

1941

St. Thomas More As Judge and Lawyer

Garrard Glenn

Recommended Citation

Garrard Glenn, *St. Thomas More As Judge and Lawyer*, 10 Fordham L. Rev. 187 (1941).
Available at: <http://ir.lawnet.fordham.edu/flr/vol10/iss2/2>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

ST. THOMAS MORE AS JUDGE AND LAWYER

GARRARD GLENN†

IT MAY be strange to speak of a Saint in connection with a chattel mortgage on an automobile, or the Federal Rules of Civil Practice. In our schools of philosophy, indeed, St. Thomas Aquinas is often invoked, but a learned discussion as to the entity of the being seems more respectable, somehow, than a discussion of chattel mortgages or the high price of credit. But respectability is often quite distant from the realities, and because St. Thomas More belongs to our profession, he was always very close to the common things that affect the citizen. His *Utopia* shows that, but so do his achievements as lawyer and judge.

He is our patron, be it remembered; and it was high time that we had one. St. Giles of Brittany was, indeed, supposed to fill that place; but so small a part did he play with us that Mr. Wigmore had to devote quite a lot of research as to the life of that Saint; and, when Mr. Wigmore feels compelled to search antiquity, somehow I feel that whatever he is looking for is very far away. But St. Thomas More needs no research. He walks among our courts and schools today just as if Westminster Hall was still partitioned off into the Chancery and the three courts of common law. So pervading, indeed, is his personality, so lasting, that even a mere outline of his professional achievements must take account of it. That is why I mention the chattel mortgage and the high price of credit. *He* was interested in such things, and much of his professional fame related to these humble subjects. That is because he was an accomplished lawyer and a distinguished judge. When to this one adds the fact that his was a great personality, we can understand why St. Thomas More has always bulked large in the annals and traditions of our common law.

Thus it is a fact that, although this man died for a Religion which so soon was to be proscribed by penal laws in his native England, yet his fragrant memory persisted in the ranks of our profession, and never a generation went by without some mention of More, in book or essay. And always it is a pleasant, an affectionate mention, as though this agreeable man had lived and been seen by the writer. The account of his trial, as it appears in the State Trials, is largely taken from the *Life of Henry VIII* which was written by Lord Herbert of Cherbury, published

† Professor of Law, University of Virginia, Department of Law.

Address, revised for publication, delivered at the luncheon of the Saint Thomas More Society of America, Washington, D. C., May 16th, 1940.

in 1649. Lord Herbert was certainly not a Catholic,—indeed, he was hardly orthodox about anything, but of More's trial he said:

"This was the Judgment pronounced upon this great man, who had deserved so well of the king and kingdom, and for which Paulus Jovius calls King Henry 8 another Phalaris. . . ."¹

"It is said, when news of his death was brought to the King, who was at that time playing at tables, Anne Bullen looking on, he cast his eye upon her and said, 'Thou art the cause of this man's death:' and presently leaving his play he betook himself to his chamber, and thereupon, fell into a fit of melancholy."²

Two other characters, also diverse, mention him. The discursive John Aubrey, who certainly spared not the knife when he wrote of the great, was entranced by the wit of St. Thomas. "His discourse," said Aubrey, "was extraordinarily facetious"; but he suddenly breaks off, does this seventeenth century sophisticate, to say,—prophetically as it turned out,—"Methinks 'tis strange that all this time he is not canonized, for he merited highly of the Church." Another of an earlier date, with none of the wit or charm of Herbert or Aubrey, also had a reminiscence of More. I refer to the learned Serjeant Stone of Lincoln's Inn, who wrote the first book on bankruptcy. Stone quotes "a very wise and witty" saying of More whereby he got the best of a pertinacious bore. It was all in Latin; but it had a point. Then, in the eighteenth century, Blackstone was caught by a story of More which tradition's tide had brought to him. It seems that when More was in Flanders on an embassy to the Emperor Charles V, a learned doctor of the laws announced, at Bruges, that he was prepared to debate any point with anybody. Quite a large order, as it would seem to us of today, but that fashion of the Middle Ages still lingered, it would appear, in the Universities of More's time, as also at his own Inns of Court. More was there, as it happened, on other business; but he could not let this challenge go by, and so he put a point which related to our common law. It was couched in such a combination of bad Latin and "law French", (with a couple of old English words thrown in) that no continental could make head or tail of it; and so the learned doctor of Bruges had to retire, red-faced, from a question which any law student in More's London could answer readily. And thus, says the delighted Blackstone, "This Thraso or braggadocio, not so much as understanding those terms of our common law, knew not what to answer to it, and, so he was made a laughing stock to the whole

