Gunderson v. State of Indiana

Supreme Court of Indiana, 90 N.E.3d 1171 (14 February 2018);
***cert. denied*, 139 S.Ct. 1167 (U.S. S.Ct. 2019)**
http://www.casebriefsummary.com/gunderson-v-state-of-indiana/

FACTS:

The plaintiffs, Don and Bobbie Gunderson, own lakefront property in Long Beach, Indiana, consisting of three lots in Section 15 of Michigan Township. The plaintiffs' deed does not reference the boundary separating the disputed property from Lake Michigan to its north. An 1829 federal survey, contained in the deed, shows Lake Michigan as the northern boundary of Section 15 and notes: "to Lake Michigan and set post." Furthermore, the Town of Long Beach instituted an ordinance in 2010 separating state-owned beaches from private portions of the shore, which the plaintiffs allege infringes upon their property rights. The plaintiffs accordingly sued the State of Indiana in 2014 seeking a declaratory judgment of their littoral rights to the shore of the lake and quiet title to the disputed property. The defendants and intervening parties responded by filing cross motions for summary judgment on their behalf.

PROCEDURAL HISTORY:

The trial court issued a summary judgment in favor of the State of Indiana, ruling that the State holds title to the Lake Michigan shores in trust for the public and private property interests overlap with those of the State. The Court of Appeals affirmed in part and reversed in part, holding that: (1) absent an express legislative abrogation of public trust rights in the shore of the lake, those rights are controlled by the common law public trust doctrine; (2) DNR's administrative boundary is invalid and the OHWM remains defined by common law; and (3) the northern boundary of the plaintiffs' property extends to the ordinary low water mark and is subject to public use rights up to the OHWM for activities such as walking along the beach and accessing the public waterway. Plaintiffs now successfully petitioned the decision for transfer to the Indiana Supreme Court, thereby vacating the Court of Appeals opinion.

ISSUE:

(1) Whether the State of Indiana holds exclusive title to the exposed shore of Lake Michigan up to the OHWM – ordinary high-water mark – or whether the plaintiffs, as riparian property owners, hold title to the water's edge, thus excluding public use of the beach.

(2) Whether the OHWM is located wherever the water meets the land at any given moment or is located further landward to include the exposed shore.

RULE:

The boundary separating public trust land from privately-owned riparian land along the shores of Lake Michigan is the common-law ordinary high-water mark and that, absent an authorized legislative conveyance, the State retains exclusive title up to that boundary.

ANALYSIS:

First off, the State of Indiana acquired title to the shores and submerged lands of all navigable waters within its border, which is the primary issue here, upon admission into the Union in 1816, pe *Kivett*. The plaintiffs contend that they own the disputed property, per deed, to the water's edge of Lake Michigan, up until the point at which the water meets the exposed shore at any given moment. They further argue that the State of Indiana owns the submerged lakebed, thereby limiting public use to the waters only. On the other hand, the defendants assert that the State exclusively owns the bed of Lake Michigan up until the OHWM, including the exposed shores when the water recedes, per the equal-

footing doctrine. The plaintiffs believe that the equal-footing doctrine, per the Northwest Ordinance of 1787, granted States exclusive title to the waters only. However, the equal-footing doctrine originated in the U.S. Constitution and *United States v. Utah* later interpreted it to convey exclusive title to the States of the beds of rivers within the state once the state was admitted into the Union (1816 for Indiana). States have long held the right to establish rules concerning public use of the aforementioned property. Moreover, modern courts abandoned the ordinance relied upon by the plaintiffs in favor of the "admission into the Union" standard for determining equal-footing and, accordingly, the ordinance does not affect the defendant's title to the shores and submerged lands of Lake Michigan.

On another note, the plaintiffs' contend that their deed represents prima facie evidence of their title to the disputed property absent another party's superior title, which the defendants assert they acquired upon admission into the Union in 1816. The federal government did not survey the land granted to the plaintiffs' predecessor per the deed, which originated from an 1837 federal land patent. In addition, the U.S. Supreme Court held, per *Shively v. Bowlby*, that grants of land by congress do not convey title to property below the high-water mark and do not inhibit a state's dominion over such property in navigable waters. However, absent evidence proving the plaintiffs hold an express federal grant prior to 1816 conveying them the property below the OHWM, the shore lands below the OHWM belong to the State of Indiana for public use.

