CLASS 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. Images of manuscript copies are attached. The full texts of everything that Accursius cites are in the footnotes.):

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, therefore[1] , that is to say all the creatures which the land, the sea, and the heavens[2] produce, at the same time as[3] 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[4] 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[5] or fowling, the latter may forbid him entry[6] 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 difficult[8] to pursue[9] it.

13. It[10] 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 happen[13] 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),[1] 44[2] (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[3] (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[4] ("if a man takes possession of

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[1] D.41.1(On acquiring the ownership of things).5[pr] (Watson trans.): "**5** GAIUS, *Common Matters or Golden Things, book 2*: An animal is deemed to regain its natural state of liberty when it escapes our sight or, though still visible, is difficult of pursuit."

[2] D.41.1.44 (Watson trans.): "**44** Ulpian, *Edict, book 19:* The following case is discussed by Pomponius: When wolves were carrying off pigs from my swineherd, a farmer on a neighboring estate, with some strong and powerful dogs which he kept to protect his own herd, pursued the wolves and snatched the pigs away from them; that or the dogs tore them away; but when my swineherd claimed the pigs, the question arose whether the pigs had become the property of their rescuer or remained mine; for, in a way, the dogs got them by hunting. He, however, used to ponder whether, since animals caught on land or sea cease to belong to their captors on regaining their natural freedom, so also things captured from a man's property by wild animals of land or sea cease to be his, when the beasts elude his pursuit. Who indeed can say that what a bird, flying by, takes from my threshing-floor or land or snatches from me myself remains mine? If, then, ownership is so lost, the thing will belong to the first taker on being freed from the beast's mouth, just as a fish, wild boar, or a bird, which escapes from our power, will become the property of anyone else who seizes it. But he thinks that rather is it the case that the thing remains ours so long as it can be recovered; what he writes about birds, fish, and wild animals, however, is true. He also says that what is lost in a shipwreck does not cease forthwith to be ours; indeed, a person who seizes it will be liable for fourfold its value. And it is certainly preferable to say that what is seized by a wolf remains ours so long as it can be retrieved. If, then, it does so remain, I am of opinion that even the action for theft will lie; for even if the farmer did not give chase with the intent to steal, though he may have had that intent, still, even assuming that he did not give chase with that intent, nevertheless, when he does not restore on request, he appears guilty of detaining and appropriating. Accordingly, I am of the view that he is liable to both the action for theft and that for production; and the pigs, when produced, can be reclaimed from him by a *vindicatio*."

[3] JI.2.1.7 (Moyle trans.): "Things which are sacred, devoted to superstitious uses, or sanctioned, belong to no one, for what is subject to divine law is no one's property."

[4] JI.2.1.4[6–]7 (Moyle trans.): " **46**. Nay, in some cases the will of the owner, though directed only towards an uncertain person, transfers the ownership of the thing, as for instance when praetors and consuls throw money to a crowd: here they know not which specific coin each person will get, yet they make the unknown recipient immediate owner, because it is their will that each shall have what he gets. **47**. Accordingly, it is true that if a man takes possession of property abandoned by its previous owner, he at once becomes its owner himself: and a thing is said to be abandoned which its owner throws away with the deliberate intention that it shall no longer be part of his property, and of which, consequently, he immediately ceases to be owner."

property abandoned by its previous owner, he at once becomes its owner himself")]. (3) By time, as [in D.41.1.31.1[5] ("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[6] (see *Mats.*, p. I–11)]. (4) By censure, as [in JI.2.1.7[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[8] ("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][9] (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[10] (holds that if I stipulate to give

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[5] D.41.1.31.1 (Watson trans.): "31 PAUL, *Edict, book 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. . . ."

[6] JI.2.1.39 (Moyle trans.): "If a man found a treasure in his own land, the Emperor Hadrian, following natural equity, adjudged to him the ownership of it, as he also did to a man who found one by accident in soil which was sacred or religious. If he found it in another man's land by accident, and without specially searching for it, he gave half to the finder, half to the owner of the soil; and upon this principle, if a treasure were found in land belonging to the Emperor, he decided that half should belong to the latter, and half to the finder; and consistently with this, if a man finds one in land which belongs to the imperial treasury or the people, half belongs to him, and half to the treasury or the State."

[7] Above, note 3.

[8] JI.3.17pr (Moyle trans.): "From his master's legal capacity a slave derives ability to be promisee in a stipulation. Thus, 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."

[9] C.7.6.1.3 (Justinian, 531) (Frier trans): "**3.** We also know that this too was introduced by the edict of the deified Claudius in connection with the ancient Latin status., that if man should expel his mortally ill slave from his house, neither caring for him, nor entrusting him to another, even though he could have sent him to a hospital (*xenonem*) or helped him in some other way, a slave in this situation used to rmain in Latin liberty in an earlier age, and when he died the master used to receive his property, though he had abandoned the slave to die. **3a.** Therefore, such a slave, who has been endowed with liberty of necessity with an unwilling master but by the situation itself, shall by this act immediately become a Roman citizen, and the former master shall retain no rights as patron. When such former master throws him publicly out of his house and family, neither caring for him, nor trusting him to another, nor sending him to a venerable hospital, nor nor furnishing him the customary allowance, the slave shall remain entiely independent from his former master and his property, both for the remainder of his life as a freedman, and upon his death, and after he has yielded to his fate."

