

Alan Watson Foundation

UNIVERSITY OF BELGRADE
SCHOOL OF LAW

LORD MANSFIELD: JUDICIAL INTEGRITY OR ITS LACK;
SOMERSET'S CASE

BY

ALAN WATSON

This paper may be downloaded without charge at
the Alan Watson Foundation website: www.alanwatson.org



Univerzitet u Beogradu

PRAVNI FAKULTET



Belgrade 2006

Probably the most famous decision in English law is that of Lord Mansfield in *Somerset v. Stewart*¹ in 1772. It is very short and very dramatic. Indeed, it is so rhetorical that much of what is vital is overlooked. As it was meant to be.

Somerset was a slave of Stewart in Virginia and was brought to England by his owner. Somerset traveled extensively in the service of his master; to Bristol and Edinburgh, for example. But two years after they left America, Somerset left Stewart. Stewart was incensed by Somerset's ingratitude and advertised for his return. Somerset was captured by slave-catchers and on Stewart's orders was put on the *Ann and Mary* bound for Jamaica. Virtually a death sentence for Somerset. On request from Somerset's friends, Long Mansfield issued a writ of *habeas corpus* to the ship's captain, and Somerset was removed from the ship and placed under the authority of the Court of King's Bench. The case of *Somerset v. Stewart* was heard in the Court of King's Bench before Mansfield on 14 May, 1772.²

Mansfield opens his judgment: "The question is, if the owner has a right to detain the slave, for the sending him over to be sold in Jamaica." The issue as so expressed is a very narrow one. On the face of it, the issue is not whether Somerset is free or not. Even less is it a declaration that there can be no slaves in England. As Wise puts it: "*Somerset* was Mansfield's minimum antislavery position." His decision against Stewart was understood as meaning that in his view there could be no slaves in England. But in subsequent correspondence Mansfield wrote: "[N]othing more was then determined, than that there was no right in the master forcibly to take the slave and carry him abroad." Again he insisted that he had gone "no further than to determine the Master had no right to compel the slave to go into a foreign country."³ What seems to follow from Mansfield's opening sentence in the case and these quotations is that he thought Somerset was a slave.

I believe that the correspondence -- obfuscating as it is -- gives his true position on the case. Mansfield is "hiding the ball." As he should! The opening statement of the action at the beginning of the case reads:

On return to an *habeas corpus*, requiring Captain Knowles to shew cause for the seizure and detainure of the complainant Somerset, a negro – the case appeared to be this --

The second sentence of Mansfield's judgment reads: "In five or six cases of this nature, I have known it to be accommodated by agreement between the parties: on its first coming before me, I strongly recommended it here." Indeed he had. In this case also he ordered five separate hearings and he frequently urged Stewart to render the issue moot by freeing Somerset.⁴

But why? Mansfield continues: "But if the parties will have it decided, we must give our opinion. Compassion will not, on the one hand, nor inconvenience on the other,

¹ 1 *Lofft*, p. 499 ff. at p. 509

² See most recently, S.M. Wise, *Though the Heavens May Fall: The Landmark Trial that Led to the End of Human Slavery*, (Cambridge, Mass. 2005)

³ For sources see Wise, *Though the Heavens May Fall*, p. 209.

⁴ See, e.g. W.M. Wiececk, 'Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World,' 42 *University of Chicago Law Review* (1976), pp. 86 ff. at p. 102.

be to decide; but the law: in which the difficulty will be principally from the inconvenience on both sides.” If Mansfield declared Somerset free, the main inconvenience would be the financial loss to the slave owners. “The setting 14,000 or 15,000 men at once free loose by a solemn opinion, is much disagreeable in the effect it threatens.” The figures of the number of slaves in England may not be wholly accurate, but they are Mansfield’s figures, and that is what matters here. He reckons that £50 per slave would not be a high price, and so the owners’ loss would be above £700,000. And this, he adds, does not include further loss to the owners by actions for slave wages or on slight coercion by the master. He continues: “Mr. Stewart may end the question, by discharging or giving freedom to the negro.” If not, as Mansfield had said just before: “If the parties will have judgment, fiat justitia, ruat coelum,”⁵ let justice be done whatever the consequences.

