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*con il patrocinio del  
Dipartimento di Giurisprudenza dell'Università di Catania*

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*in memoriam*



KENNETH PENNINGTON

## Odofredus and Irnerius

Odofredus Denari († 1265) has been a significant figure in the history of the *Ius commune* for over a century. His commentaries are filled with intriguing anecdotes about the schools and jurists. Surprisingly, no one has written a modern biography about this garrulous jurist whose entertaining style has won praise leavened with skepticism<sup>1</sup>.

Odofredus wrote about his long-dead predecessor Irnerius extensively in his commentaries on Justinian's *Codex* and *Digest*. He gave an especially detailed account of Irnerius' importance for establishing the law school at Bologna.<sup>2</sup> Modern scholars have not treated his attempt to give Irnerius pride of place in the history of the law school kindly. They have accused him and his stories of perpetrating

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The texts that Irnerius and then Odofredus grappled with are challenging. My thanks to Orazio Condorelli, Atria Larson, Luca Loschiavo and Andrea Padovani who made suggestions to drafts of this essay and the people of academia.edu who also gave me helpful suggestions and comments on an earlier draft.

<sup>1</sup> Nino Tamassia, *Odofredo: Studio storico-giuridico* (Bologna 1894) and Enrico Besta, *L'opera d'Irnerio (Contributo alla storia del diritto italiano)*, I: *La vita, gli scritti, il metodo*, II: *Glosse inedite d'Irnerio al Digestum vetus* (2 vols. Torino 1896). Enrico Spagnesi, 'Odofredo Denari', *Dizionario biografico dei giuristi italiani (XII-XX secolo)*, edd. Italo Birocchi, Ennio Cortese, Antonello Mattone, Marco Nicola Miletta (2 vols.; Bologna 2013) II 1450-1452 is the best recent biography. Andrea Padovani, *L'Archivio di Odofredo. Le pergamene della famiglia Gandolfi Odofredi: Edizione e regesto (1163-1499)* (Miscellanea 7; Spoleto 1992).

<sup>2</sup> Besta, *L'opera d'Irnerio* used Odofredus extensively for his treatment of Irnerius. See also Horst Heinrich Jakobs, 'Irnerius' Sigle', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 135 (2017) 444-490 who examines the gloss to Dig. 2.14.3 attributed to Irnerius in great detail. See also his 'Odofredus und die Glossa ordinaria', *Festschrift für Gerd Kleinheyer zum. 70. Geburtstag*, edd. Franz Dorn and Jan Schröder (Heidelberg 2001) 271-352.

myths about Irnerius and his role in the nascent law school in Bologna<sup>3</sup>. In his *Lectura* to the sixth law in title one of Justinian's *Digest*, Odofredus wrote<sup>4</sup>:

Well students, lord Irnerius was a lamp of the law among us, that is he was the first to teach law in this city. For when at first a school of arts began in this city and when the school at Rome was destroyed, the *libri legales* were brought to the city of Ravenna and from Ravenna to this city. A certain lord Pepo began to teach law on his own authority. Nevertheless, whatever knowledge he had, he was of no importance. But because lord Irnerius taught the arts in this city when the *libri legales* were brought here, he began to study these law books on his own, and while studying them began to teach law. He was of great importance and was the first interpreter of our science. Because he was the first who wrote glosses in our books, we call him the lamp of the law. Lord Irnerius, our instructor of law, wrote an interlinear gloss to this law using the most elegant words, and he wrote finely that this text states that "civil law does not depart from natural law or the law of peoples completely and does not follow those laws in all matters".

Modern scholars have questioned almost everything in this gloss, from Irnerius' teaching to the authorship of his glosses. Odofredus wrote

<sup>3</sup> Ennio Cortese, 'Irnerio', *Dizionario biografico dei giuristi italiani* I 1109-1113, gives an excellent summary of the scholarly discussion on 1110 with bibliographical references.

