

PART VII. GLOSSATORS: WILD ANIMALS

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A. JUSTINIAN'S INSTITUTES WITH THE ACCURSIAN GLOSS 2.1.11–13

in *Corpus Juris Civilis* (Lyon 1604) 4.2.125–6
[Moyle and CD trans. Citations modernized.]¹

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,² that is to say all the creatures which the land, the sea, and the heavens³ produce, at the same time as⁴ 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 immaterial⁵ 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 hunting⁶ or fowling, the latter may forbid him entry⁷ if aware of his

¹ The gloss (on §§ 12–13 only) is given in the footnotes that follow. The gloss on § 11 may be found below, XIII.C. The texts that Accursius cites in the glosses are either explained in the parentheticals that follow the citations or a reference is given to where they may be found.

² Because one ought to begin with the older: therefore &c. Accursius.

³ I.e., the sky. Accursius.

⁴ That is immediately after &c. But are *res sacrae* granted to the occupant? [JI.2.1.7 (the answer to the question is, of course, “no”: “7. Things which are sacred ... belong to no one, for what is subject to divine law is no one's property.”)]. Answer: a thing is said to be no one's in six or seven ways: (1) By nature, as here. (2) In fact, as [in JI.2.1.47 (“if a man takes possession of property abandoned by its previous owner, he at once becomes its owner himself”)]. (3) By time, as [in D.41.1.31.1 (“Treasure is an ancient deposit of money, memory of which no longer survives, so that it is without an owner; thus, what does not belong to another becomes the property of him who finds it.)]. And in these three situations the rule stated applies, except that in the case of treasure a half is given to the owner of the ground, on the basis of equity. [JI.2.1.39 (see above, p. I–11)]. (4) By censure, as [in JI.2.1.7 (see above, first citation in this gloss and p. I–8)]. (5) By circumstance, as in an inheritance that has not been taken up, which takes the place of the owner. [JI.3.17pr (“as an inheritance in most matters represents the legal ‘person’ of the deceased, whatever a slave belonging to it stipulates for, before the inheritance is accepted, he acquires for the inheritance, and so for the person who subsequently becomes heir.”)]. (6) By the fault of man, as when I cast out a sick slave. [C.7.6.1.[3] (modifying previous law, Justinian rules that if an owner expels a sick slave from his house, the slave immediately becomes a Roman citizen and the owner loses all rights to him and to his property)]. (7) By constitution of natural law, as a free man. [D.45.1.83.5 (holds that if I stipulate to give you a free man, i.e., as a slave, the stipulation is void, because “to await the chance of bad luck falling on a freeman is neither civil nor natural; for we properly deal with objects which can at once be put to use and under our ownership.”)].

⁵ So far as acquiring ownership is concerned.

⁶ It is otherwise [if I go on] for the sake of reclaiming my fugitive slave [C.6.1.2 (a cryptic rescript that was interpreted by the doctors as meaning that a judge could grant the owners of fugitive slaves the right to search for them in others' houses; see *id.*, rubr. [Lyon, 1604], col. 1267)] or for the sake of collecting acorns [D.43.28.1 (“The praetor says: ‘I forbid the use of force to prevent such a one from gathering and taking away on the third day the acorns which fall from his field into yours’. 1. All fruits are included under the term ‘acorns.’”)] or in order to get back money that I have hidden there [D.10.4.15 (the text is considerably more complicated than Accursius makes it out to be, but it would seem that Roman law would give an action or an interdict to a man who wished to dig up treasure that he had buried on another's land)] or if the seller

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,⁸ 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 difficult⁹ to pursue¹⁰ it. 13. It¹¹ 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.¹² 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,¹³ for it may happen¹⁴ in many ways that you will not capture it.¹⁵

prohibits me from taking a grape harvest that I have bought [D.19.1.25 (again, a bit more complicated than Accursius makes it out to be: “One who has bought a vintage on the vine can, if prevented by the seller from gathering the grapes, meet the seller’s action for the price by the plea ‘if the money in question is not the price of a thing sold and not delivered’. But if after the delivery he is prevented from either treading the crop of grapes or removing the juice, he can bring the action for production (*ad exhibendum*) or the action for invasion of right (*iniuria*), just as much as if he were prevented from removing any other property of his.”)].

