

The Two Laws in Thomas More: A Preliminary Reading of the Canon and Common Laws in His Career and Writings

R.J. Schoeck

Follow this and additional works at: <https://scholarship.law.stjohns.edu/tcl>



Part of the [Catholic Studies Commons](#)

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

THE TWO LAWS IN THOMAS MORE: A PRELIMINARY READING OF THE CANON AND COMMON LAWS IN HIS CAREER AND WRITINGS¹

R. J. SCHOECK*

INTRODUCTION

IT IS TOO EARLY in the day for most of us to begin with the Nineteenth Century English jurist's observation that "the state of a man's mind is as much a fact as the state of his digestion," and in any case we should want a text a little closer to More's time. In 1477, Chief Justice Brian said that, "It is common knowledge that the thought of man should not be tried, for the Devil himself knoweth not the thought of man"—or, in Law-French, "Comen erudition est l'entent d'un home ne sert trie, car

* Attended McGill University (no degree); M.A., Ph.D. Princeton University, 1949. The author, who has been professor of English at St. Michael's College, University of Toronto (1961-1971), is now Director of Research, Folger Shakespeare Library, Washington, D.C. He is a member of the editorial board of the *American Journal of Jurisprudence*, a member of the Columbia Seminar on Legal History and Political Philosophy, and has served as representative of legal history on the council of the Renaissance Society of America (1968-1970).

¹ A paper given at the St. Thomas More Symposium held at St. John's University on October 9-10, 1970, under the auspices of the Anglo-American Associates. In its untruncated form, it will appear with full documentation in the volume of symposium papers to be edited by the chairman-organizer of the Symposium, Professor Richard S. Sylvester, and to be published in 1971.

This paper, therefore, appears in the form in which it was presented, and no effort has been made to alter the touches and tonal emphasis which seemed appropriate for its oral delivery; nor will there be any footnotes (which of course were not part of the presentation), save for the one bibliographical note which follows, and the placing of names in parentheses to identify a number of the quotations.

le Diable n'ad conusance de l'entent de l'home." We shall return, near the end of my paper, to the question of one's being triable for thoughts and intentions—so close to the perilously balanced point on which More tried to rest his defense: given More's silence (his argument ran), everyone had the reasonable right to suppose that by his silence More was giving assent to the King's Act of Supremacy. The fact is that the civil law maxim, *Qui tacet consentire videtur*—or, as Harpsfield translates it, *he that holdeth his peace seemeth to consent*, cuts several ways, and much depends upon where one stands in one's interpretation.

Tout court, we are here to talk about the interface—a currently fashionable term which subsumes, as I understand its ambience, both the conflicts and the influences—between canon and common law as we find this problem in the career and writings of Thomas More. We look towards, though we cannot hope yet to comprehend, the larger role and importance of law in the England of More, and ultimately that problem should be related both to the practice of the day (for which some of the rare legal books on exhibit must be studied more closely) and also to such criticisms of contemporary legal institutions and practice as those of St. German and Starkey, and to literary satires like those of Skelton and John Heywood. And so, simply to examine the problem with respect to Thomas More; there are two pivots, two great matters or issues about which this paper will turn. The first is the affair of Richard Hunne—because in its central issue of heresy we have a prime area of conflict, and it is a case which continued to be discussed throughout the lifetime of

More and, indeed, resurfaces again in the 1590's in the controversy of Cosin and Morice. The second is the matter of More's trial—in ways and for reasons which will I think emerge.

THE LEGAL CAREER OF SIR THOMAS MORE²

Although he had been admitted to the bar several years earlier than 1510 and had served his inn of court, Lincoln's Inn, and had played a notable role in the 1503 Parliament, Thomas More's first significant public legal office was that of under-sheriff of London, which he held from 1510 until 1518. Considering that his mother's father had been sheriff of London in 1503-1504 and that much of his father's considerable legal practice had been in the city, Thomas More's appointment as under-sheriff and

² Much of this paper builds upon several published papers and articles, as well as one as yet unpublished book. I would first cite a survey-article which appeared in 2 CATHOLIC LAW, 61-67 (1956), as an introduction to More, and I would next list the following in chronological order of their appearance:

Rhetoric and Law in Sixteenth-Century England, 50 STUDIES IN PHILOLOGY 110-27 (April 1953); *Canon Law in England on the Eve of the Reformation*, 25 MEDIAEVAL STUDIES 125-47 (1963); *Sir Thomas More, Humanist and Lawyer*, 34 TORONTO Q. 1-14 (1964); *Recent Scholarship in the History of Renaissance Law*, 20 RENAISSANCE Q. 279-91 (1967); contributions to the NEW CATHOLIC ENCYCLOPEDIA (1967); *Court of Arches, Doctor's Commons, Law-French, Thomas More; Tommaso Moro*, 12 BIBLIOTHECA SANCTORUM 608-14 (Rome, 1969).

A series of lectures on Thomas More and the law (given at Yale University in November-December 1967) is as yet unpublished. The lectures were: *The Tudor Inns of Court; Thomas More, Lawyer and Judge*; and *A Lawyer's Life of More: Roper's Saint's Life*.

his continuing close relations with the city and with city companies is more easily understandable.

Plucknett has commented on the extent to which More would have "ministered mingled law and equity as Under-Sheriff," a point to which to return in developing the consideration that More had long been experienced in mingling law and equity before becoming Lord Chancellor. During his under-sheriff years, More seems to have moved into some work with maritime and international law, both of which drew heavily upon the procedures of Roman rather than common law. His most famous case in this field came in about 1517—his defense of the papal right to a ship which Henry had stopped at Southampton and claimed as a forfeiture. More was retained as counsel and interpreter for the papal interests, and the case was heard in Star Chamber before Wolsey and other judges, where (Roper accounts in his biography),

Sir Thomas More not only declared to the ambassador the whole effecte of all their opinions, but also, in defens of the Pope's side, argued so learnedly himself, that both was the foresaid forfeiture to the Pope restored, and himself amonge all the hearers, for his upright and comendable demeanor therein, so greatly renowned, that for no intreaty wold the king from thenceforth be induced any longer to forbear his service.

