Hale and Mansfield: Common Law Resilience and Common Law Innovation

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Sir Matthew Hale and Lord Mansfield stand as two of the most influential Chief Justices in the history of the English common law. Each shepherded the common law through a time of disruption: Hale through the political disruption of the English civil war and restoration; Mansfield through the technological disruption of the industrial revolution. Hale is celebrated for his resilience in upholding the core values of the common law; Mansfield for his innovation. Together, they reflect the best of the common law tradition and its potential to respond to the needs of the age. Writing centuries later, Chief Justices Gageler and Winkelmann reflect upon the lives and times of Hale and Mansfield, highlighting their distinctive yet complementary contributions to the common law tradition and drawing upon their legacies to reflect on how a judiciary within that common law tradition might be expected to address contemporary global challenges.

INTRODUCTION

Sir Matthew Hale and Lord Mansfield were two of the most influential Chief Justices in the history of the common law of England. Each shepherded the common law through a time of disruption: Hale through the political disruption of the English civil war and restoration; Mansfield through the technological disruption of the industrial revolution. Hale is celebrated for his resilience in upholding the core values of the common law. Mansfield is celebrated for his innovation. Together, they epitomise the best of the common law tradition.

Lord Campbell, who succeeded Hale and Mansfield as Chief Justice in the middle of the nineteenth century, wrote a multi-volume critique of his predecessors. Campbell's *The Lives of the Chief Justices of England*[1] was so biting in its criticism that it was said to have added a new terror to an eminent lawyer dying: the uncomplimentary commentary that would follow.[2] Of Hale and Mansfield, however, Campbell had little but praise. Turning to Hale, having chronicled the life of Hale's immediate predecessor, Sir John Keylinge, Campbell wrote "[w]e pass from one of the most worthless of Chief Justices to one of the most pure, the most pious, the most independent, and the most learned".[3] "In the list of our great magistrates", he wrote, "there is no name more venerated".[4] Campbell likewise described Mansfield as "a venerable magistrate"[5] to be "compared with Mont Blanc when the mists which for a time obscured his summit have passed away".[6]

Neither Hale nor Mansfield was without flaw, and the legacy of neither is properly to be appreciated by treating them as transcending the ages in which they lived. To be acknowledged at the outset is that the reputation of Hale was tarnished even in his own lifetime as a result of him having presided over

* Chief Justice of Australia and Chief Justice of New Zealand. This is an edited version of a paper jointly presented at the annual conference of the Banking and Financial Services Law Association on 31 August 2025 in Queenstown, New Zealand. The theme of the conference was "Law in a Time of Disruption". Thanks are due to Nathan Pinder, Kate Renehan and Tristan Taylor for their assistance in the preparation of this paper.

[1] John Campbell, *The Lives of the Chief Justices of England: From the Norman Conquest till the Death of Lord Mansfield* (1851).

[2] John Hostettler, *The Red Gown: The Life and Works of Sir Matthew Hale* (Universal, 2002), xvii.

[3] Campbell, n 1, vol 1, 407.

[4] Campbell, n 1, vol 1, 456.

[5] Campbell, n 1, vol 2, 301.

[6] Campbell, n 1, vol 2, 303.

an infamous witch trial at Bury St Edmonds which resulted in the conviction and execution of two women. Whether Hale's participation in the trial was explicable in terms of him faithfully implementing statute law which he was bound by his judicial oath to apply, or whether it amounted to "a most lamentable exhibition of credulity and inhumanity", as Campbell felt compelled to conclude,[7] has long been the subject of controversy.[8] The controversy was reignited only recently following reference to Hale in the opinion of the majority of the Supreme Court of the United States in *Dobbs v Jackson Women's Health Organization*,[9] the decision that overruled *Roe v Wade*.[10]

Mansfield has been criticised for favouring the interests of commerce at too great a cost to other interests.[11] He might also be criticised for having avoided the merits in high-profile cases, thereby averting political disapproval. This included the two cases in which he most famously uttered the words, "fiat justitia ruat caelem" – let justice be done though the heavens fall. In the case of *Rex v Wilkes* concerning political libel,[12] and the case of *Somerset v Stewart*,[13] concerning the status of a slave in England, he resolved the matters before him on technical (*Wilkes*) or narrow (*Somerset*) grounds.

Acknowledging them to have been men who were subject to blindnesses and prejudices of their ages, there remains much to admire about both Hale and Mansfield, and there is much to be gained from reflecting in the present on their respective approaches to meeting the large challenges of those ages. In looking back at each of them, we hope to highlight their distinctive yet complementary contributions to the common law tradition, a tradition which is now the inheritance of each of our countries. We draw on their legacies to reflect on how a judiciary within that common law tradition might be expected to address contemporary global challenges centrally including those wrought by political polarisation and technological dislocation.

We therefore start with the respective lives and times of Hale and Mansfield. We turn after to what can profitably be taken from their respective approaches into the modern era.