⁷ What if after prohibition he takes something? Answer: He does not make it his. [C.3.32.17 (a man has bought a piece of land by fraud and the judge is ordered to restore both the land and its fruits to the previous owner), 22 (states the general rule that bad faith possessors have to restore all the fruits they have taken from the land, while good faith possessors have only to restore those that accrue after the *litis contestatio*); cf. JI.2.1.14 (the passage on bees, above, IA). ADDITION: Say that this is true, according to Angelus [probably Angelus de Gambillionibus da Arezzo, c. 1400–1461], if the fruit of the land consisted in hunting, otherwise not, as the gloss holds in [D.8.3.16 v° *aucupibus* (see Appendix immediately following)] and in [D.41.1.3 s.v. *prohiberi* (which simply cross-refers the gloss on D.8.3.16)], although Por. [Johannes Christopherus Portius, below, XIII.E] follows this gloss.

⁸ I.e., freedom [*laxitas*, an unbound state], as immediately follows. [D.41.1.5 (below XIII.A), 44 (a wonderful case that asks what happens when a wolf takes away your pig and then someone else captures the wolf along with the pig; it uses the word *laxitas*, where we would expect *libertas*.)].

⁹ I.e., impossible. So [in D.17.2.23 v° *difficile* (see Appendix); contra D.9.3.2 (see Appendix)]. Accursius. [Accursius’ interpretation of this passage is challenged by the editors of the edition of Lyon, 1604 (col. 125), who say “Rather, the text ought to be understood as it stands, and all this lies in the discretion of the judge, as the gloss below [footnote 12] holds according to Christo. [Johannes Christopherus Portius, below, XIII.E]. And Ang[elus de Gambillionibus] notes this text.”]

¹⁰ So [D.41.2.3.13 (says that if I drop a vase and cannot find it, I have lost possession of it, even though no one else has possession of it; if, on the other hand, I lose a vase in a place where I can find it, even though I do not know where it is, it is still in my possession)].

¹¹ So [D.41.1.5.1 (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)].

¹² Having considered the nature of the man and of the beast, not divine possibility, although I have in no way considered the ease.

¹³ So [D.41.1.55 (see below, p. VII–4)].

¹⁴ Although one thing is proved, i.e., that it has been wounded, it nonetheless does not follow that it could be taken. [C.4.19.10 (says that the fact that a man can show that his parentage was free and that he has held honors does not prove that his daughter is not slave, because he may be free-born and she a slave)].

¹⁵ Note that what can happen is considered. Thus, [D.19.2.9.1; D.36.1.80.15; D.35.2.73.1; D.4.6.26.7; D.39.2.13.2 (all deal with quite different situations in which possibilities are considered)]. Argument,

a. APPENDIX

D.8.3.16 v^o . *aucupibus*: “But since fowling in another’s land is prohibited by this law; therefore what is taken does not belong to the taker, and if it happens, it seems that he ought to make restitution. Nonetheless, I [Accursius?] take the opposite position. [JI.2.1.12]. But can the hunter still on the land be detained so that he gives up what he taken? Say that he cannot, but let him bring and action for *iniuria* if he has entered with him prohibiting. ADDITION: A beast taken on another’s land by him who entered against the will of the owner does not belong to the taker, and Baldus held to this opinion reckoning that the intruder in this case would be punished for *iniuria*, and Porcus [Johannes Christopherus Portius; see below XIII.E] confirms the same.” [Citations mostly omitted.]

D.17.2.23pr. The question is whether someone who is a member of a partnership and who takes on another partner is liable to the partnership for losses that the new partner causes, or whether the partnership as whole must bear the losses. Ulpian’s opinion is “My judgment is that he [the admitting partner] is wholly liable for the person whom he alone admitted—it would be hard (*difficile*) to deny that he was to blame for admitting him.” The gloss v^o *difficile* (Lyon, 1604), col. 1689, says: “Difficult, that is impossible as a matter of law. [Citations omitted.] So on the other side “impossible” for “difficult” as [in D.9.3.2]. Azo. [Azo Portius, d. c. 1230, the teacher of Accursius]

D.9.3.2. D.9.3.1.10 says that if a number of people occupy a lodging house and something is thrown down from it an action (for the damages caused) may be brought against any one of them. This is so, Gaius explains in D.9.3.2 “because it is quite impossible to know which one poured or threw out anything.”

however, to the contrary: [D.15.1.50pr (seems to suggest that one of the possibilities that cannot be considered is that the *iudex* will render a wrongful judgment)].