1. The Trial of Thomas More, 1 How. St. Tr. 394 (1809).

2. *Id.* at 396.

city for his presumptuous bragging."³ For your benefit I will give the question: *An averia capta in vetitio namio sunt irreplegibilia?* It means, whether cattle taken *in withernam* are redeemable. But the phrases, *averia*, *in withernam*, and *pledge* were quite beyond the ken of a man across the Channel.

After Blackstone, it remained for other judges and writers of England to carry on the tradition of More. It was Lord Mansfield, who admired English equity from afar, and did so much to carry its spirit into common law process, it was Mansfield who attributed to St. Thomas one of the finest doctrines of equity. I will get back to that in a moment; but meanwhile let me turn to Lord Campbell. He says that when he was offered a sinecure well known to this day in England, the Chancellorship of the Duchy of Lancaster, he hesitated about accepting it, because his Scotch principles were against the idea of sinecures. But Lord John Russell, says Campbell, "overcame my scruples by saying, 'Remember, this office has been held by Sir Thomas More and by Dunning'."⁴ Dunning was close to the time of Russell and Campbell, because he had been a great liberal as well as a leading barrister, some two generations previously; but the example of More, although so far away, was equally potent with those nineteenth century Whigs.

Later Lord Campbell wrote his *Lives of the Chancellors*, deservedly a classic with us; and of all that long chain of men, many illustrious, as we know, Lord Campbell reserves the greatest praise for our patron. "I am, indeed, reluctant to take leave of Sir Thomas More," is the conclusion of a masterful sketch which fills four complete chapters. Equally eulogistic is Foss, of the Inner Temple, whose *Judges of England*, like Campbell's *Lives*, is an authority for us.

Finally, only this season there appeared a book which, in my opinion, will rank as a classic. It is Scott *on Trusts*, the last word on the subject, and apt to be the last word for many years to come. This book is written after the grand manner, in that it takes due account of the origins of things, and so, in the fore part, there is an excellent sketch of English equity, from the time when the Chancellors started the practice of sitting in a separate court of their own. That was about 1422; but, although a century elapsed before More was sworn in as Lord Chancellor, yet Mr. Scott's view is that equity "did not begin to assume the shape of law until More became Chancellor"; and then, according to this modern authority, "equity took a great stride forward during his adminis-

3. 2 CAMPBELL, LIVES OF LORD CHANCELLORS (1874) 24.

4. 2 CAMPBELL, LIVES OF LORD CHANCELLORS (1874) 22 note.

tration."⁵ This is the first time, I believe, that the rise of English equity has been so clearly fixed, a system which Lord Mansfield later was to describe as "noble, rational and uniform."

Now, how can all that be said of More? Of course, he was the first lawyer ever to be Chancellor, and the very fact that he was a lawyer has stirred up Mr. Scott's sympathy, as one can plainly see; for Mr. Scott has no use for Bishops as Chancellors, whether they be Catholic, as was the case with More's predecessors, or Anglican, as happened occasionally in later reigns. But St. Thomas More was Lord Chancellor for a very short time, less than three years before Henry VIII got him; and thus it would seem strange that in so short a period the man could have made a name as the father of equity. We are led, then, to ask, what happened during this period, all too short, to make St. Thomas More a great Chancellor?

