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Withernam: A Legal Practical Joke of Sir Thomas More

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WITHERNAM: A LEGAL PRACTICAL JOKE OF SIR THOMAS MORE

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THOMAS STAPLETON[1] TELLS a joke in illustration of More's character. The joke itself has been wrongly reproduced in some later works. On the whole its meaning has been misunderstood, and it is time that the point of it should be explained, so that More's intention can be known. There was not a little of the rascal in More's make-up, and the fun which he had with his victim on this occasion deserves to be more widely enjoyed.

The Joke

Stapleton says:[2]

> Quum Bruxellis legatione apud Carolum V Imperatorem fungeretur, accidit ut in tam celebri Aula nescio quis gloriosulus affixa ad valuas charta in omni cuiuscunque iuris quaestione, adeoque in humanae literaturae scientia, omnes ad certamen prouocaret: paratum se dicens cuicunque quaestioni respondere ac de quacunque disputare. Thomas Morus visa hominis petulanti vanitate, hanc ex iure Britannico quaestionem proposuit.

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[1] Lived 1535-1598. See DICT. NAT. BIOG.

[2] TRES THOMAE 265 (Duaci (Douay) 1588). As translated the episode reads as follows: "When he was at Brussels on an embassy to the Emperor Charles V it chanced that some braggart in that illustrious Court affixed to the wall a paper in which he issued a challenge to all and sundry. He professed himself ready to answer any questions or dispute upon any point in law or literature. Seeing the man's vanity, Thomas More proposed the following question in English Law, 'Whether cattle taken in withernam be irrepleviable?' adding that one of the suite of the English ambassadors desired to dispute upon that subject. The braggart could of course make no answer to a question of which he did not even understand the terms, and was forced to acknowledge his vanity in thus issuing a general challenge, becoming the laughing-stock of the whole Imperial Court." See STAPLETON, LIFE AND ILLUSTRIOUS MARTYRDOM OF SIR THOMAS MORE 138-39 (Hallett transl. 1928).

Utrum animalia capta in Withernamia sint irreplegibilia:[3] addens esse in familia Legati Anglici qui de ea disputaret. Ad hanc quaestionem quum nihil ille gloriosulus respondere posset, ac ne terminos quidem intelligeret; et suam ipse vanitatem ita generaliter omnes prouocantem agnoscere coactus est, et per totam celeberrimam illam Aulam non sine risu acceptus fuit.

The story is perfectly clear. Thomas More (who, we know, was in the habit of disputing in foreign universities whenever he happened to be on the continent on missions) offered to dispute with one of the jurists of the Imperial court on a question of English law. The jurist declined to accept the question. It is plain that his challenge to all comers who might choose any topic in law or letters they fancied was ill-mannered at a time when foreign as well as native savants were in the vicinity of the court; and it was especially ill-mannered when a man of More's tremendous reputation was at hand. But it was not in itself an unusual proceeding, since no one could proceed to a doctorate without exposing himself to public disputation in the different branches of learning that were relevant to his claim for promotion, and this sort of public challenge fitted into the contemporary intellectual scene sufficiently well. That he should offer to dispute upon any topic in law *and letters* may surprise those who are unacquainted with the state of legal studies at that time (1521). The movement then was in favour of ousting the leading jurists, the associates and academic descendants of Bartolus, and replacing them with humanists learned in the cultural environment of the authors of the various component fragments of Justinian's *Corpus Juris*. At this very period, Budé, Alciati, and other celebrated innovators in legal studies were turning legal interpretation upside down. They were insisting upon interpreting the original sources of Roman law in terms of recently-recovered Latin and Greek texts and the still more recently garnered comparative and historical learning. The pegs upon which the Bartolists hung their rules were ruthlessly chopped off. A comparison of editions of the *Corpus Juris* published before the Alciatists had established their position (c. 1550) and afterwards gives us an immediate impression of the effect of their influence. To be a leading jurist in the Emperor's court in 1521 one must be a humanist in the true sense of the word as well as a jurist, and one must be able to cite precedents from Plato, Plutarch, Polybius, or Cicero, and not rest content with what was done by the Florentines or the Venetians in the 14th century.

We notice that the jurist refused More's question, but we have only Stapleton's word for his reason, and the results of his refusal. How did Stapleton come to know this story, which is not known from any other source? Stapleton, whose brilliance and competence are well known amongst historians of Catholic apologetics in the 16th century, was a scrupulous worker, and can be relied upon to copy out only what he had on good authority. Biographers of More have not hesitated to follow him in relating the tale,[4] though it

[3] For the correct form of the question see text accompanying and following note 8 *infra*.