B. JUSTINIAN'S DIGEST WITH THE ACCURSIAN GLOSS 41.1.55

in *Corpus Juris Civilis* (Lyon 1604) 3.393–4
[De Zulueta and CD trans. Citations modernized.¹

55. PROCULUS, *Letters*, book 2.

Casus:² 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 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*.

[The original text:] 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*);³ do you think the wild boar I carried off was yours?⁴ 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, be given as an *actio in factum*? The answer given was: let us⁵ see if it makes a difference whether I have set the trap on public or private land,⁶ and if on private land, whether on mine or some one else's,⁷ 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 principle⁸ to be this, that if he has come into my power⁹ he has become mine. But if

¹ All the texts cited are given in the appendix to this section in the order in which they appear in the glosses. Because who said what is important, I've checked the printed gloss against two manuscripts: Troyes, BM 130 and Frankfurt, UB Barth. 15. We'll return to this problem in § VII(I), *Dissensiones dominorum* ('Disagreements of the masters').

² This *casus* is probably by the son of Accursius, also named Franciscus (1225–1293), who, like his father, taught at Bologna.

³ I.e., took (*accepit*). Thus [D.47.2.48; 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].

⁴ Answer: no, according to Johan. [probably Johannes Bassianus, d. 1197] and V. [probably (H)Ugo, d. c. 1168], unless the person who set the trap had taken and apprehended it. [The Frankfurt manuscript has something that looks like 'W' for the second *siglum*, in which case we are dealing with Wilhelmus de Cabriano, d. ?1201.]

⁵ He changes persons.

⁶ As is otherwise distinguished. [D.9.2.28]

⁷ Which does not seem to be of importance. [D.41.1.2; the reference is to 1.3 on the words *nec interest*].

⁸ Of this question, or of my opinion in this question, and thus here I say that the previous distinctions are rejected, according to R. [probably Rogerius, d. c. 1170]. Others say that the question was not answered.

⁹ 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; the Frankfurt manuscript has 'M.', which would be Martinus, d. c. 1160; the Troyes manuscript is unclear, it could be 'W'; it is clearly not 'Azo'], 'mine,' that is, the power of me who laid the trap, since the boar could not get out by itself. But how could it come in his power who did not know of it? [D.41.3.4.12; D.50.16.215; D.41.4.7.7]; argument to the contrary [D.31.1.77.3]. H. [probably Hugolinus, d. c. 1235], also notes, as I have said, that the animal does not belong to you who placed the trap, until that

you had released to his natural liberty a wild boar who had become mine¹⁰ and he had thereby ceased to be mine, then an *actio in factum*¹¹ ought to be accorded to me, according to¹² the opinion¹³ given when a man had thrown another's cup overboard.

a. APPENDIX

D.47.2.48 (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 (*abstulit*) it. The thief was 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.

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.

D.41.1(On acquiring the ownership of things).3.1 (Watson trans.): **3.** GAIVS, *Golden Things, book 2*: . . . **1.** So far as wild animals and birds are concerned, it matters not 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. [Cf. *Jl.2.1.12.*]

D.41.3(On 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.

D.50.16(The meaning of expressions).215 (Watson trans.): PAUL, *Lex Fufia Caninia, sole book*: The word 'potestas' has many meanings; in the person of magistrates it means imperium; in the person of children it means parental power; in the person of a slave it means ownership. But when we are dealing over noxal surrender with someone who does not defend his slave, we mean the capacity and ability to hand over an actual body. In the *lex Atinia*, according to Sabinus and Cassius, something stolen seems to have come into the *potestas* of its owner if he has acquired the *potestas* of claiming it by *vindicatio*.

D.41.4.7 (On usucapion *pro emptore*).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.