HALE: COMMON LAW RESILIENCE IN A TIME OF POLITICAL DISRUPTION

Hale was born in 1609. He died in 1676. Those versed in history will immediately recognise his life to have spanned the most tumultuous decades of the most tumultuous century of English history. Hale was in the thick of it. His professional life from the time of being called to the bar at Lincoln's Inn in 1636 until his retirement in the year of his death encompassed: the final years of the absolute reign of Charles I; the Long Parliament and the civil war; the capture, trial and execution of Charles I; the Rump Parliament; the Barebone's Parliament; the Protectorate of Oliver Cromwell which included the First and Second Protectorate Parliaments; the Convention Parliament; and the restoration of Charles II. Hale survived each of those dramatic changes in political circumstances to die of natural causes, a feat in itself. More remarkably, during his career, Hale in turn held the offices of: Law Reform Commissioner under the Rump Parliament; Justice of the Court of Common Pleas under Oliver Cromwell; Chief Baron of the Exchequer under Charles II; and ultimately Chief Justice of the Court of King's Bench under Charles II. He also served both as a member of the First Protectorate Parliament during the Protectorate of Oliver Cromwell and as a member of the Convention Parliament which called for the restoration of Charles II.

A quietly spoken man of modest and even shabby appearance who was born into a middle-class family of puritan persuasion and who maintained a humble disposition and an abstemious lifestyle

[7] Campbell, n 1, vol 1, 447.

[8] Gerald J Postema, *Matthew Hale on the Law of Nature, Reason, and Common Law: Selected Jurisprudential Writings* (Oxford University Press, 2017), xviii.

[9] *Dobbs v Jackson Women's Health Organization*, 597 US 215 (2022).

[10] *Roe v Wade*, 410 US 113 (1973).

[11] Norman S Poser, *Lord Mansfield: Justice in the Age of Reason* (McGill-Queen's University Press, 2013), 237–241.

[12] *Rex v Wilkes* (1770) 4 Burr 2527; 98 ER 327 (KB).

[13] *Somerset v Stewart* (1772) Lofft 1; 98 ER 499 (KB).

throughout his career,[14] Hale was universally respected as a person of great learning (in the sciences and the humanities as well as the law), as a person of impeccable integrity, and as a person of studied moderation. It was said that "[h]is abilities excited universal admiration, and the manner in which he used them disarmed all envy".[15] His contemporary, John Aubrey, described him as "not only just, but wonderfully charitable and open handed" and as someone who "did not sound the trumpet … as the hypocrites do".[16]

As a barrister during the period of the Long Parliament, Hale defended many high-profile royalists charged with treason. He was widely expected to defend Charles I in the proceeding which led to his execution, but the refusal of Charles I to acknowledge jurisdiction meant that no defence was possible.[17] When Hale subsequently explained to Cromwell his reluctance to accept the position of a Justice of the Court of Common Pleas on account of concern about the lawfulness of Cromwell's authority, Hale was persuaded to overcome that reluctance by Cromwell's stern assurance that, having taken possession of government, he was determined to keep it, and the somewhat ominous statement from Cromwell that if "he was not permitted to govern by red gowns, he was resolved to govern by red coats".[18] Nevertheless, Hale refused to sit in criminal jurisdiction. Sir William Blackstone was later to explain that "if judgment of death be given by a judge not authorized by lawful commission, and execution is done accordingly, the judge is guilty of murder … upon [which] account, Sir Matthew Hale himself, though he accepted the place of a judge of the common pleas under Cromwell's government (since it is necessary to decide the disputes of civil property in the worst of times), yet declined to sit on the crown side at the assizes, and try prisoners".[19]

On Hale's later appointment by Charles II as Chief Baron of the Exchequer, the Lord Chancellor is reputed to have said that "if the King could have found out an honester and fitter man for that employment, he would not have advanced [Hale] to it" and that the King "had therefore preferred [Hale] because he knew that none that deserved it so well".[20] It was said that the King was aware that he would lose cases before Hale, but recognised that the Kingdom was better for his service.[21]

The private writings of Hale reveal a character which matched his public persona. Unlike Mansfield after him, and unlike Sir Edward Coke before him to whom he has often been compared,[22] Hale left no glittering collection of reported judgments, and he published no legal treatise in his lifetime. Yet he did write prolifically, apparently for his own instruction. And some of his jurisprudential writings were to become enormously influential through posthumous publication.

Hale's two most famous writings, *History of the Pleas of the Crown* and *History of the Common Law of England*, were published a generation after his death.[23] The former became the primary authority on English criminal law for around a century after its publication.[24] The latter has a claim to being the first history of the common law ever written,[25] being described as "the first book with any pretence to be a comprehensive account of the growth of English law"[26] and influencing the writings both of

[14] Alan Cromartie, *Sir Matthew Hale 1609-1676: Law, Religion and Natural Philosophy* (Cambridge University Press, 1995), 5.

[15] WS Holdsworth, "Sir Matthew Hale" (1923) 39 *Law Quarterly Review* 402, 404.

[16] Cromartie, n 14, 3.

[17] Campbell, n 1, vol 1, 415.

[18] Postema, n 8, xvii.

[19] William Blackstone, *Commentaries on the Laws of England* (Dawsons of Pall Mall, first published 1765–1769, 1966 ed) vol 4, 178.

[20] Hostettler, n 2, 78.

[21] Cromartie, n 14, 78.

[22] See, eg, Harold J Berman, "The Origins of Historical Jurisprudence: Coke, Selden, Hale" (1994) 103 *Yale Law Journal* 1651.

[23] Berman, n 22, 1705.