Furthermore, the plaintiffs contend that a number of cases and the federal Submerged Lands Act designate the water's edge as the legal boundary between private and public property. The State, on the other hand, rightfully argues that the land granted per the equal footing doctrine extends from temporarily-exposed shores of the lake up until the OHWM. As stated by the court, the states have title to all land on the waterbody side of the OHWM, including submerged soil and the shore, whereas private owners may own land on the upland side on the OHWM. The Supreme Court of Michigan further held that OHWM includes temporarily-submerged land to account for the inherent fluctuation of water levels. Additionally, common law historically determines the boundary of the OHWM, not at the water's edge as asserted by the plaintiffs, but actually at wherever the mark/presence of the water on the soil/vegetation ends. Therefore, the plaintiffs' based their argument upon a misinterpretation of the Submerged Lands Act of 1953 and, in turn, the State of Indiana lawfully acquired exclusive title of Lake Michigan up to the OHWM upon statehood. The State of Indiana also has the authority to define the limits of land for public trust and private ownership as it sees fit. Thus, the contention that both parties hold overlapping title to the disputed property is invalid, as the State acquired sovereignty upon statehood.

The plaintiffs further argue that the Lake Preservation Act intended to extinguish public trust rights to the land encompassed by Lake Michigan. Regardless, the legislature did not intend to extinguish the public trust rights of the defendant over the shores of Lake Michigan. In fact, Indiana enacted a submerged property statute providing that private owners may only acquire permits to use the land within navigable waters, but the land remains encumbered by public trust. In other words, the public trust rights held by the State trumps any rights to the land granted to private owners. The plaintiffs rely upon *Bainbridge*, which deals with the Ohio River, to support their contention that the State of Indiana relinquished rights to the disputed property. Their argument, however, proves incorrect merely because rulings concerning the Ohio River do not hold weight in issues regarding Lake Michigan.

Finally, the court determined that even if the plaintiffs brought evidence of an express federal grant prior to 1816 granting them rights to the disputed property, private riparian owners cannot interfere with public use of the lake as fundamental as walking along the shore. Ruling in favor of the plaintiffs would inevitably carry with it ramifications to key social and economic functions of the state. Furthermore, the court here cannot practically take away public use of waters and shores of the lake without interfering with the state's sovereignty over the disputed land. For this reason and those listed above, the court chose to exercise judicial restraint over the matter and, in turn, conclude that the disputed property is intended for public use, as opposed to ownership by the plaintiffs.

CONCLUSION:

The Supreme Court of Indiana affirmed in part and reversed in part the trial court's grant of summary judgment in favor of the defendants.

Justinian, *Institutiones* 2.1 pr.-19 (promulgated 533 CE):

Superiore libro de iure personarum exposuimus: modo videamus de rebus. quae vel in nostro patrimonio vel extra nostrum patrimonium habentur. quaedam enim naturali iure communia sunt omnium, quaedam publica, quaedam universitatis, quaedam nullius, pleraque singulorum, quae variis ex causis cuique adquiruntur, sicut ex subiectis apparebit.

1. Et quidem naturali iure communia sunt omnium haec: aer et aqua profluens et mare et per hoc litora maris. nemo igitur ad litus maris accedere prohibetur, dum tamen villis et monumentis et aedificiis abstineat, quia non sunt iuris gentium, sicut et mare. **2.** Flumina autem omnia et portus publica sunt: ideoque ius piscandi omnibus commune est in portibus fluminibusque. **3.** Est autem litus maris, quatenus hibernus fluctus maximus excurrit. **4.** Riparum quoque usus publicus est iuris gentium sicut ipsius fluminis: itaque navem ad eas appellere, funes ex arboribus ibi natis religare, onus aliquid in his reponere cuilibet liberum est, sicuti per ipsum flumen navigare. sed proprietas earum illorum est quorum praediis haerent: qua de causa arbores quoque in iisdem natae eorundem sunt. **5.** Litorum quoque usus publicus iuris gentium est, sicut ipsius maris: et ob id quibuslibet liberum est, casam ibi imponere, in qua se recipiant, sicut retia siccare et ex mare deducere. proprietas autem eorum potest intellegi nullius esse, sed eiusdem iuris esse cuius et mare, et quae subiacent mari terra vel harena.

