

Moreana, no. 3 (Jun. 1964): 5-22.

THE 'NEW' DOCUMENT ON THOMAS MORE'S TRIAL.

by J.Duncan M.Derrett

One of the most pleasant and informative surprises in *Moreana* N°1 (1963) was Mr E.E.Reynolds' publication (in partial transcript) and discussion of the damaged manuscript which is to be referred to as Public Record Office, State Papers of Henry VIII (S.P. Hen.8), 2, Folio R, fos. (21 and 22 : unfoliated). This document was vaguely calendared at Letters and Papers of Henry VIII, volume 8, n° 814 (p.309), item 2. To Mr. Reynolds belongs the considerable credit of having tracked down the document and realized what its importance is for the study of the trial of More. To him we owe a considerable opportunity of, for the first time, making a judgment of what More really said in the Tower to Sir Richard Rich. This is important because we need to know whether More was lying, or quibbling. If he was quibbling, it is worth remembering that to quibble about minute distinctions in law was not only the fashion of the age, but his life-long profession as an advocate and a judge.

The present writer had already formed an impression of what must have taken place at that famous conversation long before Mr. Reynolds made his sensational discovery. The proofs of the relevant study came to hand after *Moreana* N° 1 had reached him, and he was able to make alterations sufficient to refer the reader to the article and

to show what new contributions have been made by the discovery ; but an appraisal of the discovery in detail had to await this present opportunity, which is in any case apt, seeing that while Mr. Reynolds' discovery must be accorded every appreciation, the present writer cannot accept Mr. Reynolds' conclusions from it.

Mr. Reynolds is evidently right when he says that the significance of the damaged manuscript had escaped everyone. But when he says that "it is now confirmed by this official record which was made between the conversation and the drawing up of the indictment" that Rich committed perjury he places on the document a weight which might be greater than it can bear. Thus we are bound to examine its contents (so far as these are legible) closely, and once again relate them to the other sources of information on the conversation. Where one will agree without hesitation with Mr. Reynolds is this : the document is anterior to the indictment, and good evidence of what was believed by someone to have been the purport of the conversation at a time when the indictment had not been drawn up.

The present writer is struck by a fact of which Mr. Reynolds does not in fact make much -namely that the document contains two abstracts (indeed the document is an 'abstract' or 'brief'), the first of More's replies to questions put to him on the 3rd June, 27 H.8 (1535), by the committee which included Audley and Cromwell, and the second of the conversation with Rich on the 12th June. In other words both abstracts were to serve one purpose, and a comparison of them with the Latin text of the indictment reprinted, for example, in Chambers' edition of Harpsfield's Life, shows plainly that the purpose was to instruct the draftsman of the indictment. Here we have, then, an extraordinarily precious document : Cromwell's

approved Brief for the draftsman. The learned discoverer of this document has drawn emphatic attention to the portion of the abstract of the second conversation which does not appear in the indictment. One may readily assume that the draftsman thought better than to include it in the indictment (for what Rich said -the omissions relate to words of Rich- would not be a charge against More), and if by chance it was included any lawyer retained for the Crown (for example Rich himself) would have advised its removal.

Before proceeding further the present writer would like to reproduce the parts of the document which are relevant in a manner more closely representing the original than does Mr. Reynolds' transcript. Mr. Reynolds took the aid of a palaeographer whose accuracy -in so important a matter- left a little to be desired.

We are already familiar with the tenor and progress of the conversation up to the point where Rich asks More : "You know that our Lord the King is constituted chief head on earth of the Church of England...why, Master More, can you not affirm to accept the same, just as you would in the preceding case, that I should be made King, in which case you agree that you would be obliged to acknowledge and accept me as King ?" Whether Rich actually put it in that way or not is of little importance, for the indictment turned not upon these preliminary manoeuvres or the exact phrasing of Rich's last question, but on More's answer. What we have in our new document is this:

"Whereunto the said More said that the cases were not lyke by cause that a King (ma)y be made by Parlyament and a King depryved by Parliament to which act any [erasure] subgett being of the Parliament may gyve his consent but to the case (you put) a subgett can not be bound by cause he cannot give his consen(t) (?o)n hym (?in) the

Parliament, saying further that although the King were accepted (with) in England yet moste utter parts doe not affyrm the same."

