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WITHERNAM: A Postscript

J. DUNCAN M. DERRETT*

IN THE Summer 1961 issue of *The Catholic Lawyer*¹ I explained the meaning of Sir Thomas More's practical joke. The explanation was that the question about *withernam* concealed a problem on the legality of reprisals which would have been embarrassing to the continental jurist to whom it was addressed. The idiotic challenge was punctured by a very sharp response. When I wrote that article I did not know that More himself had been considering a problem regarding reprisals at the very period under discussion, or that German jurists of considerable standing had opened their mouths rather wide on the same subject. I did not know that those same jurists had been engaged in professional rivalry with More. These facts serve to confirm my hypothesis. They are well worth further discussion, though many implications of the episodes cannot be dealt with here. When I come to cope with More's trial in detail, those matters that necessarily have to be considered will be attended to properly.

In a footnote to the above-mentioned article I said, "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."² Professor H. W. Donner has pointed out to me that Chambers, in his biography, refers to the *Hanserecesse* in connexion with More's presence in the Low Countries on embassy in 1520, from which reference it appears that a good deal is known of More's activities as ambassador. The material, however, appears not to have been fully exploited, whether by Chambers, or anyone else. There is some vagueness about the chronology, which would not be there if the subject had been thoroughly studied. For example

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¹ Derrett, *Withernam: A Legal Practical Joke of Sir Thomas More*, 7 CATHOLIC LAWYER 211 (1961).

² *Id.* at 221 n.47.

Elizabeth F. Rogers, in her edition of More's Correspondence,³ shows a letter from Knight, More, Wilsher [*sic*] and Sampson to Wolsey under the date 15 September 1520 and adds "Cranevelt's letter to Erasmus (Allen IV. 1145) confirms the date," when the *Hanserecesse* make it quite clear that the date of that letter must be 1521.

The accounts of the embassies of 19 July 1520 – 12 August 1520, where More, previous to his knighthood, acted as secretary to the English embassy, but soon emerged as the ideal chairman and a born diplomat, and 12 September 1521 – 30 November 1521, when More was a full member of the embassy, though subordinate to the very experienced Dr. William Knight, are full indeed.⁴ For the latter embassy two independent accounts, one longer than the other, exist. These were written up from minutes taken by the "other side," *i.e.*, the representatives of the Hanse, and, if used with caution, form valuable and otherwise incomparable sources on Thomas More as a practical man of business. Chambers, who appears to have looked at these

sources somewhat casually, would have us believe that the English showed themselves "very stiff opponents." That is somewhat complimentary. The Hanse found them obstinate and unpredictable. But this is not the place to go into the story at large.

It suffices for our purpose to notice that one of the complaints lodged by the Hanse, and on which they demanded satisfaction, related to the conduct of Cardinal Wolsey (More's predecessor) as Chancellor. Some time before 1520 petitions had been filed in Chancery before Wolsey that individuals belonging or claiming to belong to the Hanse had wronged Englishmen and it had proved impossible to bring them personally to account. The whole question of making Hanseatic merchants amenable to English law courts, particularly the Exchequer, had long been in the air, and in fact attempts were frequently made to cut the Germans and Dutchmen down to size, at which they repeatedly complained, pointing to their so-called privileges, some of which were hard to construe and some of which had actually been repealed. The rights and wrongs of these matters are beyond our present scope: no doubt there was much to be said for both sides. But in this case it was claimed on behalf of the petitioners that pressure should be brought to bear on those undoubted Hanseatic merchants who resided in London, whereby the Hanse towns in question might be brought to afford justice to the petitioners. Wolsey summoned representatives of the Hanse who were within his grasp, threatened them that if their compatriots did not behave themselves it would be the worse for them, and ultimately granted reprisals against the goods of the latter, leaving it to the outraged Germans to obtain their remedy out of the original respondents who were out

³ CORRESPONDENCE OF SIR THOMAS MORE 247-48 (no. 98) (Princeton 1947).