This case of the Pope's ship explains why More never became a serjeant, for this event comes on the heels of his having been away for some months on the 1515 embassy to Bruges (during which he was permitted to fill his office of under-sheriff by deputy and during which he wrote the

major part of the *Utopia*); for normally, having done his two readings at Lincoln's Inn, he would have soon been made serjeant; and eventually, so distinguished a common lawyer would have become a common-law judge. Instead, as we know, More was drawn into the king's service.

A second point: in this case of the Pope's ship, as during the trade negotiations at Bruges, More manifested the results of study and experience in jurisprudential thought of theologians and canonists, and he was skilled in the procedures of both Roman and canon law. His admission to Doctor's Commons in 1514 is now more understandable, yet still remarkable, for here is a common lawyer admitted to a professional association of established, if not all distinguished, civilians without a formal period of study at a university with recognized faculties in the two laws, and indeed without any academic degree—much less the advanced degree in law and the specialized ecclesiastic or equivalent practice that were required (at least a little later, if not in 1514). On a subsequent embassy to Bruges in 1520-1521, references were made in the confidential Hanseatic dispatches to More's skillful handling of "multasque rationes, jura, leges et canones." And other activities during the 1520's would have developed still further More's legal expertise in Roman and canon law—all before he became Chancellor in 1529.

In 1524 he was made high steward of the University of Oxford, and a year later of the University of Cambridge as well. These high stewardships were quasi-judicial, for in addition to other duties More was involved (at one of the unrulier

periods in the history of those universities) in trying persons accused of crimes, though of course, as Chambers goes on to comment, there were also aspects which More found pleasant. In 1525 More succeeded Sir Richard Wingfield as Chancellor of the Duchy of Lancaster, a separate administration of many lands, estates and possessions; here More's offices were partly administrative, but doubtless largely judicial. The modern More scholar must disagree with Chambers' statement that "very little which interests us today is recorded of the business which came before him in the Duchy Court," for Margaret Hastings has been at work on this business for some years and has shown how potentially rich the extant records are. In a paper given at the Anglo-American Conference in 1965 she stressed the freedom of the Chancellor of the Duchy to operate at a farther remove from "extraneous pressures . . . royal whims and demands . . . and the larger forces of change in Europe":

As Chancellor of the Duchy, he was the king's lieutenant for the administration of justice, but, instead of having to administer it through King's Council, Star Chamber, Masters of the Requests, and Chancery, he could perform all his judicial duties within the one court beginning in his time to be regularly called the Court of Duchy Chamber.

She stresses the fact that the procedures of this court were more flexible than those of the Chancery, and that since 1485 More's predecessors had been laymen, generally trained like More himself in one of the Inns of Court.

If there ever had been a clash between common law and equity, there is no obvi-

ous evidence of it in the Duchy records. In Marny's time, 1509-1523, and probably also in More's, when important decrees were given, the chief common law justices of the Duchy were present and party to the court's decisions.

Duchy were present and party to the court's decisions. Professor Hastings' conclusion is that More "emerges from the details of the cases as a hardworking administrator, a peacemaker more concerned to get at the causes of violence in the countryside than to inflict harsh punishments, a protector of the weak against the strong, and an astute lawyer who could cut through the mass of detail to the heart of the matter in hand."

From the earliest days of his legal practice, More seems to have been known for his skill in arbitration, for he was involved in some of the most complex estate questions of his period, to take but one kind of practice. We shall hear about the thrust of his literary activities from Professor Martz and about his inner devotional life from l'Abbé Marc'hadour—both vital dimensions in the totality of More—but let us never forget that More was continuously a busy man of the law, who spent most of his waking hours for the greatest portion of his adult life reading petitions and other legal documents, hearing evidence and questioning witnesses, and giving opinions or decisions. We can begin to appreciate the force of his lament that the law (to borrow Bacon's later phrase) "drinks too much time"—or as More himself wrote Peter Gilles (another humanist-lawyer) in 1516:

I am constantly engaged in legal business, either pleading or hearing, either giving an

award as arbiter or deciding a case as judge. I pay a visit of courtesy to one man and go on business to another. I devote almost the whole day in public to other men's affairs and the remainder to my own. I leave to myself, that is to learning, nothing at all.

When I have returned home, I must talk with my wife, chat with my children, and confer with my servants. All this activity I count as business when it must be done—and it must be unless you want to be a stranger in your own home. . . .

At the age of about 52 he was appointed Lord Chancellor and served from October 1529 to May 1532. He was of course not the first layman, but there had not been a layman as chancellor for many years. Even if we bear in mind Maitland's injunction that medieval clerics were not all canonists any more than they were all saints, what is notable is that for some time the Chancellor had traditionally been the Archbishop of Canterbury or York—Morton, Warham, Wolsey—and consequently he was a cleric usually trained in canon law, probably Roman as well, and hence a person with a training that equipped him to apply equity in his administration of the formalized common law.

More's own practice had taken him into Star Chamber and Chancery proceedings, and he would long have known that equity was there applied, and how it was applied. In 1528 St. German began to develop his arguments for the greater application of equity in the common law, in the first Latin dialogue of what later became his celebrated *Doctor and Student*—later expanding the ground of his argument to differences in procedure between common and canon law; and by 1533 More would

be deep in controversy with St. German over conflicts between the two procedures, notably over the *ex officio* oath in heresy matters, as will shortly be seen in discussing the Hunne affair.