6. Universitatis sunt, non singulorum, veluti quae in civitatibus sunt theatra, stadia et similia et si qua alia sunt communia civitatium.

7. Nullius autem sunt res sacrae et religiosae et sanctae: quod enim divini iuris est, id nullius in bonis est. **8.** Sacra sunt, quae rite et per pontifices Deo consecrata sunt, veluti aedes sacrae et dona quae rite ad ministerium Dei dedicata sunt, quae etiam per nostrum

pr. In the preceding book we have expounded the law of Persons: now let us proceed to the law of Things. Of these, some admit of private ownership, while others, it is held, cannot belong to individuals: for some things are by Natural Law common to all, some are public, some belong to a society or corporation, and some belong to no one. But most things belong to individuals, being acquired by each for various reasons, as will appear from what follows.

1. Thus, the following things are by Natural Law common to all—the air, running water, the sea, and consequently the seashore. No one therefore is forbidden access to the seashore, provided he keeps away from villas, monuments, and buildings; for these are not, like the sea itself, subject to the Law of Nations. **2.** On the other hand, all rivers and harbours are public, so that all persons have a right to fish therein. **3.** The seashore extends to the limit of the highest tide in time of storm or winter. **4.** Again, the public use of the banks of a river, as of the river itself, is part of the law of nations; consequently every one is entitled to bring his vessel to the bank, and fasten cables to the trees growing there, and use it as a resting-place for the cargo, as freely as he may navigate the river itself. But the ownership of the bank is in the owner of the adjoining land, and consequently so too is the ownership of the trees which grow upon it. **5.** Again, the public use of the seashore, as of the sea itself, is part of the law of nations; consequently everyone is free to build a cottage upon it for purposes of retreat, as well as to dry his nets and haul them up from the sea. But they cannot be said to belong to any one as private property, but rather are subject to the same law as the sea itself, with the soil or sand that lies beneath it.

6. As examples of things belonging to a society or corporation, and not to individuals, may be cited buildings in cities—theatres, racecourses, and such other similar things as belong to cities in their corporate capacity.

7. Things that are sacred, devoted to superstitious uses, or sanctioned, belong to no one, for what is subject to divine law is no one's property. **8.** Those things are sacred which have been duly consecrated to God by His ministers,

constitutionem alienari et obligari prohibuimus, excepta causa redemptionis captivorum. si quis vero auctoritate sua quasi sacrum sibi constituerit, sacrum non est, sed profanum. locus autem, in quo sacrae aedes aedificatae sunt, etiam diruto aedificio, adhuc sacer manet, ut et Papinianus scripsit. **9.** Religiosum locum unusquisque sua voluntate facit, dum mortuum infert in locum suum. in communem autem locum purum invito socio inferre non licet: in commune vero sepulcrum etiam invitis ceteris licet inferre. item si alienus usus fructus est, proprietarium placet, nisi consentiente usufructuario, locum religiosum non facere. in alienum locum, concedente domino, licet inferre: et licet postea ratum habuerit quam illatus est mortuus, tamen religiosus locus fit. **10.** Sanctae quoque res, veluti muri et portae, quodammodo divini iuris sunt et ideo nullius in bonis sunt. ideo autem muros sanctos dicimus, quia poena capitis constituta sit in eos qui aliquid in muros deliquerint. ideo et legum eas partes quibus poenas constituimus adversus eos qui contra leges fecerint sanctiones vocamus.