⁴ HANSERECESSE VON 1477-1530, ed. Dietrich Schäfer, HANSERECESSE, pt. 3, vol. 7 (Leipzig 1905), cited below as HANSERECESSE. This series of Hanse archives contains the minutes, protocols, memoranda, documents, exhibits, and letters (including reports) relating to business including negotiations between the Hanse and various courts. No comparable documents survive on the English side, though what there is can be made to fit easily with the masses of documents Schäfer laboriously edited for us. It is interesting to note in passing that his opponents recognised More as *ceteris facundior et lingua promptior* (p. 810), a fact which made him their real antagonist, and must have made him unpopular with his English colleagues. The "embassy" of 1520 is dealt with at pp. 583f (No. 332f); that of 1521 at pp. 806f (No. 448f).

of the jurisdiction. The amount granted against them was £500. The Hanse therefore present as paragraph 10 of their bill of complaints that Wolsey had in the Chancery *represaleas* [sic] *quoque iuri, equitati et privilegiis anze contrarias contra omnes mercatores concessit, in maximum totius anze dispendium et gravamen.*⁵ In the view of the doctors of laws who drew up this marvellous document, Wolsey's act had been contrary to Law, Equity, and the alleged privileges of the Hanse. It is difficult to understand wherein lay their complaint. Germans moved in and out of England, no one knew what cities they belonged to, or whether those cities had any league with England. They murmured the word "Hansa" and they were, or claimed to be, free from various duties, or to a large extent free from duties in respect of exports and in numerous other contexts. That the privileges were open to abuse no one doubted. The seizure of their goods to satisfy English creditors seems to have been restricted. They could slip away when they chose, and other individuals, closely connected with them in interest and profit, could take their places — and the processes of the common law were, or were alleged to be, virtually powerless against them. The marvel is that it was sufficiently profitable for England to tolerate this situation as long as she did: especially when the Hanse themselves were by no means cooperative toward English merchants in their areas. That in such circumstances Wolsey should have granted *represaliae* seems not only just, but actually inevitable. The Hanse demanded that such injuries should not be inflicted upon them again.

More's answer to this is interesting.⁶ He

says that the matter is *res iudicata*. Wolsey being Chancellor there is no question of an appeal from him. The affair is closed. How can the learned *oratores* question Wolsey's sentence? If it is passed it is presumed to be lawful and just. Since there is no question of an appeal there is no occasion to rebut the presumption in favour of its being lawful and just. Nevertheless, they (the English "ambassadors") would look into the matter, and see whether anything needed to be done to relieve the Hanse.

The Hanse's representatives produced written replications to the English answers. To the answer to paragraph 10 they say, *in hoc versari laborem nostrum, ne alius pro alio gravetur nec represaliae tam facile concedantur, quod nostris nequaquam tollerabile* [sic] *est.* "What we are concerned about is that one individual should not have to answer for the debts of another, and that reprisals should not be granted so easily — for that we really cannot tolerate."⁷ That seems to have been the end of this discussion, for when negotiations were resumed next year other points and other angles were taken. Nevertheless the source of the grievance remained, and the grievance, we must presume, with it. Unless the Hanse was prepared to guarantee its members (which presumably was impossible as it had no idea what its membership amounted to), reprisals seem to have been the only method open to English law to cope with the phenomenon we have described. Were those reprisals contrary to Law, or to Equity? Was it improper that one should answer for another's wrong? The theoretical aspects have been dis-

⁵ HANSERECESSE 605.

⁶ HANSERECESSE 607 ¶10.

⁷ Replication dated August 1, 1520. HANSERECESSE 612-13 ¶10.

cussed in the former article.⁸

We now see that in 1520 and, almost certainly, again in 1521, the fundamental character of reprisals, especially as exercised in England at that very time, must have been before More's mind. I think we can be sure that he would lean to the view that reprisals, granted in proper circumstances, had a necessary and important part to play in the administration of justice. But we have seen how debatable the whole matter was. The jurists who drew up the Hanse's case were committed to the view that reprisals in such circumstances were unlawful and unjust. That they were prepared to argue the matter according to Romano-canonical law may be taken as certain. On the collateral complaint that the king had (with the advice and consent of Lords and Commons) enacted a statute which infringed the Hanse's privileges, More blandly said that he was no jurist, but was prepared to argue the matter on general principles.⁹ Yet the *oratores* for the other side insisted that Roman law was applicable in England so far as general principles and natural equity were concerned and that the principles of canon law were binding upon Henry VIII personally, for he must answer to the Pope for his conduct in questions of broken faith and the like.¹⁰ And they proceeded to