[10] D.45.1(On verbal contracts).83.5 (Watson trans.): "**5.** I will stipulate without effect for sacred or religious objects or for public utilities left in perpetuity, (for example, a forum or basilica) or for a free person; although sacred objects can be secularized and public utilities restored to private purposes and a freeman become a slave. For when someone promises a secular object or the slave Stichus, the promise is released if without his help the object becomes sacred or Stichus acquired his liberty; nor will the obligation be revived if again, by operation of law, the sacred object become profane or Stichus from freedom is reduced to slavery. For one and the same reason exists for both, for being released and being bound, because either it is possible to deliver or not. If an owner took a ship, which he had promised, apart and remade it from the same planks, because this would be the same ship, the obligation would be revived. For this reason Pedius writes that it is possible to hold as follows: If I stipulated for a

you a free man, i.e., as a slave, the stipulation is void, because "to await the chance of bad luck falling on a free man 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[11] (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[12] ("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[13] (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[14]

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hundred jars of wine, I ought to wait until it is produced; if, when produced, it is consumed without the promisor's fault, I ought to wait again until more can be produced and this delivered, and by these events the stipulation will either be avoided or validated. But these cases are different; for, indeed, when a freeman is promised, the possibility of his becoming a slave is not in mind; for a stipulation in this form concerning a freeman, 'do you promise to deliver him when he becomes a slave', would not be valid nor 'to convey that plot of land when it ceases to be sacred or religious and becomes secular', because the obligation cannot take effect immediately and only those matters which are possible can be the subject of obligations. But we stipulate not for the particular wine but generically and a tacit temporal element is presumed; but a freeman is a particular object. 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. And as for the ship, if it is dismantled with the intention that the planks should be put to another use, then, although it is remade due to a change of mind, the first ship has been destroyed and this one must be regarded as a different one. But if the planks are all refixed in order to rebuild the ship, it is not yet considered to be destroyed, and it remains the same ship on its reconstruction. In the same way timbers removed from a house with the intention that they be replaced are part of the house, but if they are taken to a vacant plot, although the same material be returned, it will be different. It is a question whether this applies also to praetorian stipulations where security is taken for the restoration of an object and whether it be the same object."

[11] C.6.1.2 (Diocletian and Maximian, 293) (Frier trans.): "It is the governor's duty to give masters the right to search for runaway slaves."

[12] D.43.28(On gathering acorns).1 (Watson trans.): "**1.** ULPIAN, *Edict, book 71:* The praetor says: 'I forbid the use of force to prevent such a one from gathering and taking away also on the third day the acorns which fall from his field into yours'. **1**. All fruits are included under the term 'acorns'."

[13] D.10.4(On the action for production).15 (Watson trans.): "**15.** POMPONIUS, *Sabinus, book 18:* My treasure is buried in your land and you will not allow me to dig it up. If you have not removed it, Labeo says I cannot properly bring an action for theft or for production of the treasure, because you are not in possession, nor have you fraudulently lost possession; for it could be that you do not know that this treasure is in your land. But he says it is not unreasonable that provided I swear that in making my request I am not acting vexatiously, I should be given an interdict or action to ensure that as long as I am not responsible for any failure to give you a *cautio* for damage anticipated as a result of the work, you will not use force to stop me digging up, removing, and carrying away the treasure. But if the treasure has actually been stolen, the action for theft can also be used."

[14] D.19.1(On the actions for sale and purchase).25 (Watson trans.): "**25.** JULIAN, *Digest, book 54:* The buyer of grapes on the vine, if he should be prevented by the seller from gathering the grapes and then sued for their price, may employ against him the defense 'unless the money in question is sought for something sold and not delivered'. However, if after delivery he should be forbidden to tread the crop of grapes or to take away the unfermented wine, he may bring an action for production or for insult, just as if he were forbidden to take away any other property of his."

(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[15] (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[16] (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, v° *plane*[17] (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° *aucupibus*[18] (see Appendix immediately following in *Mats.*)] and in [D.41.1.3 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 on "difficult": I.e., impossible. So [in D.17.2.23 v° *difficile*[19] (see Appendix); contra [D.9.3.2[20] (see Appendix)]. Accursius. [Accursius' interpretation of this passage is challenged by

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[15] C.3.32(On the action to claim ownership [*rei vindicatio*].17 (Diocletian and Maximian, 293) (Frier trans.): "If the person against whom you directed your petition, who who wanted to buy a farm belonging to you, was warned against buying it because it was not the seller's property, but nevertheless bought it without right, or, in some other manner, contracted for it in bad faith, the governor will, when you go before him, order that the farm be restored to you, if you prove it to be yours, along with the fruits which are shown to have been received by him in bad faith."

[16] C.3.32.22 (Diocletian and Maximian, 294) (Frier trans.): "It is certain that possessors in bad faith regularly restore all fruits, together with the property itself. Possessors in good faith restore only those fruits on hand at the time of joinder of issue, plus all those that have accrued thereafter."

[17] JI.2.1.14 (Moyle trans): "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 some one else, it becomes his property. So too any one may take the honey-combs which bees may chance to have made, though, of course [*plane*], if you see some one 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 in your sight and easy of pursuit: otherwise it belongs to the first person who catches it."

[18] D.8.3(On rustic predial servitudes).16 (Watson trans.): "**16**. Divine Pius wrote thus to the fowlers: 'It is not consonant with reason that you do your fowling on others' land when the owners are unwilling'."

Gloss v° *aucupibus* (Lyon, 1604, col. 1003) (CD trans.): "The same is true in the case of hunting. But since fowling on another's land is prohibited by this law, therefore that which is taken does not become his who takes it, as [C.1.14.5], and if it happens, it seems that it ought to be restored, arg[umentum from] [D.3.3.46.4] and [D.5.3.52]. But I say to the contrary, as in [JI.2.1.12], and [JI.2.1.13], and [?JI.2.1.14 v° *plane*], and arg. [C.6.2.22.3]. But can the hunter be distrained while he is still in the field so that he return what he has captured? Say that he cannot by the aforesaid laws, as arg. [Nov.134.7], again of this law. But let [the owner] bring an action of *iniuria*, as [D.47.10.13.7]..

[19] D.17.2(On partnership).23[pr] (Watson trans.): "**23.** ULPIAN, *Sabinus, book 30:* Pomponius is undecided on this point: is it enough for the admitting partner to commit his rights of action to the charge of his partners, so that if he cannot act, he will owe no further liability to them, or must he guarantee them security from loss? My judgment is

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[21] (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[22] (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 below, p. 11; *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[23] (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)].

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that he is wholly liable for the person whom he himself admitted on his own responsibility-it would be hard (*difficile*) to deny that he, if anyone, was to blame for admitting him.."

Gloss v[o] *difficile* (Lyon 1604), col. 1689 (CD trans.): "That is legally impossible. Thus [D.5.3.25.14] et [D.46.8.22.7]. Thus to the contrary 'impossible' for 'difficult', as [D.9.3.2]. Azo."

