

suade others to the same faith, but many scandals, many wicked deeds, many impieties.⁸

Wherefore, seeing both possession and title of possession fail, neither the substance nor jurisdiction of the Indians should be accounted in that nature as if they had been no man's before, neither seeing they were theirs could be rightly gotten by others. It follows that the peoples of India of whom we speak are not proper to the Portugals but free and in their own power, whereof the very Spanish doctors themselves make no question.

CHAPTER 5

That the sea or right of sailing on it is not proper to the Portugals by title of possession

If then the Portugals obtained no right over the people, countries, and jurisdictions, let us see whether they can make the sea and navigation or traffic to be in their power. Let us first consider of the sea which, seeing it is everywhere said to be no man's right, or common, or the public right of nations, what these words signify shall be most fitly declared if, following all poets from Hesiodus and philosophers and ancient civilians, we distinguish those things into times, which peradventure not a long time, yet notwithstanding by certain reason and their nature, are distinguished. Neither are we to be blamed if in the explanation of the law of nature we use their authority and words who (as it is manifest) were most powerful in the judgment of nature.

We are to know, therefore, in the first beginning of the life of man, dominion was another thing and communion differing from that which they are now.¹ For now dominion properly signifieth that which so appertaineth unto one that after the same manner it cannot be another's, but we

8. Vitoria, *De Indis*, II. 4.

1. Glossators and Castrensis on *Digest*, I. 1. 5; Glossators on *Decretum*, I. 1. 7.

call that common whose propriety is conferred among many with a certain fellowship and agreement excluding the rest. The defect of tongues hath enforced to use the same words in a thing which was not the same. And so these names of our custom are referred to that ancient law by a certain similitude and resemblance. That, therefore, which at that time was common was no other thing than that which is simply opposed unto proper. But dominion is a just or lawful power to use a common thing, which it seemed good to the Schoolmen to call *usum facti, non juris* because that use which is now called use in law or right is a certain propriety, or (that I may speak after their manner) is said privatively unto others.²

By the first law of nations, which sometimes also is called natural and which the poets elsewhere describe in the golden age, and in another place in the kingdom of Saturn or Justice, nothing was proper, which Cicero affirmed: “For by nature nothing is private.”³ And Horace:

*nam proprie telluris herum natura nec illum,
nec me, nec quemquam statuit.*⁴

For nature could not distinguish lords. In this signification, therefore, we affirm all things common at that time, signifying the same thing which the poets do when they say the first men sought the middle and justice held the middle of things by a chaste and inviolable covenant; which, that they might more plainly express, they deny that the fields were divided by bounds at that time or that there was any traffic:

*promiscua rura per agros
praestiterant cunctis communia cuncta videri.*⁵

This word *videri* is rightly added by reason of the translation of the word as we have said. But this communion was referred unto use:

2. Vázquez, *Controversiae illustres*, I. 17. 6–8; *Sext*, V. 12. 3; *Constitutions of Clement*, V. II. 1.

3. Cicero, *De officiis*, I. 8. 21.

4. “Nature, in truth, makes neither him nor me nor anyone else lord of the soil as his own”: Horace, *Satires*, II. 2. 129–30.

5. “The farms scattered throughout the fields showed that all things seemed common to everyone”: Avienus, *On Aratus’ Phaenomena*, 302–3.

*pervium cunctis iter,
communis usus omnium rerum fuit.*⁶

By reason whereof there was a certain kind of dominion, but universal and indefinite. For God gave all things not to this man or that but to mankind and after that manner many may be wholly lords of the same thing; but if we take dominion in that signification which it hath at this day it is against all reason, for this includeth a propriety which then no man had. But that is most aptly spoken:

*omnia rerum
usurpantis erant.*⁷

But it seemeth we are come to that distinction of dominions which is now not violent but by little and little, nature showing the beginning thereof. For seeing there are many things the use whereof consisteth in abuse, or for that being converted into the substance of the user they admit no use after, or because by use they are made worse for use, in things of the former kind, as meat and drink, a certain propriety appeared not severed from use.⁸ For this is to be proper, so to appertain to any that it cannot also be another's, which afterwards by a certain reason was derived to things of the latter kind, to wit, garments and chattels or movables; which being so, all immovable things—to wit, fields—could not remain undivided, although the use of them consist not simply in abuse, yet the use thereof was procured by reason of some abuse, as ploughed fields and orchards of fruit trees for food, pastures also for raiment, but they could not in common suffice for the use of all people. Property being found out, there was a law set down which should imitate nature. For, as in the beginning that use was had by corporal application whence, we said before, property had his original, so by the like application it seemed good they should be made the proper goods of everyone. This is that which is called

6. "Open to all the way, in common was the use of every thing": Seneca, *Octavia*, 402–3.

