Confronting the Yorke-Talbot Slavery Opinion and its legacy within English law

It is an unfortunate feature of English legal history that more is known about how the law ended slavery than how the law supported it. Many have heard of the Slave Trade Act 1807 that outlawed the slave trade in the British Empire, or the Slavery Abolition Act 1833 that outlawed slavery there altogether. Some may even have heard of Lord Mansfield's ruling on the status of slavery in England in the *Somerset* case of 1772. But few will be familiar with the so-called 'Yorke-Talbot Opinion' of 1729 – even fewer the Colonial Debts Act of 1732. Both measures were part of a small group of dicta, statutes, and opinions that provided the legal basis for slavery in England and throughout the empire.

One judge in particular, Lord Hardwicke, played a central role in the development of slavery within English law. As the co-author of the Yorke-Talbot Opinion, he put his name to a document that not only became a primary source cited by slave owners in justifying the legal basis of slavery, but also contributed to a significant expansion in the slave trade.

This article provides an analysis of the Opinion, its relationship with preceding and subsequent law, and the legacy it left behind. Whilst the legal history of slavery in England stretches back to the Domesday book (which recorded 10 percent of the population as slaves), forms of servitude in the Middle Ages differed markedly from the enslavement and shipment of Africans within the transatlantic slave trade.[1] A focus on how the law facilitated slavery can help us in modern Britain to better understand the operation of a trade that was central to our country's imperial system for over two centuries.

The imperial backdrop

Prior to the abolition of slavery in 1834, the legal status of slaves in England and throughout the empire was the subject of much dispute and change. The first point to note is that, with respect to slavery, English law generally diverged more from colonial laws than it aligned with them. Each colony within the empire operated under a bespoke legal system, some more comparable to that of England than others. A key difference between them was their treatment of slaves in the seventeenth and early eighteenth-centuries.

Although English merchants had been involved in the Portuguese slave trade since the 1550s, it was not until the first slaves arrived in Virginia in 1619 that slavery existed within the British Empire.[2] However, slavery, as codified by the law of property, did not exist in Virginia until the first slave code of 1705.[3] From that point onward, Virginia vacillated between treating slaves as chattel property, which made it easier for creditors to seize them in debt proceedings, and real property. By contrast, South Carolina defined slaves as freehold property, attaching them to a landed estate as in the serfdom system. Attachment to the land gave slave owners the right to slaves' services, rather than absolute ownership over them. This practice was a common feature of slavery in the West Indies: Jamaica, for

[1] D.B. Davis, *The Problem of Slavery in Western Culture* (Oxford, 1966), p.53.
[2] For a comprehensive study of Virginia's settlement, see J. Horn, *1619: Jamestown and the Forging of American Democracy* (New York City, NY, 2018).
[3] *The statutes at large; being a collection of all the laws of Virginia*, ed. W.W. Hening (Charlottesville, VA, 1969), vol. 3, pp. 333-335.

example, treated slaves as a form of real property, but based its system on the common law rules of inheritance.[4]

The legal status of slaves shaped commercial relationships between the creditors and investors in Britain and the merchants in the colonies. These relationships helped develop a so-called 'cult of commerce' in the eighteenth-century empire.[5] Embedded within this commercial culture was a reliance on credit, the financial instrument which served as an essential cog in the wheel of the imperial trading machine. Three main types of credit circulated throughout the imperial economy: international credit, book credit, and promissory notes. Almost everyone in commerce was implicated: larger colonial importers relied on credit from British suppliers; colonial merchants in rural locations relied on credit from the large importers in port cities, and consumers received credit from retailers.[6]

Within this extensive network of credit, there was a need to find suitable assets for use in the recovery of debt obligations. By the 1720s, British creditors were increasingly concerned about mounting levels of debt owed to them and began to lobby for reform. Whilst administrations in metropolitan Britain generally adopted a policy of legal pluralism within the empire, slavery came to be identified as an area in need of uniformity. This is where the Yorke-Talbot Opinion and the Colonial Debts Act came in.

The Opinion

The Yorke-Talbot Opinion of 1729 was the most significant development in the legal history of slavery since the first slave code of Barbados in 1661. It opined that slavery could exist throughout the British Empire, including in England – something that had been outlawed by a national synod at Westminster in 1102 and in the judgments of Sir John Holt a few decades earlier. The Opinion offered slavery protection within English law in an unprecedented way, and it did so at a time when plantation economies were growing throughout the empire.

Strikingly though, the first printed issuance of the Opinion appeared in the colonies rather than in England – a theme to which this article returns. On 7 September 1730, the *Boston Gazette* featured an 'advertisement' which read as follows:

> *In Order to rectify a Mistake, that Slaves become free, by their being in England, or Ireland or being Baptized, it has been thought proper to consult the King's Attorney and Sollicitor General in England thereupon, who have given the following Opinion, sub- scribed with their own Hands.*
>
> *We are of Opinion, that a Slave, by coming from the West-Indies to Great Britain or Ireland, either with or without his Master, doth not become free, and that his Master's Property, or Right in him, is not thereby determined or varied. And that Baptism doth not bestow Freedom on him, nor make any alteration in his temporal Condition in*

[4] 'An Act for the better Order and Government of Slaves (1696)', cited in L.B. Wilson, 'A "Manifest Violation" of the Rights of Englishmen: Rights Talk and the Law of Property in Early Eighteenth-Century Jamaica,' *Law and History Review*, 33/3 (2015), p. 553.

[5] Linda Colley gives this description in L. Colley, *Britons: Forging the Nation, 1707-1837* (New Haven, CT, 1992), p. 56.

