

Jerzy Zajadło

University of Gdańsk

jzajadlo@prawo.ug.edu.pl; ORCID: 0000-0002-3113-9828

Lord Mansfield – Truly a judge*

<http://dx.doi.org/10.12775/SIT.2018.022>

1. Introductory remarks

Exactly three hundred years ago, in the spring of 1718, a thirteen-year-old boy travelled alone from Scotland to London on horseback. This extremely dangerous escapade on the roads and byways of the island took him over a month, but he arrived happily. He travelled to study at the most prestigious English school at the time, Westminster College, and was never to return to his native Scone Palace in Scotland. His name was William Murray, but he came down in the history of jurisprudence as Lord Mansfield – one of the greatest judges in history, not just in the English judicial system. However, it is not only owing to the occasion of this special anniversary that is it worth presenting his character to Polish lawyers. The following considerations are paradigmatic and have two sources of inspiration – both negative and positive.

The first one is concerned with the propaganda campaign that accompanied the changes in the Polish justice system – amendments to the laws regulating the system of common courts, the Supreme Court, and the National Council of the Judiciary were preceded by manifestations of incidental negative behaviour on the

* The article has been previously submitted for publication in a Polish-language version in the journal “Państwo i Prawo” 2018, issue no. 10.

part of particular judges, thus creating in the public space a false image of the state of the judiciary and the third power as a whole. It would perhaps be a rational method of reform to eliminate undesirable phenomena, if it was not for the fact that in its essence this defamatory campaign was in fact pure instrumentation aimed at concealing the real intentions of the proposed changes – the political subordination of the organs of the judiciary, contradictory to the constitution.

The second source of inspiration was a book depicting the characters of eminent judges who, by their body of rulings, have made a permanent contribution to the history of jurisprudence¹ – it points to the possibility of constructing a different methodology for the reform of judicial authorities. Of course it is possible to implement changes keeping negative experiences in mind. However one may also draw from the history of the judiciary and the history of judicial approaches what was best in them and search for positive patterns. One may also say that the example was inadequately chosen because the book in question describes judges operating in a completely different legal culture – the Anglo-Saxon common law system. Such an accusation, however, may be easily rejected – at the level of theory and legal philosophy, a methodologically legitimate procedure is to search for such paradigms as are independent of historical and cultural contexts. Thus, it is not only about presenting the profiles of great judges – it is rather about understanding why they were great in a universal, and therefore timeless and supracultural sense, and what meaning this has for contemporary times.

In the case of this paper we present Lord Mansfield and his body of rulings, but perhaps this is just the beginning of a cycle of texts – someone else will surely want to find an equally fascinating example, e.g. in the history of the Polish justice system, and will definitely succeed.

¹ A.C. Hutchinson, *Laughing at the Gods. Great Judges and How They Made the Common Law*, Cambridge 2012.

2. Lord Mansfield's legend

Of course in the philosophy of law there have been examples when certain model visions of an ideal judge were established on the basis of particular theoretical assumptions. We may, for instance, point to the figure of judge Hercules in the integral philosophy of law of Ronald Dworkin. However, in our case the situation is different – Lord Mansfield is not an imaginary, fictitious figure, but a judge of flesh and blood, whose judiciary decisions earned him his true and well-deserved legendary status. Speaking in the language of Kant, here we do not only operate within the sphere of theoretical reason (as it is) or even practical reason (as it should be), we enter the sphere of the power of judging and certain evaluating aesthetics (it is as it should be). Therefore, it is not a coincidence that while drawing up the character of judge Hercules, Dworkin to a large extent sought inspiration in the body of rulings of Lord Mansfield, particularly in his understanding of the precedent as a confirmation of existence of the legal principle².

A detailed presentation of Lord Mansfield's fascinating biography³ would of course exceed the framework of this study – in different periods of his life he was not only a great and well-educated lawyer, but also a very involved and influential politician, a success-

² D. Brooke, *Jurisprudence. Questions and Answers*, 5. Publ. Routledge, New York 2011, p. 61; cf. also R. Siltala, *A Theory of Precedent. From Analytical Positivism to a Post-Analytical Philosophy of Law*, Oxford-Portland (Oregon) 2000, p. 99 et seq.

³ We know a lot about the life and work of William Murray, as there are a number of biographies and monographs analysing his case law – the first was created a few years after his death (J. Holliday, *The Life of William Late Earl of Mansfield*, London 1797), slightly later an extensive chapter was included in the history of English *Chief Justices* (J. Lord Campbell, *The Lives of the Chief Justices of England. From the Conquest Till the Death of Lord Mansfield*, John Murraay, London 1849, Vol. II, pp. 302–584). Moreover, there are several contemporary studies: C.H.S. Fifoot, *Lord Mansfield*, Scientia Verlag, Aalen 1977 (reprint of the first edition of Clarendon Press Oxford 1936); E. Heward, *Lord Mansfield. A Biography of William Murray, 1st Earl of Mansfield, Lord Chief*

ful attorney, member of the House of Commons and the House of Lords, member of the Secret Council and a trusted adviser to the monarch, he held the high offices of Solicitor General and Attorney General, but from the perspective of our main topic the most important fact is that in the years 1756–1788 he was the Chief Justice of the Court of King’s Bench and it is the period of the discussed body of rulings discussed presented here as an example. Indeed, by character, conviction, and calling William Murray was first and foremost a judge – on several occasions he was offered the position of the supreme office of Lord Chancellor, yet he refused each time. He knew perfectly well that entanglement in the current political situation could last only briefly, whereas as a judge of the Court of King’s Bench he was independent and practically irremovable from his post. He was involved in politics anyway, which from today’s perspective may be a bit surprising, but in the England of that time it was an absolutely normal phenomenon. Here, however, we come across a certain special feature in Lord Mansfield’s biography. As a Scotsman from a rebellious Jacobite family he was constantly being suspected of lack of loyalty to the Hanoverian dynasty, yet he managed to achieve the highest state positions and was a trusted advisor to King George III. He was very skillful when it came to politics – extremely cautious, skilfully manoeuvring in the world of enemies and friends, at times even opportunistic and conformist. However, this did not affect his performance as the highest judge – behind the judge’s bench he became a real titan, courageous, creative, at times even bravado, at time apodictic, yet also surprisingly capable of showing the reflexes of empathy and tolerance.