11. Singulorum autem hominum multis modis res fiunt: quarundam enim rerum dominium nanciscimur iure naturali, quod, sicut diximus, appellatur ius gentium, quarundam iure civili. commodius est itaque a vetustiore iure incipere. palam est autem, vetustius esse naturale ius, quod cum ipso genere humano rerum natura prodidit: civilia enim iura tunc coeperunt esse, cum et civitates condi et magistratus creari et leges scribi coeperunt.

such as churches and votive offerings which have been properly dedicated to His service; and these we have by our constitution forbidden to be alienated or pledged, except to redeem captives from bondage. If anyone attempts to consecrate a thing for himself and by his own authority, its character is unaltered, and it does not become sacred. The ground on which a sacred building is erected remains sacred even after the destruction of the building, as was declared also by Papinian. **9.** Anyone can devote a place to superstitious uses of his own free will, that is to say, by burying a dead body in his own land. It is not lawful, however, to bury in land which one owns jointly with someone else, and which has not hitherto been used for this purpose, without the other's consent, though one may lawfully bury in a common sepulchre even without such consent. Again, the owner may not devote a place to superstitious uses in which another has a usufruct, without the consent of the latter. It is lawful to bury in another man's ground, if he gives permission, and the ground thereby becomes religious even though he should not give his consent to the interment till after it has taken place. **10.** Sanctioned things, too, such as city walls and gates, are, in a sense, subject to divine law, and therefore are not owned by any individual. Such walls are said to be 'sanctioned,' because any offence against them is visited with capital punishment; for which reason those parts of the laws in which we establish a penalty for their transgressors are called sanctions.

11. Things become the private property of individuals in many ways; for the titles by which we acquire ownership in them are some of them titles of Natural Law, which, as we said, is called the law of nations, while some of them are titles of Civil Law. It will thus be most convenient to take the older law first: and Natural Law is clearly the older, having been instituted by Nature at the first origin of mankind, whereas Civil Laws first came into existence when states began to be founded, magistrates to be created, and laws to be written.

12. Ferae igitur bestiae et volucres et pisces, id est omnia animalia quae in terra mari caelo nascuntur, simulatque ab aliquo capta fuerint, iure gentium statim illius esse incipiunt: quod enim ante nullius est id naturali ratione occupanti conceditur. nec interest, feras bestias et volucres utrum in suo fundo quisque capiat, an in alieno: plane qui in alienum fundum ingreditur venandi aut aucupandi gratia, potest a domino, si is providerit, prohiberi, ne ingrediatur. quidquidautem eorum ceperis, eo usque tuum esse intellegitur, donec tua custodia coercetur: cum vero evaserit custodiam tuam et in naturalem libertatem se receperit, tuum esse desinit et rursus occupantis fit. naturalem autem libertatem recipere intellegitur, cum vel oculos tuos effugerit vel ita sit in conspectu tuo, ut difficilis sit eius persecutio. **13.** Illud quaesitum est, an, si fera bestia ita vulnerata sit ut capi possit, statim tua esse intellegatur. quibusdam placuit, statim tuam esse et eo usque tuam videri, donec eam persequaris; quodsi desieris persequi, desinere tuam esse et rursus fieri occupantis. alii non aliter putaverunt tuam esse, quam si ceperis. sed posteriorem sententiam nos confirmamus, quia multa accidere solent, ut eam non capias. **14.** Apium quoque natura fera est. itaque quae in arbore tua consederint, antequam a te alveo includantur, non magis tuae esse intelleguntur, quam volucres quae in tua arbore nidum fecerint: ideoque si alius eas incluserit, is earum dominus erit. favos quoque si quos hae fecerint, quilibet eximere potest. plane integra re, si provideris ingredientem in fundum tuum, potes eum iure prohibere, ne ingrediatur. examen quod ex alveo tuo evolaverit eo usque tuum esse intellegitur donec in conspectu tuo est nec difficilis eius persecutio est: alioquin occupantis fit. 15. Pavonum et columbarum fera natura est. nec ad rem pertinet, quod ex consuetudine avolare et revolare solent: nam et apes idem faciunt, quarum constat feram esse naturam: cervos quoque ita quidam mansuetos habent, ut in silvas ire et redire soleant, quorum et ipsorum feram