[20] D.9.3(Those who pour or throw things out of buildings).1.10, D.9.3.2, D.9.3.3 (these passages have to be read together in order to make sense out of them): D.9.3.1.10 (Watson trans.): "**1.** ULPIAN, *Edict, book 23:* . . . **10**. If a number of people occupy a lodging house and something is thrown down from it, action may be brought against any one of them," D.9.3.2 (Watson trans.): "**2**. GAIUS, *Provincial Edict, book 6:* because it is quite impossible to know which one threw or poured out anything," D.9.3.3 (Watson trans.): "**3.** ULPIAN, *Edict, book 23:* and each is liable for the whole damage; but if action is brought against one, the rest go free, ..."

[21] D.41.2(On acquisition and loss of possession).3.13 (Watson trans.): "**3.** PAUL, *Edict, book 54:* . . . **13.** The younger Nerva says that, leaving aside a slave, movable things are possessed by us only so long as they are in our keeping, that is, so long as we can, if we so choose, take physical control of them. For once an animal strays or a vase falls, so that it cannot be found, it immediately ceases to be in our possession, even though it is possessed by no one else; this differs from the case of something which is still in our keeping, though not immediately traceable; because the fact remains that it is still there, and all that is necessary is a diligent search for it."

[22] D.41.1.5.1 (Watson trans.): "**5.** GAIUS, *Common Matters or Golden Things, book 2:* . . . **1.** The question has been asked whether a wild animal, so wounded that it may be captured, is already ours. Trebatius approved the view that it becomes ours at once and that it is ours so long as we chase after it; but, if we abandon the chase, it ceases to be ours and is open to the first taker. Hence, if, during the period of our pursuit, someone else should take the animal, with intent to profit thereby, he is to be regarded as stealing from us. The majority opinion was that the beast is ours only if we have actually captured it because many circumstances can prevent our actually seizing it. And that is the sounder opinion."

[23] C.4.19.10 (Diocletian and Maximian 293) (Frier trans.): "Neither your birth, granted that you can prove that you are free-born, nor the offices that you say you have filled carry with them a suitable proof of the free birth of your daughter, since nothing prohibits you from being free-born and her from being 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;[24] D.36.1.80.15;[25] D.35.2.73.1;[26] D.4.6.26.7;[27] D.39.2.13.2[28] (all deal with quite different situations in which possibilities are considered)].

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[24] D.19.2(On lease and hire).9.1 (Watson trans.): **9.** ULPIAN, Edict, book 32: . . . **1.** Here can be appended what Marcellus wrote in the sixth book of his Digest: **'**If a fructuary leases out a farm for five years and then dies [before the term is over], his heir is not liable for providing the [tenant's] enjoyment, no more than the lessor is liable to the lessee when an apartment house burns down.**'** But Marcellus asks if the lessee is liable on lease for providing a rental payment prorated to his [actual] time of enjoyment, just as he would owe had he hired the services of a slave held in usufruct or a dwelling. He prefers to allow liability, and this is the fairest position. He then asks (*idem quaerit*) whether he may recover outlay he made on the farm under the assumption he would enjoy it for five years. He says that he may not recover this, since he should have foreseen the possible outcome. However, what if he [the fructuary] leased it to him while posing not as a fructuary but as the farm's owner? Obviously, he is liable, since he deceived the lessee; and so the Emperor Antoninus together with the deified Severus replied in a rescript. Likewise, in the case of a building destroyed by fire they replied that rent was due for the time when the building stood."

[25] D.36.1(On the senatusconsultum Trebellianum).80(78).15 (Watson trans.): "**80 (78)**. SCAEVOLA, *Digest, book 21*: . . . **15.** An heir was asked to restore the inheritance to Septicius at his age of twenty. In the interval, he sold certain farms which had been pledged to the deceased; the debtor, therefore, brought an action upon the pledge against him; he died, leaving Sempronius his heir, and he restored the inheritance to Septicius while the action was still pending. The question was whether he nonetheless should be condemned in the suit; for he might have retained or taken a *cautio* for what he would have to pay under the judgment. He replied that the judgment nonetheless might still be executed against the heir, even after the inheritance had been restored."

[26] D. 35.2(On the lex Falcidia).73.1 (Watson trans.): "**73.** GAIUS, *Provincial Edict, book 18:* . . . **1.** Great uncertainty existed in respect of debts the condition of which was pending at the deceased's death; is the conditional amount included in the creditor's assets and deducted from those of the debtor? Our rule is that the amount of the obligation in expectancy is deemed to accrue to the stipulator's wealth and to reduce the debtor's. Alternatively, the matter can be adjusted by the giving and taking of security so that one of two courses follows: An account is taken either as though the debt were unconditional or as if nothing were owing; then the heirs and legatees enter into mutual undertakings that if the condition should eventuate, the heir will make restoration of his underpayment or the legatees return the amount of their overpayment."

[27] D.4.6(The grounds on which those over 25 obtain *restitutio in integrum*).26.7 (Watson trans.): "**26.** ULPIAN, *Edict, book 12:* . . . **7.** If special holidays are declared, for example, on account of some success or in honor of the emperor, and for this reason the magistrate has not heard the application, Gaius Cassius specifically provided in his edict that he would grant *restitutio* because this must be held to have happened through the praetor. Account of ordinary holidays ought not to be taken, because the plaintiff could and ought to have planned his application so that it would not fall on one of them. This is correct and so Celsus writes in the second book of his Digest. But when holidays cut into the time, *restitutio* is to be made only with respect to the days themselves not the whole time. And so Julian writes in the fourth book of his Digest; for he says that a usucapion is to be rescinded, to the extent that there is *restitutio*, with respect to those days on which the plaintiff wished to bring an action and was prevented through the intervention of holidays."

