Chapter XI

That trade with the Indians does not belong to the Portuguese by right of prescription for custom.

There remains for consideration the question of prescription, or custom, if the reader prefers the latter term. But we have shown, in agreement with Vasquius, that neither custom nor prescription has any force in the relations between free nations or between the rulers of different peoples; and again, that these two factors are likewise without force when opposed to the principles introduced by the earliest form of law. Accordingly, in this connexion, too, we find that no lapse of time avails to make a private property of the right to trade, a right which is in itself incapable of assuming the character of private property. Consequently, in the case under discussion, neither a title nor good faith can have been present; and when these elements are clearly lacking, prescription will, according to the canonists, be regarded not as a right but as a wrong.

Furthermore, the very concept of quasi-possession of trade would seem to be based, not upon a private right, but upon a common right which pertains to all men alike; so that, conversely, it should not be supposed, merely because non-Portuguese peoples may have neglected to engage in commerce with the (East) Indians, that they refrained from so doing out of deference to the Portuguese, since one ought rather to assume that they considered the omission expedient for themselves. This attitude on their part will by no means prevent them from undertaking, at any time when such a course shall seem advantageous, the activity from which they previously abstained. In fact, the Doctores have laid down an infallible rule regarding these matters which involve free judgement

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a Vide argumenta. c. 7.: See the arguments in chapter 7 (does not occur in the ms.).

b glos. et Bart. in l. viam.: this is the beginning of a long marginal note which continues on p. 58 and is dealt with in note a of that page. The full stop after ‘viam’ is of course a printer’s error; it has been maintained, however, in the 1618 and 1633 editions. I found it corrected for the first time in ed. 1667, followed by ed. 1689. The ed. 1712 changed ‘L. viam publ.’ into ‘L. 2’; which was taken over by the 1720, 1735 and 1773 editions.
“probabiliores. Victoria putat”: the full stop before Victoria is a printer’s error, see Err.

Virgil. 1. Aen.: Virgilius, Aeneis, I [539 f.].

7. Aeneid.: Virgilius, Aeneis, VII [229 f.].

Cf. below, p. 20 note f.


Sig. ult. de reb. [read: re.]: Carolus Sigonius in the last book of his De regno Italiae [quinque reliqui libri] (= lib. XX, ed. p. 194 and 196). The reference was taken over from Gentilis, De iure belli, I, 19, ed. p. 145; my identification is borrowed from Gentilis, De iure belli (Italian translation), p. 130, referring to an edition Venetiis 1591 of De regno Italiae quinque reliqui libri. Confusion has been caused by the fact that Sigonius’ work was published in two parts: Historiarum de regno Italiae libri quindices and De regno Italiae quinque reliqui libri. Interpreters who only used an edition of the first part must have looked in vain in chapter XV, see Boschan, p. 26 n. 7 (who explicitly says so) and Williams, p. 219 and 410 (who simply does not specify). Bensly, p. 117, has found the right passage in the second part.


Numeri c. 20: Numeri XX [14-22].

August. lib. 4. qu 44 super. Num. Et est c. [glos. et Bart. in l. viam (cf. p. 57 note b)] publ. ff. de via publ. Balb. in 4. par. 5. par. princ. qu. 1. Panorm. in c. ex parte Astens. de concess. praeben. Doct. in l. qui iure familiaritas. ff. de acq. poss. et alleg. per Covar. in c. possessor. parte. 2. § 4. in 6. [ms.: §. 4. n. 6]; [Accursian] gloss ‘viam not potest’ and Bartolus [ed. V, fol. 134 v] on D. 43, 11, 2; Balbus, ed. p. 452-454; Panormitanus on Decretal. 3, 8, 10, ed. VI, fol. 98 v [num. 7]; Doctores on D. 41, 2, 41 and cited by Covarruvias in regulam Possessor, pars II, § 4, num. 6, ed. p. 421-422. The printer’s error ‘in 6.’ (instead of ‘n. 6.’) has been maintained in the 1618, 1633 and all later 17th century editions. The 1712 edition, followed by the 1720, 1735 and 1773 editions, simply omitted ‘in 6.’ The 1633 edition wrongly added the references of notes b and c to note a. This was taken over by all later 17th century editions but in the 1712 and other 18th century editions this error was partly corrected by inserting ‘Vas.’ before ‘contr. usu freq.’ Magoffin added further confusion by reading ‘Controversiae illustres’.


d. n. 12.: [Vasquius] num. 12, cited above (note b).

d. Vasq. de [ms.: d.] loco. n. 11.: Vasquius, cited above (note b), num. 11. For the