7. "All things belonged to anyone who could take them": Avienus, *On Aratus' Phaenomena*, 301–2.

8. *Digest*, VII. 5; Pope John XXII, *Extravagantes tum Viginti Joannis Papae XXII tum Communes*, XIV. 3, 5; Aquinas, *Summa Theologiae*, IIaIIae, q. 78, a. 1.

occupation by a word most aptly applied unto those things which before were indifferent. Whereunto the tragedian Seneca alludeth,

*in medio est scelus
positum occupanti;*⁹

and the philosopher, “All things pertaining to the Horsemen belonged to the gentlemen of Rome, yet amongst them is my proper place which I possessed.”¹⁰ Hereupon Quintilian saith it is natural to all that there should be a reward of industry and Tully that things by ancient occupation became theirs who in times past succeeded into the goods of the dead.¹¹ But this occupation in those things which resist possession, as wild beasts, ought to be perpetual; in other things it sufficeth that a corporal possession begun be retained in the mind. Occupation or possession in movables is apprehension; in immovables, instruction and limitation. Whereupon when Hermodenianus saith they were distinct dominions he added that the fields were bounded and houses built.¹² This state of things is declared of poets:

*tum laqueis captare feras, et fallere visco
inventum;*¹³

*tum primum subiere domos;*¹⁴

*communemque prius, ceu lumina solis et aurae
cautus humum longo signavit limite messor.*¹⁵

After these things, intercourse of merchandise began to come in use, for which cause,

*fluctibus ignotis insultavere carinae.*¹⁶

9. “Between us lies the crime for him who first shall do it”: Seneca, *Thyestes*, 203–4.

10. Seneca, *De beneficiis*, VII. 12. 3.

11. Quintilian, *Declamations*, XIII. 8; Cicero, *De officiis*, I. 7. 21.

12. *Digest*, I. 1. 5.

13. “Then men found how to snare game in toils and to cheat with birdlime”: Virgil, *Georgics*, I, 139–40.

14. “In that age men first sought the shelter of houses”: Ovid, *Metamorphoses*, I, 121.

15. “And the ground, which had hitherto been a common possession like the sunlight and the air, the careful surveyor now marked out with a long-drawn boundary line”: Ovid, *Metamorphoses*, I, 135–36.

16. “Keels . . . leaped insolently over unknown waves”: Ovid, *Metamorphoses*, I, 134.

The same time commonwealths began to be instituted and established. And so of those which were divided or separated from the first common two kinds are made, for some things are public, to wit, proper to the people (which is the double signification of this word), some things mere private, to wit, proper to every particular man. But occupation is made public after the same manner that it is made private. Seneca saith, “we call those the bounds of the Athenians or Campanians which afterward the borderers divide among themselves by private bounds.”¹⁷ For every nation,

*partita fines regna constituit, novas
extruxit urbes.*¹⁸

After this manner Cicero saith, “the territory of the Arpinates is called Arpinatum, of the Tusculans, Tusculanum; the like description,” saith he, “is of private possessions, whereupon because every man’s own consisteth of those things which by nature were common, let every man hold that which fell to his share.”¹⁹ But contrariwise Thucydides calleth that land which fell to no people in division ἀοριστον, to wit, indefinite.²⁰

Of these things which hitherto have been spoken two things may be gathered. The first is that those things which cannot be occupied or were never occupied can be proper to none because all propriety hath his beginning from occupation.²¹ The other is that all those things which are so ordained by nature that anyone using them they may nevertheless suffice others whomsoever for the common use are at this day (and perpetually ought to be) of the same condition whereof they were when nature first discovered them. Cicero meaneth this when he saith, “This society among all showeth itself far to all men among themselves, in the which a community of all those things which nature brought forth for the common use is to be preserved.”²² But all things are of this kind, wherein without the

17. Seneca, *De beneficiis*, VII. 4. 3.

18. “. . . marking out boundaries, established kingdoms, built new cities”: Seneca, *Octavia*, 420–21.

