

OUTLINE – LECTURE 7b

The Revival of Academic Law – The Civilians

The Civilian Glossators on Wild Animals:

Glossators (B=Bolognese; M='Gosiani'):

- a. Irnerius (d. c. 1130)
- b. Martinus Gosia (d. c. 1160), Bulgarus de Bulgarinis (d. c. 1166), [H]Ugo de Porta Ravennate (d. 1166 X 1171), Jacobus de Porta Ravennate (d. 1178) – the four doctors – advised Frederick I at the Diet of Roncaglia in 1158
 - c1. Rogerius (d. c. 1170) (M), Johannes Bassianus (d. c. 1190) (B), Placentinus (d. 1192) (M), Vacarius (d. c. 1198)
 - c2. Pillius Medicinensis (d. c. 1210) (B), Azo (d. 1220) (B)
 - d. Hugolinus (d. c. 1235), Roffredus (d. c. 1243), Accursius (d. 1263), Odofredus (d. 1265), all students of Joh. Bas. and/or Azo

A typical set of glosses: JI.2.1.11–13 with the Accursian gloss (*Mats.* pp. VII–2 to VII–4). (Glosses indicated below with footnote number in red if you are looking at a digital copy. An early printed edition of these glosses may be found [here](#). A manuscript copy may be found [here](#). [They will make you promise not to do something bad with it before they let you in.]):

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. Wild animals, birds and fish, therefore¹, that is to say all the creatures which the land, the sea, and the heavens² produce, at the same time as³ they are caught by any one 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 immaterial⁴ 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 hunting⁵ or fowling, the latter may forbid him entry⁶ 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,⁷ 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 difficult⁸ to pursue⁹ it.

13. It¹⁰ has been doubted whether a wild animal becomes your property immediately [when] you have wounded it so severely as to be able to catch it.¹¹ 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 the opinion that it does not belong to you till you have actually caught it. And we confirm this latter view,¹² for it may happen¹³ in many ways that you will not capture it.¹⁴

1. *Glosses of the traditional kind*, i.e. they explain what the passage means in its context and what the difficult words mean:

Gloss 1 on “Wild animals, birds and fish, therefore”: Because one ought to begin with the older: therefore &c. Accursius.

Gloss 2 on “the heavens”: “I.e., the sky. Accursius.”

Gloss 3 on “at the same time as”: That is immediately after &c.

Gloss 4 “on immaterial”: So far as acquiring ownership is concerned.

Gloss 7 “on natural liberty”: I.e., freedom [*laxitas*, an unbound state], as immediately follows. [D.41.1.5 (*Mats.*, § XIII.A), 44 (a wonderful case that asks what happens when a wolf takes away your pig and then someone else captures the wolf along with the pig; it uses the word *laxitas*, where we would expect *libertas*).]

2. *Gloss that deals with a potential contradiction.*

Gloss 4 on “immaterial” (cont’d): But are *res sacrae* granted to the occupant? [JI.2.1.7 (the answer to the question is, of course, “no”) “7. Things which are sacred . . . belong to no one, for what is subject to divine law is no one’s property.”]. Answer: a thing is said to be no one’s in six or seven ways: (1) By nature, as here. (2) In fact, as [in JI.2.1.47 (“if a man takes possession of property abandoned by its previous owner, he at once becomes its owner himself”). (3) By time, as [in D.41.1.31.1 (“Treasure is an ancient deposit of money, memory of which no longer survives, so that it is without an owner; thus, what does not belong to another becomes the property of him who finds it.)]. And in these three situations the rule stated applies, except that in the case of treasure a half is given to the owner of the ground, on the basis of equity. [JI.2.1.39 (see *Mats.*, p. I–11)]. (4) By censure, as [in JI.2.1.7 (see above, first citation in this gloss and *Mats.*, p. I–8)]. (5) By circumstance, as in an inheritance that has not been taken up, which takes the place of the owner. [JI.3.17pr (“as an inheritance in most matters represents the legal ‘person’ of the deceased, whatever a slave belonging to it stipulates for, before the inheritance is accepted, he acquires for the inheritance, and so for the person who subsequently becomes heir.”)]. (6) By the fault of man, as when I cast out a sick slave. [C.7.6.1.[3] (modifying previous law, Justinian rules that if an owner expels a sick slave from his house, the slave immediately becomes a Roman citizen and the owner loses all rights to him and to his property)]. (7) By constitution of natural law, as a free man. [D.45.1.83.5 (holds that if I stipulate to give you a free man, i.e., as a slave, the stipulation is void, because “to await the chance of bad luck falling on a freeman is neither civil nor natural; for we properly deal with objects which can at once be put to use and under our ownership.”)].