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

D.41.2(On acquiring 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

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. [Johannes Bassianus] & B. [Bulgarus] & R. [probably Rogerius, all three *sigla* confirmed in the manuscripts], argument from [D.41.2.1.21]. And M. [Martinus] & H. [Hugolinus, both *sigla* confirmed in Frankfurt; Troyes has 'ac. & h', the first would be Accursius (d. 1263), which can't be right] 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. [there's no Roman-law glossator with that *siglum*; both manuscripts have 'W.', i.e. Wilhelmus de Cabriano], it does not become mine, because many things can happen, &c. ([D.41.1.5]), although there is an argument to the contrary [D.41.2.18.2]. Accursius.

¹⁰ I.e., 'me' who takes him in the trap; posit that I have already taken him. H. [probably Hugolinus]

¹¹ Subsidiary to the *lex Aquilia*. [*Jl.4.3.16*].

¹² I.e. Like. Accursius.

¹³ [D.19.5.14.pr; cf. D.41.2.3.14]. Accursius.

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.

D.41.1(On acquiring the ownership of things).5pr-1 (Watson, trans.): **5.** GAIUS, *Golden Things*, book 2: **pr** 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 the beast is ours only if we have actually captured it because many circumstances can prevent our actually seizing it. [Cf. JI.2.1.13.]

D.41.2(On acquiring possession).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.

JI.4.3(On the *lex Aquilia*).16 (Moyle trans.): **16.** It is held that a direct action lies under this statute only when the body of the offender is substantially the instrument of mischief. If a man occasions loss to another in any other way, a modified action will usually lie against him; for instance, if he shuts up another man's slave or quadruped, so as to starve him or it to death, or drives his horse so hard as to knock him to pieces, or drives his cattle over a precipice, or persuades his slave to climb a tree or go down a well, who, in climbing the one or going down the other, is killed or injured in any part of his body, a modified action (*utilis actio*) is in all these cases given against him. But if a slave is pushed off a bridge or bank into a river, and there drowned, it is clear from the facts that the damage is substantially done by the body of the offender, who is consequently liable directly under the *lex Aquilia*. If damage be done, not by the body or to a body, but in some other form, neither the direct nor the modified Aquilian action will lie, though it is held that the wrongdoer is liable to an action on the case (*actio in factum*); as, for instance, where a man is moved by pity to loose another's slave from his fetters, and so enables him to escape.

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.

[It is odd that Accursius cites only the pr here, because para. 2 seems at least as, or even more, relevant:]

D.19.5(On actions *de praescriptis verbis* and *in factum*).14pr (Watson trans): **14.** ULPIAN, *Sabinus*, book 41: . . . **2.** But again, if a man, intending to do harm and not to make a profit, tossed another's silver cup into the sea, Pomponius, in the seventeenth book of his *Sabinus*, wrote that neither the action on theft nor that for wrongful harm lies; action must be brought *in factum*.

D.41.2(On acquiring possession).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.

C. SUMMA TRECENSIS 7.32.9-11¹

ed. Hermann Fitting, *Summa Codicis des Irnerius* (Berlin 1894),
pp. 140, 238-9 [CD trans.]

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, which done, possession is seen to have been handed over to you by a certain kind of intention by measuring or long hand and taken by you. This

¹ Perhaps the work of a *gosiarius*, c. 1150.

takes place in the situation of columns and other things made of marble which cannot be moved because of their size. The same is true in the case of a bundle of rights (*acervo iuris*). It is one thing to begin possession in yourself, another to acquire it from a prior possessor. Possession is acquired in three ways: by occupation, by accession, or by translation. By occupation you acquire possession of a vacant thing or something that is detained by no one. In which case it begins entirely with you, whether it was of no one or whether you occupy something of another's that is vacant. When you occupy something that is no one's by nature, you also acquire ownership thereby: since you have just cause for possessing, you possess for yourself, as in wild beasts or stones found on the beach. Again if you take possession of something that is another's but misled for good reason you think it is no one's, you do not acquire ownership for yourself but you begin to possess justly for yourself.

