

OUTLINE — LAW SECTION 5

Glossators on Wild Animals; Alexander III on Marriage

Accursius on *JI* 2.1.12 (Mats. pp. VII–2 to VII–4, Glosses indicated below with footnote number in bold):

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 'therefore'): Because one ought to begin with the older: therefore &c. Accursius.

Gloss 2 (on 'heaven'): I.e., the sky. Accursius.

Gloss 3 (on 'at the same time as'): That is immediately after &c.

Gloss 4 (on 'it is 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*.)]

[This shows a command of the material, but there's nothing here, I think, that would have surprised Justinian's lawyers.]

2. *Gloss that deals with a potential contradiction.* [What's the problem that gives rise to this gloss, i.e., what's the contradiction?]

Gloss 3 (cont'd; on 'natural reason admits the title of the first occupant to that which previously had no owner'): 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.")].

[The command of the material here is even more impressive, because A. has had to range throughout the whole of the *Corpus* and employs the classic legal method of resolving contradictions with a distinction, but, once more, there's nothing here, I think, that would have surprised Justinian's lawyers.]

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

Gloss 5 (on 'if he goes on another man's land for the sake of hunting' but looking forward to 'the latter may forbid him entry'): 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.”)].

[Why is Accursius telling us that “it is otherwise” in the case of someone who is searching for fugitive slaves, or acorns that have fallen from his trees, money that he has buried there, or a grape-harvest that he has bought from the landowner?]

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

Gloss 6 (on ‘the latter may 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, c. 1400–1461], if the fruit of the land consisted in hunting, otherwise not, as the gloss holds in [D.8.3.16 v^o *aucupibus* (see *Mats.*, p. VII–4; which reads in part “But since fowling in another’s land is prohibited by this law; therefore what is taken does not belong to the taker, and if it happens, it seems that he ought to make restitution. Nonetheless, I [Accursius?] take the opposite position. [JI.2.1.12].”¹)] 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.

[Clearly, we are getting into something more controversial here. The *additio* shows us that two fifteenth-century authors disagreed with each other about this gloss. When we get to it, we are going to see even more disagreement with Accursius. But let us confine ourselves to Accursius. What does he have to support his position?]

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 *Mats.*, p. VII–4; in this case word ‘difficult’ seems to be an ironic understatement); contra [D.9.3.2 (see *Mats.*, p. VII–4; in this case, the word ‘impossible’ is probably an exaggeration; ‘legally impossible’ or ‘impossible under the normal institutional constraints’ seems to be what it means)]. 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. [probably Angelus de Gambillionibus] notes this text.”]

Gloss 9 (on ‘to pursue it’): 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 the Republican jurist 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 ‘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 ‘able to catch it’): So [D.41.1.55 (this is the case of boar who fell into the trap; see *Mats.*, p. VII–4)].

¹ Either Accursius is contradicting himself or, perhaps more likely, this is not a gloss by Accursius, but by another glossator whose sign got left out.

Gloss 13 (on ‘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 ‘that you may not catch 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)].

[How do we know that Accursius is putting a ‘spin’ on his text here?]

D.41.1.55 (*Materials*, pp. VII–4 to VII–5, where you will also find translations of all the glosses and of the material that is cited in the glosses.)

[If you want to have some fun with this, take a look at a mid-14th century [manuscript](#) of it and compare it with the [printed edition](#) of the same text.]

PROCULUS, *Letters*, book 2. 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*);¹⁵ do you think the wild boar I carried off was yours?¹⁶ 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 answer given was: let us¹⁷ see if it makes a difference whether I have set the trap on public or private land,¹⁸ and if on private land, whether on mine or some one else’s,¹⁹ 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 principle²⁰ to be this, that if he has come into my power²¹ he has become mine. But if you had released to his natural liberty a wild boar who had become mine²² and he had thereby ceased to be mine, then an *actio in factum*²³ ought to be accorded to me, according to²⁴ the opinion²⁵ given when a man had thrown another’s cup overboard.

“Do you think the wild boar I carried off was yours?”: Fn 2: Answer: no, according to Johan. [Johannes Bassianus] and V. [perhaps Vacarius or Vincentus Hispanus, a canonist of the early 13th century], unless the person who set the trap had taken and apprehended it.

“governing principle”: Fn 6: Of this question, or of my opinion in this question, and thus here I say that the previous distinctions are rejected, according to R[ogerus]. Others say that the question was not answered.