[24] Cromartie, "Sir Matthew Hale", *Oxford Dictionary of National Biography* (2004), 6.

[25] Holdsworth, n 15, 415.

[26] Charles M Gray, Introduction to Sir Matthew Hale's *The History of the Common Law of England* (1971 reprint), xi.

Sir Frederick Pollock and Frederic Maitland[27] and of Sir William Holdsworth.[28] Within his *History of the Common Law of England*, Hale's "Analysis of the Civil Part of the Law" set out a methodological arrangement which formed the basis for Sir William Blackstone's *Commentaries on the Laws of England*. Blackstone himself wrote in the preface to his *Analysis of the Laws of England* that "of all the schemes hitherto made public for digesting the laws of England the most natural and scientifical of any, as well as the most comprehensive, appeared to be that of Sir Matthew Hale … This distribution therefore hath been principally followed".[29]

Less well-known are two tracts dating from the last fifteen years of Hale's life published much later: *Considerations touching the Amendment or Alteration of Laws*[30] and *Reflections on Mr Hobbes his Dialogue of the Law*.[31] Both have been republished this century in a volume of Hale's jurisprudential writings entitled *Matthew Hale on the Law of Nature, Reason, and Common Law* edited by Gerald Postema.[32] Read together with his *History of the Common Law of England*, they offer an account of the nature of the common law and of its relationship to political power, which has a marked contemporary resonance.

The common law according to Hale had constancy and internal consistency, both because it was rooted in the experience of the past and because it was constantly in renewal to meet the exigencies of the present and the future. Hale was a traditionalist without being what would now be called an originalist. To him there was no contradiction between the notion of the common law having existed since time immemorial and the notion of a rule within that system having been created or modified at a moment in time either by statute or by judicial interpretation or reinterpretation of mutable custom. Hale's outlook was labelled by JGA Pocock "historical",[33] although we might equally or better describe it as "pragmatic".

According to Hale, as Pocock explained:

> Each law is the product of a moment's exigency; as time goes on, new exigencies will arise and the old law will survive or be modified or fall into desuetude, as it gives satisfaction or not in dealing with them. If it survives it will be accounted immemorial, but mainly in a conventional sense …. Each law is the product of many past moments and is being tested at the present moment by a wisdom which in its turn relies on the past. Each law will change, but society and its wisdom will go on.[34]

One of Hale's repeated metaphors, which he may have borrowed from John Selden,[35] was that of the Argonauts' ship. In Hale's own words:

> [T]hough … particular variations and accessions have happened in the laws, yet they being only partial and successive, we may with just reason say, they are the same English laws now, that they were 600 years since in the general. As the Argonauts ship was the same when it returned home, as it was when it went out, though in that long voyage it had successive amendments, and scarce came back with any of its former materials.[36]

The same metaphor illustrates Hale's perception of change properly, indeed necessarily, occurring incrementally and interstitially within an interconnected and coherent whole. Important to him was

[27] *History of English Law before the Time of Edward I*, first published 1895.

[28] *A History of English Law*, first published in 1903.

[29] William Blackstone, *An Analysis of the Laws of England* (Oxford, 6th ed, 1771), vii–viii.

[30] First copied in 1690 from Hale's original manuscript by Sir Robert Southwell, later collated as Sir Matthew Hale, "Considerations Touching the Amendment or Alteration of Lawes" in Francis Hargrave (ed), *A Collection of Tracts Relative to the Law of England from Manuscripts* (1787) 253.

[31] WS Holdsworth, "Sir Mathew Hale on Hobbes: An Unpublished MS" (1921) 37 *Law Quarterly Review* 274.

[32] Postema, n 8.

[33] JGA Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press, 1957), 178.

[34] Pocock, n 33, 178.

[35] DEC Yale, *Hale as a Legal Historian* (Seldon Society Lecture, 7 July 1976), 11–12.

[36] Hale, n 26, 40.

that the common law should be stable. The stability of the common law was not to be found in the notion that the detail of the law had always been thus, as had sometimes been pretended by Coke. Nor was it to be found in abstract reason or moral principle, as Hale understood to have been asserted by Thomas Hobbes. Rather, stability was to be found in earnest adherence to common law methodology. The strength and resilience of the common law according to Hale, as elucidated in the thorough analysis of his writing that has been undertaken by Postema, derived from common law reasoning being "[a]n intensely practical deployment of reason … focused on practical, moral matters in all their complexity, but … guided and constrained by broad general principles and by concrete … determinations of them". Common law reasoning was reasoning in the present which was respectful of the past and mindful of the future. It was tethered simultaneously to broad principles of justice, to the accumulation of collective experience, and to systematic connections within the ongoing body of the law.[37]

Hale's overarching and enduring aspiration to systemic stability was evident in a speech he gave in a non-judicial capacity as a member of the Convention Parliament. Hale spoke in support of the restoration of the monarchy whilst simultaneously urging limits on prerogative power. "We are like foolish passengers in a storm", he cautioned, "that when the boat reels too much to one side, run all to the other, which [does] not cure, but increase, the danger". The King had earlier governed without a Parliament; the cure had been for Parliament to govern without a King. "[T]he detestation of the latter extreme", he warned, "will carry us over to the former extreme".[38]