Thus, to pinpoint: in 1528 two influential books appeared in England which in different ways brought to bear upon the common law concepts of canon and/or Roman law: Christopher St. German's *Doctor and Student* and John Parkins' *Profitable Book*, the first published in Latin, the second in Law-French, and both with remarkable printing histories. At about this time a copy of a 1526 Decretum of Gratian was bought by the son of a chief justice of Common Pleas and annotated throughout. From these and like clues, it would appear then that the study of canon law by common lawyers was more widespread than has hitherto been supposed.

RICHARD HUNNE AND THE STANDISH AFFAIR

The affair of Richard Hunne occupied Englishmen of all classes for three decades, and the still-continuing problems of interpreting this complex affair are of prime concern to historians of Lollardy and of the growing Lutheranism in Tudor England, to students of the ecclesiastical courts at the end of the Middle Ages, and to the future biographer of Thomas More. For all historians, indeed, it has been a matter of controversy for the past four centuries. Here our concern is with locating the events of this affair in the context of conflicts between common and canon law.

Richard Hunne was a freeman and

merchant of London, a well-to-do member of the Merchant Tailors and a citizen widely known (as More testifies) for his charitable practices and fair dealing. Overnight his name became a rallying cry for lay grievances against the clergy, and his legal causes widened into a conflict between ecclesiastical and secular jurisdiction that foreshadowed the cutting of the canon-law ties between England and Rome.

The facts of his story are as follows. His baby son, an infant of five weeks, died on March 29, 1511, and the rector of the parish demanded the child's christening robe (or binding-sheet) as a mortuary; the father refused. The rector, Thomas Dryffeld, having waited one year, brought suit against Hunne for the mortuary on April 26, 1512, suing in the archbishop's court of Audience. Two days later Hunne was summoned and on May 13 appeared before the court, where he denied the truth of Dryffeld's declaration; but Tunstall pronounced judgment on that date in favor of the rector. This much we know. What is not certain is the sequence of all the ensuing court actions, or details of the pleadings in them. It is clear that on December 27, 1512, Hunne was addressed by the parish priest with these words: "Hunne thowe arte accursed and thowe stondest accursed," and that the priest refused to proceed with vespers until Hunne left the church. On January 25, 1513, Hunne instituted a suit for slander against the priest, and a little later in Hilary term his suit for praemunire was filed. It seems clear that Hunne had been accused of heresy by this time, but if so he was not summoned for a year. On December 2, 1514, he was

finally brought before the bishop of London on charges of heresy, and two days later (before any action was taken by the bishop) he was found hanged in his cell in the Lollards' Tower; a coroner's jury was impanelled, but did not return its verdict until February 1515. Meanwhile, on December 10 a Paul's Cross sermon was preached against Hunne and on the sixteenth he was signified *post mortem*; his corpse was turned over to the secular arm and burned at Smithfield on December 20, 1514. The child had died in March 1511, and Hunne himself in December 1514—three turbulent years in the courts, and all men were discussing the case.

Against this background, and that of the issuance of Leo X's bull in 1514 pronouncing that laymen had no jurisdiction over churchmen in certain matters (*Bulla reformationis curiae*), Parliament met in February 1515, with a sermon by the Abbot of Winchcombe on the opening of Convocation that was immediately the focus of public attention and itself the cause of a wider *cause célèbre*. For Kidderminster preached against Parliament's renewal of an act of 1512 (4 Henry VIII, c.2), the sometimes-called Criminous Clerks Act, by denying any distinction between major and lesser orders: all orders were holy orders, he insisted, and therefore any clerk was immune from the punishment of lay tribunals for criminal offenses. This was an open challenging of the accepted practice of the common law, and it was presented as doctrinal and with intransigence.

At the opening of convocation it was preached that "little by little the laity were encroaching, serpent-like, upon ecclesi-

astical dominion" and the bull *Supernae Dispositionis* "contained the massive consolation of several clauses dealing hard blows upon the laity." Clerical morale, it has been argued, must have been strengthened by this bull, and "there is every likelihood that the renewed confidence aroused by the Fifth Lateran's Council's decree lay behind the notorious case of Richard Hunne. . . . Certainly the decree inspired some strong opinions to be voiced." The lords, where the spirituality had the majority vote dropped the statute that would have renewed the Act of 1512, although commons had passed a bill to renew it. At this point, Dr. Henry Standish, then warden of the mendicant friars in London and, later to be rewarded with a bishopric, defended the 1512 Act and argued that the decree of Leo X had never been received in England.

On April 17, 1515, the court of aldermen of London appointed a committee to speak with the bishop of London about the matter, for in February the coroner's report on Hunne's death had been shown to the jury and the jury found that Hunne had been murdered by the jailor and his assistant, together with the bishop of London's chancellor, Dr. Horsley. Feelings of London citizens ran high indeed. Small wonder that the historian Polydore Vergil should have written on March 3, 1515, that there was a great outcry in England, and still less wonder that in the popular mind there should have been a connection between the particular issue of Horsley as the accused murderer of Hunne and the more theoretical issue of criminous clerks and the debate of Standish and Kidderminster. The two issues are certainly in-

timately connected in the legal memorandum incorporated in Keilwey's Reports. It is not too much to say that in the debate that joined these issues not only had a collision course been set between elements of the common and the canon law in England, but a direct challenging of canon-law jurisdiction had been issued; yet here, as elsewhere, old socio-religious institutions survive within a new frame of reference.

The 1515 Convocation sermon of Kidderminster was the focus of the resentments of members of commons and of others, and the speaker of the house was part of a group that requested the king to have the issue argued further. Accordingly, the king chose lawyers and theologians to argue the points involved before various judges and theological counsel at Blackfriars on March 10, 1515.