“come into my power”: Fn 7: I.e., “me” who takes him out of the trap, according to B[ulgarus].., 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, “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[ugo or Hugolinus, probably the latter] 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. & R. [probably a typo for Johannes Bassianus and Rogerius] (argument from [D.41.2.1.21]), and M. & H. [Martinus and Hugolinus?] 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. [perhaps Vincentus Hispanus], it does not become mine, because many things can happen, &c. ([D.41.1.5] [Cf. JI.2.1.13.]), although there is an argument to the contrary [D.41.2.18.2]. Accursius.

“mine”:Fn 8: I.e., “me” who takes him in the trap; consider that I have already taken him. H.

“the opinion given when a man had thrown another’s cup overboard”: Fn 11: [D.19.5.14pr (“D.19.5.14.pr (*On actions de praescriptis and in factum*; Ulpian on Sabinus : In order to save his own cargo a man hurled another’s cargo into the sea; he is not liable in any action. But if he had done this for no reason, he is liable *in factum*, and if maliciously, for fraud.”); cf. D.41.2.3.14]. Accursius.

Odofredus on the same case (*Mats.*, p. VII–12): “Others want to say otherwise according to Johannes [Bassianus] and Azo, and thus they write here: If you laid the trap, whether you took out the boar, as the peasants do, [or] found the boar and killed him, and afterwards returned home so as to take away the boar with other peasants, this boar has become yours. Whence if another takes it, he has committed theft against you, and hence is held in action for theft. But if you have not taken out the boar, he is not held for theft, as below [D.41.3.35], but for an action in fact, as we said in the case of the ship at the end of this law. If, moreover, the boar could escape, then if anyone takes him out of the trap, he has not taken out your boar, because the boar belongs to no one [*in nullius bonis est*], whence he is not held for theft, but for an action in fact, as in [D.41.1.5.1]. And this is a good opinion.”

Why are the glossators 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.
3. What can we say about the development of law through chains of masters and students?

The Decretals of Alexander III (1159–1181) on the Formation of Marriage (*Mats.*, pp. VIII–16 to VIII–19)

Gratian (indissoluble marriages are not formed until the couple has sexual intercourse); Peter Lombard (indissoluble marriages are formed by the exchange of present consent; sexual intercourse has nothing to do with it).

1. *Veniens ad nos* (1176 X 1181) (*Mats.*, p. VIII–19): the fourth and final stage

Alexander III to the bishop of Norwich: A certain William appealed to us, showed in his account that he received in his house a certain woman by whom he had children and to whom he swore before many people that he would take her as wife. In the meantime, however, spending the night at the house of a neighbor, he slept with the neighbor’s daughter that night. The girl’s father finding them in the same bed at the same time compelled him to espouse her with present words. Recently, William standing in our presence, asks us to which woman he ought to adhere. Since he could not inform us whether he had intercourse with the first woman after he had given his oath, we therefore order you to examine into the matter carefully, and if you find that he had intercourse with the first woman after he had promised he would marry her, then you should compel him to remain with her. Otherwise, you ought to compel him to marry the second one unless he was compelled by a fear which could turn a steadfast man.

[What is the scheme of rules that can be derived from this decretal?]

- a. Future consent freely given between a man and a woman capable of marriage makes an indissoluble marriage, if that consent is followed by intercourse.
- b. Present consent freely given between a man and a woman capable of marriage makes an indissoluble marriage, even if that consent is given in the most informal of circumstances.

2. *Veniens . . . B* (before 1170) (*Mats.*, p. VIII–16): the first stage

Alexander, bishop, servant of the servants of God to his beloved sons G the chief canon and the canons of Lucca greetings and apostolic blessing. Coming to the clemency of the apostolic see, B. the bearer of these presents not without blushing and shame proposed that when Guilla the woman had been lawfully espoused to L. and both were of full age, the aforesaid B. driven on by sin knew her. When the deed was published the treugani and consuls of Pisa seized him and compelled him by their force and threats to take the aforesaid woman as wife. Wherefore, since it is unworthy and contrary to the sanction of the canons that the same woman be handed over to two men, we commend to your discretion by apostolic writing that you very carefully inquire into the truth of this matter, and if it is notorious or otherwise lawfully apparent to you, that the aforesaid L. previously received the aforesaid woman as his by espousal, as, for example, it is usually done with the pledge of a ring, you should totally absolve the same B. from her petition and impose on him a moderate and suitable penance for perjury. Otherwise, you should very strictly compel him, though it appears that he is in holy orders, to take the same woman as wife and treat her with marital affection.