19. Cicero, *De officiis*, I. 7. 21.

20. Thucydides, *Histories*, I. 139. 2.

21. Douaren on *Digest*, I. 8.

22. Cicero, *De officiis*, I. 16. 51.

damage of one another may be pleased. Hence, saith Cicero, is that “not to forbid running water.”²³ For running water as it is such, not as it is a river, is acknowledged of the civilians to be in the number of those things which are common to all; and of the poet,

*quid prohibetis aquas? usus communis aquarum est.
nec solem proprium natura, nec aera fecit,
nec tenues undas: in publica munera veni.*²⁴

He affirmeth these things not to be proper by nature—as Ulpian saith, they lie open to all by nature²⁵—both because they were first discovered by nature and never came as yet into the dominion of any (as Neratius speaketh),²⁶ and also because (as Cicero saith) they seem to be brought forth of nature for the common use.²⁷ But he calleth those things public by a translated signification, not which appertain to any one country and people but to the whole society of mankind, which in the laws are called *publica juris gentium*: that is, common to all and proper to none.²⁸ Of this kind the air is for a double reason, both because it cannot be possessed and also because it oweth a common use to men. And for the same cause the element of the sea is common to all, to wit, so infinite that it cannot be possessed and applied to all uses, whether we respect navigation or fishing.²⁹ Whose ever the sea is, theirs also are those things which the sea, taking away from others’ uses, hath made for own, as the sands of the sea, part whereof joining to the land is called the shore. Cicero therefore saith well, “what is so common as the sea to them that float thereon and the

23. Cicero, *De officiis*, I. 16. 52.

24. “Why do you deny me water? The enjoyment of water is a common right. Nature has not made the sun private to any, nor the air, nor soft water: the common right I seek”: Ovid, *Metamorphoses*, VI, 349–51.

25. *Digest*, VIII. 4. 13.

26. *Digest*, XLI. 1. 14.

27. Cicero, *De officiis*, I. 16. 51.

28. Connan, *Commentaria juris civilis libri X*, III. 2; Doneau, *Commentarii de jure civili*, IV. 2; *Digest*, XLI. 3. 45.

29. *Digest*, I. 8. 2.

shore for them that are cast out.”³⁰ Virgil also saith that the air, the water and the shore lie open unto all.³¹

These things therefore are those which the Romans call common unto all by the laws of nature, or which are said to be the same *publica juris gentium*, as also they call the use of them sometimes common and sometimes public.³² But although even those things are rightly said to be no man’s as touching the property, yet they differ much from those things which are no man’s and are not attributed to common use, as wild beasts, fishes and birds. For if any man possess these they may become his proper right, but those things by the consent of all mankind are perpetually exempted from propriety for use which, seeing it belongeth to all, it can no more be taken away by one from all than you may take away that from me which is mine. This is that which Cicero saith, that it is among the first or chief duties of justice to use common things for common things.³³ The Schoolmen would say that some things are common affirmatively and some privatively. This distinction is not only very common among the civilians but also it expresseth the confession of the common people, whereupon the master of the feast in Athenaeus saith the sea was common but the fishes theirs that could take them. And in Plautina, to one that said unto him, keeping his cable,³⁴ “The sea was common for all,” the fisherman consented, but when he added, “It was found in the sea; it is common,” it came well to hand: “That which my net and hooks have gotten is principally mine.”³⁵

The sea therefore cannot be altogether proper unto any because nature doth not permit but commandeth it should be common, no nor so much as the shore,³⁶ but that this interpretation is to be added: that if any of

30. Cicero, *Pro Roscio*, XXVI. 72.

31. Virgil, *Aeneid*, VII. 230.

32. *Institutes*, II. 1. 1, 5; *Digest*, I. 8. 1, 2, 10; *Digest*, XLI. 1. 14; *Digest*, XLVII. 10. 13, § 7; *Digest*, XLIII. 8. 3, 4.

33. Cicero, *De officiis*, I. 7. 20.

34. *Et in Plautina Rudente servato dicenti*: “And in Plautus’s *The Rope*, when the servant said. . . .”

35. Plautus, *The Rope*, IV. 3. 975, 977, 985.

36. Doneau, *Commentarii de jure civili*, IV. 2.

those things by nature may be occupied, that may so far forth become the occupant's as by such occupation the common use be not hindered. Which is worthily received and approved, for seeing it is so, both exceptions cease whereby we said it came to pass that all things should not be transferred to proper right.