[4] LYFE OF SYR THOMAS MORE 112 (Hitchcock & Hallett ed., London, 1950). Here we see that the word *averia* is correctly substituted, but in his enlargement of the challenge so that it embraces "civil, common, municiple, or any point of other learning" he is doing the challenger a little less than justice. M.T.M., CRESACRE MORE or LIFE AND DEATH OF SIR THOMAS MOORE 83 (c. 1631)

must be admitted that it has not recommended itself (one wonders why) to all recent biographers of note.[5] Stapleton was in close touch with descendants and associates of More, and if the tale had been known to them he could have obtained it from them. I suspect that this was his primary source. He could not himself have verified unaided the question, which is a technical question of English law; and we know that some of More's connexions in exile were acquainted with law, and were long in touch with William Roper, who was a lawyer.

He could have obtained it from a written record, such as some notes of William Rastell's, which have survived only in fragments. But from whatever source he obtained it, confirmation of the event and its general upshot could easily have been obtained from the place where it is supposed to have occurred. Stapleton was in Louvain shortly after the accession of Queen Elizabeth[6] and spent a great part of his life in what is now Belgium. The law teachers in Belgian universities would be likely to remember the discomfiture of the jurist, and for a very good reason. There is no proof that he was a Belgian, or even a German.[7] He was almost certainly one of the senior jurists attached to the Imperial court, and might have come from any country in Europe. He was obviously drawing attention to himself, and this implies rivalries, and his ill luck must have caused delight amongst the resident jurists who would have been keen to know what sort of men normally advised their Emperor. Admittedly Stapleton was on the spot forty years after the event, but the occasion will have been remembered. It was a moral story, as we shall see, for the edification of all doctorands.

Transmission of the Joke

Naturally, since there is no independent source we are not concerned with distortions or embellishments of the tale in later writers. But a curious alteration appears in the pages of the famous historian and expositor of English law, Blackstone, which has resulted in false reports of the tale in later, highly respectable writers.[8] Blackstone, whilst discussing the law relating to *withernam,* says:

> The substance of this rule composed the terms of that famous question, with which Sir Thomas More (when a student on his travels) is said to have puzzled a pragmatical professor in the university of Bruges in Flanders; who gave a universal challenge to dispute with any person in any science: *in omni scibili, et de quolibet ente.* Upon which Mr. More sent him this question *"utrum averia carucae, capta in vetito namio, sint irreplegibilia;"* whether beasts of the plough, taken in *withernam,* are incapable of being replevied.[9]

or 70 (Hunter ed., London, 1828) also has *averia.* HODDESDON, GENT., THO. MORI VITA ET EXITUS or THE HISTORY OF SIR THOMAS MORE 26 (London 1652), retains or inserts the *averia;* but when he follows CRESACRE MORE, *op. cit. supra,* in saying "what Art soever" he too exaggerates the terms of the challenge. BRIDGETT, LIFE AND WRITINGS OF SIR THOMAS MORE 190-91 (London 1891), copies Stapleton and later derivative versions. He stages the event (following *Cresacre More*) at Bruges, where we know More had been sent, but Stapleton's *Bruxellis* does not mean Bruges.

[5] The story does not appear in Chambers' biography (1935), but appears with a minimum of comment in REYNOLDS, SAINT THOMAS MORE 176 (1953).

[6] His movements are detailed in the article in the DICT. NAT. BIOG.

[7] 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 284 (4th ed., London, 1935): "omniscient German."

[8] See note 7 *supra.* Holdsworth merely copied Blackstone with the unnecessary embellishment indicated above.

[9] 3 BLACKSTONE, COMMENTARIES ON THE LAWS

He gives a reference to Hoddesdon's *Life of More,*[10] but when we turn to it we find that the errors with which the tale in this form bulges cannot be attributed to Hoddesdon, who has been reasonably faithful to his authority. In fact what has happened is this: an English lawyer, considering the question as reported by Stapleton or writers depending upon him, thought that that the question was not sufficiently difficult, it being one which could be answered without great difficulty by anyone who knew English law. But he did know of a complication which would make the question almost insoluble. That such a man had looked at the question is clear from the alteration from *animalia* to *averia. Averia* is undoubtedly correct, and Stapleton, who after all had little idea what had actually happened, was in no position to correct the tradition as he received it. *Averia* are beasts, such as cows, pigs, and the like; *animalia* is slightly wider, but is not the technical expression. *Averia carucae,* "beasts of the plough" were specially protected in the context of attachment (to be explained below) by an English statute,[11] which the foreign jurist cannot have known of; and, as a result, the question, if it had been posed in that form, would have been extremely hard for an English, let alone a foreign jurist.

This corruption, well intentioned though it was, has made it difficult to understand More's motive, but fortunately we can return to the original as Stapleton left it, and that is good enough. A slight modification gives us the question, *an averia capta in withernamio sint irreplegibilia?* "Can beasts taken in *withernam* be replevied?" In non-technical language, can cattle that have been seized by due process of law in reprisal for the owner-defendant's having driven over the border the cattle which he had seized in distraint for a debt he claimed was owed to him by the plaintiff, be recovered by the process of replevin while the cattle originally taken by him have still not been delivered to the plaintiff and the *withernam* discharged? What was the point of this question? To show that a jurist who did not understand English law was a fool to issue such a challenge (as Stapleton thought)? I think not. The position was not as simple as that.