12. Wild animals, birds, and fish, that is to say all the creatures which the land, the sea, and the sky produce, as soon as they are caught by anyone become at once the property of their captor by the Law of Nations; for Natural Reason admits the title of the first occupant to that which previously had no owner. So far as the occupant's title is concerned, it is immaterial whether it is on his own land or on that of another that he catches wild animals or birds, though it is clear that if he goes on another man's land for the sake of hunting or fowling, the latter may forbid him entry if aware of his purpose. An animal thus caught by you is deemed your property so long as it is completely under your control; but so soon as it has escaped from your control, and recovered its natural liberty, it ceases to be yours, and belongs to the first person who subsequently catches it. It is deemed to have recovered its natural liberty when you have lost sight of it, or when, though it is still in your sight, it would be difficult to pursue it. **13.** It has been doubted whether a wild animal becomes your property immediately you have wounded it so severely as to be able to catch it. Some have thought that it becomes yours at once, and remains so as long as you pursue it, though it ceases to be yours when you cease the pursuit, and becomes again the property of any one who catches it: others have been of opinion that it does not belong to you till you have actually caught it. And we confirm this latter view, for it may happen in many ways that you will not capture it. **14.** Bees again are naturally wild; hence if a swarm settles on your tree, it is no more considered yours, until you have hived it, than the birds which build their nests there, and consequently if it is hived by someone else, it becomes his property. So too any one may take the honeycombs which bees may chance to have made, though, of course, if you see someone coming on your land for this purpose, you have a right, to forbid him entry before that purpose is effected. A swarm which has flown from your hive is considered to remain yours so long as it is

esse naturam nemo negat. in his autem animalibus, quae ex consuetudine abire et redire solent, talis regula comprobata est, ut eo usque tua esse intellegantur, donec animum revertendi habeant: nam si revertendi animum habere desierint, etiam tua esse desinunt et fiunt occupantium. revertendi autem animum videntur desinere habere, cum revertendi consuetudinem deseruerint. **16.** Gallinarum et anserum non est fera natura idque ex eo possumus intellegere, quod aliae sunt gallinae quas feras vocamas, item alii anseres quos feros appellamus. ideoque si anseres tui aut gallinae tuae aliquo casu turbati turbataeve evolaverint, licet conspectum tuum effugerint, quocumque tamen loco sint, tui tuaeve esse intelleguntur: et qui lucrandi animo ea animalia retinet, furtum committere intellegitur. **17.** Item ea quae ex hostibus capimus iure gentium statim nostra fiunt: adeo quidem, ut et liberi homines in servitutem nostram deducantur, qui tamen, si evaserint nostram potestatem et ad suos reversi fuerint, pristinum statum recipiunt. **18.** Item lapilli gemmae et cetera quae in litore inveniuntur, iure naturali statim inventoris fiunt. **19.** Item ea quae ex animalibus dominio tuo subiectis nata sunt eodem iure tibi adquiruntur.

in your sight and easy of pursuit: otherwise it belongs to the first person who catches it. **15.** Peafowl too and pigeons are naturally wild, and it is no valid objection that they are used to return to the same spots from which they fly away, for bees do this, and it is admitted that bees are wild by nature; and some people have deer so tame that they will go into the woods and yet habitually come back again, and still no one denies that they are naturally wild. With regard, however, to animals which have this habit of going away and coming back again, the rule has been established that they are deemed yours so long as they have the intent to return: for if they cease to have this intention they cease to be yours, and belong to the first person who takes them; and when they lose the habit they seem also to have lost the intention of returning. **16.** Fowls and geese are not naturally wild, as is shown by the fact that there are some kinds of fowls and geese that we call wild kinds. Hence if your geese or fowls are frightened and fly away, they are considered to continue yours wherever they may be, even though you have lost sight of them; and anyone who keeps them intending thereby to make a profit is held guilty of theft. **17.** Things again which we capture from the enemy at once become ours by the law of nations, so that by this rule even free men become our slaves, though, if they escape from our power and return to their own people, they recover their previous condition. **18.** Precious stones too, and gems, and all other things found on the seashore, become immediately by Natural Law the property of the finder: **19.** and by the same Law the young of animals of which you are the owner become your property also.

