

*William Welwod's Critique*

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## “Of the Community and Propriety of the Seas”

Having of late seen and perused a very learned but subtle treatise (*incerto authore*) entitled *Mare Liberum*, containing in effect a plain proclamation of a liberty common for all of all nations to fish indifferently on all kind of seas, and consequently a turning of undoubted proprieties to a community, as the fifth chapter thereof at large discovers (wherein the unknown author protesteth that he may for his warrant use the authority and words of such old writers as have been esteemed most mighty in the understanding and judging upon the natural condition of things here below), and the discourse being covered with the maintenance of a liberty to sail to the Indians, I thought always expedient by occasion of this argument of fishing contained in my former title,<sup>1</sup> by God’s grace to occur thereunto, as manifestly direct at least (in my weak sight) tending to the prejudice of my most worthy prince and his subjects, and that not only by arguments derived from the first verity of the nature of things, but also from his own proofs, warrants, and their authors.

And yet before I go any further I cannot pass the author his ridiculous pretence, in both epistle and beginning of his discourse, as for a liberty only to sail on seas: a thing far off from all controversy, at least upon the ocean, specially since passage upon land through all regions Christian is this day so indifferently permitted to all of all nations, even to Turks, Jews, pagans, not being professed enemies; and therefore much less to be restrained on sea in all respects, so that I cannot but persuade both myself and other loyal subjects that the said pretence is but a very pretence, and

1. Welwod, *An Abridgement of All Sea-Lawes*, ch. XXVI, “Of Fishers, fishing, and trafiquers therewith.”

so much the more to be suspected as a drift against our undoubted right and propriety of fishing on this side the seas.

Now remembering the first ground whereby the author would make *mare liberum* to be a position fortified by the opinions and sayings of some old poets, orators, philosophers, and (wrested) juriconsults—that land and sea, by the first condition of nature, hath been and should be common to all, and proper to none—against this I mind to use no other reason but a simple and orderly reciting of the words of the Holy Spirit concerning that first condition natural of land and sea from the very beginning: at which time, God having made and so carefully toward man disposed the four elements, two to swim above his head, and two to lie under his feet; that is to say, the earth and water, both wonderfully for that effect ordered to the upmaking of one and a perfect globe, for their more mutual service to man’s use. According to this, immediately after the creation God saith to man, “Subdue the earth, and rule over the fish,”<sup>2</sup> which could not be but by a subduing of the waters also.

And again, after the Flood God saith, “Replenish the earth,”<sup>3</sup> and for the better performance hereof God in his justice against the building of Babylon scattered mankind over all the face of the earth;<sup>4</sup> therefore is it that Moses saith, “These are the isles of the nations divided in their lands.”<sup>5</sup> So that hereby is evident that things here done are not so naturally too common, sith God, the author of nature, is also as well author of the division as of the composition, and yet howsoever in his justice (as is said) yet in his mercy also and indulgent care for the welfare and peace of mankind. For those are sentences both vulgar and sure, set down by the Roman juriconsults:<sup>6</sup> *communio parit discordiam. Quod communiter possidetur, vitio naturali negligitur. Habet communio rerum gerendarum difficultatem.*<sup>7</sup>

2. Genesis 1:28.

3. Genesis 9:1.

4. Genesis 11:8 (the Tower of Babel).

5. Genesis 10:5.

6. *Digest*, XXVII. 9. 5, § 16; *Digest*, XXVII. 9. 7.

7. “Community of property breeds disagreement. Whatever is owned communally is neglected due to natural viciousness. Community of goods carries with it difficulty of administration”; cf. *Digest*, XXXI. 1. 77, § 20.

Afterward, the earth, by the infinite multiplication of mankind being largely replenished and therefore of necessity thus divided, and things upon the earth not sufficient for the necessities and desires of man in every region, followed of force the use of trading upon the seas; not only for the ruling of the fish therein, according to the commandment given by the Creator at the beginning, but also for transporting of things necessary for the use of man. For the which, and other causes above mentioned, the waters became divisible and requiring a partition in like manner with the earth, according to that of Baldus: *videmus, de jure gentium, in mare esse regna distincta, sicut in terra arida*.<sup>8</sup>

And thus far have we learned concerning the community and propriety of land and sea by him who is the great Creator and author of all, and therefore of greater authority and understanding than all the Grecian and Roman writers, poets, orators, philosophers, and jurisconsults, whosoever famous, whom the author of *Mare Liberum* protests he may use and lean to without offence.