⁸ See note 1 *supra*, at 219-21. I add to the bibliographical references at p. 215, n.16 the following: JACOBUS A CANIBUS, TRACTATUS· REPRESALIRUM SEU DE INIURIIS ET DAMNO DATO, which is printed in VOLUMEN XVII TRACTATUM EX VARIIS IURIS INTERPRETIBUS COLLECTORUM (Lugduni (Lyons) 1549). I note that on the whole this writer takes a more favourable view of *represaliae* than the others I have cited, but the variations are in any case slight.

⁹ HANSERECESSE 583 ¶18: *se nichil praeter leges Anglicanas didicisse, quod et ingenue fateretur...*

¹⁰ HANSERECESSE 585. The constitutional importance of this doctrine in relation to the affair of

argue at length the impossibility of Parliament's passing a statute contrary to privileges conceded to a foreigner.¹¹ This amazing performance shows how the wind blew, and what sort of arguments More would have had to meet had they pressed their point. As it was, his answer was correct from the Romano-canonical angle as well as the common law, so he was spared that amusement. But there was nothing to stop him from raising the matter in another forum! And no doubt his colleagues discussed it with him.

More and his colleagues were often subjected to long delays at Bruges. They ran out of funds, had to ask Wolsey for an advance to keep them afloat, and got appropriate apologies from their opposite numbers when the meetings eventually started. There were certainly delays in the course of the second meeting (1521). Some social contacts between the members on both sides must have taken place, though we do not hear of them. The minutes were written up from the Hanse side in a tone of intense suspicion of the English, somewhat curious to read (for it shows that the English reputation for hypocrisy is ancient): but we need not suppose that this went much beyond the form, for the Hanse jurists' masters expected them to be alert, and suspicion in a diplomat is as much a matter of form as scepticism in a modern theologian.

More would have had opportunities of

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Friar Standish (1518) and the trial of Thomas More himself cannot be overemphasized—I hope to deal with it in a separate article.

¹¹ HANSERECESSE 610-11 ¶¶2,3. Apart from what appears to be a slip of the pen this is an admirable, terse summary of the then universal law on the subject. The embarrassment of the English party is quaint, though understandable.

an authorized priest and at least two witnesses.

7) There are sufficiently clear and valid moral principles which form the basis for judging the rightness or wrongness of cooperating in the evil action of another.

8) The Third Plenary Council of Baltimore of 1884 laid down positive legislation

binding on all the baptized within the territory of the United States relative to civil action for separation and divorce.

9) Every reasonable man is capable of grasping and understanding the basic dictates of the natural law relative to marriage and the family.

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(Continued)

getting to know his opposite numbers and sizing them up. There is no reason to suppose that they were second-rate men. The Hanse could afford to pay for the best international lawyers then in practice. To cope with the allegedly rascally and treacherous English no one but the best would be employed. In 1520 they had Matthew Pakenbusch, LL.D., of Lübeck, and Jodocus Erbach, LL.D., of Cologne. The former was senior, and came from the very heart of the Hanse. We know the latter somewhat better since it was he who prepared the protocol, and perhaps the minutes out

of which it was made. In 1521 the representation was strengthened. To the previous two were added Jodocus Wilpurg, LL.D., and Johannes Duyseldorp, LL.D. Thus the English contingent of four, two of whom were doctors of law (Knight and Sampson), was faced by four doctors. Of these four Pakenbusch was absent in Brussels in the course of November 1521,¹² and the sittings seem to have been suspended on account of his absence. We may never know who was the jurist upon whom More played the joke: it would be rather humorous, would it not, if it were Dr. Pakenbusch?

¹² HANSERECESSE 829, ¶49.