Because therefore building is a kind of occupation, it is lawful to build upon the shore if it may be without the hurt of the rest, as Pomponius speaketh, which we will expound out of Scaevola, unless the public, that is to say, the common use should be hindered.³⁷ And he which hath built shall become lord of the soil because that ground was proper to none nor necessary for the common use; it is therefore the occupant's, but no longer than the occupation continueth, because the sea seemeth to resist possession, by the example of a wild beast which, if it betake itself to the natural liberty, is no longer his who was the taker; so also the shore, which afterward giveth place unto the sea again.³⁸

But whatsoever may become private by occupation we have declared that the same may also become public, that is to say, proper to the people. So Celsus thinketh that the shore enclosed within the bounds of the empire of Rome appertaineth to the people of Rome;³⁹ which, if it be so, it is no marvel that the same people could grant a means (by their prince or praetor) to their subjects how to possess the shore.⁴⁰ But even this occupation, no less than private, is so to be restrained that it stretch no further than that the public use may be preserved. No man therefore may be forbidden by the people of Rome to come unto the sea-shore and to dry their nets and do other things which once all men would have perpetually to be lawful for them.⁴¹

But the nature of the sea differeth in this from the shore in that the sea, unless it be in some small part thereof, cannot easily be built upon nor can be included, and though it could, yet this notwithstanding should scarce

37. *Institutes*, II. 1, § 5; *Digest*, I. 8. 5, § 1; *Digest*, XXXIX. 2. 24; *Digest*, XLI. 1. 50; *Digest*, XLIII. 8. 4.

38. *Digest*, I. 8. 10; *Digest*, XLI. 1. 14.

39. *Digest*, XLIII. 8. 3; Doneau, *Commentarii de jure civili*, IV. 2, 9.

40. *Digest*, XLI. 1. 50; *Digest*, XLIII. 8. 2, §§ 10, 16.

41. *Digest*, I. 8. 5; *Digest*, XLIII. 8. 3.

happen without the impediment of the common use, yet if any little part may so be occupied it is granted to the occupant. It is therefore a hyperbole:

*contracta pisces aequora sentiunt
iactis in altum molibus.*⁴²

For Celsus saith that planks or piles laid in the sea are his who laid them, but that is not to be granted if the use of the sea by that means shall become worse.⁴³ And Ulpian saith that he that dams up the sea is so to be allowed and defended if no man be hurt thereby.⁴⁴ For if this thing shall hurt any man surely he must be forbidden, that nothing be done in a public place.⁴⁵ As Labeo also saith, if any such thing be built in the sea he will have him forbidden, “that nothing be done in the sea whereby the haven, road or way for ships may be made the worse.”⁴⁶

And the same regard that is to be had of navigation is to be had likewise of fishing, that it may remain common unto all. Yet shall not he offend that encloseth a place of fishing for himself with stakes or piles in a creek of the sea and so maketh it private, as Lucullus who cut down a hill at Naples to let in the sea to his farm?⁴⁷ And of this kind I think the fishponds upon the sea-coast were whereof Varro and Columella make mention.⁴⁸ Neither did Martial mean otherwise when he speaketh of Formianus of Apollinaris:

*si quando Nereus sentit Aeoli regnum,
ridet procellas tuta de suo mensa.*⁴⁹

42. “The fishes note the narrowing of the waters by piers of rock laid in their depths”: Horace, *Odes*, III. 1. 33–34.

43. *Digest*, XLIII. 8. 3.

44. *Digest*, XLIII. 8. 2, § 8.

45. *interdictum utique*, “*Ne quid in loco publico competiturum*”: “the interdict, ‘Ne quid in loco publico fiat’ is to be enforced.”

46. *Digest*, XLIII. 12. 1, § 17.

47. Varro, *De re rustica*, III. 17. 9.

48. *Ibid.*, III. 2. 17; III. 3. 10.

49. “Should Nereus feel the power of Aeolus, the table, secure in its own store, laughs at storms”: Martial, *Epigrams*, X. 30. 19–20.

And Ambrose: “Thou bringest the sea within thy manors lest monsters⁵⁰ should be wanting.”⁵¹ Hence it may appear of what mind Paul[us] was: “if the proper right of the sea appertain to any, as ye possess them,⁵² he must be forbidden.”⁵³ That this interdiction was ordained for private causes not for public, wherein also those things are comprehended which by the common law of nature we may do, but here the right of enjoying is handled which happeneth upon a private cause, not public or common. For Marcian testifieth whatsoever is possessed or may be possessed, that now appertaineth not to the law of nations as the sea doth:⁵⁴ as, for example, if any had forbid Lucullus or Apollinaris to fish in that which was private unto them in regard they enclosed a creek of the sea, Paulus thought they were to be forbidden, not only an action of trespass to be brought against them by reason of the private possession.