[28] D.39.2(On anticipted injury).13.2 (Watson trans.): "**13.** ULPIAN, *Edict, book 53:* . . . **2.** When there is between your house and my house another house that is not defective, consideration must be given to whether it is only you who must give me a *cautio* or whether the owner of the nondefective house must do so as well or whether it is only the latter who must do so or whether you must both do so. The better view is that you must both give a *cautio* because it can happen that the collapse of the defective house onto the nondefective one causes me injury. Someone might say that it was not through any defect in the house which was in good condition that the collapse onto it of another house caused injury; but granted that the owner of the nondefective house could have taken the precaution of securing a *cautio* against anticipated injury and failed to do so he deserves to be made the object of legal proceedings."

Argument, however, to the contrary: [D.15.1.50pr[29] (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

[29] D.15.1(On the *peculium*).50pr (Watson trans.): "**50.** PAPINIAN, *Questions, book 9:* **pr** If a father goes to ground at a time when there is nothing in the *peculium*, I cannot be put in possession of his property in order to safeguard my interests in a forthcoming suit against him on the *peculium*, since it is not fraudulent for a person to go to ground when he would be entitled to judgment if he allowed the lawsuit to proceed. Nor is it relevant that there might in fact be judgment against him; the fact that he might wrongly be held liable in a debt suit does not make it fraudulent for a debtor to go to ground while his debt is still conditional or not yet due. But Julian thinks that a guarantor can be held liable on a guarantee given when the *peculium* is empty, because guarantees of future claims are perfectly valid if they are accepted as such."

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 juris* 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.

   "By the interpretation of the civil law it is not always necessary to take possession by both body and act, but sometimes you subject a thing to your custody by eyes and affect . . . "

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.

   "Query. For acquiring possession of things that are no one's intention (*animus*) alone is not sufficient, unless corporal seizing follows afterwards, as in flying beasts and such things, but for those things that are someone's, intention alone suffices, if the thing itself is absent, as [D.41.2.1.1, 21]. Why this? Say that in the second case there are two affects, to wit, his who wishes to transfer the possession and his who wishes to have it. In the other case, however, there is only one, his who wishes to have the flying bird – which does not suffice. And it is no wonder that the affect of two people can do more than one."

3. A nice example of one of a formal *quaestio disputatata* 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.

   "The tame deer that I have I deposited with you. He loving natural liberty more went back to his own and ceased to have the *animus revertendi*. You, the depositary, afterwards took him while hunting, it is asked whether you are held to restore him to me by the action of deposit."

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*?)

   "Bulgarus says that a boar who fell into a trap is not understood to be yours before you seize it or have the power of seizing it, to wit through having it under your eyes and through the affect of possession. Rogerius, the same. Hugo, however, say that it is immediately understood it to be yours when by long struggling it cannot get out, as [D.41.1.55]."

5. On p. VII–4 we have a *casus*, a summary of case. It also simplifies the result considerably.

   Casus:[30] 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

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

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.*

6. Bulgarus' commentary on *Digest* 50.17.153 (*Mats.* p. VII–12) is a good example of the best of this type of literature. The text is too long to recite here, but it is well worth reading. Bulgarus' 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*[31] 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.

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*);[1] do you think the wild boar I carried off was yours?[2] 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 us[3] see if it makes a difference whether I have set the trap on public or private land,[4] and if on private land, whether on mine or some one else's,[5] 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 principle (*summam*)[6] to be this, that if he has come into my power[7] he has become mine. But if you had released to his natural liberty a wild boar who had become mine[8] and he had thereby ceased to be mine, then an *actio in factum*[9] ought to be accorded to me, according to[10] the opinion[11] given when a man had thrown another's cup overboard.

Gloss 1: I.e., took (*accepi*). Thus [D.47.2.48;[32] 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].

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

[32] D.47.2(On thefts).48 (Watson trans.): **48.** ULPIAN, *Sabinus, book 42:* **pr.** Someone lost a silver vase and brought the action for theft in respect of it; a dispute arising over the weight of the vase, which the plaintiff put higher than it was, the thief produced the vase and the plaintiff, to whom it belonged, promptly appropriated it. The thief was

Gloss 2: 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 3: He changes persons.

Gloss 4: As is otherwise distinguished. [D.9.2.28][33]

Gloss 5: Which does not seem to be of importance. [D.41.1.3; the reference is to 3.1 on the words *nec interest*].[34]

Gloss 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[possibly Rogerius, d. c. 1170, possibly Roffredus Beneventanus, d. c. 1243 or Roffredus Epiphanii, a contemporary]. Others say that the question was not answered.

Gloss 7: 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;[35] D.50.16.215;[36] D.41.4.7.7[37]]; argument to the contrary [D.31.1.77.3[38]]. H.

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nevertheless condemned for double its value, and the decision was undoubtedly correct. For in the penal action, the stolen thing itself does not come into issue, whether the action be for manifest or for nonmanifest theft.

[33] D.9.2(On the lex Aquilia).28 (Watson trans.): **28.** PAUL, *Sabinus, book 10:* People who dig pits to catch bears and deer are liable under the lex Aquilia if they dig such pits in a public place and something falls in and is damaged, but there is no such liability for pits made elsewhere, where it is usual to make them. **1.** But this action is only given for good reason, that is, if no warning was given and the plaintiff did not know of the danger, nor could he have foreseen it; and many cases of this sort can be seen in which the plaintiff fails, because he could have avoided the danger.

[34] D.41.1.3[.1] (Watson trans.): "**3.** GAIUS, *Common Matters or Golden Things, book 2*: . . . 1. So far as wild animals and birds are concerned, it matters not (*nec interest*) whether they be taken on one's own or on someone else's land. Of course, a person entering another's land for the purpose of hunting or fowling can, if the latter becomes aware of it, lawfully be forbidden entry by the landowner."

[35] D.41.3(Usucapions and usurpations).4.12 (Watson trans.): **4**. PAUL, *Edict, book 54:* . . . **12. A** thing is to be held to have returned to its owner's power when he has taken lawful possession of it, so that it cannot be taken away, and as his own thing; for if I unwittingly buy a thing which was stolen from me, it is not regarded as returning to my power.