<sup>4</sup> The text is edited by Beryl Smalley and Hermann Kantorowicz using two manuscripts and a printed edition in 'An English Theologian's View of Roman Law: Pepo, Irnerius, Ralph Niger', *Rechtshistorische Schriften*, edited by Helmut Coing and Gerhard Immel (Freiburger Rechts- und Staatswissenschaftliche Abhandlungen 30; Karlsruhe 1970) 231-244 at 232; However, I have taken this text from the Lyon 1550 edition of Odofredus' *Lectura*. The differences between this and the Smalley and Kantorowicz' texts are not minor: "Or signori, dominus Yr. fuit apud nos lucerna iuris, id est primus qui docuit iura in ciuitate ista. Nam primo cepit studium esse in ciuitate ista in artibus et cum studium esset destructum Rome libri legales fuerunt deportati ad ciuitatem Rauenne et de Rauenna ad ciuitatem istam. Quidam dominus Pepo cepit autoritate sua legere in legibus, tamen quicquid fuerit de scientia sua nullius nominis fuit. Sed dominus Yr dum doceret in artibus in ciuitate cum fuerunt deportati libri legales cepit per se studere in libris nostris, et studendo cepit docere in legibus, et ipse fuit maximi nominis et fuit primus illuminator scientie nostre et quia primus fuit qui fecit glosas in libris nostris vocamus eum lucernam iuris. Vnde dominus Yr. lucerna iuris super lege ista scripsit glosam interlinearem elegantissimis verbis, et bene dicit ipse ista litera dicit "ius ciuile est quod neque a iure naturali vel gentium in totum recedit nec per omnia ei seruit (Dig. 1.1.6)".

this text ca. 1240-1250. Although Radulfus Niger gave Pepo pride of place as the first teacher of Roman law in Bologna, the English magister (ca. 1170-1180) is the earliest source we have outside the legal tradition of glosses for Irnerius' having taught at Bologna<sup>5</sup>. Odofredus certainly did not know Radulfus' work.

Where did Odofredus get his information? Probably from Bolognese oral traditions that are lost to us and from the manuscripts he consulted for his commentaries on the *libri legales*. In them he found information about Irnerius and many glosses that he and many of his predecessors thought were Irnerius'. In fact, there are thousands of glosses in early Roman law manuscripts that are signed with the letter "y."<sup>6</sup> In the earliest manuscripts the siglum is often in the front of the gloss, which has led scholars to conjecture that the "y." is a distorted paragraph (§) sign or some other indication<sup>7</sup>. However, the sigla of other jurists are also found in front of glosses<sup>8</sup>.

Although there have been many doubters, Odofredus was correct to interpret many glosses signed with "y." in his manuscripts as being

<sup>5</sup> See Smalley-Kantorowicz, 'English Theologian' 242 and Ludwig Schugge, '“Codex Iustinianus et Institutionum bairulus” - Eine neue Quelle zu Magister Pepo Bologna', *Ius commune* 6 (1977) 1-9.

<sup>6</sup> See my essay 'The *Constitutiones* of King Roger II of Sicily in Vat. lat. 8782', *Rivista internazionale di diritto comune* 21 (2010) 35-54 with photos of "y." glosses on p. 54 figures 6 and 7.

<sup>7</sup> See Anders Winroth, *The Making of Gratian's Decretum* (Cambridge Studies in Medieval Life and Thought 49; Cambridge 2000) 164-170 for an extended argument that the "y." glosses have no meaning or importance and are not connected to Irnerius. Winroth does not take into account the opinions of other legal historians cited in this essay. See also Andrea Padovani, 'Alle origini dell'università di Bologna: L'insegnamento di Irnerio', *Bulletin of Medieval Canon Law* 33 (2016) 13-25 at especially 16-17.

<sup>8</sup> See Gero Dolezalek, *Repertorium manuscriptorum veterum Codicis Iustiniani* (2 vols. *Ius Commune*, Sonderhefte 23; Frankfurt am Main 1985) I 461-485. See the *Digest* manuscripts, Paris, Bibliothèque Nationale de France lat. 4450, has "y." glosses with the "y." at the beginning and the end, e.g. fol. 3va, 8va (with glosses of "y." in front of 7 glosses, "a." and "al." in front of three glosses), fol. 33rb, fol. 40va, fol. 42rb and Troyes, Bibliothèque municipale 174, fol. 196va, 197rb, 197vb, and 198rb, three "y." sigla in front of gloss, fol. 200va. These glosses precede the practice of providing links between the gloss and the texts with various symbols that precluded the sigla of jurists being attached to the beginning of a gloss. Loschiavo notes a number of "y." glosses with the siglum placed at the beginning of the gloss: Luca Loschiavo, *Summa codicis berlinensis: Studio ed edizione di una composizione 'a mosaico'* (*Ius commune*, Sonderhefte, Studien zur Europäischen Rechtsgeschichte, 89; Frankfurt am Main: Vittorio Klostermann, 1996) 219, 220, 222, 225, 229.