Mansfield does not want to decide the case, he is most reluctant to do so, but he will have to unless Stewart acts; and the consequence will be – though that is not what he is deciding – that all the slaves in England will be free. As Mansfield said earlier in his brief judgment: “The difficulty of adopting the relation, without adopting it in all its consequences, is indeed extreme; and yet, many of those consequences are absolutely contrary to the municipal law of England.”

Mansfield’s arguments for his own position convinced people then and scholars since. He would have to find for Somerset on the narrow issue thus framed but the consequence, he knew, would be the end of slavery with resulting financial catastrophe for many in England. And, as has frequently been pointed out, many of those who would lose financially were Mansfield’s friends.

The problem for Mansfield is not quite as it seems. His superb rhetorical skill – and it is outstanding – conceals what is going on in his head. Yet, paradoxically, at the same time it reveals that all is not as it seems. Mansfield regrets that the economic consequences of his decision will be ruinous. But he trumpets them: “Let the heavens fall!” The case, of course, attracted much public attention, but it is Mansfield who spells out consequences that might – I say only might – have otherwise largely passed unnoticed. And, as we have just seen, he later removes himself from the consequences. His decision, as he says, was a narrow one. Mansfield, in fact, was in a quandary.

But then there is another immediate problem in Mansfield’s judgment. He cites no legal precedent, statute or principle for his decision.⁶ On what legal argument can the owner be barred from removing Somerset from England? I know of none. This absence of any known basis for Mansfield’s judgment is remarkable and demands an explanation.

For Mansfield’s own approach to law, Somerset is, and should remain, a slave. For this there can be no doubt. The issue, never stated but obvious, is one of conflict of laws. This was a subject on which Mansfield had wide experience.

The basic question in conflict of laws is what is to be done when a legal question involves the law of more than one state – in this issue Virginia and England -- and the answer depends on the law of which state is to be recognized. Roman law had nothing on the issue, but for subsequent scholars when an answer had to be found then, in the

⁵ “Let justice be done, though the sky fall.”

⁶ In Scottish reported cases of the time judges seldom set out the reasons for their decision. But this is not a Scottish case.

absence of legislation, it was to be found in Roman law. And Roman law, to be useful, had to be fabricated. One theory, generally disregarded but vital here, was that of the Frisian, Ulrich Huber (1634-1694).

The factual position in the case was that Somerset was acquired as a slave by Stewart in Virginia. Virginia was a slave state and by the law of Virginia Somerset was the property of Stewart. But Somerset was in England, the lawsuit was raised in England. Which law, that of Virginia or that of England, was to apply? There were many approaches to the issue, but which approach was to be chosen? Oddly, fascinatingly, the question was not raised in the case, not even by the attorneys. But it had to be there. And Mansfield had made his career very largely on this question of conflict of laws. And his position on the subject was one hundred percent plain. He knew the issue, and he knew the answer.

Mansfield had adopted the theory of Huber. Huber's views on conflict of laws were not well-known – they represented, after all, only one view among many on the subject. Naturally they were known in the Dutch Republic, but then so were many others.

But they were accepted in Scotland. Legal education was virtually non-existent in 17th century Scotland, English Universities were closed to the Scots so the ambitious flocked to the Universities, especially of Leiden and Utrecht, of the Dutch Republic, a fellow-Calvinist country. Naturally, students take home the books they bought for their classes, and Scotland – in contrast to England — has a fabulous number of 17th century Dutch law books. Among them is Ulrich Huber, *Praelectiones juris romani et hodierni* (Lectures on Roman and Contemporary Law) in three volumes, which was first published in 1689.⁷

England, for reasons relating to the jurisdiction of the various courts, had no theories of conflict of laws, but in Scotland it was a “hot topic.” There were several issues but one appears more obviously than any others – it is still a hot subject – marriage.

In Scotland of the time a woman could marry at the age of twelve, and parental consent was not needed. In England the marriage age for a woman was sixteen and the father's consent was needed until she was twenty-one. The resulting legal scenario is obvious. A rogue makes love to a young English heiress, runs off with her to Scotland and they marry at the first possible point, the blacksmith's shop at Gretna Green. (No religious ceremony was needed for marriage in Scotland). Was the marriage valid in England?

