fullest disclosure of facts commonly within the knowledge of the assured;<sup>15</sup> we find him developing the doctrine of "total" and

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13. STORY, MISCELLANEOUS WRITINGS (1835) 262. See also the famous tribute paid to Lord Mansfield by Mr. Justice Buller in *Lickbarrow v. Mason*, 2 T. R. 63, 73-74, 100 Eng. Rep. R. 35 (1787).

14. *Tyrie v. Fletcher*, 2 Cowp. 666, 98 Eng. Rep. R. 1297 (1777); see also *Pelly v. Royal Exchange Assurance Co.*, 1 Burr. 341, 97 Eng. Rep. R. 342 (1757); *Simond v. Boydell*, 1 Doug. 268, 99 Eng. Rep. R. 175 (1779); *Hotham v. East India Company*, 1 Doug. 272, 99 Eng. Rep. R. 178 (1779). See Vance, *Article on Insurance*, 3 SELECT ESSAYS ON ANGLO-AMERICAN LEGAL HISTORY (1909) 116. Lord Mansfield's appointment to the Bench in 1756 "may rightly be considered as the date of the beginning of the development of the modern law of insurance as a part of the common law system. . . . He not only gave prompt justice to litigants who appeared before him, and provided a fit tribunal for merchants, but he saw so clearly the fundamentals of the theory of insurance and understood so well its practical applications to the needs of business and commerce, that the numerous doctrines that he laid down have survived all of the many changes in commercial conditions and methods that have since taken place, and almost without exception they apply as well to the commercial transactions of today as to those of Mansfield's own time."

15. *Carter v. Boehm*, 3 Burr. 1905, 97 Eng. Rep. R. 1162 (1766).



"average" loss;<sup>16</sup> the distinction between warranty and representation;<sup>17</sup> and his remarkably liberal decisions on the scope of warranties of good health in policies of life insurance.<sup>18</sup>

In Negotiable Instruments, he harmonized the rules relating to the foreign bill of exchange, the inland bill of exchange, and the promissory note;<sup>19</sup> he insisted on the rights of the innocent holder for value;<sup>20</sup> he reiterated the principle that negotiable instruments were currency;<sup>21</sup> he laid down the rule that the holder of a bearer note could maintain an independent action;<sup>22</sup> he upheld the negotiability of bearer notes by delivery; he ruled that an acceptor who accepted a forged bill and paid it to a *bona fide* holder, could not recover the payment from such holder;<sup>23</sup> he emphasized the necessity for certainty in determining what was a reasonable time for presenting a bill or giving notice of dishonor and the advisability of having the court determine that question, where possible;<sup>24</sup> and he invoked the doctrine of equitable estoppel, where one placed in the hands of a broker a bill of lading so endorsed that the broker could deceive an innocent third party into believing that the broker owned the goods.<sup>25</sup>

In Agency, he laid down the rule that when money was paid to an agent by mistake, the agent was liable provided he had not paid over the money in good faith to his principal before demand for repayment, but if so paid over, only the principal was liable.<sup>26</sup>

16. *Goss v. Withers*, 2 Burr. 683, 96 Eng. Rep. R. 1196 (1758); *Lewis v. Rucker*, 2 Burr. 1167, 97 Eng. Rep. R. 769 (1761).

17. *VANCE, INSURANCE* (1920) 398; *Pawson v. Watson*, 2 Cowp. 785, 98 Eng. Rep. R. 1361 (1778); *Dehahn v. Hartley*, 1 T. R. 343, 99 Eng. Rep. R. 1130 (1786); *Pawson v. Barnevelt*, 1 Doug. 12, n. 4, 99 Eng. Rep. R. 10, n. 3 (1779).

18. *Willis v. Poole*, cited in *PARK, INSURANCE* (8th ed. 1842) 935; *Ross v. Bradshaw*, 1 Bl. W. 312, 98 Eng. Rep. R. 175 (1760). Cf. *Cardozo, J.*, in *Silverstein v. Metropolitan Life Ins. Co.*, 254 N. Y. 81, 84, 171 N. E. 914, 915 (1930).

19. *Heylyn v. Adamson*, 2 Burr. 669, 97 Eng. Rep. R. 503 (1758).

20. *Miller v. Race*, 1 Burr. 452, 97 Eng. Rep. R. 398 (1758).

21. *Peacock v. Rhodes*, 2 Doug. 633, 99 Eng. Rep. R. 402 (1781).

22. *Grant v. Vaughan*, 3 Burr. 1516, 97 Eng. Rep. R. 957 (1764).

23. *Price v. Neal*, 3 Burr. 1354, 97 Eng. Rep. R. 871 (1762); See *Ames, The Doctrine of Price v. Neal* (1891) 4 HARV. L. REV. 297, 310, which concludes: "It will certainly be a satisfaction to the writer if he has helped to vindicate the opinion of Lord Mansfield in *Price v. Neal* from the false gloss that has been put upon it by his successors."

24. *FIFoot, LORD MANSFIELD* at 112; *Medcalf v. Hall*, 3 Doug. 113, 99 Eng. Rep. R. 566 (1782); *Appleton v. Sweetapple*, 3 Doug. 137, 99 Eng. Rep. R. 579 (1782); *Tindal v. Brown*, 1 T. R. 167, 99 Eng. Rep. R. 1033 (1786).

25. *Wright v. Campbell*, 4 Burr. 2046, 98 Eng. Rep. R. 66 (1767).

26. *Buller v. Harrison*, 2 Cowp. 565, 98 Eng. Rep. R. 1243 (1777); see also *Stevenson v. Mortimer*, 2 Cowp. 805, 98 Eng. Rep. R. 1372 (1778).

In Arbitration, he ruled that awards should be liberally construed free from niceties and technicalities.<sup>27</sup> The subject of consideration in contracts will be taken up separately. In the field of Contract Law, generally, he laid down the rule governing conditions and how they were to be construed.<sup>28</sup> He disliked the Statute of Frauds,<sup>29</sup> a view which foreshadowed the now prevailing business and legal opinion that certain sections of that statute have outlived their usefulness and should be changed to conform to modern needs.<sup>30</sup> We find him eloquently proclaiming the liability in contract of a woman having a separate allowance and living apart from her husband,<sup>31</sup> a view which has since been completely vindicated by much more far-reaching legislation, but which his immediate successor Lord Kenyon rejected, lamenting "the late loose notions" and crying that "we must not by any whimsical conceits, supposed to be adapted to the altering fashions of the times, overturn the established law of the land."<sup>32</sup>

In Sales (and strangely enough very few such cases came before his court)<sup>33</sup> he ruled that it was unlawful to employ a "puffer" to raise

27. *Hawkins v. Colclough*, 1 Burr. 274, 97 Eng. Rep. R. 311 (1757).

28. *Kingston v. Preston*, 2 Doug. 689-91, 99 Eng. Rep. R. 437 (1773). Stipulations in a contract may be not only dependent or independent, but concurrent; for cases involving conflict of laws and foreign judgments, see *Robinson v. Bland*, 2 Burr. 1077, 97 Eng. Rep. R. 717 (1760); *Planche v. Fletcher*, 1 Doug. 251, 97 Eng. Rep. R. 164 (1779). The law of implied (constructive) conditions became crystallized in the 18th Century. Out of this principle evolved, among other things, the doctrine of substantial performance which is almost as old as the rule itself. See Lord Mansfield's decision in *Boone v. Eyre*, 1 Bl. H. 273, 126 Eng. Rep. A. 160, note a (1777). The doctrine finds its fullest fruition in *New York* in the case of building contracts. In *Jacob & Youngs v. Kent*, 230 N. Y. 239, 129 N. E. 889 (1921), it was held that a builder who has substantially performed his contract although he has defaulted with respect to minor specifications, can recover the agreed price less deductions for his default in performance.

29. *Simon v. Metivier*, 1 Bl. W. 599, 96 Eng. Rep. R. 347 (1776); see also *Clayton v. Andrews*, 4 Burr. 2101, 89 Eng. Rep. R. 96 (1767).

30. "It is highly desirable that some steps should be taken to give a more modern form to the existing rules of the Statute of Frauds and Sale of Goods Act which have done a great deal to impair the prestige of the English law of contract." Gutteridge, *Contracts and Commerce* (1935) 51 L. Q. REV. 96 (Jubilee Number).

31. *Barwell v. Brooks*, 3 Doug. 371, 99 Eng. Rep. R. 702 (1784); *Ringsted v. Lady Lanesborough*, 3 Doug. 197, 99 Eng. Rep. R. 610 (1783); *Corbett v. Poelnitz*, 1 T. R. 5, 99 Eng. Rep. R. 940 (1785).

32. *Ellah v. Leigh*, 5 T. R. 679, 101 Eng. Rep. R. 378 (1794); *Clayton v. Adams*, 6 T. R. 604, 101 Eng. Rep. R. 727 (1796); *Marshall v. Rutton*, 8 T. R. 545, 101 Eng. Rep. R. 1538 (1800).

33. See the interesting article by Llewellyn, *Across Sales on Horseback* (1939) 52 HARV. L. REV. 725, 740-746.

bids at an auction. "In all mercantile transactions," he said, "the great object should be certainty; and, therefore, it is of more consequence that a rule should be certain than whether the rule is established one way or the other."<sup>34</sup> "The daily negotiations and property of merchants," he wrote in another case, "ought not to depend upon subtleties and niceties, but upon rules easily learned and easily retained."<sup>35</sup>

### *Wills and Real Property*

In Wills, he laid down rules of construction which are followed literally today. "The constant object of construction is to attain the intent; . . . implications shall supply verbal omissions; the letter shall give way; every inaccuracy of grammar, every impropriety of terms shall be corrected by the general meaning, if that be clear and manifest."<sup>36</sup>

The story is told that to prove the intent of an old woman in making her will, one counsel cited case after case. Lord Mansfield interrupted him to say, "Sir, do you think that this old lady ever read those cases or would have understood them if she had?"<sup>37</sup>

"The court may supply the omission of express words, if they find a plain intent, but unless that is the case, they cannot do it; . . . Guesses may be formed, but that is not enough. . . . We cannot make a will for the testator. Conjectures may be made both ways."<sup>38</sup>

34. *Vallejo v. Wheeler*, 1 Cowp. 143, 153, 99 Eng. Rep. R. 1012 (1774).

35. *Hamilton v. Mendes*, 2 Burr. 1198, 1214, 77 Eng. Rep. R. 787, 795 (1761). For an account of Lord Mansfield's decisions relating to *Trademark and Unfair Competition* see SCHECHTER, *THE HISTORICAL FOUNDATIONS OF LAW RELATING TO TRADEMARKS* (1925) 137; *Singleton v. Bolton*, 3 Doug. 293, 99 Eng. Rep. R. 661 (1783): "If the defendant had sold a medicine of his own under the plaintiff's name or mark, that would be a fraud for which an action would lie." One of Lord Mansfield's most interesting opinions is *Millar v. Taylor*, 4 Burr. 2303, 2399, 98 Eng. Rep. R. 201 (1769). Mansfield's ruling that there was a common law perpetual copyright after publication not abrogated by the Copyright Law of 1709 met with a dissent by Mr. Justice Yates and was reversed in the House of Lords, *sub nom.* *Donaldson v. Becket*, 4 Burr. 2408, 98 Eng. Rep. R. 557 (1774). For the construction placed upon this reversal see *Wheaton v. Peters*, 33 U. S. (8 Pet.) 591 (1834); *American Tobacco Co. v. Werckmeiser*, 207 U. S. 284 (1907); *Holmes v. Hurst*, 174 U. S. 82 (1899); 6 HOLLIDAY, *HISTORY OF ENGLISH LAW* (1924) 378, 379; FIFOOT, *LORD MANSFIELD* at 225. The subject is discussed in a delightful essay by Birrell, *Authors in Court*, in *RES ADJUDICATA* (1893) 253.

36. *Chapman v. Brown*, 3 Burr. 1626, 1634-35, 97 Eng. Rep. R. 1015 (1765); *Phipard v. Mansfield*, 2 Cowp. 797, 98 Eng. Rep. R. 1367 (1778). See also *Goodright v. Glazier*, 4 Burr. 2512, 98 Eng. Rep. R. 317 (1770); *Burtenshaw v. Gilbert*, 1 Cowp. 49, 98 Eng. Rep. R. 961 (1774).

