

**PART XIII. COMMENTATORS: WILD ANIMALS**

CONTENTS	<i>Page</i>
A. DIGEST 41.1.1 thru 5 WITH THE ACCURSIAN GLOSS .....	XIII-2
B. BARTOLUS, COMMENTARIUS IN DIGESTUM NOVUM D.41.1.1, 5 .....	XIII-3
C. INSTITUTES 2.1.11 WITH THE ACCURSIAN GLOSS.....	XIII-8
D. JOHANNES FABER, COMMENTARIUS SUPER INSTIUTIONIBUS 2.1.11 thru 13.....	XIII-9
E. JOHANNES CHRISTOPHERUS PORTIUS, COMMENTARIUS SUPER INSTITUTIONIBUS 2.1.11 thru 13 .....	XIII-12

### A. DIGEST 41.1.1-5 WITH THE ACCURSIAN GLOSS

[with selected glosses from *Corpus Juris Civilis* (Lyon 1604) 3:390?] [S.P. Scott and CD trans.]

The following passage (§ XIII.B) from Bartolus is keyed to D.41.1.1-5, which is the source of JI.2.1.12-13, which we examined above, in Part VII. The passage is worth quoting in full with the relevant glosses:]

1. GAIUS, *Diurnal or Golden Matters*, book 2: Of certain things we obtain ownership<sup>1</sup> 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.<sup>2</sup> And because the law of nations is the more ancient, as it was promulgated at the time of the origin of the human race, it is proper that it should be examined first. 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<sup>3</sup> 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<sup>4</sup> 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.

---

<sup>1</sup> Of which there are five *genera*, as in [JI.2.1.pr], and the fifth member follows here, i.e., things which are or become the property of individuals, as in [JI.2.1.11], and therefore what is noted here is not a difference of things but of facts.

<sup>2</sup> 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. [Bartolus himself in his commentary on D.6.1.28 (at 171r) offers usucapion, entry on an inheritance, testament, entry into a monastery, monastic profession, arrogation, but then adds “and by many other dispositions of the laws.”]

<sup>3</sup> 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]. Also note that what is otherwise called ‘common’ in the division [of things], here is called ‘no one’s’, but by occupation they become someone’s. Accursius.

<sup>4</sup> Although one cannot be forbidden initially from occupying that which is no one’s, nonetheless consequently when one is prohibited to enter one is also prohibited from occupying. ... Again, note that I can prohibit someone from entering what is mine and even resist him physically ... and I can also bring an action of *iniuria* against him. ... Again, what if he takes something after prohibition? Respond as we said above [D.8.3.16].

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. **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.<sup>5</sup>

---

<sup>5</sup> 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. [See below p. XIII-4, note 6.] The *Institutes* says likewise [as the *Digest*] in the same paragraph, beginning “that” [JI.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. ...

---

## B. BARTOLUS, COMMENTARIUS IN DIGESTUM NOVUM D.41.1.1, 5

(Basel 1562) 181–2, 183 [CD trans.]

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].<sup>1</sup>

“All.” Read up to [D.41.5.5.1]. 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]. [D.10.4.15]<sup>2</sup> and [D.43.28.1]<sup>3</sup> are opposed. 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].<sup>4</sup> The contrary is noted in [JI.2.1.12], but the gloss on [D.8.3.16] is true, and Dy. holds to it. 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.41.01.5.pr]. I add for you [D.50.16.48] with its gloss.<sup>5</sup>

5. “Natural freedom.” The Lombard Law, *de venatoribus. l. pen.*<sup>6</sup> 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

---

<sup>1</sup> D.41.2.13.9: “If by the order of the judge something is restored to me, it is held that the accession is also to be given to me.” The gloss has considerable difficulty with this passage. Bartolus, in long commentary concludes that the rule of this passage is: “The authority of the judge makes it that there be transferred to me the condition of usucaping something which has been restored to me as if mine.” Bartolus *ad* D.41.2.13.9 (Venice, 1602), fol. 212.

<sup>2</sup> D.10.4.5: “Treasure which belongs to me is buried in your land and you will not permit me to dig it up. So long as you do not remove it from the place in which it is, Labeo says that I am not entitled to an action for theft, or to one for production on this account, because you were not in possession of the treasure, nor have you acted fraudulently in order to avoid [my] having possession of the same, since it may be that you do not know that the treasure is in your land. It is not unjust, however, where I make oath that I do not assert this claim for purpose of annoyance, if an interdict or a judgment should be granted to the effect that you shall not employ force against me to hinder me from digging up, raising, and removing the said treasure, if I take no steps to prevent security for the avoidance of threatened injury being furnished you, on account of my acts. Where, however, the treasure is stolen property, I am entitled to an action for theft.” Neither the gloss nor Bartolus’ comments give any further help on why he thought the case relevant here.

<sup>3</sup> D.43.28.1: “The praetor says: ‘Where any nuts fall from the premises of your neighbor upon yours, I forbid force to be employed to prevent him from gathering them, and carrying them away within the space of three days.’” The gloss is no help, but Bartolus’ comment (*id.* at 387–8) suggests here as it does with the previous law that something less than proof of full ownership will suffice for purposes of obtaining the interdict.

<sup>4</sup> 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.’” The gloss notes: “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 distrained 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*.”

<sup>5</sup> D.50.16.48: “We do not understand someone to be ‘freed’ who although the chains are removed is nonetheless held bodily, nor do we understand to be freed someone who is guarded in public even without chains.” The gloss notes: “Guarded, that is, kept in custody, perhaps by messengers. He, therefore, is freed to whom the power of going away is given. ... What he promises in the meantime, does not hold, just as if he were in prison ... .” Bartolus adds: “Keep in mind that the gloss is speaking about when a promise is made by the one in prison to him who unjustly put him in prison. It is otherwise if he did it justly because an instrument is valid, even of him who is in prison.”