D. PLACENTINUS, SUMMA INSTITUTIONUM 2.1.12

ed. John Douglas Adamson, *Placentini Summa Institutionum* (U. Toronto, D.Phil. thesis, 1992), 52-3, 55 [CD trans.]¹

Ownership of things is not acquired by natural law, by which all things are [held in] common, but by civil law and the law of nations. By civil law [ownership is acquired] in many ways: usucapion, prescription, arrogation, becoming a monk, deportation, testamentary succession, *bonorum possessio*, *bonorum addictio*. On these methods, though not all, there is treatment below. By the law of nations, ownership is acquired² in two ways, by apprehension and by accession. By apprehension [ownership is acquired] in four ways: by seizing [*per capionem*], by finding, by occupation and by handing over. By seizing we make what was another's ours, as when you seize something that belonged to the enemy. For they themselves become our slaves when we seize them, and we theirs. And sacred places so seized become profane. By seizure we become owners of those things that belonged to no one, or, if they did, have ceased to so belong, for example, a beast, a fish [or] a bird. Therefore seizure is divided into three species: hunting, fishing and fowling. Nor does it make any difference if you take on your land or on that of another, even if you are prohibited, although if you are prohibited you can be sued for *ininuria*. Indeed, in two cases you can rightly go onto another's land, that is, for the sake of collecting acorns up to³ the third day [from which they have fallen from your tree] or for the sake of your money that has been hidden in [the land] of another, in such a way that you may, having first sworn the oath of calumny, dig up and take [it]. [D.43.28; D.10.4.15]

The aforesaid animals which have been seized by you, even without your will, indeed contrary to your will, cease to be yours if they either flee from your sight in the free air or are in your sight in such a way that their pursuit is difficult, i.e., impossible. Therefore if someone else takes them in the meantime, even if he is ignorant (of your pursuit), he does not make them his. If he knows [that you are pursuing],⁴ he also commits theft, unless he does it with the intent of restoring [the animal to you]. Therefore, on the contrary, if they evade your custody in either of the said two ways and return to their natural liberty, they become the property of whoever captures them afterwards and of the old owner if he recaptures them *de novo*. ...

⁵By occupation something comes into the ownership of the occupier, either something that belonged to someone else, or something that belonged to no one. Again,⁶ what belonged to another, let us say, that something has been cast aside and is taken as derelict.. For I do not lose ownership of my thing by will alone, but only if some act intervenes, although it is otherwise in the case of loss of possession. [D.41.2.10] What was once no one's is granted to the occupant, as an island that is born in the sea. For this, since it is not among the things that belong to God, nor to a man, nor to a corporation, is granted to the occupant. But the seashore is not granted to those who possess around it, since the seashore is [always] no one's. Indeed, why is the seashore not granted to those who possess around it in the same way that river banks are [so granted]? The person who asks such questions is one whom the work of the world has made angry.

E. PLACENTINUS, SUMMA CODICIS 7.35

(Mainz, 1536, repr. Turin 1962), p.330-1 [CD trans.]

Placentinus's discussion of the Code title "On acquiring and losing possession" (C.7.32) is too long to be included in full. Suffice it to say here that he seems more open than is, say, Bulgarus to relaxation of the physical element of

¹ Latin text © Copyright John Douglas Adamson, 1992. The work probably dates from the 1160's while Placentinus was teaching at Montpellier. Placentinus himself lived into the early 1190's.

² Reading *acquiruntur*.

³ Reading *usque*.

⁴ Supplying punctuation where the editor has not.

⁵ This section appears after Placentinus has discussed the acquisition of ownership by finding.

⁶ Reading *Item*.

possession (*corpus*) when the mental element (*animus*) is strong. He does not apply this theory directly to wild animals, and the passage from his *Summa* on the *Institutes*, quoted above, seems to have written after he wrote this. (Weimar, in *Handbuch*, p. 202.) What he does say about wild animals, however, at least suggests a different approach.

Possession is acquired by two methods, handing over (*traditione*) and quasi-handing over (*quasi traditione*). By handing over, as when you hand over to me a thing that you have sold me, or for a similar reason. By quasi handing over as when you allow it (*patientia*)—for example, if you the owner sell me something that you have already given to me as a loan, and afterwards you allow me to have it. ... Again, possession is acquired by quasi-handing over with eyes and affect alone, in those things, for example, which cannot be bailed because of their great weight. The same holds if the seller shows me a field that he has sold me from his tower or mine, especially from mine, I then begin to possess no less than¹ if I had walked the boundaries. [D.41.2.18.2] Again, possession is gained in many other ways, as when I encompass beasts in a *vivarium*, collect fish in a fishpond, nightingales in bird cages, doves in dovecots. ...