Rich's rejoinder (which is entirely new, and Mr. Reynolds draws much attention to it) proceeds as follows :

"Well, Sir, God comfort yow, for I see your mynd wyll not change which I fear will be very daungerous to yow for I suppose your concelement to the questyon that hath ben askyd of you ys as high offence as other that hath semyd (?). And thus Jesu send yow better grace."

To this extraordinary valediction we must devote attention presently.

First let us consider what More is shown as saying. There can hardly be any doubt but that Rich, and possibly the three witnesses planted there to hear the conversation, were interviewed by Cromwell immediately after the occasion itself. Rich must have given an account of the conversation, which will have been taken down verbatim, and he of course will have given a colour to it which would not only keep him secure from attack (the times being what they were) but, if possible, obtain for him some commendation. His task had been delicate, and it must have taken a sly fox indeed to trap Thomas More. The crux was this, did More deny the King's title as Supreme Head on earth after Jesus Christ of the Church of England? The abstract makes it clear that More was replying to academic questions about parliament's competence. A king (note that the indictment says, rex, which has been mistranslated 'the king') can be made and deprived by parliament (which of course contains the king himself as a member), and according to medieval theory each subject is present in parliament and therefore bound by its lawful acts, wherefrom it follows that every subject is bound by an Act of parliament declaring

who shall have the throne -e.g. the Act of Succession to which oaths were required, in so far as this dealt with the succession simpliciter. But, in contrast, the subject cannot give consent in parliament to Acts relative to the supreme headship of the Church, once one takes the view that the Church is indivisible, which was itself a question. Granted that the Church is one and indivisible it followed as a matter of course that parliament had no competence to legislate regarding its headship, nor on other matters which were within the exclusive competence of the governing body of the universal Church, namely a general council. Thus the present writer finds no difficulty in interpreting the words "the subject cannot be bound because he cannot give his consent on him in the parliament" as meaning that parliament's act in that regard being without jurisdiction and so void, the subject could not be bound. One cannot give one's consent to something which is outside the power of the body seeking such consent. I cannot consent to the sale of the Eiffel Tower. More's comment that other nations did not accept what had been done in the instance alluded to by Rich looks at first sight like a piece of gratuitous comment. In fact it is relevant. Had the other nations unanimously accepted that Henry VIII was Supreme Head of the Church of England, had they even agreed that their respective kings were supreme heads of their national churches, there might be some ground for suggesting that the general consensus of Christians allowed this development, that some sort of substitute for a general council had spoken, and that what parliament had taken upon itself to do was retrospectively adopted or ratified. But in default of such evidence the Act was not binding upon the citizen whether in morals or law.

Thus, when we turn to the indictment which

was the offspring, in part, of this document, we see that More was accused of having denied the competence of parliament to confer (in the circumstances) the headship of the Church upon the king for the time being. Is this a denial he could have made? Certainly. He repeatedly made it. His correspondence with Cromwell (1) and to his daughter (2) - if the latter is genuine - made it perfectly clear that this was his view. In his motion in arrest of judgment at the trial he clarified it in every detail. He most certainly did not believe that parliament had this competence, and he is known to have denied that competence. Roper says that Rich accused More of saying that parliament could not make the king supreme head of the Church. The indictment tells us better than Roper can, of what More was accused. Yet it comes to exactly the same thing. Mr. Reynolds thinks (p. 16) that the categorical statement is missing in the indictment and in the document we call the abstract. But it is not. Competence was denied, for, as More says, the subject cannot be bound for want of the possibility of giving his consent.