<sup>6</sup> The reference is to the “vulgate” edition of the Lombard laws with the gloss. This is probably the law referred to (=Rothair 314, ed. Bluhme, trans. K.F. Drew): “If a stag or other animal is shot with an arrow by any man, it belongs to that one who shot is up until the next same hour of the day or night, that is for twenty-four hours after he set is aside and went away. Anyone who finds the animal after the prescribed number of hours has passed shall not be liable but may have the animal for himself.” Other relevant passages include Rothair 312: “He who finds an animal which has been wounded by another man or which is held in a trap or surrounded by dogs, or which is dead, and he kills the animal himself and leaves it, may take the right foreleg of the animal together with seven ribs if he makes it clear that he has done it with good intent.” And Rothair 313: “He who finds and hides an animal wounded or killed by someone else shall pay six *solidi* as composition to him who wounded it.”

which is cited in the treatise on mills.<sup>7</sup> 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. [See above, XIII-3, note 5.] But I hold to this law. And reply to this law and say as I said in the matter about mills.

#### a. APPENDIX

Although a number of mss. contain what is said to be Bartolus's treatise on mills it has long been doubted that he wrote one. Since he cites it here in a genuinely Bartolan work, that can hardly now be doubted. The problem is what is the treatise on mills? The answer seems to be that it is his long *repetitio* on D.43.12.2, which has long been known and is printed in our edition at 350-4. It is too long to translate in full, although it is a fascinating example of the best of Bartolus, complex but eminently practical. In effect, he develops a whole law of water and water courses out of this not very promising text: "Unless the emperor or the senate forbid it, nothing stands in the way of using a public river so long as the water is not in public use. But if it is navigable or if a navigable waterway comes from it, it is not permitted to do this." The principal issue that the *repetitio* deals with is the right to build a mill. In many situations, Bartolus concludes, one may build a mill, and if one builds one licitly, one may continue to operate it without interference by an upper riparian. That leads him to this question:<sup>8</sup>

In the fifth place I ask: According to what went before you see that the condition of him who first occupied is better. Suppose, therefore, that someone begins to work today in a river, and another begins the following day, which of them is preferred? The question comes down to this: whether something is said to have been occupied by word alone, or by beginning the work or if it is required that the water be led or required that the building to which the water is led be finished.

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, as [D.34.2.19.11<sup>9</sup>], and the laws cited there. Further when the issue is a right to be acquired, he is preferred who first comes to the *litis contestatio*, and thus he who first came to the beginning, as [D.45.1.9;<sup>10</sup> D.3.3.32;<sup>11</sup> D.30.1.33<sup>12</sup>] and Dy. at the same place. Therefore he will be stronger who first began. On the same point: [D.5.1.29<sup>13</sup>]. In favor of this proposition is what is said concerning treasure that it is acquired by him who first saw it not by him who first occupied it [D.41.1.31.1<sup>14</sup>; JI.2.1.18<sup>15</sup>], although the gloss<sup>16</sup> is against this point as Cy. notes at [C.7.32.4<sup>17</sup>].

<sup>7</sup> See below, Appendix.

<sup>8</sup> Bartolus, *ad* D.43.12.2 (Venice, 1602), fol. 135vb-136ra, nu. 10-12.

<sup>9</sup> D.34.2.19.11: [Where someone leaves a legacy of "unworked silver",] the term "unworked silver" embraces the raw material, that is, material that has not been worked. What is the position if the silver has begun to be worked? It is questionable whether, not yet being completed, it is subsumed under the term "worked" or "unworked." But I submit [that it belongs] rather with worked silver. Obviously, if it had already been worked, but was in process of being engraved, it will be included in the term "worked." But will what has begun to be engraved be included with engraved? And I submit that it is included in a case where a person has left "engraved silver." The gloss (*vº magis facti* [Lyon, 1602], col. 1265) notes that Rogerius (12th century) had come out the other way, citing D.34.2.27.3, where Servius had decided that worked items did not include things that one could not use.

<sup>10</sup> D.45.1.9: "If Titius and Seius stipulate separately, as follows, 'If you do not convey that tract of land to him, do you promise to convey it to me?', the end of the time for conveying will be the when judgment is accepted [i.e., the *litis contestatio*] and therefore the action will belong to the occupant."

<sup>11</sup> D.3.3.32: "Where several proctors have been appointed at the same time for the same purpose, the condition of the occupant is better, so that the later one cannot be proctor in that action which the previous one has brought."

<sup>12</sup> D.30.1.33: "If property is left to several persons, ... [and] the testator himself manifestly indicated by his language that he intended one of them to receive the entire property, ... the value of article should be given to one of them, and the article itself to the other. And he who first joined issue with reference to the legacy, or the trust, shall have the right to choose which he will prefer, the property itself, or the value of the same ... ." The commentary of Dinus de Mugello (Dy.) on this passage needs to be checked.

<sup>13</sup> D.5.1.29: "The plaintiff in an appeal is the one who first took the appeal."

<sup>14</sup> 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. For the rest, if someone should hide something in the ground for gain or out of fear or for safekeeping, it is not treasure and to take it would be theft."

<sup>15</sup> JI.2.1.18: "Precious stones too, and gems, and all other things found on the sea-shore, become immediately by natural law the property of the finder."

On the other hand, it seems that he is preferred who first led the water or completed the building because when preference in an acquired right is being litigated, he is first preferred who first got the judgment, as [D.9.4.14;<sup>18</sup> D.42.1.19<sup>19</sup>], as Dy. notes at [D.30.1.33<sup>20</sup>]. It appears moreover that the sentence is the end of the litigation, as [D.42.1.1<sup>21</sup>]. He therefore ought to be preferred who first led the water and arrived at the end of the work, for here we are dealing with the preference in an acquired right. For by the authority of this law the right is acquired by any one of the populace to lead water from a public stream, we are dealing therefore with who is to be preferred in an acquired right. Further, in those things in which we acquire any right by occupation we have no right before the occupation is perfected, for before that many things can happen so that we may not occupy it. [D.41.1.5.1;<sup>22</sup> 41.1.55;<sup>23</sup> 41.2.3.3<sup>24</sup>]. So even here we do not acquire right in the water except when we have led it and after the building is finished. It seems to have been finished, however, when someone can use the building. [D.50.16.139.1<sup>25</sup>]. Before, note, many things can happen that the building is not perfected, and thus he who takes the water away does no harm [*damnum*].