Nay, in a creek of the sea, as in a creek of a river, if I have possessed such a place and have fished there, specially if I have testified my purpose privately of possessing it by the continuance of many years, by that right I may forbid another to use the same (as we gather out of Marcian) no otherwise than in a lake in my jurisdiction, which is true so long as occupation continueth, as we said before of the shore.⁵⁵ The same shall not be without the creek lest the common use be hindered.⁵⁶

It is a very usual thing therefore that men forbid any to fish before my house or the prince’s palace, but by no right, so that Ulpian contemning that usurpation saith if any be forbid he may have an action of trespass.⁵⁷ The emperor Leo (whose laws we use not) changed this against the reason of the law and would have *προθυρα*, that is to say, the front of the sea, to be proper unto them who inhabited that coast, and that they have right of fishing there;⁵⁸ which yet he would have proceed so far, that the place

50. *belluae*: “wild animals.”

51. Ambrose, *De Nabuthe*, III. 12.

52. *uti possidetis*.

53. *Digest*, XLVII. 10. 14.

54. *Digest*, I. 8. 4.

55. *Digest*, XLIV. 3. 7.

56. *Digest*, XLI. 3. 45.

57. *Digest*, XLVII. 10. 13, § 7.

58. Leo, *Novellae*, LVI.

should be possessed with certain stopping enclosures or sluices, which the Greeks call ἐποχας, thinking doubtless it should not come to pass that any should envy another a little portion of the sea who should be admitted himself to fish in the whole sea.⁵⁹ Surely, howsoever any take away a great part of the sea from public utility, although he be able to do it, it is intolerable wickedness against which the holy man Ambrose inveigheth: “They challenge unto themselves the length of the sea by the law of a bondslave, and mention the right of fishes as of slaves subject to them in a servile condition. This gulf of the sea,” saith he, “is mine; that, another’s. Thus mighty men divide the elements unto themselves.”⁶⁰

The sea therefore is in the number of those things which are not in merchandise and trading, that is to say, which cannot be made proper.⁶¹ Whence it followeth, if we speak properly, no part of the sea can be accopted in the territory of any people. Which thing Placenti[n]us seemeth to have meant when he said, “That the sea was so common, that it may be in the dominion of none but God alone,” and Johannes Faber, “When the sea shall depart, left in his ancient right and being, wherein all things were common,” otherwise those things which are common to all shall differ nothing from those things which are properly called public, as the sea from a river.⁶² The people of a country might possess a river as included within their bounds, but so could they not the sea.

But territories are of the possession of a people as private dominions are of the possessions of particular men. Celsus saw this, who clearly enough distinguisheth between the shores which the people of Rome might occupy, yet so that the common use should not be hurt and the sea which retained her ancient nature.⁶³ Neither doth any law show the contrary. But those laws which are cited out of authors of contrary opinion either speak concerning islands (which is clear might be possessed) or else concerning a haven, which is not common but properly public.⁶⁴

59. Leo, *Novellae*, LVII, CII, CIII, CIV; Cujas, *Observationes*, XIV. 1.

60. Ambrose, *Hexaameron*, V. 10. 27.

61. Doneau, *Commentarii de jure civili*, IV, 6.

62. Faber on *Institutes*, II. 1. 5; Doctors on *Digest*, XIV. 2. 9.

63. *Digest*, XLIII. 8. 3.

64. *Digest*, V. 1. 9; *Digest*, XXXIX. 4. 15.