[36] D.50.16(The meaning of expressions).125. (Watson trans.): "**125.** Nepos sends greetings to his friend Proculus. Do you think that once a marriage has taken place, a dowry can be claimed from someone who promised a dowry in these words, 'when it is convenient, you will have a hundred *aurei* as the dowry for my daughter?' What if he promised in these words: 'You will have the dowry, when I can pay it?' For if a later obligation has any force, how do you interpret the words 'be able,' after the deduction of money owed or not? Proculus replied: When someone has promised a dowry in the words, 'when I can pay it, you will have a dowry of a hundred [*aurei*],' I think that the interpretation must be formulated in terms of what has been transacted. For someone who speaks ambiguously says what he declared with the words which were expressed. But it is more likely that I should think that he declared: 'I shall be able to pay after the deduction of money owed.' But it is also possible to understand the meaning: 'I shall be able to pay, provided my standing is unaffected.' This interpretation is the more acceptable if he has promised in these words, 'when it is convenient,' that is, 'when I shall be able to pay without inconvenience to myself.'"

[37] D.41.4(Usucapion as purchaser).7.7 (Watson trans.): 7. JULIAN, *Digest, book 44:* . . . **7.** Even if he possess it, a thing is not held to have returned to the control of its owner, if he does not know that it had ever been stolen from him; accordingly, if, you being ignorant of the circumstances, I give you in pledge a slave who had been stolen from you, and, the debt being paid, I sell the slave to Titius, Titius cannot usucapt him.

[possibly [H]Ugo, d. 1166, more likely 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 Epiphanii, a contemporary] (argument from [D.41.2.1.21][39]), 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[40]]), although there is an argument to the contrary [D.41.2.18.2[41]]. Accursius.

Gloss 8: I.e., 'me' who takes him in the trap; consider that I have already taken him. H. [?[H]Ugo or Hugolinus]

Gloss 9: Subsidiary to the lex Aquilia. [JI.4.3.16].

Gloss 10: I.e. Like. Accursius.

Gloss 11: [D.19.5.14pr;[42] cf. D.41.2.3.14[43]]. Accursius.

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[38] D.31.1(On legacicies and *fideicommissa*, 2).77.3 (Watson trans.) **77.** PAPINIAN, *Replies, book 8:* . . . **3.** A deaf-mute who receives a legacy can rightly be directed to restore it after his death. For jideicommissa are even binding on persons charged without their knowledge, if they have profited under a will without their knowledge.

[39] [D.41.2 (Acquisition and loss of possession).1.21 (Watson trans.):] **1.** PAUL, *Edict, book 54:* . . . **21.** If I bid the vendor to deliver a thing to my procurator, the thing being then present, Priscus says that it is to be held to have been delivered to me and that the same is true if I direct my debtor to give the money to a third party. For he says that there is no need for actual physical contact in order that possession may be taken; but that it can be done by sight and intent is demonstrated in the case of those things which, because of their great weight, cannot be moved, columns, for instance; for they are regarded as delivered, if the parties agree on their transfer in the presence of the thing; so also wines are deemed delivered when the keys of the cellar are delivered to the purchaser.

[40] D.41.1.5 (Watson trans.): "**5.** GAIUS, *Common Matters or Golden Things, book 2*: An animal is deemed to regain its natural state of liberty when it escapes our sight or, though still visible, is difficult of pursuit. **1.** The question has been asked whether a wild animal, so wounded that it may be captured, is already ours. Trebatius approved the view that it becomes ours at once and that it is ours so long as we chase after it; but, if we abandon the chase, it ceases to be ours and is open to the first taker. Hence, if, during the period of our pursuit, someone else should take the animal, with intent to profit thereby, he is to be regarded as stealing from us. The majority opinion was that the beast is ours only if we have actually captured it because many circumstances can prevent our actually seizing it. And that is the sounder opinion."

[41] D.41.2.18.2 (Watson trans.): **18.** CELSUS, *Digest, book 23:* . . . **2.** If I instruct the vendor to leave at my house what I have bought, it is certainly the case that I possess it, even though no one has yet touched it; again, if my vendor points out to me from my turret the neighboring land which I have bought and declares himself to be giving me vacant possession, I begin to possess it no less than if I set foot within its boundary.

[42] D.19.5(On actions *de praescriptis verbis* and *in factum*).14pr (Watson trans): "**14.** ULPIAN, *Sabinus, book 41:* **pr** 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." This may not be the case being referred to, but there's no case that is closer in the *Digest*.

[43] D.41.2.3.14 (Watson trans.): "**3.** PAUL, *Edict, book 54:* . . . **14.** Then again we possess those wild animals which we have penned up or the fish which we have placed in tanks. But those fish which live in a lake or beasts which roam in an enclosed wood are not in our possession, because they are left in their natural state of liberty. Any other view would mean that the purchaser of a wood thereby should be held to possess all the animals in it; and that is not true."

Odofredus on D.41.1.55 (*Mats*. pp. VII–13 to VII–14).[44]

In a trap [*In laqueum*]. This law poses a pretty case. You put a trap in some place; a boar fell into that trap and it could not get out of the trap; you were at home and did not know this. I came upon the scene and found the boar and took him out. Now there are three questions: whether I should be deemed to have taken your boar, so that I might be held for theft, or not [to have taken] your boar, because is was not in your goods and thus it became mine, and thus I am not held for theft. [Secondly] it is asked if it ceases to be yours when it was yours before and I let it loose [reading *dimissi*] in the woods? [Thirdly], if it ceased to remain yours, would you have any action?

Sir Pomponius wanted to decide the case, and he flies through the air. He makes a certain distinction: If the trap is placed in a public place, it seems that the boar belongs in all circumstances to the one who occupies it. If it is placed in a private place, he seems to distinguish between the situation where [the trap] is on your[45] land, or on that of another. If it is on your land, either the owner [of the trap] caught the boar [reading *aprum*] in the trap in such a way that it could not get out, and then it is not yours, otherwise it is. Nevertheless, whatever Pomponius said, the jurisconsult who made the law said and determined this: If this boar became yours [and] if I took him away [reading *abstuli*], I shall be deemed to have taken away your boar. Hence an equitable[46] *actio in factum* will be given for the boar or for the value of the boar. And thus in another case, if we are in a boat, which is not overloaded, and one person throws [overboard] the cup of another, there will be given an *actio in factum* against him. It says this. . . . [Various glosses on the words of the *lex* are omitted.]

