

OUTLINE — SECTION 3

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Glossators on Wild Animals

Given below is the extract from the Accusian gloss on the Institutes that was given in the outline for Lecture 7. The purpose of this Section is to make sure that we are all on the same page as to the various types of glosses and their purposes. The \$64 question is the one that is posed at the end of the outline.

A typical set of glosses (Mats. pp. VII–2 to VII–4):¹

12. Wild animals, birds and fish, therefore ², that is to say all the creatures which the land, the sea, and the heavens ³ produce, at the same time as ⁴ 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 immaterial ⁵ 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 ⁶ or fowling, the latter may forbid him entry ⁷ 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, ⁸ 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 ⁹ to pursue ¹⁰ it. 13. It ¹¹ 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. ¹² 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, ¹³ for it may happen ¹⁴ in many ways that you will not capture it. ¹⁵

Fn. 1. Glosses are indicated below with footnote number in bold.

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

Fn. 2: Because one ought to begin with the older: therefore &c. Accursius.

Fn. 3: I.e., the sky. Accursius.

Fn. 4: That is immediately after &c.

Fn. 5: So far as acquiring ownership is concerned.

Fn. 8: 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.

Fn. 4 (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.

Fn. 6: 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?

Fn. 7: 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 Ubaldis, fl. 14th century], 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 s.v. *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:

Fn. 9: I.e., impossible. So [in D.17.2.23 v^o *difficile* (see Appendix); contra [D.9.3.2 (see Appendix)]. Accursius. [Accursius’s 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 [footnote 12] holds according to Christo. [Johannes Christopherus Portius, *Mats.*, § XIII.E]. And Ang[elus de Ubaldis] notes this text.”]

Fn. 10: 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)].

Fn. 11: So [D.41.1.5.1 (reporting an opinion of Trebatius’s 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)].

Fn. 12: Having considered the nature of the man and of the beast, not divine possibility, although I have in no way considered the ease.

Fn. 13: So [D.41.1.55 (see *Mats.*, p. VII–4)].

Fn. 14: 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)].

Fn. 15: 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?

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