There at Blackfriars, Dr. Henry Standish defended the Act of 1512 and asserted that a papal decree which forbade the conventing of criminous clerks before a temporal judge as *peccatum in se* had never been received in England. To the commons' request that the abbot renounce his opinions publicly at Paul's Cross, the bishops replied that they would maintain these opinions with the utmost power. Parliament (and convocation) was prorogued from April 5 until November, but during this recess Standish continued to defend his position in public lectures. And Dr. Horsley was still in custody, while Standish was at large. But in November Standish was summoned before convocation and presented with four questions:

- (1) Can a secular court convent clergy before it?
- (2) Are minor orders holy or not?
- (3) Does a constitution ordained by pope and clergy bind a country whose use is to the contrary?
- (4) Can a temporal ruler restrain a bishop?

The thrust of these questions is all too obvious, and the importance of Standish in the eyes of contemporary ecclesiastics can be judged by the note of one who was in 1515 both clerk of the parliaments and prolocutor of convocation. He wrote in the record of both assemblies: "in this parliament and convocation there arose the most dangerous discords between the clergy and the secular power over the liberties of the church; and the minister and the fomenter of all the trouble was a certain friar-minor of the name of Standish."

Against the questions or charges put to him in convocation, Standish appealed to the king for protection. The reply of the bishops was that they were proceeding against Standish not for his counsel to the king (as he was one of the king's spiritual counsel) but for his public lectures elsewhere. Both the commons and the bishops exhorted the king's aid in accordance with his coronation oath, the first to maintain his temporal authority to the full and the second to leave Standish to the judgment of the Church.

A second meeting of judges, the king's counsel, and some of the commons, took place at Blackfriars to consider Standish's answers to the charges of convocation. The question of the 'reception' of papal decrees and the dependence of their validity in En-

gland upon reception there, was one area of discussion. The judges of the common law eventually declared that those clergy who were present at Standish's citation were guilty of *praemunire*. With the vague but terrible threat of *praemunire* over their heads, the bishops felt caught on the edge of the temporal sword. It would seem that the way of compromise had been worked out before the next meeting took place at Baynard's Castle, a royal palace by the river, adjoining Blackfriar's.

At Baynard's, Wolsey, as Hughes so aptly remarks (and Reynolds echoes), "began his career as a cardinal as he was to end it, kneeling before the king and begging his mercy from the pains and penalties of *praemunire*"; but there is more of a pattern even than this to Wolsey's career, for in 1529 he would be compelled to admit that he had tried to subject England to a foreign-based canon law. (It must be observed that the very term 'canon law' changes in the period from 1515 to 1535; but this must be studied further.) Before a great assembly of both houses of parliament, of the common law judges, and of all the king's council, Wolsey knelt before Henry and made a partial submission and a partial defense. The clergy for whom he was spokesman had no desire to diminish the royal prerogative, he said, but they did feel that the matter of bringing clerics before lay judges was contrary to the laws of God and an infringement of the liberties of the Church. Wolsey thereupon begged the king to allow the matter to be determined by the pope and his counsel at Rome. Henry's reply was that Standish had already answered all points; and in an

ensuing general discussion, Foxe and Warham supported Wolsey, and the chief-justice of the king's bench, Fineux, observed that the clergy could not determine questions of murder or felony and asked what point there could be in committing clergy to courts where they could not be tried. Henry finally ended the discussion by declaring that he would maintain the rights of his crown and temporal jurisdiction as fully as his progenitors had done; as for the bishops, he observed, they had always been able to find a way around canonical obligations whenever it suited them. When Warham put forth the plea to delay the decision until the clergy could place the matter before the Pope for a solution (at the cost of the clergy), Henry apparently remained silent, thus withholding his consent.

Convocation proceeded no further with its charge of heresy against Standish; a royal investigation of the murder charge against Horsley found no real case against him; and the attorney-general accepted his plea of 'not guilty' and the case went no further. But Dr. Horsley had to pay an enormously heavy fine—and he lost out in his ecclesiastical career, having to turn to preferments outside of London. Standish by contrast, was made a bishop: the name of the place, St. Asaph, being satirically turned by some into 'Seynt Assé'.

Compromise had indeed been achieved, but only a very thin, a perilously thin covering had been placed over the real issues and problems. The heavy hand of Wolsey kept the lid on until 1529, but by that time Lutheranism would have come to England and the lid would stay on no longer. Tyndale and St. German, a cleric

and a layman, a theologian and a common lawyer, led the campaign for reform, and both made charges about the Hunne affair which Thomas More answered in his writings from 1529 to 1533.

Some further commentary is needed on the Hunne case. The rector's demanding a child's christening robe as a mortuary payment was customary, though it was a legal right often open to abuse. It may be that Hunne's argument in refusing lay in denying that the robe belonged to the baby, but this argument would surely have been put forward in earlier, and unsuccessful, tests of mortuary payments; mortuary disputes in London as C.H. Williams has noted, were as recent as 1501 and 1502, and there is no reason to believe that the citizen there involved did not purge himself as he was ordered to do. It has not been brought forward in previous discussions of the Hunne case that the child died in the parish where he had been put to nurse, the father belonging to another parish, and that Dryffeld was the rector of the parish where the child died, not the parish where the father lived; this may well have been a new ground of Hunne's refusal to pay a mortuary to Dryffeld, and this fact may be related to Dryffeld's having waited a year to bring suit against Hunne at Lambeth. In any event, Hunne did appear before Tunstall, who was then not chancellor of the diocese but chancellor of Archbishop Warham and auditor of causes. The issue was found for Dryffeld by Tunstall, but there is no indication that Hunne paid or intended to pay; however, excommunication would have been indicated as consequent upon a failure or refusal to pay, it must be observed.

It is strange, then, to learn that although this case was over by May 1512, Hunne was apparently not accursed by the parish priest before December 27, 1512—well beyond the traditional forty days but there is in fact no record of his having been excommunicated at this stage of proceedings.

The usual assumption here is that the parish priest's denunciation (in December 1512) followed merely upon Hunne's failure to make the mortuary payment as he had been ordered by the bishop in the preceding May. It is possible, but not likely, that Hunne had begun process for a suit of praemunire before December (and that this would have been the cause of his denunciation); but we cannot be sure. We know only that the praemunire is recorded in Hilary term, 1513, and is preceded by an action for slander, sued out on January 25, 1513.