Withernam and Law on the Continent

The nature of the process of *withernam* has been explained many times,[12] and it features frequently in the early law reports. It was a primitive process essential, when

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OF ENGLAND 149 n. v (6th ed. 1774). Blackstone in fact used CRESACRE MORE, *op. cit. supra* note 4.

[10] HODDESDON, *op. cit. supra* note 4.

[11] Stat. 1266, 51 H. 3, st. 4 in Ruffhead's edition, printed among the Statutes of Uncertain Date in the Statutes of the Realm (JOWITT, DICTIONARY OF ENGLISH LAW (London 1959), where replevin and *withernam* are dealt with at pp. 187, 308-09, 1527).

[12] 3 BLACKSTONE, *op. cit. supra* note 9, at 147f; JOWITT, *op. cit. supra* note 11. *Withernam* is mentioned in passing in PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 448 (5th ed., London, 1956), but replevin is discussed at length at pp. 367-69. Exactly contemporary with More was Justice Fitzherbert, whose *Nova Natura Brevium* gives ample material on *withernam* (1730 ed., pp. 155, 157-58, 169-72), but although it is noticed that *withernam* is not available if the defendant appears, the answer to More's question is not given. Other relevant references are RASTELL, COLLECCION OF ENTREES fos. 623v-27r (London 1566); BROOKE, GRAUNDE ABRIDGEMENT fos. 337r-38r (London 1573); FITZHERBERT, GRAUNDE ABRIDGEMENT fos. 364v-65r (London 1577); DODERIDGE, ENGLISH LAWYER 74 (London 1631) ("so the word Wythernam, yet much in use, drawne from two old and outworne Saxon words wither, *alterum,* and nam, *pignus; quasi altera pignoris oblatio.*") COKE, SECOND PART OF THE INSTITUTES 140-41 (London 1642).

a replevin was frustrated, to mitigate damages due to distraint upon cattle, as indeed where men or women had been seized to enforce some claim.[13] The essential feature of *withernam* was the appeal to lawful authority to take cattle in order to force the defendant to give the plaintiff justice. The king's court gave a writ of *withernam* when the defendant had driven the cattle over the county boundary in order to escape a replevin at the plea of the plaintiff in the court of the hundred or the sheriff's county court. The writ was directed to the sheriff of the county where the plaintiff's cattle had been distrained upon, and where the defendant had cattle of his own. This jurisdiction arose out of the king's duty to secure justice to his subjects, though their adversaries might reside in various counties.

There seems to be some obscurity as to the origins of the process, but, whatever the correctness of the supposed Latin equivalents, and whether or not Coke was right in distinguishing *vetitum namium* from *withernam* (it seems he was, but Blackstone ignored him),[14] the process was well known in Scandinavia and Germany and the Low Countries. *Wither* and *nam,* meaning "retributive" (or "reciprocal") and "taking" would be terms any Dutch lawyer, for example, would understand without translation.[15] *Nam* for taking in distress or distraint was known from Normandy to Norway, and the word *replegiare,* to replevy, was a law French expression which was part of the heritage of England and the northern continent alike. If the jurist was, as is possible, a Frenchman attached to the court of the Holy Roman Empire there is every likelihood that he and his assistants would be quite familiar with what was meant by *withernam* and *irreplegibile.* But even if they were not, why should they not have accepted the question, and commenced by asking the questioner to formulate his *quaestionem de iure communi sive iure naturali* in terms significant to the doctors of civil law who would be listening, and would require the customary terms to be translated? It is quite certain that civilians were used to dealing with customary laws, and to hearing common institutions named with peculiar local names.[16] But there was

[13] 3 BLACKSTONE, *op. cit. supra* note 9, at 129.

[14] COKE, *op. cit. supra* note 12; 3 BLACKSTONE, *op. cit supra* note 9, at 149. 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 524, 577 seems to follow Coke, and links the passages in Bracton and Britton with an action called *vee de naam* for damages for retaining beasts after gage and pledge have been tendered. They shrewdly avoid committing themselves as to whether there was any historical connexion with *withernam.* One doubts it; so did Lambard.

[15] On the derivation see COKE, *op. cit. supra* note 12; GROTIUS, cited at note 26 *infra;* SMITH, cited at note 18 *infra;* STIERNHOOK, DE JURE SVENONUM ET GOTHORUM VETUSTO 126f (Holmiae (Stockholm) 1672) *(nam: unde witernamium est, quo hodie Saxones et Angli repressalias* (sic) *notant);* 1 HICKES, LINGUARUM VETT, SEPTENTRIONALIUM THESAURUS 164 n. (Oxford 1705). The last cites the ancient custom of Normandy, title *de delivrance de namps* (obviously akin to replevin, as he suggests, though he was no lawyer).