Solution: I say that the nature of those things that are acquired by occupation does not fit our question. For that has relevance in those things which are common and belong to no one; it does not have relevance to those things which are public as notes [JI.2.1.5<sup>26</sup>]. But rivers are public [JI.2.1.2<sup>27</sup>]. Here therefore is the point: When two people use a public place and by the use of one the use of the other is impeded, who is

<sup>16</sup> v<sup>o</sup> *inventoris* (Lyon, 1602), col. 128: “It is so if he eventually seizes (*occupet*) or takes it, not otherwise, according to Azo. For in the preceding section [which deals with things taken from the enemy] and in the other preceding sections, it deals with things that are acquired by occupation, whence the closeness of the text indicates that the same result follows here. [Citations omitted.] And the adverb of similarity, that is “too,” clearly lets us understand that treasure is a another case, the treatment of which is greatly separated from this, as [JI.2.1.39], and therefore it [treasure] is acquired by the one who first sees and finds not who so seizes.”

<sup>17</sup> C.7.32.4: “Although possession cannot be acquired by mind (*animo*) alone, nonetheless, it can be retained by mind alone. If therefore in the passage of time you did not cultivate the deserted possession of [your] fields, but you left off their cultivation by the necessity of fear, this wrongful act (*iniuria*, i.e., of those who caused the fear) cannot be prejudicial to you because of the passage of time.” The commentary of Cinus Pistoriensis (Cy.) needs to be checked, but he probably cited JI.2.1.39 as an example of where possession was acquired by mind alone and went on to deal with the gloss on JI.2.1.18.

<sup>18</sup> D.9.4.14: “Where anyone is sued by several persons on account of an offense committed by his slave, or by one person on account of several offenses, then it will not be necessary for him to tender the amount of damages assessed to those to whom he cannot surrender the slave, since he cannot surrender him to all of them. What then is the rule if he is sued by several parties? ... It is the better opinion that the position of the occupant is better. Therefore the slave should be surrendered, not to the plaintiff who first instituted the proceedings, but to the one who first obtained judgment ... .”

<sup>19</sup> D.42.1.19: “Where there are several persons to whom money is due for the same reason, the condition of the occupant is better. ...” The gloss notes a diversity of views on what makes an ‘occupant’ in this situation and concludes that it is the one who gets a judgment.

<sup>20</sup> Above, note 12. The commentary of Dinus de Mugello (Dy.) on this passage needs to be checked.

<sup>21</sup> D.42.1.1: “An issue is said to be determined (*res iudicata*) when an end is put to the dispute by the pronouncement of the judge, which can be either a condemnation or an absolution.”

<sup>22</sup> Above, p. XIII-3.

<sup>23</sup> The boar who fell into the trap, above, p. VII-4.

<sup>24</sup> D.41.2.3.3: “Neratius and Proculus say that there can be no acquisition of possession by intent alone (*solo animo*), unless there be a previous physical holding of the thing (*naturalis possessio*). Thus, if I know that there is treasure buried in my land, I possess it as soon as I form the intention to possess it, because what is lacking in actual holding (*naturali possessioni*) is made up by my intention (*animus*). On the other hand, the opinion of Brutus and Manlius that one who acquired ownership of land by long possession thereby also acquired treasure buried in it is not correct. Indeed, if he does know, he does not acquire it by long possession since he knows it to be the property of someone else. There are those who hold to be more correct the view of Sabinus, namely, that one aware of the existence of the treasure begins to possess it only when it is removed from the soil because, until then, it is not in his keeping (*custodia*); with these jurists I [Paul] am in agreement.”

<sup>25</sup> D.50.16.139.1: “A man is regarded as having ‘completed’ (*perfecisse*) a building if he has brought it so far that it can now be used.”

<sup>26</sup> *Inst. de rerum divi. § illorum*. There is no *paragraphus illorum* in the *Institutes*, but JI.2.1.5 (*litorum*) is on point: “Again, public use of the sea-shore, as of the sea itself, is part of the law of nations; consequently every one is free to build a cottage upon it for purposes of retreat, as well as to dry his nets and haul them up from the sea. But they [sea-shores] cannot be said to belong to any one as private property, but rather are subject to the same law as the sea itself, with the soil or sand which lies beneath it.”

<sup>27</sup> JI.2.1.2: “On the other hand, all rivers and harbours are public, so that all persons have a right to fish therein.”

preferred? And 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. And for this [note] the text [D.43.8.2.2<sup>28</sup>] and the gloss [*v<sup>o</sup> obtinendum*], and it is [the case] according the third reading [of the gloss] “when two wagons are in each others’ way.”<sup>29</sup> And the same rule applies in the use of a public stream and the water of the same as applies in the use of a road and a way [D.43.14.1.1, 1.9<sup>30</sup>]. And according to this he who began first prevails. Or if you wish to say that the rivers are public but their use is common (as the text in [JI.2.1.2] seems to say, although the gloss there explains it otherwise<sup>31</sup>) according to this the written law would require a perfected occupation, according to the laws cited above; nonetheless this written law is corrected by custom, as he is said to have preoccupied who first begins and follows it up, as the gloss notes on [D.41.1.5.1<sup>32</sup>]. Therefore, the same applies in the proposed case, as he may be said to have occupied who began to work to lead the water, if he follows up on the work begun, but not if he quits, according to the opinion of Trebatius [D.41.1.5.1<sup>33</sup>]. Again if you wish to say that these rights are not corrected by custom, it is still true what I have said about the law. For these laws speak about animals which are no one’s but in

---

<sup>28</sup> D.43.8.2.2: “[The interdict forbidding things to be done in public places or public roads that could cause damage to someone] provides for both public and private welfare (*utilitatibus*). For public places serve both public and private uses, that is to say, as the property of the *civitas* and not of each individual, and we have as much right to enjoy them as anyone of the people has to prevent their misuse (*tantum iuris habemus ad optinendum, quantum quilibet ex populo ad prohibendum habet*). On account of this, if any work should be undertaken in a public places that causes private damage, suit may be brought against it under this prohibitory interdict on account of which thing this interdict is available.”