Trans. J. B. Moyle, *The Institutes of Justinian* (5th ed. 1913; modified)

The Problem of "Common Things"

1. Some Things Are "Common" in Literary Sources:

Plautus, *Rudens* 4.3.36-40 (speech of Gripus the fisherman):

> Ecquem esse dices in mari piscem meum?
> quos cum capio, siquidem cepi, mei sunt; habeo pro meis,
> nec manu adseruntur neque illinc partem quisquam postulat.
> in foro palam omnes vendo pro meis venalibus.
> mare quidem commune certost omnibus. 40
>
> "Which fish in the sea will you say 'is my own'? When I catch them, if indeed I do catch them, they are my own; as my own I keep them. They are not claimed as having a right to freedom nor does any person demand a share in them. In the market I sell them all openly as my own wares. Indeed, the sea is, surely, common to all persons."

Ovid, *Metamorphoses* 6.349-352 (Titania)

> "'Why do you forbid me your waters? The use of water is everyone's right. Nature has not made the sun, or the air, or the clear waves, private things. I come for a public gift, and yet I beg you to grant it to me as a suppliant...." (transl. A.S. Kline, 2000)

See also Cicero, *pro Roscio Amerino* 72, *de Officiis* 1.51-52, *Topica* 32; Ovid, *Metamorphoses* 1.135-136; Seneca, *de Beneficiis* 4.28.3; Servius (Auctus), *ad Aeneidem* 1.540. Earlier Greek sources: Sophocles, frag. 612 Nauck; Plato, Laws 7.824b (a legislative proposal); Aeschines, Falsa Leg. 71; Phoenicides (a New Comedy writer, early third cent. BCE), in Athenaeus, 8.345e ("Phoenicides ... said that the sea was common, but that the fish in it belonged to those who bought them").

2. Maritime Villas Became a Source of Considerable Moral Anxiety

Horace, *Carmina* 3.1.32-35:

> "The fish can feel that the channel's narrowing,
> when piles are driven deep: the builder, his team
> of workers, the lord who scorns the land
> pour the rubble down into the waters."
> (transl. A.S. Kline, 2003)

See also Varro, *de Re Rustica* 3.17.9. Sallust, *Bellum Catilinae* 20.11. Horace, *Carmina* 2.18.20-22, 3.24.3-4; *Epistulae* 1.1.83-87; *Ars Poetica* 63-68. Tibullus 2.3.45-46. Seneca, *Epistulae Morales* 122.8; *Thyestes* 459-460. Petronius, *Satyricon* 119 lines 87-89. Lucan 2.677-679

Legal Sources on Common Things: The Seashore

Stage 1: Late Republic to ca. 150 CE: Public Beaches vs. Private Villas

Cicero, *Topica* 32 (44 BCE): Solebat igitur Aquilius collega et familiaris meus, cum de litoribus ageretur, quae omnia publica esse vultis, quaerentibus eis quos ad id pertinebat, quid est litus, ita definire, qua fluctus eluderet; ...

> "My colleague and friend (the jurist) Aquilius, when there was discussion of shores, which you (jurists) claim are all public, and those interested in the matter asked what 'the shore' is, used to define it as 'where the waves play'; ..."

Neratius, D. 41.1.14 (ca. 100 CE): **pr.** Quod in litore quis aedificaverit, eius erit: nam litora publica non ita sunt, ut ea, quae in patrimonio sunt populi, sed ut ea, quae primum a natura prodita sunt et in nullius adhuc dominium pervenerunt: nec dissimilis condicio eorum est atque piscium et ferarum, quae simul atque adprehensae sunt, sine dubio eius, in cuius potestatem pervenerunt, dominii fiunt. **1.** Illud videndum est, sublato aedificio, quod in litore positum erat, cuius condicionis is locus sit, hoc est utrum maneat eius cuius fuit aedificium, an rursus in pristinam causam reccidit perindeque publicus sit, ac si numquam in eo aedificatum fuisset. quod propius est, ut existimari debeat, si modo recipit pristinam litoris speciem.

> "**pr.** What a person builds on the shore will be his. For public shores are not like things in the people's patrimony, but like those that were first bestowed by nature and have not yet come into anyone's ownership. Nor is their legal state different from that of fish and wild animals, which, as soon as they have been captured, clearly become owned by the person into whose power they came. **1.** It remains to look at the legal state of the area after the building placed on the shore is removed: whether it remains the person's whose building it was, or returns to its original condition and is then public, as if nothing had ever been built on it. This is the better way of thinking about it, provided it recovers the shore's original appearance."