Well, Lord Mansfield knew of one thing that happened, and fortunately, he told us. Lord Campbell, himself a successor of More on the woolsack, mentions other things, gathered from the Life that was written by More's son-in-law, Roper (himself a barrister); and between them, we can get the facts.

We have to resort to this devious method, you see, because up to that time the opinions of the Chancellors had not been reported regularly. Occasionally the Year Books would write up a case in the Chancery; but by the time More came to the bench the Year Books themselves had ceased; and it is, perhaps, characteristic of the part of Henry VIII's reign which then began, that there was utter darkness over his courts of law. But what More did was threefold, as we are fortunate enough to know. First, he reformed the practice in Chancery. Second, he created the idea that equity would relieve against forfeitures, thereby transforming the ancient bond into a modern obligation, and also laying the groundwork for the present day mortgage, with its equity of redemption. And third, he proposed, far in advance of his time, that fusion of law and equity, in remedial practice, which his native country enjoys today under the Judicature Act of 1873, but actually came into being with the New York Code of Procedure of 1848, and lately has been exemplified in the Federal Rules.

As to chancery practice, no doubt it needed reforming. The ecclesiastics who preceded More were hardworking men,—at least Morton was, as More himself tells us; and even Wolsey worked at the job, if the faith-

5. 1 SCOTT, TRUSTS (1939) § 1.1. See also 5 HOLDSWORTH, HISTORY OF ENGLISH LAW (1924) 218, 222.

ful Cavendish is to be believed. Nevertheless they were not lawyers, as Mr. Scott says; nor were they used to lawyers' ways. But More, on the contrary, was a lawyer who had earned his advancement by hard work at the Bar. It takes that kind of a man to effect true reforms. Three centuries later, Lord Campbell pays tribute to the Rule of Court which More promulgated. It was ordered by this rule, "that no subpoena should issue till a bill had been filed, signed by the attorney; and he (the Lord Chancellor) himself having perused it, had granted a fiat for the commencement of the suit."⁶ To us of today this sounds archaic, but to the men of that time it meant a great deal. It did away with the graft of minor officials, who demanded a subsidy before process could issue; and it meant, too, that henceforth a suit in the court was to be a real suit, with no irresponsible person using equity process for purposes of blackmail. At one stroke, then, St. Thomas More converted the Chancery into a court of justice; an impersonal tribunal open to all, but not to be used for improper purposes.

The second contribution related to our substantive law, and a most important part at that. It is pictured by an opinion of Lord Mansfield in 1780. There a default occurring on the due date of a bond, but being later made good, the question was whether the debtor who had received a discharge in bankruptcy, nevertheless could be sued for the penal sum. The court held not, and in the course of his opinion Lord Mansfield said:

"All forfeitures are odious, if carried beyond their true intent. Besides, (I here speak my own opinion), in questions between the parties, I should exceedingly incline to say, that annuity bonds are within the reason, though not the letter, of the Act of the 4th and 5th of Queen Anne; an Act made to remove the absurdity which Sir Thomas More unsuccessfully attempted to persuade the Judges to remedy in the reign of Henry VIII. For he summoned them to a conference concerning the granting relief at law, after the forfeiture of bonds, upon payment of principal, interest, and costs; and when they said they could not relieve against the penalty, he swore by the body of God, he would grant an injunction."⁷

I don't know where Lord Mansfield got this, any more than I know where Serjeant Stone, William Aubrey and Blackstone got their stories of More. I don't believe that More used the oath that is accredited to him; for his son-in-law, Roper, says that his favourite oath was by

6. MORE, *LIFE OF SIR THOMAS MORE* (Kennedy ed. 1941); 2 CAMPBELL, *LIVES OF LORD CHANCELLORS* (1874) 37.

7. *Wyllie v. Wilkes*, 2 Dougl. 519, 522, 99 Eng. Reprints 331, 333 (1780).