Hale's attitude to the thesis of Hobbes that the King needed to be above the law, pithily expressed by Aubrey, was that Hale "much mislike[d] it".[39] Hale's own summation was that it was "pernicious and dangerous".[40] Anticipating the constitutional settlement to be formalised only after his death in the *Bill of Rights* of 1689, Hale located sovereign power not in the King alone but in the composite body of the King-in-Parliament[41] to legislation duly enacted by which the King and his ministers were subject.[42]

Before turning from the life and times of Hale to those of Mansfield, there remains to refer to the rules which Hale laid down for his own conduct as a judge. He labelled them "Things necessary to be continually had in remembrance". Lord Campbell said that they "ought to be inscribed in letters of gold on the walls of Westminster Hall, as a lesson to those intrusted with the administration of justice".[43] Lord Bingham said only 15 years ago that they remained sound rules for the conduct of judicial office.[44] We agree. There are 18 rules in all. Those most relevant to the present theme can be stated in truncated form as follows: "[t]hat in the execution of justice I carefully lay aside my own passions"; "[t]hat I be wholly intent upon the business I am about"; "[t]hat I suffer not myself to be prepossessed with any judgement at all, till the whole business and both parties be heard"; "[t]hat I never engage myself in the beginning of any cause, but reserve myself unprejudiced till the whole be heard"; "[t]hat popular or court applause or distaste have no influence in anything I do, in point of distribution of justice"; and "[that I not] be solicitous what men will say or think, so long as I keep myself exactly according to the rule of justice".

[37] Postema, n 8, xlix.

[38] Postema, n 8, xvi.

[39] Postema, n 8, 185.

[40] Postema, n 8, 202.

[41] Postema, n 8, lvii.

[42] Postema, n 8, lv.

[43] Campbell, n 1, vol 1, 433.

[44] Tom Bingham, *The Rule of Law* (Allen Lane, 2010), 21.

MANSFIELD: COMMON LAW INNOVATION IN A TIME OF TECHNOLOGICAL DISRUPTION

Lord Mansfield, like Sir Matthew Hale, was a remarkable man who lived through remarkable times. William Murray, the future Lord Mansfield, was born at Scone Palace in Perthshire in Scotland in 1705. Although the son of a viscount, his family was both poor and large – he was the fourth son and the 11th child.[45] His family was also unmistakeably attached to the Jacobite cause – "infected with the Jacobite heresy" as Cecil Fifoot put it.[46] Jacobitism was a political movement that aimed to restore the Catholic House of Stuart, beginning with the deposed King James II, to the English throne. It was a revolutionary although doomed cause; even so it persisted for nearly one hundred years, leading to active revolts against the Crown. Any taint of Jacobitism was seen as disqualifying for high office. It is a measure of how close Mansfield was to the cause that his older brother James served in senior roles at the court of the Jacobite "Pretender" in France and Italy.[47]

The young Murray was a genius child. At age 13, he was accepted into Westminster School, located in the grounds of Westminster Abbey in London,[48] which is still in operation today. He made the trip from Perth to London on a pony alone – a journey of over 360 miles, taking over seven weeks.[49] At Westminster he rose to the prestigious rank of King's Scholar. This in turn led to a scholarship to Christ Church, at the University of Oxford,[50] following which he was called to the bar at Lincoln's Inn where he was again a brilliant success.[51] By his own account, this was in part due to his deep and extensive learning.

Murray read widely. In letters he wrote in later life offering advice to those thinking of a career in law, he recommended reading history, both ancient and modern, in preparation for legal studies.[52] He also recommended learning of other systems of law, including civil law – namely Roman Law and the domestic laws of France and Scotland. He recommended the works of Hugo Grotius and Samuel von Pufendorf, the two leading natural law theorists of the preceding century. And he advocated reading John Locke, sometimes referred to as the father of modern liberalism. The breadth of his learning shaped him as a lawyer, and later as a judge. It gave him the confidence to see beyond the case law, and beyond the prevailing legal fashions of the day, to the functional operation of the law. And as we will come to, it gave him the confidence to see that the common law method allows, and can be strengthened by, new ideas and new approaches.

In 1742, at the age of 37, Murray became Solicitor General and entered Parliament.[53] His political career was not a happy one – he has been described as "[p]rudent to the point of timidity, … too cool or too calculating to accept without reserve the tenets of any party".[54] This was no doubt because the Jacobite sympathies of his family attracted constant insinuation. In 1753 it was alleged against him that, as a young man, he had "drunk the health of the Pretender" on his knees.[55] So serious an allegation was this, that it was investigated in both the House of Lords and Privy Council before being

[45] Poser, n 11, 12.

[46] CHS Fifoot, *Lord Mansfield* (Clarendon Press, Oxford, 1936), 27.

[47] Fifoot, n 46, 27; Edward Corp, "Murray, James, Jacobite first earl of Dunbar" in *Oxford Dictionary of National Biography* (Oxford University Press, 4 October 2008), https://doi.org/10.1093/ref:odnb/92615 viewed 29 September 2025.

[48] Poser, n 11, 19–20.

[49] Poser, n 11, 19.

[50] Poser, n 11, 30.

[51] Poser, n 11, 37.

[52] William Murray, John Dunning and Edward Thurlow, *A Treatise on the Study of The Law* (Harrison Cluse, London, 1797), 1–54.

