

BOOK REVIEWS

**JAMES OLDHAM, *ENGLISH COMMON LAW
IN THE AGE OF MANSFIELD*
(CHAPEL HILL: THE UNIVERSITY OF
NORTH CAROLINA PRESS, 2004)
PAGES I–XVIII, 1–426. ISBN 0 8078 5532 4**

Reviewed by
Craig Collins*

In early 1788, as the First Fleet sailed on its mission to colonise New South Wales, it carried with it an invisible cargo: the laws of England. A large part of that cargo comprised the common law, the “unwritten law” derived by judges from English custom and tradition. As Arthur Phillip ordered the Union flag to be hoisted on a makeshift pole planted beside Sydney Cove on 26 January, back in London one of the greatest common law judges contemplated retirement. Lord Mansfield, Chief Justice of the Court of King’s Bench since 1756, would eventually retire from office on 4 June 1788.

The author of this book, James Oldham, makes two central claims. First:

Were it possible to revisit England in the year 1750, it probably would not be evident that the common law courts over the next half-century would lay many of the foundation stones that would support the Anglo-American law of the twenty-first century. Yet this proved true, both in commercial areas (such as contracts, insurance, negotiable instruments, intellectual property and international trade) and in protecting the rights of individuals (as in the law of negligence, nuisance, religious freedom, and slavery).¹

* Lecturer, School of Law, The University of New England.

¹ James Oldham, *English Common Law in the Age of Mansfield* (2004) xi.

Secondly, Oldham claims that, “[t]hough assisted by the work of able contemporary and predecessor judges, Lord Mansfield was the dominant judicial force behind these developments”.²

Both claims are thoroughly supported by the material contained in this book. Indeed, this is a work grounded in deep scholarship and it is worth commenting on its derivation and the author’s credentials. James Oldham is the author of the seminal two-volume published work *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (1992). That work comprised transcriptions of Lord Mansfield’s notes taken of jury trials in which he sat, some explanatory essays by the author and a set of appendices. The present work under review is described by Oldham as “a one-volume updated abridgement of the explanatory essays” from the 1992 publication.³ Part of the “update” stems from the author’s post-1992 examination of sources held by the libraries of three Inns of Court in London – Lincoln’s Inn, the Middle Temple, and the Inner Temple. The product of this reflective distillation is a book highly accessible to the general reader, besides achieving its stated aims as “agreeable to most individual budgets and feasible as well for classroom use”.⁴

The book is divided into four parts. Part I, ‘Mansfield and the Court of King’s Bench’ sets the scene and identifies the broader themes to follow. The first chapter in this Part offers a brief portrait of Mansfield the person, including his early life. Born as William Murray in Scotland in 1705, he was educated at Westminster School and then Christ Church, Oxford, where he studied the classics and history (including legal history). While at university, his friend Alexander Pope coached him in public speaking. Murray was called to the bar in 1730 and “by 1738 his career was strongly launched”.⁵ Under the patronage of the Duke of Newcastle, Murray became Solicitor General in 1742 before filling Dudley Ryder’s shoes, first as Attorney General and then as Chief Justice of the Court of King’s Bench in 1756. Some measure of Murray’s self-confidence is suggested by his insistence that his appointment as Chief Justice come with a

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid 6.

peerage. Oldham refers to two characteristics which served Lord Mansfield all his life: “a readiness to perform the long hours of drudgery and apprenticeship necessary to develop a thorough grounding in a subject or skill, and an irrepressible intellectual curiosity”.⁶ Mansfield died in 1793, within five years of retiring from the bench.

Chapter two of Part I, ‘The Court of King’s Bench’, succeeds in conveying the atmospherics of the day-to-day legal work of the court generally and its Chief Justice in particular. The legal system was large and complex. Some 62 courts were identified in and around London by the 1790’s – many with overlapping jurisdictions – and they were serviced by 753 court officers. The three “central” supreme courts were the Court of King’s Bench, the Court of Common Pleas and the Court of Exchequer. As the author says:

Four judges sat on each of these three courts, and together the twelve central court judges, although comprising a small part of the total judicial system, superintended the litigation that gave form to the body of common law to which the entire system responded.⁷

It was from this platform that Mansfield, with his “cerebral urbanity”, “force of personality” and sheer longevity as a Chief Justice, exerted much influence in shaping the common law. Mansfield’s heavy work-load – and his capacity to match it – were notorious. Although driven by a sense of duty, being paid by the case ensured that he acquired significant wealth. The following anecdote illustrates this sense of diligence:

In regulating the flow of business in his court, Mansfield was notorious for his unremitting work habits. Heward recounts the response of Serjeant Davy to Mansfield’s announced intention to sit on Good Friday: “Your Lordship will be the first judge to have done so since Pontius Pilot”.⁸

Parts II to IV of the book comprise a set of stand-alone essays categorised by area of law. Part II, *Commerce and Contract*, has chapters on contract and quasi-contract; bankruptcy; insurance; negotiable instruments; usury; prize and trade, and intellectual property. Part III, *Crime and Tort*, covers libel; restrictions on

⁶ Ibid 4.