37. HOLLIDAY, *HISTORY OF ENGLISH LAW* at 127.

38. *Doe v. Shippard*, 1 Doug. 75, 78, 79, 95 Eng. Rep. R. 52 (1779); *Jones v. Morgan*, 1 Bro. C. C. 206, 28 Eng. Rep. R. 1086 (1783).

Lord Mansfield's decisions in the law of Real Property are of little interest to us today save to show the quality of his mind. Professor John Chipman Gray says that ". . . the reputation of Lord Mansfield as a commercial lawyer should not blind us to the fact that he was not equally great in the law of real property."<sup>39</sup> The trouble was not that Lord Mansfield was ignorant of the law of real property, but that he mistook the scope of the judicial process; he thought that by judicial decision he could change rules deeply rooted in the law but which his orderly logical mind showed him were originally based upon misconceptions, or had outlived their usefulness. Yet so farsighted was he in his rulings in this branch of the law that many of his decisions, considered revolutionary and rejected in his day, have since been enacted into statutory law. Consider the rule in *Shelley's Case*. It is incomprehensible to us now that such a furor could have been raised over any attempt to interfere with this arbitrary, artificial rule. Yet friendships were broken over it and Mansfield, because he valiantly, though unwisely, sought to reduce the rule from one of absolute law to one of construction that would yield to the intention of the testator, was subjected to abuse and vituperation that came from most reputable quarters. To many lawyers of the 18th Century the feudal origin of the law was a reproach; its antiquity was a disgrace. Lord Mansfield held that view. The storm broke over the celebrated case of *Perrin v. Blake*.<sup>40</sup> For the second time Mr. Justice Yates dissented. Mansfield administered a stinging rebuke to the dissenter.

"I do not doubt that there are and have always been, lawyers of a different bent of genius and different course of education who have chosen to adhere to the strict letter of the law and they will say that *Shelley's Case* is uncontrollable authority, and they will make a difference between trusts and legal estates, to the harassing of a suitor."

Mr. Justice Yates thereupon took a walk to the more placid precincts of the Court of Common Pleas, but he had the satisfaction of having his dissent upheld on appeal to the Exchequer Chamber, Mr. Justice Blackstone, regarded as the foremost authority on the law of real property then on the bench, taking a leading part in the reversal. The case never went to the House of Lords. As Lord Wright tells the story, "The rule in *Shelley's Case* was abolished in 1925. Most people now perhaps remember it for the sake of the wit and wisdom of Lord Macnaghten's

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39. GRAY, *THE RULE AGAINST PERPETUITIES* (3rd ed. 1915) 169 n. 5.

40. 4 Burr. 2579, 98 Eng. Rep. R. 355 (1770) cited in 2 CAMPBELL, *LIVES OF THE CHIEF JUSTICES* (1849) 433.

judgment in *Van Grutten v. Foxwell* (1897) A. C. at p. 668. Some time after that judgment was delivered, the editor of a well known text book was asked why he had not referred to *Van Grutten v. Foxwell*. He replied that he could not bear to think of a judgment which spoke disrespectfully of the rule in *Shelley's Case*. I wonder if some such feeling does not lurk in the minds of many lawyers when reform of any familiar rule is mooted."<sup>41</sup>

*Evidence, Pleading and Practice*

Lord Mansfield did much to liberalize the law of evidence. He distinguished between two kinds of presumption, one in effect a rule of law and the other a "species of evidence."<sup>42</sup> He formulated the rule governing declarations as to matters of pedigree.<sup>43</sup> He restated some of the important rules of evidence. Opinion, generally speaking, was inadmissible.

"Great stress was laid upon the opinion of the broker. But we all think, the jury ought not to pay the least regard to it. It is mere opinion; which is not evidence. . . . It is an opinion which, if rightly formed, could only be drawn from the same premises from which the Court and jury were to determine the cause: and therefore it is improper and irrelevant in the mouth of a witness."<sup>44</sup>

On the other hand, he adhered to the exception to this rule, which allowed the opinion of experts in matters involving special knowledge.

"In matters of science no other witnesses can be called. An instance frequently occurs in actions for unskillfully navigating ships. The question then depends on the evidence of those who understand such matters; and when such questions come before me, I always send for some of the brethren of the Trinity House."<sup>45</sup>

Lord Mansfield evidently was not troubled by any question as to the power of the court of its own motion to call independent experts, a subject which has engaged the attention of the New York State Law Revision Commission.<sup>46</sup> The handwriting of a witness could be proved by the

41. WRIGHT, LEGAL ESSAYS AND ADDRESSES (1939) Preface, XIX; see (1935) 4 FORDHAM L. REV. 316.

42. *Goodtitle v. Duke of Chandos*, 2 Burr. 1065, 1072, 97 Eng. Rep. R. 710 (1760).

43. *Goodright v. Moss*, 2 Cowp. 591, 594, 98 Eng. Rep. R. 1257 (1777); but parents were not allowed to offer evidence showing that a child born during marriage was illegitimate.

44. *Carter v. Boehm*, 3 Burr. 1905, 1918, 79 Eng. Rep. R. 1162 (1766).

45. *Folkes v. Chadd*, 3 Doug. 157, 159, 99 Eng. Rep. R. 589 (1782).

46. REPORT OF THE N. Y. LAW REVISION COMMISSION (1936) 803, 855.

testimony of persons who had seen him write.<sup>47</sup> He defined the parol evidence rule with a clarity that sometimes is lacking in modern decisions.

"The doctrine is simply this: You shall not by parol evidence impeach the written agreement on account of the danger of perjury. But when the agreement is admitted, you may show other circumstances which make it illegal, but do not contradict the bond."<sup>48</sup>

In anticipation of the modern trend, he leaned toward the admissibility of evidence, placing the emphasis on credibility rather than competency.

In his views on Pleading and Practice, we find ourselves very much at home with Lord Mansfield. He displayed a remarkable liberality, considering the period in which he lived.

". . . the strong bias of my mind has always leaned to prevent the manifest justice of a cause from being defeated or delayed by formal slips, which arise from the inadvertance of gentlemen of the profession; . . . I have always thought, and often said, that the rules of pleading are founded in good sense. Their objects are precision and brevity."<sup>49</sup>

"The justice of the case is extremely plain: and an objection that tends manifestly to obstruct that justice, is entitled to no favor. . . . It is making the practice of the Court chicane, and an elusion of justice, instead of being a method of coming at right. I wish gentlemen would tell their clients, that objections of this sort ought not and cannot prevail."<sup>50</sup>

Lord Mansfield always objected to the unnecessary length of pleadings<sup>51</sup> and was extremely liberal in allowing amendments.

"General rules are wisely established, for attaining justice with ease, certainty, and dispatch. But the great end of them being 'to do justice', the Court must see that it be really attained . . . to give the defendant leave to amend his plea . . . seems to be the true way to come at justice; and what we therefore ought to do: for the true test is *boni judicis est ampliare justitiam* [not *jurisdictionem* as it has often been cited]. This is what I would wish to do, if we can do it."<sup>52</sup>

47. *Rex v. Hensley*, 1 Burr. 642, 644, 97 Eng. Rep. R. 489 (1758).

48. *Pole v. Horrobin*, 3 Doug. 91, 95, 99 Eng. Rep. R. 555 (1782).

49. *Bristow v. Wright*, 2 Doug. 665, 666, 99 Eng. Rep. R. 421 (1781).

50. *Hart v. Weston*, 5 Burr. 2586, 98 Eng. Rep. R. 360 (1770).

51. *Dundass v. Weymouth*, 2 Cowp. 665, 98 Eng. Rep. R. 1296 (1777); ". . . though he was told this was the usual practice, he thought it a disgrace to the profession and to the court."

52. *Rex v. Philips*, 1 Burr. 292, 301, 304 97 Eng. Rep. R. 321 (1757); see also *Rex v. Lyme Regis*, 1 Doug. 135, 99 Eng. Rep. R. 89 (1779): "It is very essential to the administration of justice, that slips, or mistakes of the pen, should not be fatal." *Sayer v. Pocock*, 1 Cowp. 407, 408, 98 Eng. Rep. R. 1156 (1776): "One is ashamed and grieved

*Public Law*

Mansfield showed his complete independence by declaring to be illegal the general warrant issued by his own colleagues in the cabinet.<sup>53</sup> In the great case of *Campbell v. Hall*, he laid down the rules under which British colonies have been governed ever since and declared invalid the royal proclamation issued by the King, on his own authority, imposing a tax upon the inhabitants of Grenada, which had been ceded to England after the Seven Years' War by the Peace of 1763.<sup>54</sup>

In the celebrated *Sommersett's Case* he ruled that a slave brought into England could not be removed from the country, against his will, by his master.<sup>55</sup> What does it matter if, as has been charged, Mansfield sought every means in his power to have the case settled so as to avoid handing down a decision on the subject? Suppose the actual decision did not go as far as the language of his opinion indicates. What if the decision was based on prior rulings by Holt and Northington which rejected an earlier case holding that a slave was a chattel and subject to be recovered as such. It is said that the decision was virtually extorted from Lord Mansfield and that he really decided the case on a technical fault in the return to the writ of *habeas corpus* which the slave sued out. But Mansfield did sustain the slave's writ and so eminent an authority as Holdsworth expresses the view that Mansfield's decision settled the law on the subject.<sup>56</sup>

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that such objections [to an amendment] remain. They have nothing to do with the justice of the case, but only serve to entangle, without being of the least aid in preventing irregularities." We admire the efficient way in which Lord Mansfield cleared his calendar; his frequent resort to special verdicts, his success in having a reluctant bar agree to consolidate causes having the same issues, his discouragement of the prolixity of counsel and his general practice of rendering his decisions promptly.

53. *Money v. Leach*, 1 Bl. W. 555, 96 Eng. Rep. R. 320 (1765).

54. 1 Cowp. 204, 98 Eng. Rep. R. 1045 (1774).

55. 20 How. St. Tr. 1, 82 (1772) cited in 3 CAMPBELL, LIVES OF THE CHIEF JUSTICES (1849) 320; see also THOMAS, LEADING CASES IN CONSTITUTIONAL LAW (1934) 107 *et seq.*, and 1934, 50 L. Q. REV. 499.

56. 3 HOLDSWORTH, HISTORY OF ENGLISH LAW (1923) 508: "The decision was then no foregone conclusion. The slave trade was a well established and a lucrative business in which many had an interest; Yorke and Talbot, when attorney and solicitor-general had given an opinion against this view of the law; and York had adhered to this opinion when he became Lord Chancellor. That Lord Mansfield should refuse to follow the custom of the merchants, and should give a decision based mainly on the rules of the medieval common law, no doubt surprised many of his contemporaries as much as an opposite decision would have surprised us."

For an excellent account of Lord Mansfield's views on the functions of court and jury in criminal libel cases, which aroused bitter public condemnation, see 2 STEPHEN, HISTORY

To this day, students of the law thrill over the eloquence of the opinion:

“The air of England has long been too pure for a slave, and every man is free who breathes it. Every man who comes into England is entitled to the protection of English law, whatever oppression he may heretofore have suffered, and whatever may be the colour of his skin. Let the negro be discharged.”

We shall now take up more in detail Lord Mansfield's decisions bearing on Religious Tolerance, The Doctrine of Consideration, Quasi-Contracts, The Relationship of Law and Equity and his conception of The Nature of the Judicial Process.

### *His Broad Tolerance*

In an age of religious intolerance based primarily on political considerations, Lord Mansfield, although by no means a champion of religious freedom, did what he could to soften the rigors of the disability statutes.<sup>57</sup>

Under the Test Act, all persons elected to municipal office had to

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OF THE CRIMINAL LAW OF ENGLAND (1883) 343; see also his decision reversing the outlawry of Wilkes and his great speech proclaiming the independence of the judiciary, *Rex v. Wilkes*, 4 Burr. 2527, 98 Eng. Rep. R. 327 (1770). See also *Rex v. Woodfall*, 20 How. St. Tr. 895 (1770). His indiscretion in the debates in Parliament on the validity of the last mentioned decision is discussed in 2 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND at 326. See also *Rex v. William Shipley, Dean of St. Asaph*, 21 How. St. Tr. 847 to 1046 (1784); 2 CAMPBELL, LIVES OF THE CHIEF JUSTICES, 481.