It is now time to set out Huber's approach to conflict of laws which, of course, in the nature of things had to be based on Roman law. There was nothing else that could be thought appropriate. But there was nothing to the point in Roman law, so the Roman sources had to be manipulated, as they so often were in so many contexts by so many jurists. Huber's solution is, as was to be expected, brilliant.⁸

Huber was very much a Frisian and during his teaching career – he was a judge for three years in Friesland – remained a faithful professor of the University of Franeker,

⁷ See Alan Watson, *Joseph Story and the Comity of Errors* (Athens, GA., 1992), pp. 1 ff. and *passim*.

⁸ What follows on Huber is an abridged and slightly modified version of my *Joseph Story and the Comity of Errors*, pp. 3-13.

twice rejecting professorships at Leiden. His reputation was enormous and extended well beyond Friesland, attracting many students from other places, especially from Holland, Germany, and Scotland. His main treatment of conflict of laws is in a few pages of the second volume of his *Praelectiones juris romani et hodierni* (Lectures on Roman and Contemporary Law); 2.1.3, which, like the first volume, was presumably written when he was a professor at Franeker. Volume 1 of the *Praelectiones* was devoted to Justinian's *Institutes*, and he turned to the *Digest* in volume 2. So his treatment of conflict of laws in 2.1.3. is right at the beginning of his commentary on the *Digest*. Very prominent and accessible. It would be well-known to students who make use of textbooks.

Huber claims in his section 1 that there is nothing on conflict of laws in Roman law, but that nonetheless the fundamental rules by which this system should be determined must be sought in Roman law, though the issue relates more to the *ius gentium* than the *ius civile*. These two terms had more than one meaning in the Roman legal sources, but Huber is using them in this context in the sense found in Justinian's *Institutes* 1.2.1. *Ius civile* is law which each people has established for itself and is particular to itself. *Ius gentium* is declared at this point in the *Institutes* to be law established by reason among all men and observed equally by all nations. In fact, for an institution to be characterized in this sense as belonging to the *ius gentium* it seems to be enough that it is accepted in Rome and other states. *Ius gentium* in this context is very much part of Roman private law. It should be stressed that Huber here is not using *ius gentium* in the sense of "law established between peoples," that is, international law. Though that was one meaning in Huber's own time, the term *ius gentium* was not so used in Roman law. Huber goes on: "In order to lay bare the subtlety of this particularly intricate question we will set out three axioms which being accepted, as undoubtedly in appears they must be, seem to make straightforward the way to the remaining issues." At the beginning of the first volume of his *Praelectiones*, Huber had explained what he meant by axioms. Budaeus, he declared, had not absurdly said that rules of law were handed down by *axiomata* or by *positiones*, terms that he said were taken from the usage of mathematicians. "For axioms are nothing other than statements that require no proof." Their correctness is thus self-evident.

Accordingly, conflict of laws as a system exists for Huber only if one accepts, as he feels and says we must, his three axioms (which significantly he prints in italics in section 2). As axioms they require no proof. The first two he expressly and reasonably – according to the approach of his time – bases on Roman law, on *Digest* 2.1.20 and *Digest* 48.22.7.10 respectively. The first axiom is, "*The laws of each sovereign authority have force within the boundaries of its state, and bind all subject to it, but not beyond.*" The second reads: "*Those people are held to be subject to a sovereign authority who are found within its boundaries, whether they are there permanently or temporarily.*" The third axiom is referred to no such authority but is Huber's own contribution. It must, for Huber, be treated like the other two as a binding rule, in order to have a systematic basis for conflict of laws. It reads: *The rulers of states so act from comity (comiter) that the rights of each people exercised within its own boundaries should retain their force everywhere, insofar as they do not prejudice the power or rights of another state or its citizens.*

The absence of stated authority for the third axiom does not mean that for Huber there was no authority for it. Indeed, he has already stated that the fundamental rules for

the subject have to be sought in Roman law. The position for him is that by Roman law axiom 3 is part of the *ius gentium* – because it is accepted among all peoples – and so it need not be expressly set out in any particular jurisdiction – Rome, for instance – in order to be valid there. In fact, as we shall see, Huber goes on to claim in the same section of his work that no doubt has ever existed as to the validity of the third axiom. This is not true except in a perverted sense, since Huber seems to be the architect of the scope of the axiom. Though axiom 3 is not stated by Huber in a normative way, it is for him a rule of law and is normative. That is the very nature of an axiom.