[16] Bartolus says *pignorationes* are known by various names *(e.g., clarigatio, presa)* in different places in his *Tractatus Represaliarum* (composed in 1354) printed in, *e.g.,* SUPER AUTHENTICIIS ET INSTITUTIONIBUS, BARTOLI A SAXOFERRATO COMMENTARIA 327-40 (Basileae (Basel) 1588), our leading treatise on the subject. Other civilians earlier than More are cited in the margin of the 1588 Basel edition of Bartolus on the first part of the *Codex,* p. 84 (rubric: *De Judaeis et Caelicolis, Nullus tanquam,* Cod. I, ix, 14). The Romano-canonical jurists frequently allude to the habits of people of various localities, sometimes humorously. Angelus de Gambilionibus Aretinus, commenting upon the *Institutes of Justinian,* says that by custom a contract may be binding only when it is drunk on, for the *idiotae* of Tuscany say the bargain is "done," when *super hoc biberunt.*

a good reason why the question should not have been taken up, for it was understood only too well: we shall come to this shortly.

No doubt since Stapleton's day it has been assumed that More's question was a foolish question to put to a continental lawyer, about as foolish as the lawyer's own challenge. One imagines a case where some monks are about to hold a mediaeval disputation and invite questions on Holy Theology. A theologian from Cairo asks with the aid of how many angels Muhammad ascended into heaven; and another from Calcutta asks whether the god Vishnu should be shown with six or eight arms. But there is no similarity here with such preposterous questions. The civilians assumed that English law, for all its peculiarities (many of which horrified them),[17] was as capable of being comprehended in terms proper to the Roman law, to them the universal law, as was Scots law. And the English civilians held no different opinion. Sir Thomas Smith describing English institutions about half a century later has not the least hesitation in assuming that they are comprehensible against a Roman legal background.[18] An even more striking case is that of Sir Thomas Ridley, another English civilian, whose description of the civil law is designed to fit English needs, with a most curious effect from the point of view of a common lawyer.[19] When Henry Swinburn wrote on the law of wills he wrote as one expounding the civil law as modified by English custom and statute, and to him the peculiarities of English law were in many places to be attributed to England's following the *ius naturale* rather than the constitutions of the Emperors.[20] How much the law of the Chancery was affected by the learning of the Bartolists in 1521 is not known, but that courts of requests and similar equity courts were staffed by men learned in the civil and ecclesiastical law like Christopher St. German is already well known. That the ecclesiastical and admiralty courts were served by civilians is notorious, and prior to 1535 civil and canon law were still very much part of the law of the land.

One may object firstly that continental civilians concerned themselves with Roman civil and ecclesiastical law, and secondly that a process like *withernam,* known to common lawyers, was well outside their concern. Neither of these points is true. Firstly, it was a point of honour amongst French and German civilians of the period to work up their discussions of customary laws, legislation or imperial *placita* into a picture totally comprehensible in terms of the universal legal system. The famous Andreas Tiraquellus (André Tiraqueau) gained much of his reputation by writing upon the customary law of a French province in such a fashion as to weave the custom and the civil law into one garment.[21]

[17] See for example the *Relatio de Regno Brittanico* attributed to a Venetian ambassador and reprinted in J. de Laet of Antwerp's edition of Smith's *De Republica Anglorum,* Lugduni Batavorum (Leyden), 1641, at pp. 418f.

[18] SMITH, DE REPUBLICA ANGLORUM (Alston ed., Cambridge, 1906). The first edition appeared in 1583, but the work was written in 1565. Smith was a younger contemporary of More, a D.C.L. of Padua, Vice-Chancellor of Cambridge, and Secretary of State (see DICT. NAT. BIOG.) His comments on the word *withernam* appear at page 135 of the 1906 edition (see note 25 *infra*).

[19] RIDLEY, A VIEW OF THE CIVILE AND ECCLESIASTICALL LAW (2d ed. (Gregory) 1634).

[20] SWINBURN, A BRIEFE TREATISE OF TESTAMENTS AND LAST WILLES fo. 19 (London 1590-91) and in many other places.

[21] Tiraqueau and More were contemporaries, and Tiraqueau knew More's work as he cites from it. His magnum opus in customary law was the cele-