The possession that you gain begins with the thing that you seek,² for example, if you find something while you are hunting, or fowling, or fishing, then if you find something which previously belonged to no one, like a gem on the sea shore, or used to belong to someone else, like treasure, that is, money hidden by previous owners, the memory of which no longer exists, [then you begin to possess it].

¹ Reading *quam si* for *quasi*.

² Placentinus is playing here on two meanings of the word *quaerere*, “to seek” and “to gain what you seek.”

F. AZO, SUMMA INSTITUTIONUM 2.1.12¹

(Pavia, 1506, repr. Turin, 1966), sig. E1r-E1v (pp. 353–4 in repr.) [CD trans.]

By the law of nations ownership is acquired by us in many ways. The first way is by occupation of those things which do not belong to anyone, such as wild animals, birds, and fish, i.e., all animals which are born on the sea or on land or in heaven, that is the air, whether someone captures them on his own land or on another's. The owner of the land, however, if he sees it, can prohibit someone from coming on for the sake of hunting or fowling, and if you are prohibited you are held for an action of *iniuria*, unless you enter for the sake of collecting acorns up to the third day [from which they have fallen from your tree] or unless you enter for the sake of your property that has been hidden in the land of another, in which case, however, you must first swear that you that you will not dig, pick up, or take away with the intent of committing trickery. [D.43.28.1; D.10.4.15; D.19.1.25.] And by this reason [i.e., occupation] the thing the thing begins to by mine that is constrained by my custody. And by the same reason if [reading 'si'] it escapes my custody and returns to its natural liberty it ceases to be mine and again comes under the ownership of the one who occupies. It regains, moreover, natural liberty when it either escapes from sight (in the free air not under my hood) or it is in my sight in such a way that its pursuit is difficult, that is impossible, as [JI.2.1.12]. Occupation includes fishing, hunting and trapping. Pursuit alone does not make a thing mine. For even if a wild beast is so wounded that I could [reading 'possim'] capture it, it is nonetheless not mine unless I take it, but rather it will belong to the one who subsequently occupies it, because many things can happen that I might not capture it, as [JI.2.1.13]. And this is so true that if a boar falls into a trap that you have placed [reading 'posueras'] for the sake of hunting and while it is caught [reading 'coheretur'], I drew him out and took him away, he becomes mine if he came under my power, as [D.41.1.55].

G. QUARE BAMBERGENSIS 61

ed. Emil Seckel, Erich Genzmer, in *Gedächtnisschrift für Emil Seckel*
(Berlin 1927) p. 25 [CD trans. Citations modernized.]

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, 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. Argument [D.29.5.3]. [This last citation is so wild that it must be explained: The passage concerns the SC Silianum under which slaves were automatically tortured if their master was murdered. The Roman jurists tempered the strictures of the SC, and this passage gives an outline of the main situations in which the SC will not apply. The reference seems to be to D.29.5.3.1, where it is said that even if the master on his deathbed accuses one of his slaves of murdering him, that still is not sufficient to convict the slave unless there is other proof that the slave did it.]

H. PILLIUS, QUAESTIONES AUREAE 73

(Rome, 1560), pp. 133–4 [CD trans. Citations omitted]

Whether Titius, who took in hunting that deer that had been deposited with him and had escaped is held to return it to the owner.

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.

¹ The work probably dates from the 1210s.

That he is held:

And that you are held seems to be proved in the first place by the general rule: that you ought to be restored to your original state and your original rights ought to be restored. Although you are not held of your own funds, since you ceased to have it without grave fault, you will be held in a restitutionary action. Nor does it stand in the way that the deer returned to its natural liberty and here you captured him afterwards, for although someone else might retain him lawfully, you retain him illicitly. Because of the different quality of persons, something is said to be licit or illicit. [This is true in this case] especially since what was quickly recovered ought not be regarded as lost.

