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SOMERSET v. STEWART: THE CASE HEARD ‘ROUND THE WORLD THAT CAUSED THE SHOT HEARD ‘ROUND THE WORLD

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We’ve all heard of the “shot heard ‘round the world”[1]. It took place on April 19, 1775, at Lexington, Massachusetts. The conventional wisdom of how that shot came about is a story of British heavy-handedness, high-handedness, ham-handedness, under-handedness, pig-headedness, and short-sightedness.[2] In a corollary to Murphy’s Law, everything that the British could do wrong, they did do wrong. However, few know how a decision by one of England’s greatest justices pushed the independence of the Colonies past the point of no return. This is Part 1 of that story. To start, let’s first count a few of the ways the British empire marched into a quagmire made of their own folly.

LORD MANSFIELD

After the French and Indian War (1754-1763), the first shot of which was fired by George Washington and troops of the Virginia Volunteers and British regulars under his command, the British government took the position that the Colonies should pay for the protection they received from Britain. The Colonists rightly pointed out that the war was just as much one of aggression against France. Also, as many Americans fought in the war as did British. It was also noted that British trade policies and regulations were designed to keep the Colonies subservient to Britain. So, in

their mind, they were already being taxed.

For example, many products produced in the Colonies could be exported only to Britain. Products shipped to the Colonies had to be on British ships. And certain products could only be imported from the “mother country.” The pernicious effect of these policies resulted in the evil triangle. New England ship owners bought slaves in West Africa with rum manufactured in America. The slaves were shipped to the West Indies where they were sold for molasses and sugar that made the rum. The profits from all of this paid for finished products imported from England.

These policies also had a psychological effect on each side of the Atlantic. John Dickinson, in one of his famous “Letters From a Pennsylvania Farmer,” said this: “Let us behave like dutiful children who have received unmerited blows from a beloved parent. Let us complain to our parent; but let our complaints speak at the same time the language of affection and veneration.” In England, William Pitt, Minister of War during the French and Indian War, said this: “I love the Americans because they love liberty, and I love them for their noble efforts they made in the last war, ...[but] they must be subordinate. In all laws relating to trade and navigation especially, this is the mother country, they are the children; they must obey and we prescribe.” [3] While the British were busy prescribing laws, they forgot that their children were growing up. Here is what they did.

1. In 1763, Britain imposed the Quartering Act on the Colonies which required them to house British soldiers. Writs of Assistance allowed custom agents to search private property for smuggled goods. In response to Chief Pontiac’s rebellion, they issued the “Proclamation Line,” which set a boundary for westward expansion by the Colonists. This was not meant as any favor to Native Americans. Rather, the British did not want to defend settlers in the Western expanses. The white man had, in the name of God and King, stolen all the costal land between Canada and Florida from the Indians and would get to the rest of the continent in good time—but it is life, liberty and the pursuit of happiness that we are talking about here. There would be plenty of time later for manifest destiny.

2. In 1764, they imposed the Sugar and Stamp Acts.

3. In 1765, the Townshend Acts imposed new duties on tea, lead, paper and glass. Jurisdiction over violations of certain trade laws was given to Admiralty Courts which had no juries and trials took place in London.

4. In 1767 and 1768, the New York and Massachusetts Assemblies were dissolved for non-cooperation with the Quartering Act.

5. In 1768, British troops garrisoned Boston.

6. In March 1770, a mob of Boston citizens provoked a group of British soldiers. After the smoke lifted, Crispus Attucks, a black sailor, and four other citizens lay dead. The anti-Tory spin that it was a massacre quickly overtook the more ambiguous truth of the event and provided more tinder for the conflagration to come. In front of a sympathetic Tory jury, John Adams led a defense that resulted in the acquittal of six soldiers and the conviction of two for manslaughter. The guilty parties’ thumbs were branded and they were released.

7. In April 1773, in a move to bail out the East India Company, Parliament passed a new tea tax. On December 16, the “Sons of Liberty” dumped forty-five

tons of tea into Boston Harbor.