Now, sith the weakness of this his first and principal ground doth this way appear, let any man judge upon the truth of that which Cicero (his man) sets down—*sunt privata natura nulla*<sup>9</sup>—and likewise of all other his authors their opinions for the fortification of an original community of things.

It followeth to examine the chief warrants of *Mare Liberum*, and to consider how far they may bear forth to a common liberty for fishing on all seas indifferently.

The author cites Ulpian, a renowned jurisconsult indeed, and Marcian their sentences,<sup>10</sup> alleging that Ulpian should say, *ante aedes meas aut praetorium ut piscari aliquem prohibeam, usurpatum quidem est, sed nullo jure, adeo ut contempta ea usurpatione, injuriarum agere potest. sz. prohibitus*.<sup>11</sup> That is to say, if I should forbid any man to fish before my house, he may

8. “We see that, by to the law of nations, the sea is divided into distinct realms, like the dry land”: Baldus on *Digest*, I. 8. 2, § 1.

9. “There are no things private by nature”: Cicero, *De officiis*, I. 7. 21.

10. Grotius, *The Free Sea*, p. 29, above.

11. *Digest*, XLVII. 10. 13, § 7.

misknow such an usurpation and intend action of injury against me for a wrongful staying him from fishing there.

But as I read, Ulpian his words are thus: *sunt qui putant injuriarum me agere posse*;<sup>12</sup> that is, there are men who think, I may intend action, etc. It is true also that Marcian saith, *nemo ad littus piscandi causa accedere prohibetur*.<sup>13</sup> And yet neither of these two juriconsults pronounceth absolutely in these cases, but upon another higher warrant; and therefore Ulpian adds, *saepissime rescriptum est nec piscari, etc. prohibere posse*;<sup>14</sup> that is, it is by writ most often answered, etc. Which Marcian expounds most clearly when he saith, *nemo igitur ad littus maris piscandi causa accedere prohibetur*, and subjoins his warrant, *idque Divus Pius piscatoribus Formianis rescripsit*;<sup>15</sup> that is, no man is forbidden to come to the seaside and fish, as the emperor Divus Pius did write to the fishers of Formian. So that you see the emperors to have been warrants to these lawyers and their written opinions concerning the voyage of the sea.

Now, to pass the propriety which hereby we see these emperors did claim on the seas, I ask first, to whom did the emperors write such resolutions? Was it not to the professed subjects of their own empire? And what? Even the usage of the seas and coasts of their empire to be indifferently common to every one of their own subjects. And how? *Jure gentium*, that is, according to the law kept by all other nations, to every one of their own nation in like cases.

Moreover, albeit these and other Roman lawyers pronounce so concerning the community of the sea-shore and coast that private men may build houses within the flood-mark and appropriate them to themselves, according to that which Neratius writes, *quod in littore quis aedificat, eius fit*.<sup>16</sup> that is, what a man builds on shore, it becometh his own; yet upon this condition, *tamen decretum praetoris adhibendum est ut id facere liceat*, saith Pomponius:<sup>17</sup> that is, providing the praetor his decree be interponed

12. *Digest*, XLVII. 10. 13, § 7.

13. “No-one is forbidden to come to the sea-shore to fish”: *Digest*, I. 8. 2, § 4.

14. *Digest*, XLVII. 10. 13, § 7.

15. *Digest*, I. 8. 4.

16. *Digest*, XLI. I. 14.