[53] Poser, n 11, 83–84.

[54] Fifoot, n 46, 37–38.

[55] Fifoot, n 46, 38; Poser, n 11, 107–110.

dismissed as "scurrilous".[56] It did not ultimately halt his progression, however: the following year he was made Attorney General.

In 1756, after the unexpected death of the incumbent Sir Dudley Ryder, Murray was offered the position of Chief Justice of the King's Bench – in contrast to Hale, an appointment straight from a political life.[57] Appointment brought with it a barony, and so he became Lord Mansfield. His biographer Norman Poser says this:

> Murray's vulnerability throughout his life to accusations of Jacobitism shaped his character in important ways. It made him cautious and unwilling to take a stand on political issues or to challenge the authority of the government; arguably, if it had not been for his Jacobite connection, his enormous talents may well have made him prime minister during the government crisis of the 1750s. Yet it is just as well that he did not reach the very top of the political hierarchy, for his contribution to Anglo-American law was far more important and long-lasting than anything he might have achieved as a politician.[58]

From his appointment in 1756, Mansfield held the office of Chief Justice until his retirement from the bench in 1788.[59] During that period, England was undergoing unparalleled economic change. Industry was expanding, driven in significant part by the growth in manufacture of textiles, and metal working – a growth super-charged by England's ready access to coal as a source of energy.[60] England became a centre of industrial innovation, driven by the invention of the spinning jenny in 1767 and the water frame in 1769.[61] To support this economic growth, canals and roads were developed, easing transport and creating an integrated and specialised national economy.[62] This growth in manufacturing led to shifts in social patterns as populations moved from villages and towns to the cities. It led to a change in business model with cottage industries moving to factories.[63] It coincided with the economic opportunities created by the territories and colonies being drawn into the English economic sphere, particularly India, the North American colonies and the British West Indies.[64] This fuelled a rapid expansion in international trade so that by the mid-18th century, England had moved from being an economic backwater to the world's greatest trading nation.[65]

The financial world was transformed alongside this. The Bank of England had been created in 1694 and the first organised stock exchange in 1698, providing the framework for a modern banking and finance system.[66] New forms of property became established including patents and many new forms of chose in action. More dramatic was the growth in financial instruments including bills of lading, promissory notes, options, shares in joint stock companies, and contracts of all kinds, but particularly insurance contracts.

This transformation of the British economy, accompanied by the encouragement offered by enlightenment narratives, created forces for Britain as elemental as anything we are dealing with, or likely to be dealing with today. And yet the law as it stood at that same point in history was far from dynamic, and far from fit to serve this new economy. Rather, it reflected the preoccupations of feudal times, with much of the case law focused upon real property.

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[56] Fifoot, n 46, 38.

[57] Fifoot, n 46, 39; Poser, n 11, 112–113, 118.

[58] Poser, n 11, 14.

[59] Mansfield attempted to tender his resignation to the Lord Chancellor in November 1786 but his request was not conveyed to the King, and he remained in office, virtually incapacitated, for nearly two more years: James Oldham, "Murray, William, first earl of Mansfield" in *Oxford Dictionary of National Biography* (Oxford University Press, 4 October 2008), https://doi.org/10.1093/ref:odnb/19655 viewed 29 September 2025.

[60] C Knick Harley, "Trade: discovery, mercantilism and technology" in Roderick Floud and Paul Johnson (eds), *The Cambridge Economic History of Modern Britain: Volume 1 – Industrialisation, 1700–1860* (Cambridge University Press, 2008), 190.

[61] Poser, n 11, 223; Harley, n 60, 186.

[62] Poser, n 11, 223.

[63] Poser, n 11, 241.

[64] Poser, n 11, 224.

[65] Harley, n 60, 195.

[66] Poser, n 11, 225; *Bank of England Act 1694*, 5 & 6 Wm & Mar, c 20.

The judiciary Mansfield assumed control of also had little connection with the commercial world. It is said that the law reports contained so few commercial cases as to give the appearance that "either Englishmen of that day did not engage in commerce, or they appear not to have been litigious people in commercial matters".[67] Historically, commercial disputes, such as they were, had been decided not in the common law courts but in piepowder courts set up at fairs and presided over by a representative of the local lord, or by the mayor or bailiff of the borough.[68] The work of these courts developed what came to be known as the law merchant. As trade became more complex, special commercial courts were set up by statute: the Courts of the Staple.[69] Presided over by the local mayor and two constables, they were required to apply the law merchant and not the common law.