[6] *The Economy of British America, 1607-1789*, ed. J.J. McCusker and R. Menard (Chapel Hill, NC, 1985), pp. 80-82.

these Kingdoms. We are also of Opinion, that his Master may legally compel him to return again to the Plantations.

P. Yorke
C. Talbot

Jan. 14 1729[7]

Although the Opinion was cited in later case law, there are few places where the full text of the Opinion – inclusive of its prefatory material – can be found.[8]

Essentially, the Opinion's authors drew three conclusions. First, that a slave did not cease to be slave when they came to England; in other words, the mere act of stepping foot on English soil did not emancipate a slave. Second, being baptised did not result in a slave's emancipation or any alteration in their status. Third, slave owners could legally compel slaves to return to the colonies. This final part would have assuaged the concerns of slave owners who feared they lost their property interest if slaves ran away whilst in England.

All three of these conclusions were significant, not only for the legal status of slavery, but also for its wider place within the empire. The second conclusion facilitated missionary activities in the colonies and helped to normalise the presence of slaves within colonial society. Keen to secure slave owner approval, missionaries argued that exposure to Christianity would improve the obedience of slaves while not undermining their ownership status.[9] The first and third conclusions endorsed a much broader view of slavery – that it had a uniform, 'imperial' status.[10] In other words, a slave was legally considered as much a slave in England as in Jamaica or Virginia.

The authors

Despite the lofty nature of its conclusions on the legality of slavery, the Yorke-Talbot Opinion was not the product of litigation like the much-celebrated *Somerset* ruling. Instead, it was an Opinion of Counsel authored by the Crown's two chief Law Officers. As seen from the *Boston Gazette* 'advertisement', they cited no authority and offered no rationale in their Opinion. It simply documented how two lawyers understood the law, even though much of the Opinion contradicted the most up-to-date cases. Even though the Opinion of Counsel was becoming a more common feature of English legal practice, it was 'by no

[7] *Boston Gazette*, Sept. 7 (Boston, 1730), p. 2.
[8] See, for example, *Knight v Wedderburn*, 8. Fac. Dec. 5, Mor. 14545 (Scot. Ct. Sess. 1778). This was a Scottish case involving a slave born in Guinea and later sold in Jamaica to a Scotsman. Joseph Knight was taken to Scotland where he was baptised and married a servant of the Wedderburn family. He asked for, but was refused, permission to live with his wife and child. On leaving his service, Wedderburn had Knight brought before the justices of the peace. After two appeals, Knight resisted the claim in a case that established that Scots law would not uphold slavery.
[9] For further reading, see K. Gerdber, *Christian Slavery: Conversion and Race in the Protestant Atlantic World* (Philadelphia, PA, 2018).
[10] G. W. Van Cleve, *A Slaveholder's Union: Slavery, Politics and the Constitution in the Early American Republic* (Chicago, IL, 2010), p. 21.

means equivalent to case law'.[11] However, given the Law Officers' eminent positions and their subsequent career success, it 'carried enormous weight'.[12]

The Opinion's authors were the Attorney General, Sir Philip Yorke, and the Solicitor General, Charles Talbot. Few legal figures wielded more influence than them at this time. As the Law Officers, they represented the Crown in legal proceedings, offered advice to the government, and even served in Parliament. This experience helped them reach the higher echelons of legal and political office. Yorke became Lord Hardwicke upon his appointment as Lord Chief Justice of the King's Bench in 1733, and both went on to become Lord High Chancellor of Great Britain. Lord Hardwicke served as Lord Chancellor for almost twenty years between 1737 and 1756, during which time he supported five Whig administrations. He was rewarded for assisting the Duke of Newcastle to become Prime Minister in 1754 by being made the Earl of Hardwicke and Viscount Royston. For the son of a lowly attorney, Lord Hardwicke ascended to the zenith of the legal profession, exercising considerable influence over the direction of the common law and equity in his time.

Lord Mansfield, who had been mentored by Lord Hardwicke, famously set aside his mentor's opinion in *Somerset v Stewart* (1772). In a report of that case, Lord Mansfield apparently observed that the Yorke-Talbot Opinion was issued '*upon a petition in Lincoln's Inn Hall, after dinner*'.[13] There is, however, no contemporary source corroborating that claim. He went on to state: '*the principal matter was then, on the earnest solicitation of many merchants, to know, whether a slave was freed by being made a Christian? And it was resolved, not*'. This account suggests that the agency of merchants played the lead role in procuring the Opinion. Nevertheless, a different account in the *London Evening Post* points to the activism of Christians, as a response to merchants' anti-missionary stance. Lord Mansfield reportedly stated that the '*notion of a slave becoming free by being baptized prevailed so strongly, that the planters industriously prevented their becoming Christians…upon which their* [Yorke and Talbot] *opinion was taken*'.[14] Such is the ambiguity around the Opinion's origin historians continue to debate it.

The preceding law and mercantile interests

The traditional view is that the Opinion was solicited by slave owners and those involved in imperial trade. Thomas Clarkson, a leading abolitionist, wrote in 1808 that '*planters, merchants and others*' secured the '*cruel and illegal opinion'*.[15] The question of illegality was probably a reference to how the Opinion disregarded legal precedents. Although accounts that emphasise mercantile activism rely on later sources like Clarkson, merchants in the 1720s would have been keen to reverse the more liberal rulings of Sir John Holt between 1696 and 1706.