Celsus, D. 43.8.3 (ca. 120 CE): **pr.** Litora, in quae populus Romanus imperium habet, populi Romani esse arbitror: **1.** Maris communem usum omnibus hominibus, ut aeris, iactasque in id pilas eius esse qui iecerit: sed id concedendum non esse, si deterior litoris marisve usus eo modo futurus sit.

> "**pr.** I think that the shores over which the Roman people have dominion belong to the Roman people. **1.** Use of the sea is common to all people, like the air, and foundation placed on it belong to the person who places them; but this is not allowable if use of the shore or sea will thereby be worsened."

Celsus, D. 50.16.96 pr. (ca. 120 CE): Litus est, quousque maximus fluctus a mari pervenit: idque Marcum Tullium aiunt, cum arbiter esset, primum constituisse.

> "The shore extends to the highest wave from the sea; and they say that Marcus Tullius (Cicero) established this when he was an arbitrator."

See also Aristo in Pomponius, D. 1.8.10; Javolenus, D. 50.16.112

Stage 2: Intervention of the Emperor Antoninus Pius (138-161 CE), and the Rights of Fishers

Marcian, D. 1.8.4 pr. (ca. 220 CE): Nemo igitur ad litus maris accedere prohibetur piscandi causa, dum tamen villis et aedificiis et monumentis abstineatur, quia non sunt iuris gentium sicut et mare: idque et Divus Pius piscatoribus Formianis et Ca<i>enatis rescripsit.

"So no one is prohibited access to the seashore for fishing, so long as he keeps away from anyone's buildings and monuments because these are not, as the sea is, subject to the Law of Nations; and the deified Pius wrote this to the fishers of Formiae and Caieta."

Stage 3: The Late Classical Doctrine: Balancing Private Interests

Pomponius, D. 41.1.50 (ca. 160 CE): Quamvis quod in litore publico vel in mari exstruxerimus, nostrum fiat, tamen decretum praetoris adhibendum est, ut id facere liceat: immo etiam manu prohibendus est, si cum incommodo ceterorum id faciat: nam civilem eum actionem de faciendo nullam habere non dubito. (See also D. 41.1.30.4.)

"Although what we construct on a public shore or in the sea becomes ours, still a decree from the Praetor must be sought for permission to do this. Indeed, he must be physically prevented if his acts cause inconvenience to others; for I do not doubt he has no civil action on acting."

Gaius, D. 1.8.5.1 (ca. 170 CE): In mare piscantibus liberum est casam in litore ponere, in qua se recipient ...

"Fishers are free to place on the shore a hut where they can take refuge ..."

Scaevola, D. 43.8.4 (ca. 180 CE): Respondit in litore iure gentium aedificare licere, nisi usus publicus impediretur.

"He responds that by the Law of Nations a person is allowed to build on the shore unless public use is impeded."

Ulpian, D. 43.8.2.8 (ca. 215 CE): Adversus eum, qui molem in mare proiecit, interdictum utile competit ei, cui forte haec res nocitura sit: si autem nemo damnum sentit, tuendus est is, qui in litore aedificat vel molem in mare iacit. (See also D. 8.4.13 pr.; 39.1.1.18; 43.8.2.9; and the following page.)

"Against a person who thrusts a pier on the sea an analogous interdict is available to anyone this perhaps will harm. But if no one is harmed, the person who builds on the shore or throws a pier into the sea must be protected."

See also Papinian, D. 41.3.45 pr.; Paul, D. 18.1.51, 41.1.65.1, 47.10.14.

Stage 4: The Doctrine of *Res Communes*

Ulpian, D. 47.10.13.7 (ca. 215):

Si quis me prohibeat in mari piscari vel everriculum (quod Graece σαγήνη dicitur) ducere, an iniuriarum iudicio possim eum convenire? Sunt qui putent iniuriarum me posse agere: et ita Pomponius et plerique esse huic similem eum, qui in publicum lavare vel in cavea publica sedere vel in quo alio loco agere sedere conversari non patiatur, aut si quis re mea uti me non permittat: nam et hic iniuriarum conveniri potest. Conductori autem veteres interdictum dederunt, si forte publice hoc conduxit: nam vis ei prohibenda est, quo minus conductione sua fruatur.