How then could More so vehemently deny at his trial that he had even said these words? Of much less importance is the discrepancy about his alleged statement that he called the Act a two-edged sword - yet the discrepancy is exactly the same. Part 1 of the abstract shows him directly describing the Act as such a sword, but his own account of this in the letter to his daughter (if genuine) indicates that he was giving an hypothetical opinion. Here too More denied that

(1) Rogers n° 199, p.498, ll. 230 ff.

(2) Ibid. n° 200, p.506, ll. 117-129. Cf. n° 206, p. 525, ll. 405 ff.

he spoke the words as alleged against him, and here the jury disbelieved him.

There is very little comfort for the friend of More in the allegation that More did not say in conversation with Rich what he had previously written and was undoubtedly his true opinion. If it was a crime to utter such an opinion, and he was tricked into uttering it, well, even we cannot deny that he was unlucky, and ought to have been clever enough to avoid the trap. If More had been accused of opinions which he did not hold that would be altogether a different matter.

According to Roper not only did More deny that he had denied the king's title and that he had spoken the words alleged against him, but he accused Rich of perjury. The question would be easier to answer had the other men present in the room at the time given evidence, but both Southwell and Palmer refused to testify as to the contents of the conversation, which must have annoyed Cromwell very much and puzzled the jury. Indeed people were very puzzled about this. The men had obviously been planted for this very purpose, and they apparently gave no explanation of their behaviour which has survived. One possible explanation is that they were frightened by More's denunciations against Rich. Another is that at the last moment they doubted whether the words alleged in the indictment did really correspond exactly with those which they overheard or ought to have overheard. Contemporaries searched and apparently found a most curious explanation, which was never treated seriously by the biographers until Thomas More, More's great-grandson. This was that Rich stank so abominably that no one could bear to stand close to him at that time, so that the men had their faces averted from him, and were thus not in the best position to catch what was said with perfect and exhaustive

accuracy. The present writer has his own guess to add to these, as will appear below.

Mr. Reynolds believes that the question is answered by Rich's valedictory comment. Let us admit at once that there is no proof that Rich ever made it. The present writer feels that if More had heard it he would have used it in his cross-examinatory speech to Rich. He would have said, "You yourself know that I never said these words, for you were evidently disappointed, and actually accused me of concealment, as the others had done previously." Had More said this one may feel sure that either Roper or the contemporary Latin reporter (author of what the present writer calls R) should have noted it, and that neither does strongly suggests that More did not say this, did not refer to Rich's disappointment, and therefore never heard Rich's comment, if indeed he actually made it. But though we admit this without hesitation, we cannot avoid noting that Cromwell was told by Rich that he made that comment. In other words Rich reported to Cromwell that he had reproached More for concealing his opinion on the subject, possibly in order to give Cromwell the impression that he had made one further, desperate attempt to get something definite out of More. Rich therefore feared, or believed, that he had failed. From this Mr. Reynolds concluded that More did not deny the supremacy, and that Rich perjured himself when he swore to the conversation set out in the indictment. But this does not follow at all.

The reason for Rich's disappointment is plain enough, in view of the words which Rich himself attributed to More (as we see from the abstract). More is made out to have said to Rich that the case put by Rich differed from the previous cases, because there was a distinction. The distinction lay in the liability of the subject to be bound by the statute: in a context of a temporal nature,

which was national, the subject was bound; whereas in a context of a spiritual nature which was also international the subject could not be bound ipsissimo statuto. In other words More confined himself to giving a legal opinion on the subject of a citizen's liability to be bound by a statute. This was part of an academic discussion, entered into by both parties in the spirit of debate. Both were lawyers, both knew the basic principles of statutory interpretation; the discussion was such as might take place between Benchers of any Inn of Court. Rich's disappointment lay in More's keeping the answer strictly to the question 'if the context is...the subject will be bound; but if the context is...the subject cannot give consent, and cannot be bound.' His own personal opinion of the validity of the king's title was kept out of the discussion!