On the other side:

On the other contrary, the depositary is said not to be held because once the obligation is extinguished, it cannot be restored. Again, because it is his hunting, and his office ought not be the cause of harm to him [*damnosum*]. Item because once it is made his it ought not become another's without his deed, but the deer has become his. He also added this: that it did not come to him as depositary but as hunter, and it is not possible to sue an owner under another law than the one under which he holds [*alio iure dominum unde conveniri non potest*]. Again, it is so certain that the former depositor is not the owner that it is not equitable that the owner restore his own thing by an action of deposit to one who is not the owner. Further the action of deposit, especially does not have a place, since the contract of deposit is without effect, since that thing came to that situation from which the [contract] cannot begin. From these things the depositor is plainly excluded from the action of deposit with this addition: by the change of ownership it seems to be another deer, and he is therefore not held to restore it.

Solution:

It seems to me without prejudice to a better opinion that a distinction ought to be made on the basis of the intention with which the depositary here took the deer, whether he took it with the intention of restoring it to the depositor, or [with that of] retaining it for himself. If for the depositor, the thing ought to be returned to its original case, if in his own name and for himself he did the business, he will not be held.

I. DISSENSIONES DOMINORUM

[There are several versions of this work. It is hard to determine whether to characterize it as a single work with recensions by different authors, or different works in the same genre with a considerable amount of plagiarism. Gustav Haenel edited four versions of the work in 1834, and although another version has been found since then, and some other manuscripts, it has not been reedited. D. 41.1.55 is treated in two of the versions, one that is anonymous and dates from the very late 12th century (sec. 169); it is found in one messy manuscript that is now in the Vatican Library (Chigi E.VII.218). The other dates from the early 13th century (probably before 1216), and is found in a number of manuscripts (sec. 427). The latter collection was ascribed by Haenel to the jurist Hugolinus, but there is considerable doubt about that attribution. I compared Haenel's edition to one of the manuscripts (Paris, BN lat. 4609), and note the variants in the footnotes. When we put this together with the Accursian gloss on the same text (above, § B) and with Odofredus' commentary on it (below, § L), can we come at least to a tentative conclusion about who took what position and why?]

1. DISSENSIONES DOMINORUM, sec. 169

ed. G. Haenel, *Dissensiones dominorum* (Leipzig, 1834), p. 246
[CD trans. Citations modernized.]

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. Roger, the same. Hugo, however, says that it is immediately understood it to be yours when by long struggling it cannot get out, as [D.41.1.55].

2. DISSENSIONES DOMINORUM, sec. 427

ed. G. Haenel, *Dissensiones dominorum* (Leipzig, 1834), pp. 246 note r, 536
[CD trans. Citations modernized.]

Bulg'. [Bulgarus d. c. 1166] 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. V. [?(H)Ugo, d. c. 1168] and Y. [?Irrnerius, d. c. 1130],¹ however, say that it is immediately understood to be yours when by long struggling it cannot get out, as [D.41.1.55]. Al. [?Albericus, d. c. 1200]² and others on the contrary say that from the time one ceases to have it in one's sight one loses possession,³ whether one is away for a long time or not. Iob. [Johannes Bassianus, d. ?before 1200], according to Alb'. [?Albericus]⁴.

¹ Haenel notes that his basic manuscript (Cambridge, Gonville & Caius 30) says 'y & y'. The Paris manuscript could say 'v & y', but 'w & y' seems more likely..

² The Paris manuscript reads 'al' alii'. The 'al'' need not be Albericus' *siglum*; it could be an abbreviation for 'alias', 'otherwise'.

³ The Paris manuscript has '.p.' for Haenel's 'possessionem'. The scribe may have thought that this was a *siglum* (?Placentinus d. c. 1182, ?Pillius, d. c. 1210), but Haenel's text makes more sense.

⁴ The Paris manuscript adds '&b.' after 'iob', presumably a further reference to Bulgarus. What follows could be 's' ab', corresponding to Haenel's 'secundum Alb'', i.e. 'according to Albericus', but it doesn't look very much like that. The abbreviation for 'secundum' looks more like a 'y' with a circumflex accent over it, The 'a' of 'ab'' does not look like any other 'a's' in text, but it's hard to imagine what else it could be. This may be a string of *sigla*: Johannes Bassianus, Bulgarus, Irnerius, and Albericus. This is followed by a citation to the Digest not found in Haenel's text, but what it is a citation to, I leave to palaeographers more expert than I. D.41.1.5 would make sense in this context without it bearing much resemblance to what is written there.