3. *List of situations where one could not forbid someone to come on his land.*

Gloss 5 on “hunting”: It is otherwise [if I go on] for the sake of reclaiming my fugitive slave [C.6.1.2 (a cryptic rescript that was interpreted by the doctors as meaning that a judge could grant the owners of fugitive slaves the right to search for them in others’ houses; see *id.*, rubr. [Lyon, 1604], col. 1267)] or for the sake of collecting acorns [D.43.28.1 (“The praetor says: ‘I forbid the use of force to prevent such a one from gathering and taking away on the third day the acorns which fall from his field into yours’. 1. All fruits are included under the term ‘acorns.’”)] or in order to get back money that I have hidden there [D.10.4.15 (the text is considerably more complicated than Accursius makes it out to be, but it would seem that Roman law would give an action or an interdict to a man who wished to dig up treasure that he had buried on another’s

land)] or if the seller prohibits me from taking a grape harvest that I have bought [D.19.1.25 (again, a bit more complicated than Accursius makes it out to be: “One who has bought a vintage on the vine can, if prevented by the seller from gathering the grapes, meet the seller’s action for the price by the plea ‘if the money in question is not the price of a thing sold and not delivered’. But if after the delivery he is prevented from either treading the crop of grapes or removing the juice, he can bring the action for production (*ad exhibendum*) or the action for invasion of right (*iniuria*), just as much as if he were prevented from removing any other property of his.”)].

4. *Is this just analysis of the text?*

Gloss 6 “on forbid him entry”: What if after prohibition he takes something? Answer: He does not make it his. [C.3.32.17 (a man has bought a piece of land by fraud and the judge is ordered to restore both the land and its fruits to the previous owner), 22 (states the general rule that bad faith possessors have to restore all the fruits they have taken from the land, while good faith possessors have only to restore those that accrue after the *litis contestatio*); cf. JI.2.1.14 (the passage on bees, *Mats.*, § IA). ADDITION: Say that this is true, according to Angelus [de Gambillionibus or Aretinus, d. 1461], if the fruit of the land consisted in hunting, otherwise not, as the gloss holds in [D.8.3.16 v^o *aucupibus* (see Appendix immediately following in *Mats.*)] and in [D.41.1.3 v^o *prohiberi* (which simply cross-refers the gloss on D.8.3.16)], although Por. [Johannes Christopherus Portius, *Mats.* § XIII.E] follows this gloss.

5. *Accursius puts a “spin” on his texts:*

Gloss 8 on “difficult”: I.e., impossible. So [in D.17.2.23 v^o *difficile* (see Appendix); contra [D.9.3.2 (see Appendix)]. Accursius. [Accursius’ interpretation of this passage is challenged by the editors of the edition of Lyon, 1604 (col. 125), who say “Rather, the text ought to be understood as it stands, and all this lies in the discretion of the judge, as the gloss below [gloss 13] holds according to Christo. [Johannes Christopherus Portius, *Mats.*, § XIII.E]. And Ang[elus de Gambillionibus] notes this text.”]

Gloss 9 on “pursue”: So [D.41.2.3.13 (says that if I drop a vase and cannot find it, I have lost possession of it, even though no one else has possession of it; if, on the other hand, I lose a vase in a place where I can find it, even though I do not know where it is, it is still in my possession)].

Gloss 10 on “it has been doubted”: So [D.41.1.5.1 (reporting an opinion of Trebatius that the animal became the property of the one who had so wounded it and remained so as long as it was in his sight and he continued to pursue it)].

Gloss 11 on “wounded it so severely as to be able to catch it”: Having considered the nature of the man and of the beast, not divine possibility, although I have in no way considered the ease.

Gloss 12 on “And we confirm this latter view”: So [D.41.1.55 (see *Mats.*, p. VII–4)].

Gloss 13 on “for it may happen”: Although one thing is proved, i.e., that it has been wounded, it nonetheless does not follow that it could be taken. [C.4.19.10 (says that the fact that a man can show that his parentage was free and that he has held honors does not prove that his daughter is not slave, because he may be free-born and she a slave)].