<sup>29</sup> D.43.8.2.2, *v<sup>o</sup> obtinendum* (Lyon, 1604), col. 651–2. The translation of the *Digest* text given above resolves a potential contradiction in the Latin. What the Latin says literally is “we have as much right to obtain as anyone of the people has to prevent.” The gloss offers four ways to explain this seemingly contradictory statement, of which Bartolus cites only the third, but he probably has the others in mind as well. “[1.] “to obtain,” that is, the public use that we make by proposing the edict [presumably, one cites the edict as justification for building] as much as anyone of the public has to prohibit what is made by building [in the public place], according to Jo[hannes Bassianus]. And thus, since we are in a situation of equality (*pari causa*), my position, who am prohibiting, is stronger, as [D.10.3.28] and [D.8.5.11]. 2. Or say secondly, according to B[ulgarus], we have as much [right] to obtain by building as anyone of the people, etc. i.e., the faculty of building lasts as long as the faculty of prohibiting. 3. Or say thirdly, that neither wants to build, but both to use. In this case neither prevails, because one has as great a right as the other, as appears in the case when two wagons are in each others’ way, in which case there is an occasion for showing kindness as may be argued from [D.11.7.46] or casting lots as is argued in [D.5.1.13; the suggestion is in the *casus*, (Lyon, 1604), col. 680], unless one happens to foresee [it] and the other not, argument from [D.19.2.9.1], and [C.3.34.11] is relevant. 4. Or say fourthly, one person has as much right to use a public place as we have a right to prevent that something be done in a public place that causes some harm (*aliquid molestiae*) to us. Acc[ursius].” Neither of the texts cited on the foresight question is particularly relevant, though D.19.2.9.1 does suggest that a person will be held to have foreseen what he could have foreseen.

<sup>30</sup> *ut infra tit.2 l.j § 1 et § fi*. This being title 12, the next title 2 would be 44.2, which contains nothing of relevance. The suggestion that D.43.14.1 is meant is based on the fact that 43.14.1.1 says “[The interdict to allow navigation in a public river] provides that nobody should be prevented from navigating in a public river; for just as an interdict has been provided above to protect someone who is prevented from using a public road, so the praetor thought one should be provided in this case, too.”, i.e., it expressly makes the analogy between the right to navigate in public streams and the right to travel on public roads. The final section (D.43.1.14.9) reads: “Mela also says that an interdict of this kind lies to prevent the use of force to stop herd animals from being watered in a public river or on the bank of a public river.” This is a right that well could be seen as parallel to that which existed with regard to public roads.

<sup>31</sup> We give all the glosses on JI.2.1.2, although it is pretty clear that Bartolus is referring to the last: *v<sup>o</sup> Flumina autem omnia* (Lyon, 1604), col. 120: “That is to say, continual, like the Po or the Rhine. Certain rivers, however, are private, like ditches placed in fields, which rise and fall, which sometimes flow and sometimes do not. As D.43.12 and D.43.13 [the citations are botched and cannot be more precisely identified].” *v<sup>o</sup> Omnibus*: “Nor can he who has been fishing for a long time repel another who comes upon him, as [D.41.3.10], unless he happens [to have been doing it] for a period of thirty years, as [D.44.3.7].” Or according to Johannes [Bassianus] understand that law [D.44.3.7] [as applying] when he was in possession of fishing. *v<sup>o</sup> Commune*: “That is, it is open to all in common, for it [the right to fish] is not common but public according to Johannes [Bassianus].” D.44.3.7: “If for several years someone has fished by himself in a side stream of a public river, he may prevent another person from exercising the same right.” D.41.3.10 (too long to quote here) gives the standard rule that one cannot acquire by usucapion (long use) a servitude (property right to use land) unless it is attached to a piece of land or (as this passage says) a building. The reference in the gloss *Omnibus* to 30 years is a reference to the longest period of prescription that was known to the later Roman law. On the basis of this, can you reconstruct what Johannes Bassianus’s views were on acquiring property rights in public rivers? How do they differ from Bartolus’s?

<sup>32</sup> Above, p. XIII–3.

<sup>33</sup> *Ibid.*

inanimate things staking out [*exceptio*] alone suffices, whence if one wishes to build in the sea or on the shore, it immediately becomes his when the pilings are set down and the finishing of the thing is not required [D.41.1.30.4<sup>34</sup>]. Further the law [D.43.8.2.8<sup>35</sup>] says that he is to be protected who is building on the shore or puts out his bulkhead in the sea and here uses a verb of the present tense, ‘is building’. It suffices therefore that he is presently building and will finish the work. 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. An intervening act of nature is no obstacle as [C.6.23.28<sup>36</sup>]. I would say the same if he turned aside for a few days to find masters or preparations by the argument of that which is in [D.43.16.3.9<sup>37</sup>]. But if after the work is begun he neglects to pursue it, I would think that he would lose his right as [D.39.2.15.35<sup>38</sup>] and [D.41.2.40.1<sup>39</sup>].

The aforesaid is true if the water he is leading for his use does not suffice for both of them. For if it suffices for both, either can lead it, as [D.43.20.4<sup>40</sup>] and [C.3.34.4<sup>41</sup>] and [D.39.3.8<sup>42</sup>]. 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.

---

<sup>34</sup> D.41.1.30.4: “If I drive piles into the sea and build upon them, the building is immediately mine. Equally, if I build on island arising in the sea, it is mine forthwith; for what belongs to no one is open to the first taker.”

<sup>35</sup> D.43.8.2.8: “Against anyone who has built a breakwater out into the sea this interdict (“to prevent anything from being done in public places or ways”) may validly lie in favor of anyone who should happen to be harmed by it. But if nobody is conscious of suffering damage, the person who builds on the shore or throws a breakwater into the sea is to be protected.”

<sup>36</sup> C.6.23.28 is too long to quote in full, but it relaxes the former requirement that the making of a testament be a single, continuous act in order to allow “a break,” say, for giving the testator food, drink, or medicine.

<sup>37</sup> D.43.16.3.9: “Anyone who comes with arms we may repel with arms. But this must be at once, not after an interval. We should know that it is not only permissible to resist ejection, but that even if someone is ejected, he may eject in his turn, as long as this is immediately and not after an interval.” The gloss on the word “immediately” (v<sup>o</sup> *ex continenti* [Lyon, 1604], col. 684–5) asks whether the ejected person who goes to the city in order to gather his friends and stays away for two or three days loses his right to recover and decides that he does not.

<sup>38</sup> D.39.2.15.35: “[S]omeone who is granted *missio in possessionem* and does not take it up has lost the praetor’s benefit, should the building collapse. This should be interpreted as referring to the case where he neglected to enter into possession not where the house collapsed while he was doing so.” The context here is the *cautio de damno infecto*.

