THE FREEDOM OF THE SEAS: OR, THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE. A DISSERTATION

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Trieste

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AD INDICANA COMMERCIA,

DISSERTATIO

1608

Carnegie Endowment for International Peace
DIVISION OF INTERNATIONAL LAW

THE FREEDOM OF THE SEAS

OR

THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE

A DISSERTATION BY

HUGO GROTIUS

TRANSLATED WITH A REVISION OF THE LATIN TEXT OF 1633

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EDITED WITH AN INTRODUCTORY NOTE

BY

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INTRODUCTORY NOTE

Since the month of August, 1914, the expression "Freedom of the Seas" has been on the lips alike of belligerent and neutral, and it seems as advisable as it is timely to issue—for the first time in English—the famous Latin tractate of Grotius proclaiming, explaining, and in no small measure making the "freedom of the seas."[1]

The title of the little book, first published, anonymously, in November, 1608, explains the reason for its composition: "The Freedom of the Seas, or the Right which belongs to the Dutch to take part in the East Indian trade." It was an open secret that it was written by the young Dutch scholar and lawyer, Hugo Grotius. It was a secret and remained a secret until 1868 that the *Mare Liberum* was none other than Chapter XII of the treatise *De Jure Praedae*, written by Grotius in the winter of 1604-5, which first came to light in 1864 and was given to the world four years later.[2]

The publication of the treatise on the law of prize is important as showing that the author of the *Mare Liberum* was already an accomplished international lawyer, and it

[1] For the freedom of the seas and the relation of Grotius to the doctrine, see Ernest Nys's *Les Origines du Droit International* (1894), pp. 379-387, and the same author's *Etudes de Droit International et de Droit Politique*, 2e série (1901), *Une Bataille de Livres*, pp. 260-279. For an account in English see Walker's *History of the Law of Nations*, Vol. I (1899), pp. 278-283.

For an interesting sketch of the illustrious author of the *Mare Liberum*, see Motley's *The Life and Death of John of Barneveld*, Vol. II, Chap. XXII; for an analysis of Grotius' views on the law of nations, see Hallam's *Introduction to the Literature of Europe* (4th edition), Vol. II, Part III, Chap. IV, Sec. III; for an account of Grotius as a humanist, see Sandys' *History of Classical Scholarship* (1908), Vol. II, pp. 315-319.

[2] *Hugonis Grotii De Jure Praedae*, edited, with an introduction, by H. G. Hamaker, and published at The Hague in 1868 by Martinus Nijhoff.

proves beyond peradventure that the masterpiece of 1625 on the "Law of War and Peace" was not a hurried production, but the culmination of study and reflection extending over twenty years and more. More important still is the fact that neither the law of prize nor the *Mare Liberum* was a philosophic exercise, for it appears that Grotius had been retained by the Dutch East India Company to justify the capture by one of its ships of a Portuguese galleon in the straits of Malacca in the year 1602; that the treatise on the law of prize, of which the *Mare Liberum* is a chapter, was in the nature of a brief; and that the first systematic treatise on the law of nations—The Law of War and Peace—was not merely a philosophical disquisition, but that it was the direct outgrowth of an actual case and of professional employment.[1]

[1] In support of the view that Grotius appeared as counsel in cases arising out of captures made by vessels in the service of the Dutch East India Company, and that the treatise, *De Jure Prædæ*, is a legal brief, see R. Fruin's *Een Onuitgegeven Werk van Hugo De Groot* in *Verspreide Geschriften*, Vol. III, pp. 367-445. The following passages are quoted from this remarkable essay:

"While busy with the sale of the goods [of the captured merchantman *Catherine*, which had been unloaded in the Amsterdam arsenal], the process of adjudicating the booty before the admiralty court was conducted in the usual forms. Claimants: Advocate General of Holland, the Board of eight Aldermen, and Admiral Heemskerck; . . . on Thursday, September 9, 1604, final sentence was rendered, and 'the merchantman together with the goods taken from it were declared forfeited and confiscated'" (pp. 388-390).

"Hulsius in some measure replaces what the fire at the Marine Arsenal has robbed us of; among other records he has preserved for us in his *Achte Schiffart* the sentence pronounced in this matter by the admiralty, and of which we have knowledge from no other sources. From it we learn the grounds upon which the claimants demanded the adjudication of the booty. These grounds are the same twelve which De Groot discusses in his book. . . . This concordance can be explained on the ground that De Groot must have had acquaintance with the sentence; but he was not a man merely to repeat what others had before him witnessed. I should be inclined to feel that in the process he had served as counsel for the Company, and that he himself was one of the authors of the written claim upon which the sentence was based. It would not then be surprising if in his book he should develop at greater length and throw light upon what had already been set forth in the claim" (pp. 390-391).