Gloss 14 on “it may happen in many ways that you will not capture it”: Note that what can happen is considered. Thus, [D.19.2.9.1; D.36.1.80.15; D.35.2.73.1; D.4.6.26.7; D.39.2.13.2 (all deal with quite different situations in which possibilities are considered)]. Argument, however, to the contrary: [D.15.1.50pr (seems to suggest that one of the possibilities that cannot be considered is that the *iudex* will render a wrongful judgment)].

Why is Accursius doing this?

1. The importance of possession in the world of the glossators. The basic Roman-law rule that possession requires *animus* (a mental element) and *corpus* (a physical element).
2. The importance of hunting in the glossators' world. The rights of lords and problem of poaching.

Types of glossatorial literature:

- a. Glosses, *lecturae*, *apparatus* – see *Mats.* pp. VII–2 to VII–7, VII–13 to VII–14 (wild animals); VIII–21 to VIII–24 (marriage).
- b. *Summae* – *Summa Trecensis* 5.4.4, 6; 7.32.9–11 (ed. Hermann Fitting, *Summa Codicis des Irnerius* (Berlin 1894)) (the work, perhaps, of a *gosianus*, c. 1150) – see *Mats.* VII–7, VIII–24.
 - Placentinus, *Summa Institutionum* (ed. Adamson) – see *Mats.* p. VII–7 to VII–8.
 - Placentinus, *Summa Codicis* (Mainz 1536, repr. Turin 1962) – See *Mats.* VIII–8 to VII–9, VIII–24.
 - Azo, *Summa Codicis* (many eds. of which the most convenient is Pavia, 1506, repr. Turin 1966).
 - Azo, *Summa Institutionum* (Pavia 1506, repr. Turin 1966) – see *Mats.* VII–10.
- c. *Casus* and *commenta* – see *Mats.* p. VII–7, VIII–23, VIII–24.
- d. *Quaestiones legitimae* – see *Mats.* p. VII–10.
- e. *Quaestiones disputatae* – see *Mats.* p. VII–10 to VII–11.
- f. *Distinctiones*.
- g. *Dissensiones* – see *Mats.* p. VII–11.
- h. *Regulae iuris*, *brocardia*, *notabilia* – see *Mats.* pp. VII–12, VIII–24.
- i. Epitomes, abbreviations, vocabularies – see *Mats.* pp. VII–12, VIII–24.

1. An isolated gloss is not worth much. Glosses get their value when they are combined into a *lectura*, literally ‘a reading’, that show how a particular master read a text or a group of texts. A work that chose glosses of different masters on a given text or group of texts might be called an *apparatus*. Accursius' great work is an apparatus of glosses on the entire CJC.
2. After lecturing on the texts themselves, the master might lecture generally on the subject matter of the title of the *Digest* or *Code* in which the texts appeared. The relationship of this *summa* to the text is looser; the master is attempting to “put it all together.” The earliest *summae* deal with particular titles of the *Digest*: Bulgarus “On fraud” (D.4.3) and “On ignorance of law and fact” (D.22.6) and Martinus “On the law of dowries” (D.23.3). The next development was more ambitious, a *summa* of the whole of Roman law, loosely arranged according to the titles of the Code. The earliest such work, called the *Summa Trecensis* (from the location of the chief manuscript in Troyes, France), was formerly thought to be by Irnerius, but is now known to date from the middle of the 12th century. It was probably composed by a Frenchman who seems to have been influenced by Martinus, and it exhibits an interest in equity — in relaxing the strictures of the law to make it conform to moral principle — that is characteristic of the *gosiani*, the followers of Martinus. Rogerius, who also may have been a pupil of Martinus, is known to have composed a second *summa*, which he left unfinished. His pupil Placentinus finished it sometime in the 1170's and then went back and wrote his own *summa* on the titles that Rogerius had already treated. Both of these works show the same characteristics as the *Summa Trecensis*.

Placentinus' *Summa* was completed at Montpellier, and the others may come from southern France as well. The most influential *summa* on the titles of the Code is that by Azo (between 1208 and 1210), which marks a return to the mainstream of the Bolognese tradition.