Thomas More thought that Hunne "was detected of heresy before the praemunire sued or thought upon," as he wrote in the *Supplicacion of Soules*, and then the parish priest's denunciation in December 1512 would have been for heresy, not for refusal to pay a mortuary. This explanation would clarify the sequence, but if the denunciation were for heresy, the long delay before his being summoned becomes an element that needs explanation. Yet, it may well be that the heresy process was simply set aside until the praemunire issue was settled. The inference from the available evidence is that Hunne's demurrer in the praemunire suit had been argued in the Michaelmas term of 1512 and effectively decided against Hunne, and that a formal judgment would have been entered in Hilary term

1513, but that Hunne was by that time dead.

In the winter of 1512-1513, the scope and power of praemunire had not yet been fully determined, but the penalties were severe: complete loss of lands and goods, at least. In his praemunire suit, Hunne named Dryffeld as the principal defendant. The defendant's plea was that the whole process was lawful. To this Hunne demurred.

Several possible pleas would have been open to Hunne—besides the two already noted, that mortuaries as property ought not to fall within the jurisdiction of a spiritual court, or that the whole ecclesiastical system was a foreign system of law—but we do not know, the proceedings having been lost. More tells us that the decision which would have been given would have gone against Hunne, that

it appered clerely to the temporall judge and all that were anye thing learned in the temporall lawe, that hys suite of ye praemunire was nothing worth in ye kinges law, for asmuch as by plaine statute the ple to the holden upon mortuaries, belongs unto the spirituall court.

The inference to be drawn from More's comment is that the jurisdiction of the spiritual court was clearly recognized by all, and that there had not been—at least, not recently—any challenges of that jurisdiction. However, the statute or writ *Circumspecte Agatis* (13 Ed. 1, 1285)—while it limited ecclesiastical courts to what was then interpreted as strictly ecclesiastical business—could be seen as carrying royal assent to that business.

Denounced by the parish priest on 27 December 1512, and claiming damage in reputation and business, Hunne also instituted suit for slander. What is remarkable is that his fellow-merchants seem to have reacted already (in response to some ecclesiastical pressure), and one must ask whether Hunne was in fact *vitandus* by the end of 1513.

While much has been made of More's friendship with Tunstall, not enough stress has been put on More's close connections with the city and its companies, which would have been as likely to give him a bias towards London merchants as towards the hierarchy; for in addition to his quasi-judicial office as one of the two undersheriffs of London from 1510 to 1518, he acted for or with a number of the London companies on legal and business matters, and was especially intimately involved with the Merchant Adventurers, and from 1510 to 1512 he represented the City in Parliament. But there is one further connection, seldom noted: More was brother-in-law of the lawyer-printer John Rastell, who was soon after given wardship of Hunne's two daughters.

While at first reading More does not seem concerned with questions of the conflict of jurisdiction in the Hunne case, we must consider the context of the oft-cited chapter in the *Dialogue*: first, that it belongs to the year 1528-1529, a period of vigorous anti-clericalism, but not yet of a splitting off from Rome; and second, that it is part of a literary dialogue and that in this chapter More is dealing only with what the Messenger knows by hearsay about the Hunne affair—consequently More chooses

to discuss the case only in this light, and his treatment is rather humorous, both to discredit the rumours and to induce the reader to see the case in a chosen perspective. Shortly afterwards, the case again appears in a controversial work, *The Supplication of Souls*, in which More is answering similar charges made in Simon Fish's *Supplication of Beggars*, a violently anti-clerical work. (A year or two later, the common lawyer Christopher St. German will attack More from another quarter, but that must be a later chapter in this complex story.) For now, we must simply declare that in the *Dialogue* and the *Supplication* More is answering allegations and rumours about the handling of the charges of heresy against Richard Hunne—no more. However, we do learn that bitterness in London about the case continues nearly twenty years later, and we can test More's essential accuracy in his handling of facts, even though he does not present the full story.

More tells us in the *Dialogue* that he knew the case intimately:

So well I knowe it from toppe to toe that I suppose there be not very many menne that knoweth it much better. For I have not only been divers tymes present myself at certain examinacions thereof, but have also dyvers and manye times sunderley talked with almost all such, except the dead man hymselfe, as most knew of the matter.

I do not know how to explain the contradiction with a passage later in the *Apology* which very strongly implies that More *had* talked with Hunne:

And yet for bycause I perceyued in him a

great vayne gloryouse lykyng of hym selfe, and a great spyce of the same spyryt of pryde that I perceyued byfore in Rycharde Hunne when I talked with him
Apology (Taft ed. at 142)

If the phrase "when I talked with him" is to refer only to Thomas Philipps and not to Hunne, then this is a very careless sentence on a crucial point. More thought, from his knowledge of the case, that Horsley was not guilty. He was also convinced that Hunne had been a heretic, and in the *Dialogue* he brings forward the evidence of an Essex carpenter accused of heresy six or seven years after Hunne's hanging, who named Richard Hunne as one of those who came together secretly for heretical readings. But the strongest argument by More is that,

My self was present in Poules when the bishop, in the presence of the Mayre and the aldermen of the citie, condemned him for an heretic after his death. And than were there read openly the depositions by which it was wel proved that he was convicted as well of diuers other heresies, as of misbelief toward the holy sacrament of the autler. And thereupon was the judgment given that his body should be burned, and so was it. Now thys is (quod 1) to me a full profe.

When we turn from the Hunne affair to the Standish, the evidence is less contradictory; the issues are clearly drawn, and perhaps the clearest is the opposition of Standish and Kidderminster, the direct challenging by Kidderminster of the common law position and the direct challenging by Standish of the traditional liberties of the church. Further, it is clear that the King consulted carefully with his theo-

logical counsellors on the progress of the Standish matter and that his decision was final and, for the future of church-state relations in England, absolutely determinative.