Of course, legal historians may protest against this somewhat idealised depiction of the judge. For in his lifetime, what we would today define as a judge’s activism and assumption of the role of legislator not only won him supporters, but also strong opponents. The best known of them was a person writing to the press under

Justice for 32 Years, Chichester–London 1979; J. Oldham, *English Common Law in the Age of Mansfield*, Chapel Hill–London 2004; N.S. Poser, *Lord Mansfield. Justice in the Age of Reason*, Montreal–Kingston–London–Ithaca 2013.

the pseudonym *Junius*⁴. Although this criticism primarily regarded Lord Mansfield's conservative approach to freedom of the press and the prosecution of publishers of publications criticising the government (the so-called seditious libel), in one of the letters we may also find his disapproval of Mansfield's philosophy of judgment in general⁵.

His eternal political rival, William Pitt, also did not spare Lord Mansfield bitter words. Generally, however, esteem prevailed⁶, or at times even admiration that created around the judge the atmosphere of a legend already during his lifetime, and with time the legend became fixed. Poems were written in his honour, even a ship was named after him – however for the sake of truth and accuracy, let us add that he was often a negative hero of satirical drawings in political pamphlets.

At the end of the nineteenth century, James Croake (or James Paterson) cited the following opinion of Edward Thurlow (Lord Chancellor in 1778–1783): “Lord Mansfield was indeed amazing, in ninety-nine cases he was right, and if he was wrong just one lawyer in a hundred was able to recognise it”⁷. This opinion is probably highly exaggerated. Of course on occasion he made mistakes, and his precedent rulings were overruled by other judges, particularly after his resignation from the post of Chief Justice in 1788. However, it is also a fact that in the decades-long career of the judge, dissenting opinions on his judgments were relatively rare.

Modern biographers tend to avoid this type of “hagiographical” pathos and focus primarily on what has endured from the legacy

⁴ I refer to the cycle of critical letters which did not concern only William Murray, written at the turn of 1760s and 1770s to *Public Advertiser* and published in 1772 under the common title *Letters of Junius*. Historians have not yet identified with absolute certainty who was hiding under this pseudonym – most likely it was the British politician of Irish descent, Sir Philip Francis.

⁵ *Letter XLI to the Right Honourable Lord Mansfield*, in: *Letters of Junius*, Vol. II, New York 1810, pp. 29–43.

⁶ N.S. Poser, op.cit., p. 206: “Nevertheless, the vast majority of Mansfield's contemporaries as well as later writers recognised him as a great judge, in part because of his basic humanity and Instinct for justice”.

⁷ J. Croake, *Curiosities of Law and Lawyers*, London 1882, p. 35; cit. after: W. Swain, *The Law of Contract 1670–1870*, Cambridge 2015, p. 76.

of Lord Mansfield's body of rulings. The author of the latest monograph, Norman S. Poser, estimates that Lord Mansfield's greatness as a judge was based on two foundations: "First, the long-term impact of his decisions, as they were based on the desire to match the law to changing conditions and on fundamental principles. Second, on enriching the law with elements of morality"⁸.

The framework of this study does not allow discussion of both of these problems, so let us therefore briefly focus on the first one. Indeed, Lord Mansfield's judgments were very often cited in the legal literature and case law of the common-law culture. There would be nothing extraordinary about it, if not for the fact that they were made more than two hundred years ago and are still quoted to this day. For example – in a recent monograph on human rights in English law, Lord Mansfield appears several dozen times, even though he himself did not use the concept at all and that the problem is mainly related to the current legal situation⁹. The situation regarding his judicial decisions is even more interesting. It turns out, for instance, that the US Supreme Court from its establishment until today has cited Lord Mansfield's rulings over three hundred and thirty times, from very different areas of law and legal institutions – from commercial law, through contracts, unjust enrichment, defamation, parental authority, freedom of the press, and criminal law. If we add to this the difficult to quantify rulings of lower courts and courts of Australia, Great Britain, India, Israel, Canada, New Zealand, or South Africa¹⁰, we will have to acknowledge that we are indeed faced with a *sui generis* phenomenon. The validity of this legacy in principle relates only to the rulings. Although Lord Mansfield had a great influence on the final shape of particular editions of William Blackstone's *Contemporary Commentaries of the Laws*, he himself was not a learned lawyer and never wrote any treatise concerned with the law. At the same time, however, he kept quite detailed notes on the cases and decisions being prepared. They were discovered relatively recently in 1967 in

⁸ N.S. Poser, *op.cit.*, p. 218.

⁹ M. Tugendhat, *Liberty Intact. Human Rights in English Law*, Oxford 2017.