Prior to these rulings, the courts had begun to give slavery a legal footing in England. In *Butts v Penny* (1677), the first case arising from the transatlantic slave trade, an action for trover (i.e. the recovery of damages for the wrongful taking of another's personal property) was brought concerning '*10* negroes *and a half*e'.[16] The court allowed slaves to

[11] For discussion on the development of the Opinion of Counsel in the eighteenth-century, see J.H. Baker, *The Law's Two Bodies: Some Evidential Problems in English and Legal History* (Oxford, 2001), pp. 86-90. For the quote about its status relative to case law, see D.B. Davis, *The Problem of Slavery in the Age of Revolution, 1770-1823* (New York City, NY, 1999), p. 479.
[12] Davis, *The Problem of Slavery*, p. 479.
[13] Lofft, *Reports of Cases Adjudged*, Easter Term, 12 Geo. 3 1772, K.B., p.8.
[14] *London Evening Post*, June. 23-35 (1772), p.1.
[15] T. Clarkson, *The History of the Rise, Progress and Accomplishment of the Abolition of the African Slave-Trade by the British Parliament* (London, 1808), pp. 64-65.
[16] *Butts v Penny* (1677) 2 Lev 201, 84 ER 1011. The case continued to be cited by counsel until 1721 with *Pickering v Appleby* (1721) 1 Com. 355, 92 E.R. 1109.

be treated as goods in actions for trover because merchants treated them as goods under the English Navigation System.[17] The court also decided to offer slavery some protection under English law because slaves were 'infidels', and therefore lacked the rights enjoyed by Christians.[18] Another case in 1677, *Lowe v Elton*, employed the same religious rationale.[19] This view overturned the *Cartwright's* case of 1569, the first recorded – yet unreported – slavery case before the English Courts. In relation to a white Russian slave, the court there ruled that slavery could not exist on English soil because '*England was too pure an air for slaves to breathe in*'.[20] William Harrison captured this principle in his widely read *Description of England* in 1577, stating that being present in England automatically emancipated slaves because '*all note of servile of bondage is utterly removed from them'*.[21]

Later cases extended the principle in *Butts*. *Chambers v Warkhouse* (1693) was the first case to describe slaves as 'Merchandize' in commercial contexts.[22] The following year, *Gelly v Cleve* (1694) decided that slaves could be used in actions for trover since they were infidels or 'heathens', and thus men could have property in them.[23] In an article for the *Law Quarterly Review*, Edward Fiddes aptly commented that by the end of the seventeenth-century there had been 'a rhythmical seesaw of judicial opinion, now for slavery, now against'.[24] It was Sir John Holt, Lord Chief Justice between 1689 and 1710, that tipped the seesaw against slavery in England, though slave owners still benefitted from some legal protection.

In a series of three cases, Holt, or at least the Court of King's Bench under his leadership, rejected the approaches in *Butts* and *Gelly*. He refused to accept that slaves were variations of villeins (effectively serfs tied to the land within the feudal system). Villeinage and slavery were placed on distinct footings: the former a legally authorised relic of feudalism; the latter a legally impermissible status in England.[25] With villeinage, a slave owner had the right to slaves' services, but they were not his chattel. This distinction was fundamental to the remedies a slave owner could expect to obtain from the English Courts for any interference with their slaves.

The first case, *Chamberlain v Harvey* (1696), involved a Barbadian slave brought to England. Chamberlain sued Harvey for trespass *de bonis asportatis* ('of goods carried away') after Harvey employed the slave. Chamberlain sought damages for the loss of value and services of the slave, but Harvey contended that no man could own another human being under natural law. Although the jury sympathised with Chamberlain over his trespass claim, Holt boldly declared that slaves could not be demanded as chattel under English law because '*one man cannot have an absolute property in the person of another man*'.[26] He

[17] The Navigation System was built on a series of 'Navigation Acts' in the seventeenth-century. They aimed at reducing competition from other European states to ensure the benefits of trade were kept within the parameters of the British Empire. The Acts contained certain restrictions on the use of foreign ships or mariners, and prevented colonies from exporting certain 'enumerated' goods to countries other than England.

[18] G.W. Van Cleve, 'Somerset's Case and its Antecedents in Imperial Perspective', *Law and History Review*, 24/3 (2006), p. 615.

[19] *Lowe v Elton* (1677) as cited in J. Baker, *An Introduction to English Legal History* (4th ed., London, 2002), p. 475.

[20] S. Juss, 'How the law came to support slavery', *New Law Journal*, 170/7904 (2 October 2020), p.7.

[21] *The Description of England by William Harrison*, ed. G. Edelen (Washington D.C., 1994), p. 118.

[22] *Chambers v Warkhouse* (1693) 83 ER 717-718. In 1698, Parliament exempted slaves from import duties on all 'goods and Merchandize' coming into England or the colonies in *An Act to Settle the Trade to Africa* (1698) 9&10 Will. III, c.26.

[23] *Gelly v Cleve* (1694) 1 Ld Raym 147. The case was also cited in *Chamberlain v Harvey* (1696) 91 ER 994.

[24] Quoted in Juss, 'How the law came to support slavery', p.8.

[25] D. Rabin, 'Empire on trial: slavery, villeinage and law in imperial Britain', in *Legal Histories of the British Empire: Laws, Engagements and Legacies*, ed. S. Dorsett and J. McLaren (Abingdon, 2014), pp. 203-217.