8. In March 1774, the British closed the Port of Boston and put that Colony under military rule. These measures, known in America as the "Intolerable Acts," united the Colonies and breathed new life into the rebellion. From this point on, it was only a matter of time.[4]

In March 1749, a nine-year old boy arrived in Virginia on a slave ship from West Africa. Somewhere along the way the boy picked up the name Somerset before he was purchased by a Norfolk slave trader named Charles Stewart. Stewart would rise through the ranks of the local business community, eventually becoming paymaster general of the American Board of Customs. In 1769, Stewart moved with Somerset, now 29, to London. London, at that time had a large community of free blacks, slaves, runaway slaves, indentured servants and others lost into the crevices of society.

In August 1771, Somerset was baptized in the church of St. Andrew and took the first name James. For a black person, this was an event of double significance. Being baptized brought a person fully into the Christian faith. This bewildered the slave holding set because they justified slavery partly on an interpretation of the Bible that divided people into Christians and heathens and heathens could be slaves. But how would God look upon a Christian made in his image with an immortal soul, but having no more rights than a dog?

In October 1771, Somerset fled from his owner in London and was caught by a slave catcher a month later. On the authority of his owner, he was turned over to a ship captain bound for Jamaica where he would be resold at auction. A week later, Somerset's Godparents obtained a writ of Habeas Corpus from William Murray, Lord Mansfield, the Chief Judge of the Court of King's Bench, the highest judge in England.[5]

A short aside on the organization of the English Courts is in order, they being only slightly less Byzantine than the courts of New York. But then, they had several hundred years longer to work on reform. The superior courts of England in the 1700's were the Court of Chancery and the three great common law courts: the Court of Common Pleas, the Court of Exchequer and the Court of Kings Bench. All four sat in Westminster Hall in London. By manipulating arcane rules of procedure, each vied for jurisdiction over new and old causes of action.

The Court of Chancery was the equity court and evolved out of the practice of petitions being heard directly by the King (or Queen) and then by the Privy Council. The Court of the Exchequer, the oldest of the common law courts, started out as sort of a tax court for the efficient collection of Crown revenues. However, it evolved to permit private litigants to collect debts. The Court of Common Pleas heard cases where the Crown had no interest and provided the breeding ground for the development of the common law. The King's Bench heard matters that did involve the Crown, including criminal cases. However, these categories were not hard and fast and many claims could be brought in several different courts. (We lack space to discuss the Ecclesiastical Courts, the Court of Star Chamber, the Court of Admiralty or the Court of Requests.)

The Judicature Act of 1873, merged the three common law courts into the High Court of Justice. In 1772, when the Somerset judgment was rendered, an appeal could have been taken to the Exchequer Chamber and then to the House of Lords, but this was a cumbersome, lengthy and costly

enterprise. Even today, the Supreme Court of England is the House of Lords where a panel of peers, known as Law Lords, sits as the court of last resort.

If the Somerset case had been appealed in New York after statehood, it would have gone to The Court for the Trial of Impeachments and Correction of Errors. The chief judge of this court was the president of the senate who was the Lieutenant Governor. Also in the court was the Chancellor, the three judges who made up the State Supreme Court and the entire State Senate**.** This was justice by committee. For example, in **People v. Purdy** (4 Hill 384 [1842]) the vote was 13-11. In the case of **In Re Lieutenant Governor** (2 Wend. 215 [1815]) the vote was 23-5.

The issue, as framed by Mansfield in *Somerset*, was quite narrow. Did the law of England allow Stewart to remove his slave from England by force? If the law of England permitted this, Mansfield would have to find that the law of "comity" required England to defer to the municipal ordinances of Jamaica and Virginia. If this was the holding, there was nothing to prevent England from becoming a slave nation just by slave owners moving there.

Mansfield did everything he could to pressure a settlement so that this legal question could remain unanswered. To Somerset's lawyers he suggested that Somerset's Godmother buy him from Stewart and then manumit him. Somerset was also being assisted by Granville Sharpe (1735-1813). Sharpe was a one man ACLU and the founder, in 1787, of the Society for the Abolition of Slavery. He was as famous then in England as William Lloyd Garrison would be in America on the same issue in the 1850's.

Stewart's defense was taken over by the West Indian planters' interest. Mansfield told them that they faced a big risk of losing the legal protection over their slaves. One adjournment was granted so that the planters could petition Parliament for legislative authority. In the end, he told the planters he would decide the case if that is what they wanted but *"fiat justitia, ruat cœlum":* let justice be done, though the heavens may fall.