For an interesting sidelight on Lord Mansfield's attitude in criminal cases see HOLLIDAY, LORD MANSFIELD, at 213; MATHEW, FOR LAWYERS AND OTHERS at 155. He believed forgery was a crime which endangered commercial credit and merited the supreme penalty. In the field of criminal law, Mansfield was content to follow the trend of his time; he did not see ahead. He accepted the savagery of the penal code as a matter of course. See *Crepps v. Durden*, 2 Cowp. 640, 98 Eng. Rep. R. 1283 (1777), a holding that by exercising his trade on Sunday, a man committed only one offense, not every time he sold an article; *Rex v. Stratton*, 21 How. St. Tr. 1045, 1223 (1779) on “compulsion by necessity”, discussed in 2 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND at 109.

57. He was determined that no man should be convicted before him of celebrating Mass, though that was forbidden by a statute of William III. In *Rex v. Webb*, he displayed his religious toleration by suggesting that “the jury must not infer that he is a priest because he said Mass and that he said Mass because he is a priest.” (See HOLLIDAY, *op. cit.* pp. 176-179, and, 2 CAMPBELL, LIVES OF THE CHIEF JUSTICES, at 514, 515). Lord Mansfield went a long way in admitting the evidence of non-Christians and non-conformists, allowing them to be sworn according to their own customs. *Atcheson v. Everitt*, 1 Cowp. 382, 98 Eng. Rep. R. 1142 (1776). In *Rex v. Barker*, 3 Burr. 1265, 97 Eng. Rep. R. 823 (1762), he granted a mandamus to enforce the admission of a dissenting minister to an endowed chapel. For a scholarly discussion of this subject see Mullett, *Catholics and the Courts in England Since the Protestant Revolt*, (1940) 9 FORDHAM L. REV. 38.



conform. If a person elected refused to accept the office he was fined. The practice grew of electing wealthy dissenters to office, and when they failed to take the necessary oath, they were heavily fined. Lord Mansfield denounced this vicious practice, in his celebrated speech in the House of Lords in the case of *The Chamberlain of London v. Evans*:

"Conscience," he said, "is not controllable by human laws, nor amenable to human tribunals. Persecution, or attempts to force conscience, will never produce conviction, and are only calculated to make hypocrites or martyrs. . . . The common law of England, which is only common reason or usage, knows of no prosecution for mere opinions. . . . There is nothing certainly more unreasonable, more inconsistent with the rights of human nature, more contrary to the spirit and precepts of the Christian religion, more iniquitous and unjust, more impolitic, than persecution. It is against Natural Religion, Revealed Religion and Sound Policy."<sup>58</sup>

"This noble vindication of the rights of conscience," Lord Campbell says, "produced an unanimous reversal of the decree of the Lord Mayor's Court, but caused considerable clamour in the city; and Lord Mansfield was set down with many as 'little better than an infidel'."<sup>59</sup>

Lord Mansfield expressed his entire approval of the extremely moderate bill passed, with practically no opposition, in 1778, to mitigate the laws against Catholics. The refusal to repeal the Act of 1778 led to a most disgraceful episode. Charles Dickens describes the riots in "Barnaby Rudge."<sup>60</sup> The wild mob, encouraged by the fanatical Lord George Gordon, descended on the Houses of Parliament and insulted and assaulted some of its members on their way to the sessions. Lord Mansfield, then in his seventy-fourth year, occupied the Woolsack in the absence of the Lord Chancellor. He acted with poise and with courage. The mob singled out Mansfield as one of its main objects of hatred. His town house in Bloomsbury Square was burned to the ground, and his library was completely destroyed together with all his notes and correspondence.

Mansfield bore his loss with dignity and fortitude, refusing to make any claim for compensation, but supporting the action of the government in calling out the militia to suppress the disorders. Yet this same man presided over the trial of Lord Gordon for high treason. Gordon

58. HOLLIDAY, LORD MANSFIELD, at 260, 261. See 8 HOLDSWORTH, HISTORY OF ENGLISH LAW, (1926) 414; 2 BURN. ECCL. LAW 218.

59. 2 CAMPBELL, *op. cit.* at 514.

60. Vol. II, Chapter VIII; see also the account of the outrageous occurrences in I, MEMOIRS OF SIR SAMUEL ROMILLY (MDCCCXL) 114 to 133.

was acquitted after a fair trial and an impartial summation to the jury. Even so pronounced a Tory as Doctor Johnson declared: "I hate Lord George Gordon, but I am glad he was not convicted of this constructive treason; for, though I hate him, I love my country and myself."

### *The Doctrine of Consideration*

By his decisions on the subject of consideration in contract, Lord Mansfield enjoys the rare distinction of one who has stepped out of his own environment and bears us company today.

The doctrine of consideration has been referred to by one of the greatest of modern judges as "a concept which itself came into our law, not so much from any reasoned conviction of its justice, as from historical accidents of practice and procedure."<sup>61</sup>

With his conviction that the customs of merchants should be incorporated into the common law and be made to govern in applicable commercial transactions, and that above all, fair and just dealing should prevail, it is not surprising that Lord Mansfield should have made vigorous efforts to put a dent in the existing common law rules relating to consideration. His views on consideration are illustrated in important decisions which have been the subject of discussion and controversy through the years.

In 1765, in *Pillans v. Van Mierop*,<sup>62</sup> his most famous decision on this subject, he laid down the rule that a promise in writing made in or as part of a business transaction was binding without any consideration. He cited no authorities. "In commercial cases amongst merchants," he said, "the want of consideration is not an objection. . . . A *nudum pactum* does not exist, in the usage and law of merchants." This flat pronouncement being contrary to the common law, he looked around for some reconciling principle. "I take it," he went on, "that the ancient notion about the want of consideration was for the sake of evidence only." The important thing to him was the intention to contract, the intention to assume a binding duty. Consideration was but an evidence of such an intention. A promise under seal had been held binding, because of the seal, long before the doctrine of consideration was evolved in the common law, and Mansfield reasoned that by reducing the undertaking to writing, although not under seal, a definite intention to contract would be disclosed. That being so, it "would be very destructive to trade and to trust in commercial dealing," if the promise (in

61. *Allegheny College v. Chautauqua Bank*, 246 N. Y. 369, 375, 159 N. E. 173, 175 (1927).

62. 3 Burr. 1663, 1669, 97 Eng. Rep. R. 1035 (1765).

writing) although gratuitous could be repudiated. On the basis of reason, ethics and convenience the decision was sound. If it had been sustained, it probably would have been extended to non-commercial transactions.

But the rule laid down in this case was overruled in *Rann v. Hughes*, in 1784.<sup>63</sup> Lord Chief Baron Skynner, delivering the opinion of the Judges to the House of Lords, said: "It is undoubtedly true that every man is by the law of nature bound to fulfill his engagements. It is equally true that the law of this country supplies no means nor affords any remedy, to compel the performance of an agreement made without sufficient consideration." And further, "All contracts are by the laws of England distinguished into agreements by specialty and agreements by parol; nor is there any such third class, as some of the counsel have endeavored to maintain, as contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved." This case did not involve a mercantile transaction, but no attempt was later made to press any such distinction. As Lord Wright points out, "The idea . . . that a deliberate intention to contract was sufficient to create a binding obligation was never seriously entertained. It was too far removed from the traditional ideas of the common law. . . ."<sup>64</sup>

In 1777, Lord Mansfield approached the doctrine of consideration from another angle. "It was sought to find something outside of the deliberately made promise, outside of the intention to contract, to give it efficacy." In *Trueman v. Fenton*<sup>65</sup> he held that a promise by a bankrupt to pay a creditor, who accepted no dividend, was enforceable. But he did this on the broad theory that moral obligation was good consideration for a promise. ". . . the debts of a bankrupt," he ruled "are due in conscience, notwithstanding he has obtained his certificate; and there is no honest man who does not discharge them, if he afterwards has it in his power to do so. Though all legal remedy may be gone, the debts are clearly not extinguished in conscience." He used the analogy of the revival of an obligation barred by the Statute of Limitations.<sup>66</sup>

63. 7 T. R. 350 note a, 101 Eng. Rep. R. 1014 (1784); see also 4 Brown. P. C. 27, 2 Eng. Rep. R. 18 (1778).

64. WRIGHT, LEGAL ESSAYS AND ADDRESSES at 315.

65. 2 Cowp. 544, 98 Eng. Rep. R. 1232 (1777).

66. Cf. *Dusenbury v. Hoyt*, 53 N. Y. 521, 523, 13 Am. Rep. 543 (1873); "The moral obligation of the bankrupt to pay it remains. It is due in conscience, although discharged in law, and this moral obligation, uniting with a subsequent promise by the bankrupt to pay the debt, gives a right of action." *Herrington v. Davitt*, 220 N. Y. 162, 115 N. E. 476 (1917): "The action . . . might . . . have been brought upon the new promise."

In 1782, in *Hawkes v. Saunders*,<sup>67</sup> he pressed the doctrine of "moral consideration" to a further point. In that case he said:

"Where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever actually made. *A fortiori*, a legal or equitable duty is a sufficient consideration for an actual promise. Where a man is under a moral obligation, which no Court of Law or Equity can enforce, and promises, the honesty and rectitude of the thing is a consideration."

The doctrine of "moral consideration" was generally regarded as law in England until 1840, when it was rejected in *Eastwood v. Kenyon*.<sup>68</sup> Lord Denman, C.J., in that case held "that consideration in its technical meaning was inconsistent with the idea of 'moral' consideration; he dismissed with contempt and in a sentence the idea that a legal obligation could be based on the moral obligation to perform a promise which the mere promise by itself, if seriously made, involves."<sup>69</sup> Thus the modern law in this matter was established.

As Dean Pound has pointed out, the courts fortified the old technical doctrine of consideration "and enabled it to survive so that, although slowly crumbling and loaded with exceptions and analytical anomalies it remains a serious barrier in the way of security of transactions."<sup>70</sup> So much so that in 1881, Jessel, M.R., was moved to say: "According to English Common Law a creditor might accept anything in satisfaction of his debt except a less amount of money. He might take a horse, or a canary, or a tomtit if he chose, and that was accord and satisfac-

67. 1 Cowp. 289, 98 Eng. Rep. R. 1091 (1782): See the reference to this by Gaynor, J., in *Drake v. Bell*, 26 Misc. 237, 55 N. Y. Supp. 945, *aff'd* 46 App. Div. 275, 61 N. Y. Supp. 657 (2d Dept. 1899).

68. 11 Ad. & E. 438, 450, 113 Eng. Rep. R. 482 (Q. B. 1840); this case also held that the consideration must move from the promisee and that a past or executed consideration was not a good consideration at law.