The role of these courts waned from the time of Coke, as common law courts asserted jurisdiction in commercial matters on the basis that the prevailing merchant practice could found a legal duty.[70] But to be recognised in the common law, the practice had to be proved as a matter of fact, had to have existed from time immemorial, and had to be limited to a certain place. This was all very problematic. It hindered the development of the law, producing results that could be said to be predictably unpredictable. This unpredictability flowed from the fact that the core principles used to decide cases (collectively, the law merchant) were treated as issues of fact to be resolved by juries.[71] To this must be added an even more significant difficulty: a clash between, on the one hand, the common law requirement of consideration for binding contractual obligations and, on the other hand, the demands of the commercial community for the negotiability of financial instruments. The common law had carved out an exception to the requirement for consideration in respect of the negotiability of bills of exchange, but had refused to extend that exception to promissory notes.[72]

This was a major difficulty for the economy. The impasse existed just at the time when capital was short in the British economy. The refusal of the law to provide an effective legal framework for negotiable instruments was seen as stultifying trade. There is some suggestion that so singular was the common law's failure to respond to new markets that it drove a growth in arbitration.[73]

Mansfield made clear from the outset of his time as Chief Justice, in the way of some modern Chief Justices, that he intended to ensure that the law served the commercial community. He said in many public statements, and in many cases, that to do so the law must be certain.[74]

In a series of decisions, Mansfield confirmed the negotiability of bills of exchange and promissory notes, treating them as a kind of currency and, in so doing, removing an obstacle to the development of financial markets. In the case of *Miller v Race*, he held that an innkeeper who had accepted a negotiated promissory note by way of payment gained good title to the note even though he had actually received it from a thief, the innkeeper acting in good faith (as Mansfield put it, "in the course of currency, and in the way of his business").[75] In *Edie v East India Company*, he confirmed the

[67] Thomas Edward Scrutton, "General Survey of the History of the Law Merchant" in Association of American Law Schools (ed), *Select Essays in Anglo-American Legal History* (Little Brown, Boston, 1909), vol 3, 7.

[68] Charles A Bane, "From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law" (1983) 37 *University of Miami Law Review* 351, 353. They were so called because of the dusty feet (in Norman French, *pie poudres*) of the travelling merchants with whom they dealt.

[69] Bane, n 68, 354; *Statute of the Staple 1353*, 27 Edw 7, stat 2.

[70] Bane, n 68, 355.

[71] Poser, n 11, 226–227.

[72] Aleksi Ollikainen-Read, "Law and Commerce: The Fortunate Crisis of the Eighteenth Century" (2022) 53 *Journal of Legal History* 56, 76–77 citing *Buller v Crips* (1703) 6 Mod 29; 87 ER 793 (KB) and *Clerke v Martin* (1702) 2 Ld Raym 757; 92 ER 6 (KB).

[73] Ollikainen-Read, n 72, 75.

[74] He said in *Milles v Fletcher* (1779) 1 Doug 231; 99 ER 151 (KB): "The great object in every branch of the law, but especially in mercantile law, is certainty".

[75] *Miller v Race* (1758) 1 Burr 452; 97 ER 398 (KB).

enforceability of a bill of exchange although it was not expressly stated to be negotiable.[76] The bill was drawn by a Colonel Clive upon the East India Company, payable to a Mr Campbell or order. Mr Campbell negotiated it to another, a Mr Ogilby, but omitted the words "or order". Mansfield declared that the bill was enforceable by the person at the end of the chain of negotiation because it was negotiable in its original creation. In his view the requirements of trade dictated that bills of exchange had to be fully negotiable, and predictably so, to serve their purpose.

The development of the law of insurance was another necessary support for the growth of international trade. In this area, Mansfield's impact was just as significant. Lord Neuberger has characterised his contribution to the law of insurance as almost amounting to a codification.[77] Certainly, he established many of the fundamental principles of insurance. For example, that an insurance contract was a contract of indemnity such that the person who wished to insure a vessel or goods or other assets must have an "insurable interest" in it.[78] Another example, that the principle of good faith underlies contracts of insurance.[79]

Restitution scholars will of course be familiar with Mansfield's decision of *Moses v Macferlan*.[80] Widely recognised as a foundational authority in the development of the law of restitution, it established the principle that the law will impose an obligation to return money or benefits when they are received under circumstances rendering it unjust that they be retained – or in other words, where retention would give rise to unjust enrichment.

Mansfield has been described as the father of modern commercial law. Joseph Story, a United States Supreme Court justice, said of him "that he broke down the narrow barrier of the common law against the prejudices of the age, and fused into it an attractive equity, which it seemed to all his predecessors incapable of sustaining", redeeming it from "feudal selfishness and barbarity".[81]

His herculean contribution to the commercial law was not simply drawn forth from his mind, or his books. Mansfield was an innovator in his methods. It is sometimes said that his innovation was to use special juries knowledgeable in the law merchant, in deciding cases. He did use, and indeed popularise, special juries.[82] But it was not his innovation. Special juries had been employed for some time in this way – a use that had been formalised by statute in 1730.[83] His innovation was ultimately to obviate the need for these special juries, which declined in use following his tenure.[84] With an understanding of the law merchant gained from his own practice in the law, and from the special juries, and drawing from the approach of civil law, he was able to incorporate the law merchant into the common law. He was motivated to do so by a concern as to the uncertainty created by treating what was in essence a question of legal principle (custom captured in the law merchant) as a question of fact.[85]

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[76] *Edie v East India Company* (1761) 2 Burr 121; 97 ER 797 (KB).

[77] David Neuberger, "A Scotsman Caught Young: The Influences Which Shaped William Murray, First Earl of Mansfield" (Fifth Annual Lecture, Selden Society and Four Inns of Court, 22 October 2024).

[78] See, eg, *Le Cras v Hughes* (1782) 3 Doug 81; 99 ER 549 (KB).

[79] *Carter v Boehm* (1766) 3 Burr 1905; 97 ER 1162 (KB).

