

OUTLINE — LECTURE 7

The Revival of Academic Law—The Civilians

Studium a term used for centers of learning before there were formal universities.

The Origins of the *Studium* at Bologna:

a. Codex Florentinus (formerly Pisanus), the grandfather of all western manuscripts of Justinian's *Digest*, was in the library at Pisa from the 12th to the 15th century (1406), when it was taken to Florence as war booty, and where it has remained ever since. It dates from the late 6th century, and may be an official copy of the *Digest*. The manuscript may have been copied at Monte Cassino, during the abbacy of Desiderius, 1058–86 (later Pope Victor III, 1086–87). Beneventan marginal notes in the manuscript suggests that there may be some truth to story that the manuscript was at Amalfi (just south of Naples), but whether it was taken by Pisans when they captured Amalfi in 1135 cannot be certain. (All these places can be seen on this [map](#), except for Monte Cassino, which is in the mountains about half way between Rome and Naples.)

b. (according to Odofredus s. 13/2:) “A certain Sir Pepo began on his own authority to read in laws; nonetheless whatever there was of his science was of no moment. But Sir Yrnerius while he was teaching in arts in that city when legal books were brought in began on his own to study, and studying began to teach in laws, and he was of great name and was the first illuminator of our science, and since he was the first to make glosses in your books, we call him the lamplight of the law.”

c. Matilda, countess of Tuscany (1046–1115), a consistent supporter of the papacy during the Investiture Controversy.

Glossators (B=Bolognese; M=‘Gossiani’):

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 (Mats. pp. VII–2 to VII–4, 1. (Glosses indicated below with footnote number in bold, 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 them 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: Because one ought to begin with the older: therefore &c. Accursius.

Gloss 2: I.e., the sky. Accursius.

Gloss 3: That is immediately after &c.

Gloss 4: So far as acquiring ownership is concerned.

Gloss 7: 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 (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: 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: 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 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:*

Gloss 8: 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 Gambillionibus] notes this text."]

Gloss 9: 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: 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)].

Gloss 11: 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: So [D.41.1.55 (see *Mats.*, p. VII–4)].

Gloss 13: 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: 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 literature:

- a. Glosses, *Lecturae*, *Repetitiones* — see Mats. pp. VII-2 to VII-6, VII-10 to VII-11 (wild animals); VIII-22 to VIII-25 (marriage).
- b. *Summae*—*Summa Trecensis* 5.4.4, 6; 7.32.9–11 (ed. Hermann Fitting, *Summa Codicis des Irnerius* (Berlin 1894)) (the work of a *gosianus*, perhaps the youthful Rogerius, c. 1150)—See Mats. VII-6, VIII-26.
 - Placentinus, *Summa Codicis* (Mainz 1536, repr. Turin 1962)—See Mats. p. VIII-26.
 - 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-9.
- c. *Casus* and *commenta*—see Mats. p. VII-3 to VIII-5 (wild animals); VIII-24 (marriage).
- d. *Quaestiones legitima*e—see Mats. p. VII-7.
- e. *Distinctiones*—see Mats. p. VIII-7.
- f. *Brocardia*, *notabilia*—See Mats. pp. VII-8, VIII-26.
- g. *Dissensiones*, *disputationes*, *consilia*—see Mats. p. VII-9.
- h. Epitomes, abbreviations, vocabularies—see Mats. pp. VII-9, VIII-27.

Types of 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* 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* is rather far out both because it's not clear that the author has 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-7. 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-9, 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, *Materials* 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. The remainder of the types of literature seem to have been more memory aids than examples of the fundamental method. On p. VII-4 we have a *casus*, a summary of case. It also simplifies the result considerably. Rules of law (*regulae juris*, *brocardia* and *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 of the topic are quite careful, noting exceptions in the case of *regulae juris*, noting in the case of the others just how incomplete the generalization was. Bulgarus's commentary on *Digest* 50.17.153 (*Mats.* p. VII-8) 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. In practice literature, qualifications of this sort tend to fall by the board. The same can be said of epitomes, abbreviations and vocabularies (e.g., pp. VII-9, VIII-27). The best of them are serious efforts. The worst of them are Gilbert's outlines at their most miserable.

6. The story of Bulgarus and the boar caught in a trap (p. VII-12).