69. WRIGHT, LEGAL ESSAYS AND ADDRESSES at 315-316.

70. POUND, INTERPRETATIONS OF LEGAL HISTORY (1923) 66; see also POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW (1925) 272: "On the other hand the extent to which courts today are straining to get away from the bargain theory and enforce promises which are not bargains and cannot be stated as such is significant. Subscription contracts, gratuitous promises afterwards acted on, promises based on moral obligations, new promises where a debt has been barred by limitations or bankruptcy or the like, . . . —all these make up a formidable catalogue of exceptional or anomalous cases with which the advocate of the bargain theory must struggle. When one adds enforcement of promises at suit of third-party beneficiaries which is making headway the world over, and enforcement of promises where consideration moves from a third person, which has strong advocates in America and is likely to be used to meet the exigencies of doing business through letters of credit, one can but see that Lord Mansfield's proposition that no promise made as a business transaction can be a *nudum pactum* is nearer realization than we had supposed."

tion; but, by a most extraordinary peculiarity of the English Common Law, he could not take 19s 6d in the pound; that was *nudum pactum*. . . . That was one of the mysteries of English Common Law."<sup>71</sup>

As late as 1915, in a case holding that, even if there was an agreement, it was unenforceable for want of consideration, Lord Dunedin said: ". . . I confess that this case is to my mind apt to nip any budding affection which one might have had for the doctrine of consideration. For the effect of that doctrine in the present case is to make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce."<sup>72</sup>

Although Lord Mansfield's decisions on consideration were rejected, in the main, in England, they have not fallen on stony ground. "There is, it seems to me," says Holdsworth, "good sense in Lord Mansfield's view that consideration should be treated, not as the sole test of the validity of a simple contract, but simply as a piece of evidence which proves its conclusion. This is in effect the view which he tried to enforce in *Pillans v. Van Mierop* and though, like some of his other rulings, it was demonstrably not English law, it embodied a true idea of the tendency of legal development. . . . A legal history is not perhaps the place to make suggestions as to the law of the future. It is concerned with the past. But, if history is to be something more than mere antiquarianism, it should be able to originate suggestions as to the best way in which reforms in the law might be carried out, so as to make it conform with present needs." The true remedy, he says, is not to scrap the doctrine of consideration but to reduce it to a subordinate place in the English theory of contract. So he suggests an act which would (1) abolish the differences between simple and specialty contracts, (2) repeal Sec. 4 of the Statute of Frauds and Sec. 4 of the Sale of Goods Act, and (3) provide "that all lawful agreements should be valid contracts, if the parties intended by their agreement to affect their legal relations, and *either* consideration was present *or* the agreement was put into

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71. *Couldery v. Bartrum*, 19 L. R. Ch. D. 394, 399 (1881); the artifice of having the other creditors all agree with each other was made the basis of the necessary consideration for the composition agreement. In 1884, the decision in *Pinnel's case*, 5 Coke 117a, 77 Eng. Rep. R. 237 (1884) was approved by the House of Lords, although with reluctance, *Foakes v. Beer*, 9 L. R. App. Cas. 605 (1884). The rule in these cases is no longer law in New York State in consequence of legislation passed on the recommendation of the Law Revision Commission. See notes 111, 112 *infra*.

72. *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.*, [1915] L. R. A. C. 847, 855.

writing and signed by all the parties thereto.”<sup>73</sup>

We go from a great English legal historian to one of her most distinguished judges, Lord Wright of Durley, formerly a Justice of the King’s Bench, Master of the Rolls, and now a Lord of Appeal in Ordinary. In his scholarly address on “The Common Law in Its Old Home,” delivered in 1936, at the Harvard Tercentenary Conference of Arts and Sciences, he sums up his views as follows:

“The scientific view is, in my opinion, . . . that the sole condition of the enforceability of a contract, assuming the transaction to be free from illegality, fraud, mistake, or kindred defects, is that the parties should have intended to enter into binding relations of contract. I think this view should be accepted as the rule of the common law. It is true that in most cases of contract there is in fact consideration, and in any disputed case consideration would have the strongest evidential value as going to show the intention to make a binding contract. That is its true function; but that is a very different conception from the present common law, which treats it as the sole condition on which a contract can be valid at all. . . . But it may be that such a change would involve too great a breach with so ancient a tradition. As a practical alternative I should propose that a promise should be enforceable as a contract if there be either (1) consideration or (2) evidence in writing. That would in effect be to accept Lord Mansfield’s ruling in *Pillans v. Van Mierop*, but without his limitation of the rule to commercial contracts. I should apply it to contracts in general.”<sup>74</sup>

What a splendid tribute to Lord Mansfield’s learning and to his ability to see far into the future!

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73. 8 HOLDSWORTH, HISTORY OF ENGLISH LAW (1926) 47, 48; see also Lorenzen, *Causa and Consideration in the Law of Contracts* (1919) 28 YALE L. J. 621, reprinted in SELECTED READINGS IN THE LAW OF CONTRACTS (1931) 565.

74. WRIGHT, LEGAL ESSAYS AND ADDRESSES, at 375, 376 also published in THE FUTURE OF THE COMMON LAW (1937) 108, 109; see also the scholarly article by Lord Wright, *Ought the Doctrine of Consideration to be Abolished from the Common Law* (1936) 49 HARV. L. REV. 1225, also published in his volume of LEGAL ESSAYS AND ADDRESSES at 287, and the recommendations of the Lord Chancellor’s Law Revision Committee, Sixth Interim Report (1937). Those recommendations are outlined in the study by Prof. Hays on *The Seal and the Enforcement of Contracts without Consideration* in the 1941 report of the N. Y. LAW REVISION COMMISSION, LEGIS. DOC. (1941) No. 65 (M) at pp. 32, 33; for an adverse criticism of those recommendations see Hanson, *Reform of Consideration*, (1938) 54 L. Q. REV. 233. It is significant that Lord Wright recommends that the rule in *Foakes v. Beer*, 9 L. R. App. Cas. 605 (1884), should be abrogated; that is, the rule that acceptance of or a provision to accept a smaller sum in satisfaction of a larger sum which is liquidated and presently due and owing is no consideration; and that past consideration should be treated as sufficient consideration. And how it would gratify Lord Mansfield to read this further recommendation by Lord Wright: “As a corollary to such a reform there should go, as I think, the repeal of Section 4 of the Statute of Frauds which deals with contracts, and Section 4 of the Sale of Goods Act (1893). These sections

In this country Lord Mansfield's views on consideration have had a marked beneficial effect.<sup>75</sup> In New York, the well known case of *De Cicco v. Schweizer*<sup>76</sup> indicates a tendency to liberate the courts from the technical rules governing consideration at common law. A father had made an agreement with the prospective husband of his daughter to pay the daughter a certain sum annually. The daughter sued to recover an unpaid installment and was allowed to recover. It was urged that consideration was lacking because at the time when the promises were exchanged the promisee was already affianced to the daughter and "the marriage was merely the fulfillment of an existing legal duty."

Cardozo, J., writing for the Court of Appeals, rejected this contention. He found a good consideration for a promise which was undoubtedly based upon a moral obligation. The situation was the same in substance as if the promise had been made to both husband and wife and had been intended to induce performance by both. They were free to break their engagement or to postpone their marriage. If they gave up that right and assumed the obligations of marriage in reliance on the father's promise, he may not thereafter retract it.

And in *Allegheny College v. Chautauqua Co. Bank*<sup>77</sup> a way was found to uphold the binding effect of a charitable subscription. Cardozo, Ch. J., speaking for the majority of the court, said that "the question is not merely whether the enforcement of a charitable contribution can be squared with the doctrine of consideration in all its ancient rigor." The question also was whether it could be enforced under the doctrine of promissory estoppel.

Lord Mansfield's decisions on consideration have come to their fullest

have from the beginning proved unsatisfactory. They have led to untold chicanery and litigation; they have been restricted and explained away wherever possible; they have been the subject of unnumbered sophistries and evasions." WRIGHT, *LEGAL ESSAYS AND ADDRESSES* at 377; *THE FUTURE OF THE COMMON LAW* at 110.

75. See for example *RESTATEMENT, CONTRACTS* (1932) §§ 86, 87, 88. See also Sec. 90, illustration 1, in which a promise has been made without consideration but is of such a nature that it reasonably induces action on the faith of the promise or in reliance upon it. See also *McKenzie v. Harrison*, 120 N. Y. 260, 24 N. E. 458 (1890). Cf. Lord Mansfield's decision in *Montefiori v. Montefiori*, 1 Bl. W. 363, 96 Eng. Rep. R. 203 (1762), in which he resorted to estoppel by conduct, a formula through which the legal conscience finds expression.

76. 221 N. Y. 431, 436, 438, 439, 117 N. E. 807, 809, 810 (1917).

77. 246 N. Y. 369, 373, 374, 159 N. E. 173, 174, 175 (1927); see also *Matter of Taylor*, 251 N. Y. 257, 167 N. E. 434 (1929); *I. & I. Holding Corp. v. Gainsburg*, 276 N. Y. 427, 12 N. E. (2d) 532 (1938); Cf. Lord Wright's views on the presence of consideration in charitable subscriptions, 49 *HARV. L. REV.* (1936) 1225, 1250 reprinted in Wright, *Legal Essays and Addresses*, pp. 287, 321.

fruition in the legislation enacted in New York State as the result of the recommendations of the Law Revision Commission.<sup>78</sup> At first the Commission dealt with problems of consideration involved in changes, modifications or the discharge of existing contracts. In its 1941 report it took up the doctrine of consideration as it affected the formation of new or original contracts. The full significance of the valuable contributions of this Commission can be appreciated only after an examination of their splendid reports and the scholarly research studies which support them. Without any attempt at detail it will suffice to list some of the legislation in the field we are considering, enacted in consequence of the Commission's recommendations:

1. Except as otherwise expressly provided by statute, the presence or absence of a seal upon a written instrument hereafter executed shall be without legal effect.

2. A release, in writing, was made binding regardless of a seal or consideration.

3. An agreement, in writing, to change, or modify or to discharge in whole or in part, any contract, obligation, or lease or any mortgage or other security interest in personal or real property, was made binding regardless of consideration.

4. The law with respect to accord and satisfaction was changed so as to make written executory accords binding.

In dealing with the formation of new or original contracts, the following legislation has been passed:

5. A promise, the consideration for which is past or executed, is a binding promise, if it is in writing, signed by the promisor and if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed.

6. An assignment is irrevocable, notwithstanding the absence of consideration, provided the assignment is in writing and signed by the assignor.

7. The requirement of consideration is dispensed with, in the case of an offer in writing, which expressly states that it shall be irrevocable for a specified time. If the offer states that it shall be irrevocable but

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78. N. Y. LAW REVISION COMMISSION, LEGIS. DOC. (1936) No. 65 (C); *Studies Made in Relation to the Seal and Consideration* 7-293; See also Leg. Doc. (1941) No. 65 (M) entitled *Acts Recommendations and Study Relating to the Seal and to the Enforcement of Certain Written Contracts*. For a review of the early work of this important Commission, see Shientag, *A Ministry of Justice in Action: The Work of the New York State Law Revision Commission*, (1937) 22 CORN. L. Q. 183.



no time is specified, it shall be construed to be irrevocable for a reasonable time.<sup>79</sup>

The Commission has gone a long way toward acceptance of the doctrine of consideration as formulated by Lord Mansfield. In its 1941 report the Commission made the recommendations covered in items 5, 6 and 7 above set forth, which are now law. The Commission stated:

"As experience demonstrates the desirability of further additions to the list of exceptions, (i.e., dispensing with considerations), they may be made without the necessity of revising the entire law of consideration. In this way the dangers of a sudden and revolutionary change in the law of contracts are avoided, but specific and well recognized defects are removed."<sup>80</sup>

Perhaps in the near future this most efficient Commission will find itself in a position to recommend more general legislation on the subject of consideration, along the lines suggested by Lord Wright and by Holdsworth in England and by Dean Pound and others in this country. The important thing, however, is that in this country, even if not in his own, by legislation dispensing with consideration under certain conditions, and by the judicial extension of the doctrine of promissory estoppel, the influence of Lord Mansfield is being exerted, slowly to be sure, but nonetheless steadily and effectively, to enlarge "the domain of legally enforceable promises." ". . . the mills of God grind slowly, yet they grind exceeding small. . . ."

#### *Quasi-Contract*

It is in the field of Quasi-Contract or Restitution that Lord Mansfield gave forceful expression to the moral ideal implicit in the law. In his decisions on this subject he left his eternal mark on the law. "Here Lord Mansfield had his chance," says Holdsworth. "He was not faced by a coherent body of principles like the doctrine of consideration, or the rules as to disseisin or the rule in *Shelley's Case*. He found an incoherent set of rules stated in a number of heterogeneous cases; and if there was any one principle at their back, it was the innate feeling of the judges that it was just and equitable that a convenient remedy

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79. N. Y. CIV. PRAC. ACT § 342; N. Y. DEBTOR AND CREDITOR LAW § 243; N. Y. REAL PROP. LAW § 279; N. Y. PERS. PROP. LAW §§ 33, 33a. See also, N. Y. REAL PROP. LAW § 282; N. Y. PERS. PROP. LAW § 33-c. The effect given to a seal by the recent case of *Cochran v. Taylor*, 273 N. Y. 172, 7 N. E. (2d) 89 (1937) was discussed in (1939) 8 FORDHAM L. REV. 414 and later in N. Y. LAW REVISION COMMISSION, LEG. DOC. (1941) No. 65 (M).

