

**LORD MANSFIELD AND THE CULTURE OF IMPROVEMENT**  
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**THE IDEAS OF THE ENLIGHTENMENT IN THE 21<sup>st</sup> CENTURY**  
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The multiple national enlightenments of 18<sup>th</sup> century Europe had common themes which justify the continued use of the term The Enlightenment. I will concentrate on one such theme and illustrate it with one man's achievement.

The theme is the culture of improvement: the widespread conviction that by the application of reason, things can be done better. One of the great achievements of The Enlightenment was the inculcation of a belief that no individual, nor society at large, was doomed by God or by nature or by fate to continue to do things the way they had always been done.

I distinguish an ‘improver’ from a ‘reformer’. As Senator Roscoe Conkling, a New York Republican who defended the spoils system against proponents of civil service reform, once put it: “When Samuel Johnson said that patriotism was the last refuge of the scoundrel, he did not have in mind the possibilities of the word ‘reform’”.

A reformer proceeds on the basis that something needs fixing or that someone has done something wrong. An improver proceeds on the basis that, however effective or efficient current practices are, they could be made better and we should always seek ways of doing so.

Lord Mansfield, Chief Justice of the Court of Kings Bench for an unsurpassed long term – from 1756 to 1788 – was a man of affairs, not an armchair *philosophe* on the Continental model. The English Enlightenment was characterised by a pragmatic focus on what worked, a quality which attracted the admiration of Continental thinkers like Montesquieu and Voltaire, but not Rousseau who, like Marx in the next century, found refuge from intellectual persecution in England. Both displayed a remarkable lack of curiosity about why it was that England could produce a society in which each could find such refuge.

The culture of improvement was manifest in every 18<sup>th</sup> century debate about social relations or constitutional change and, perhaps most spectacularly, in science and technology. In England, primarily because of Lord Mansfield, it was also manifest in the law. He played a critical role in the subsequent success of London as a commercial and financial city, of which its residents remain the beneficiary to this day.

The common law was a fertile ground for the display of Enlightenment values. It had developed over the centuries, not as a manifestation of revelation or dogma, but by the application of formal reasoning. Precedents were applied through articulated thought processes. Principles and new rules emerged by express reasoning invoking logic, usually inductive albeit sometimes deductive. The weight of tradition and precedent – the idea still manifest amongst some lawyers that nothing must ever be done for the first time – slowed down the process, but did not prevent it.

Outside legal circles, Mansfield is best known as the creator of Kenwood, his wonderful Hampstead home that continues to delight visitors, and as the judge in the landmark slave trade decision, *Sommerset's case*, who famously is supposed to have said: "The air of England is too pure for any slave to breathe. Let the black go free". His

actual rhetoric was not quite as memorable, but the version is close enough and it would be churlish to correct it.

For lawyers, however, Mansfield is remembered for, virtually single-handedly, creating English commercial law.

Born in Scotland in an aristocratic Jacobite family, a disloyal connection which would bedevil his political career, William Murray, the future Lord Mansfield, left for England for high school – Westminster – followed by Oxford and Lincoln's Inn, never to return. He was not a member of the Scottish Enlightenment but his Scottish origins were significant.

He displayed a Scottish francophone tendency. He read French authors and became attracted to French jurists. His classical education – particularly his reading of Cicero – convinced him of the strength of Roman jurisprudence, the systematic order of which contrasted with the chaos of the common law. He proposed that William Blackstone prepare the first comprehensive outline of the common law, which became the *Commentaries*, probably the most influential text on the law of England ever published, which self-consciously invoked the spirit of the age.

Most significantly, Mansfield's personal and educational background meant that he did not share the insularity of most common lawyers. He was prepared to adopt the practices of international traders to fashion a commercial law, especially maritime law, that was self-consciously global in perspective. He was convinced that the functional requirements of commercial law – particularly certainty – were the same everywhere. He accepted the common law method and tradition, without deifying it.

Mansfield's determination to improve the legal system was manifest on the first day he sat as a judge. He delivered his first judgment on the spot, *ex tempore* as we lawyers still say. This was not then the practice. Plainly it minimised delay for the parties. It was also a much more efficient use of judicial time. His initiative remains the dominant tradition of English judges, who deliver a much higher proportion of "*ex temps*" than we do, much as we try.

His concerns and solutions have a decidedly contemporary ring. The excessive delays and costs of litigation were attacked by taking control of the progress of cases from the profession: imposing time limits on counsel preparing submissions on legal points after a jury had

found the facts, forcing practitioners to justify adjournments and abolishing the practice of hearing cases in order of the seniority of counsel, very lucrative for the senior bar, but unfair to any litigant who could only afford junior counsel. He set an example for hard work and drove the profession to appear when needed. However, when he proposed to sit on Good Friday, he relented after the exasperated barrister pointed out that the last judge to do that was Pontius Pilate. On another occasion when he proposed to sit on a holiday, the whole bar met and agreed not to turn up.