3. The Bolognese law professor might test students' knowledge by posing questions while he was expounding the text. Examples in the text that we just looked at are to be found in Gloss 4 (Are *res sacrae* granted to the occupant?) and Gloss 6 (What if after prohibition he takes something?). Particularly apt questions with the professor's answer, were recorded either in the gloss or separately in collections of *Quaestiones legitimae*; not surprisingly this type of question is closely related to lists of *distinctiones*, since by far the most common way of resolving a question was by making a distinction.
4. A more elaborate form of question, the *quaestio disputata*, usually involving a hypothetical set of facts, was reserved for formal debate. This is, of course, mooting, a method that has been used for teaching law ever since. In these questions, too, we can see the beginning of the practical element in the training of students, how they were taught to apply the law to facts, how they learned to marshal arguments one side or another, even how they applied laws of the first six centuries to the 12th.
5. From this second type of question there seem to have developed various collections of "Disagreements of the Masters," *Dissensiones dominorum*.
6. The remainder of the types of literature seem to have been more memory aids than examples of the fundamental method.
7. *Casus* are brief summaries of a case in the sources, originally designed for students; *commenta* are similar, but tend to be even shorter.
8. Rules of law, maxims, highlights (*regulae iuris*, *brocardia*, *notabilia*) are worth perhaps a bit more time. The jurists went in for maxim jurisprudence more than we do, but they were well aware of the dangers of it. The better treatments are quite careful, noting exceptions in the case of *regulae iuris* and noting in the case of *brocardia* and *notabilia* just how incomplete the generalization is. In practice literature, qualifications of this sort tend to fall by the board.
9. The same can be said of epitomes, abbreviations and vocabularies. The best of them are serious efforts. The worst of them are *Gilbert's Outlines* at their most miserable.

Wild animals in glossatorial literature other than glosses (see the list above):

1. The text of the *summae* on this topic in the *Materials* shows that at least some glossators, of whom the author of the *Summa trecensis* was one (p. VII–7), were prepared to say that in some situations one can acquire possession by eyes and affect alone, the implications of this for the wild animals problem are perhaps too obvious to need spelling out.
2. The example in the *Materials* of a *distinctio* from the *Quare Bambergensis* (p. VII–10) is rather far out both because it's not clear that the author has the got the Roman law quite right and because the resolution smacks of logic chopping.
3. A nice example of one of a formal *quaestio disputata* is in the materials on p. VII–10 to VII–11. It's particularly interesting because it shows that at least by the time of Pillius

(around the beginning of the 13th century), the professors were exploring the intersection point of property and obligation.

4. Examples of *dissensiones* (“disagreements”) are given on p. VII–11, where two authors try to count up the various ways that the glossators split on the problem of the boar that fell into the trap. (D.41.1.55, *Mats.* pp. VII–4 to VII–6). Note that there are two fundamental problems here: is the corporeal element of capture in a trap sufficient? And how about the *animus*?)
5. On p. VII–4 we have a *casus*, a summary of case. It also simplifies the result considerably.
6. Bulgarus’ commentary on *Digest* 50.17.153 (*Mats.* p. VII–12) is a good example of the best of this type of literature. His point is that Paul’s statement that since possession is acquired by mind and body, it must be lost by mind and body is at best misleading and at worst just flat out wrong. We can lose possession by mind alone; we cannot lose it by body alone. If we lose bodily possession we must also lose mental possession for us to lose legal possession, but we may lose legal possession even if we remain in bodily possession, so long as we lose mental possession.
7. The story of Bulgarus and the boar caught in a trap (p. VII–13) (from Odofredus on D.41.1.55).

“One day while he was riding toward *Galerium*¹ with one of his students, in a place where there were many swine, he found a trap [with a boar caught in it]. The student wanted to dismount and said to Bulgarus that he wanted to take the boar, so that he might have a good dinner with it. And then Sir Bulgarus said to him, ‘You are not speaking well.’ But the student responded thus to him: ‘Did you not expound the law *In laqueum* this way, the other day when you were reading *Digest* [41.1]?’ Bulgarus said, ‘I’m not changing my opinion, but I don’t want you to take the boar, not because I fear the judgment to come, but scandal or words: The peasants will make a furor and will follow after us with weapons and will perhaps beat us up badly.’”

D.41.1.55 with the Accursian gloss (*Mats.* pp. VII–5 to VII–7).

55. PROCULUS, *Letters*, book 2.

Casus:² You made a trap to capture a wild animal. A boar fell in the trap and could not get out. I was coming by and saw the boar caught there in the trap and extricated him from it and took him. Am I held to return the boar to you? And it is said that I am not, since he had not been made yours because you had not taken him from the trap. If, however, you had taken him from the trap and thus he had been made yours and I had taken him and let him go free, he would cease to be yours and I would be held by an *actio in factum*. And he adds a similar case or the cup of one person which another threw out of a ship: in this situation he is held by an *actio in factum*.