But though Rich was disappointed, and hinted that More would be charged merely for having concealed his opinion, since it was about to be alleged that he committed a crime merely in not stating his approval, Cromwell saw at once that in a court of law the distinction which More had so carefully preserved, and which had annoyed and frustrated Rich, would not prove to be material at all. And in this way: -Let us imagine a counterpart which will be readily intelligible to a non-lawyer: A cleric called A holds the benefice of village X, and a parishioner of village X, called B, refuses to pay his tithes. Proceedings are commenced against B to obtain payment of the tithes, and a friend of A warns B that B's attitude is unreasonable. In conversation with this friend B says, "I object to paying tithes." When he is asked what are the grounds of his objection he says, "I decline to give my objections, but if you ask me whether a man whose mother was never a married woman is qualified to hold a benefice I should be inclined to say he is

not, and I believe many doctors of canon law would hold this view." A commences proceedings against B in the civil court alleging that B told his friend that A was a bastard. B says to A, "I never said you were a bastard. I know nothing of your parentage. If your friend says that I said you were a bastard he is lying and if he swears this he is committing perjury."

In the present writer's opinion something very like this happened. More, qualifying his speech with evident reference to the academic nature of the discussion (which Rich did not report), showed why parliament in his view had no competence to grant the headship of the Church. This Rich reports as a statement that no subject can be bound by the Act of Supremacy. Rich was sad because More had only repeated what he had written in his letter to Cromwell, and thus Rich had not done what he had been paid to do, namely get a direct ad hoc opinion from More on the reality of the Supremacy. But Cromwell was not disappointed -since there is no real difference between saying that a man's mother was not married (which is one statement) and saying that he is a bastard (which is another). To say that the latter is not the same as the former is to quibble. If parliament in More's opinion had no capacity to legislate on the subject of the supremacy then More's opinion destroyed the king's supremacy, More was depriving the king of his title, and he was certainly within the Act of Treasons.

What point, therefore, was there in More's vehement denial that he had spoken the words alleged against him? Did he merely want to say that one or two words more or less disagreed? Surely not. He himself might not have remembered with perfect exactness what he had said. His point was, as Roper makes abundantly clear, that parliament lacked competence, and Rich reported, and the indictment transcribed, the effect of

this and not its tenor. If we refer to Roper (E.E.T.S. edn. repr. 1958, p. 85-6) we see that More asked Rich what would be the position if parliament said God were not God, and that Rich denied parliament's competence to make any such law (in the abstract and indictment Rich's objection is on the grounds of impossibility -for parliament cannot enact anything impossible). But we note that Roper does not give More's rejoinder, only he gives what More was alleged to have rejoined. Nowhere does Roper give what More said he had rejoined. That they were discussing parliamentary competence is agreed by both sides. Therefore it is hardly open to us to suppose that Rich merely invented the rejoinder. Thus More's own explanation of the situation (at Roper, p.89: "nothing affirming and only in putting of cases") fits what we know and may well describe what is concealed from us.

The reason for More's vehement denial may well have been that he was proud of having observed the distinction between giving an academic opinion on competence, on the one hand, and stating his estimation of the king's supremacy on the other. He had observed every care. The distinction without a difference had been significant to Rich as a lawyer, who may have committed perjury where a layman would be totally unaware of the distinction. More had also studied the meaning of the word 'maliciously' in the Act of Treasons. He believed as a good lawyer that unless one deprived the king of his title maliciously one was not within the statute, and to discuss the matter in large terms and upon general principles of jurisprudence with a fellow lawyer was not 'malicious'. This comes of being a lawyer. One can put too much faith upon quibbles and fine distinctions. One ought to know that it is difficult to predict whether the court will seize

one's subtlety and utilise it, or simply neglect it for the triviality it really is.

