

ST. THOMAS IN THE COURT OF APPEAL

IT is now some thirty years since the *Summa Theologica* began to circulate in an English translation. Little or no notice was taken of it even by those whom it was calculated to serve in their service of scientific truth. But the lack of welcome which befell it had no dismays for those responsible for an enterprise which seemed on the verge of folly. They were not moved when they were told that no good and little profit could come of an attempt to put the clock of modern progress back seven centuries to the age of Aquinas. Such friendly dissuasion as they were offered they met by silence and a more dogged resolve to forgive even their enemies by offering them not a cup of water but a wine-cup of the best!

Experience and instinct had taught them that after the bewilderment of modern materialistic expansion had settled, the human mind would begin to ask questions; that is, to seek ultimate causes. Some sort of unity would be demanded by the finer minds who could not brook a mere welter of multiplicity. Men would seek to discuss with their fellow men the What and Whence and Why. They would desire both a Synthesis and the power to discuss that synthesis with minds of like desire. All this meant that they would demand such a Synthesis if it existed and accept some standardised vocabulary in order that discussion might become a possibility.

But the little group behind the English translation of the *Summa* knew that it, *and alone it*, was the only existing Synthesis of human thought. Moreover, they had learned with deep thankfulness, that the vocabulary of the *Summa* was for four reasons suit-

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able and perhaps imperative for rational discussion : (1) It was consistent ; (2) It was intelligible ; (3) It was traditional, and therefore (4) It was scientific. When the friends of this group called them enthusiastic they did not understand how such an adjective could be applied to an intuitive certitude that, at long last, the scientific best would impose itself on the men who think.

Yet their certitude of final success never led them to foresee such speedy victories. In their wildest dreams they did not forecast the far-flung battle-line which the Summa is now organising, not only in lands where English is the language spoken but in other lands where English is a language understood by men of culture. And though the translators of the Summa were proud to recognise that their elder brother, The Dumb Ox, had left the world the first and most classical treatise on LAW, they did not foresee how soon the bellowings of the Dumb Ox would be heard in an English Court of Appeal.

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The facts are worthy of a place in BLACKFRIARS.

On April 14th, 1929, Joan Carroll, the illegitimate child of Ellen Carroll, was born; and later on was baptised by a Catholic priest. Before the close of the year the child, with the mother's consent, was transferred to a Protestant Adoption Society. In consenting to the adoption of her child the mother had forgotten to say that she wished it to be brought up in the Catholic religion. Later on the mother, realising that her child was being brought up a Protestant, tried to regain possession of her child. But on June 5th, 1930, Mr. Justice Charles, in chambers refused to order that the writ of *habeas corpus* should issue.

Again, on July 22nd, 1930, the Divisional Court also refused.

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From the order of the Divisional Court an appeal was made on December 2nd to the Court of Appeal, in which sat Lord Justice Scrutton, Lord Justice Greer and Lord Justice Slesser. In the event Lord Justice Scrutton and Lord Justice Slesser, but not Lord Justice Greer, upheld the appeal, and the child was re-delivered into the custody of her mother.

It is especially the judgment of Lord Justice Slesser that concerns the brethren of St. Thomas Aquinas. The question of the religious upbringing of an irresponsible child was raised above mere legal casuistry in the following passage from Lord Justice Slesser's judgment :

I propose to consider the question of religion first. The Court is not concerned with the respective merits of religions when considering the welfare of a child; but it is concerned with the possible invasion of natural law (unless expressly authorized by statute) involved in bringing up a child in a religion different from that of its parent. . . . As regards the father it was long a settled rule that, except in special circumstances, a child should be brought up in his father's religion. It has even been said that a father could not bind himself conclusively by contract to exercise in all events, in a particular way, rights as to religion which the law gave him for the benefit of his children and not for his own The parent it has been said is guardian by nature and by nurture

This guardianship by nature and by nurture would appear to be based upon the doctrine of natural justice as derived from antiquity. The father or mother may take possession of a child by reason of nurture but not a stranger, per Mr. Justice Danby. I read from the Year Book 8 Edward IV Michaelmas Pleas pl. 2 : ' Le pier ou le mier mais un estrange ne peut justifier le prie d'un enfant p. reason de norture.' The early Canon Law with which the equitable view was closely associated exhibits the same view : ' Infans infidelium licite baptizatur, si parentes, id est, pater, mater, avus, avia, vel tutores consentiant.' (Codex Juris Canonici. Can. 759 paraphrased.)