This course of reasoning is entirely appropriate for Huber. He is attempting to set out the principles on which a particular branch of law, namely conflict of laws, is established. For this he does require authority. Roman law was looked to in all continental European countries to supply legal authority in general. Its status varied from jurisdiction to jurisdiction, though notoriously there had been a greater reception of Roman law in Friesland than elsewhere in the United Provinces. But Huber is not here concerned particularly with the law of Friesland. He is actually attempting to set out the principles which all states are bound to apply in conflicts situations. The only principles that could be binding, not in one territory alone but everywhere, had to be drawn from Roman law. There just was no other appropriate system. For the Romans, *ius gentium*, law that was accepted everywhere, was *ipso facto* part of Roman law. Therefore, if the validity of axiom 3 has not been doubted (as Huber claims), it is part of Roman private law; and it is as Roman law that it is authoritative. Huber is not out of line with other scholars in this approach. In exactly the same way, when Bartolus was earlier attempting to build up a system of conflicts law, he based (or purported to base) his propositions on Roman law.

Huber's axiom 3 was, of course, not found in Roman law. Nor, of course, were axioms 1 and 2 part of a system of conflicts law, but concerned issues of jurisdiction. Huber was well aware of this and did not hide the fact, since he had said in this very same paragraph that to use Roman law to build up new law unknown to the Romans was standard juristic practice. Indeed, in the absence of other authority, it was necessary if law was to grow. It is important to determine the precise meaning of axiom 3 for Huber. It is fully in accordance with this that he proceeds: "From this it is clear that this subject is to be sought not from the uncompounded civil law (*ius civile*) but from the benefits and tacit agreement of peoples: because just as the laws of one people cannot have direct force among another, so nothing could be more inconvenient than that what is valid by the law of a certain place be rendered invalid by a difference in law in another place. This is the reason for the third axiom on which hitherto there has been no doubt."

That Huber regarded the application of foreign law as binding becomes even clearer when we bring into account his earliest treatment of the subject in the second edition of his *De jure civitatis* (On the Law of the State), published in 1684 at 3.10.1: "Among the matters that different peoples reciprocally owe one another is properly included the observance of laws of other states in other realms. To which, even if they are not bound by agreement or the necessity of being subordinate, nonetheless, the rationale of common intercourse between peoples demands mutual indulgence in this area." By *ius gentium* in its other, non-Roman, sense of "international law" – and that sense is also relevant for this passage – one state is bound to observe the law of another, first if it is subject to it, second if there is an agreement to that effect. That was well

established. In addition, for Huber, one state is equally bound to observe the law of another on a further rationale which is, namely, comity. Comity is binding.

It is the application of axiom 3 as a binding rule of law that gives private law transnational force. The laws of a state do not directly apply outside the territory of the state, but the rulers of other states must apply them *comiter* even when their own rules are different.

There is admirable skillful sleight-of-hand in all this. Huber's axiom 3 did not exist in Roman law, and this he admits even though he bases his whole system supposedly on Roman law. But then he claims his axiom 3 has never been doubted and is part of the *ius gentium*, accepted everywhere. In an upside-down sense, the first part of his claim is perfectly accurate. Axiom 3 had never been expressed before and hence was never doubted! Other Dutch jurists such as Paulus Voet had a very different notion of *comitas*. Huber provides no evidence that *comitas* in his sense was part of the *ius gentium*, accepted everywhere. And, of course, he cannot provide such evidence because his view is novel. But he is not required to provide any evidence because he sets out his legal proposition in an axiom, and by definition an axiom is a rule that requires no proof because it is self-evident.