17. *Digest*, XLI. I. 50.

thereunto, or that the prince give grant, as Ulpian writes: *vel ut princeps concedat*.<sup>18</sup> As for the remnant of these sorts of warrants alleged for *mare liberum*, sith they sing all one song for the common use to the people and propriety to the prince, if men will but only mark them, I need not stay further upon them. So that every man may see both the use of the word *commune* and the meaning of *jure gentium* among these lawyers, whereupon this *mare liberum* appears so to be founded that it cannot be shaken. For *commune* there is nothing else but *publicum, quasi populicum*, signifying a thing common for the usage of any of one sort of people and not for all of all nations, according to that of Modestinus: *Roma communis patria est*.<sup>19</sup>

Neither yet doth that word *jure gentium* mean any law set down by common consent of all nations, but only notes the example of the law or custom of other nations, as if they would say the liberty of fishing on our seas and of other doing there and at shore should be common to everyone of the Roman Empire, like as the same is common to all of all other nations on their seas and their shores.

Likewise, that of Placentinus: *quod mare sit in nullius bonis, nisi solius dei*; that is, God is only lord of the sea.<sup>20</sup> And so say we with king David, that the land also is the Lord's.<sup>21</sup> But that of Faber, *mare esse in primavo jure quo omnia erant communia*,<sup>22</sup> I need no otherwise to refute now than I have done above already.

And these are the authors and warrants whereupon *Mare Liberum* infers his conclusion: *demonstratum igitur nec populo, nec privato jus aliquod in mare competere posse, quum occupationem, nec natura, nec publici usus ratio permittat*.<sup>23</sup> Which, how it followeth upon the premises, let men judge,

18. *Digest*, XLIII. 24. 3, § 4.

19. “Rome is the common *patria* of us all”: *Digest*, L. I. 33.

20. Placentinus on *Institutes*, II. I. I.

21. Psalm 24:1.

22. “The sea has been left in its primeval right, wherein all things were common”: Faber on *Institutes*, II. I. 5.

23. “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”: Grotius, *The Free Sea*, p. 32, above.



sith neither these his authors make for him neither yet the reason inserted in the conclusion bears out, which is, *quum occupationem nec natura, nec publici usus ratio permittat*; that is, neither nature nor the common need suffers the sea to be acquired in property to any occupation.

For answer, first concerning the nature of the sea, as supposed impossibly occupable or acquirable: is this so thought because the sea is not so solid as is the land that men may trade thereon as upon land? Or that it is continually flowing to and fro? Surely, that lack of solidity for man his trading thereon by foot shall not hinder the solid possession of it, far less the occupation and acquiring, if we will give to the sea that which the jurisconsults indulgently grant to the land, which also cannot be denied. Paulus the jurisconsult saith, *qui fundum possidere velit, non utique omnes glebas eius circumambulet, sed sufficit quamlibet parte eius introire, dum mente et cogitatione hac sit ut totum possidere velit usque ad terminum*;<sup>24</sup> that is, it is not needful for him who would possess himself in any part of the land to go about and tread over the same but it is sufficient to enter in upon any part thereof with a mind to possess all the rest thereof, even to the due marches. And what can stay this to be done on sea as well as on land? And thus far concerning the solidity.

As for the flowing condition of the sea, howsoever it be liquid, fluid, and unstable in the particles thereof, yet in the whole body it is not so, because it keeps the prescribed bounds strictly enough concerning the chief place and limits thereof.<sup>25</sup>

Which discourse gives us occasion of force to answer to a scoff cast in by the author of *Mare Liberum* concerning the possibility also of marches and limits for the division of the seas: *mundum dividunt*, saith the foresaid author of *Mare Liberum*, *non ullis limitibus, aut natura, aut manu positis, sed imaginaria quadam linea: quod si recipitur, et geometrae terras, et astronomi coelum nobis eripient*:<sup>26</sup> that is, they divide the world not by any marches put either by nature or by the hand of man but by an imaginary

24. *Digest*, XLI. 2. 3, § 1.

25. Psalm 104:9.

26. Grotius, *The Free Sea*, p. 34, above.

or fantastic line, which kind of doing being embraced the geometers may steal away the earth and the astronomers the heavens from us.