<sup>39</sup> D.41.2.40.1: “If the tenant farmer through whom the landowner possesses, should die, it has been accepted on grounds of convenience that possession is retained and continued through the tenant, and on his death, it is not to be said that possession is broken forthwith but only when the owner fails to take possession. A different view is to be taken, he [Julian] says, if the tenant goes out of possession of this own accord. All this, however, is true, only if no stranger has taken possession meanwhile but the land has remained throughout in the tenant’s inheritance.”

<sup>40</sup> D.43.20.4: “I have ceded to Lucius Titius the right of drawing water from my spring. The question is: May I cede to Maevidius also the right of drawing water along the same water channel? If you think it possible to cede water along the same water channel to two persons, how should they use it? He [Julian] replied: Just as a right of way on foot or with cattle, or of a road, can be ceded to several people either together or separately, so the right of drawing off water can rightly be ceded. But if those to whom the water is ceded cannot agree how to use it, it will be only fair that an *utile iudicium* should be delivered, as it has been held should be done for dividing a common usufruct among several people to whom it belongs.

<sup>41</sup> C.3.34.4: “The praetor’s edict does not permit one to lead water that arises in a place belonging to another without the permission of him to whom the use of the water pertains.” Check the gloss.

<sup>42</sup> D.39.3.8: “In the matter of concession of the right to carry water across land, the consent must be sought not only of those on whose property the water originated but also of those who have a right to use the water, that is, those to whom a servitude on the water is owing. This is not unjustified since, when their rights are being diminished, one must necessarily inquire whether they are agreeable. As a general rule, it is agreed that consideration must be given to the consent of anyone who has an interest in the land itself on which the water originates or in the rights pertaining to that land or in the water itself.”



### C. INSTITUTES 2.1.11 WITH THE ACCURSIAN GLOSS

in *Corpus Juris Civilis* (Lyon 1604) 4.2.124 [Moyle and CD trans.]

In order to understand what is going on the following passages, we need, in addition to the glosses on JI.2.1.12–13 (above Part VII), the gloss on JI.2.1.11. To understand the difficulties with which the gloss, Faber (sec. 13D) and Portius (sec. 13E) are dealing when they come to comment on this text, the multiple definitions of *ius naturale* and *ius gentium* in JI.1.1 and JI.1.2 (above, Part II) should be reviewed.

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,<sup>1</sup> is called the law of nations, while some of them are titles of civil law.<sup>2</sup> It will thus be most convenient to take the older<sup>3</sup> law first: and natural law is clearly the older, having been instituted<sup>4</sup> by the nature of things<sup>5</sup> 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.

---

<sup>1</sup> But where? I answer: [JI.1.2.1] at the point: “those rules prescribed by natural reason [among all men, these are equally observed among all peoples, and are called *ius gentium*, as the law which all nations use].” Or [JI.1.2.11: “But natural laws which are equally observed among all nations, constituted by divine providence, remain ever firm and immutable”]. Or better [JI.1.2pr: “Natural law is what nature has taught all animals.”].

<sup>2</sup> As usucapion, arrogation, succession, deportation, monastic profession, about which he begins to speak below [J.1.2.6].

<sup>3</sup> Thus, [D.50.6.6: “Old age has always been venerated in our city ... .”]

<sup>4</sup> I.e. just as soon as God procreated the nations, immediately there was the law of nations. Accursius.

<sup>5</sup> I.e. God.

---

## D. JOHANNES FABER, COMMENTARIUS SUPER INSTIUTIONIBUS 2.1.11-13

(Lyon 1540)<sup>1</sup> fol. 22 [CD trans.]<sup>2</sup>

*Individuals.* In the gloss “But where”<sup>3</sup> at the end: indeed there he speaks of the true natural law by which all things are common, as I said above [JI.2.1.5]; [see also] in D.1 c.6.<sup>4</sup> Say therefore as in [JI.1.2.11] and according to this, the last opinion seems to be approved which is put there in the gloss,<sup>5</sup> but this does not seem true; whence say as in the said section [JI.1.2.1 at the words “those rules”].

In the gloss “Immediately” at the end: But according to this the law of nations is no different from the primeval law of nature; nonetheless the texts contradict the said canon [D.1 c.6]. [Cf. D.1.1.1.4].<sup>6</sup> 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, but the law of nations itself proceeded afterwards with the multiplication of the populace as you can see [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.”

*Wild beasts therefore.* In the verse “It is clear” in the gloss “It is otherwise” where it alleges [C.6.1.2], see below [?JI.4.1.1].<sup>7</sup>

In the gloss “What if after” at the end, the gloss holds the contrary of [D.8.3.16] and [D.41.1.3 at the word “clear”], which seem to be truer. For no one can prohibit fowling but entry. [D.47.10.13.7].<sup>8</sup> But he has no action and the prohibition ought not operate unless with respect to the entry because he did it injuriously, nor does it impede the act. [D.41.2.44.2.<sup>9</sup> See D.41.1.55] in that it reproves the distinction between of mine and another’s. And in [C.3.32.17, 22], two things are required so that someone may profit from fruits, receipt and good faith. Here, however, occupation alone suffices. [JI.2.1.13.]<sup>10</sup> 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;<sup>11</sup> D.50.12.8<sup>12</sup> at the end]. For the prohibition of the judge impedes the transfer of ownership, much more its acquisition. 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.8.3.1.16]. Today, however, by the custom by

<sup>1</sup> Faber (Jean Fauré) was French and probably not a professor. He died before 1350 and is known chiefly for this work.

<sup>2</sup> I have little confidence in some of the restored citations in this text.

<sup>3</sup> Faber refers to the glosses not by the keyword in the text but by the first word of the gloss.

<sup>4</sup> “Natural law is either civil law or the law of nations.” But the reference may be to the next canon (D.1 c.7): “Natural law is common to all nations because it is held there by the instinct of nature not by any constitution, such as 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.”

<sup>5</sup> JI.1.2.11 v<sup>o</sup> *naturalia*: “... Or say that this section speaks of the *ius gentium*, as appears in its letter ‘those things that among all nations’, etc. [JI.1.2.1].”

<sup>6</sup> “*Jus gentium*, the law of nations, is that which all human peoples observe. That it is not co-extensive with natural law can be grasped easily, since this latter is common to all animals whereas *jus gentium* is common only to human beings among themselves.

<sup>7</sup> Check this; there’s no *sec. furto* in JI.4.1.

<sup>8</sup> Reading “si quis” for “si ver.”