Huber's aim was to provide conflict of laws with a legal basis. Axiom 3 determines when and whether a state can raise an exception to recognizing that the law of another jurisdiction rules. It is not to be up to the individual court to be able to reject the foreign law because it finds it unpalatable or prefers its own rules.

Huber does not allow for free discretion in applying foreign law. At the beginning of the next section, 3, he writes, again with italics:

This proposition flows from the above: All transactions and acts both in court and extrajudicial, whether in contemplation of death or inter vivos, properly executed according to the law of a particular place are valid even where a different law prevails, and where if they were performed as they were performed they would have been invalid.

And, on the other hand, transactions and acts executed in a particular place contrary to the laws of that place, since they are invalid from the beginning, cannot be valid anywhere.

Foreign law is binding. Of course, since it is binding only indirectly, whereas the law of the local jurisdiction is binding directly, foreign law would not prevail where it was expressly excluded by the local law, say by statute. This is not stated by Huber, but it is implicit in the distinction he makes between axioms 1 and 2 on the one hand, and axiom 3 on the other.

This necessary recognition of foreign law is, of course, subject to the exception to axiom 3: transactions and acts elsewhere are recognized "insofar as they do not prejudice the power or rights of another state or its citizens." In keeping with the brevity of axioms, the practical meaning of the exception requires elucidation. Huber glosses it a little further on in section 3: "But it is subject to this exception: if the rulers of another people would thereby suffer a serious inconvenience they would not be bound to give effect to such acts and transactions, according to the limitation of the third axiom." The point deserves to be explained by examples. The examples he gives here and in another work, *Heedensdaegse Rechtsgeleertheyt* (Contemporary Jurisprudence, 1686), best

clarify Huber's meaning. The situations mentioned as giving rise to the exception can be fitted into a very small number of distinct classes.

The basic rule for Huber is that the validity and rules of a contract depend upon the place where the contract was made. Likewise, if a marriage is lawful in the state where it was contracted and celebrated, it will be valid everywhere (subject to any exception in axiom 3). But this is dependent, as Huber notes in section 10, on a fiction of Roman law that is set out in *Digest* 44.7.21: "Everyone is considered to have contracted in that place in which he is bound to perform." Hence, for marriage, for instance, the place of a marriage contract is not where the marriage contract was entered into, but where the parties intend to conduct the marriage, which will be the normal residence of the parties. This case, of course, has an important effect on community of property and other property relations of the spouses, but the effect does not follow from the exception to axiom 3.

A first category within the exception is where persons subject to a jurisdiction take themselves out of the territory deliberately in order to avoid the jurisdiction. Most examples would amount to a *fraus legis*. The following instances occur in Huber. Where a Frisian, who is forbidden by law to marry his niece, goes with a niece deliberately to Brabant and marries her, the marriage will not be recognized in Friesland. (On the other hand, when someone from Brabant marries there within the prohibited degrees under a papal dispensation, and the spouses migrate to Friesland, the marriage that was valid in Brabant remains valid). Where young persons under guardianship in West Friesland go to East Friesland to marry, where consent of guardians is not required, and then immediately return to West Friesland, the marriage is void as a subversion of the law. Again, if goods are sold in one place for delivery in another where they are prohibited, the buyer is not bound in the latter place because of the exception.

A second category for the exception is also of limited extent. If two or more contracts are made in different states and the rights of creditors would vary in different states according to the priority or value accorded to each contract, the sovereign need not, and indeed cannot, extend the law of the foreign territory to the prejudice of his own citizens. For instance, some states give validity to the pledge of property without delivery for a valid hypothec. If state A does not demand delivery, and a pledge is made there without delivery, and the issue comes somehow before the court of state B, state B in the ordinary case would recognize the hypothec as valid because it was valid in state A. But if the same hypothec is made in state A, a second hypothec with delivery is made in state B to a citizen of B, and the issue comes before the court of B, the court must decide the issue of priority according to its own law, because in the event of a straight conflict of rights, a court cannot extend the law of a foreign state to the detriment of its citizens. In such a case of conflict it is more reasonable, says Huber, to follow one's own law than a foreign law.