⁷ Ibid 12.

⁸ Ibid 14.

religious observance; nuisance; assault, false imprisonment, and offences against public order and welfare; as well as perjury; negligence, and trespass and trover. Part IV, *Status and Property*, has chapters on slavery; marriage; labour and employment, and property and wills.

Not every category of common law is covered (as would occur in a textbook traverse of the law), nor are the listed areas given equal space and treatment. As Oldham notes :

During the late eighteenth century, some subject areas were developing or changing more rapidly than others. For this reason, there is greater emphasis in this book on commercial topics such as insurance and contract than on subjects such as real property and wills. Also emphasized are subject areas of particular interest to the modern reader such as slavery, religious toleration, seditious libel, collective action by workers, married women's property rights, breach of warranty (a subdivision of contract), negligence, and nuisance.⁹

Modern commercial lawyers may be surprised to find much in this historical account that is familiar. Mansfield incorporated merchant customs and usage into the common law. Prominent London merchants variously served as witnesses, special jurors and arbitrators in commercial cases. Indeed, one merchant, Edward Vaux, was said to have "almost as much authority as the Lord Chief Justice himself"¹⁰ in such cases. Mansfield initiated procedural reforms to deal expeditiously with his high volume case-load. He "was a decided friend to the arbitration process as an efficacious means of concluding cases that presented no question of law or need for jury deliberation, or that would be well served by an arbitrator's expertise."¹¹ Mansfield's inclination to use "common sense to get at the truth"¹² made him a great modernising influence on procedure and commercial law.

One striking feature of this account is Oldham's recurring, qualifying words to the effect "except in cases of seditious libel". This qualification is applied, for instance, to propositions about Mansfield's good relations with juries and avoidance of public

⁹ Ibid xv.

¹⁰ Ibid 20.

¹¹ Ibid 69.

¹² Ibid 66.

controversy. Mansfield came into conflict with juries and the wider public in maintaining a severely curtailed role for juries in libel prosecutions. Cartoonists depicted him as an itchy Scotchman (captioned “Sawny Wetherbeaten or Judas Iscariot”) and as joining George III in a fox-hunt style pursuit of printers.¹³ Oldham says that “Mansfield applied and clung tenaciously to the traditional view”, which shut out juries from considering anything but the fact of printing and, where there was ambiguity about meaning or to whom the libel referred, innuendo.¹⁴ Mansfield, as well, speaks with some satisfaction about never deviating in the form of words used to direct juries in such cases over his entire career as Chief Justice.

The chapter on libel (chapter 10) is an intriguing summary of conventional (Holdsworth) and revisionist (Hamburger) approaches to the seditious libel action and the role of the jury. Oldham acquits Mansfield of the popular charge of “having created a restrictive seditious libel apparatus that imprisoned freedom of the press”,¹⁵ placing responsibility with Chief Justice Holt some decades before. He maintains, however, that “[w]hat Mansfield did was to give Holt’s doctrine an undeserved pedigree by misrepresenting it as age-old”.¹⁶ As there is more than a hint from both Oldham and Hamburger that Mansfield must have known what he was doing; ‘misrepresentation’ may not be too strong a word. Oldham draws out the contrast between Mansfield’s approach to seditious libel and “the spirit of modernizing the law and making it procedurally effective – the spirit that animated his commercial law decisions”.¹⁷ According to Oldham, Mansfield’s approach to seditious libel was grounded in a particular “vision of government” – one by which authority was derived from monarchy with little or no room for “the consent of the governed”. On this score, at least, Mansfield’s approach ultimately did not prevail.

The libel chapter offers just a taste from the whole smorgasbord of essays to be found on a range of topics. The book concludes with some observations about Mansfield’s modern influence,

¹³ Ibid 223, 225.

¹⁴ Ibid 211.

¹⁵ Ibid 209.

¹⁶ Ibid.

¹⁷ Ibid 235.

especially in the United States (reflecting the author's perspective). For instance, the lineage of the US Uniform Commercial Code is traced directly to Mansfield's doctrines, via Karl Llewellyn in the 1940's and 1950's. Similarly, the Seventh Amendment guarantee of jury trial must, under the "historical test", be interpreted by "the scope of trial by jury in the common law of England in 1791".¹⁸ From an Australian perspective, by a similar quirk of timing, Mansfield's legacy was unpacked in 1788 on the shores of Sydney Cove.

¹⁸ Ibid 369.