But they who say that some sea appertaineth to the empire of Rome interpret their saying so that they affirm that right over the sea proceedeth not beyond protection and jurisdiction,⁶⁵ which right they distinguish from propriety; nor peradventure do they sufficiently observe that, in that the people of Rome might appoint a convoy for the aid and succor of such as passed the seas and punish such pirates as were taken on the sea, it happened not by any proper right but of the common right which also other free nations have in the sea. In the mean space we yet confess this that some nations might agree among themselves that such as were taken in this or that part should be judged by this or that commonwealth, and so for the benefit of distinguishing jurisdictions the bounds in the sea to be described, which truly bindeth the making that law to themselves which could not bind other people in like manner. Neither doth it make the place proper to any but conferreth the right upon the persons of the contractors.⁶⁶

Which distinction, as it is agreeable to nature, so it was approved by a certain answer of Ulpian who, being demanded whether the lord of two manors upon the sea could impose servitude upon one of them which he would sell, that it should not thereby be lawful to fish in a certain place of the sea, answered the thing itself, that the sea could not have any servitude imposed on it because by nature it should be open to all, but seeing the true meaning of a contract required the law of sale to be kept, the persons of the possessors and such as succeeded in their right were bound by this law.⁶⁷ It is true that the lawyer spoke of private manors and a private law but in a territory and law of the people here is the same reason, because the people in respect of all mankind have the place of private men.

In like manner, the rents which are set down for fishing upon the sea-coast are reckoned in the number of royalties, and bind not the thing, that is, the sea or fishing, but the persons.⁶⁸ Wherefore subjects over whom the commonwealth or prince have power to make a law by consent may peradventure be compelled to these burdens and impositions, but the right of

65. Glossators on *Digest*, I. 8. 2; Baldus and Glossators on *Institutes*, II. 1. 1, 5.

66. Baldus on *Feuds*, p. 19; *Code*, XI. 12; Angelus on *Digest*, XLVII. 10. 14.

67. *Digest*, VIII. 4. 13.

68. *Feuds*, II. 56.

fishing everywhere ought to be free to foreigners, that servitude be not imposed on the sea, which cannot serve.

For the reason of the sea and of a river is not the same, which seeing it is public, that is to say, the people's, the right also of fishing in it may be granted or letten by the people or prince,⁶⁹ so that they of ancient time gave a prohibition of enjoying a public place to him who hired it, adding a condition "if he who had the right of letting let it to any to enjoy," which condition cannot be in the sea.⁷⁰ But they that reckon fishing in the number of royalties did not sufficiently consider that place which they interpreted, whereof Isernia and Alvarotus were not ignorant.⁷¹

It hath been declared that neither the people nor any private man can have any property in the sea (for we excepted a creek), seeing neither the consideration of public use nor nature permitted occupation. And indeed this disputation was appointed for this purpose that it might appear the Portugals have not made the sea whereby we sail to the Indies to be in their jurisdiction. For both reasons which hinder propriety are infinitely more effectual in this case than in all the rest. That which in other things seemeth hard cannot be so at all in this; that which we judge unjust in others in this is most barbarous and inhuman.

We treat not here of an inland sea which here and there spreading itself upon the earth and somewhere also exceeds not the breadth of a river, whereof yet it is manifest the Roman lawyers spake when they uttered or published those noble sentences against private avarice. The question is concerning the whole ocean, which antiquity calleth unmeasurable and infinite, the parent of things bordering upon heaven, with whose perpetual moisture the ancients supposed not only fountains and rivers and seas, but also the clouds and the very stars themselves, in some sort to be maintained, which finally compassing the earth (this seat of mankind) by the reciprocal courses of tides can neither be kept back nor included and more truly possesseth than is possessed.

And in this ocean the controversy is not of a bay or narrow strait or

69. Balbus, *De praescriptionibus*, V. 4, q. 6, n. 4.

70. *Digest*, XLVII. 10. 13, § 7; *Digest*, XLIII. 9. 1.

71. On *Feuds*, rubric: *Quae sint regalia*, n. 72.

concerning all that may be seen from the shore. The Portugals challenge to themselves whatsoever lies between two worlds divided by so great distance that in many ages they could not from place to place convey the report of them. But if the portion of the Castilians (who are in the same case) be added, little less than the whole ocean is enthralled to two nations, so many other nations being brought to the narrow straits of the north, and nature is much deceived who, seeing she hath scattered this element over all, thought also it should suffice all. If any in so great a sea should take empire and jurisdiction wholly to himself from the common use, yet nevertheless he should be accompted an ambitious seeker of excessive dominion; if any should forbid others to fish, he could not escape the brand of the brainsick covetousness. But he that doth also hinder navigation whereby he loseth nothing, what shall we conclude of him?