The limited scope of this category should be noticed. It exists only when there are at least two contracts, contracted in different territories with different laws, where these contracts have to be pitted against one another, and where one party is a citizen of the state where the case is heard. It should be stressed that even in this case Huber is not deciding against the validity of the contract made abroad. It is valid, but its ranking is postponed behind the contract made in the home territory. Huber gives another example. A marriage contract in Holland contains the private bargain, valid in Holland, that the

wife will not be liable for debts subsequently contracted by the husband alone. Such an agreement if made in Friesland would be effective against subsequent creditors of the husband only if it was made public or if the creditors could be expected to have knowledge of it. If the husband subsequently contracted a debt in Friesland, the wife was sued for one-half of the debt, and she pled her marriage contract as a defence, the defence was disallowed in Friesland. By the same token, if the wife had been sued in Holland, the defence would have prevailed. This category for the exception exists only where they are contracts with different bases – though this time the contracts are at one remove from the basic act, the private bargain in the marriage contract – and superior ranking has to be granted to one.

A final category – which, as we shall see, is in theory not within the exception – has special significance within the context of this work. Not its sole significance for us is that Huber graces it with only a single example, in section 8 “Marriage also belongs to these rules. If it is lawful in the place where it was contracted and celebrated, it is valid and effective everywhere, subject to this exception, that is does not prejudice others; to which one should add, unless it is too revolting an example. For instance, if a marriage in the second degree, incestuous according to the law of nations, happened to be allowed anywhere. This could scarcely ever be the case.” We have already considered what was meant by “prejudice to others.” Now we must consider the nonrecognition of foreign law on the ground that it is “too revolting”. To judge from Huber’s words in the example, this is permitted only when the foreign law is contrary to the law of nations. Moreover, according to Huber, this will scarcely ever be the case. Accordingly, only very rarely will a state be legally entitled to fail to give recognition to another’s law on the basis that it is too revolting or immoral, and then the rejection will be on the basis that the rule is contrary to the law of nations. Since axiom 3 is part of the law of nations, and binding on that account, an act or transaction valid where it is made, but void by the *ius gentium*, will by the same *ius gentium* be given no recognition in another jurisdiction when it would have been void if made there. But it must be emphasized that the invalidity does not derive from the exception to axiom 3 but from the very legal basis of that axiom. Slavery, it may be observed, is not contrary to the *ius gentium* in Huber’s sense here since it was so widely accepted in many jurisdictions.

We must stress the very limited extent of the true exceptions to Huber’s axiom 3. The axiom is a rule of law subject to exceptions. But in the axiom itself, the exceptions are stated so widely that they could swallow up the rule. This cannot be Huber’s intention because he is adamant that an axiom contains a binding rule. He is also adamant that the scope of his exceptions is to be explained by the examples. Perhaps we should detect in Huber’s broadness of language a sensitivity that, as we shall see, his view of the indirect binding nature of the rule of recognition of foreign law was stricter than that of his contemporaries. What should be stressed above all from Huber’s examples is that, in comity, courts have no discretion in deciding whether to recognize foreign law or not: that issue is determined by the facts of the case. That the above mentioned categories are the only ones for the exception best appears in the context of the fuller treatment in Huber’s *Heedendaegse Rechtsgeleertheit* 1.3.

To revert now to the marriage in Scotland of an English woman under twenty-one who did not have the consent of her father. The marriage would be valid even in England

unless there was *fraus legis* in Huber's sense, i.e. when the couple intended to return and live in England.

Huber's was the position taken by Mansfield. The first reference to Huber in the English reports is by Lord Mansfield in 1750 in *Robinson v. Bland*. Yet it is plausible to suggest that Huber was cited in the English courts before this. He had been cited in Scottish cases with approval on comity from as early as *Goddart v. Sir John Swynton* in 1713, six years after the union with England. That case then came before the House of Lords in 1715 on appeal, and though the report does not say so, it seems likely that Huber (and à Sande) were prominent in the written pleadings. Moreover, between 1736 and 1756 there were five reported cases from Scotland involving points of conflicts law before the House of Lords, and Mansfield (who became lord chief justice in the latter years) appeared as counsel in every one of them.⁹ Mansfield's predilection for Huber in this area is one of the themes of this paper.