Mansfield's greatest contribution was the development of commercial law. Like Augustus who said "I found Rome a city of brick and left it of marble", so Mansfield found English law a feudal inheritance, preoccupied with real property, and left it with a vibrant set of principles for a commercial, and soon an industrial, society. The comparative significance of property was transformed during this era – from real or tangible physical property to pieces of paper bearing promises: government debt, insurance policies, bank notes, bills of exchange, shares in joint stock companies, options and contracts of all kinds.

The internationally recognised Law Merchant, hitherto spasmodically enforced by trade guilds, local courts in sea towns and by the Court of Admiralty was brought into the mainstream to be recognised and enforced by the central courts. The law of every kind of insurance – marine, life, fire etc – of negotiable instruments, of sale of goods, of intellectual property and every aspect of maritime law – collisions, wrecks, charter parties, freight – all in a form recognisable today – was established or reinforced at this time.

In his prior political career – not entirely abandoned on his appointment – he manifested a keen interest in and understanding of commercial issues, not least in the investment advice he was called upon to give to his spendthrift party leader, the Duke of Newcastle. An early reader of Adam Smith, Mansfield objected to government interference with trade: attacking restrictions on food imports established in what he described as “the imaginary private interests of our landed gentry” and deploying all his formidable oratory against a bill that would prohibit British insurance of French ships in times of war. His views did not prevail at a political level until the repeal of the Corn Laws.

When he became Chief Justice he was able to develop commercial law in accordance with these principles. He was determined

that the law should be based on freedom of contract – “not to dictate but to interpret”, as he put it. He established the practice of giving commercial contracts a flexible business-like interpretation, recognised the need for good faith in commercial dealings, accepted negotiable instruments as a form of currency, validated the role of insurance and enforced established legal rules, even those he thought were wrong, on the faith of which commercial arrangements had been made. The overriding principle was, if there was no existing rule, the law would adopt the customs of the particular trade.

At the time, issues of fact in his court had to be tried by jury. Mansfield was well aware of the defects of the common law jury trial and its inability to determine the facts in complex disputes. He made two fundamental changes to jury trials in commercial cases.

Mansfield institutionalised a system of special juries of merchants who would sit with the judge and determine what commercial practice in the particular trade required. These specialist jurors also acted in other cases as expert witnesses or as arbitrators.

Secondly, he used his authority to refer such matters out to independent arbitration. He often nominated the arbitrator and made

detailed orders for the conduct of the arbitration, enforced by contempt proceedings. His orders by-passed inefficient technical rules of court procedure eg the contemporary rule that a party could not give evidence. His efforts to get parties to settle were relentless. He was an interventionist judge at a time when the adversary system was still being formed. All of this has resonance today as judges, led by commercial judges, assume more and more responsibility for case management.

The flexibility and resilience of English commercial law was established in Mansfield's term of office. He sat on thousands of cases over his 32 years and was rarely overturned. He failed in his attempt to abolish the need for consideration in the law of contract and, more dramatically, failed in his attempt to fuse law and equity, so that parties could get equitable relief or equitable procedural advantage in a common law court, without instituting separate proceedings in the Court of Chancery. That change would require legislation, a century later or, in New South Wales, two centuries later. The profession in my state remains an international bastion of evangelical equity scholarship, amongst whom Mansfield is still treated as a heretic.

Lord Mansfield could be characterised as a judicial activist, which would be an odd description of one of the most conservative political figures of his time.

This was not an age in which most such matters were ever expected to be the subject of legislation. The common law developed from the ground up, by the identification of principle through the slow accretion of practical knowledge about the range of issues that actually arise, rather than by the application of an inflexible predetermined verbal formula in a statute or code. Mansfield was much admired by Edmund Burke – his political opponent on issues such as the American Revolution and hardly the champion of activism – who said: “Mansfield’s ideas go to the growing melioration of the law by making its liberality keep pace with the demands of justice and the actual concerns of the world, conforming our jurisprudence to the growth of our commerce and of our empire”.

Mansfield accepted that he was bound by precedent, but the common law method permitted adjustment within this constraint and, as an improving judge, Mansfield could often ensure a just result.

As Judge Richard Posner, an American legal polymath, has observed, the law is the *only* sphere of discourse in which the word “innovative” has a pejorative connotation. The word “improvement” has no such connotation. Mansfield was an improver.

The culture of improvement has been at the forefront of judicial developments over the last two or three decades. Every participant in the administration of justice has been concerned with reducing the delays and costs of court proceedings. Judges are no longer passive umpires who allow lawyers to dictate the timing and pace of proceedings. The adversary system, which was only fully developed in the 19<sup>th</sup> Century, has been modified.

The demise of the jury has meant that specialist juries of merchants are not required. However, functionally equivalent structures which directly involve commercial actors in dispute resolution has emerged. I refer, for example, to the Takeovers Panel.

Led by commercial judges, the role of the judiciary in case management more closely resembles the practices of Lord Mansfield than it did for about a century and a half before, about, the mid 1980's. Judges now control the proceedings by seeking to identify the issues

really in dispute at an early stage, by refusing adjournments, by minimising delays, by encouraging settlements, by no longer treating commercial arbitration as a trade rival, by controlling the length and pace of trials.

A culture of improvement has again become the framework for judicial practice.