The problems with Stewart's legal arguments were manifest. First, as a practical matter, England was not about to let the tail of a colony wag the dog of an empire on this monumental issue. Second, what law were they referring to? There was no positive law of Virginia that said that a white person was permitted to own a black person in perpetuity as chattel----just as now there is no law that says you can own, say, a car. Blacks were just presumed to be property and the control over a slave was to be found in the common or positive law of real or chattel property. (This would be an action sounding in trover not trespass or assumpsit, if you're keeping score.)

In 1772, the common law of property of Virginia would be essentially—the common law of England. After all, that was the Colonists' big lament; that, as British subjects, they were entitled to the rights and protections of the laws of Britain. Unfortunately for Stewart, there was no common law of slave ownership in England. Going further, all of the Colonial Charters had provisions that no law could be repugnant to the laws of England.

One of Mansfield's colleagues, who served on the Court of Common Pleas, was William Blackstone, the author of one of the most famous legal texts ever written, *Commentaries on the Laws of England*.[6] This is what he said in 1765, in the *Commentaries* about slavery in England:[7]

> And this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soul, that a slave or a Negro, the moment he lands in England, falls under the protection of the laws and so far becomes a freeman.[8]

In June of 1772, Mansfield delivered the opinion of the court. The trial had been conducted by Mansfield but the opinion also carried the concurrence of the other three judges of the Court of King's Bench. Had he chosen to, Mansfield could also have convened a twelve-member court made up of the four members each of the Court of Common Pleas and the Court of the Exchequer. Mansfield's opinion, delivered without notes, was short and adorned only by its directness.

> The state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political; but only by positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory; it is so odious that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow this decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged. (98 Eng. Rep. 499, King's Bench, 22 June 1772.)

By positive, law Mansfield was referring, of course, to an act of Parliament. Parliament was not about to bat on this sticky wicket.[9] The import of the Somerset decision was not immediately clear. Mansfield tried to limit it to the narrow holding that the law of England did not permit the removal of a person by force to another land. In the press and in the public mind however, it abolished slavery in the Mother country. Did it do so also in the Colonies? Benjamin Franklin, then living in London as the Colonies' representative to the Court, remarked as follows:

> Pharisaical Britain! To pride itself in setting free a single slave that happens to land on thy coasts, while thy merchants in all thy ports are encouraged by the laws to continue a commerce whereby so many hundreds of thousands are dragged into a slavery that can scarce be said to end with their lives, since it is entailed on their posterity.[10]

Hypocrisy it was noted by Samuel Johnson, sailed both ways across the Atlantic. Johnson, a staunch anti-slavery, anti-colony member of Parliament and of dictionary fame, remarked: "How is it that we hear the loudest yelps for liberty among the drivers of Negroes?"

A Virginian would draft the Declaration of Independence. Another Virginian would lead the Colonies to victory over British oppression. Another Virginian would draft the Constitution and the Bill of Rights. For the first thirty-six years of our Country's existence the Presidency would be occupied by Virginians for thirty-two of those years. All of these persons would be slave

holders. Little did they know that their own independence and that of the slaves they owned had been guaranteed by Lord Justice Mansfield and his pen and the Negro Somerset and his courage in the *Somerset Case*. **Next time, the Somerset decision crosses the Atlantic.**

1.

"By the rude bridge that arched the flood, Their flag to freedom's breeze unfurled, Here once the embattled farmers stood, And fired the **shot heard 'round the world**." Ralph Waldo Emerson

2.