<sup>9</sup> “*l. peregre in fi. j. rn.*”

<sup>10</sup> Reading *infra* for *supra prox. sec.*

<sup>11</sup> “He who knowingly buys from one whom the praetor has forbidden to diminish [the inheritance] because he is a suspect heir does not take in use [i.e., does not begin usucapion].”

<sup>12</sup> “... ‘Staius Ruffinus will behave correctly if he completes the building of the proscenium which he promised the people of Gabil ... . If he declines, appointed agents, who can legally act on behalf of the community will be able to approach judges in prosecution of him on the public behalf; these judges, as soon as possible, will hear the case before he [Staius] sets off for exile and if they establish that the work ought to be completed by him they will order him to obey the community in this case or they will forbid the sale of the farm which he has in the territory of the Gabines’.”

which warrens and enclosures are tolerated, it does not seem<sup>13</sup> 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.]<sup>14</sup> 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 [JI.1.2.12],<sup>15</sup> which otherwise might seem to stand in the way. By the feudal law, moreover, hunting with traps is prohibited except for boars, wolves, etc., in [*Libri feudorum* 2.27.5].<sup>16</sup>

*Whatever.* You have this verse almost word for word in [D.41.1.5].

In the gloss on the word “impossible” at the end: It seems better if it be understood as “plainly difficult,” so that it becomes “so that it cannot be captured with the diligence that is to hand.” [D.41.2.3.13]. Otherwise it would follow that scarcely or never would it recover its natural liberty, since there is no animal so swift that it is not possible to capture it, and that is what this text is trying to say in the verse “natural” and below at *examen*,<sup>17</sup> and to the same effect, note [the previous sentence]<sup>18</sup> and cite [D.41.1.55].

*It has been.* In the gloss “Note what can happen is considered” at the end: It is trying to say that the ease is not considered in every way, but that which can be had with the greatest and most careful and usual and accustomed skill, as if I should gather the dogs and men of a city according to their accustomed and usual skill, as it happens, and I begin to hunt. [D.21.1.18].<sup>19</sup> And this is confirmed as I wrote in the preceding section *si tamen*,<sup>20</sup> on account of uncertainty it does not become the captor’s unless he captures it in fact, as follows in the text. Take this example: if there are two judges appointed jointly in the same territory so that the condition of the occupant not be better [?],<sup>21</sup> he who first captures a malefactor seems to have occupied. [C.3.32.15] and take what I wrote below [JI.1.2.18].

[The translation (and probably the underlying text) of what follows is awkward; the basic points seem relatively clear. CD]

In the gloss note what is seen at the end:<sup>22</sup> Although the ways of brocards are dangerous, the glossator most wisely has acted by not pursuing the point. You could say that in those things which are judged at the present time and unalterably laid down and can reasonably be laid down with regard to the present situation, it is not to be considered what can happen for that which the disposition of the law might vary or differ. [D.47.2.14.5;] *ff. de iurisd. om. iu. quedam sec. si iunct*,<sup>23</sup> C.7.62.39; D.2.8.15.7; D.12.3.1; D.15.1.50.] In other things, however, it can be distinguished, for either it is asked for the disposition of the law and then what might happen is considered and attended to if the nature of the thing makes it ready and apt for imitation. [D.39.2.13.2; JI.1.12.5; ?D.2.1.12.2;<sup>24</sup> D.24.3.2], with the notes. And this unless to expect or wait for would be uncivil or irrational. [D.45.1.83.5; D.40.9.6.] Or so far as fault to be experienced [*probata*] or

<sup>13</sup> Reading *videtur*.

<sup>14</sup> The citations seem to be a bit of a stretch, since both fragments concerns fraudulent sales (*fraus legis*).

<sup>15</sup> Probably JI.1.2.11 is meant.

<sup>16</sup> “No one shall lay nets or traps or any other instrument for taking game (*venationes*), except for taking bears, boars, or wolves. At the palace of the count no knight shall bear arms unless asked to do so by the count.” (Constitution of the Emperor Frederick [?I]).

<sup>17</sup> There is no “examen” in the text, but JI.2.1.13 is probably being referred to (*quaesitum*).

<sup>18</sup> *infra prior sec.*

<sup>19</sup> A fragment that makes use of a rule of common sense when judging whether someone has exaggerated the good qualities of a slave to be sold.

<sup>20</sup> There is no *si tamen* in the text, but the previous sentence is probably being referred to (*cum vero*).

<sup>21</sup> Perhaps this means that the appointment is made in such a way that the previous occupant of the position is not entitled to priority.

<sup>22</sup> What it says is the end is: “Argument, however, to the contrary,” with a citation.

<sup>23</sup> Not found in the named title in the *Code* (3.13), nor in the parallel title (*De iurisdictione*) in the *Digest* (D.2.1).

<sup>24</sup> *de iurisd. om. iudi. si item sec. fi* does not seem relevant.

neglect tending to the utility or loss of a private person, then he whose interest it is ought to consider if it is likely and if he can foresee. [D.19.2.9.6; D.4.6.26.7; D.3.5.34.2;<sup>25</sup> D.36.1.80, penultimate gloss.]

---

<sup>25</sup> Reading *sed nec* for *sed si*.

**E. JOHANNES CHRISTOPHERUS PORTIUS,  
COMMENTARIUS SUPER INSTITUTEIONIBUS 2.1.11–13**

(with the additions of Jason de Mayno)<sup>1</sup> (Lyon 1540) fols. 34v-35r [CD trans.]<sup>2</sup>

*Individuals.* The ownership of things is acquired either by the law of nations or by the civil law, and we ought to begin with the older. It says this.

Addition. This section is divided into 13 parts according to the thirteen ways given here by which ownership is acquired: concerning the law of nature and of nations, first, how ownership is acquired by hunting or capturing animals; second, at sec. 17, how it is acquired by taking captives; third, in sec. 20, how it is acquired by alluvion and flooding of waters; fourth, in sec. 25, how by commingling; fifth in sec. 29, how it is acquired by building; sixth, in sec. 31, how it is acquired by planting; seventh, in sec. 33, how by putting letters on something; eighth, sec. 34, how it is acquired by cultivation; ninth in sec. 39, how it is acquired by finding; tenth, in sec. 40, how it is acquired by *traditio*; eleventh, in sec. 41, how it is acquired by sale; twelfth, in sec. 46, how it is acquired by petition; [thirteenth], to the end, [how it is acquired by derelict]. Ja.may.