It is true that there are not in every part of the sea isles sensible (as Guernsey is to England in the narrow seas) or sands (as the Washes at the west seas of England) nor rocks or other eminent and visible marks above water for the designation of the bounds (or laying out the limits) of the divisible parts thereof; but God, who is both the distributor and first author of the division and distinction of both land and sea, hath given an understanding heart to man for the same effect as well as for all other necessary actions wherein he hath to employ himself, so that to a very wonder God hath diversely informed men by the helps of the compass, counting of courses, sounding, and other ways to find forth and to design *finitum in infinito* so far as is expedient for the certain reach and bounds of seas properly pertaining to any prince or people.

Which bounds Bartolus hardly extends and allows for princes and people at the seaside an hundred miles of sea forth from their coasts at least,<sup>27</sup> and justly, if they exercise a protection and conservacy so far;<sup>28</sup> and this reach is called by the Doctors *districtus maris, et territorium*.<sup>29</sup> It is true Baldus esteemeth *potestatem, jurisdictionem, and districtum*, to be all one.<sup>30</sup>

To conclude, then: since Papinian writes *in finalibus quaestionibus vetera monumenta sequenda esse*,<sup>31</sup> what more evident monuments for our King his right in the narrow seas than these isles of Guernsey, etc.? And for the eastern seas direct from Scotland what is more anciently notorious than that covenant twixt Scottish men and Hollanders concerning the length of their approaching toward Scotland by way of fishing?

And thus far through occasion of answering to that alleged impossibility of acquiring the sea by occupation because (as would appear) of the unsolidity thereof for any foot treading. It rests to touch the other cause natural for that other impossibility which may be the continual flux and

27. Bartolus, *Tyberiadis*, p. 56.

28. Bartolus on *Digest*, L. 16. 99.

29. Glossators on *Decretals*, I. 6. 3.

30. Baldus on *Code*, VI. 25. 9.

31. “In questions of boundaries old monuments are to be followed”: *Digest*, X. I. II.

instability of the sea, in such sort that it would appear not aye to be one and the self same body but daily changeable. For answer, I must remember that which the juriconsult sets down so prettily:<sup>32</sup> suppose (says he) a certain college of judges, or a legion of soldiers, or the particular parts of a ship, or of a man's body, should so continually and often be changed and altered that none of that first college or legion could be found alive nor yet any part of the ship or body could be so certainly demonstrate that it might be affirmed for the very same that it was at the first; yet if that college or legion be in number full, and the ship or man whole and able in all the frame, they shall be accounted and esteemed not to be new but to be the very same which they were at the beginning. Even so, however the sea many ways and hourly changes in the small parts thereof by the ordinary rush on land, mixture with other waters, swelling in itself, exhalation and back receipts thereof by rain, yet since the great body of the sea most constantly keeps the set place prescribed by the Creator, I see not in this respect neither wherefore the nature of the sea should not yield to occupation and conquest. And thus far concerning *Mare Liberum* his last and great conclusion against all appropriation thereof by people or princes. I call it his last great conclusion because of other two passing before, whereof the first is this: *mare igitur proprium alicuius fieri non potest, quia natura jubet esse commune*.<sup>33</sup> And for what reason? Even because Cicero, Virgil, and Plautus have said so. To whom I could also assent concerning the great, huge, and main body of the sea. His next conclusion is this: *est igitur mare in numero eorum quae in commercio non sunt, hoc est, quae proprii juris fieri non possunt*,<sup>34</sup> that is, the sea to be of that order of things which cannot be appropriate to any man. His warrants for his conclusion also are the Roman lawyers whom I said to be wrested by *Mare Liberum*, and therefore must show the same, contrary to his purpose indeed. Marcianus, as the author of *Mare Liberum* largely grants,<sup>35</sup> saith that if any pri-

32. *Digest*, V. I. 76 (Alfenus).

33. “The sea therefore cannot be altogether proper unto any because nature . . . commandeth it should be common”: Grotius, *The Free Sea*, p. 26, above.

34. “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”: Grotius, *The Free Sea*, p. 30, above.