Irnerius<sup>9</sup>. As we will see not only Odofredus but many of the twelfth-century jurists came to the same conclusion. In some cases they vigorously debated Irnerius' conclusions. Those glosses provide proof that Irnerius did teach.

Aside from the fact that Odofredus and twelfth-century jurists thought that glosses signed with "y." were Irnerius', the best and earliest evidence we have that the y. sigla must be Irnerius' are the excerpts and summaries of Justinian's legislation that were added to the margins of *Codex's* and *Institutes'* manuscripts as "authenticae." Some of these texts were provided with the siglum "y." The sigla and an oral tradition led Huguccio to attribute these texts to Irnerius<sup>10</sup>. Whoever composed the "authenticae" must have had great authority in the world of the schools. Early on Gratian included a large number in his *Decretum*. They were even added to a very early version of the *Decretum* found in St Gall Stiftsbibliothek 673<sup>11</sup>.

<sup>9</sup> The most recent skeptic is Anders Winroth, 'The Teaching of Law in the Twelfth Century', *Law and Learning in the Middle Ages: Proceedings of the Second Carlsberg Academy Conference on Medieval Legal History 2005*, edd. Helle Vogt and Mia Münster-Swendsen (Copenhagen 2006) 41-61 at 42-44, who denies that Irnerius taught and that the teaching of Roman law did not begin until the 1130's; this essay and André Gouron, 'Le droit romain a-t-il été la 'servante' du droit canonique?', *Initium* 12 (2007) 231-243 presents evidence that Irnerius was the first significant teacher of Roman law in Bologna. The historians whom I cite in n. 48 also think the "y." glosses were Irnerius'. I have argued elsewhere that the traditional dates for the beginnings of the law school in Bologna are correct. See Pennington, 'The 'Big Bang': Roman Law in the Early Twelfth-Century', *Rivista internazionale di diritto comune* 18 (2007) 43-70 at 43-44 and 'Roman Law at the Papal Curia in the Early Twelfth Century', *Canon Law, Religion, and Politics: Liber Amicorum Robert Somerville*, edited by Uta-Renate Blumenthal, Anders Winroth, and Peter Landau (Washington, DC: The Catholic University Press of America, 2012) 233-252. See also Ronald G. Witt, *The Two Latin Cultures and the Foundation of Renaissance Humanism in Medieval Italy* (Cambridge 2012) 237-242 who is also skeptical of a late development of legal education in Italy and has a very good bibliography.

<sup>10</sup> See Johannes Baptista Palmerio, *Authenticarum collectio antiqua*, in *Scripta anectoda glossatorum vel glossatorum aetate composita* (Bibliotheca iuridica medii aevi 3; Bologna, In aedibus successorum Monti, 1901; reprinted Torino, Bottega d'Erasmus, 1962) 69-95 at 72, 74, 81, 82 and Pennington, 'The Beginning of Roman Law Jurisprudence and Teaching in the Twelfth Century: The *Authenticae*', *Rivista internazionale di diritto comune* 22 (2011) 35-53 at 37-39.

<sup>11</sup> See Pennington, 'Big Bang' 63-66.

Odofredus did not doubt that some but not all of the “authenticae” were the work of Irnerius<sup>12</sup>. He thought that Irnerius composed (adapted?) them from the collection the jurists called the *Authenticum*. He often stated that the words of the “authenticae” were Irnerius’ and not Justinian’s<sup>13</sup>. The main point is that if the jurists interpreted the “y.” siglum after the “authenticae” as being Irnerius’s then the siglum appended to many glosses must be his as well. If that is true – there is of course no absolute proof only the preponderance of the evidence in identifying the authors of glosses – then the questions about whether Irnerius taught law in Bologna are not warranted.

Odofredus wrote a particularly interesting commentary on the “authenticae” to Cod. 4.1.17 that has a very unusual textual history. He attributed the text to Irnerius but wrote that Azo was responsible for expanding and complicating it. Irnerius composed the first part of the “authenticae” and Azo added two sections<sup>14</sup>:

Or signori antiqui libri satis breviter habent hanc auctenticam hic, secundum quod dominus yr. extraxit eam breviter de corpore auctenticorum, sed dominus Azo diffusius extraxit eam de corpore auctenticorum et secundum quod dominus yr extraxit eam non vult aliud dicere nisi hoc licet iure... sed secundum dominum Azo<nem> qui extraxit eam diffusius et plenius loquitur hec autentica et continet in se tria dicta.