Note first: ownership of things is acquired either by the law of nations or by the civil law.

Note second: natural law is called the law of nations but against this seems to be [D.1.1.5]. Solution: Say that natural law can be considered doubly: in one way that which is fitting to all animals, like drinking and eating and the joining of male and female. And in this meaning it is never called the law of nations. The other way is what is only fitting to nations. And this in two ways: For there are some things that are produced from the beginning of natural creation, such as to keep faith and pact. And this is called the primeval or antique law of nations. Some things are not produced from the beginning of rational creation, but were laid down after the growing evil of men, such as servitudes, wars, captivities, and this is called the secondary law of nations that can in no way be called [natural law], but the first can be. And this [secondary] law is talked about in [D.1.1.[5]; D.1 c.9].

Note that we are to begin with the older. Accord: [D.50.6.6], as does *l. j. ff. de abloscribe*<sup>3</sup>; as does what Cicero says in the first book *Of offices*: “The office of the adolescent is to fear those of greater age.”

Addition: Note where it says most old that we can consider old laws so that we may more easily understand the new ones. Add that it is permissible to argue from old laws that have been corrected but are nonetheless included in the *corpus iuris* [D.37.8.1pr],<sup>4</sup> although it is otherwise if they are not included in the *corpus juris* for then the penalty of forgery for him who alleges them. [C.7.6.1.1, C. praef. *de novo codice componendo* sec. 3], and the things alleged on *lex* 1, above. Accord: the gloss in [X 2.12.13] where it says that although the whole *ius civile* be taken away, nonetheless its reason would remain. [C.12 q.2 c.8.] Ja.may.

Note at the word “civil” a text better proving the other text.<sup>5</sup> So far as the substance of the law is concerned writing is not required, where it says “laws to be written.” There were laws, therefore, before they were written, about which I spoke in [JI.1.2.4], and [C.1.14.1] is to the same effect.<sup>6</sup>

---

<sup>1</sup> Johannes Christopherus Portius (Parcus, Porcus), taught at Pavia, where he was born, from 1434. Savigny. He is known principally for this commentary on the *Institutes*. Jason de Mayno (1435–1519) is considerably more distinguished. He was, among other things, the teacher of the great humanist jurist Alciatus.

<sup>2</sup> I have little confidence in many 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.

<sup>3</sup> Clearly a “bum cite.”

<sup>4</sup> The citation is clear enough; the relevance of the cited text is obscure. It is possible that the scribe or printer misread the citation of one of the titles *de constitutionibus*.

<sup>5</sup> A citation to JI.1.2.2 (at the end) may be missing here.

<sup>6</sup> With considerable interpretation.

Note at the verse “wild animals, birds,” etc.: Animals if they are no one’s are granted to the occupant.

Note the rule: those things that are no one’s are granted to the occupant by natural reason.

Again note: one can hunt and fowl on another’s land unless one has previously been prohibited by the owner.

Note at the word[s] “An animal:” Thus captured animals remain in the ownership of their captors if they do not escape their eyes or return to their natural liberty so that their pursuit is difficult. If, however, these captured animals were made so tame that, although they escape from custody, they then are accustomed to return home, they do not pass out of the ownership of him who captured them. [D.41.1.4]

Addition: And thus note at the word[s] “natural liberty” that a thing is said to be restored to its pristine liberty by the releaser, when it is loosed and freed in such a way that pursuit is difficult. Note this because of those detained, so that he who is detained in prison is then said to have been freed when he is so restored from the power of his detainer to his pristine liberty to the point that if he wished to flee from the sight of his detainer he could. Otherwise, however, he is not said to have been “freed,” but “let go” so that he could immediately be captured. As here and [D.41.1.3]. Jas.may.

Note in the verse “It has been doubted:” A wild animal so wounded that he easily be captured does not come into the ownership of the captor, unless he also captures it.

Note the reason: Many things can happen by which they are not captured. From which you gather that what can happen is to be looked into.

Finally note the mode of taking counsel: For in a dubious matter the consultor ought to make arguments in parts: first, for that which he does not maintain; then, for that which he intends to favor, refuting the argument of the previous one. You see in this example that the emperor recites the opinions. Accord: [D.41.1.5.1] and what the gloss notes and teaches in [D.28.4.3].<sup>7</sup>

In the gloss on the word “as soon as,” where it cites [JI.1.2.39]: Note from the gloss the time of losing the ownership of the treasure. But you should say the contrary. For time is not a means of conferring ownership nor of losing it. [D.44.7.44.1.] For time is nothing, but is the concomitant of certain things; therefore he glosses badly. Solution: say that the ownership of treasure is not lost immediately by time, but is lost by the obligation of men which is caused by long time. [D.41.2.44.] [This view] is also had in [C.7.32.4].

In the gloss on the word “clear,” where it cites [C.6.1.2]. Note from the gloss that it is not permitted that the owner of a fugitive slave seek him in the houses of others. This is true without the authority of the judge, who ought easily grant it. [C.6.1.2] and [C.6.1.1]. And this is true in the case of a fugitive slave, but it is otherwise in the case of another thing taken from you by theft. *Glo. est ordi. in sec. sed hec. infra de ob qui ex quasi deli.*<sup>8</sup> and in *d. l. j. sec. j. de ser. fugi.*<sup>9</sup> And this causes hatred of slaves, for [their] nature is so prone to evil that when they cannot steal anything else from their owner they steal the ashes. Gloss on [D.19.1.13.1]. Therefore there ought not be authority given me to seek out my thing taken by theft in others’ houses. Reason: because it is injurious and invidious that the vileness of poverty be detected and that riches be confessed invidiously. [C.10.35.2.7.] You will limit this proposition: it is true unless there are some *indicia*, even slight ones, that my things are in your house; for then the judge ought to impart to me his office that I may inquire. Reason: For we see that if *indicia* precede, it is licit to put men to the torture to root out the truth. [C.9.41.7; D.48.18.1.] How much the more therefore will it be licit in this case to inquire into the truth by entry into a house. Argument in [D.48.19.10].<sup>10</sup> And therefore light *indicia* suffice, for this is dealt with little prejudgment. Supporting this: [C.10.1.7;

<sup>7</sup> One of the few *Digest* texts that gives the arguments on both sides.