¹⁰ N.S. Poser, *op.cit.*, p. 398 et seq.

his home, Scone Palace and published in two large volumes as the *Mansfield Manuscript*¹¹. Reading them allows us to deeply investigate the world of the philosophy of judging of a unique lawyer – this world might seem to be enclosed in the time and space of history, yet at the same time it is a world full of universals.

3. What are we afraid to learn from Lord Mansfield?

Returning to the sources of inspiration for the article which were specified in the introduction, it would be a bit perverse to ask whether anything from Lord Mansfield's biography and achievements would be useful when implementing the proposed reforms of the judiciary when it comes to reaching for positive standards – and of course we are looking at the officially declared objectives and not the real and hidden ones that make up the hidden agenda. Such a step would be difficult to take without facing the accusation of ahistoricism, but on the other hand, at a philosophical and legal level, some of the problems may strike us with their surprising relative similarity and timeliness.

First of all, it is difficult for us to determine exactly how many cases Lord Mansfield reviewed in his life. Although we have the above-mentioned manuscripts, it still needs to be remembered that in the system of his time he adjudicated upon cases not only in London at Westminster Hall (at times on a certain group of cases in Guildhall), but he also regularly travelled to the province as an assize judge¹². However, we will leave the details of the organisation of English courts and complicated process procedures to historians of law¹³ – a theoretician and philosopher of law may draw a certain

¹¹ J. Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century*, Vol. 1–2, Chapel Hill–London 1992.

¹² This is broadly discussed by E. Heward, *op.cit.*, pp. 65–74.

¹³ More recent Polish literature on this subject matter, beside older works by M. Szerer and K. Baran, cf. e.g. J. Halberda, *Historia zobowiązań kontraktowych w common law*, Cracow 2012.

general picture on this basis, and all possible exceptions do not violate its validity, but only confirm the rule. Comprehensive education (legal and extra-legal) and many years of practical experience (barrister, Solicitor General, Attorney General) meant that in the courtroom of Lord Mansfield not only did he have excellent control over the matter of the trial, but also over the parties to the proceedings. Everything indicates that in every case he had the desire to terminate it as soon as possible, if feasible at a single sitting, and did not allow lawyers to delay the proceedings. Sometimes, of course, complicated and formalised court procedures made it difficult, however perhaps that is why his first step after becoming Chief Justice was to introduce a reform of the procedures¹⁴.

Secondly, of course Lord Mansfield did not use this concept, but everything seems to indicate that his philosophy of law was perfectly in line with what Roland Dworkin described more than two centuries later as integrity. As a judge, however, he did not have an easy task - he acted in a system that made quite a strict distinction between common law and equity (also within the competences of particular courts), and at the same time showed a programmatic distance to the *acquis* of Roman law. Contemporary commentators of Lord Mansfield's case law emphasise that perhaps this was his greatest merit. He tried to combine these three traditions - common law, equity, and Roman law into one whole, but with regard to this last element, its Scottish origin was not without significance, as Scottish law, unlike English, was primarily based on Roman law. This was supplemented with the aforementioned pursuit towards incorporation into the legal system of non-legal norms, especially moral ones, and being driven by the sense of justice and reason. And this is exactly what Junius held against him - first, that he went beyond his competence and introduced elements of equity reserved for the Court of Chancery into the case-law of the Court of King's Bench that was founded on common law; second, that

¹⁴ Owing to the limited editorial framework I need to refer readers interested in measures taken by Lord Mansfield to simplify and accelerate the procedures to the literature on the subject - cf. e.g. C.H.S. Fifoot, *op.cit.*, pp. 52-81 and N.S. Poser, *op.cit.*, pp. 193-219.

by appealing to the sense of justice, he actually based his rulings on his subjective and arbitrary ethical convictions. Let us add, however, that Lord Mansfield was not referring to his own moral convictions, but rather to certain non-legal norms functioning in the society which today we would define as public morality. This is best seen in the example of commercial law – Lord Mansfield implemented a very important modification, enriching the common law with the actual customs (*lex mercatoria*) functioning in the merchants' environment. In court practice, this translated, for example, into the appointment of a jury in such cases composed of representatives of this particular environment (a special jury), because they best knew the needs and possibilities of trade flow. With all this in mind, from today's perspective we could say that Lord Mansfield had a holistic and systemic approach to law (the said integrity in the meaning of Dworkin), and in its application he used a specifically understood systemic interpretation - in the conditions of common law based on narrowly and casuistically understood precedents, this was a significant modification of the very philosophy of judging.

Thirdly, such a position obviously required a radical change of approach to case law. Lord Mansfield, of course, did not underestimate the significance of precedent and stood on the foundation of its declaratory theory, but nevertheless introduced a certain fundamental modification in this respect – I will give the same ruling as another court in a similar case did before not because it ruled this way, but because its ruling resulted from the effective rule in force and only confirmed it, therefore I, in the name of legal certainty, should do the same until the rule is in force. However, here we can also see Lord Mansfield's common-sense approach – the rule binds me, but that does not mean that I cannot overthrow it, particularly if it has lost its timeliness and following it would simply contradict reason¹⁵. In one of his judgments (*Jones v. Randall*, 1774), the judge concluded with some sarcasm and irony that “law would be