Rich's approach to More is not quite identically given in Roper and in our new abstract. Roper makes it appear that Rich was friendly but treacherous (p.84) ; the abstract shows Rich's elaborate courtesy (Mr. Reynolds speaks of a 'well-oiled compliment', justly). The present writer however sees no sign there of friendliness. Rich's parting words (whether spoken or not) betray his deep involvement with Cromwell and the governmental party and his resentment against More. Rich represents himself as wanting to correct More by argument, with the intention of reasoning him out of his obstinacy, not merely (and perhaps not at all) in order to save More's head, but in order to remove More's error, save his soul, and relieve the kingdom of the embarrassment which his opposition to the government constituted. He said "for me to give you advice is like pouring water into the Thames...", but might he not reason with him on the subject, not as a representative of the government (this to warn More that the occasion was not privileged and outside the contemplation of the statute), but as one lawyer to another? Rich wanted to persuade More, and in the course of it to elicit, for Cromwell's purposes, what More really believed. He was so keen upon this object that he failed to recognise More's opinion for what it was, namely a perfectly workable comment on the statute. Cromwell, who was a lawyer of a slightly different type, recognised what he saw, and was well content.

Thus, to sum up, there is no reason, whether from this precious new document or elsewhere, to suppose that More did not commit a crime within the Act of Treasons ; moreover there is every reason to suppose that he denied the capacity of parliament to make Henry supreme head of the

Church of England. More relied, it seems, upon the quibble that (to use an everyday English expression) to call a spade an 'agricultural implement' is to avoid calling it a spade. In a great many contexts of the common law such quibbles would be significant and operative : Coke's Reports are full of such instances, which now amuse or astound the modern lawyer. But he was unlucky in this case, and the jury did not believe him. The jury, after all, were not lawyers, and no jury, faced with the problem whether "You are a child of a unmarried woman" is the same as "You are a bastard" would hesitate more than 15 minutes in arriving at an answer.

Did More realise the risk he was taking? Surely he must have known it. It is possible that he hoped that the risk was worthwhile, taking a long view. About his own life he had, we know, little confidence. His personal future was bound to be short. But the (to him) horrible confusion into which England had been plunged by amateurish meddling with high constitutional legal problems was something of far more importance than More, something which would last, for good or evil, long after his time. Rich came to try to convince More: More decided to allow More to convince Rich. Rich was a mere mouthpiece for Cromwell, but he was a more conversant common lawyer than was Cromwell or his legal expert for the time being, Audley. More and Rich could speak the same language. The present writer believes that More may well have thought that if Rich saw the point of the argument he would report it in all its richness to Cromwell and Cromwell would take it more seriously from him than he would from More himself direct. More in the Tower was, at the extreme end of his time, even more impressive than More recently incarcerated. Another attempt to show Cromwell the defects in his methods was worthwhile. True,

when on trial for his life More asked the court whether he would open the secrets of his mind to such a one as Rich : but More was not responsible for Rich's elevation. Rich was one of the law officers of the Crown, and as such the fit person to report on steps the government should take. At the risk of his own life More was prepared to have yet another attempt to show where the government's view of the constitution was faulty ; if they could profit from this discovery and amend the statutes accordingly it would be to the profit of the nation. The risk to More's own life was a calculated risk, and he was well satisfied with the calculation : hence the line he adopts in his defence at the trial. But his motive was, the present writer suggests, far higher than any dis-burthening of his conscience. He was not a sick man blabbing, nor a wily lawyer outwitted, nor a traitor detected in treachery. He was a patriot to the last, and placed his country's constitutional health above his own convenience.