St. Julian. We must remember that even girls in those days swore by a favourite Saint, thus Joan of Arc, at her trial, said she had never (even while soldiering in the Army) used a stronger oath than "By St. Gris." But whether St. Thomas was so profane as appeared in the legend of which Lord Mansfield availed himself, the important fact is that this matter of forfeitures worried him, and, as Chancellor, he took pains to stop the practice by enjoining the action at law.⁸

Now, let me give you a picture of the time so that we may understand the trouble that confronted the courts. If you pick up any law book of the fifteenth, sixteenth or seventeenth centuries, you will find much learning on the subject of conditions. Although it is to go to Rome in a day, one must perform the condition or lose his inheritance, and so on. Thus, Littleton, thus Perkins' Profitable book, thus Doctor and Student; and to the same effect is Blackstone, even in Lord Mansfield's time. To us, of course, this sounds like an exercise in logic, detached from the realities, silly stuff that is quite outmoded. But it did not sound that way to Thomas More, and the reason was that he was an experienced lawyer. Scholar he was, yes,—friend of Erasmus and Colet, yes—but he also had been at the Bar. His practice, as his son-in-law Roper said, netted him "without greefe not so little as four hundred pounds by the year," by modern standards £20,000, or \$100,000 a year;⁹ and the case of the Pope's ship, which he won against the Crown, led to the canny Henry VII vowing that "for henceforth" the King would have his services. As he said in a letter to Erasmus (tr. Campbell) his life at the Bar was spent "in pleading, in hearing, in deciding causes, or composing disputes as an arbitrator." Well, an experienced lawyer who ascended the bench would know what the trouble was.

It lay not in conditions, but in money lending. The penal sum of the bond, and the mortgage of land, were aimed to cut off the unlucky debtor who defaulted on the due day. In case of default he was bound for twice the debt, if the loan took the form of a bond; and a man who borrowed on mortgage lost his land if he did not perform the condition subsequent, which was payment of the debt on the "law day" and no later.

8. Loyd, *Penalties and Forfeitures* (1915) 29 HARV. L. REV. 117; Brightman, *Liquidated Damages* (1925) 25 COL. L. REV. 277; McCormick, *Liquidated Damages* (1930) 17 VA. L. REV. 103.

9. In which aspect he may be compared with St. Ives, of whom mention was earlier made. As Caxton says in his translation of the *Golden Legend*, St. Ives never took any fees; on the contrary, he practised "without any acception or taking of money nor none (*sic*) other goods." St. Thomas More was really one of us.

Of course, our law of today is removed from these barbarities. Default on a debt due by bond means, not recovery of the penal sum, but only the actual loan with interest; and the mortgagor, as every law student knows, has an equity of redemption, of which he cannot be deprived. But the origin of this many men did not know until Lord Mansfield gave credit where it was due. It took an experienced lawyer to suggest the great idea of redemption for the debtor; and there, in the two and a half years he was Chancellor, and there, I say, Thomas More performed one of the greatest works of his career.

It is possible, indeed, that More's work is not finished, because one can observe, in loans on automobiles, radios, *etc.*, a distinct return to the forfeiture idea. The conditional sale reached the point where England was compelled to legislate, recently, so as to save the borrower from a forfeiture of the sort that our patron saint abhorred so heartily; and I find in a late issue of the *Commonweal* an article called "The Auto Finance Racket," which shows the need for similar legislation with us, unless our courts do their duty with respect to preserving, even for the small man improvident, his true equity of redemption. So in the great idea of equity to which he turned his energies, St. Thomas More was quite modern, just as he was in all other things.