¹⁵ Such understanding of the essence of the precedent by Lord Mansfield is emphasised by many contemporary theoreticians and philosophers of law – the recent account on this subject matter in the Polish literature, although slightly differing in details regarding a few points, T. Zych, *W poszukiwaniu*

a strange science if we had to go back to the times of Richard I to see what the law was.” However, we are now entering the ground of a certain fundamental contemporary discussion – “the choice between judges’ activism or passivism”, which despite appearances, and rather paradoxically, also concerned Lord Mansfield¹⁶. Again, let us leave history for a moment as well as the fact that this dilemma has a completely different dimension on the basis of common law, and another on the ground of continental legal culture, and look at the problem in a more universal manner. Within the culture of continental civil law the problem concerns the judge’s entering into the competences of the legislator, whereas in common law culture, it concerns the excessive breaking of precedents and establishing new rules – however, the mechanism is the same: suddenly the judge goes beyond his natural sphere of application and interpretation of the law and enters (excessively or at all?) into the sphere of law-making. Hence, Lord Mansfield would perfectly understand the question whether to choose the “activism or passivism of judges” but although his answer would be unambiguous it would also be relativised by further questions: of course – activism, but why, for what purpose and what does it mean? For this reason, J. Oldham analyses Lord Mansfield’s body of rulings from the point of view of various forms of activism:

- reaching for international and foreign law;
- application of equity rules;
- creating a new law;
- breaking of precedents;
- an expanding interpretation of laws;
- a restrictive interpretation of laws;
- reaching for regulations that are no longer in force¹⁷.

According to some authors, in the case of Lord Mansfield, we are dealing with the activism of judges, yet this is rational and justified

pewności prawa. Precedens a przewidywalność orzeczeń sądowych w tradycji prawa anglosaskiego, Toruń 2017, pp. 154–160.

¹⁶ J. Oldham, *Judicial Activism in Eighteenth-Century English Common Law in the Time of the Founders*, “Green Bag” 2005, Vol. 8, No. 2, pp. 269–280.

¹⁷ *Ibidem*, p. 271.

activism – its essence is not in replacing the legislator, but rather the culture of permanent improvement and improvement of law in the process of its application and interpretation (the culture of improvement)¹⁸.

Fourthly, there is a certain aspect of this goes beyond the formal analysis of Lord Mansfield's body of rulings – the question of character, personality, intellectual qualities of the judge, and sometimes simply his sense of humour. William Murray's biographies abound in anecdotes about his various unconventional actions in the courtroom, which helped him find that sometimes much-needed emotional bond with the parties to the trial. Here we are entering a sphere, which E. Łętowska has been describing for years as the problem of communication between the court, the parties to the proceedings, and the external environment. In the courtroom, Lord Mansfield manifested a special natural ease that allowed him to enrich the *ratione imperii* activities with the elements of *imperio rationis* so important from the point of view of communication. It was that much easier for him because he was a brilliant and seasoned speaker – his mentor and friend, the famous English poet Alexander Pope helped him in improving his rhetorical competences, and William Murray's verbal battles in parliament with the already mentioned William Pitt went down in history. With regard to his judicial decisions, this translated into an extremely communicative and persuasive language of the justifications to Lord Mansfield's judgments. This is best seen in the undoubtedly best known case of the judge – Somerset v. Steward of 1772, which is discussed below by way of an example.

4. Legendary rulings

There are several rulings of Lord Mansfield, which owing to the merits of the settlement and the legal effects in the system of common law can be considered as milestones – they include, for

¹⁸ J.J. Spigelman, *Lord Mansfield and the Culture of Improvement*, "Quadrant", October 2008, pp. 53–55.

example, *Pillans v. Van Mierop* (1765) in the law of contract, *Moses v. MacFerlan* (1760) in quasi-contract law and in relation to the institution of unjust enrichment, *Carter v. Boehm* (1766) in insurance law or *Millar v. Taylor* (1769) in copyright law¹⁹. In the Polish literature on the subject these verdicts sometimes appear in studies within specific areas of law, but only one of them – *Moses v. MacFerlan*²⁰ – has been subject to a more thorough analysis. Of course, one can also find in the biography and body of rulings of the judge such elements as are difficult to reconcile with our today's perspective – for instance, his attitude to the freedom of the press or the problem of taxing colonies and the war for independence in the United States. One could, of course, defend Lord Mansfield's conservatism and say that as Chief Justice he was only guarding the constitutional order. However to many it would not sound too convincing. Thus, the final assessment of Lord Mansfield depends to some extent on one's point of view. Thomas Jefferson, as an opponent of a strong judiciary, was very critical in his assessment – in Blackstone's *Commentaries of the Laws of England*, for instance, he used the phrase "the honey Mansfieldism"²¹. Nevertheless, already such prominent judges as John Marshall and Joseph Story, highly valued Lord Mansfield and eagerly invoked his rulings.

In order to illustrate some of the above-described elements of the philosophy of judging, I will refer, by way of example, to the case which was the most resonant in Lord Mansfield's career since it

¹⁹ An indirect proof of this may be the fact that in the contemporarily prepared collections of commentaries to the so-called landmark cases we may also find rulings by Lord Mansfield – cf. C. Mitchell, P. Mitchell (ed.), *Landmark Cases in the Law of Contract*, Oxford-Portland (Oregon) 2008 (cases *Pillans v. Van Mierop*, *Carter v. Boehm*, *Da Costa v. Jones*); iidem (ed.), *Landmark Cases in the Law of Restitution*, Oxford-Portland (Oregon) 2006 (case *Moses v. MacFerlan*); P. Handler, H. Mares, I. Williams (ed.), *Landmark Cases in Criminal Law*, Oxford-Portland (Oregon) 2017 (case *R v Shipley: The Dean of St Asaph's Case*).

