The Commentators on Wild Animals

Bartolus de Saxoferrato (Bartolo da Sassoferrato) (1313 – 1357), the best-known of the civilian commentators, taught for all his professional life at Perugia.

Bartolus on D.41.1.1–5

Bartolus on D.41.1.1. “Of certain things.” It is opposed that ownership is acquired by civil law. Solution: Ownership is of the law of nations, but the means of acquiring ownership are of the civil law. And see the gloss that states the modes and begins: “Rome, by its excellence, etc.” And add one more means, by judgment, as you will see in [D.41.2.13.9].

The text on which he is commenting, (and which is not given in the manuscripts or the printed editions) reads as follows:

D.41.1.1: GAIUS, *Diurnal or Golden Matters*, book 2: “Of certain things we obtain ownership by the law of nations, which is everywhere followed among men, according to the dictates of natural reason; and we obtain the ownership of other things by the civil law, that is to say, by the law of our own country.”

Ordinary gloss on “our own county”: “Rome, by its excellence, as [JI.1.2.2]. As, for an example, by usucapion, prescription, arrogation, monastic profession, deportation, testament, succession, *bonorum possessio*, entering into an inheritance.”

Where does this ‘opposition’ come from?

Does Bartolus’ ‘solution’ correspond to that of the Roman texts?

Does his commentary on the gloss follow through on what may be his quite radical suggestion in the solution?

Bartolus on D.41.1.1–5pr: “‘All.’ Read up to [D.41.5.5.1]. . . .

All animals, therefore, which are captured on land, on sea, or in the air, that is to say, wild beasts and birds, as well as fish, become the property of those who take them.

2. FLORENTINUS, *Institutes*, book 6: The same rule applies to their offspring, born while they are in our hands.

3. GAIUS, *Diurnal or Golden Matters*, book 2: For what does not belong to anyone by natural law becomes the property of the person who first acquires it. 1 Nor does it make any difference, so far as wild animals and birds are concerned, whether anyone takes them on his own land, or on that of another; but it is clear that if he enters upon the premises of another for the purpose of hunting, or of taking game, he can be legally forbidden by the owner to do so, if the latter is aware of his intention. 2 When we have once acquired any of these animals, they are understood to belong to us, as long as they are retained in our possession; for if they should escape from our custody and recover their natural freedom, they cease to belong to us, and again become the property of the first one who takes them,
4. FLORENTINUS, *Institutes*, book 6: Unless, having been tamed, they are accustomed to depart and return.

5. GAIUS, *Diurnal or Golden Matters*, book 2: [Wild animals] are understood to recover their **natural freedom** when our eyes can no longer perceive them; or if they can be seen, when their pursuit is **difficult**.

As Bartolus sees it, there are actually four issues here: (1) Can the statement that what belongs no is acquired by the person who first acquires it be applied generally? (2) Can someone prohibit anyone from coming on his land to take something? (3) What happens if I capture a wild animal on someone else’s land after I have been forbidden to do so? and (4) What happens if I capture an animal and then it escapes? Here’s what he has to say about these issues:

Bartolus on D.41.1.1–5pr (cont’d): . . . [1] It is opposed that a man belongs to no one, and nonetheless he is not granted to the occupant. Say as in the gloss and in [JI.2.1.12]. [2] [D.10.4.15] and [D.43.28.1] are opposed. [3] I wish to go into your field for fowling, and even though you prohibit it, I go in; do I acquire a right by my hunting? And the gloss sends you to [D.8.3.16]. The contrary is noted in [JI.2.1.12], but the gloss on [D.8.3.16] is true, and Dy. holds to it. [4] Take this case: someone taken captive in a church is ordered by a judge to be released to his own liberty, you let him go a little way and then seize him; have you fulfilled the judgment? Certainly not because such liberty ought to be given to him that his pursuit would be difficult, as in [D.41.1.5.pr]. I add for you [D.50.16.48] with its gloss.”

[1] Ordinary gloss on “by natural law becomes”: “This is not true in the case of a free man, and the reason is that this rule speaks of those things which can be subjected to our ownership, which does not exist in the case of a free man, as in [JI.3.19.pr, 1]. It is also not true in the case of a sick slave cast out by its owner, who is made free. [C.7.6.1.3]. And since this rule seems not to be true in the case of many other things say in how many ways something is said to be no one’s [nullius in bonis], as notes [D.1.8.1]. . . .”