That leads me to the third idea which he projected into the centuries that were to come. This man who was born during the Wars of the Roses, had the notion that law and equity could be brought together. Lord Campbell in his *Life of More* said as to this:

"Differing from Lord Bacon in the next age, he was of opinion that law and equity might be beneficially administered by the same tribunal, and he made an effort to induce the common-law Judges to relax the rigor of their rules, with a view to meet the justice of particular cases; but, not succeeding in this, he resolutely examined their proceedings, and stayed trials and executions wherever it seemed to him that wrong would be done from their refusal to remedy the effects of accident, to enforce the performance of trusts, or to prevent secret frauds from being profitable to the parties concerned in them."¹⁰

That is Lord Campbell's conclusion; but More's son-in-law Roper in his *Life*, puts it a little more cautiously.

"And as few Injunctions as he graunted while he was Lord Chauncellor, yeet were the(y) by some of the Judges of the Law misliked, which I understandinge, declared the same unto Sir Thomas Moore, who answered

10. 2 CAMPBELL, LIVES OF LORD CHANCELLOR (1874) 38.

me, that they have little cause to find fault with him therefore. And thereupon caused he one Mr. Crooke, cheefe of the six Clarkes, to make a Dockett, contayninge the whole number and causes of all such Injunctions, as ether in his tyme had alreadie passed, or at that present tyme depended in any of the Kinge's Courts at Westminster before him. Which done, he invited all the Judges to dinner with him in the Councell Chamber at Westminster, where after dinner when he had broken with them what complaints he had hard of the Injunctions, and moreover shewed them both the number and causes of every of them in order soe plainely, that, upon full debatinge of those matters, they were all inforced to confess, that they, in like case, could have done no otherwise themselves, then offered he this unto them, that if the Justices of every Court, unto whome the reformation of rigor of the Law, by reason of there office, most specially appertained, would, upon reasonable considerations, by there owne discretions (as they were, as he thought, in conscience bound) mittigate and reforme the rigor of the Law themselves, there should from henceforth by him no more Injunctions be graunted. Whereupon when they refused to condescend, then sayd he unto them: 'Forasmuch as your selves, my Lords, drive me to that necessitie for awardinge out Injunctions to relive the peopl's injurie, you cannot here after any more justly blame me;' after that he had sayd secretly unto me: 'I perceave, sonne, whie they like not soe to doe. For they see, that they may, by the verdict of the Jurie, cast off all quarrells from themselves upon them, which they account there cheife defence, and therefore am I compelled to abide the adventures of all such reportes'.¹¹

It would take a book to trace the development of this idea, that the more the principles of equity are absorbed by common law process, the fewer the "injunctions against actions at law." Year after year, every student of Equity II sees how the process of absorption marched along during the eighteenth and nineteenth centuries; and it was only fitting, then, that Lord Mansfield, to whom so much of this is due, should evoke the memory of Thomas More, the true patron of every real lawyer and every conscientious judge.

No wonder, then, that our Saint has been the good companion of Mansfield, Blackstone and Campbell. But he also warmed the hearts of such diverse creatures as Lord Herbert of Cherbury and John Aubrey. Indeed, he belongs to every one who speaks the English tongue. Especially now, when possibly our civilization may disappear before the blows of the alien men, we need the help of one who remained true to the day of his death. Every child needs the prisoner who remembered, and

11. ROPER, *LIFE OF MORE* (Hitchcock ed. 1935) 44.

repeated to his daughter, the stories that had been told him in his own childhood, about Father Fox and his penitent, a most wily Wolf. The soldier needs the man who, in that eventful hour when he must choose between life and death, decided for death rather than dishonour, and thereby, as he lightly said, "gave the devil as foul a fall as ever he had." The plain man cannot but be helped by the story the veteran lawyer told, on the eve of execution, about the recalcitrant juror who hung out for a verdict for an unpopular defendant; and when the foreman said, "Why can't you go along with us for the sake of good company?" answered: "Nay, but I would not be in good company always. If I join in the verdict, I would perjure myself and go to hell, and that, indeed, would be a lonesome journey." But we of the Bar, practitioners and teachers, need him because he showed us how it is possible for a man to lead a busy life, to find time for his family, to leave behind him the idea of reforms which the centuries were to develop; and, better still, also to leave the memory of a vibrant personality.