Thus the king's assertion of his view of sovereignty and jurisdiction is to be studied with care:

By the ordinance and sufferance of God we are King of England, and the Kings of England in time past have never had any superior but God alone. Wherefor know you well that we will maintain the right of our Crown and of our temporal jurisdiction, as well in this point as in all others, in as ample a wise as any of our progenitors have done before us. And as to your decrees, we are well informed that you yourselves of the Spirituality do expressly contrary to the words of many of them, as has been well shown to you by some of our spiritual Counsel; nevertheless, you interpret your decrees at your pleasure. Wherefor, consent to your desire more than our progenitors have done in time past we will not.

For the influence of this affair upon More's career and thought, a few words. First, it is difficult to believe that it would not have coloured his thinking during the months he was away from England immediately after the meeting of Parliament in February 1515 and while he was writing the first draft of his *Utopia* during his Flemish embassy. This collision of the spiritual and the temporal laws, together with the failure of the Fifth Lateran Council to achieve reform, surely go far (as I think) to explain the note of urgency in Book I of the *Utopia*. And while there is little in More's writings that is a direct commentary on the criminous clerks ques-

tion, it is worth recalling that in his *Utopia* those priests who commit any offense whatsoever suffered no temporal punishment; instead, they were left only to God and their own consciences:

... even if they have committed any crime, they are subjected to no tribunal but left only to God and to themselves. They judge it wrong to lay human hands upon one, however guilty, who has been consecrated to God in a singular manner as a holy offering. It is easier for them to observe this custom because their priests are very few and very carefully chosen.

Second, as I have commented elsewhere, we must realize that More was officially concerned with heretics before he became Chancellor of England, before he became Chancellor of the Duchy of Lancaster, before, even, he wrote the *Utopia* in 1515. The implications of this point are several, and I am sure they will be discussed.

The above passages from Thomas More's writings dealing with the Hunne affair have been torn from their contexts in very different works, and, therefore, something must be said about their weight and usefulness. One must here also stress the obvious: More's cited writings are all in the vernacular, whereas heretofore the canon law was of course a matter for Latin. Christopher St. German's writings are notable for pioneering discussion of equity, procedure and other matters in English. Inevitably there would be problems of terminology (one must note problems in citations, e.g., and the carrying over into English of Latin tags familiar enough to those trained in canon law in Latin), but other difficulties as well. These I must defer for later treatment.

At no time did More sit down to write out a full brief on the Hunne affair; in his *Supplication of Soules*, first, he is answering Simon Fish's satiric and often deliberately exaggerated attack in *A Supplication for the Beggars* (1528); in his *Dialogue* (1529), he is dealing with the Lutheran case, but the mood, the control, the pace, are such that one can read with good humour—and in Book III, chapter 15, More's fullest treatment of the Hunne affair, he persuades the Messenger in the dialogue that the popular notions are misconceptions. The remaining works which refer to Hunne are in one respect at least of a kind. The *Confutation* (part I, 1532; part II, 1533), the *Apology* and *Debellation* (both 1533) are replies (the first to Tyndale, the second and third to Christopher St. German, though he wrote anonymously and More did not identify his anonymous opponent with the author of *Doctor and Student*). They have a common method and a common tone which is not-good-humoured.

The greater part of the *Debellation* is devoted to More's defense of the existing laws for the investigation and trial and punishment of heretics. More in his conclusion (*Works* at 1031/ sig. T.viii/) almost misses St. German's main thrust. For More lays the consent of the general council and "the generall approbacion of all christen realmes" against the changes which St. German proposes; but that is precisely what St. German denies, for he is doing nothing less than challenging the traditional system of canon law, with its authority, procedures and jurisdiction. More argues against this "generall approbacion"; he layeth his own reason. And

what is his own "irrefragable *resen*"? The Hunne case is therefore presented with a need and greater urgency by St. German. To Fish, it had been an example of what results from a court-system whose procedure is secret; but he scarcely challenges that system as a whole. St. German *is* challenging the system, and he uses the Hunne affair as an example; his division of spirituality and temporality is deliberately a dividing, with a lessening and subordinating of the spirituality. (But the debate of More and St. German on canon v. common law must be deferred.)

As to More's view of the conflict between common law and canon law that emerges during the Hunne affair and the sequential Standish case, at this stage of More studies I can only assert my opinion that More did not accept the dominant view of Parliament, of commons (which perhaps represented the view of a majority of English common lawyers—though this is by no means certain) that Parliament could solve disputed points of canon law. Rather, as Dorrett has pointed out, he shared the continental view that Parliament could not. But much further study of More's legal writings and of his legal philosophy needs to be done.

To generalize only from this one case would be to act like the tourist who exclaimed, "all Indians walk in single file. At least the one I saw did."

Yet this one case, with its wealth of secondary materials, points clearly towards a wider body of events, evidence and literature, and towards several conclusions. First, no one can deny that there was

current a general dissatisfaction with the machinery of the courts Christian; "popular feeling, in London at any rate," a distinguished Tudor historian has written, "had been inflamed by quarrels between the laity and the ecclesiastical courts over church-dues and jurisdiction," and there was much bitterness towards the secrecy of the ecclesiastical courts. The dry wood needed only a strong spark to burst into flame. The coroner's jury and its findings, together with the popular outcry over Hunne's death and against Dr. Horsley, point to what our generation can call only a credibility gap. And, we must observe further, there seems to be very little evidence that the Fifth Lateran Council, then sitting, was very much concerned, or sufficiently concerned, with these matters which so deeply troubled the laity; clearly, there was no effort to communicate what few efforts had been made towards reform to the laity. In England the effulgent figure of Wolsey, as Pollard graphically writes, "had been invoked to pale the ineffectual fires of an insurgent house of commons," after these fire-warnings had been continuously ignored by Rome. This early in the history of the Reformation, it is notable that Richard Hunne was a merchant; not that heresy or even strong anti-clericalism was a characteristic peculiar to his class, but that Hunne as a merchant enjoyed a high degree of independence and a high social status, whereas the city's parish clergy tended to be of a much lower social position. We can say with firmness that when the stand was taken against what so many of the London citizenry had long thought were the unreasonable demands of the clergy, particularly in areas of mortu-

ary payments and ecclesiastical procedure, it is no surprise that such a stand was made by a merchant.