Now one can suggest why Southwell and Palmer refused to testify against him. They knew the tone of the conversation. They realized that the words alleged against More, whether they agreed with the facts or not, word for word, were part of an argument which was intended for their country's welfare, and they knew that it was not a malicious deprivation of the king's new title, malicious, that is to say, as the man in the street understood the word. They knew that they were intended to help Cromwell trap More, and they actually saw Rich worsted by the same technique with which he hoped to vanquish his opponent. They knew that the rights and the wrongs of the matter would not be sorted out for many years to come, and they were unwilling that the burden of deciding More's personal fate should rest, even in part, upon them. They may well have expected that the jury might have found More not guilty, seeing what

a poor showing Rich made in the witness-stand. Furthermore, unless they had been perfectly rehearsed and practised in repeating the words said to have been used by More, they would inevitably fumble and trip over the fine distinction between an opinion and a comment, and they had only to trip, and their evidence would have set More free (since only the fourth count of the indictment remained at issue between the Crown and the defendant). Awareness of the distinction, awareness of the tone of the whole conversation led them to desert Rich at the critical moment. The jury perhaps thought they did this out of sympathy for More, and disregarded their scruples.

The discovery of the 'new' manuscript enables us to penetrate with our conjectures much more closely into the minds of the parties, and all persons interested in the trial of More, his character and the nature of his predicament must be grateful to Mr. E.E. Reynolds for the work he put into the publication and discussion of that document.

The editor felt from the start - and told Mr Derrett - that his challenging article was bound to provoke rejoinders, and maybe from various quarters. The delay in publication made it possible for Mr Reynolds to read it, and to send us the following note.

Dr. Derrett's analysis of the More-Rich document calls for careful study, but at this stage, I can do little more than make a few points calling for consideration.

Page 6, § 3

I fail to understand the suggestion that the document 'contains two abstracts', i.e. of the interrogation of 3 June and of the conversation. The document opens, 'The effect of the (conversation)...' There is inevitably a repetition of the subject matter of all the interrogations and of the letter to Cromwell (Rogers, 199), etc., because that is what it was all about, but I can see no specific connexion with the third interrogation.

Ib., last line

'Cromwell's approved Brief' - what evidence is there of Cromwell's approval?

Page 7, § 2, 1. 5

'a palaeographer whose accuracy left a little to be desired'. I have compared Dr. Derrett's version with a photostat (our version was made from the original); the only differences I can find are, 'subgett' where we read 'Subyettes' (disputable), and 'consent' ('he cannot give his consen(t)'). We transcribed 'cause'; it should be 'consent' but a slip by the writer was not unlikely and could be explained by his having written 'cause' just previously. It seemed to me to confirm the impression made by the style of writing that this was not a carefully drawn-up report but one written as soon after the conversation as possible, and therefore the more reliable.

Page 8, § 4, 1. 3

'three witnesses planted there', and later, 'men had obviously been planted...'. What evidence is there for this assumption? The Lieutenant and Rich were there as officials; the others to do a job of work.

Page 10, 1. 8

'(if the latter is genuine)' This serious suggestion should have been supported by some kind of evidence as it raises a doubt as to the authenticity of an important document. It seems an irresponsible remark.

Page 11, 1. 5 (bottom)

'that Rich stank'. I agree this should not be taken seriously. They all stank in those days (according to our standards). Six men in a smallish room could not avoid the collective smell (which would appal us). Unless More and Rich were talking in undertones, the others must have heard something of the conversation. The later suggestion that the men were 'frightened by More's denunciations' is far-fetched. He was a helpless prisoner, but Rich was in a position to victimize his assistants.

Page 12, § 2, 1. 3

'no proof that Rich ever made it'. One might as well say there is no proof that the rest of the document is a genuine report. The final words are just as much a part of it as the rest. It was left out of the indictment, presumably, because

it told in favour of More.

Two minor corrections

Page 8, l. 12 (bottom)

'Supreme head on earth after Jesus Christ' :
the last three words are not in the Act of Supremacy.

Page 19, l. 7

'Would have set More free'. He would have been returned to the Tower as he was already condemned to life imprisonment, etc., under the Act of Attainder (26. H 8, c.23).

Perhaps it comes down to this. After many years studying the life and works of Thomas More, I believe that when, at his trial, he denied having said the words reported by Rich, he was speaking the truth. Dr. Derrett doubts this.

E.E.R.