80. N. Y. LAW REVISION COMMISSION, LEGIS. DOC. (1941) No. 65 (M) at pp. 15 and 16.

should be given in these cases. This was a situation with which he was eminently qualified to deal."<sup>81</sup>

It should be remembered that, generally, for a suitor to prevail at Common Law he had to bring his claim within one of the recognized forms of action. Certain forms of action possessed procedural advantages over others. *Indebitatus assumpsit* was such a form. It had been developed long before Mansfield. Professor Ames has stated that *indebitatus assumpsit* "did not create a new substantive right; it was primarily only a new form of procedure. . . . Based at first only upon an express promise, it was afterwards supported upon an implied promise, and even upon a fictitious promise."<sup>82</sup> By "implied promise", Ames meant a promise implied in fact or a true contract. By a "fictitious promise", he meant what has been called a promise implied by law, which is no contract at all, has nothing to do with contract, and which is, in a sense contrary to the intention of the parties, but which under certain circumstances the law will imply, as if it had been made.

*Indebitatus assumpsit* had been resorted to before Mansfield in cases of unjust enrichment, but Chief Justice Holt disliked reference to a fictitious contract which was no contract at all. It was under the influence of Lord Mansfield that "the action was so much encouraged that it became almost the universal remedy where a defendant had received money which he was 'obliged by the ties of natural justice and equity to refund'."<sup>83</sup>

Within four years after he ascended the bench, Lord Mansfield rendered his famous decision in *Moses v. Macferlan*, in which he laid down the conditions under which an action would lie for unjust enrichment and "summed up and thereby gave precision to the principle underlying the earlier cases."

"If the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action (*indebitatus assumpsit*), founded in the equity of the plaintiff's case as it were upon a contract '*quasi ex contractu*', as the Roman Law expresses it."

"This kind of equitable action," he continued, "to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which *ex aequo et bono* the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could

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81. 8 HOLDSWORTH, HISTORY OF ENGLISH LAW at 97.

82. 3 AMES, SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY (1909) 277, 298, *The History of Assumpsit*.

83. 3 AMES, *op. cit.* at 297.

not have been recovered from him by any course of law; as in payment of a debt barred by the Statutes of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or for money fairly lost at play; because, in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied); or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.

"In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."<sup>84</sup>

This crystallization of the principles underlying the doctrine of unjust enrichment did much to liberalize the Common Law and has formed the basis of a large part of our modern law of Quasi-Contracts. Lord Mansfield has been criticized because in *Moses v. Macferlan* he failed to distinguish between money paid under mistake of fact and payment made

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84. 2 Burr. 1005, 1008, 1010, 1012, 97 Eng. Rep. R. 676 (1760), Holdsworth points out that Mansfield erred in the actual decision in this case which held that the action of *indebitatus assumpsit* lay to recover money paid under the compulsion of legal process. Lord Kenyon held the action would not lie in such cases and Eyre, C.J., was of the same opinion; see *Marriot v. Hampton*, 7 T. R. 269, 101 Eng. Rep. R. 969 (1797); *Phillips v. Hunter*, 2 Bl. H. 414, 126 Eng. Rep. R. 624 (1795); 12 HOLDSWORTH, HISTORY OF ENGLISH LAW (1938) 545, 546. Professor Keener stated that Mansfield's decision in *Moses v. Macferlan* is good law. KEENER, LAW OF QUASI CONTRACT (1893) 412-416. Nor did Mansfield in this case draw a clear distinction between payment made under a mistake of fact and money paid under a mistake in law. In *Farmer v. Arundel*, 2 Bl. W. 824, 96 Eng. Rep. R. 485 (1772), De Grey, C.J., said: "When money is paid by one man to another on a mistake either of fact or of law or by deceit, this action (for money had and received) will certainly lie." In *Buller v. Harrison*, 2 Cowp. 565, 98 Eng. Rep. R. 1242 (1777) and in *Bize v. Dickason*, 1 T. R. 285, 99 Eng. Rep. R. 1097 (1786), it was assumed there was no distinction between the two situations. As is pointed out in JACKSON, HISTORY OF QUASI CONTRACT IN ENGLISH LAW (1936) 59, "The line of cases which exclude mistake of law as a ground for recovery begins with *Lowry v. Bourdieu*, 2 Doug. 468, 99 Eng. Rep. R. 299 (1780). Lord Mansfield, disallowing recovery, based his decision on the fact that it was an illegal contract, and that the parties were in *pari delicto*. Willes, J., dissented because there was a mistake. Buller, J., concurred with Lord Mansfield chiefly because it was an executed illegal contract but he also held there was no mistake of fact, and that "if the law was mistaken, the rule applies, that *ignorantia juris non excusat*." The rule was finally settled in *Bilbie v. Lumley*, 2 East 469, 102 Eng. Rep. R. 448 (1802) and *Brisbane v. Dacres*, 5 Taunt. 143, 128 Eng. Rep. R. 641 (1813). In Equity the courts did not adhere strictly to the rule that recovery could not be had for money paid by mistake of law, e.g., where there was a fiduciary relationship between the parties; *Rogers v. Ingham*, 3 L. R. Ch. D. 351, 355, 357 (1876).

by mistake of law. The view that, generally speaking, money paid by mistake of law cannot be recovered in an action at law for unjust enrichment, would seem to be out of harmony with realistic considerations, and is being subjected to critical scrutiny. The New York State Law Revision Commission has been studying this problem and is expected to report thereon to the Legislature in the near future. It is to be hoped that the Commission's recommendations will tend to do away with the distinctions between mistake of law and mistake of fact and bring the law of New York into line with Lord Mansfield's abhorrence of unjust enrichment, however it may arise.<sup>85</sup>

In later cases Lord Mansfield reiterated his conception of the action for unjust enrichment: "It is a liberal action founded upon large principles of equity where the defendant cannot conscientiously hold the money."<sup>86</sup> "This is a liberal action in the nature of a bill in equity; and if, in the circumstances of the case, it appears that the defendant cannot in conscience retain what is the subject matter of it, the plaintiff may well support this action."<sup>87</sup>

It should be noted that while Lord Mansfield used the fiction of a debt or a contract implied by law, it was for procedural reasons; he placed the emphasis on unjust enrichment, the obligation of a defendant to restore what in equity and good conscience, he should not be permitted to retain.

In this country, the trend of the law has been to follow the principles laid down by Lord Mansfield. Professor Keener was the first to treat the subject of Quasi-Contracts adequately, as a separate and distinct branch of the law. In the Restatement of the Law, the subject is called The Law of Restitution, and there is set forth a definite system of rules just like the rules of contract or tort. The basis of the remedy, whether

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85. N. Y. LAW REVISION COMMISSION (1940) at pp. 16, 17. The Commission is also engaged in a study on the subject of the "Recovery of Plaintiff in Actions on Contracts, The Plaintiff Being in Default." This study likewise may result in a closer approach to Lord Mansfield's rules on unjust enrichment.

86. *Sadler v. Evans*, 4 Burr., 1984, 1986, 98 Eng. Rep. R. 34 (1766).

87. *Clarke v. Shee*, 1 Cowp. 197, 98 Eng. Rep. R. 1041 (1774); see *Smith v. Bromley*, 2 Doug. 696 n, 99 Eng. Rep. R. 441 (1760), for the rule that the action could be used when the parties are not in *pari delicto*; where the parties were equally innocent, the action could not be used for the recovery of the money paid, *Price v. Neal*, 3 Burr. 1354, 97 Eng. Rep. R. 871 (1762); see also the rule that the action would not lie where the contract, though technically legal, was manifestly unfair. ". . . therefore (plaintiff) should not be assisted in an action for money had and received, which is an equitable action and founded in conscience under the particular circumstances of each case." *Plumbe v. Carter*, 1 Cowp. 116, 98 Eng. Rep. R. 997 (1774) N. B.

at law, or in equity (by way of constructive trust, equitable lien or subrogation), is the restitution by the defendant of what would be, if not restored, an unjust enrichment.

"On this topic," says Lord Wright as late as 1939, "legal thought is, in my opinion, more generally advanced in America than in England, where it is still considered a mark of legal orthodoxy to deny or ignore the distinction between contract and quasi-contract and say that there are only two categories, contract and tort. This may appear strange when it is realized that in England after the Common Law Procedure Act the fictitious *assumpsit* became superfluous and obsolete, and then a little later all forms of action were abrogated by the Judicature Act of 1873. This confusion of juristic conceptions is unfortunate because it has, at least for the time, prevented the development in England of the doctrine of quasi-contract."<sup>88</sup>

Professor Winfield has written what appears to be the fairest and most scholarly analysis of the problem. "It seems harsh," he says, "to reproach Mansfield for leaving 'the sound soil of implied contract' for 'the shifting sands of natural equity'. Whatever faults the *aequum et bonum* theory may have had, it was not nearly so artificial as the doctrine of 'implied contract' and it was probably not a whit more unstable."<sup>89</sup>

Sir Frederick Pollock in one of his Essays refers to the "introduction

88. WRIGHT, LEGAL ESSAYS AND ADDRESSES at 207.

89. WINFIELD, TORT AND QUASI CONTRACT, IN THE PROVINCE OF THE LAW OF TORT (1931)

131. See, however, JACKSON, THE HISTORY OF QUASI CONTRACT IN ENGLISH LAW (1936) 119-121.

Holdsworth says that Winfield "would make the essence of this large group of quasi-contractual obligations, not relationships from which the law will imply a promise but 'the idea of unjust benefit'." Fifoot is in general agreement with this view, FIFOOT, LORD MANSFIELD at 245-249. Holdsworth does not agree. He believes there is much to be said for the retention of the idea of a contract implied in law and gives his reasons for that view; 12 HOLDSWORTH, HISTORY OF ENGLISH LAW (1938) 545. Professor Hazleton in his Preface to Jackson's volume says "By turning the minds of lawyers from the theory of fictitious contract to a theory based on considerations of natural justice and *aequum et bonum*, Mansfield introduced into the study of quasi contract certain notions of an equitable character which, still of influence, have given to the obligation, from some points of view, the appearance of an equitable institution enforced by common law remedies." (P. XIX)

ALLEN, LAW IN THE MAKING (1930) 229, says: "As Lord Mansfield rightly saw, the whole basis of quasi contract is equitable, being founded on natural justice and 'imposed by law as the result of a desire to do justice between parties who have been brought into relation with one another, where such relation is not strictly one of contract.'" Citing 2 MILES, DIGEST OF ENGLISH CIVIL LAW (Jenks ed.), Part III, Art. 707.

in Common Law Procedure of a liberal and elastic remedy on causes of action *quasi ex contractu*". "Blackstone," Sir Frederick Pollock continues, "following Lord Mansfield's creative example as a faithful expositor, said in so many words of this class of actions—those of which the count for 'money had and received to the plaintiff's use' is the type—that they arise 'from natural reason and the just construction of the law'. Thus the whole modern doctrine of what we now call quasi-contract rests on a bold and timely application, quite conscious and avowed, of principles derived from the Law of Nature."<sup>90</sup>

Three cases in England illustrate the trend in that country toward placing the emphasis on the fictitious contract implied by law.

Lord Sumner, when he was on the Court of Appeal, said in 1913:<sup>91</sup>

"To ask what course would be *ex aequo et bono* to both sides never was a very precise guide, and as a working rule it has long since been buried. . . . Whatever may have been the case 146 years ago, we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled 'justice as between man and man'."

In 1914, the House of Lords decided the famous case of *Sinclair v. Brougham*.<sup>92</sup> While the court afforded to the plaintiff a measure of equitable relief, based upon principles of unjust enrichment, there were dicta to the effect that actions arising *quasi ex contractu* are actions based upon a contract which is imputed to the defendant by a fiction of law. "The fiction can only be set up with effect if such a contract would be valid if it really existed." (The reference was to a contract which, if made, would have been *ultra vires*.)