Further, the institution called *withernam* was an illustration of a wider category of process, with which both civilians and common lawyers were perfectly familiar, and which had its roots in Roman law. If the defendant did not agree to enter a defence to an action, or left the town or jurisdiction (whether it be a county or a country), and in some places even if it was suspected that he might leave or attempt to delay justice, property of the defendant could be attached provided it was within the jurisdiction and subject to certain other very general requirements. In the city of London, for example, which More knew extremely well, and whose peculiar customs were better known to him, we may be sure, than the intricacies of the Roman law, there existed the special process known as "foreign attachment," whereby a plaintiff could distrain upon any goods or monies owed to his defendant unless the latter gave security to appear and defend the action in the city court.[22] It was said that this and some other customs known in certain English boroughs and cities was a legacy from the Roman period, but the truth of this has not been established. The civil law was familiar with an institution known as *pignoratio,* which is the taking of pledges (*i.e.,* distraint) out of the property of persons *other* than the defendant in cases where the defendant has left the jurisdiction or has concealed his property, and in order to bring pressure to bear upon the court of the jurisdiction to which the defendant is amenable to give justice to the plaintiff.[23] This curious process is an extension of the process of attachment against the goods, etc., of the defendant within the jurisdiction, and it is available only upon suit to the ruler, who can grant a *pignoratio* to the plaintiff against goods, etc., belonging to fellow-citizens of the defendant. Only in the last resort, and in order to achieve justice indirectly when direct methods are impracticable, were these *pignorationes* used: but it is clear that they were frequently adopted in the Middle Ages. The jurists tell us that the common or vulgar name for *pignoratio* is *represalia, i.e.,* "reprisal(s)".[24] The whole subject is well known to international law.

Now *withernam,* though differing from *represaliae* in important and obvious respects (for it was in use *inside* a country, and the goods distrained upon were those of the defendant himself), was identified by contempories with *represaliae.*[25] Hugo

brated *De Legibus Connubialibus.* For his work on customary and other laws see the extraordinarily thorough BREJON, ANDRE TIRAQUEAU (Paris 1937).

[22] BOHUN, PRIVILEGIA LONDINI (London 1702) is very rich on the special commercial customs of London. PULLING, LAWS, CUSTOMS, USAGES AND REGULATIONS OF THE CITY AND PORT OF LONDON (2d ed., London, 1854) is also useful, containing as it does references to old authorities.

[23] In the civil law this remedy was subject to the important and difficult constitution of Justinian, the fifth/seventh Novel of the fifth collection or "collation" Nov. 52, *ut non fiant pignorationes.* See BARTOLUS, *op. cit. supra* note 16, at 63 (where he anticipates succinctly material in his *Tractatus*).

[24] BARTOLUS, *op. cit. supra* note 16. GAILL, PRACTICARUM OBSERVATIONUM . . . LIBRI DUO (Coloniae Agrippinae (Cologne) 1601), DE PIGNORATIONIBUS (separately paginated), a work of about 1578. See particularly pp. 182, 183, 186. RIDLEY, *op. cit. supra* note 19, at 95.

[25] SMITH, *op. cit. supra* note 18, at 135, says: "The same Littleton was as much deceived in *withernam* and diverse other olde wordes . . . it is in plain Dutche and in our olde Saxon language, *wyther nempt, alterum accipere, iterum rapere,* a worde that betokeneth that which in barbarous Latine is called *represalia,* when one taking of me a distresse, which in Latine is called *pignus,* or any other thing, and carrying it away out of the jurisdiction wherein I dwell, I take by order of him that hath jurisdiction an other of him againe or of

Grotius says:[26]

> Another form of the enforcement of right by violence is "seizure of goods" or "the taking of pledges between different peoples." This is called by the more modern jurists the right of reprisals; by the Saxons and Angles "withernam," and by the French, among whom such seizure is ordinarily authorized by the king, "letters of marque." This enforcement of right occurs, as the jurists say, where a right is denied.

An even closer identification was open to them with what was known in Germany as *Gegenpfandung (repignorationes, i.e. mutuae et reciprocae pignorationes),* a *de facto* customary institution viewed by the civilians with disfavour on principle.[27] From this it is plain that the institution known as *withernam* was no stranger to the jurists of the region in which More was, and that the relevance and point of his question will have struck them at once.

The Point of More's Question

Looking at the question as a common lawyer, the point is limited. The writ of replevin is available where there has been a wrongful taking, and in order that possession may be restored so that the plaintiff shall suffer no loss until the right of possession is adjudged.[28] A *capias in withernam* is a pending process, and does not affect the right to possession, still less property.[29] It is available by way of reprisal in order to prevent the defendant from delaying the replevin, and thus bringing upon the plaintiff additional losses merely by taking advantage of the constitutional division of the country into counties, etc. Nothing that has been taken in *withernam* has been wrongfully taken:[30] It follows from the *withernam* that the law has decided to bring pressure to bear upon a man who is refusing the offer of security from the plaintiff, and is wrongfully refusing to submit his case to justice. In the long run the averments of the defendant may leave the plaintiff with no remedy, if the action was misconceived from the commencement. But refusal to restore the original cattle in response to the replevin was a wrongful act, and *withernam* was a lawful rejoinder. He in his turn can have a *withernam* against the cattle of the plaintiff if the latter eloins (sends out of the jurisdiction) the cattle taken in *withernam* after he, the defendant, has won the first round of the battle.

Thus there is no question about it. Britton had long ago declared: to replevy the cattle taken in *withernam* is beyond the defendant's power.[31] He must restore the

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some other of that jurisdiction, and doe bring it into the jurisdiction wherein I dwell, that by equall wrong I may come to have equall right. The manner of *represalia,* and that we call *withernam,* is not altogether one: but the nature of them both is as I have described, and the proper signification of the words does not much differ." The Flemish translator of Smith, who elsewhere did not scorn small additions and amendments, reproduces this passage with no appreciable amendment, and when he says, for "Dutche," *Germanice* we take it that he knows the force of what he is saying.