[80] *Moses v Macferlan* (1760) 2 Burr 1005; 97 ER 676 (KB).

[81] William W Story (ed), *The Miscellaneous Writings of Joseph Story: Associate Justice of the Supreme Court of the United States* (Little and Brown, 2nd ed, 1852), 114.

[82] James Oldham, *English Common Law in the Age of Mansfield* (University of North Carolina Press, Chapel Hill, 2004), 25–27; see, eg, *Carter v Boehm* (1766) 3 Burr 1905; 97 ER 116 (KB).

[83] *Juries Act 1729*, 3 Geo 2, c 25, ss 15–18. See Blackstone, n 19, vol 3, 357–358.

[84] Law Reform Committee, Parliament of Victoria, *Jury Service in Victoria* (Final Report, December 1997), vol 3, [1.69]. The special jury was not however abolished until well after Mansfield's death: *Juries Act 1949*, 12, 13 & 14 Geo 6, c 27, s 28.

[85] Poser, n 11, 227.

HOLDING FIRM

As we witness a global trend towards political polarisation, declining trust in institutions and the rule of law, and rising authoritarianism, what can we as current custodians of the common law tradition draw from the life and times of Hale? Four things, at least.

The first is the importance to the common law tradition and to the stability of the societies which it serves of upholding and promoting the distinctiveness of common law reasoning: doing law is and must be seen to remain fundamentally different from doing politics. Legitimacy would be eroded to the extent that distinction might ever become blurred. Perhaps the most famous sentence ever spoken by any Australian judge was that spoken by Sir Owen Dixon on being sworn in as Chief Justice of Australia in 1952, having the previous year led a majority of the High Court in holding invalid legislation banning the Australian Communist Party which had been introduced and unsuccessfully defended by the government of Sir Robert Menzies that subsequently appointed him. "There is no other safe guide to judicial decisions in great conflicts", Dixon then said, "than strict and complete legalism".[86] There have been differences of opinion about precisely what Dixon meant by "legalism" and about the extent to which "strict and complete legalism" ought to be tied to the "strict logic and high technique" to which he later referred in an important lecture concerning judicial method.[87] There can, however, be no room for any difference of opinion about the importance of the central point he was making: that law must be and be seen to be distinct from politics.

The second is the importance to upholding and promoting the distinctiveness of common law reasoning of maintaining the integrity of the common law process. That is because the distinctiveness of law from politics is not to be found in the notion that the current content of the law is somehow to be discovered in the distant past or, to use the words of Oliver Wendell Holmes, that it is to be found hovering over us as a "brooding omnipresence in the sky".[88] The distinctiveness of law is rather to be found, as Hale emphasised, in the distinctiveness of the process by which the law is kept fit for purpose by its current custodians. Hale, the great historian, would have agreed with Sir Victor Windeyer that "[t]he common law develops, but not by looking back to an assumed golden age" and that "the only reason for going back into the past is to come forward to the present, to help us to see more clearly the shape of the law of today by seeing how it took shape".[89] He would also have agreed with Sir Gerard Brennan that "the law is not an ever-expanding cosmos containing rules for the solution of the problems of every generation and awaiting only a judicial telescope to capture their text"; "[a]s each generation faces new problems, the rules must be crafted by the judges of the time".[90]

The third is the importance to the integrity of the common law process of the integrity and personal discipline of its current custodians as epitomised by Hale in his "Things necessary to be continually had in remembrance". Translated to the present, one of those things is objectivity, another is diligence, another is fairness. Two other things also stand out. One is open-mindedness: avoiding what might now be described as anchoring bias or confirmation bias. The other is humility: the judge is no hero who looks for public praise or who shies away from public criticism.

But there is a broader and deeper dimension of intellectual integrity that we see illustrated in Hale's life rather than written in his rules. Ronald Dworkin captured it early this century when he wrote the following words in response to what was then a recent decision of the United States Supreme Court given urgently and in politically controversial circumstances:

> Judges do not gain legitimacy from God or election or the will of the governed or their supposed pragmatic skill or inspired reasonableness. The sole ground of their legitimacy – the *sole* ground – is the discipline of argument: their institutional commitment to do nothing that they are not prepared to justify

[86] "Swearing in of Sir Owen Dixon as Chief Justice" (1952) 85 CLR xi, xiv.

[87] Dixon, "Concerning Judicial Method" in Crennan and Gummow (eds), *Jesting Pilate and Other Papers and Addresses by The Rt Hon Sir Owen Dixon* (Federation Press, 3rd ed, 2019), 112.

[88] *Southern Pacific Company v Jensen*, 244 US 205, 222 (1917).

[89] *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460, 496.

[90] "Retirement of Chief Justice Sir Gerard Brennan" (1998) CLR v, ix.

> through arguments that satisfy, at once, two basic conditions. The first is sincerity. They must themselves believe, after searching self-examination, that these arguments justify what they do, and they must stand ready to do what the arguments justify in later, perhaps very different, cases as well, when their own personal preferences or politics are differently engaged. The second condition is transparency. The arguments they themselves find convincing must be exactly the arguments they present to the professional and lay public in their opinions, in as much details as is necessary to allow that public to judge the adequacy and future promise of those arguments for themselves.[91]

Hale, a committed theist, would have disagreed with Dworkin's opening words but would have embraced the balance of his explanation. In that explanation lies the essence of what Dixon famously described as "legalism". It is not about technicality. It is about intellectual integrity.