If any should forbid another to take fire from his fire, which is wholly his, and light from his light, by the law of human society I would accuse and sue him to condemnation, because the force of this nature is such

*ut nihilominus ipsi luceat, cum illi accenderit.*⁷²

What else, for when he may without his own damage let him impart unto another in such things as are profitable to the receiver and not offensive to the giver?⁷³

These be the duties which the philosophers will have performed not only to strangers but also to the unthankful.⁷⁴ That which is envy in private things in a common thing cannot but be cruelty. For this is most wicked for thee so to intercept that which by the appointment of nature and by the consent of nations is no less mine than thine, that thou wilt not grant me so much as the use, which granted, that may be thine no less than it was before.

But then if they also who⁷⁵ violently take other men's goods and intercept common things defend themselves with a certain kind of possession.

72. "That no less will his [light] shine when he his [friend's] has lit": Ennius, cit. Cicero, *De officiis*, I. 16. 51.

73. Cicero, *De officiis*, I. 16. 51–52.

74. Seneca, *De beneficiis*, IV. 28.

75. *Tum vero etiam qui*: "But even they who. . . ."

For because (as we said) the first possession maketh things proper, therefore a detaining, although it be unjust, carrieth a certain kind of show of dominion. But whither have the Portugals compassed that sea with garrisons placed there, as we use to do the land, that so it should be in their power to exclude whom they would? Or whither is it so far off that they also, when they divide the world against other nations they defend themselves, not by any limits either by nature or set by hand but by a certain imaginary line? Which if it be allowed, and such a dimension be sufficient for possession, the geometricians should long since have taken away the earth from us and the astronomers heaven.

Where is therefore this adjoining of body to body, without which no dominion began? Surely that which our doctors have delivered appeareth not more truly spoken in anything: that seeing the sea is incomprehensible, no less than the air, it can be added to the goods of no nation.⁷⁶

But if they call this possession, that they sailed before others and after a sort opened the way, what can be more ridiculous? For seeing there is no part of the sea into the which someone hath not entered first, it will follow that all navigation was possessed of some. So we are every way excluded. And they also who were carried about the whole world shall be said to have gotten the whole ocean to themselves. But no man is ignorant that a ship passing the seas leaveth no more right than the way thereof. But that they also assume unto themselves that no man sailed that ocean before them it is not true, for a great part of that sea whereof we speak, round about Mauritania, was long since sailed and that part of the sea beyond, bending toward the east, in the victories of Alexander the Great was compassed, even to the gulf of Arabia.⁷⁷

There are also many arguments to prove that this voyage by sea was well known in times past to those people or islanders of Gades. Caius Caesar, the son of Augustus, having to do in the gulf of Arabia, the marks or tokens of ships remaining of the Spanish wrecks were known unto him of old, which also Caelius Antipater reported he saw, who sailed from Spain to Aethiopia for trade of merchandise, and to the Arabians also, if it be

⁷⁶. Faber on *Institutes*, II. 1. 5.

⁷⁷. Pliny, *Natural History*, II. 67, VI. 31; Pomponius Mela, *De situ orbis*, III. 17.

true which Cornelius Nepos witnesseth, that a certain man called Eudoxus in his times, when he fled from Lathyrus, king of Alexandria, coming forth of the Arabian Gulf, was brought to the islands Gades. It is most evident also that the Carthaginians, who were well skilled in matters of the sea, could not be ignorant of that ocean, seeing Hanno, when Carthage most flourished, being carried about from Gades to the uttermost bounds of Arabia, sailing by the promontory now called the Cape de Bona Esperanza (whose ancient name seemeth to have been Hesperion Ceras), hath set down all that voyage in writing with the situation of the shore and islands, and witnesseth at last that not the sea but provisions failed him.

That also in the flourishing estate of Rome they were wont to sail from the Arabian gulf to India and the islands of the Indian Ocean, even to golden Chersonesus (which most men suppose to be Japan), the voyage described of Pliny, the embassages from the Indies to Augustus, to Claudius also from the island Taprobane, besides the worthy acts of Trajan and Ptolemy's tables, sufficiently declare.⁷⁸ Strabo witnesseth that even in his time a fleet of Alexandrian merchants out of the Arabian Gulf sailed to the furthest parts of Aethiopia, and so of India, when in times past few ships durst attempt it.⁷⁹ Thereby the people of Rome had great revenues. Pliny addeth that they sailed having shipped bands of archers for fear of pirates, and that India alone took away yearly from the empire of Rome 500 sestertia (if you add Arabia and Seres they took 1,000), and that the merchandise were sold for a hundredfold more.⁸⁰

These ancient testimonies sufficiently argue that the Portugals were not the first. That ocean in every particular part thereof, both then when the Portugals first entered it and also before, was never unknown, for the Moors, Aethiopians, Arabians, Persians, and Indians could no way be ignorant of that part of the sea whereof they were borderers. They therefore speak untruly who boast that they first found out that sea.