To cap the climax, in 1923, so able a judge as Scrutton, L.J., deprecated what he called the "well meaning sloppiness of thought" which the doctrine of *aequum et bonum* involved.<sup>93</sup>

An American judge is somewhat embarrassed by these observations. It has always been supposed that to ensure justice as between man and man was the highest aim of the law. There are as many precedents to guide judges with respect to what constitutes unjust enrichment as there

90. POLLOCK, *ESSAYS IN THE LAW* (1922) 68, 69. Sir Frederick Pollock in this connection quotes 1 Wms. Saund. 366 (1871), to the effect that "Lord Holt used to say that he was a bold man that first ventured on them (the general or common counts) though they are now every day's experience."

91. As Hamilton, L.J., in *Baylis v. Bishop of London*, 1 L. R. Ch. D. 127, 140 (1913).

92. L. R. A. C. 398 (1914). See the scholarly analysis of this case, and the problems it presents in Wright, *English Law of Quasi-Contracts* (1938) 6 CAMB. L. J. 305-326, reprinted in WRIGHT, *LEGAL ESSAYS AND ADDRESSES*, at 1-33.

93. *Holt v. Markham*, 1 L. R. K. B. 504, 513 (1923).

are to determine when a fictitious promise will be implied by law to bring about the restitution demanded in good conscience.

In this connection it may be well to consider an observation made by Sir Frederick Pollock in his *Essay on "The History of the Law of Nature"*:

"One of the most characteristic and important features of the modern Common Law is the manner in which we fix the measure of legal duties and responsibilities, where not otherwise specified, by reference to a reasonable man's caution, foresight or expectation, ascertained in the first instance by the common sense of juries, and gradually consolidated into judicial rules of law. The notions of a reasonable price and of reasonable time are familiar in our law of sale and mercantile law generally. Within the last century and a quarter, or thereabouts, the whole doctrine of negligence has been built up on the foundation of holding every lawful man answerable for at least the amount of prudence which might be expected of an average reasonable man in the circumstances. Now St. German pointed out as early as the sixteenth century that the words 'reason' and 'reasonable' denote for the common lawyer the ideas which the civilian or canonist puts under the head of 'Law of Nature'. Thus natural law may fairly claim, in principle though not by name, the reasonable man of English and American law and all his works, which are many."<sup>94</sup>

However, it is better to let Lord Wright meet the attack of his distinguished brethren. The only "sloppiness of thought", Lord Wright finds, is the resort to an outworn, outmoded, fiction of the law, which had served its purpose in its day and under modern practice is meaningless and confusing.<sup>95</sup> It did not occur to him at first, he says, that in this matter of quasi-contract or restitution he "was to some extent aligning himself after a long interval of time in these matters with that great Judge, Lord Mansfield, perhaps the greatest of the English judges."<sup>96</sup> Lord Wright holds that unjust enrichment has no relation

94. POLLOCK, *ESSAYS IN THE LAW* at 69. It is strange to see how even the most distinguished of English judges sometimes frown upon any talk about the "equity" or the "justice" of a case. Lord Bowen once said, perhaps not quite seriously, "I often hear eminent counsel talk of 'an equity' in the case. It always reminds me of the story that Confucius once called his followers together and asked them what was the greatest impossibility conceivable? None could answer. Then he said that it was when a blind man is searching in a dark room for a black hat which is not there." A CHANCE MEDLEY (1911) 279, quoted in COHEN, *THE SPIRIT OF OUR LAWS—BRITISH JUSTICE AT WORK* (1932) 174.

95. Lord Mansfield himself said: "But fictions of law hold only in respect of the ends and purposes for which they were invented." *Morris v. Pugh and Harwood*, 3 Burr. 1241, 97 Eng. Rep. R. 811 (1761).

96. WRIGHT, *LEGAL ESSAYS AND ADDRESSES* preface XII.

as a juristic concept with contract at all. "The fiction of the contract implied in law," he says, "was adopted for procedural reasons of convenience which were quite sufficient while the old forms of action continued. The old common lawyers were a robust people, and if a fiction was convenient under the old rigid forms of pleading they did not worry about its correspondence to reality or to juristic concepts."<sup>97</sup>

But all that has been changed. Before the Common Law Procedure Act of 1852 and the Judicature Act of 1873 the judges naturally referred to contracts implied by law because the convenience of the writ of *indebitatus assumpsit* outweighed the logical absurdity of having the Court make a fictitious contract for the parties.

"I should like to see it (the fiction) forgotten for good and all here and now," Lord Wright concludes. "But it is certainly doomed. Another generation of lawyers will have forgotten it, or if they ever remember it, will wonder why people troubled to discuss it except as a matter of obsolete history."<sup>98</sup>

### *Law and Equity*

Lord Mansfield, in his views on the relations of Law and Equity, showed a remarkable insight into the future.

His familiarity with Scottish law, and his extensive practice at the Chancery Bar gave him an understanding of the history of equity, and of its kinship to the common law, such as few judges possessed. In his efforts to modernize the law, he found that the principles of equity were often superior to those of the common law in their adaptability to changing needs, and in their effectiveness in obtaining results that conformed to the dictates of reason and justice.

The origin and growth of Equity is one of the most absorbing and fascinating chapters in English legal history. From the prerogative of mercy and justice which was inherent in the person of the King, it became customary to transmit to the King's Council the appeals from his subjects for relief against oppression and injustice. The President of the Council was the Chancellor. He was the most learned member, usually a Bishop, and the King's first Minister. The practice accord-

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97. WRIGHT, *op. cit.* at 15, 20; see Parke B., "the greatest of the classical common lawyers," in *Kelly v. Solari*, 9 M. & W. 54, 58, 59, 152 Eng. Rep. R. 24 (1841); as to money paid by mistake, the only substantial ground is that "it is against conscience to retain it." He does not mention the notional or constructive contract. WRIGHT, *op. cit.* at 21. See also *in re Rhodes*, 44 L. R. Ch. D. 94, 107 (1890).

98. WRIGHT, *op. cit.* at 33. See *Craven-Ellis v. Canons Ltd.*, 2 L. R. K. B. 403 (1936); *Brooks Wharf Ltd. v. Goodman Bros.*, 1 L. R. K. B. 534 (1937).



ingly developed of referring to him and to his subordinates those civil cases in which a subject complained of violence and fraud for which he could obtain no relief elsewhere. The Chancellor represented the conscience of the King. Gradually, instead of presenting complaints to the King and his Council, petitions for the redress of grievances were addressed directly to the Chancellor and a jurisdiction in equity was built up that centered around him.

As was inherent in the situation, conflicts arose at times between the common law courts and the court of the Chancellor. As early as the days of Sir Thomas More, it was said that "as few injunctions as he granted while he was Lord Chancellor, yet they were by some of the judges misliked."<sup>99</sup> These clashes came to a head during the reign of James I in the famous controversy between Lord Chief Justice Coke and Lord Chancellor Ellesmere. The Chancery Court had undertaken to forbid a litigant to take advantage of a common law judgment he had obtained, on the ground that it would be unreasonable for him to enforce it. The common law judges resented this strongly. The reigning monarch was appealed to and, after consulting men learned in the law, James I decided in favor of the Chancellor. Indeed the King could hardly have been expected to decide against his own "conscience."<sup>100</sup>

The Chancellors were very shrewd in the way they developed their jurisdiction. They did not pretend to sit in review of judgments of the common law courts. They did not attempt to set such judgments aside. They acted *in personam*. They assumed the validity of the common law judgment. But by order directed to the person holding the judgment, they forbade him to take action under it and if he violated the Chancellor's decree, he was subject to punishment. This procedure tended to minimize conflicts between the two tribunals and impelled Maitland to make his classic observation that "Equity came, not to destroy the law, but to fulfill it."

As the Court of Chancery went through the process of "scraping the conscience" there developed certain general principles of equity in connection with that somewhat painful operation. But as late as the seventeenth century, we find the famous observation of Selden about the length of the Chancellor's foot.<sup>101</sup> Be that as it may, by Lord Mansfield's

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99. ROPER, *LIFE OF MORE* (Hitchcock ed. 1935) 44.

100. 2 CAMPBELL, *LIVES OF THE LORD CHANCELLORS* at 255 *et seq.*; see also 1 CAMPBELL, *LIVES OF THE CHIEF JUSTICES* (1849) 282.

101. "Equity is a roguish thing, For law we have a measure, know what to trust to: Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one, as if they should make the standard for the measure

time, equity had begun to be systematized under a governing moral principle and had become transformed from a sort of "arbitrary fairness into a system of ameliorated law". It was supplementary to the law and its jurisdiction was embraced under three heads—auxiliary, concurrent and exclusive, the last mentioned embracing protective and administrative processes.

Moreover, the procedure in equity was quite different from that at common law. The procedure of the Chancery Court was akin to that of the Ecclesiastical Court. At common law, juries decided issues of fact; in equity there was no jury. In equity witnesses did not appear in court; the evidence there consisted of affidavits. While at common law, a person interested in the result was not competent to testify, in equity the defendant was forced, through the medium of written interrogatories, to answer under oath the charges made against him. Examination before trial, discovery and inspection were unknown to the common law; they could only be had by resort to equity.

We should have been greatly disappointed if Lord Mansfield, with his learning and outlook, had not been critical of a system, the like of which prevailed in no other country in the world, where law and equity were administered by two separate and distinct tribunals, with different rules of pleading and practice, with different rules of substantive law to guide them to each of which a suitor might have to resort in order to obtain complete relief.

Lord Mansfield endeavored to apply to causes in the law courts, certain equitable principles which the Chancellor would have invoked had the issue been before him. For this, Mansfield was attacked by Bentham and by Junius.<sup>102</sup> In some instances Lord Mansfield was successful,

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we call a foot to be the Chancellor's foot. What an uncertain measure would this be; one Chancellor has a long foot, another a short foot, a third an indifferent foot; 'tis the same thing in the Chancellor's conscience." SELDEN, *TABLE TALK* (Pollock's ed. 1927) 43.

102. Bentham said: "Should there be a Judge who, enlightened by genius, stimulated by honest zeal to the work of reformation, sick of the caprice, the delays, the prejudices, the ignorance, the malice, the fickleness, the suspicious ingratitude of popular assemblies, should seek with his sole hand to expunge the effusions of traditional imbecility, and write down in their room the dictates of pure and native Justice, let him but reflect that partial amendment is bought at the expense of universal certainty; that partial good thus purchased is universal evil; and that amendment from the Judgment seat is confusion." BENTHAM, *COMMENT ON THE COMMENTARIES*, (1891) 214, quoted in 12 *HOLDSWORTH, HISTORY OF ENGLISH LAW* at 558.

Junius, in one of his milder outbursts, said: "Instead of those certain, positive rules, by which the judgment of a court of law should invariably be determined, you have fondly introduced your own unsettled notions of equity and substantial justice. . . . The court of King's Bench becomes a court of equity, and the judge, instead of consulting

notably, in his resort to the doctrine of equitable estoppel<sup>103</sup> and in his development and extension of the "common counts", to secure redress for unjust enrichment.<sup>104</sup> Indeed, Holdsworth expresses the opinion that it was Mansfield's familiarity with equitable principles that "helped him to create our modern system of commercial law."<sup>105</sup>

Lord Mansfield gave legal effect to the mortgagor's equity of redemption but his ruling on this point was rejected by Lord Kenyon.<sup>106</sup> However, as early as 1804, it was held in New York that the mortgagor's interest was subject to sale on execution, contrary to cases in England which still treated the mortgagor as having an equitable interest that could be reached only by bill in equity.<sup>107</sup> In 1809 Kent, C.J., said: "Whenever the nature of the case would possibly admit of it, the courts of law have inclined to look upon a mortgage, not as an estate in fee, but as a mere security for a debt."<sup>108</sup> Thus at an early date, as Professor Walsh points out, "New York definitely established that the mortgagor is owner and entitled to possession both at law and in equity, and the great majority of the states have followed New York in adopting this so-called 'lien' theory of mortgages. . . . This was forced upon the law courts because the technical common law doctrine was so completely at variance with social and economic conditions and with the actual law by which the rights of the parties were determined in equity, that even the pretense of giving effect to the technical legal title of the mortgagee was dropped as a matter of common sense."<sup>109</sup>

In this connection it is well to remember a point recently emphasized in a delightful article by Professor Garrard Glenn, that it was Sir Thomas More, the first Chancellor who was a lawyer, who "created the idea that equity would relieve against forfeitures", laying the groundwork for the mortgage with its equity of redemption.<sup>110</sup> In 1780 Lord Mans-

strictly the law of the land, refers only to the wisdom of the court, and [the] purity of his own conscience." Junius, *Letter XLI*, cited in 12 HOLDSWORTH, HISTORY OF ENGLISH LAW at 558, n. 6.