<sup>8</sup> There is no *sec. sed hec* in JI.4.5.

<sup>9</sup> There is no relevant gloss here.

<sup>10</sup> Relevant?

D.10.4.3.6;<sup>11</sup> D.10.4.15.] Again you will limit this proposition: it is true unless public utility is at stake. [C.11.7.6] text and gloss.

Addition: Can someone be compelled to point out (*indicare*) a thief? Say that he is not compelled by a party. [D.12.5.4.4.] But by the judge in a general inquisition. [D.1.18.13.] It is otherwise when he is brought in as a witness against one accused of theft and swears to tell the truth; otherwise he would be punished for perjury. [C.4.20.14.] Again, when a stolen thing which is found with him is vindicated he ought out of kindness [*de urbannitate*], as if he wishes to avoid all evil suspicion, point out the thief. [C.6.2.5] and Bartolus on the same passage. Otherwise, he is not held. But by the canon law, he is held after an edict is promulgated that if anyone knows, let him point out that stolen thing under penalty of excommunication. [X 5.18.4] and what Innocent says there that a thief who knowingly sells a stolen thing can steal it again without penalty and restore it to the first owner if he is a poor thief. Nor is he with whom a stolen thing is found called a thief, because the species of *furtum conceptum* has been done away with, but to avoid suspicion he ought to point out. And this is true unless he knowingly accepted, because [then] he is a non-manifest thief. [C.6.2.14.] But the receiver of a thief is held to the penalty of a receiver according to Baldus in [D.47.2.48]. Jas.may.

In the gloss on the word “entry” at the end: Note from the gloss that a wild animal taken in another’s field by him who entered against the will of the owner does not become the captor’s. The gloss on [D.8.3.16] determined the contrary. The same seems to hold in [D.41.1.5], and Baldus seems to follow them for this reason: Although the law may prohibit entry on another’s land if the owner is unwilling, it does not, nonetheless, prohibit animals which belong to no one which are found in that land to become the captor’s; indeed it permits by the rule posed here, etc. Although he entered against the will of the owner, it is enough that such an entrant be punished with the penalty of *iniuria* for vicious entry. [D.47.10.11.8.]<sup>12</sup>

Addition: Add another case in which it is licit to enter another’s land, for example, if a public way is broken up, it is licit to go by way of your field. [D.8.6.14.] Again, if a private way is broken up. [D.43.19.1.5.] Otherwise, however, outside of those cases it is not licit to go by way of your field or another’s. See below [JI.2.3] at the end; note the first distinction in the first chapter. Jas.may.

Dynus,<sup>13</sup> 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. [C.1.14.5; D.47.2.12.] 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,” 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. In the same way if you find another’s beast in your meadow it is not licit for you to detain it if you know the owner, but you ought to expel it in the civil mode; if however you do not know the owner, you may detain it for the sake of preserving your right. [D.9.2.39.]<sup>14</sup>

Addition: Note whether someone can detain a beast found in his meadow. See concerning this Bartolus in *l. pretor sec. dns ff. de damno infec.* [D.39.2.7]<sup>15</sup>, and below [JI.4.9pr] (see throughout the

<sup>11</sup> Reading *item* for *idem*.

<sup>12</sup> This does not seem relevant, and the reference probably is to D.47.10.13.7.

<sup>13</sup> Dinus de Mugello, c. 1240–1298, one of the earliest commentators.

<sup>14</sup> Quintus Mucius on the pregnant mare.

<sup>15</sup> The word *dominus* appears twice in this fragment, but not at the beginning of a section.

doctors [on this]), and see in [Durantis, *Speculum*] de actore sec. j. versi. pone nostro and [D.39.2.9] etc. Jason May.

In the gloss on the word “difficult” at the word “impossible.” This gloss does not speak well; indeed, the text is to be understood literally as it lies, for straight away it ought be examined whether in the opinion of the judge the difficulty of recapturing was so great that it took away the loser’s mind and spirit of retaining ownership, as perceives the gloss on the word “catch it,” below.

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 ‘latter’ at the place ‘because many’ *a contrario sensu*. [I.e., P. is making a negative inference from ‘because many things may happen to prevent us from doing so’.]<sup>16</sup> 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.<sup>17</sup> 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.

Addition: On the matter of this passage, whether a wounded beast is said to belong to the wounder whenever it is captured afterwards by another, see the well-phrased gloss on [D.41.1.5], where the custom that is followed in these matters is canvassed. Ja.may.

In the gloss on the word “capture it.” Therefore, what can happen is not considered, for such an eventuality was not a civil or an honest future. Therefore the event is then considered when it can happen honestly and civilly.<sup>18</sup>

---

<sup>16</sup> The Latin reads: ‘in the verse *possessore* at the place *quia multa a contrario sensu*. This strange citation appears, it would seem, in all the editions of Portius, including that of 1498. The phrase *a contrario sensu* does not seem to have been used by the classical jurists. *Vocabularium*. It was probably added by Portius or an earlier glossator or commentator. Of the various discussions of possession in the *Institutes* those in book 4, and particularly 4.2, could have given rise to such a discussion. Search for gloss on the word *possessore* in all the places where it occurs in the *Institutes* and the *Digest* has, however, proved unavailing. Equally unavailing has been a search through Portius for all the places where the *Institutes* uses the word *possessor*. It is possible that Portius is referring to his own commentary on JI.4. This commentary was not printed, and the only manuscript of the work that I have been able to locate (Chicago, University Library, MS. 40) does not contain such a discussion. Thanks are owing to Owen Lewis for assistance in a search that so far has proved fruitless. The translation offered above is based on the assumption that *possessore* is a corruption of *posteriolem* in JI.2.1.13: ‘sed posteriolem sententiam nos confirmamus, quia multa accidere solent, ut eam non capias’. ‘Quia multa’ appears in that sentence, and what P. is saying is that if you take it *a contrario sensu*, i.e., if you assume that many things cannot happen that you would not capture it, then it belongs to the wounder.

<sup>17</sup> Owen Lewis notes that assuming that modern rules of chess were being followed (which is likely but not certain), then two knights must have been involved here. What follows is what today is called a “discovered check.”

<sup>18</sup> Perhaps a reference to the text on void stipulations, D.45.1.83.5.