²⁰ J. Halberda, *Argumentacja historyczno-prawna w orzecznictwie Izby Lordów przelomu XX i XXI wieku na przykladzie nawiazan do sprawy Moses v. MacFerlan z 1760 roku*, „Krakowskie Studia z Historii Państwa i Prawa” 2015, v. 8, n. 2, pp. 199-214.

²¹ Jefferson used this phrase in his letter of 17 February 1826 to James Madison.

caused such far-reaching consequences which he himself probably could not predict²².

On 22 June 1772 as the judge ruled in the case *Somerset v. Stewart*, he used the following formula: “Let justice be done though the heavens fall” (*Fiat iustitia, ruat coelum*)²³. In colloquial language another version of this sentences has become more popular – *Fiat iustitia, pereat mundus* (“let justice be done, and let the world perish”). This last maxim most often is a pejorative symbol of extreme formalist legalism, however it may also appear in favourable contexts²⁴. In this latter case, it could mean the search for justice against all adversities and regardless of possible consequences. In such an event the maxim *Fiat iustitia, pereat mundus*, could be translated as follows: “let justice be done and overcome the pride

²² More on this topic J. Zajadło, *Sędziowie i niewolnicy. Szkice z filozofii prawa*, Gdańsk 2017.

²³ The literature on the *Somerset v. Stewart* case is so voluminous that it is difficult to cite it here briefly. Lord Mansfield’s ruling and its influence on the problem of slavery in the USA are still subject to dispute and analysis. From numerous recent writings cf. e.g. A.A.W. Blumrosen, R.G. Blumrosen, *Slave Nation. How Slavery United the Colonies and Sparked the American Revolution*, Naperville 2005; J.B. Dyer, *After the Revolution: Somerset and the Antislavery Tradition in Anglo-American Constitutional Development*, “The Journal of Politics” 2009, vol. 71, no. 4, pp. 1422–1434; J. Oldham, *English Common Law*, pp. 305–323; R. Paley, *After Somerset: Mansfield, slavery and the law in England, 1772–1830*, in: *Law, Crime and English Society, 1660–1830*, ed. N. Landau, Cambridge 2004, pp. 165–184; D. Rabin, “In a Country of Liberty?": *Slavery, Villeinage and the Making of Whiteness in the Somerset Case (1772)*, “History Workshop Journal” 2011, no. 72, pp. 5–29; G.W. Van Cleve, *A Slaveholders’ Union: Slavery, Politics, and the Constitution in the Early American Republic*, Chicago 2011, pp. 31–40, 50–56, 169–172, 255–257; D.A. Webb, *The Somerset Effect: Parsing Lord Mansfield’s Words on Slavery in Nineteenth Century America*, “Law and History Review” 2014, vol. 32, no. 3, pp. 455–490; S.M. Wise, *Though the Heavens May Fall. The Landmark Trial that Led to the End of Human Slavery*, Cambridge (Mass.) 2005. Cf. also thematic issues of “Texas Wesleyan Law Review” 2007, vol. 13, no. 2: *Symposium Edition. Too Pure an Air: Law and the Quest for Freedom, Justice, and Equality*, pp. 285–817 and “Law and History Review” 2006, vol. 24, no. 3: *Forum – Somerset’s Case Revisited*, pp. 601–671.

²⁴ Cf. *Łacińska terminologia prawnicza [Latin Legal Terminology]*, ed. J. Zajadło, Warsaw 2013, p. 39 et. seq.

of the great of this world”²⁵. And Lord Mansfield did use it in such an approving sense in the cited judgment. It is recalled here as it is of great importance for the final assessment of the judgments of American courts in matters of slavery. The factual situation of this extraordinary case study was as follows.

James Somerset was a slave brought from Africa to America in 1749, then sold in Virginia to a British customs official, Charles Stewart. In 1769, Stewart returned to London, and there after 2 years his slave fled. Somerset was captured after about two months later by the people hired by Stewart and transported onto the *Ann and Mary* ship moored on the Thames, then he was to be transferred to Jamaica and sold. Luckily for Somerset, England of that time was already characterised by a very strong abolitionist movement with the influential and opinion-forming Granville Sharp at the forefront²⁶. The imprisonment of the slave met with an immediate reaction from the abolitionists – Thomas Walkin, Elizabeth Cade, and John Marlow, with the help of lawyers, applied for his release under the habeas corpus procedure. An especially important contribution was made by a young novice lawyer Francis Hargrave – we can thoroughly analyse his arguments as they were written down by him and published in the form of an eighty-page pamphlet right after the trial²⁷.

Judge Lord Mansfield ordered Somerset to be freed until the case was finally settled and several months of preparation for the trial ensued. Formally, the captain of the *Ann and Mary* ship, John Knowles, was a party to the *habeas corpus* procedure, as it was where the slave was being held. While preparing for the trial, the lawyers of the parties presented various arguments during inciden-

²⁵ M. Kuryłowicz, *Słownik terminów, zwrotów i sentencji prawniczych łacińskich oraz pochodzenia łacińskiego*, Cracow 2002, p. 106.

²⁶ The topic of Granville Sharp's relations with slavery cases dealt with by Lord Mansfield still raises interest in modern science – the most recent work contains a complete documentation of these cases, including some unknown and unpublished source materials: A. Lyall, *Granville Sharp's Cases on Slavery*, Oxford – Portland (Oregon) 2017.