[26] *Chamberlain v Harvey* (1696) 5. Mod. 182; also reported at 87 E.R. 596 and Carth. 397, 90 E.R. 830.

rejected the rationale in *Butts*, holding that neither trover nor an ordinary action in trespass would be permitted for the taking of a slave.[27] In a compromise, however, Thomas Carthew's report of the case suggests that Holt sanctioned the recovery of damages for the loss of slaves' services, rather than their value or any damage done to them.[28]

By refusing to import Barbados law's understanding of slavery, the court entrenched a distinction between colonial laws and the laws of England. This same principle would mirror how Lord Mansfield dealt with a conflict of laws question involving Virginia law 76 years later. Holt further demonstrated a desire to distinguish the positions on slavery of colonial law and English law in *Smith v Browne and Cooper* (1701).[29] The case involved a plaintiff looking to recover the price of a slave originally bought in Virginia and sold in England. Holt informed the plaintiff that he should have pleaded that the contract 'occurred' in Virginia since the law there was founded not on English common law, but on the Royal Prerogative establishing a Crown colony.[30] This pleading rationale maintained the aversion of English law to recognising chattel slavery, a concept enshrined in Holt's famous words that '*as soon as a negro comes into England, he becomes free. One may be a villein in England, but not a slave*'.[31]

If *Chamberlain* and *Browne and Cooper* weakened a slave owners' interests, then the third case, *Smith v Gould* (1705-1707), was a relative victory for them. [32] The court once again prevented an action for trover involving a slave because men could not be 'the subject of property' (and *Butts* was 'not law'); but in a change of direction, it allowed a bespoke trespass *quare captivum suum cepit* (i.e. a captured prisoner) action.[33] Justice Powell declared that a man may sell a captive and '*he remains a captive to the vendee*'.[34] The ruling strengthened a slave owner's capacity to sue for damages and, for some historians, provided a means to assert title to a slave.[35] However, *Gould* was far from an endorsement of chattel slavery; that status remained repugnant to English law.

The thread that connected Holt's rulings was that English law did not recognise slaves as inherently different to other people. Slaves could be freely exchanged and held as property in the colonies, whereas this was not the case in England. Enslaved Africans were not recognised by English law as slaves; they could only be considered villeins. For two decades, these rulings did not sit comfortably with slave owners and, in particular, British merchants. Their frustration with the limited actions available to seize slaves in the English Courts was compounded by mounting levels of colonial debt.

Where mercantile lobbying groups like sugar planters, tobacco merchants, and slave traders had previously protested independently of one another, they began to co-ordinate their efforts in the late 1720s and early 1730s. They ultimately sought to have slaves treated as chattels in support of property claims. This was a concern both at home and abroad, with colonies like Virginia continually changing the legal status of slaves. A year before the Yorke-Talbot Opinion, the Virginia legislature passed a 1728 statute which made

[27] W.M. Wiecek, 'Somerset: Lord Mansfield and the legitimacy of Slavery in the Anglo-American World', University of Chicago Law Review, 42/1 (1974), p. 90.
[28] Carth. 397, 90 E.R. 830. This action was known as an action for trespass *per quod servitium amisit* ('whereby he lost the value [of his servant]').
[29] *Smith v Browne and Cooper* (1702-1706) 91 E.R. 567. The case is also reported at 2 Ld. Raym. 1274.
[30] Van Cleve, 'Somerset's Case', p. 617.
[31] 91 E.R. 567.
[32] *Smith v Gould* (1705-1707) 2 Salk 666.
[33] Quoted in Wiecek, 'Somerset', p. 93.
[34] Quoted in Van Cleve, 'Somerset's Case', p. 618.
[35] Wiecek seemed to think so in 'Somerset', p. 93. See also Rabin, 'Empire on trial', pp. 203-217.

slaves chattel property, but it also contained provisions inhibiting their seizure because planters could annex them to their land.[36]

Merchant anxiety stemmed not only from colonial law itself, but also from the Privy Council's position on colonial law. A Privy Council decision in the 1720s sought to base a colony's governing law on whether the colony was settled or conquered.[37] What law governed in each colony had been a live issue for decades, especially in Jamaica, which declared in one piece of local legislation that all English common law was in force.[38] Not without creating legal uncertainty, the Privy Council's position also exposed merchants to the risk that slavery might be unlawful in certain colonies due to Holt's rulings.[39] Such a risk clearly necessitated the need for legal clarification on key issues regarding slavery.

The role of missionary Anglicanism

In addition to their property claims, slave owners wanted to diminish the chances of slaves being freed. As their 'infidel' status was used as a justification for the enslavement of Africans, certain religious groups thought conversion to Christianity could offer slaves some degree of earthly salvation. Manumission, the act of bestowing freedom upon slaves, was thought to be achieved through baptism.[40] Colonies like Virginia legislated against manumission, but the question of whether baptism conferred freedom remained legally unclear in England.[41]

In a valuable contribution to the historiography, Travis Glasson has persuasively argued that, rather than slave owners, it was in fact churchmen that procured the Yorke-Talbot Opinion. They did so, supposedly, to facilitate the baptism of enslaved peoples.[42] A circle associated with the Anglo-Irish philosopher George Berkeley (later the Bishop of Cloyne) had been seeking to convert slaves to Christianity in North America and the West Indies. However, they faced a reluctance from slave owners who feared baptising slaves could inadvertently free them. Glasson reasons that Berkeley, himself a slave owner in Rhode Island, sought an opinion to reassure slave owners that religious conversion did not alter the status of slaves, and that property could still be held in them.