[2] The cited texts say that owner of acorns that have fallen onto someone else’s land (D.43.28.1) or of treasure buried on someone else’s land (D.10.4.15) may obtain a court order to enter onto the land and get his property. That is obviously not analogous to the situation here, and the distinction is too obvious to need stating.

[3] D.8.3.16: “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’.”

Ordinary gloss on D.8.3.16: “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 ... and if it happens, it seems that it ought to be restored ... . But I say to the contrary, as in [JI.2.1.12, 13 ...] But can the hunter be distrainted while he is still in the field so that he return what he has captured? Say that he cannot ... but let [the owner] bring an action of *iniuria*.”

[4] Bartolus’s treatment of the fourth issue, the problem of the wild animal which escapes, assumes the teaching of the base text and applies it to a hypothetical question that is quite far away from the base text. The citation of D.50.16.48, a reference to the Digest title on the meaning of words where the word ‘freed’ is being expounded, seems
to be squarely on point.

Bartolus on D.41.1.5.1: “Natural freedom.” . . .

D.41.1.5.1: “It has been asked whether a wild animal which has been wounded in such a way that it can be captured is understood immediately to become our property. It was held by Trebatius that it at once belongs to us, and continues to do so while we pursue it, but if we should cease to pursue it, it will no longer be ours, and will again become the property of the first one who takes it. Therefore, if during the time that we are pursuing it another should take it with the intention of himself profiting by its capture, he will be held to have committed theft against us. Many authorities do not think that it will belong to us, unless we capture it, because many things may happen to prevent us from doing so. This is the better opinion.”

Bartolus on D.41.1.5.1 (cont’d): . . . The Lombard Law, de venatoribus. l. pen. is opposed. Solution: that law is one thing this law is another, but by custom the opinion of Trebatius is approved. And keep in mind this gloss which is cited in the treatise on mills. I begin to make a mill; someone finishes before me; can I prohibit him? And according to the reasoning of the jurisconsult no, because when we begin to build something but have not completed it, it is not ours, as here, unless we completely take it. But the gloss says that custom observes the contrary. But I hold to this law. And reply to this law and say as I said in the matter about mills.

Ordinary gloss on “better opinion”: Even if the trap belonged to another, as in [D.41.1.55]. But according to the Lombard law the one wounding waits up to twenty-four hours, and afterwards [the animal] belongs to the one occupying [i.e., the one who takes the animal after the twenty-four hour period], as in the Collection of Lombard Laws, in the next to last law. The Institutes says likewise [as the Digest] in the same paragraph, beginning “that” [II.2.1.13, above VIII.]. But by custom the opinion of Trebatius is observed. Likewise note that according to Trebatius that is considered which can come to pass.

Bartolus’s “Treatise on Mills” (see Mats. pp. XIII–4 to XIII–8; this is radically abbreviated to just the points the we need for the lecture):

There is little in Roman law on mills, and nothing directly on the issue that Bartolus raises in this treatise: whether someone who builds a mill acquires the right to take water from the stream when he begins to build or only when he actually begins to draw the water. It’s all done by analogy. The pro (“And it seems that he who first began and first proffered the words of occupation is preferred, for what is begun is taken for completed”, p. XIII–4) and contra (“On the other hand, it seems that he is preferred who first led the water or completed the building”, p. XIII–5) that he proposes at the beginning of his analysis (p. XIII–4 to XIII–5) rely on the law of judgments. Like our law, Roman law sometimes cuts off rights at the joinder of issue and sometimes at judgment. Bartolus’ pro and contra citations are on the opposite sides of this issue. That property rights probably accrued to the discoverer of buried treasure rather than the occupier supports the case of the person who has begun but not completed the mill. The cases on occupation of wild animals, on the other hand, suggest that the builder of the mill must have completed the job. Bartolus’s solution (p. XIII–5) prefers the one who first starts to the interloper. He employs both the distinction between public and common things (rivers, he declares,
are public in Roman law [with some justification]) and the distinction between animate and inanimate things (the former are acquired by occupation, the latter by staking out). Finally, he notes in passing the wonderful judgment in Bologna dividing water (p. XIII-8):

“So it was decided at Bologna when the commune granted first to the Dominicans water from one river for cooking beans, and afterwards granted it to the Franciscans. For since the water was sufficient for both they divided it in measures, and each order leads it to its place.”