But about this I ask two things: How is it to be understood "he has become mine"? Certainly, in this way, according to Bulgarus: if you set a trap and a boar enters the trap, and I find him and take him away. And this is what our predecessors report that Bulgarus thought. . . . [At this point Odofredus tells the story of Bulgarus and his student, above.]

Others want to say otherwise according to Johannes [Bassianus] and Azo, and thus they write here: If you laid the trap, either you took out the boar – as the peasants do, so that when they find a boar and kill it, and afterwards they return 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 (read 'or' to go with 'either' above) if you have not taken out the boar, he is not held for theft, as below [D.41.3.35],[47] but for an action in fact, as we will say in the case of the ship at the end of this law. If, moreover, the boar could escape, then if

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[44] The work probably dates from the 1260s.

[45] Changing persons along with the text.

[46] Reading 'de equitate' for 'de equitare'.

[47] D.41.3.35 (Julian *On Urseius Ferox*, bk. 3): "If a slave, the usufruct of whom has been bequeathed, and who has never been in possession of the heir, should be stolen, the question arises, can the slave be acquired-by usucaion, because the heir has no action of theft? Sabinus says that no usucapion can exist of one in respect of whom an action for theft will lie, and, moreover, that he who is entitled to the usufruct can bring the action. This, however, must be understood to apply to a case where the usufructuary can use and enjoy his right; for otherwise, the slave would not be a proper subject of the action. But if the slave had been stolen from the usufructuary, while in the enjoyment of his right, not only he himself, but also the heir, can bring the action for theft." The relevance of this passage would seem to be its statement that the heir who has not entered into the inheritance (and so is not possessed of it) cannot bring the action for theft.

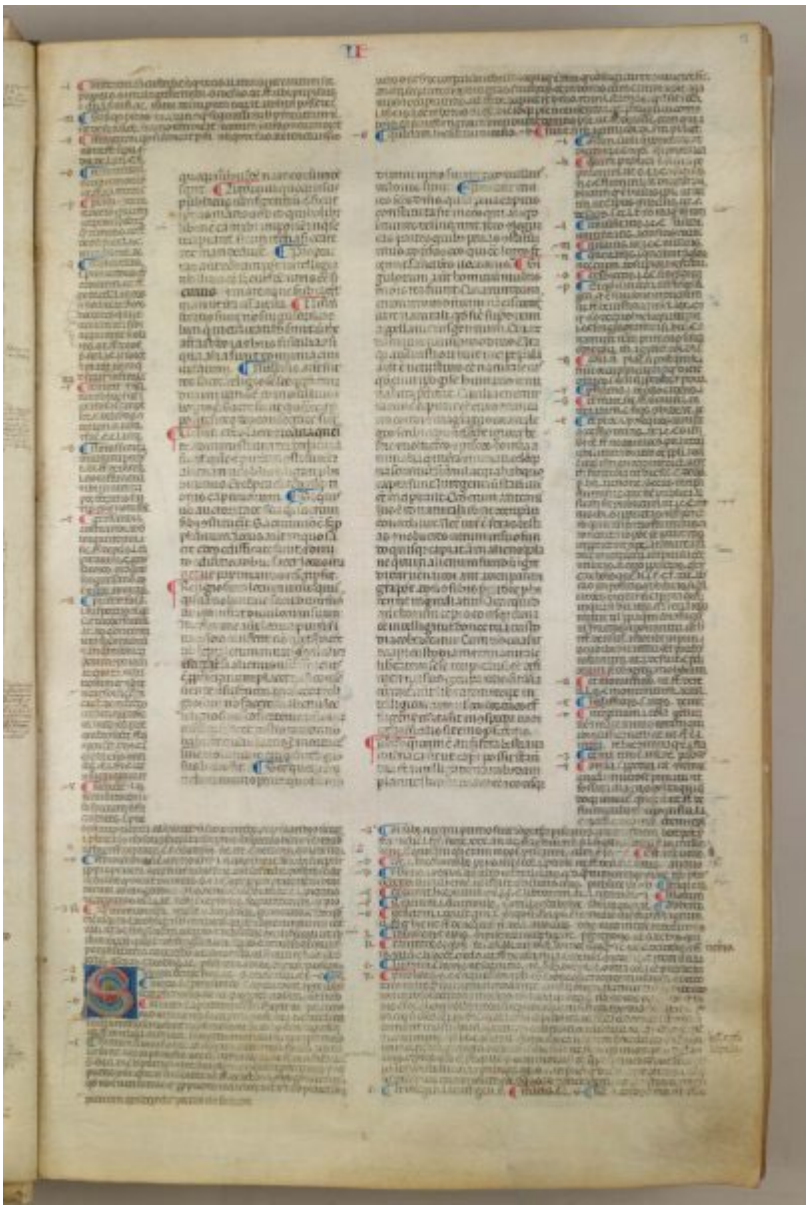
anyone takes him out of the trap, he has not taken out your boar, because the boar belongs to no one [*in nullius bonis est*], whence he is not held for theft, but for an action in fact, as in [D.41.1.5.1].[48] And this is a good opinion.