Although Azo’s editorial interventions cannot be proven, the manuscripts do confirm that the authenticae was altered and expanded, but its evolution was even more complex than Odofredus knew. The alteration of the text is not unusual. Other “authenticae” were also expanded before the texts were frozen in the thirteenth century<sup>15</sup>. The earliest manuscripts have a short statement that five witnesses are

<sup>12</sup> Cod. 1.4.28 *Lectura ad Codicem* [Lyon 1480 = henceforth (ed. 1480)] fol. 40ra: “Dominus Yr. hic eam (Liberi furiosi) posuit, et hec authentica ponit quam penam paciuntur liberi si negligunt curare parentem”.

<sup>13</sup> E.g. “Sicut alienatio” to Cod. 1.2.14, Odofredus (ed. 1480) fol. 20ra, “Qui res” to Cod. 1.2.14, Odofredus (ed. 1480) fol. 21ra-21rb, “Si quas ruinas” to Cod. 1.2.14, Odofredus (ed. 1480) fol. 22ra and fol. 22va, “Praeterea si habeat” to Cod. 1.2.21, Odofredus (ed. 1480) fol. 25ra, “Generaliter autem iudex” to Cod. 1.2.25, Odofredus (ed. 1480) fol. 32ra, “Sed hodie” to Cod. 1.2.25, Odofredus (ed. 1480) fol. 33rb,

<sup>14</sup> Odofredus, *Lectura* (ed. 1480) to “Sed iure novo” after Cod. 4.2.17 fol. 9vb (sic).

<sup>15</sup> Pennington, ‘Beginning’ 42-53.

necessary for a contract with a one pound value in gold in the city<sup>16</sup>. The manuscripts confirm Odofredus' opinion that Irnerius had composed a much shorter text and that Azo had expanded it.

Luca Loschiavo has examined another "authentica" with a very complicated history. "Quas actiones" established that the Roman Church had the privilege of a one hundred year prescription, i.e. the amount of time that someone must occupy a property before owners lost their property rights. The earliest Irnerian short version of the "authentica" appears in the *Summa Trecensis* and Vacarius' *Liber pauperum*. Gratian included Irnerius' text in his *Decretum*. I have argued that all the "authenticae" that Gratian put into his *Decretum* must represent an Irnerian body of texts. Consequently, we can date the early version of the "Quas actiones" to the years 1130 to 1140. Loschiavo traces the evolution of the text in detail<sup>17</sup>.

Odofredus always referred to Irnerius as "yr." and that creates a possible complication for our understanding of the glosses that he cited in Roman law manuscripts. "Yr." was the siglum that the jurists recognized as the glosses of Enrico di Baila (ca. 1160-1170) and understood them to be different from Irnerius<sup>18</sup>. Dolezalek and Savigny speculated that Enrico chose the name to honor himself<sup>19</sup>. Enrico wrote numerous glosses in the second half of the twelfth century. They are scattered in the margins of a number of extant *Codex* manuscripts<sup>20</sup>. Did Odofredus confuse "y." and "yr." glosses? I was alert to that possibility as I did the research for this essay.

<sup>16</sup> *Codex*, Munich, Bayerisches Staatsbibliothek lat. 22, fol. 65vb and Paris, Bibliothèque Nationale de France lat. 4519, fol. 16910, fol. 66rb: "Set nouo iure neque quantitas neque contractus distinguitur ultra librum auri in ciuitate v. testibus adhibitis". Vienna, Österreichische Nationalbibliothek 2267 fol. 62rb: "Set nouo iure neque quantitas ultra libram auri in ciuitate neque contractus distinguitur. Si enim ultra librum auri creditum uel solutum fuerit, necessarium cyrographum cum suscriptione v. testium probare oppinionis fiat". Paris, Bibliothèque Nationale de France lat. 4535, fol. 63rb: "Set nouo iure neque contractus neque quantitas excedens librum auri distinguitur in ciuitate nisi quinque testibus adhibitis. § Hoc ita si in septis fiat. Alioquin pauciores sufficiuerit".

<sup>17</sup> *Summa codicis berolinensis* 109-119.

<sup>18</sup> Cecilia Natalini, 'Enrico di Baila', *Dizionario biografico dei giuristi italiani* I 798-799.

<sup>19</sup> Dolezalek, *Repertorium* I 494 and Friedrich Carl von Savigny, *Geschichte des römischen Rechts im Mittelalter* (7 vols. Heidelberg 1834; reprinted Bad Homburg 1961) 4.37.