[26] II GROTIUS, DE JURE BELLI ET PACIS iii, 626 (Scott transl., Oxford, 1925).

[27] GAILL, *op. cit. supra* note 24, at 198-99: *pignatorus . . . via iuris, non facti, id est repignorationis, ius suum et possessionem defendere tuerique debet.*

[28] BLACKSTONE, *op. cit. supra* note 9.

[29] See the careful discussion in I LORD RAYMOND'S REPORTS 613-14 (2d. ed. (Wilson), London, 1765), the case of *Moor v. Watts.*

[30] COKE, *op. cit. supra* note 12, emphasizes this.

[31] I BRITTON 138 (Nichols transl., Oxford, 1865) says, "And if the beasts are shut up within a house or within pound, or if they are driven out of the county, or if the bailiff meet with other disturbance, let him immediately cause beasts of the deforcer to be taken *to the extent of double the value* by way of *withernam,* and keep that distress without permitting it to be replevied, until the

original cattle upon which he distrained, whereupon the *withernam* comes to an end, for after he has given security to defend the plaintiff's action the sheriff will be ordered to deliver the defendant's cattle taken in *withernam*.[32] It might be argued that there is nothing except a very technical point of English law to prevent a replevin of such cattle. This is incorrect. One could discover this by attention to first principles. An attachment of a thing taken in reprisal for a denial of justice cannot be released upon an attempt to dissolve the attachment independently of the action in which that attachment was given by the court. He cannot have the attachment lifted, for the court will not hear him until he has satisfied the original plaintiff. Replevin is based upon a wrongful taking, and by definition *withernam* is not wrongful.

But, says More, is that really so? How does the civilian view such a situation? Firstly, is not *withernam* itself a process of doubtful validity? If it exists by statute, well and good. But in England it does not. If the *withernam* is awarded in the king's court, no doubt it is good and repels any attempt at replevin, for if pledges are to be given by the defendant he must give them in the original action. But what if the *withernam* was obtained in the sheriff's court by plea? This was later to become unusual, but was in More's day still common.[33] How had the sheriff, who had no jurisdiction over a man resident in another county, and who had taken the cattle into another county, a right to seize cattle belonging to that man in his own county? Was not *withernam,* like *represaliae* themselves, contrary to natural and divine law? If this was so, what was the status of this customary and widespread practice?

The jurist who affixed the challenge to the doors in Brussels will have been prepared to argue, as Bartolus himself had done,[34] that *represaliae* were consistent with natural, divine, and imperial laws, provided that certain conditions were complied with.[35] It will be remembered that *withernam* was characteristically a process granted by the sheriff within his county, and it could be of men or beasts. At a time when it was not known whether the defendant had a right in the beasts, nor whether the plaintiff had been wrong to withhold the rent or whatever payment had been allegedly due and had led to the distraint, attachment was ordered, and distraint placed, upon cattle, which by definition did not come within the scope of any previous attachment on the part of the plaintiff, and which

distress eloined be brought back." (Emphasis added). This is assumed to be standard law by ENEVER, HISTORY OF THE LAW OF DISTRESS 106-07 (London 1931), but Britton was very antiquated (his period is c. 1270), and granted that More knew him in manuscript (he was not printed until 1534) his rule was evidently not judicially established until later. This actually emerged in *Moor v. Watts* (see note 29 *supra*) in the time of William III, but the seeds of the decision were sown much earlier and can be seen in Coke. It goes without saying that to take in *withernam* more than the value of the cattle distrained upon and eloined was quite incapable of justification according to the civil law.

[32] The procedure is explained simply in JOWITT, *op. cit. supra* note 11.

[33] The lawyers practicing in London would deal with the writs of *withernam* since proceedings could be removed, and where they arose by plea ought to be removed in most cases, to the king's courts by writs of *recordari* or *pone,* on which see BLACKSTONE, *op. cit. supra* note 9, at 149, and FITZHERBERT, *op. cit. supra* note 12, under those writs.

[34] BARTOLUS, *op. cit. supra* note 16, at 328. See also GAILL, *op. cit. supra* note 24, at 182.

[35] The conditions were *auctoritate superioris et iusta causa,* following St. Thomas Aquinas (see note 41 *infra* and accompanying text).

were not the subject of any legal claim. If this was repugnant to reason it was repugnant to natural law, and so (according to contemporary ideas) void. The civilians had had a great deal to say about *represaliae,* and the summary of previous authorities given by Sylvester,[36] More's Italian contemporary and, like More himself, a redoubtable opponent of Martin Luther, contains many embarrassing points which an English lawyer would like to hear discussed.