Cooperation there was and had been between secular and ecclesiastical jurisdictions, but it turned on a perilous balance. While one would not use so anachronistic a concept as the consent of the governed here, nonetheless it would appear that in England the close cooperation of which Logan speaks in his study of excommunication was possible, and would continue, only so long as the secular power so consented. Once challenged seriously, and with the tacit support of the king, the force of the ecclesiastical arm fell to the ground. Further, it follows—if my reading of the Hunne case is accurate—that the Reformation in England began in 1515 but was interrupted. Checked by a number of forces—and not least by the enormous and then-increasing concentration of power in the hands of Wolsey (so much of it illegal, *i.e.*, contrary to or without the sanction of existing canon law)—the Reformation was held back until 1529. Then, at the time of Wolsey's fall (though not primarily for that reason), the forces for reform began to swell, and there is merit in echoing the cliché that the 1529 Parliament, the so-called Reform Parliament, began where the 1515 and 1523 Parliaments had left off. These observations and conclusions have an important bearing for the history of the Reformation in England; but, for the moment, I would urge that the Hunne affair is vital for understanding the relations between ecclesiastical and secular jurisdictions in England: and that, from a reading of the case as has here been put forward,

one would have to conclude for England at least that the long-overdue reform of the canon law (which had been on the agenda of the Fifth Lateran Council) was in fact too late to prevent the gathering storm, even if it had been successfully dealt with before the close of that council in April 1517, for the split had been manifestly widening in 1515, and October 1517 was already too late.

THE TRIAL OF SIR THOMAS MORE

There is no need to recapitulate the story of More's trial—already well told by Chambers, it has more recently been twice told by Reynolds, and there is of course the version by Bolt in *A Man for All Seasons*, which has already influenced the way that our students picture and think of the trial. Yet some aspects deserve commentary in the light of our present discussion.

Long imprisoned in the Tower; yet the length of that imprisonment, while it grabs our hearts with fear and pity, the length is not so extraordinary as the quality of the solitary life More lived, as we know from the evidence of the *Prayer Book* and from the Tower writings. The final events in More's case moved swiftly, after the trial of John Fisher on June 17, 1535, and his beheading on the June 22. A grand jury at Westminster returned a true bill against More, described as "late of Chelsea," on June 28, and the trial was set for July 1. Crucial to the concluding part of the indictment is the charge of the jurors that "the aforesaid Thomas More, falsely, traitorously, and maliciously" deprived the king of the dignity, title, and name of the

Supreme Head on earth of the Church of England.

More's first reply stressed the fact that he was being tried under acts passed while he was imprisoned, and that during this time of imprisonment he had kept silent on all matters pertaining to the State.

Touching, I say, this challenge and accusation, I aunswere that, for this my taciturnitic and silence, neyther your lawe nor any lawe in this world is able iustly and rightly to punishe me, vnlesse you may besydes laye to my charge eyther some worde or some facte in deede.

(Harfsfield at 185)

It is at this point that More argued that

if the rule and Maxime of the ciuill lawe be good, allowable and sufficient, that *Qui tacet, consentire* (he that holdeth his peace seemeth to consent), this my silence implyeth and importeth rather a ratification and confirmation then any condemnation of your Statute.

(Harfsfield at 185-86)

More, it is clear, rested his case upon this subtle principle, supported as it was by civil law tradition—but he was speaking to men trained in the common law, not civilians or even canonists. It was a delicate principle, and the tactics of arguing upon it to such a body of judges must be seen as a desperate remedy. Professor Elton has recently reminded us of how relatively undeveloped the law of treason was on the eve of the Henrician Reformation, and so it was. Mere treasonable utterances had already been construed by fifteenth-century common-law judges as constituting an overt deed within the meaning of the statute of 25 Edw. III, st. 5, c.2 (1352): words, it

is clear, “were quite often treated as equivalent to overt deeds in trials of treason.” It is then, perhaps not so remarkable that the woolier minds among the Tudor common lawyers could with some force of sincerity have believed that the withholding of consent, particularly by the king's former lord chancellor, be construed as treasonable. Greatness or high place gave no security against the suspicion of treason, as we know from the histories of the Buckinghams, Poles, Wyatts and others during the reign of Henry VIII.

Then there is the quite different matter of Rich's testimony. It does More no good now, as it would have done him no good then, to point out that generally in ecclesiastical matters involving good faith, contracts, and the like, two witnesses would have been required; certainly, in heresy proceedings, it would be most unusual to find fewer than two witnesses to establish the guilt of the accused. Heresy was a kind of treason of the soul; there are parallels, and we should not be surprised by an awareness of such parallels. But on this point, at least, the courts christian would have given a witness somewhat more safeguards than did the court that tried More.

Roper quotes two of More's speeches in some detail, and they are so vital that they must be quoted again here. While speaking to the discharge of his own conscience and to the demurrer that the particular law under which he was being charged was contrary to the laws and statutes of England, he cites *Magna Charta*:

Quod Anglicana ecclesia libera sit, et habeat omnia iura sua integra et libertates suas illoesas.