<sup>20</sup> Dolezalek, *Repertorium* I 493-498 who lists Douai, Bibliothèque municipale 579 and Munich, Bayerische Staatsbibliothek Clm 22 as important witnesses.



In this essay I will attempt to connect Odofredus's comments about Irnerius' glosses with marginal and interlinear texts in early *Codex* manuscripts. In other words I tried to find the glosses that Odofredus read and that he thought were Irnerius'. I focused on Odofredus' citations of Irnerius in his *Lectura* on the first four books of *Codex* and not on his *Lectura* on the *Digest* for two reasons. First he cited Irnerius in his *Lectura* on the *Codex* many times, and those references give us ample texts to look for in the manuscripts. Second, although Odofredus cited Irnerius often in his *Lectura* on the *Digest*, there are many more manuscripts of the early *Codex* than of the early *Digest*<sup>21</sup>. Consequently, we have a much better chance of finding Irnerius' glosses that Odofredus saw in the margins and in the interlinear glosses of the *Codex* manuscripts. From this evidence we can judge whether Odofredus' and the other jurists' attributions of glosses to Irnerius had some basis in fact.

The first text I will examine is a well-known gloss that appears at the beginning of the *Codex* in several manuscripts in which Odofredus confronted Irnerius' enigmatic comments on one of Justinian's introductory letters, "Cordi nobis." At the end of "Cordi nobis" Justinian stated that only his constitutions in the second edition of the *Codex* can be cited in the courts. Irnerius argued that Justinian's constitutions in the *Authenticum* were not granted the same authority and should not be used<sup>22</sup>. With typical élan Odofredus created a court scene to give drama to Irnerius' argument<sup>23</sup>:

Well students, from this letter (Cordi nobis) you can find a contrary argument to lord Yr. because lord Yr. had argued a point in court, but a law in the *Authenticum* was cited that contradicted him. Irnerius said

<sup>21</sup> Both *Codex* and *Digest* manuscripts also have many of the early layers of glosses erased to make way for Azo's or Accursius' apparatus.

<sup>22</sup> Luca Loschiavo, 'La riscoperta dell'*Authenticum* e la prima esegesi dei glossatori', *Novellae constitutiones. L'ultima legislazione di Giustiniano tra Oriente e Occidente, da Triboniano a Savigny*. Atti del Convegno Internazionale, Teramo, 30-31 ottobre 2009, ed. Luca Loschiavo, Giovanna Mancini, Cristina Vano (Università degli Studi Di Teramo, Collana della Facoltà di Giurisprudenza 20; Napoli, Edizioni Scientifiche Italiane, 2011) 111-139 at 128-129. Stuttgart, Württembergische Landesbibliothek Iur. Fol. 71, fol. 2vb also contains the second version of the gloss. See also Pennington, "Beginning of Roman Law Jurisprudence" 38-39.

<sup>23</sup> Odofredus (ed. 1480) fol. 4vb: "Or signori ex littera colligitur arg. contra dominum yr. quia dum dominus yr. allegaret semel in iudicio et oppositum fuit sibi de quadam lege authentica que ei contradicebat, ipse dixit 'Vade bone homo, quia liber ille non erat a Iustiniano factus, sed a quodam monacho, et ideo non erat autenticus'".

<to his opposing advocate>, “To the contrary my good man, because that book was not made by Justinian but by a certain monk”. Therefore it was not authentic.

Odofredus went on to argue that the style of the laws in the *Authenticum* was different, and the collection was not divided into books as were the other books of Justinian’s codification. Odofredus also thought that Irnerius’s interpretation of the *Authenticum* was not correct. The *Authenticum*, he maintained, was authentic<sup>24</sup>.

In the title on ignorance of right and fact (*De iuris et facti ignorantia*), Odofredus grappled with a constitution of Diocletian and Maximian that had engaged and perplexed four generations of jurists<sup>25</sup>.

Cum testamentum nullo iure constiterit, ex eius quae ab intestato successit professione sola, vel ut ex testamento liberos per errorem profitentis, orcini vel proprii liberti, si non ipsius accessit iudicium, cum errantis voluntas nulla sit, effici non poterunt. (Since the will was drafted without the necessary testamentary legal rights (nullo iure), a sole declaration by her who succeeded as heir through intestate that they <slaves> were free based on the dead testator’s error or freedmen by her own, unless the intestate heir’s judgment is confirmed [or: a court’s decision confirmed the intestate heir’s declaration], since the erroneous intentions are void and cannot be made valid).