103. *Montefiori v. Montefiori*, 1 Bl. W. 363, 96 Eng. Rep. R. 203 (1762); *Russel v. Langstaffe*, 2 Doug. 514, 99 Eng. Rep. R. 328 (1780).

104. *Moses v. Macferlan*, 2 Burr. 1005, 1010, 97 Eng. Rep. R. 676 (1760).

105. 12 HOLDSWORTH, HISTORY OF ENGLISH LAW at 559, 560.

106. *Eaton v. Jaques*, 2 Doug. 455, 460, 99 Eng. Rep. R. 290 (1780); disapproved by Lord Kenyon in *Westerdell v. Dale*, 7 T. R. 306, 312, 101 Eng. Rep. R. 989 (1797).

107. WALSHE ON EQUITY (1930) 124.

108. *Jackson v. Willard*, 4 Johns. 41, 42 (N. Y. 1809).

109. WALSHE, *op. cit.* at 125, 126.

110. Glenn, *St. Thomas More as Judge and Lawyer* (1941) 10 FORDHAM L. REV. 187, 190 a beautiful and moving account of the great service to the law rendered by Sir

field referred to this in one of his opinions, calling attention to the fact that in the reign of Henry VIII, Sir Thomas More attempted to remedy the evils of "forfeiture." He summoned the judges "to a conference concerning the granting relief at law, after the forfeiture of bonds, upon payment of principal, interest, and costs; and when he said they could not relieve against the penalty, he swore by the body of God, he would grant an injunction."<sup>111</sup>

In the case of *Perrin v. Blake*,<sup>112</sup> Lord Mansfield met with one of his major setbacks, when he attempted to subordinate the rule of law in *Shelley's Case* to one of construction and intent. He reasoned that since, in executory trusts, the intention governed, it must also govern in the devise of the legal estate. Lord Mansfield believed that law should follow equity, if, as was desirable, legal and equitable rules were to be kept identical.

"If courts of law," Lord Mansfield said, "will adhere to the mere letter of the law, the great men who preside in Chancery will ever devise new ways to creep out of the lines of law and temper with equity."<sup>113</sup>

In *Corbett v. Poelnitz*<sup>114</sup> he held that when a married woman had a separate maintenance and acted and received credit as a *feme sole* she was liable as such, another decision rejected by Lord Kenyon, but vindicated by subsequent legislation.

Without attempting to trace the further development of equity jurisdiction it suffices to say that Lord Mansfield's views were, to a considerable extent, ultimately adopted in this country and in England. In time "the dead weight of legal conservatism" was overcome. In New York, which is selected as typical of most of the states in this country, and in England, law and equity were brought together, to be administered by a single tribunal, in a single action, under the same rules of pleading and procedure. In New York this was done in 1848 and trial by jury was preserved in all cases in which there had been such a right

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Thomas More, its patron saint, distinguished lawyer, great Lord Chancellor, author of *Utopia*, who gave up his life rather than yield his religious and moral convictions.

111. *Wyllie v. Wilkes*, 2 Doug. 519, 522, 99 Eng. Rep. R. 331 (1780).

112. 4 Burr. 2579, 98 Eng. Rep. R. 355 (1770); see also *Burgess v. Wheate*, 1 Eden 177, 28 Eng. Rep. R. 652 (1757-9); Mansfield's view being accepted by subsequent legislation 12 HOLDSWORTH, *HISTORY OF ENGLISH LAW* at 586.

113. *Collect. Jurid.* 1, 321, 322, cited in 12 HOLDSWORTH, *HISTORY OF ENGLISH LAW* at 558.

114. 1 T. R. 5, 99 Eng. Rep. R. 940 (1785) *overruled* by Lord Kenyon, C.J., in *Marshall v. Rutton*, 8 T. R. 545, 101 Eng. Rep. R. 1538 (1800).

prior to the abolition of the Court of Chancery and the adoption of the Old Code.<sup>115</sup>

In England, as the result of the Common Law Procedure Act of 1852 and the Judicature Act of 1873 which became effective in 1875, substantially the same purpose was accomplished. Forms of action were abolished, the rules of pleading and practice were in substance made uniform, it being provided generally that in all matters "in which there is a conflict or variance between the Rules of Equity and the Rules of the Common Law, with reference to the same matter, the Rules of Equity shall prevail." The English Courts of Law and Equity were united in a single court, the Supreme Court of Judicature, but for convenience, divisions of the court were created and it has tended to become the practice for a judge assigned to the Chancery Division to devote his entire time to Equity cases while a judge designated to the King's Bench tries law actions.<sup>116</sup> In New York, the same justice tries both kinds of cases; at Trial Term he tries law actions and at Special Term, equity causes. The division of the judicial work in England brings about a certain amount of specialization and a certain difference in outlook, that tends to perpetuate the distinctions between the two systems.

Thus far everything that was done by the legislation mentioned is in line with Lord Mansfield's views. The implications of his decisions, as they were expressed in Blackstone's Commentaries,<sup>117</sup> would have encouraged, if they did not necessitate, a fusion of the substantive rules of law and of equity as well as a consolidation of jurisdiction and a uniformity in pleading and procedure. The legislation in England and in this country, was not designed to accomplish such a result. Equity and law, for the most part, remained the same so far as substantive rights were concerned.<sup>118</sup> As Holdsworth points out, there was a partnership, not a fusion or merger of substantive rules.

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115. N. Y. CODE OF PROCEDURE § 69; by the N. Y. Constitution of 1846 the Court of Chancery was abolished and its jurisdiction and powers were vested in the Supreme Court. See WALSEH ON EQUITY (1930) 37.

N. Y. CIV. PRAC. ACT § 8, provides: "There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished." N. Y. STATE CONSTITUTION, Art. 6, Sec. 1, "The Supreme Court is continued with general jurisdiction in law and equity. . . ." ART. 1, \*2: "Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever."

116. 17, 18 VICT. CH. 125 (The Common Law Procedure Act). The first Judicature Act, 36, 37 VICT. CH. 66, was passed in 1873; it went into effect in 1875. See § 25, sub. 11 of the Act of 1873.

117. See Holdsworth, *Blackstone's Treatment of Equity* (1929) 43 HARV. L. REV. 1.

118. "The distinguishing features of the two classes of remedies, legal and equitable, are

It is true that by legislation many substantive rules have ceased to be rules of law or of equity and have become statutory rules. Many principles of equity have, by enlightened judicial decisions, been absorbed by the common law and that process is an ever continuing one. Generally speaking, however, legal rights and equitable rights remain as distinct as ever and the same facts must now be pleaded to obtain relief, whether legal or equitable, as before the adoption of the Old Code in this state and of the Practice and Judicature Acts in England. The jurisdictional and procedural changes accomplished by this legislation undoubtedly will and should have the effect of a gradual obliteration of the distinctions in substantive law between the two formerly independent systems. The problem is complicated, in this state, by the constitutional right to trial by jury, but that difficulty is not insurmountable.

The trouble in New York, for the moment, is that it does not seem to have given full effect to the jurisdictional and procedural consolidation of the two systems. Thus, in *Terner v. Glickstein & Terner Inc.*,<sup>119</sup> the Court of Appeals ruled, in effect, in a situation before issue had been joined that an action brought on the wrong side of the Court required dismissal. That would seem to be contrary to an earlier case, which had been regarded as settling a problem variously treated by the lower courts in New York.<sup>120</sup> It would appear that the spirit of the remedial code legislation would authorize the transfer of an action to the proper side of the court, whether before or after issue joined, with appropriate provision for amendment and for the reservation of the right, in a proper case, to demand a jury trial.

Holdsworth, while agreeing that the union of adjective law is and should be complete, is firmly of the opinion that there should not be any fusion of legal and equitable substantive rules. This entire subject is well worth study by Judicial Councils and Law Revision Commissions.

Maitland thought that since the Judicature Acts, equity need not be taught as a separate system. Holdsworth is eloquent in his disagreement with this view. Both are probably right in a measure so far as

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as clearly marked and rigidly observed as ever they were." *Chipman v. Montgomery*, 63 N. Y. 221 (1875).

119. 283 N. Y. 299, 28 N. E. (2d) 846 (1940); see N. Y. CIV. PRAC. ACT § 111, and articles by Rothschild on the subject (1923) 23 COL. L. REV. 619-624; (1924) 24 COL. L. REV. 733-742; (1926) 26 COL. L. REV. 33; (1927) 27 COL. L. REV. 258, 262; WALSH ON EQUITY (1930) 109-116. See also: *Jackson v. Strong*, 222 N. Y. 149, 118 N. E. 512 (1917).

120. *Wainwright & Page, Inc. v. Burr & McAuley, Inc.*, 272 N. Y. 130, 5 N. E. (2d) 64 (1936).

the immediate future is concerned. Maitland, however, makes this significant observation: "The day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of common law; suffice it that it is a well-established rule administered by the High Court of Justice."<sup>121</sup> That, to the mind of the writer, indicates the future trend of the law and is directly in line with the views of Lord Mansfield.

Holdsworth says: "It may be that the old jurisdictional and procedural bond has been dissolved. But its effects remain. Like the forms of action, 'it rules us from its grave', because it lives in the very distinct technical approach, and the very distinct intellectual characteristics, which it imposes upon those who study the principles and rules of equity."<sup>122</sup> With the greatest respect, it is submitted that such an attitude does much to hinder the progress sought to be achieved by the Judicature Acts.

When a judge tries an equity cause, there is a certain quickening of the heart; the old tradition is there, the instinctive appeal to the conscience of the Chancellor, even though it is a conscience that is now fairly outlined and circumscribed by well established precedent. All the ingenuity, all the resourcefulness of the judge are called into play to avoid a result obnoxious to a sense of fairness and decency. The endeavor should be to carry that same feeling into Trial Term as well. Then will the intuitive inspirations of Lord Mansfield be realized and the true purpose of the law achieved.

#### *His Conception of the Nature of the Judicial Process*

Lord Mansfield's personality as a judge and his conception of the nature of the judicial process are essentially modern. That is the true test of greatness—the ability of a man to project himself and his work out of his own time and environment and far into the future. It is remarkable how free from technicality he was; how liberal was his outlook.

"I never like to entangle justice in matters of form and to turn parties round upon frivolous objections where I can avoid it. It only tends to the ruin and destruction of both."<sup>123</sup>

121. MAITLAND, LECTURES ON EQUITY (1926) 20. See also, Simpson, *Fifty Years of American Equity* (1936) 50 HARV. L. REV. 171, 179, 180; Bordwell, *The Resurgence of Equity* (1934) 1 U. OF CHI. L. REV. 741.

122. Holdsworth, *Equity*, (Jubilee Number) (1935) 51 L. Q. REV. 142, 160; see also, HOLDSWORTH, SOME MAKERS OF ENGLISH LAW (1938) 201 *et seq.*

123. *Trueman v. Fenton*, 2 Cowp. 544, 547, 98 Eng. Rep. R. 1232 (1777); see also *Goodright v. Cator*, 2 Doug. 477, 484, 99 Eng. Rep. R. 304 (1780).

He often found the promptings of justice and of precedent at war in his own breast. "A judge on the bench," he told Garrick, "is now and then in your whimsical situation between Tragedy and Comedy; inclination drawing one way and a long string of precedents the other."<sup>124</sup> So skillful was he in the use and the disentanglement of the precedents that he frequently assumed "not to make new law, but to vindicate the old from misrepresentation."