Si quem tamen ante aedes meas vel ante praetorium meum piscari prohibeam, quid dicendum est? Me iniuriarum iudicio teneri an non? Et quidem mare commune omnium est et litora, sicuti aer, et est saepissime rescriptum non posse quem piscari prohiberi: sed nec aucupari, nisi quod ingredi quis agrum alienum prohiberi potest. Usurpatum tamen et hoc est, tametsi nullo iure, ut quis prohiberi possit ante aedes meas vel praetorium meum piscari: quare si quis prohibeatur, adhuc iniuriarum agi potest. In lacu tamen, qui mei dominii est, utique piscari aliquem prohibere possum.

"If someone forbids me from fishing in the sea or dragging a net (which in Greek is called a σαγήνη), can I sue him for *iniuria*? Some think that I can sue for *iniuria*; and thus Pomponius and most (jurists think) that he is like a person who does not allow (me) to use a public bath, or to sit in a public theater, or to conduct business or sit or talk in some other place, or does not permit me to use my property; for he can be sued for *iniuria*. But Republican jurists gave an interdict to a (public) lessee if he happened to have leased this; for force cannot be used to prevent his enjoyment of the lease.

"But what should be ruled if I forbid someone from fishing in front of my house or my villa? Am I liable in an action for *iniuria*, or not? And indeed the sea and its shores are, like the air, common to all; and imperial rescripts have often held that a person cannot be forbidden from fishing, no more than from birdcatching, except if he is forbidden to enter another's land. But people have claimed, although without legal right (to do so), that someone can be forbidden from fishing in front of my house or my villa; hence, if someone is forbidden, the suit on *iniuria* can lie for this. However, on a lake that I own entirely I can in any case prevent someone from fishing."

Marcian, D. 1.8.2, 4 pr., 6 pr. (ca. 230):

(2) **pr.** Quaedam naturali iure communia sunt omnium, <quaedam publicae,> quaedam universitatis, quaedam nullius, pleraque singulorum, quae variis ex causis cuique adquiruntur. **1.** Et quidem naturali iure omnium communia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris.

"**pr.** Some things are common to all by Natural Law, <some are public,> some belong to a community, some are no one's; but many belong to individuals and are acquired by each for various reasons. **1.** And indeed the things that are common to all by Natural Law are these: the air, flowing water, and the sea and by extension the seashores.

(**4**) **pr**. Nemo igitur ad litus maris accedere prohibetur piscandi causa, dum tamen ullius et aedificiis et monumentis abstineatur, quia non sunt iuris gentium sicut et mare: idque et Divus Pius piscatoribus Formianis et Ca<i>enatis rescripsit. **1.** Sed flumina paene omnia et portus publica sunt.

"**pr.** So no one is prohibited access to the seashore for fishing, so long as he keeps away from anyone else's buildings and monuments because these are not, unlike the sea, subject to the Law of Nations; and the deified Pius wrote this to the fishers of Formiae and Caieta. **1.** But almost all river and ports are public.

(**6 pr.**) In tantum, ut et soli domini constituantur qui ibi aedificant, sed quamdiu aedificium manet: alioquin aedificio dilapso quasi iure postliminii revertitur locus in pristinam causam, et si alius in eodem loco aedificaverit, eius fiet.

"To such an extent that those who build there (on the shore) Tare considered also owners of the land, but (only) as long as the building remains. But when the building collapses, the place returns to its original state as if by the right of return, and if a third party builds on the same place, it becomes his."

So, What Are *Res Communes* in Roman Law?

1. The Air: evidently not regulated at all except as to emissions, with no claim of public ownership

2. The Sea (and Seafloor): regulated only as to controlling piracy and conflicts; but no claim of public ownership

3. The Seashore to Highest Water Mark: claim of public ownership, but open to private use and, with official permission, private development

4. Navigable Rivers: claim of public ownership; from early date, highly regulated especially for navigation, fishing, and riparian rights

Select Further Reading

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