Somerset's case, as was emphasized by Mansfield, was decided on the narrow issue of the writ of *habeas corpus*, but in his judgment he makes it clear that he believes a consequence will be that all slaves in England will become free, and that this is something he wants to avoid.

Mansfield's dilemma is extreme. If the issue in front of him had been whether Somerset was free or a slave, then he would have had to decide, following Huber, that Somerset was a slave. The law to be applied, Mansfield following Huber, was that of Virginia. This emerges, in startling clarity, in an English case, *Holman v. Johnson*,¹⁰ three years later, in 1775. Mansfield's approach in that case is all the more striking since it is given only very shortly after the Boston Tea Party of 1773. Mansfield cited Huber and followed his proposition of law. He said, "I entirely agree with him." The relevant passage in Huber is from his *Praelectiones* 2.1.3.5, which reads:

What we have said about wills also applies to *inter vivos* acts. Provided contracts are made in accordance with the law of the place in which they are entered into, they will be upheld everywhere, in court and out of court, even where, made in that way, they would not be valid. For example: in a certain place particular kinds of merchandise are prohibited. If they are sold there, the contract is void. But if the same merchandise is sold elsewhere where it is not forbidden, and an action is brought on that contract where the prohibition is in force, the purchaser will be condemned; because it would be contrary to the law and convenience of the state which prohibited the merchandise, in accordance with the limitation of the third axiom. On the other hand, if the merchandise were secretly sold in a place where they were prohibited, the sale would be void from the beginning, nor would it give rise to an action, in whatever place it was initiated, to compel delivery: for if, having got delivery, the buyer refused to pay the price he would be bound, not by the contract but by the fact of delivery insofar as he would be enriched by the loss of another.

⁹ See A.E. Anton, "The Introduction into English Practice of Continental Theories on the Conflict of Laws," 5 *International and Comparative Law Quarterly* (1956), pp. 534ff., at pp. 538f.

¹⁰ 1 Cowp. R. 341

At the root of *Holman v. Johnson* was the fact that in England the sale of tea on which duty was not paid was prohibited. Mansfield quote Huber's general case in his *Praelectiones* 2.1.3.5 and gave as a translation adopted to the particular case:

In England, tea, which has not paid duty, is prohibited; and if sold there the contract is null and void. But if sold and delivered at a place where it is not prohibited, as at Dunkirk, and an action is brought for the price of it in England, the buyer shall be condemned to pay the price; because the original contract was good and valid... .But if the goods were to be delivered in England, where they are prohibited; the contract is void, and the buyer shall not be liable in an action for the price, because it would be an inconvenience and prejudice to the State if such an action could be maintained.

And he held it to be irrelevant that the point of the transaction was that the tea was to be smuggled into England. The case is decided very much in accordance with Huber's axiom 3 and its exception.

This last point must be stressed. Huber said with regard to his exception: "If the rulers of another people would thereby suffer a serious inconvenience they would not be bound to give effect to such acts and transactions." This was, as we know, interpreted by him very strictly. And so it was by Mansfield. The rulers of England would suffer "a serious inconvenience," one might think, if duty was not paid on tea. And deliberate avoidance of paying duty on tea was at the root of the transaction. But for Huber, as for Mansfield, the contract was valid. Nothing could better illustrate Mansfield's complete adoption of Huber on comity. Thus, if Somerset's case had come before the court on the issue of whether Somerset was a slave, Mansfield, to be true to himself, would have to have held that Somerset was a slave.

A final issue must be mentioned. Neither the attorney speaking for the plaintiff nor that for the defence said anything about conflict of laws. Were they aware of this dimension? If the answer is Yes, then we must ask why they were silent. If the answer is No, then we must question further why Mansfield said nothing. Mansfield's strategy was so successful that even the latest commentator on the case, Steven M. Wise, fails to notice Mansfield's dilemma, and his deliberate -- it must be -- avoidance of the central question of conflict of laws.