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].[1]

"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][2] and [D.43.28.1][3] 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].[4] 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.[5]

5. "Natural freedom." The Lombard Law, de venatoribus. l. pen.[6] is opposed. Solution: that law is one thing this law is another, but by custom the opinion of Trebatius is approved. And keep in mind this gloss which is cited in the treatise on mills.[7] 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

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[1] 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.

[2] 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.

[3] 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 then proof of full ownership will suffice for purposes of obtaining the interdict.

[4] 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*."

[5] 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."

[6] 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."

[7] See below, Appendix.

custom observes the contrary. [See above, XIII-**Error! Bookmark not defined.**, 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:[8]

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[9]], 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;[10] D.3.3.32;[11] D.30.1.33[12]] and Dy. at the same place. Therefore he will be stronger who first began. On the same point: [D.5.1.29[13]]. 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[14]; JI.2.1.18[15]], although the gloss[16] is against this point as Cy. notes at [C.7.32.4[17]].

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[8] Bartolus, *ad* D.43.12.2 (Venice, 1602), fol. 135vb–136ra, nu. 10–12.

[9] D.34.2.19.1: [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 (v° *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.

[10] 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."

[11] 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."

[12] 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.

[13] D.5.1.29: "The plaintiff in an appeal is the one who first took the appeal."

[14] D.41.1.31.1: "Treasure is an ancient deposit of money, memory of which no longer survives, so that it is without and 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."

[15] 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."

[16] v° *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."

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;[18] D.42.1.19[19]], as Dy. notes at [D.30.1.33[20]]. It appears moreover that the sentence is the end of the litigation, as [D.42.1.1[21]]. 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;[22] 41.1.55;[23] 41.2.3.3[24]]. 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[25]]. 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[26]]. But rivers are public [JI.2.1.2[27]]. 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 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[28]] and the gloss [v^{o} *obtinendum*], and it is [the case] according the third reading [of the gloss]

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[17] 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.

[18] 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 ... . "

[19] 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.

[20] Above, note 12. The commentary of Dinus de Mugello (Dy.) on this passage needs to be checked.

[21] 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."

[22] Above, p. XIII–**Error! Bookmark not defined.**.

[23] The boar who fell into the trap, above, p. VII–**Error! Bookmark not defined.**.

[24] 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."

[25] 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."

[26] *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."

[27] JI.2.1.2: "On the other hand, all rivers and harbours are public, so that all persons have a right to fish therein."

[28] 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

"when two wagons are in each others' way."[29] 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[30]]. 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[31]) 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[32]]. 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[33]]. 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 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[34]]. Further the law [D.43.8.2.8[35]] says that he is to be

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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."

[29] D.43.8.2.2, v° *obtinendum* (Lyon, 1604), col. 651–2. The translation of the *Digest* text given above resolves a potential contraction 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 foresee what he could have foreseen.

[30] *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.

[31] We give all the glosses on JI.2.1.2, although it is pretty clear that Bartolus is referring to the last: v° *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° *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° *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 *Ominibus* 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?

[32] Above, p. XIII–**Error! Bookmark not defined.**.

[33] *Ibid*.

[34] 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."

[35] 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."

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[36]] . 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[37]]. 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[38]] and [D.41.2.40.1[39]].

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[40]] and [C.3.34.4[41]] and [D.39.3.8[42]]. 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.

[36] 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.

[37] 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^{o} *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.

[38] 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*.

[39] 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."

[40] 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 Maevius 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.

[41] 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.

[42] 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 it, 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."