Surely, says Bartolus, *represaliae* are not valid in conscience, for divine law shows that a sinner must bear his own wrong, and *alius pro alio non potest capi.*[37] These *represaliae* were repugnant to natural reason. As a matter of fact the seventh title of the first book of the *Constitutions of Naples* (a famous collection of juridical material), *de cultu pacis et generali pace in regno seruanda,* distinctly forbids *presaliae* or *represaliae*[38] within the realm. Pope Gregory X notes that *represaliae* are forbidden by positive laws, by local constitutions (*e.g.,* of Naples), and repugnant to natural equity, and he excommunicates those that issue them against ecclesiastical persons.[39] Nevertheless a text of St. Augustine upon *iustum bellum* (which would seem to have nothing to do with the matter)[40] and St. Thomas Aquinas on War, *utrum bellare semper sit peccatum,*[41] are relied upon to justify the practice subject to the conditions mentioned. We note that *represaliae* are likened to acts of war. Sylvester says *repraesaliae sunt quoddam bellum.*[42] The well-known Italian jurist of an earlier age, Andreas ab Isernia,[43] has some caustic remarks to make about *represaliae,* for to him the isolated passage of Augustine seemed not so unharmed by the canon of Gregory as "modern" jurists thought. He warns the ruler against the practice of reprisals within the realm, which he obviously thinks (as did all others) were *eiusdem generis* with foreign reprisals.[44]

Sylvester makes it plain that reprisals of *persons* are totally forbidden (this would cut out the *capias in withernam* of a man) and adds *secundum ipsum nulla consuetudo valeret.*[45] This is the genuine civilian speaking, and here is the attitude that More would have liked to see displayed in debate. Sylvester adds that in all reprisals it is not the individual nor the foreign merchants that suffer, but the *ciuitas* or *dominus* in his subjects. If he denies justice he is made to suffer indirectly by his subjects' goods being seized. There is of course no room whatever for this doctrine *within* a realm. And to make matters worse Sylvester points out that only the prince can grant *represaliae,* except where

[36] Silvestro Mazzolini di Prierio, or Sylvester Prierias (c. 1456-1523). See *Prierias* in the ENCICLOPEDIA ITAL. His extraordinary digest of ecclesiastical and legal learning, *Summae Syvestrinae,* was first printed in 1514.

[37] BARTOLUS, *op. cit. supra* note 16, at 327, referring to Ecclesiasticus XVIII (apparently a slip or misprint).

[38] PLACITA PRINCIPUM SEU CONSTITUTIONES REGNI NEAPOLITANI CUM GLOSSIS fo. 9 (Lugduni (Lyons) 1534).

[39] SEXTUS LIBER DECRETALIUM V, 8, 1, the rubric *Etsi pignorationes.*

[40] LIBER QUAESTIONUM VI, 10; incorporated in the second part of the *Decretum* of Gratian: *Decret.* II, xxiii, 2,2, the rubric *Dominus noster.*

[41] II-II, q. 40, art. 1.

[42] SUMMAE SYLVESTRINAE QUAE SUMMA SUMMARUM MERITO NUNCUPATUR, PARS SECUNDA 302 (Antverpiae 1581).

[43] Andreae de Rampinis ab Isernia (c. 1220-1316). His *Peregrina Lectura* was published in More's lifetime, but the edition referred to in note 44 *infra* appeared more than a decade after his practical joke.

[44] PEREGRINA LECTURA DOMINI ANDRAEAE AB ISERNIA fo. 14*v* (Lyons 1533).

[45] See note 42 *supra.*

he is a tyrant or ruler *de facto* and not *de iure,* in which case local governors (*e.g.,* sheriffs?) can grant them!

To sum up, *withernam* could survive in the civilians' estimation only if it were granted by the king's court, and against, say, the Scots, or the French (in respect of actions commenced in Calais). And in any case it was, like true reprisals, founded upon a very shaky substratum of law, and might be held to be contrary to Divine, Natural, and Pontifical Law unless conditions were observed which might not be relevant. Thus if the *capias in withernam,* founded upon no certain claim in law, but only a hypothetical right to obtain delivery of the cattle distrained upon, were unlawful according to the fundamental laws of the realm of England, replevin of cattle taken in *withernam* would be allowable! The extremely forced reasoning of Hugo Grotius when he speaks of the justice of reprisals and their derivation from ancient usage and convenience in his *De Iure Praedae*[46] does not attract us. He admits that men suffer who are not culprits (and it follows that goods not liable for a proved debt – which must precede a valid attachment – ought to be free from such a process), yet he tries to make out that the universal practice of monarchs is founded on right as well as might. Some such debate could well have followed More's question.