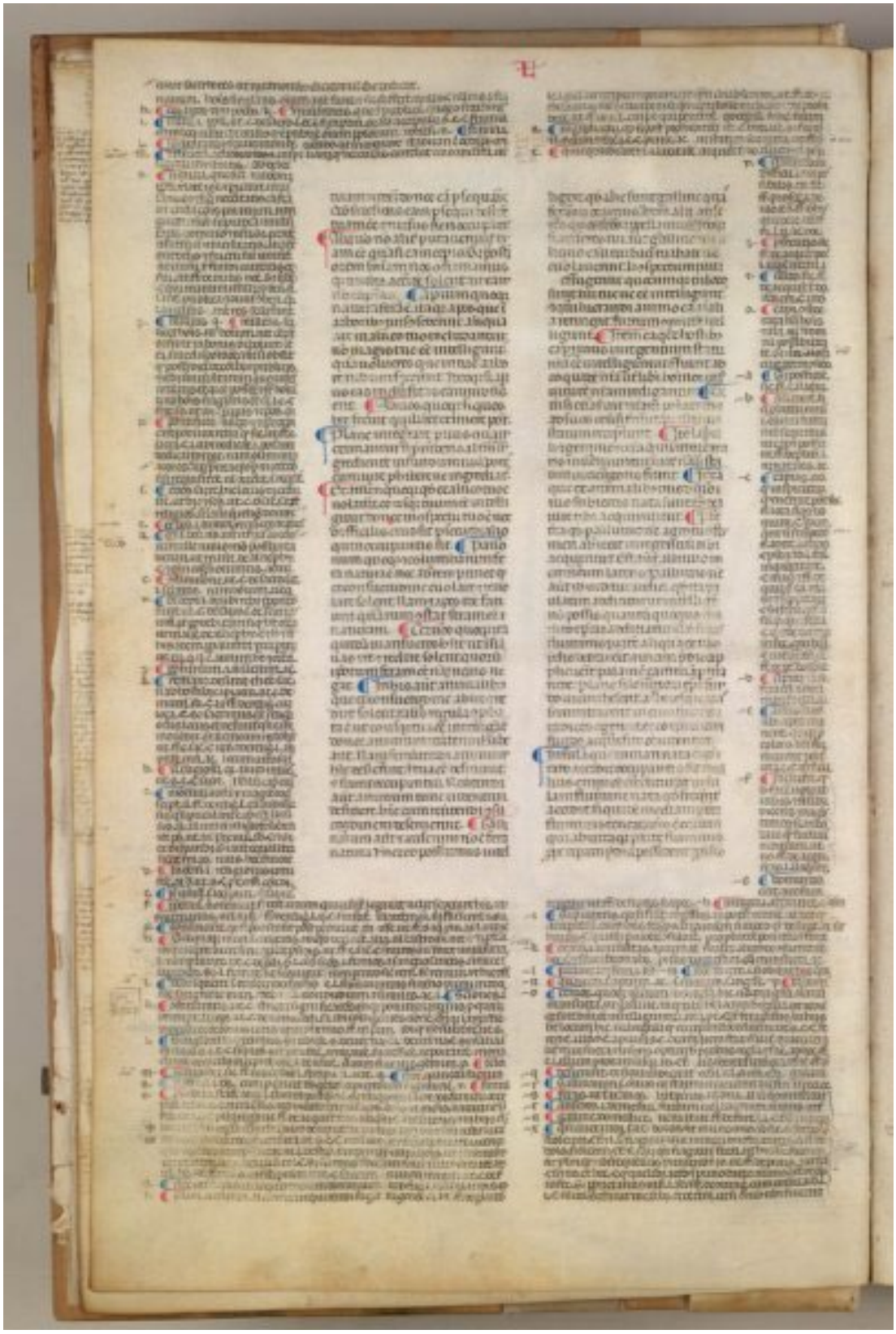
Others say, if you laid the trap and the boar cannot escape and you did not take him out, although another takes him, he is held for theft, because in this case possession is acquired through another, as otherwise in [C.7.32.1],[49] but normally this is not the case, as in [D.41.2.3],[50] in the beginning. But the opinion of Johannes and Azo is better. Odofredus.

[48] D.41.1.5.1 (Gaius, *Golden Things*, bk. 2). "The question has been asked whether a wild animal, so wounded that it may be captured is already ours. Trebatius approved the view that it becomes ours at once and that it is ours so long as we chase after it; but, if we abandon the chase, it ceases to be ours and is open to the first taker. Hence, if, during the period of our pursuit, someone else should take the animal, with intent to profit thereby, he is to be regarded as stealing from us. The majority opinion was the beast is ours only if we have actually captured it because many circumstances can prevent our actually seizing it." Of course, there is nothing here about an action in fact.

[49] C.7.2.32.1 (Septimius Severus and Caracalla, 196) (Frier trans.): "Expediency (*utilitas*) dictates, and the law has long permitted, that possession may be acquired through a free person even for a man who has no knowledge thereof, and that the condition for usucapion may start after knowledge (of such possession) is obtained."

[50] D.41.2.3pr–1 (Paul, *Edict*, bk. 54): "Those things can be possessed which are corporeal. **1.** Now we take possession physically and mentally, not mentally alone or physically alone. But when we say that we must take possession both physically and mentally, that should not be taken to mean that one seeking to possess an estate must go round every part of it; suffice it that he enters some part of the estate, but with the intent and awareness that thereby he seeks to possess the estate to its utmost boundaries."