The most plausible evidence for attributing the Yorke-Talbot Opinion to missionary Anglicanism is found in how and where it was issued. References to the Opinion were initially found in more colonial settings than in England. Indeed, as previously pointed out, the full text of the Opinion first appeared in the *Boston Gazette*, the most influential and widely read newspaper in the colonies. Even the London-based *Monthly Chronicle*

[36] Hening, *Statutes at large*, vol. 4, pp. 225-226.
[37] *Case 15 – Anonymous* (1722) 2 P. Wms. 75, 24 E.R. 646.
[38] See *APC Colonial* (1720-1745), vol. 3, p. 47 (26 July) and J.H. Smith, *Appeals to the Privy Council from the American Plantations* (New York City, NY, 1950), pp. 482-3.
[39] Van Cleve, 'Somerset's Case', p. 619.
[40] The term manumission literally means to send from the hand. It is the same word that the Romans used to free their slaves.
[41] For example, in 1667, Virginia passed 'An Act declaring that baptisme of slaves doth not exempt them from bondage'. A copy of this document passed by the Virginia General Assembly can be found in W.H. Hening, *Statutes at large*, vol. 2, p. 260.
[42] T. Glasson, 'Baptism doth not bestow freedom: missionary Anglicanism, slavery and the Yorke-Talbot opinion, 1701-30', *The William and Mary Quarterly*, 67(2), 2010, p. 280.

reproduced information from the Boston version, revealing that the Opinion might have been of primary interest to people in the colonies.[43]

Berkeley and his circle had important colonial connections. In the late 1720s, Berkeley sought to establish a college in Bermuda for training ministers and missionaries.[44] His philosophical reputation brought him into contact with myriad clergymen, and there is a correlation between his associates and the organisations that initially publicised the Opinion. These organisations included the Society for the Propagation of the Gospel in Foreign Parts ("SPG") and the Society for Promoting Christian Knowledge, both of which still carry out mission activities overseas today.[45] It is unsurprising that SPG was keen to promote the Opinion given their established practices in North America and their growing presence in the West Indies. A sermon given by Berkeley in 1732 before the SPG also appears to connect the Opinion to himself. In that sermon he spoke the following words:

> *An antient Antipathy to the Indians . . . together with an irrational Contempt of the Blacks, as Creatures of another Species, who had no Right to be instructed or admitted to the Sacraments, have proved a main Obstacle to the Conversion of these poor People. To this may be added, an erroneous Notion, that the being baptized, is inconsistent with a State of Slavery. To undeceive them in this Particular, which had too much Weight, it seemed a proper Step, if the Opinion of his Majesty's Attorney and Sollicitor-General could be procured*.[46]

It has therefore been suggested that it was a member of Berkeley's circle, at Berkeley's request, that approached Yorke and Talbot for an opinion. Berkeley's immediate network included future bishops Martin Benson and Thomas Secker, as well as the Anglo-Irish politician John Perceval – the foremost backer of the Bermuda scheme. All three were connected to the Talbot family, which featured fellow clergyman Edward Talbot. Previous sermons of Berkeley, delivered in Rhode Island, had dwelled on the legal effects of baptising slaves. His own personal view before the issuance of the Yorke-Talbot Opinion was that baptism did not alter the civil status of slaves, and that Christianity would not make slaves worse servants.[47] He certainly would have known that an opinion from the Crown's Law Officers would help to put slave owners' objections to rest.

Ultimately, there is no direct evidence attributing the Opinion to a particular group or person; there is only circumstantial evidence allowing for reasonable inferences. Whatever the origins of the Opinion though, be it mercantile or religious, the Crown had a special interest in resolving legal ambiguities about the status of slaves. The Crown understood the importance of predictable rules to give confidence to British investors and creditors. It also knew that the opportunities of overseas trade were too great to pass up. Where previously competing empires had monopolised trading routes, the Spanish Crown had offered the British South Sea Company an *asiento* contract in 1713 to supply slaves to South America for thirty years.[48] Britain's economic horizons were broadening in the early

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[43] 'Advice from Boston in New England, of Sept. 7', *Monthly Chronicle* (November 1730), p. 218.
[44] Glasson, 'Baptism doth not bestow freedom', p. 294.
[45] Ibid., p. 295.
[46] G. Berkeley, *A Sermon Preached before the Incorporated Society for the Propagation of the Gospel in Foreign Parts… On Friday the 18th of February 1731* (London, 1732), pp. 18-20.
[47] Glasson, 'Baptism doth not bestow freedom', p. 299.
[48] R. Blackburn, *The Making of New World Slavery* (London, 1997), pp. 141-2.

eighteenth-century, and the slave trade was becoming a central part of the British imperial economy.

The immediate effects of the Opinion

The Yorke-Talbot Opinion was a boon to the merchants and planters involved in the slave trade. Of all the legal decisions they would have heard about involving slavery, none spoke more directly to their interests. In her analysis of the *Somerset* case of 1772, Ruth Paley argued that the real significance of Lord Mansfield's ruling lay not in what was decided but in how it was used.[49] Despite its jurisdictional limitations in applying only to English law, the *Somerset* ruling was taken by the anti-slavery lobby as a victory for their wider aims throughout the empire. In a like manner, the Yorke-Talbot Opinion, as the most pro-slavery interpretation of English law, was brandished by slave owners as an unambiguous endorsement of transatlantic slavery.