J. BULGARUS, DE DIVERSIS REGULIS IURIS ANTIQUI, SEC. 195

(=D.50.17.153), ed. Wilhelm C. Beckhaus, *Bulgari de diversis regulis iuris commentarius* (1856, repr. Frankfurt, 1967) pp. 146–7 [Watson and CD trans.]

Paul, On the Edict, book 65. We are bound in more or less the same ways as those by which we are also freed; we acquire by the same means as those by which we also lose. As therefore no possession can be acquired except by mind and body, so none is lost except when both have been counteracted.

[Bulgarus:] "We are bound in more or less the same ways," etc. We are bound by contract either by words or letters or consent. He who is obliged by a thing given is freed by the thing paid; he who is obliged by consent is freed by contrary consent, if the matter has proceeded no further (*re integra*), and so with the others. He says "more or less," because however an obligation is contracted it can be taken away by words [i.e., by a contract of stipulation] or by the law itself or by an exception. But by whatever ways we acquire, by the same ways we lose on the other side. For possession is acquired by mind and body (*animo et corpore*), similarly for it to be lost mind and body are necessary. It is not lost by body alone, unless mind concurs at the same time. It is, however, said to be lost by mind alone, for although you are on a piece of ground, if you nonetheless do not wish to possess it, you immediately lose your possession. If therefore you begin with the body, if you should ask whether possession is lost, I reply it is not lost by the body, but by the body and mind; if, however, you begin with the mind, I ought to respond that it can be lost by the mind.

[Placentinus, commenting on this passage from Bulgarus:] Indeed, what the Golden Mouth (i.e., Bulgarus) most notably speculated, in order to resolve the contradiction "if you begin with the mind, not if [you begin] with the body," is to be interpreted in this way, not in foolishly searching about, but beginning with the matter itself from the mind. Indeed, if you begin with the mind, that is if you determine in your mind that you do not want to possess, even if you remain on the land, you immediately lose all possession, even natural. Clearly if you begin with the body, that is if you bodily leave the land, not however with the mind (intent) of abandoning possession, in my judgment you lose no possession.

K. VOCABULARIUM, “AFFINITAS EST PERSONARUM REGULARITAS,” SEC. 33¹

F. Patteta ed., in *Bibliotheca Iuridica Medii Aevi* 2:133 (Bologna, 1913), pp. 246, 536 [CD trans.]

Possession is detention either natural or civil. Natural possession is when we rest on something bodily. Civil is when we either retain something in intention alone or when someone holds in our name, for example that which my slave holds or he to whom I have leased or bailed or with whom I have deposited. And possession is sometimes separated from ownership, for he who is not owner often possesses and vice versa. But the rightful owner rightly prevails [the word also means vindicates] in a possessory action—he who otherwise would prevail rightly in an action about ownership. We acquire possession, moreover, for example, in an interdict *quorum bonorum* or an interdict *quorum legatorum*.

L. ODOFREDUS, LECTURA ON D.41.1.55¹

(Lyon, 1552, repr. Bologna, 1968), fols. 49v–50r [CD trans.]

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 it 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 your² 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 equitable³ *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. One day while he was riding toward *Galerium*⁴ 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.”

¹ The work probably dates from the 1260s.

² Changing persons along with the text.

³ Reading ‘de equitate’ for ‘de equitare’.

⁴ Savigny, *Geschichte*, 4:93 speculates that this a place-name near Bologna. Nothing like it is found in the comprehensive dictionary of Latin place-names known as ‘Graesse’.

¹ The work probably dates from the 12th c.

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],⁵ 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 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].⁶ 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],⁷ but normally this is not the case, as in [D.41.2.3]⁸, in the beginning. But the opinion of Johannes and Azo is better. Odofredus.

⁵ 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 usucapion, 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.

⁶ See below p. XIII-4.

⁷ 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.”

⁸ D.41.2.3pr-1 (Paul, *Edict*, bk. 54) (Watson trans.): “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.”