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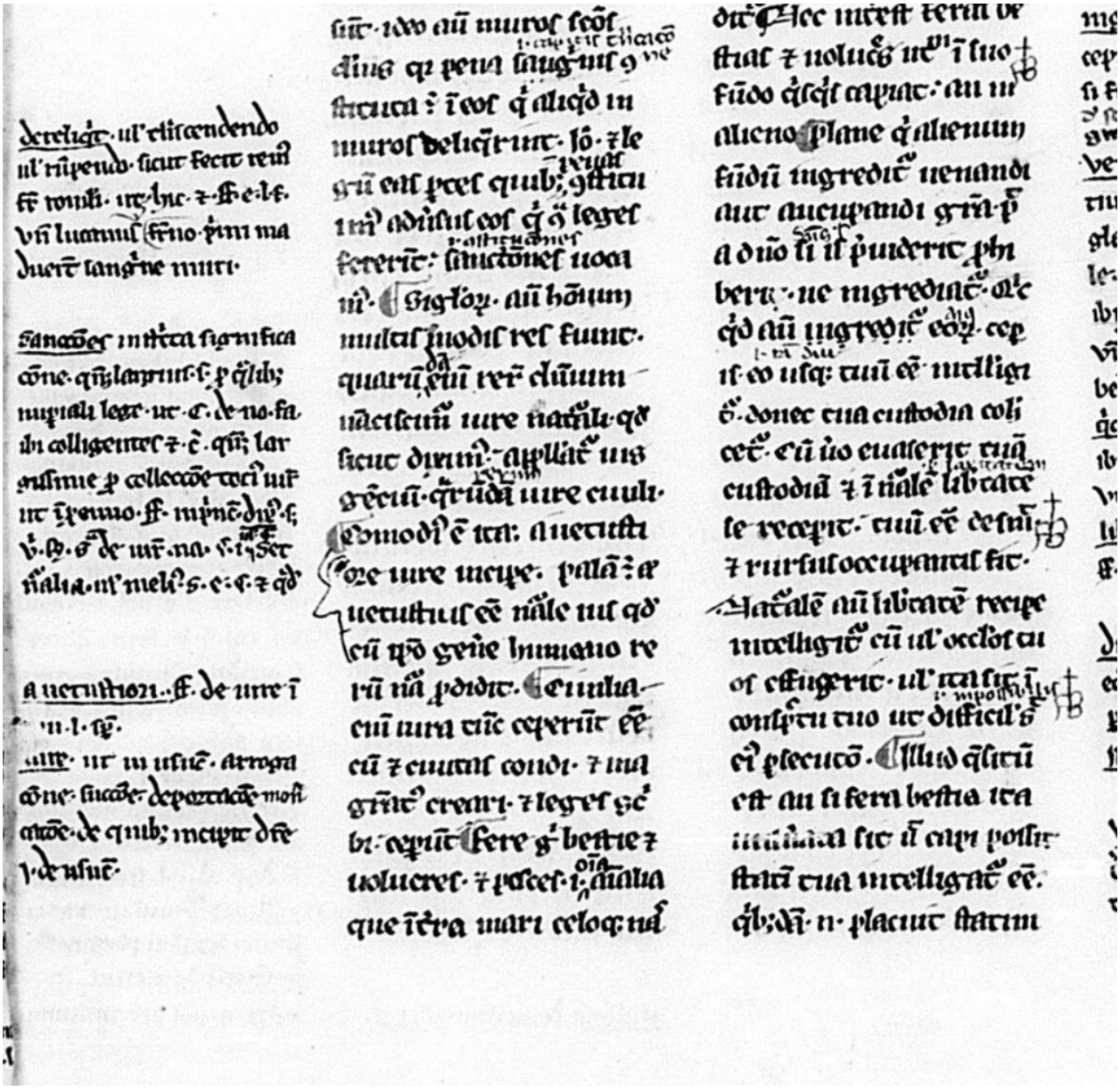

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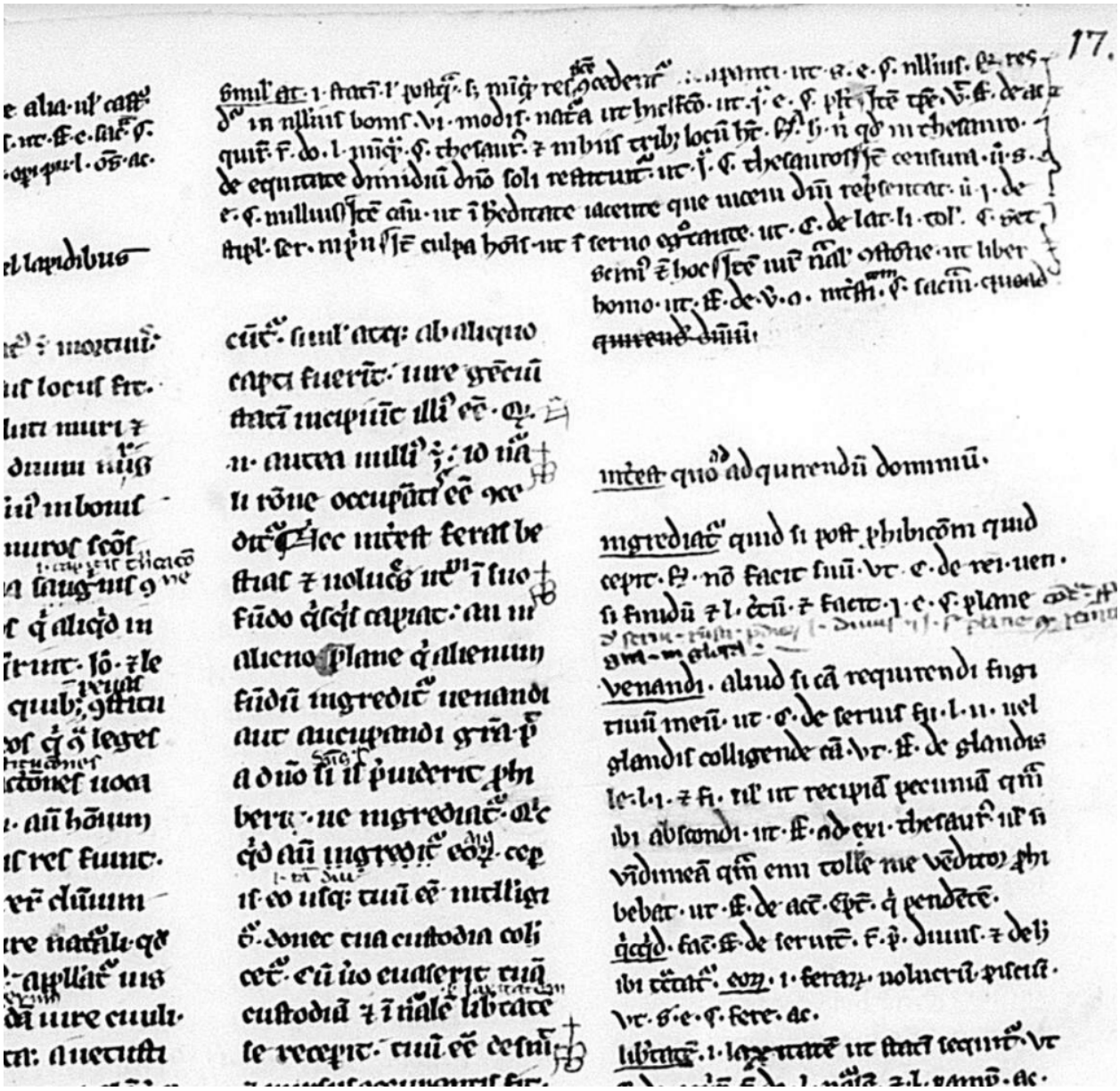

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