What therefore shall any man say? Seemeth it a final matter that the Portugals have renewed navigation first, intermitted peradventure so

78. Pliny, *Natural History*, VI. 24.

79. Strabo, *Geography*, II. 5. 12; XVII.

80. Pliny, *Natural History*, VI. 23; XII. 18 [Grotius's references].

many ages and (which cannot be denied) have discovered it unknown to the nations of Europe through their great labor, cost and danger? Nay truly, if this hath been all the care and endeavor, to show that to all which they only have found, who is so mad that would not profess himself much indebted unto them? For they should deserve the same thanks, praise and immortal glory wherewith all discoverers of great matters have been contented, how many soever have endeavored not to benefit themselves but mankind. But if the Portugals had their own gain before their eyes, gain (which always is the greatest thing in perverting negotiations)⁸¹ ought to suffice them. For we know the first voyages sometimes have yielded forty-fold increase or more, whereby it came to pass that a people who were long time poor came suddenly to unexpected riches, in so great excess of riot⁸² as scarce befell the happiest nations in the highest degree of fortune's long progress.

But if they went before in this, that no man should follow, they deserve no thanks, seeing they respected their own gain, but they cannot call it their gain when they take away that which is another's. Neither is that certain unless the Portugals had gone thither that no man would have gone, for the times were at hand wherein, as almost all arts, so the situation of seas and countries were daily more clearly known unto us. The ancient examples which we now reported would have provoked us, and if all had not been discovered at one clap yet by little and little the shores had been descried by sailing, one shore always discovering another. Finally that had come to pass which the Portugals hath taught us might be done, seeing there were many nations no less inflamed with the desire of merchandise and foreign commodities. The Venetians, who had learned many things of India, would have been as ready to seek as the rest. The undaunted diligence of the Bretons of France and the stout courage of the English should not have been wanting to this enterprise. And the Hollanders themselves have attempted much more desperate matters.

No reason therefore of equity nor surely any probable opinion maketh for the Portugals. For all they who will by possibility have the sea subject

81. *praevertendis negotiantibus*: "for those first in a new field of enterprise."

82. *tanto luxus apparatu*: "in such appearance of luxury."

to the command of any attribute it to him who have the next havens and bordering shores in his jurisdiction.⁸³ But the Portugals in that huge coast of shores have nothing except a few garrisons which they may call theirs.

Moreover, also he that should have authority over the sea could diminish nothing of the common use, as the people of Rome could hinder none from using all things in the shore of the empire of Rome which were permitted by the law of nations.⁸⁴ And if it could forbid any of those things, to wit, fishing, whereby it may be said after a sort that fishes should be taken, yet they could not forbid navigation, whereby the sea loseth nothing.

For proof whereof that which we have delivered by the opinion of doctors is a most certain argument: that on the land, which is given both to nations and every particular man in property, a quiet and harmless passage can justly be denied to no men of any nation, no more than drink out of a river. The reason appeareth because, seeing the uses of one thing were naturally divers, the nations only seem to have divided it among themselves, which cannot conveniently without property be had and contrarily he received it by whom the condition of the lord should not be made the worse.

All men therefore see that he who would forbid another to sail can defend himself by no law, seeing Ulpian saith he is guilty of wrong.⁸⁵ Others also thought that he that is forbid may have a prohibition.⁸⁶

And so the intention of the Hollanders is grounded upon the common law, seeing all men confess that all men are permitted to sail in the sea though leave be obtained of no prince, which is plainly expressed in the Spanish laws.⁸⁷

83. Glossators on *Sext*, I. 6. 3. 2; Glossators on *Decretum*, II. 9. 3.

84. *Digest*, I. 8. 4; Gentili, *De jure belli*, I. 19.

85. *Digest*, XLIII. 8. 2, § 9.

86. *interdictum utile prohibito competere*: "that the injunction *utile prohibito* might be brought against him"; Glossators on *Digest*, XLIII. 14. 1.

87. Baldus on *Digest*, I. 8. 3; Rodericus Suárez, *De usu maris*, I. 3; *Las Siete Partidas*, Pt. III, tit. 28, law 3.