It is unsurprising that the Opinion was mostly read in the colonies, for that was where the majority of activities involving slaves were found. Whether initially distributed in connection with George Berkeley's circle or not, it undoubtedly reached a wide audience.[50] The result, as expected, was an increase in the slave trade, particularly in those colonies with plantation-based economies. For example, the number of slaves imported into Virginia increased from 211 in 1728 to 1,291 in 1732.[51] This number continued to rise into the 1730s, reaching 3,222 by 1736.[52] Comparable rises in slave importations were found in the West Indies. In Jamaica, one the largest sugar producing colonies, the number of slaves imported into Jamaica more than doubled from 5,350 in 1728 to 13,552 in 1732.[53] The number of slaves exported out of the colony also sharply rose from 986 to 5,288 over the same period.[54] These datasets are not conclusive of the Opinion's economic impact in the colonies, but are suggestive of its effects. Other measures like the Colonial Debts of 1732 also played a role in expanding the slave trade.

Discussion of the Yorke-Talbot Opinion would be incomplete without mention of the Colonial Debts Act, a piece of legislation which settled the status of slaves as chattel property in the recovery of debts owed to British merchants. [55] The two measures, taken in conjunction with each other, fundamentally reshaped the operation of slavery throughout the British Empire. George Van Cleve has argued that the Colonial Debts Act served as the 'legislative analogue' of the Opinion.[56] Of its three conclusions, the Opinion's conclusion that an owner's property right to a slave was not 'determined or varied' by arrival in Great Britain or Ireland was most significant. In other words, slaves were property anywhere in the British Empire, even England – a point at odds with Holt's rulings. Any notion of 'imperial' law – as opposed to the law of England or a particular colony – was also profoundly new. Even the loosely enforced Navigation Acts which applied to the colonies were generally not

[49] R. Paley, 'After Somerset: Mansfield, Slavery, and the Law in England, 1772-1830', in *Law, Crime, and English Society, 1660-1830*, ed. N. Landau (Cambridge, 2002), pp. 165-184.
[50] Davis, pp. 209-210.
[51] *Virginia Slave-Trade Statistics 1698-1775*, eds. W. Minchinton, C. King, and P. Waite (Richmond, VA, 1984), pp. xix-xv.
[52] Ibid.
[53] R.B. Sheridan, *Sugar and Slavery: An Economic History of the British West Indies* (Barbados, 1974), pp. 501-502.
[54] Ibid.
[55] For a detailed analysis of the Colonial Debts Act of 1732, see N.G. Leah, 'The Politics of Imperial Trade: A study of the Colonial Debts Act of 1732', *The Journal of the Oxford History Society*, Issue XII (2020), pp. 1-92.
[56] Van Cleve, *A Slaveholder's Union*, p. 21.

held out as 'imperial'; rather, they were deemed to primary legislation mandating the colonies to trade in a particular way.

The Colonial Debts Act was a landmark piece of imperial legislation in that it bound all the colonies under a common regulatory framework. It made all '*Houses, Lands, Negroes, and other Hereditaments and real Estates*' in North America and the West Indies liable as tangible assets for '*all just Debts, Duties and Demands, of what Nature or Kind* soever'.[57] Leaving the Act's transformative effect on colonial land to one side (which merits independent reading), its impact on slavery was unprecedented.[58] Whilst the Yorke-Talbot Opinion answered the crucial question about the legality of slavery in England, it was silent on the property status of slaves. The Act finally resolved that tension by making slaves chattel property for the purposes of debtor-creditor relations. Given that credit underpinned imperial trade, this wholesale change affected almost every sinew of commerce.

It would be wrong to interpret the Act as a triumph of British metropolitan interests though. Remarkably, unlike any legislation that had come before, it was the result of lobbying from mercantile groups in both the colonies and Britain. Representatives from the sugar, tobacco, and slave trades all identified a common problem of debt and a common solution in the form of chattel slavery. Colonial tradesmen and planters wanted – and needed – credit to expand commercial operations, even at the expense of their slaves being seized in the event of a default on repayments. Like the Yorke-Talbot Opinion, it was mercantile interest which seemed to be the priority.

There are, however, some obvious points of divergence between the Yorke-Talbot Opinion and the Colonial Debts Act. Jurisdictionally, the Act made no reference to the laws of England; it only applied to '*British plantations in America*'.[59] This was 'imperial', but only for the purpose of setting up a remedial framework for debts owed in the colonies. Beyond its legal ramifications for colonial property, it was constitutionally significant as it represented Parliament's willingness to intervene in colonial affairs beyond its usual purview. Some colonies, particularly older ones like Virginia, viewed this as constitutional overreach. [60] Even Alexander Hamilton later reflected on the constitutional significance of the Colonial Debts Act, describing it as '*one of the Highest Acts of Legislature that one Country could exercise over another*'.[61]

In the Virginian mindset, there was a difference between legislation passed by Parliament, a body without knowledge of local affairs, and the transmission of Royal instructions, which benefitted from the advice of the Privy Council under the King's 'paternal care'.[62] As a document drafted by the Crown's chief Law Officers, the Yorke-Talbot Opinion would have been more amenable to colonies like Virginia than parliamentary legislation. Ultimately, the Opinion could be viewed as more legally consequential for slavery at a foundational

[57] HL/PO/PU/1/1731/5G2n10, f. 219. Public Act, 5 George II, c.7, an Act for the more easy recovery of Debts in his Majesty's Plantations and Colonies in America. The full text of the Act can also be read at, 'The Statutes Project', https://statutes.org.uk/site/the-statutes/eighteenth-century/1732-5-george-2-c-7-recovery-of-american-debts/ <accessed 15 July 2021>.
[58] See, C. Priest, 'Creating an American Property Law: Alienability and its Limits in American History', *Harvard Law Review*, 120/2 (2006), pp. 385-459.
[59] HL/PO/PU/1/1731/5G2n10, f. 219.
[60] For a study of the constitutional dimension of the British Empire in the eighteenth-century, see J.P. Greene, *The Constitutional Origins of the American Revolution* (Cambridge, 2010).
[61] A. Hamilton, 'Practical Proceedings in the Supreme Court of the State of New York' (1782), in *The Law Practice of Alexander Hamilton*, ed. J. Goebel (1964), vol. 1., p. 97.
[62] Leah, 'The Politics of Imperial Trade', p. 55.

level. Its assertion that slave property could exist anywhere in the empire sent a message of imperial uniformity on a key legal issue.