[What is the scheme of rules that can be derived from this decretal?]

3. *Sicut Romana* (1173 or 1174) (*Mats.*, p. VIII–16): the second stage

Alexander III to William, archbishop of Sens: Further, if any man and woman contract marriage with equal consent and the man, the woman unknown, takes another as wife and knows her, he is to be compelled to dismiss the second and return to the first. For although some think differently and the church does not have the same custom, it nonetheless seems safer (*tutius*) that he ought to have the first rather than the second, since he ought not to be separated from the first without that judgment of the church after he contracted marriage with her by equal vow and consent. Indeed, although it is permitted for an espoused woman unknown by a man to become a nun, he cannot take another woman as wife.

[What is scheme of rules that can be derived from this decretal?]

4. *Ex litteris* (1175 X 1181) (*Mats.*, p. VIII–16) and *Licet preter solitum* (probably 1176 or 1177) (*Mats.*, p. VIII–17): the third stage

Licet preter solitum. Alexander III to the archbishop of Salerno: [I]f a proper present agreement is made between man and woman (observing the customary solemnities, that is, before a priest or before an official in the presence of suitable witnesses, as is still done in some places,) that the one receives the other unto himself by expressing the customary words of mutual consent, saying to the other “I receive you as mine” and the other saying “I receive you as mine,” whether accompanied by an oath or not, that man is not permitted to marry another woman. And if he does marry another woman, even if intercourse follows, she ought to be separated from him, and he ought to be compelled by constraint of the church to return to the first. Although some have felt one way and some another on this matter, this is the way the matter was at one time resolved

by some of our predecessors.

[What is scheme of rules that can be derived from this decretal?]

5. *Significasti* (1159 X 1181) (*Mats.*, p. VIII–18), and *Veniens ad nos* (1176 X 1181) (*Mats.*, p. VIII–19): the fourth and final stage
 - a. Present consent freely given between a man and a woman capable of marriage makes an indissoluble marriage, unless one of the parties chooses the religious life.
 - b. Future consent freely given between a man and a woman capable of marriage makes an indissoluble marriage, if that consent is followed by intercourse.
 - c. With few exceptions any Christian man was capable of marrying any Christian woman, so long as they were of marriageable age, not in orders or solemn vows, and not too closely related to each other.
6. Why did Alexander do this?
 - a. Christian marriages once fully formed were indissoluble. Not only did the statements in the NT compel that result but one of tenets of the reformers of the 11th century was the indissolubility of marriage. Alexander could, and did, make some changes around the edges of that rule, but he could not, and there is no evidence that he would have wanted to, impugn the basic principle.
 - b. Alexander was committed, as was the church of his time, to incorporating as many people as possible within the realm of orthodox Christianity. In Alexander's world there were extraordinarily diverse marriage customs, and many people had virtually no education. Any rule that Alexander came up with would have to be simple, and, to the extent that this was possible, could not impose a requirement that was unfamiliar and unlikely to be followed.
 - c. Much has been written about the 12th century's discovery of the individual. While much of this is exaggerated, I think that there's a kernel of truth in it. Twelfth century thought, both religious and secular, puts a heavy emphasis on individual choice.
 - d. Within this context, a consensual system of marriage has obvious attractions. It resonates with the notion of individual choice; it cuts through the diversity of customs. The choice will be limited because of the principle of indissolubility. Once the choice was made, it cannot be revoked. Having focused on individual choice, the present/future consent distinction has obvious attractions. It resonates with Roman law. It emphasizes the present commitment of the individuals involved. There is, however, in this system a gap. What if the couple proceeds from future consent to intercourse without going through the intermediate stage? There is some evidence that that was customary in some areas. For this problem we have a solution: Gratian's solution cut down so that it applies to future consent marriages only.

As these principles emerge as the principles all else tends to fall by the wayside. The western church had never had a single set of marriage ceremonies. If one says that the couple must follow the ceremonies customary in the area, one risks not only making a lot of married couples not married in the eyes of the church, but one also raises a difficult factual question. Similarly, a parental consent requirement not only raises factual issues but seems to add a secular element, an

element of property negotiations, that may well have been characteristic of marriage in the period but was certainly not one that the church wanted to emphasize.