²⁷ F. Hargrave, *An Argument in the Case of John Sommersett A Negro*, London 1772.

tal sittings, while Lord Mansfield urged the parties to a settlement, and, in particular, tried to persuade Stewart to voluntarily enfranchise Somerset. He was aware of the consequences, including the economic ones, of a possible verdict undermining the legality of Somerset's imprisonment, as the precedent nature of such a ruling could cause an avalanche of lawsuits against several thousand slave owners in England. When the attempts to persuade Stewart to make a settlement failed, reportedly the words mentioned above were spoken: *Fiat iustitia, ruat coleum*. On June 22, 1772, Lord Mansfield made the final decision in favour of Somerset, and, although the sky did not fall, the legend of the case began, thus supposedly marking the end of slavery in England. The word of Lord Mansfield's ruling spread like wildfire – already in the following year a similar verdict was made in the *Knight v. Wedderburn* case, although there is doubt whether Joseph Knight really had a slave status comparable to that of James Somerset's²⁸.

The legend of Somerset had a particularly strong influence on the British colonies in America and later of course also on the United States. A phenomenon known today as the “Rashomon effect” occurred – the name comes from the title of a well-known film by Akira Kurosawa, in which four witnesses report the same events seen at the same time in a completely different manner²⁹. The same happened with the interpretation of the meaning of Lord Mansfield's ruling in America. Extreme abolitionists, such as the anarchist Lysander Spooner, saw in it the basis for questioning the constitutionality of the institution of slavery. Activists around William Lloyd Garrison and Wendell Phillips repeated that this is only evidence that the American Constitution is indeed “a covenant with death and an agreement with hell.”³⁰ Moderate abolitionists,

²⁸ J.W. Cairns, *After Somerset: The Scottish Experience*, “The Journal of Legal History” 2012, vol. 33, issue 3, pp. 291–312; cf. also: I. Whyte, *Scotland and the Abolition of Black Slavery, 1756–1838*, Edinburgh 2006, p. 16 et seq.

²⁹ D.A. Webb, op.cit., p. 455.

³⁰ A completely separate place is taken by a black abolitionist Frederick Douglass, who, without being a lawyer, developed his own constitutional theory – initially it was close to the Garrisonists's theory, but later came closer to Lincoln's republicanism – cf. P. Finkelman, *Frederick Douglass's Constitution:*

like Salmon P. Chase, emphasised that the constitutional principle of freedom applies at the federal level, which does not mean, however, that a positive law sanctioning slavery cannot be passed at the state level. Finally, pro-slavery democrats from the South either completely disregarded Lord Mansfield's judgment or perversely interpreted it in their favour³¹.

In fact, the legal sense of the *Somerset v. Stewart* judgment was indeed somewhat complicated. Firstly, because the Somerset ruling did not mean the end of slavery in England, since the ban on the slave trade was introduced in 1807, while the total ban on slavery in the colonies was implemented as late as in 1833. Secondly, at the time of the ruling in England, the type of slavery that gave Somerset his legal status no longer existed under the law of Virginia (known as chattel slavery), however there were institutions similar to slavery (near slavery) and various forms of serfdom (known as villeinage). Thirdly, the content of the judicial opinion in the *Somerset v. Stewart* case does not suggest that Somerset ceased to be a slave under the law of Virginia, but only that he could not be forcibly deprived of liberty in England as there was no legal basis for it. In this aspect, there is a phrase in Murray's sentence which later became the foundation of his legend. Namely, in Lord Mansfield's opinion, slavery in itself is so repugnant that it is not supported by either the law of nature or common law, and as a result can be sanctioned only by positive law. Since no such positive law exists in England and the positive law of Virginia only applies to its territory, Somerset should be released. Let us note that Lord Mansfield did not refer in any particular way to moral arguments, the justification to his decision from the beginning to the end remains embedded within the legal argument *par excellence*. It was similar to the case-law of American courts in slavery matters described in subsequent chapters of this book. However, it is impossible to ignore the *Somerset v. Stewart* case, as it had led to

From Garrisonian Abolitionist to Lincoln Republicanism, "Missouri Law Review" 2016, vol. 81, no. 1, pp. 1-73.

³¹ D.A. Webb, *op.cit.*, pp. 458-489.

the establishment in modern literature of a mental and interpretive paradigm that is known as the “Somerset effect”³².

Even though the ruling in the *Somerset v. Stewart* case was given during the colonial period before the outbreak of the War of Independence, in the modern literature of the subject it is quite commonly regarded as a very important moment in the history of American constitutionalism³³. And probably rightly so, since it had a very significant impact not only on the debate in the constitutional convention but also on subsequent judicial decisions, even if it was accompanied by a certain overinterpretation of Lord Mansfield’s words. There is of course a deep paradox in that because William Murray was not a supporter of the American revolution – quite on the contrary – he supported the Crown’s taxation of the colony and resolutely opposed the rebellion³⁴.

One problem with the final assessment of the significance of this ruling, however, is that we do not really know where its real impact ends and where the legend that has accompanied it for decades begins³⁵. Lord Mansfield presented the justification for his breakthrough decision verbally and therefore we know it only from indirect accounts. The literature emphasises that there are at least five versions of it, quite significantly differing in details³⁶. There is no doubt, however, that in their subsequent judgments American judges recalling the *Somerset v. Stewart* case most often cited the part in which Mansfield highlighted that slavery must have a positive-law basis, because it is in itself contrary, not only to the law of nature, but also to the traditional common law. As Kunal

³² *Ibidem, passim*.

³³ Cf. e.g. the chronology of American constitutionalism contained in the study: M.K. Curtis, J.W. Parker, D.M. Douglas, P. Finkelman, W.G. Ross, *Constitutional Law in Context*, Durham 2010–2011, vol. 1, p. XXXVI and vol. 2, p. XXXIV.