Future developments in the legal history of slavery

In 1749, now elevated to the woolsack as Lord Chancellor, Lord Hardwicke directly defended the Yorke-Talbot Opinion in *Pearne v Lisle*.[63] The case concerned a dispute between residents from England and Antigua over the renting of 14 slaves. The defendant, who had withheld a rental fee and refused to return the slaves, threatened to flee to Antigua.[64] In order to grant the plaintiff a remedy in trover, Lord Hardwicke sought to demonstrate that Antigua law was subject to English law. He therefore used the Opinion as a justification for the view that English law permitted slavery as a slave was '*as much property as…any other thing*'.[65] At the heart of his defence was a critique of Holt's separation of colonial law and English law in relation to slavery.[66] Lord Hardwicke argued that Holt had been wrong about arrival in England freeing a slave because, if true, then all slaves would be free as all colonies were subject to English law. This argument was legally unsound, and one that has been characterised as a 'remarkable conclusion in view of [Lord] Hardwicke's intimate familiarity with the conquest/settlement doctrine stemming from his prior Crown legal service'.[67]

The imperial dimension of *Pearne* made it an important authority for Lord Mansfield to later grapple with. The reaffirmation of the view that slavery could exist in England – as it did in the colonies – also gave the Yorke-Talbot Opinion added precedential force. Nevertheless, the law underwent a further seesaw ride. In *Shanley v Harvey* (1762), Lord Northington, then Lord Chancellor, held that any slave who came to England was emancipated because '*as soon as a man sets foot on English ground he is free*'.[68] He also declared that a slave was protected by *habeas corpus* and possessed a right to sue for '*ill usage*' by his owner. Counsel did bring *Shanley* to Lord Mansfield's attention, though it was given little weight as Lord Northington's comments were *obiter* and therefore not binding.

The final case prior to *Somerset*, *R v Stapylton* (1771), involved the attempt to forcibly deport Thomas Lewis, who Staplyton claimed was his slave.[69] Stapylton defended his actions at trial on the grounds that Lewis was his property, thus no criminal offence could have been committed. Lord Mansfield directed the jury that if they found Stapylton had a property interest then they should bring a special verdict (i.e. a factual conclusion rather than a declaration of guilt). The jury found him guilty, so he had been unable to discharge the evidential burden of proof. At trial, Lord Mansfield mentioned how he had previously granted writs of *habeas corpus* to deliver slaves to their masters based on property interests. It appears, therefore, that Lord Mansfield had some notion of slave property existing under English law. He neither presumed Lewis's freedom nor averred that a slave became free in England.

It was this concept of emancipation in England that has come to be associated with Lord Mansfield *Somerset v Stewart* (1772), even though Lord Mansfield made no ruling to that effect.[70] The case involved a slave, James Somerset, who had escaped while his owner, Charles Stewart, was on a two-year sojourn from Virginia with him in England. After

[63] *Pearne v Lisle* (1749) Amb. 75, 27 E.R. 47.
[64] Rabin, 'Empire on trial', pp. 203-217.
[65] Amb. 75, 27 E.R. 47.
[66] Van Cleve, 'Somerset's Case', p. 620.
[67] Ibid.
[68] *Shanley v Harvey* (1762) 2 Eden 126, 28 E.R. 844.
[69] Van Cleve, 'Somerset's Case', p. 622.
[70] *Somerset v Stewart* (1772) 98 E.R. 499.

recapturing Somerset, Stewart wanted to send him to Jamaica. Somerset's three godparents from his baptism, Elizabeth Cade, John Marlow, and Thomas Walkin, therefore applied for a writ of habeas corpus demanding that Somerset was brought before a judge.

Arguably the most famous slavery case in common law history (along with *Dred Scott v Sanford* (1857) in the United States), *Somerset* also generated enormous interest at the time. As the *Daily Advertiser* posted in January 1772, the cause of the trial was *'to know how far a Black Servant was the Property of the Purchaser by the Laws of England*.'[71] Somerset even counted the support of Granville Sharp, one the first campaigners to abolish the slave trade. In essence, the lawyers representing Somerset, Sergeant Davy and James Mansfield (unrelated to the judge), argued that the laws of Virginia should have no bearing on the law of England. They based these submissions on the precedents of Sir John Holt, in particular *Chamberlain*. Virginia law would have permitted Stewart to beat Somerset to death or cut off part of his foot for trying to escape. Since such acts amounted to crimes under English law, then Somerset's slave status had to be set aside in England. Further submissions were rooted in natural rights and notions of English liberty by citing *Cartwright's Case*. Davy submitted to the court that '*Any slave being once in England, the very air made him a free man*'[72] William Blackstone made a similar assertion in his famous *Commentaries on the Laws of England*, though he later altered that section.[73]