(Roper at 93)

Speaking thus against the intrusion of the authority of the State into a field reserved, as he argued, to the Church, More was interrupted by the chancellor, Audley, who asked More if he set his judgment against that of so many learned men, the bishops and the universities. More replied:

If the number of Bishoppes and vniuersityes be so materiall as your lordeshippe seemethe to take it, Then se I litle cause, my lorde, why that thing in my consciens should make any chainge. For I nothinge doubtte but that, thoughte not in this realme, yeat in Christendome aboute, of thes well lerned | Bishoppes and vertuous men that are yeat alive, they be not the fewer parte that be of my mind therein. But if I should speake of those whiche already be dead, of whom many be nowe holy saintes in heaven, I am very sure it is the farre* greater parte of them that, all the while [they] lived, thoughte in this case that waye that I thinck nowe. And therefore am I not bounde, my lord, to conforme my consciens to the Councell of one Realme against the generall Councell of Christendome.

The thrust of More's conciliar thought surfaces here: his argument and appeal are anchored upon a General Council of Christendom, not upon a Pope, and least upon the single historic figure who was then sitting in the chair of Peter. Although it may be said that this is a theological, or ecclesiological point, I would insist that it does have very deep implications for More's legal thought. His notion of the universal competence and jurisdiction of the canon law of the church of Christendom is involved, and he would not subordinate that law to the law of one realm.

One final point, and as Roper contains

the entire matter within a single paragraph, I shall read him entire:

Nowe when Sir Thomas More, was thavoydinge of the Indictment, had taken as many exceptions as he thought meete, and [many] moe reasons then I can nowe remember alleaged, The Lord Chauncelour, loth to haue the burthen of the Iudgmente wholye to depend vppon himself, there openlye asked thadvise of the Lord Fitz James, then Lord Chief Justice of the kings Bench, and ioyned in Comission with him, whether this indictment were sufficient or not. Who, like a wise man, awneswered: "My lords all, By St Julian" (that was euer his oath), "I must needes confes that if thacte of parliament be not vnlawfull, then is not the Indictment in my conscience insufficient."

It was indeed, to echo Reynolds on this point, rather late in the day to question the sufficiency of the indictment, and Fitz-james's answer is most guarded: if the Act of Parliament was lawful, then is the indictment sufficient. But if it were not, Fitz-james's guarded reply (couched in the negative) does not dare to go that far. Yet that, surely, is the point.

CONCLUSION

That Thomas More lived in a complex age is a truism. Indeed, one might well quip that all ages are complex (to those that live in them), only some are more complex than others. Yet Tudor historians and all scholars dealing with the literature and thought and institutions of the period would substantially agree that there were profound transformations taking place within the lifetime of Thomas More, and not least within the legal institutions, concepts, and the very language of the law.

But More himself did not question—ever, anywhere, so far as I know—the organic notion of the two arms of the law, the secular (or civil) and the ecclesiastical; for only the first of which he was responsible (as lord chancellor), and the second of which (as a layman) he did not control, yet in which he played a significant, if as yet undetermined, role.

It seems unmistakably clear to me that More was a legal amphibian, who could move and did work within the two systems and within their interface—and, still further, that he believed in the possibility, indeed the necessity, of the two systems working together. A dissenter may ask, didn't everyone? I should have to answer quite firmly, no! There were many who fought the power or the abuses of the ecclesiastical system, like Roy and Tyndale and a number of others—and perhaps those who complained against the language, or power, or mysticism of the common law provide a needed parallel—but there was at least one who wrote, and this we know for certain, powerfully and persuasively against the ecclesiastical system *in toto*, Christopher St. German. Thomas More was not writing against straw men; there was a challenge, and from 1529 to 1534 he tried to meet that challenge. After 1532, May 15 to be precise, with the Submission of Clergy he must have known that he had failed, that the fight was lost. Why then continue the fight? There was first the effort to defend the Church or the hierarch, or even more importantly what More conceived as Christendom against charges which he thought inaccurate or unjust, and progressively malicious. There was secondly the hope of changing the minds, or

modifying the views, of the many who would otherwise be won straight over by advocates of the New Lutheran Learning. But I think as much as all else there was that in More which could not abide a false case or position and have it win by default; simply, he had to answer St. German.

To a lawyer like More, the matter of jurisdiction which was so much the heart of the Hunne affair was a vital matter, and it connected intimately with his own case. After the verdict had been delivered in his own trial—and only then—More gave forth his mind in one last great speech, as we all know, declaring that he had all the councils of Christendom and not just the council of one realm (and councils of the past, not just the minds of the present) to support him in the decision of his conscience. (And may I interject that I have elsewhere offered a reading of Roper's *Life of More* as a Tudor saint's life about a man with a superlatively developed conscience?) If the Hunne affair turned upon the jurisdiction of two courts over a mortuary garment and the attendant causes between a layman and his parish priest, his bishop, and all that, More's trial turned on the Erastian question of state dominion or jurisdiction over the Church and his conscience. More died, not so much for any one historic Pope—friend of Erasmus and of so many diplomats with Roman experience that he was, he could have had no illusions about Julius or Leo or Clement VII, their dilatory successory who helped the Reformation to come to a boil in England through his calculated strategy of doing nothing over Henry's divorce proceedings—or even for an isolated, general notion of the papacy. More's death, as Pro-

fessor Sylvester has recently written, "resulted directly from his belief that no lay ruler could have jurisdiction over the Church of Christ," and his concept of the Church was more compatible with a post-Vatican II concept than with a Tridentine.

Born into a lawyer's family, trained in the household of an ecclesiastic who was both archbishop of Canterbury and Lord Chancellor of England, schooled in the common law to which he devoted so much of his mature life and skilled in much of the lore and technique of the civil and

canon laws as well, More died as he had lived: a lawyer who accepted and practiced within the structure of a double legal system that until the eve of the Reformation had functioned with its delicate balances, an implicitly organic structure of two arms of the law, of two great court systems which if they did not reinforce or complement each other had at least demonstrated that they could coexist—less than perfectly, of course, but with some considerable efficiency and with no little justice—and he could not accept a subordinating of the one system to the other.