³⁴ More on this topic in recent publications cf. E.B. Lowrie, *Lord Chief Justice Mansfield. Dark Horse of the American Revolution*, Bloomington 2016.

³⁵ J. Nadelhaft, *The Somersett Case and Slavery: Myth, Reality, and Repercussions*, “The Journal of Negro History” 1966, vol. 51, no. 3, pp. 193–208.

³⁶ This is analysed in detailed in J. Oldham, *New Light on Mansfield and Slavery*, “Journal of British Studies” 1988, vol. 27, no. 1, pp. 45–68.

M. Parker writes, “Lord Mansfield’s fundamental developments regarding the relationship between the law of nature, common law, and positive law significantly shaped the subsequent American debate on the legal sources of slavery”³⁷.

Nonetheless it must be emphasised that Lord Mansfield’s words as passed from generation to generation in various legendary versions were, in fact, far from the legal precision and gave rise to much controversy. For example, what does positive law mean in this context – is it solely a written legislative act or perhaps also a common law? What was meant by the phrase that slavery must have a positive-law basis – would it have to be proclaimed in positive-law terms or also that positive law could sanction the state of affairs existing in the form of the so-called Slave Codes³⁸? If slavery is contradictory to the law of nature, how can it be sanctioned by positive law? The problem raised by Lord Mansfield was (and continues to be) fascinating and fundamental from the philosophical point of view, however American judges ruling on specific matters had to stick to legal and constitutional reality and have their feet firmly on the ground, even if they sometimes attempted to be very creative in the interpretation of applicable laws. Thus, if they were guided by the maxim *fiat iustitia, ruat coelum*, it was applied rather in an approving than a pejorative sense and in a very balanced manner. The specific and limited significance of the ruling in the *Somerset v. Stewart* case was confirmed by some of the subsequent case-law. A typical example may be the *Slave Grace Case* from 1827. A woman named Grace, considered a free person in England, by the decision of the Admiralty Court was once again made a slave when she voluntarily returned to Antigua, an island in the Windward Islands archipelago³⁹. This had a decisive meaning for

³⁷ K.M. Parker, *Common Law, History, and Democracy in America 1790–1900*, Cambridge University Press, New York 2011, p. 176.

³⁸ Broadly on this subject matter: W.M. Wiecek, *The Sources of Antislavery Constitutionalism in America, 1760–1848*, Ithaca 1977; idem, *Somerset: Lord Mansfield’s and the legitimacy in the Anglo-American World*, “The University of Chicago Law Review” 1974, vol. 42, no. 1, pp. 86–146.

³⁹ More on this case cf. S. Waddams, *The Case of Grace James (1827)*, “Texas Wesleyan Law Review” 2007, vol. 13, no. 2, pp. 783–793.

the most famous American slave case – the *Dred Scott v. Sandford* case from 1857.

Lord Mansfield himself also tried to tone down the “revolutionary” implication of the ruling in the *Somerset v. Stewart* case and explain its actual, more limited meaning both in private conversations and in his body of rulings (e.g. in the opinion to the *Rex v. Inhabitants of Thames Ditton* judgment of 1785), however it was too late. Certain ideas began to live their own lives.

5. Conclusions

It is difficult to close this paper with firm conclusions. The purpose of this article was primarily to present to Polish lawyers, who in their daily practice are less interested in the history of law, the profile of the great judge and his interesting legacy. Thus, finding a link to the reform of the justice system was purely incidental, however it also fitted within the author’s *licentia poetica*. On the other hand, it may also suggest something, although everyone must draw their own conclusions. Among Lord Mansfield’s accomplishments one may find everything that lies at the core of reforms of the judiciary system, or at least is officially declared as such: the acceleration and simplification of court procedures, pursuing of the elementary sense of justice, properly understood judicial activism, and, last but not least, the communicativeness of opinions.

STRESZCZENIE

Lord Mansfield – sędzią być!

Punktem wyjścia tego opracowania jest tocząca się w Polsce dyskusja wokół sądów i sędziów. Autor wychodzi z założenia, że znacznie lepiej określić cele reformy wymiaru sprawiedliwości, korzystając z uniwersalnych wzorców pozytywnych niż z incydentalnych wzorców negatywnych.

Za przykład takiego pozytywnego wzorca autor wybrał sylwetkę wybitnego angielskiego sędziego z drugiej połowy XIX w. – Williama Murraya, Lorda Mansfield. Na podstawie analizy jego orzecznictwa próbuje zrozu-

mieć, na czym polegała wielkość Murraya jako sędziego. W ostatniej części artykułu przedstawiono to w oparciu o najśłynniejsze orzeczenie Lorda Mansfield – wyrok w sprawie *Somerset v. Stewart* z 1772 r.

Słowa kluczowe: sędziowie; sądy; Lord Mansfield; sprawa *Somerset v. Stewart*

SUMMARY

Lord Mansfield – Truly a judge

The starting point for this study is the ongoing debate in Poland about courts of justice and judges. The author assumes that it is much better to define the goals of reforming the justice system using universal positive models than incidental negative ones. As an example of such a positive model, the author chose the silhouette of an outstanding English judge from the second half of the eighteenth century – William Murray, Lord Mansfield. Based on the analysis of his body of rulings, he tries to understand Murray's greatness as a judge. In the last part of the article this is presented based on the most famous ruling of Lord Mansfield – the *Somerset v. Stewart* judgment from 1772.