In reaching his decision, Lord Mansfield had to depart from *Pearne* and the Yorke-Talbot Opinion. He did so, in part, through a characterisation of the Opinion as irregular – not just in the form it took (possibly pronounced after a dinner), but also in how it set out the law. This diminished the weight of the Opinion so he could more easily depart from it. Chiefly though, this allowed him to decide the case under English law rather than Virginia law. In doing so, he could carefully delimit the parameters of his ruling as he knew the trial was being played out in front of a transatlantic audience. Conscious of the potential ramifications to imperial trade, he avoided any inflammatory comments about the status of slavery at large. By ruling that only positive law (like local colonial statutes or the Colonial Debts Act rather than a legal opinion) could support an institution so 'odious', Lord Mansfield entrenched slavery as an overseas institution as no such law existed in England.[74] Consequently, he could depart from the Yorke-Talbot Opinion and rule on the narrow point that Somerset could not be forcibly removed from England. In *R v Inhabitants of Thames Ditton* (1785), Lord Mansfield made it clear that '*the determinations [in Somerset] go no further than that the master cannot be compel him to go out of the kingdom*'.[75]

The perception that *Somerset* freed slaves in England was legally misplaced, but it served as prime fuel for the growing abolitionist movement in the late eighteenth-century. It would take several decades to abolish slavery altogether though. Mercantile interests continually proved too influential in Parliament, and the common law offered little guidance.[76] There were some minor legislative victories for the anti-slavery movement such as the Slave Trade Act 1788, which sought to improve the conditions for slaves on ships following the

[71] *Daily Advertiser*, Issue 12822, Jan. 27 (London, 1772).
[72] Van Cleve, 'Somerset's Case', 627.
[73] W. Blackstone, *Commentaries on the Laws of England*, vol. 1 (Oxford, 1765), p. 123.
[74] Daniel Hulsebosch, 'Nothing but Liberty', *Law and History Review*, 24/1 (2006), p. 656.
[75] *R v Inhabitants of Thames Ditton* (1785) 99 E.R. 891.
[76] There were two interesting cases. In *R v Hodge* (1811), an unreported case, Arthur William Hodge was the first colonist to stand trial for the murder of a slave. The trial took place on the British Virgin Islands and, though the jury recommended mercy, he was hanged in May 1811. In *Forbes v Cochrane* (1824), the Chief Justice of the Common Pleas unequivocally stated that a statute was required to make slavery lawful in England. A report of that case can be found at 107 E.R. 450 at 456.

Zong Massacre.[77] The Colonial Debts Act, too, was amended by new legislation.[78] In 1797, Parliament removed the most egregious feature of the original Act as slaves could no longer be used as chattel property in the settling of debts.[79] It was not until legislation in 1807 and 1833, however, that the slave trade and slavery were completely outlawed throughout the empire. Even then, the abolition of slavery came at a cost of £20 million in 'compensation' to slave owners, equivalent to 40 percent of the Treasury's annual income.[80]

An extraordinary document

As this article has hopefully demonstrated, slavery witnessed many changes under English law before its abolition. If there is a common theme to these changes, it is that the law was used to satisfy contemporary needs, almost always commercial. In the absence of legislation, the courts were left to adjudicate on questions of English law that had profound consequences for the millions of black Africans throughout the British Empire. The various intersections between dicta, decisions, and opinions on the subject of transatlantic slavery often contradicted one another. Broadly speaking though, there were two judicial positions: one that colonial slavery fit comfortably with English law; the other that slavery was completely incompatible with it. Returning to Fiddes' concept of the rhythmical seesaw of legal opinion, Sir Philip Yorke (Lord Hardwicke) and Charles Talbot firmly sat themselves on the pro-slavery side.

A close inspection of their 80-word Opinion and its relationship with preceding authorities illustrates just how extraordinary it was. The authors chose to ignore recent precedential authority that contradicted their conclusions and failed to root their Opinion in any discernible legal principle. Such a simplistic legal assessment might be thought nugatory, but this was not the case. The Opinion's significance rested not only in its widespread distribution in the colonies, but also in how it opened the door for English law to accommodate slavery. The central notion of slaves as universal property throughout the empire, reinforced again by Lord Hardwicke in *Pearne*, served as a manifest endorsement of transatlantic slavery in all its brutal forms.

Nicholas G. Leah
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[77] The Zong Massacre involved an insurance claim for the loss of over 130 slaves who were killed by being thrown overboard. Although the jury initially found for the slave traders, Lord Mansfield ruled against them after new evidence suggested the captain and crew were at fault for what happened.

[78] 37 Geo. III, c. 119, 'An Act to repeal so much of an Act, made in the fifth year of the Reign of His late Majesty King George the Second, intituled, An Act for the more easy Recovery of Debts in His Majestys Plantations and Colonies in America, as make Negroes Chattels for the Payment of Debts (1797)', 19 July. 1797. A copy of the legislation is found in *The Parliamentary History of England: from the earliest period to the year 1803* (London, 1816), vol. 33, pp. 831-4.

[79] Views were slowly changing in Parliament. What was once viewed as a favourable measure for the British creditor came to be seen by many parliamentarians as unacceptable for the colonial slave. It was not abolitionists that pushed through the bill though. Slave owners like Bryan Edwards, MP for Grampound, wanted to protect their property interests by allowing slaves to be attached to land rather than easily seized. The amendment would have unquestionably received support from the anti-slavery lobby though, even if Edwards' commercial intention was concealed.

[80] For more research into slavery and its abolition, the Centre for the Study of the Legacies of British Slavery at University College London has put together an excellent database at 'The Legacy of British Slave Ownership', https://www.ucl.ac.uk/lbs/ <accessed on 15 July 2021>.