35. Grotius, *The Free Sea*, p. 29, above.

vate man have himself alone by any lawful space of time sufficient for a prescription kept and exercised fishing in any creek or nook of sea, which they call *diverticulum*, he may forbid all others to fish therein,<sup>36</sup> which Papinianus also confirmeth.<sup>37</sup> The which as I accept so I would further demand of him by what reason should a private man, who hath no other care nor respect but to himself alone, be thus privileged and preferred to a prince, who not for himself but for his people also in common, yea, and for the safety of all traders passing his coasts, with great charges and care protects and conserveth the seas nearest unto him? Shall not this prince be acknowledged, at least with the good which that sea conserved by him offers so directly to him? And I pray you say what less authority had Leo than the rest of the Roman emperors to grant to everyone in particular having possessions at the seaside as much of the sea as was nearest against their lands with the fishings thereof?<sup>38</sup> What then, shall not princes be equalled in these cases with subjects? Or, rather, have not all princes a like right and power within their own precinct and bounds as these Roman princes had?

But now to draw nearer to the chief point of our purpose, and so to the end thereof. As I accepted *Mare Liberum* his former large grant, so now also do I more heartily embrace the next, which is this: when after these his conclusions, he had said *in tanto mari siquis piscatu arceret, insanae cupiditatis notam non effugeret*,<sup>39</sup> he subjoins according to that of Cicero, *quando sine detrimento suo quis potest alteri communicare in iis quae sunt occupanti utilia et danti non molesta, quid ni faceret?*<sup>40</sup> and subjoins afterward: *et si quicquam eorum prohibere posset, puta piscaturam, qua dici quodammodo potest pisces exhauriri*;<sup>41</sup> that is to say, if the uses of the seas may be in any respect forbidden and stayed it should be chiefly for the fishing,

36. *Digest*, XLI. 3. 7.

37. *Digest*, XLI. 3. 45.

38. Leo, *Novellae*, CII, CIII, CIV.

39. “If any in so great a sea . . . should forbid others to fish, he could not escape the brand of the brainsick covetousness”: Grotius, *The Free Sea*, p. 33, above.

40. “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?”: Grotius, *The Free Sea*, p. 33, above; Cicero, *De officiis*, I. 16. 51–52.

41. “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”: Grotius, *The Free Sea*, p. 37, above.

as by which the fishes may be said to be exhaust and wasted, which daily experience these twenty years past and more hath declared to be overtrue. For whereas aforetime the white fishes daily abounded even into all the shores on the eastern coast of Scotland, now forsooth by the near and daily approaching of the buss-fishers the shoals of fishes are broken and so far scattered away from our shores and coasts that no fish now can be found worthy of any pains and travails, to the impoverishing of all the sort of our home fishers and to the great damage of all the nation. Whereby I see at last the author of *Mare Liberum* not so addict to serve any man's particular desires as to answer (forsooth) to his profession of the laws; that is, to allow the proper right for every man and nation and to hurt none, according to the three general precepts of all laws, set down by Gaius<sup>42</sup> and after him by Tribonianus: *honeste vivere; alterum non laedere; et jus suum cuique tribuere*,<sup>43</sup> whereof the second tries and rules the rest, according to the vulgar saying out of Pomponius, *neminem debere cum alterius damno locupletari*,<sup>44</sup> and that of Tryphoni[n]us, *ex aliena jactura lucrum haurire non oportet*.<sup>45</sup> And therefore I would meet him with his deserved courtesy, even to proclaim *mare liberum* also, I mean that part of the main sea or great ocean which is far removed from the just and due bounds above mentioned properly pertaining to the nearest lands of every nation. *Atque ita esto mare vastum liberrimum*.<sup>46</sup>

42. *Institutes*, I. 1. 3.

43. “To live honorably; not to harm another; and to give each their due”: *Digest*, I. 1. 10, § 1 [sc. Ulpian].

44. “No-one should enrich himself by harm to another”: *Digest*, L. 17. 206; *Digest*, XII. 6. 14; *Digest*, XXIII. 3. 6, § 2.

45. “No-one should derive profit from the loss of another”: cf. *Digest*, XX. 5. 12, § 1.

46. “And this should be the great and most free sea.”

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