"I cannot state definitely that Hugo De Groot was persuaded by the Directors to write such an argument; I have been unable to discover any evidence to

The Spaniards, as is well known, then claimed the Pacific Ocean and the Gulf of Mexico, and Portugal claimed, in like manner, the Atlantic south of Morocco and the Indian Ocean, and both nations, at this time under a common sovereign, claimed and sought to exercise the right of excluding all foreigners from navigating or entering these waters. The Dutch, then at war with Spain, although not technically at war with Portugal, established themselves in 1598 in the island of Mauritius. Shortly thereafter they made settlements in Java and in the Moluccas. In 1602 the Dutch East India Company was formed, and, as it attempted to trade with the East Indies, its vessels came into competition with those of the Portuguese engaged in the Eastern trade, which sought to exclude them from the Indian waters. One Heemskerck, a captain in the employ of the Company, took a large Portuguese galleon in the Straits of Malacca. To trade with the East Indies was one thing, to capture Portuguese vessels was quite another thing. Therefore, some members of the Company refused their parts of the prize; others sold their shares in the company, and still others thought of establishing a new company in France, under the protection of King Henry IV, which should trade in peace and abstain from all warlike action. The matter was therefore one of no little importance, and it appears that Grotius was consulted and wrote his treatise on the law of prize, which is in the nature of a brief and is, at any rate, a lawyer's argument.[1]

that end. That he was in close relations with the Company, he himself says in a letter of later date, addressed to his brother. Nor can there be any doubt that in writing his work he made use of the archives of the United Company and of its predecessor. If the supposition, which I have elsewhere ventured to make is correct, that is to say, that in the conduct of the case he appeared as advocate for the Company, it would then appear most probable that, after consultation with the directors, he set about writing his book, which was to be a second plea in their behalf" (p. 403).

[1] For the account which Grotius himself gives of the incident, see his *Annales et Historiae de Rebus Belgicis ab Obitu Philippi Regis usque ad Induciae Anni* 1609, written in 1612, but first published in 1658, Book 1, p. 429.

In 1608 Spain and Holland began negotiations which, on April 9, 1609, resulted in the truce of Antwerp for the period of 12 years, and, in the course of the negotiations, Spain tried to secure from the United Provinces a renunciation of their right to trade in the East and West Indies. The Dutch East India Company thereupon, it would appear, requested Grotius to publish that part of his brief dealing with the freedom of the seas. This was done under the title of *Mare Liberum*, with such changes as were necessary to enable it to stand alone.

It will be observed that the *Mare Liberum* was written to refute the unjustified claims of Spain and Portugal to the high seas and to exclude foreigners therefrom. The claims of England, less extensive but not less unjustifiable, were not mentioned, and yet, if the arguments of Grotius were sound, the English claims to the high seas to the south and east of England, as well as to undefined regions to the north and west, would likewise fall to the ground. Therefore the distinguished English lawyer, scholar, and publicist, John Selden by name, bestirred himself in behalf of his country and wrote his *Mare Clausum* in 1617 or 1618, although it was not published until 1635, to refute the little tractate, *Mare Liberum*.[1] In the dedication to King Charles I,

For a fuller account of the circumstances under which the treatise on the law of prize was written, see Hamaker's edition of the *De Jure Prædæ*, pp. vii-viii. The distinguished historian and scholar, Robert J. Fruin, after an exhaustive examination of the evidence, informed Hamaker that Grotius was retained by the Company to prepare the commentary on the law of prize. The English translation of Hamaker's exact statement reads as follows: "Fruin is of the opinion that he [Grotius] undertook this work at the instance of the Company, and that he appeared in it as their spokesman."

For an analysis of the commentary *De Jure Praedae* and the circumstances under which it was written, see Jules Basdevant's study on Grotius, pp. 131-137, 155-179, in Pillet's *Les Fondateurs du Droit International* (1904).

[1] Selden's *Mare Clausum* was not the only defense of England, nor was the *Mare Liberum* the only lance which Grotius broke for the freedom of the seas. In 1613 William Welwod, professor of Civil Law at the University of Aberdeen, published a little book entitled *An Abridgement of all the Sea-Lawes*, in which he maintained the English side of the question, of which Title XXVII, pp. 61-

Selden said: "There are among foreign writers, who rashly attribute your Majesty's more southern and eastern sea to their princes. Nor are there a few, who following chiefly some of the ancient Caesarian lawyers, endeavor to affirm, or beyond reason too easily admit, that all seas are common to the universality of mankind." The thesis of Selden was twofold: first, "that the sea, by the law of nature or nations, is not common to all men, but capable of private dominion or property as well as the land"; second, "that the King of Great Britain is lord of the sea flowing about, as an inseparable and perpetual appendant of the British Empire."

In this battle of books, to use the happy expression of Professor Nys, the Dutch Scholar has had the better of his English antagonist. If it cannot be said that Grotius wears his learning "lightly like a flower", the treatise of Selden is, in comparison, over-freighted with it; the *Mare Liberum* is still an open book, the *Mare Clausum* is indeed a closed one, and as flotsam or jetsam on troubled waters, Chapter XII of the Law of Prize rides the waves, whereas its rival, heavy and water-logged, has gone under.

In the leading case of The Louis (2 Dodson 210), decided in 1817, some two hundred years after Selden's book was written, Sir William Scott, later Lord Stowell and one of Selden's most distinguished countrymen, said, in rejecting the claim of his country to the exercise of jurisdiction beyond a marine league from the British shore:

72, deals with the community and property of the seas. Two years later Welwod published a second work, this time in Latin, entitled *De Dominio Maris Juribusque ad Dominium praecipua Spectantibus Assertio Brevis ac Methodica.*

Grotius prepared, but did not publish, a reply to Welwod's first attack, entitled *Defensio Capitis Quinti Maris Liberi Oppugnati a Gulielmo Welwodo Juris Civilis Professore, Capite XXVII ejus Libri Scripti Anglica Sermone cui Titulum Fecit Compendium Legum Maritimarum.* It was discovered at the same time as the commentary *De Jure Praedae* and was published in 1872 in Muller's *Mare Clausum, Bijdrage tot de geschiedenis der rivaliteit van Engeland en Nederland in de zeventiende eeuw.*