"I have arranged all the cases that have been determined in Westminster-hall, in order of time; and when I come to state them, you will be surprised to see they stand so little in the way, as binding authorities against justice, reason, and common sense."<sup>125</sup>

"The reason and spirit of cases," he said, "make law; not the letter of particular precedents."<sup>126</sup> And again: "The law of England would be a strange science indeed, if it were decided upon precedents only. Precedents serve to illustrate principles, and to give them a fixed certainty. But the law of England, which is exclusive of positive law enacted by statute, depends upon principles; and these principles run through all the cases, according as the particular circumstances of each have been found to fall within the one or other of them."<sup>127</sup>

He constantly sought to harmonize the precedents with the essential justice of the case. But when the precedents were too strong to be overcome he submitted although with reluctance. Thus we find him saying, "I am sorry for it. But since it is so, the law must have its course: we must not make a precedent in opposition to the statute."<sup>128</sup> "The cases are hard; but they are too strong to be got over."<sup>129</sup> "We had a strong bias . . . but the matter is too fully settled to be now gone into upon reasons at large."<sup>130</sup>

So in the case of *Robinson v. Bland*<sup>131</sup> he announced:

"Where an error is established and has taken root, upon which any rule of property depends, it ought to be adhered to by the Judges, till the Legislature thinks proper to alter it: lest the new determination should have a retrospect, and shake many questions already settled: but the reforming erroneous

124. HOLLIDAY, LORD MANSFIELD at 211.

125. *Pugh v. Duke of Leeds*, 2 Cowp. 714, 718, 98 Eng. Rep. R. 1323 (1777).

126. *Fisher v. Prince*, 3 Burr. 1363, 97 Eng. Rep. R. 876 (1762).

127. *Jones v. Randall*, 1 Cowp. 37, 39, 98 Eng. Rep. R. 954 (1774).

128. *Combe v. Pitt*, 3 Burr. 1586, 1589, 97 Eng. Rep. R. 994 (1764).

129. *O'Neil v. Marson*, 5 Burr. 2812, 2814, 98 Eng. Rep. R. 477 (1771).

130. *Ingle v. Wordsworth*, 3 Burr. 1284, 1286, 97 Eng. Rep. R. 83 (1762).

131. 1 Bl. W. 256, 264, 96 Eng. Rep. R. 140 (1760); see also *Burgess v. Wheate*, 1 Eden 177, 230, 29 Eng. Rep. R. 652 (1757-59); 3 HOLDSWORTH, HISTORY OF ENGLISH LAW at 196, n. 10.



points of practice can have no such bad consequences; and therefore they may be altered at pleasure, when found to be absurd or inconvenient."

Occasionally he did stick his judicial neck out too far, with the inevitable consequences, but for the most part they were valiant efforts which although rejected in his day, were vindicated by the action of posterity. His views on the binding effect of precedents are more in harmony with the modern American, rather than with the English trend. He would have been in complete accord with the views on this subject expressed by Professor Goodhart in his scholarly essay on "*Precedent in English and Continental Law*."<sup>132</sup>

With a clairvoyance that was remarkable, Mansfield set in motion changes in the current of judicial thought that still agitate us today. His whole judicial creed may be summed up by saying that he believed the great end of the law was to do justice—justice with ease, certainty and dispatch. The law, in order to serve its high purpose, required a continual adaptation to changing conditions. "As the usages of society alter," he said, "the law must adapt itself to the various situations of mankind."<sup>133</sup> There is no other judge in the history of the Common Law who keeps referring so often in his opinions to the "justice of the case"—"the honesty and rectitude of the thing", the "ties of natural justice and equity", the obligation "founded in conscience". He took the lead in resorting to the device of having the common law absorb principles of equity.

The tradition of Lord Mansfield was carried on by Mr. Justice Holmes when he said: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."<sup>134</sup>

Mr. Justice Cardozo followed the tradition of Lord Mansfield when he stated that: "The law must be stable yet it cannot stand still" and "My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law."<sup>135</sup>

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132. Reprinted from (1934) 50 L. Q. REV. 40.

133. *Barwell v. Brooks*, 3 Doug. 371, 99 Eng. Rep. R. 702 (1784).

134. COLLECTED LEGAL PAPERS (1921) 187.

135. THE NATURE OF THE JUDICIAL PROCESS (1921) 112; see also CARDOZO, PARADOXES OF LEGAL SCIENCE (1928) 14-15; "When changes of manners or business have brought it about that a rule of law which corresponded to previously existing norms or standard

It is likewise in the tradition of Lord Mansfield for Lord Macmillan to say: ". . . Among the motives which have inspired the formation and the acceptance of the principles of the Common Law the motive of justice, that is, of fair dealing, has undoubtedly been the predominant factor. . . . The public and the judiciary alike instinctively apply a moral standard of justice to the law, to which they expect it to conform, and that they regard the law as defective insofar as it fails to satisfy their conscience. It was one of the greatest masters of our law, Lord Macnaghten, who said: 'It is a public scandal when the law is forced to uphold a dishonest act.'"<sup>136</sup>

And the greatest Mansfieldian of them all, Lord Wright of Durley, says: "When we examine the accidents of procedure or judicial or social intolerance or prejudice out of which so many dogmas and rules originated, and see to what different conditions and circumstances they were adapted, we are less likely to view them all with superstitious veneration; we are freer to consider how far, with modern conditions of life and thought, they fit in with reason, justice and convenience."<sup>137</sup>

Lord Mansfield thought that fundamentally reform and improvement in the law could best be accomplished through the judicial process; he had little faith in legislative changes. Bentham on the contrary, condemned judicial legislation as "usurpation" and pinned his entire faith on legislative enactments. History has shown that each was partly right and that it is by the judicious employment of both methods that progress in the law is had. A century after Mansfield, Sir Frederick Pollock wrote: "The best and most rational portion of English law is in the main judge-made law. Our judges have always shown, and still show, a really marvelous capacity for developing the principles of the unwritten law, and applying them to the solution of questions raised by novel circumstances."<sup>138</sup>

Lord Mansfield was a strong judge. In no improper sense, he dominated his court. We are told that in his thirty-two years on the bench there were not more than twenty cases in which a dissenting opinion was recorded and only six decisions were reversed on appeal,<sup>139</sup> a cir-

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of behavior, corresponds no longer to the present norms or standards, but on the contrary departs from them, then those same forces or tendencies of development that brought the law into adaptation to the old norms and standards are effective, without legislation, but by the inherent energies of the judicial process, to restore the equilibrium."

136. MACMILLAN, *LAW AND OTHER THINGS* (1937) 47, 48, *Law and Ethics*.

137. WRIGHT, *LEGAL ESSAYS AND ADDRESSES* (1939) Preface p. xvii.

138. (1893) 9 L. Q. REV. 106.

139. FIFOOT, *LORD MANSFIELD* 46, 47.

cumstance which aroused caustic comment from his contemporaries, including some on this side of the Atlantic.

The first dissent, by Mr. Justice Yates, took place in 1766 in the famous copyright case of *Millar v. Taylor* and undoubtedly came as a shock to Lord Mansfield who took particular pains to say:

"This is the first instance of a final difference of opinion in this Court, since I sat here. Every order, rule, judgment and opinion has hitherto been unanimous. That unanimity never could have happened if we did not among ourselves communicate our sentiments with great freedom; if we did not form our judgments without any prepossession to first thoughts; if we were not always open to conviction and ready to yield to each other's reasons. We have all equally endeavored at that unanimity upon this occasion: we have talked the matter over several times. I have communicated my thoughts at large in writing: and I have read the three arguments which have now been delivered. In short, we have equally tried to convince or to be convinced: but in vain. We continue to differ; and whoever is right, each is bound to abide by, and deliver, that opinion which he has formed upon the fullest examination."<sup>140</sup>

A dissent in the Court of King's bench under the Chief Justiceship of Lord Mansfield was an extraordinary event. Mr. Justice Yates soon went to the Common Pleas.<sup>141</sup>

As a political statesman, Mansfield was narrow in his outlook, without great ambition, and cautious to the point of timidity. He not only failed to discern the great changes that loomed on the horizon, but he was on occasion out of step with the public opinion of his own times.

Mansfield the judge was an entirely different person. As a judge he was brilliant, valiant, daring and resourceful. He possessed not only great intellectual courage, but real moral courage as well. He sounded a note vibrant and clear for ethical values in the law. He had a fine sense of justice, a keen insight into the future trend of the law. The conservative statesman became the great forward looking judge. In his decisions he is alive and with us today. In the political arena he was most unhappy. On the Bench he was completely at home; there he

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140. 4 Burr. 2303, 2395, 98 Eng. Rep. R. 201 (1769).

141. Mr. Justice Blackstone also left the Court of King's Bench but Foss in his *BIOGRAPHICAL DICTIONARY OF THE JUDGES OF ENGLAND* (1870) at 99 says that Blackstone originally accepted a place on the Court of Common Pleas. "He actually kissed hands as judge of the Common Pleas on February 9 (1770); but at the request of Mr. Justice Yates who wished to escape collision with Lord Mansfield, he consented to take that judge's place in the King's Bench and again kissed hands for that court on the 16th of the same month, when he received the honor of Knighthood. Mr. Justice Yates died four months after, when Mr. Justice Blackstone removed into the Common Pleas, on June 22."

was sure of himself; there he was fearless. That was his life work, the work he loved; and how magnificently he did this work, is realized in our own generation.

Holdsworth tells us that "the development of the common law during the first half of the eighteenth century was slow. Its procedure was very technical; and its rules of pleading were tending to become more and more subtle and rigid. It was developing and expanding less rapidly than the parallel system of equity."<sup>142</sup> Here Mansfield saw his splendid opportunity to assist in the expansion of the common law, to meet changing economic conditions.

It is true that Mansfield was no noble humanitarian. Perhaps he did lack a certain fine spiritual quality, a feeling of inward security that would have enabled him to meet more adequately important problems that came to him—the constant fear of being drawn into controversy concerning his family's political affiliations; his failure ever to revisit his parents or his native land from the time he left as a boy of fourteen; his indifference to the savage criminal code of his time; his entry into the Cabinet and his political activities after he went on the Bench; his lack of appreciation of the significance of the struggle for freedom of the press; his weakness and indecision in dealing with the controversy in Parliament concerning his decisions in cases of criminal libel; and his ungenerous attitude toward his dying rival, the Earl of Chatham.<sup>143</sup> Future research may enable us more adequately to appraise these fascinating and perplexing personality problems. But certainly, as the Chief Justice, the head of the Common Law Courts of England, Lord Mansfield infused into the law a spirit of liberality, a wholesome moral force, that gave the law a new direction and a richer significance.

Lord Campbell stated that Mansfield "cannot be considered a man of original genius."<sup>144</sup> What a strange observation! If Lord Mansfield had not a great creative, original, judicial mind, no judge ever had.

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142. HOLDSWORTH, *SOME MAKERS OF ENGLISH LAW* at 160.

143. Nothing that Pitt ever said in the heat of debate so aroused Mansfield as the reference to the political opinions of his family who had openly espoused the cause of the Stuarts. Pitt's taunts may account for, although they do not excuse the well known scene in the House of Lords, when Chatham practically at death's door, collapsed in the midst of his last speech and all present rushed towards him except Mansfield who remained coldly in his place and who later absented himself from the funeral of his old rival. However, as lawyers, we prefer to remember the more pleasant picture of him as a judge. "He was dignified without being pompous, considerate without being condescending . . . the perfect judge, without fear and without reproach, reliable, shrewd, wise." WARREN, *MARGIN CUSTOMERS* (1941) 91.

144. 2 CAMPBELL, *LIVES OF THE CHIEF JUSTICES* at 576.

No judge in England left a more lasting or a more beneficent imprint on the common law. No judge ever did more to demonstrate the common law's capacity for growth, its power to meet the changing needs of society, its continuity, its consistency and its supreme utility in promoting justice and fair dealing between man and man. "Justice," said Ulpian, "is the constant and permanent resolve to render to each one his due."<sup>145</sup> No judge ever resolved it more earnestly or more frequently or more effectively than did William Murray, Earl of Mansfield.

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145. ULPIAN, INSTITUTES I, 1.