More had several times been in the Low Countries on embassies.[47] He knew Flemish lawyers, and was an intimate friend of Gilles, a man at the heart of commercial life at Antwerp. A comparison between the commercial customs of the cities of London and Antwerp must surely have entered their conversation, even if it is not represented in their surviving correspondence. More will have known what power of authorising attachments of citizen and foreign merchants' goods was possessed by the courts of the commercial centres in the northern territories of the Emperor. He will also have known the basic principles of international law. He was an experienced diplomat, and though he claimed no intimate knowledge of canon law, he almost certainly had more than a smattering of legal knowledge on the Roman side.[48] In

[46] I GROTIUS, DE IURE PRAEDAE 46-7, 104-08 (Williams transl., Oxford, 1950).

[47] In the years 1515 and 1517. It is to be noted that he often represented the interests of the merchants of London in dealings with their counterparts, *e.g.,* Hanseatic League merchants. Nothing is known of the actual negotiations. See ROPER, LYFE OF SIR THOMAS MOORE, KNIGHTE 9 (Hitchcock ed., Oxford, 1935 (repr. 1958)).

[48] More's own statement, "For I neyther vnderstand [the] doctors of the law nor well can turn their bookes," CORRESPONDENCE OF SIR THOMAS MORE 536 (lines 116-18) (Rogers ed., Princeton, 1947), refers to the canonists, with particular references to ecclesiastical constitutional law. If More found it difficult to "turn their bookes" there is many a student of our own days that can take courage from his experience. In a recent article by R. J. Schoeck of Princeton, *"Was Sir Thomas More a 'Roman Lawyer'?,"* (194 NOTES AND QUERIES 203 (1949)), a formidable case is made out for More's *not* having been admitted to "Doctors Commons" in December 1514 (for the purpose of arguing the case of the Pope's ship). The stiff requirements noted in IV HOLDSWORTH, *op. cit. supra* note 7, at 236, and cited by Schoeck, may not in fact have been applicable, and it is quite certain that if the King had wished it More could have been admitted to the group of civilians who then composed what we would now call the Admiralty and Prize Bar, *non obstante* any custom or regulation to the contrary. But Schoeck's main point is correct: More was highly interested in Roman law, but from the more or less academic angle of the sources of the fundamental law of all countries. The international questions in which he took a part, and the learning of the scholars in the Low Countries with whom he debated, will have helped to sharpen his

the affair of the Pope's ship in which he was briefed successfully on the Pope's side, he had certainly had to argue points of international law, and the seizure of the ship certainly suggests an attachment of a thing belonging to a foreigner in order to enforce an appearance in an independent matter.[49] While he was one of the chief judicial officers of the city of London he will certainly have looked into the alleged connexions between London customs in this context and Roman law. We shall not go so far as to say that his presence in the train of the Cardinal in 1521 was due predominantly to his knowledge of international law: others could look after that, and he was there as the best advocate England could muster. But that a man of his temperament and learning could remain unacquainted with the embarrassing aspects of *represaliae* is inconceivable. The truth was that there was evidently a great deal of doubt in the Imperial court as to the exact place of *represaliae* in the legal set-up of the Empire. If the Holy Roman Empire was really an empire, there was no justification for "reprisals" between any parts of it.[50] Between France and the Empire, or between England and France, perhaps: a regrettable but justifiable institution. But between Antwerp and Bruges, or between any of the states that made up the Empire, in fact between any two jurisdictions that owed some allegiance to the same supreme monarch, it is difficult to make out why the institution should be allowed. And if the jurists (who stood to profit from the reform) had their way, all such disputes would come to the Imperial courts, and "reprisals" would issue only from that source, and only against the goods, etc., of foreigners, *e.g.*, the subjects of the Kings of England and France, or of the Pope.

When the jurist refused to discuss this subject with More it was because he was clever enough to realise that the question, seeming like an innocent question in a customary law, was in fact a trap. Silence was the best part of discretion. To get into difficulties on a subject of international and municipal law at the court of the Emperor in disputation with a member of a foreign embassy would not help his career. Some people may indeed have laughed at his discomfiture, but they would not have been lawyers, and he would be unlikely to enlighten all and sundry as to the nature of the trap which More had set for him.

This episode, which must be genuine (for it is too clever for slender minds to have excogitated), shows More in a characteristic light. Humorous, but sharp; derisory, but sympathetic; sincere, but with a dash of sarcasm. This was rather a wicked practical joke. Perhaps it was a just rebuke for a man who, instead of introducing More to the learned company of the court and debating with him as More's host upon subjects of More's own choosing,

(Continued on page 242)

interest. Natural Law was the subject of *Utopia* (1516), and fundamental law the issue in his trial (1535).

[49] Seeing that he was a lawyer, Roper's account of this affair is singularly vague: ROPER, *op. cit. supra* note 47, at 9-10. Apparently the case was argued before an English civilian judge, and the Pope's ambassador briefed More to appear for the Pope as an expert in English law, and to serve as an interpreter for himself. The proceedings were obviously in English (not French), though many of the authorities will have been continental. More could not have acted without understanding the pleadings and authorities, which will have been predominantly civilian.

[50] This is expounded in GAILL, *op. cit. supra* note 24, and Gaill was a professional successor of the very man who issued the challenge, a jurist attached to the imperial court.