The Summa Theologica reveals the same medieval attitude concerning the rights both as to religion and custody

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of parents over children in an extreme case thus: 'It is against natural justice if a child before coming to the use of reason were to be taken away from its parents' custody or anything done to it against its parents' wish. A son before coming to the use of reason is under his father's care.'†

'And again in the Third Article§ Contra Justitiam Naturalem esset, si pueri invitis parentibus baptizarentur.'

With this dramatic defence of the patria potestas the great Ox of Aquino enters a Supreme Court of English Law. But this most renowned of a family of ten children never, perhaps, showed his genius more than in his writings on the Great Sacrament which sanctions and sanctifies family life.

Lord Justice Slessor was guided by a fine legal and even artistic sense in supporting the natural rights of parents by an appeal to St. Thomas Aquinas's defence of the rights of Jewish parents to determine the religion of their children. The question 'Whether the children of Jews ought to be baptised against their parents' will' was written about A.D. 1272. It was at a time when the Jewish question was of national and even international importance. Without discussing the cause and culpability of national Jewish policies we may note that it was in 1290 that England expelled the Jews. Students of pre-Reformation Blackfriars need hardly be reminded that the English brethren of St. Thomas constituted themselves the defenders of the Jews against injustice. In thus defending the parental right of Jews St. Thomas was not studying national prejudices but only truth and justice.

He was almost tempting the wrath of those sovereigns who, rightly or wrongly, thought they had a real grievance against the Jews.

†*Summa Theologica*, IIa, IIae, Qu. 10, Art. 12. (Eng. trans).

§This seems a misprint for 'the Same Article.'

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It is part of the heroism of St. Thomas that his intellectual defence of Jewish parents—not as Jewish, but as parents—is not mimic warfare. The present writer can recall no question on which the Dumb Ox seems to bellow more fiercely. Even the casual reader of the article in the *Summa Theologica* will be struck by the writer's downrightness. The great thinker will brook no opposition to his thought. He appeals at once to the great natural right of justice; which suffers no dispensation at the hand of any power, civil or ecclesiastical. Like a lion, rather than an ox, he bounds into the discussion. 'On the contrary, injustice should be done to no man. Now it would be injustice to Jews if their children were to be baptised against their will, since they would lose the rights of parental authority (*jus patriae potestatis*) over these children.'

Lord Justice Scrutton had quoted with approval the opinions of Lord Justice Bowen and Vice-Chancellor Kindersley that the legal phrase 'benefit of the infant' meant 'not the benefit of the infant as conceived by the Court, but . . . having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can.' He then went on to say that 'he would take the same view if it was proposed that the child of a Church of England mother, baptised with the rites of the Church of England, should be brought up in a Roman Catholic home—the wishes of the mother should prevail.'

In other words Lord Justice Scrutton agreed with Lord Justice Slesser that the case in point was not based on any 'dubium legis.' The law was clear, because it was the Natural Law that a child should be under the care of his responsible parent. And in witness to that Natural Law, Lord Justice Slesser rightly quoted the opinion of the great philosopher of law

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whose voice was now heard for the first time in an English Court of Appeal.

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Jurists and politicians are already asking themselves what are likely to be the effects of this historic decision on family life which was largely helped by the legal wisdom of Aquinas. The educational proposals of the present Government, which seem to have been dictated as much by financial as by educational reasons, are almost a ruthless ignoring of the parental right of caring for the children's good. But the decision of the Court of Appeal may be the beginning of an effective defence against unconscious but effective inroads on parental authority.

Leaving this political forecast aside, we are on surer ground of prophesy when we venture to predict that Lord Justice Slesser, in quoting from the one synthesis of all Law, Natural and Human, has opened a new era in legal and political studies. But the more the politicians, jurists and economists study the wisdom of the Angel of the Schools the more will their minds open to the lure of scientific truth.

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