I would suggest that this judgment plays an important role in this complicated story. It illustrates a typically medieval view about property. Accumulation is not favored. If you don’t need the water you must share it with your neighbor. Bartolus’ solution also protects that typically medieval creation, the possession of rights:

“It is apparent that he who began has a better right than he who began next if the latter could foresee that his use would impede the use of him who began first.”

Finally, we might note in passing a slightly nasty bit of anti-Semitism:

“When moreover I have said that he follows up on the work, you are not to understand it in the Jewish fashion that it is necessary that he always and in such a way work that he can neither eat nor sleep.”

Johannes Faber (Jean Fauré) on JI.2.11–13

Johannes Faber was roughly contemporary with Bartolus. He was French, and not well known in his time, but his focus on the Institutes was to become more important as time went on. He was also not well served by the 16th century printers. I have less confidence that I’ve gotten all the references in this text right than I do in the case of Bartolus.

We noted with Bartolus some interest in the top-level generalities, natural law, law of nations, and civil law. Faber is even more interested in it, and what troubles him troubles scholars today. The Roman law texts on the topic are quite inconsistent. Sometimes they seem to equate natural law and the law of nations; sometimes they separate them. Faber regards them as quite different, and he cannot understand why Justinian sometimes seems to regard them as the same. He is also troubled that the gloss, which also notes the inconsistency, does not seem always to have it right. To make matters more complicated, Faber is also trying to reconcile the canonistic sources, as his reference to Distinctio 1 of Gratian’s Decreta shows. His ultimate conclusion is influenced by the canonistic sources, though it does find some support in the Roman texts:

Johannes Faber, Commentarius super Institutionibus, 2.1.11–13 (Mats., pp. XIII–9 to XIII–11, once more radically abbreviated to illustrate just the points of the lecture)

“You should say that the radical beginning of the law of nations proceeds along with human law, viz. natural reason, which constitutes the same thing among all men [Here he probably thinking of the list given in Gratian Distinctio 1, c. 7: “the union of man and woman, the succession of children, the education of offspring, the common possession of all things, the single liberty of all, the acquisition of those things that are captured in the sky, the earth and the sea.”] . . . . .But the law of nations itself, he [the reference would seem to be to Justinian] continues, proceeded
afterwards with the multiplication of the populace as you can see [in JI.1.2.2] at the words ‘But the law of nations [is common to all human kind. For wars arose and captivities and slaveries, which are contrary to the natural law. For by the natural law from the beginning all men were born free].’ And when it says here that it is older add ‘than the civil law, but pure natural law is older.’”

Faber notes the conflict between the gloss on J.I.2.1.12, ‘legally forbidden’, and D.8.3.16:

“‘What if after’ at the end, the gloss holds the contrary of [D.8.3.16] … which seems to be truer. For no one can prohibit fowling but entry. … But he has no action [i.e., the landowner has no action to prevent the fowling] and the prohibition ought not operate unless with respect to the entry because he did it injuriously, nor does it impede the act. … See [D.41.1.55, the case of the boar that fell into the trap] in that it reproves the distinction between of mine and another’s. And in [C.3.32.17, 22, both of which are cited in the gloss], two things are required so that someone may profit from fruits, receipt and good faith. Here, however, occupation alone suffices. [JI.2.1.13.] But what if he has him impeded by a judge? Surely then he does not make it his own if the inhibition was made with knowledge. [D.41.4.7.5; D.50.12.8 at the end; the first citation is on point. The second is a bit of a stretch, but both support that notion that judicial action can take away property rights.]. For the prohibition of the judge impedes the transfer of ownership, much more its acquisition. [That’s a bad argument; the point is that we are not talking about transfer of ownership.] And cite what Innocent notes [X 5.1.27]. And this applies if the judge inhibits hunting; it is otherwise if he inhibits entry for the reason stated above. And by this it appears that he cannot be detained on the land as notes the said law [D.8.3.16]. Today, however, by the custom by which warrens and enclosures are tolerated, it does not seem that the captor makes it his own and that he ought to restore it. For if the prohibition of the judge can do this, as is said, much more so the customary law which can more than interdict the transfer of ownership. [D.47.14.16; C.11.48.7. Both citations seem to be a bit of a stretch, since both fragments concerns fraudulent sales (fraus legis).] Whence when such an occupation grants a right by the law of nations, as I said in the last section, by custom it can be taken away and overcome, as I said above, … which otherwise might seem to stand in the way. [citing JI.1.2.12, ?JI.1.2.11 is probably meant, though he doesn’t quite say it in either place. The argument seems to be that just as the primitive natural law was supplanted with regard to the establishment of private property by the law of nations, so too the law of nations may be superseded by custom.] By the feudal law, moreover, hunting with traps is prohibited except for boars, wolves, etc., in [Libri feudorum 2.27.5: Constitution of the Emperor Frederick [?]I]): ‘No one shall lay nets or traps or any other instrument for taking game (venationes), except for taking bears, boars, or wolves’.”

Johannes Christopherus Portius with additions by Jason de Mayno on JI.2.1.12–13

Johannes Christopherus Portius (Parcus, Porcus), taught at Pavia, where he was born, from 1434 into the mid-1400’s. He is known principally for his commentary on the Institutes. Jason de Mayno (1435–1519), who wrote additions to Portius’s commentary, is considerably more distinguished. He was, among other things, the teacher of the great humanist jurist Alciatus. I have little confidence in many of of the restored citations in
this text. Someone seems to have tried to make sense of them for the printed edition, but ended up, in many cases, with plausible citations that turn out, on balance, to be unlikely to have been the ones Portius had in mind. The commentary of Portius and Jason is even more prolix than that of Faber. It displays even greater interest in natural law.

Note how Portius seems to have Dinus supporting the position of the Accusian gloss that the poacher does not acquire title to the animal, whereas Bartolus had him coming out the other way:

“Dynus, however, holds to this gloss, and I like his opinion, first by the laws alleged in this gloss, but I urge by a reason [sed suadeo ratione]: for from the time that the entrant by entering falls into a state condemned by the law, he ought not get any benefit. … And by this reason the rule that when something is no one’s, etc., does not stand in the way because that [rule] does not win primacy of place when the entry was vicious. This is proved here in ‘it is clear [that if he goes on another man’s land for the sake of hunting or fowling, the latter may forbid him entry if aware of his purpose]’, as if to say, ‘Although I told you that so far as acquiring ownership of those things that are no one’s is concerned, it makes no difference whether someone captures on his own land or another’s; nonetheless, this is true unless he takes having entered against the will of the owner’. And by this also it does not stand in the way, because the entry is punished by the action of iniuria, because one could by capture take greater profit than one suffered mulct by vicious entry. I confess, however, that the owner of the land may not hold the hunter until he restore what he has captured, if he knows him, and in this I approve the gloss in [D.8.3.16] which expresses this.”

Unlike Faber, Portius considers the wounding problem, and what he says suggests that the rather strange opinion of Accursius that the matter was one for determination by the judge had come to prevail:

“In the gloss on the word ‘catch it’ at the end: This gloss is commonly held so that all this resides in the opinion of the judge. If the beast were so wounded that it could not have turned out other than that he would be captured, for it is prostrate, half-dead, immediately it certainly becomes the wounder’s. This is proven in the verse possessore at the place quia multa a contrario sensu. [Unidentified] And I cited this text in the determination of a question committed to me. Someone who at that time was a reverend prelate promised a graduate student [spectabili], now a doctor, to checkmate with a black knight. With a knight he drove the king onto the line of [another] knight on which there was a rook behind the knight. Then he removed the knight and said that he had captured the king with the knight. The other said ‘No way [nequaquam]’, because the king was captured by the rook not by the knight. I inclined to this judgment because of this text. Although the knight had so forced the king that it could be captured, that was not yet its effect, and therefore it was conceded to the previously occupying rook.”