Finally, we draw from the life of Hale a lesson about the importance to the stability of the common law process and its outcomes of moderation. Courts within a common law do not set an agenda: they have very limited control over the cases that come before them or over the issues litigated in those cases. They have more control over the manner and tone in which the issues presented are addressed and resolved. They can choose to go wide or narrow. They can choose to go high or low. In making those choices, they are best to avoid extremes. To adopt a line from Ovid which would have been known to Hale and which sums up his approach: "medio tutissimus ibis" – you will go safest in the middle.

MOVING FORWARD

James Spigelman described Mansfield as having "accepted the common law method and tradition, without deifying it".[92] Brian Simpson said of him that he was "no innovator in legal matters" and that his ideas commonly involved no more than "a bold and striking affirmation of views expressed by others".[93] To this Lord Neuberger responded:

> I rather suspect that all this really means is that Mansfield's contributions to the common law were not made in a vacuum, but represented developments and syntheses of previous judgments and writings. But that is precisely what one would expect of a common law judge, and it is indeed reflected by Mansfield's frequent citation of and respect for previous judicial decisions – at least when they established a rational principle.[94]

We suggest that there were three things that distinguished Mansfield from other common law judges at the time, and that explain the continuing hold he has on legal imaginations. First, the clarity with which he saw how the common law functioned, in terms of process and precedent. Second, his understanding that the common law was not a sealed system – that it did, and indeed must, draw on the ideas and practices in society, including custom. Perhaps here, his innovation was that he believed that it also could benefit from drawing on the ideas of other systems of law. Third was the clarity with which he saw the moment that the law had reached, that it was completely out of touch with – and therefore not serving – its society. He understood that the courts were sidelined, and had become irrelevant in the economic affairs of his nation. And that, far from having a stabilising effect on society, this failure of the law to develop was hindering economic development.

The common law can only achieve its stabilising purpose if it addresses the legal issues produced by the changing society that it serves. In that regard, the challenge for the common law today is, in a sense, nothing new. As can be seen from this historic review, the common law has repeatedly faced the challenge of how a system built on looking backwards to precedent can evolve and respond to a changing society. Today, it faces the challenge of responding to new disruptive challenges, such as the growth of artificial intelligence and the erosion of the private sphere through the use of new technologies, and all that entails.

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[91] Ronald Dworkin, "Introduction" in Ronald Dworkin (ed), *A Badly Flawed Election: Debating Bush v Gore, the Supreme Court, and American Democracy* (New Press, 2002) 1, 54–55.

[92] JJ Spigelman, "Lord Mansfield and the Culture of Improvement" (2008) 82 *Australian Law Journal* 764, 765.

[93] Neuberger, n 77, 18, citing AWB Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Clarendon Press, Oxford, 1987), 618.

[94] Neuberger, n 77, 18 (citations omitted).

But there is good news. The common law is better positioned than in Mansfield's time to respond to rapidly evolving societal issues, whilst retaining the integrity of the common law process.

First, it does not bear the generative load of responding to change alone – in fact today, the primary load for that is carried by Parliament. In Mansfield's time, Parliament met less frequently and had less institutional competence than it does today. That is not to say that today the common law is sidelined. The common law continues to operate in many fields that are predominantly regulated by it. Even where Parliament has spoken, the common law has work to do through the courts' engagement in statutory interpretation. And it is to be remembered that the common law is the source of many of the ideas and frameworks that find their way into those statutes.

Second, it is now conventional common law method to look to academic writing and the jurisprudence of other nations as sources of knowledge. These sources are available to judges to supplement the treasure trove of concepts and structures that already sit within the common law and are available for repurposing for a new day and a different time.

Third, the growth of legal education has changed the capability of lawyers. In Mansfield's day, law was not taught as an academic subject. Instead, lawyers gained competence through the mastery of process and case law, with little focus upon doctrine. Mansfield was exceptional because of the depth of his understanding of how the common law worked, and how it was generated. Exceptional also because of his familiarity with other systems of law. Legal education today produces lawyers who have a good understanding of the common law method and a breadth of intellectual frameworks to draw on. Moreover, drawing on the jurisprudence of other jurisdictions (a radical approach in the time of Mansfield) is now standard methodology in common law countries. This includes looking to civil law jurisdictions, and to the decisions of international tribunals and bodies.

To conclude, the integrity of common law processes is critical to the legitimacy of the common law. These processes are both constructive of the rule of law, and reflective of its ideals. But the common law is not to be "deified".[95] If it is to fulfil its stabilising, rule of law purpose in a society, then it must engage with the legal issues of that society and of its time. Existing common law processes have that capacity to engage and respond. That is the lesson we can take from Mansfield.

CONCLUSION

The traditional account is that Hale stood for constancy, and Mansfield for change. That is perhaps an oversimplification, as each applied conventional common law methodology, and each strived for certainty and stability in the law. But the times they lived in required different responses to achieve those purposes. To study them side by side is to be reminded of the great potential that the common law has to respond to the needs of the age. By reflecting on their legacies, we can learn about how the common law can respond to the challenges of the future.

[95] Spigelman, n 92.