Keywords: judges; courts; Lord Mansfield; *Somerset v. Stewart*

BIBLIOGRAPHY

- Blumrosen A.A.W., Blumrosen R.G., *Slave Nation. How Slavery United the Colonies and Sparked the American Revolution*, Naperville 2005.
- Brooke D., *Jurisprudence. Questions and Answers*, New York 2011.
- Cairns J.W., *After Somerset: The Scottish Experience*, "The Journal of Legal History" 2012, vol. 33, issue 3.
- Croake J., *Curiosities of Law and Lawyers*, London 1882.
- Curtis M.K., Parker J.W., Douglas D.M., Finkelman P., Ross W.G., *Constitutional Law in Context*, Carolina Academic Press, Durham 2010–2011, vol. 1.
- Dyer J.B., *After the Revolution: Somerset and the Antislavery Tradition in Anglo-American Constitutional Development*, "The Journal of Politics" 2009, vol. 71, no. 4.

- Finkelman P., *Frederick Douglass's Constitution: From Garrisonian Abolitionist to Lincoln Republicanism*, "Missouri Law Review" 2016, vol. 81, no. 1.
- Halberda J., *Argumentacja historyczno-prawna w orzecznictwie Izby Lordów przełomu XX i XXI wieku na przykładzie nawiązań do sprawy Moses v. MacFerlan z 1760 roku*, „Krakowskie Studia z Historii Państwa i Prawa” 2015, v. 8, n. 2.
- Handler P., Mares H., Williams I. (ed.), *Landmark Cases in Criminal Law*, Oxford-Portland (Oregon) 2017.
- Hargrave F., *An Argument in the Case of John Sommersett A Negro*, London 1772.
- Heward E., *Lord Mansfield. A Biography of William Murray, 1st Earl of Mansfield, Lord Chief Justice for 32 Years*, Chichester-London 1979.
- Holliday J., *The Life of William Late Earl of Mansfield*, London 1797.
- Hutchinson A.C., *Laughing at the Gods. Great Judges and How They Made the Common Law*, Cambridge 2012.
- Kuryłowicz M., *Słownik terminów, zwrotów i sentencji prawniczych łacińskich oraz pochodzenia łacińskiego*, Kraków 2002.
- Łacińska terminologia prawnicza*, ed. J. Zajadło, ed. 2, Warszawa 2013.
- Lord Campbell J., *The Lives of the Chief Justices of England. From the Conquest Till the Death of Lord Mansfield, John Murraay*, London 1849, Vol. II.
- Lowrie E.B., *Lord Chief Justice Mansfield. Dark Horse of the American Revolution*, Bloomington 2016.
- Lyall A., *Granville Sharp's Cases on Slavery*, Oxford – Portland (Oregon) 2017.
- Mitchell C., Mitchell P. (ed.), *Landmark Cases in the Law of Contract*, Oxford-Portland (Oregon) 2008.
- Nadelhaft J., *The Somersett Case and Slavery: Myth, Reality, and Repercussions*, "The Journal of Negro History" 1966, vol. 51, no. 3.
- Oldham J., *English Common Law in the Age of Mansfield*, Chapel Hill-London 2004.
- Oldham J., *Judicial Activism in Eighteenth-Century English Common Law in the Time of the Founders*, "Green Bag" 2005, vol. 8, no. 2.
- Oldham J., *New Light on Mansfield and Slavery*, "Journal of British Studies" 1988, vol. 27, no. 1.
- Oldham J., *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century*, Vol. 1-2, University of North Carolina Press, Chapel Hill-London 1992.
- Paley R., *After Somerset: Mansfield, slavery and the law in England, 1772-1830*, in: *Law, Crime and English Society, 1660-1830*, ed. N. Landau, Cambridge 2004.

- Parker K.M., *Common Law, History, and Democracy in America 1790–1900*, New York 2011.
- Poser N.S., *Lord Mansfield. Justice in the Age of Reason*, McGill-Queen's University Press, Montreal–Kingston–London–Ithaca 2013.
- Rabin D., "In a Country of Liberty?": *Slavery, Villeinage and the Making of Whiteness in the Somerset Case (1772)*, "History Workshop Journal" 2011.
- Siltala R., *A Theory of Precedent. From Analytical Positivism to a Post-Analytical Philosophy of Law*, Oxford-Portland (Oregon) 2000.
- Spigelman J.J., *Lord Mansfield and the Culture of Improvement*, "Quadrant", October 2008.
- Swain W., *The Law of Contract 1670–1870*, Cambridge 2015.
- Tugendhat M., *Liberty Intact. Human Rights in English Law*, Oxford 2017.
- Waddams S., *The Case of Grace James (1827)*, "Texas Wesleyan Law Review" 2007, vol. 13, no. 2.
- Webb D.A., *The Somerset Effect: Parsing Lord Mansfield's Words on Slavery in Nineteenth Century America*, "Law and History Review" 2014, vol. 32, no. 3.
- Whyte I., *Scotland and the Abolition of Black Slavery, 1756–1838*, Edinburgh 2006.
- Wiecek W.M., *The Sources of Antislavery Constitutionalism in America, 1760–1848*, Ithaca 1977.
- Wise S.M., *Though the Heavens May Fall. The Landmark Trial that Led to the End of Human Slavery*, Cambridge (Mass.) 2005.
- Zajadło J., *Sędziowie i niewolnicy. Szkice z filozofii prawa*, Gdańsk 2017.
- Zych T., *W poszukiwaniu pewności prawa. Precedens a przewidywalność orzeczeń sądowych w tradycji prawa anglosaskiego*, Toruń 2017.