[The original text:] A wild boar fell into a trap set by you for game, and when he was stuck there I extricated and carried him off (*abstuli*);³ do you think the wild boar I carried off was yours?⁴ And if you think he was yours, suppose I had turned him loose into the woods, would he in that case have ceased to be or have remained yours? And, I ask, ought the action which you would have against me, supposing he had ceased to be yours, to be given as an *actio in factum*? The

¹ Savigny, *Geschichte*, 4:93 speculates that this a place name near Bologna.

² This *casus* is probably by the son of Accursius, also named Franciscus (1225–1293), who, like his father, taught at Bologna.

answer given was: let us⁵ see if it makes a difference whether I have set the trap on public or private land,⁶ and if on private land, whether on mine or some one else's,⁷ and, if on some one else's, whether with or without leave of the landowner; moreover whether the boar has stuck so fast in the trap that he cannot get out by himself, or whether by further struggles he would not have got loose. Still I think the governing principle⁸ to be this, that if he has come into my power⁹ he has become mine. But if you had released to his natural liberty a wild boar who had become mine¹⁰ and he had thereby ceased to be mine, then an *actio in factum*¹¹ ought to be accorded to me, according to¹² the opinion¹³ given when a man had thrown another's cup overboard.

Gloss 3: I.e., took (*accepit*). Thus [D.47.2.48; the reference is probably to 48pr where *abstulit* is used in the sense of *accepit*, though the gloss on D.47.2.48pr does not note this].

Gloss 4: Answer: no, according to Johan. [probably Johannes Bassianus, d. 1197] and V. [?Vacarius, d. c. 1198, ?Vincentus Hispanus, a canonist of the 1st half of the 13th c.; manuscript evidence suggests, but does not prove, that this is Willelmus de Cabriano, d. ?1201, which is a lot more plausible], unless the person who set the trap had taken and apprehended it.

Gloss 5: He changes persons.

Gloss 6: As is otherwise distinguished. [D.9.2.28]

Gloss 7: Which does not seem to be of importance. [D.41.1.2; the reference is to 1.3 on the words *nec interest*].

Gloss 8: Of this question, or of my opinion in this question, and thus here I say that the previous distinctions are rejected, according to R[possibly Rogerius, d. c. 1170, possibly Roffredus Beneventanus, d. c. 1243 or Roffredus Epiphani, a contemporary]. Others say that the question was not answered.

Gloss 9: I.e., 'me' who takes him out of the trap, according to B[ulgarus, d. c. 1166], whence he said 'I fear scandal, not a judgment to come,' when one day he was able so to take a wild animal. But according to Azo [d. c. 1220], 'mine,' that is, the power of me who laid the trap, since the boar could not get out by itself. But how could it come in his power who did not know of it? [D.41.3.4.12; D.50.16.215; D.41.4.7.7]; argument to the contrary [D.31.1.77.3]. H. [possibly [H]Ugo, d. 1166 or Hugolinus, d. c. 1235], also notes, as I have said, that the animal does not belong to you who placed the trap, until that point when you have taken it, or have the power of taking it by examining it with your eyes and by the desire to possess, according to Io. & B. [almost certainly a misprint for "Io.B.," i.e., Johannes Bassianus] & R. [possibly Rogerius, possibly Roffredus Beneventanus, d. c. 1243 or Roffredus Epiphani, a contemporary] (argument from [D.41.2.1.21]), and M. [?Martinus, d. c. 1160] & H. [?[H]Ugo or Hugolinus, d. c. 1235] that immediately when by long struggling it cannot get itself out. What if I examine it by eyes from a distance? Answer, according to Vin. [this suggests Vincentus Hispanus; manuscript evidence suggests, but does not prove, that this is Willelmus de Cabriano, d. ?1201], it does not become mine, because many things can happen, &c. ([D.41.1.5]), although there is an argument to the contrary [D.41.2.18.2]. Accursius.

Gloss 10: I.e., 'me' who takes him in the trap; consider that I have already taken him. H. [?[H]Ugo or Hugolinus]

Gloss 11: Subsidiary to the lex Aquilia. [JI.4.3.16].

Gloss 12: I.e. Like. Accursius.

Gloss 13: [D.19.5.14.pr; cf. D.41.2.3.14]. Accursius.