Don't take my word on this. Here is what **Barbara Tuchman**, one of America's greatest historians, said about this issue in the **March Of Folly: From Troy to Vietnam** (Knopf, 1984). Tuchman noted two remarks made by Dr. Samuel Johnson; "Americans are a race of convicts and ought to be grateful for anything we allow them short of hanging." "I am willing to love all mankind except an American." Considering this, Tuchman noted; "Finally it came down to attitude. The attitude was a sense of superiority so dense as to be impenetrable." (P.229..) The great Prime Minister, Lord Chatham, **William Pitt**, the hero of the French and Indian War and namesake of Pittsburgh, said this to the British Cabinet: "The whole of your political conduct has been a continued series of weakness, temerity, despotism, ignorance, futility, negligence, and notorious servility, incapacity and corruption. (Tuchman, p. 205.) **William Eden**, a member of the British peace commission said this: "It is impossible to see what I can see of this magnificent country and not go nearly mad at the long train of misconducts and mistakes by which we have lost it." (Tuchman, p. 224.) **John Adams** said this: "The pride and vanity of [Britain] is a disease; it is a delirium; it has been flattered and inflamed so long by themselves and others that it perverts everything." (Tuchman, p. 229.)

3.

Quoted in **Angel in the Whirlwind: The Triumph of the American Revolution**, Benson Bobrick, Penguin Books, 1998, p. 32.

4.

All of these grievances and many more were itemized by Thomas Jefferson in the Declaration of Independence. Still one of the best treatments on the mis and malfeasance of the British in relation to the Colonies is Barbara W. Tuchman's **The March of Folly: From Troy to Vietnam**, Knopf, 1984, Ch.4, "The British Lose America." 127-231. If the time lines look a bit wacky, remember that in 1776, an east to west Atlantic crossing could take twelve weeks and eight weeks in the other direction. Accordingly, from the time of an event in Boston until the British government's response was received back in Boston, it would not be unusual for six months to pass.

5.

William Murray Lord Mansfield, 1st Earl of Mansfield, served as the Chief Justice of the Court of Kings Bench from 1756-1788. He was the leader of the House of Commons and the House of Lords (while being a judge). He was born in Scone, Pithshire, Scotland in 1705, and died in London in 1792. He is the John Marshall of the English judiciary and virtually singlehandedly developed the commercial law of England as the Industrial Revolution and Britain's empire commanded the resources of the world. Part of this interpretation of commercial law involved the rejection of the Colonists' theory of "no taxation without representation."

6.

Blackstone (1723-1780) was an unsuccessful lawyer who made his mark as a legal educator. His *Commentaries* is now known more for its literary style than its legal synthesis. The book actually was more influential in America than in England, probably due to the fact that it was often the only legal text available for universal reference. He served as the Queen's Solicitor General and for ten years on the Court of

Common Pleas.

7.

The interchanging use of England and Great Britain can become confusing and the terms can mean different things at different points in time. England is, of course, England. Great Britain includes England, and Wales as of 1536, and Scotland as of 1707—thus becoming the United Kingdom of Great Britain. (Even though England dominated Scotland from a much earlier point in time and Scottish kings sat on the English throne, in the early 1600's, such as James I, who was James IV of Scotland. The United Kingdom included Ireland as of 1800. In 1922, with the establishment of the Republic of Ireland, that part was reduced to Ulster or Northern Ireland. The official name is now the United Kingdom of Great Britain and Northern Ireland.

8.

Commentaries, (1765) p. 123. Quoted in **Slave Nation: How Slavery United the Colonies & Sparked the American Revolution**, Alfred and Ruth Blumrosen, Sourcebooks, p.6, 2005.

9.

The phrase sticky wicket has nothing to do with croquet. It comes from cricket. In cricket, there is a bowler (pitcher) and a batsman (batter). Behind the batter is a wicket. The wicket is made of three short (28") poles in the ground with two “bails” balanced between the three poles. The bails are about the diameter of a broom stick and about 4" long. The bowler pitches the ball toward the wicket, trying to dislodge the bails. The batter must protect the wicket. The ball pitched by the bowler often bounces in front of the batsman. If it has recently rained and the ground is soft, the carom of the ball can be affected and one is said to be playing on a sticky wicket. Oh, I forgot to mention that the grass between the bowler and the wicket is also called the wicket. If all of this sounds very confusing, one must remember that this is an **English** sport.

10.

London Chronicle, June 20, 1772. Quoted in **Slave Nation**, p. 13. At the time of the Revolution, the population of the Colonies was estimated to be about 3,000,000 which included 500,000 slaves. In 1807, Britain abolished the slave trade in the Colonies. They would abolish slavery altogether in 1833 by paying £20 million compensation to slave holders.