The text is opaque. The early jurists thought that “ipsius” referred to the dead testator<sup>26</sup>. Many others, including Accursius thought, that “ipsius” referred to the intestate heir and “iudicium” to her “voluntas”<sup>27</sup>.

<sup>24</sup> Odofredus (ed. 1480) fol. 49va-49vb: “Et ex hac littera voluit colligere dominus yr. quod liber Authenticum non fuit domini Justiniani quia non fuit hec forma condendi in eo servata. Sed nos dicimus contra, ut plene dixi supra de emend. Iustiniani Codicis in fine”.

<sup>25</sup> Cod. 1.18.8, *Cum testamentum*. The latest English translation of the *Codex* confuses the text, see *The Codex of Justinian: A New Annotated Translation with Parallel Latin and Greek Text*, ed. and trans. Bruce W. Frier et alii (3 vols. Cambridge 2016) I 297.

<sup>26</sup> *Dissensiones dominorum sive controversiae veterum iuris Romani interpretum qui glossatores vocantur*, ed. Gustav Haenel (Leipzig 1834) 34: “cum nullum antecessit defuncti iudicium”; Hugolinus quotes the same text, 251. See *Summa codicis berolinensis* 137-142, Loschiavo’s discussion of “ignorantia iuris” with especially the gloss of Irnerius that he prints on 229 as well as the other glosses of Irnerius that he prints on 219-233.

<sup>27</sup> E.g. Paris, Bibliothèque Nationale de France lat. 16910 s.v. *ipsius*: “heredis (interlin.)”. Munich, Bayerisches Staatsbibliothek, Clm 22, fol. 21vb, s.v. *ipsius*:

Although my main translation follows Accursius, I am not sure that his interpretation is correct. In the context of Roman jurisprudence “voluntas” of the heir would have been the much better word for Diocletian’s and Maximian’s jurists to use. “Iudicium” meaning the judgment of a court might make much better sense of the entire text, i.e. a court decision would make the freeing of the slaves valid in spite of the testator’s mistake or intestate heir’s action on the basis of the will or her own volition.

Odofredus called a gloss of Irnerius “an obscure gloss that is even more obscure”<sup>28</sup>. He then quoted the gloss<sup>29</sup>:

When something fails because of ignorance that should be done by a knowledgeable person as here a contract; otherwise it is a crime.

Odofredus was right. It is an obscure gloss. Jurists had been struggling to understand it for over a century. He quoted Irnerius correctly as well. A number of manuscripts preserve Irnerius’ gloss<sup>30</sup>. It is also quoted by glossators who cited Irnerius’ gloss and used it as a starting point for discussing Diocletian’s and Maximian’s constitution. If one were to judge only by the evidence of this text and the long discussion surrounding it, Irnerius taught, glossed, and influenced Roman jurisprudence for a very long time.

“heredis (interlin.)” and s.v. *iudicium* (interlin.): “voluntas”. Accursius, *Ordinary Gloss* to Cod. 1.18.8 (ed. 1496) s.v. *ipsius* and s.v. *iudicium*.

<sup>28</sup> Odofredus to Cod. 1.18.8 (ed. 1480) fol. 54va: “Dominus yr. scripsit quendam obscuram glossam que est longe obscurior”.

<sup>29</sup> Ibid. “Cum ex ignorantia deficit quod a sciente fieret ut hic pactum alias delictum”.

<sup>30</sup> E.g. Stuttgart, Württembergische Landesbibliothek Iur. Fol. 71 fol. 18vb: “y. cum ex ignorantia deficit id quod a sciente fieret ut pactum alias delictum (interlinear)” and an embedded in a gloss with the siglum W. on the same folio, which is an excerpt from Wilhelmus de Cabriano, *The Casus Codicis of Wilhelmus de Cabriano*, ed. Tammo Wallinga (Studien zur europäischen Rechtsgeschichte, 182; Frankfurt am Main: Vittorio Klostermann, 2005) 25. Since Wilhelmus studied with Bulgarus, he would have known much about the early history of the law school. He mentioned Irnerius at four other places in his *Casus*: Cod. 2.19(20).2 (Guarnerius and G.) pp. 83-84 and Cod. 4.57.6 9 (G.) p. 323 and Cod. 8.13(14).7 (G.) p. 572, where he points out a disagreement between Irnerius and Bulgarus. A much longer version of Irnerius’ gloss is found in Douai, Bibliothèque municipale 579 fol. 19va. The incipit corresponds to Irnerius’ text, but a long passage is added. The gloss is signed y. Paris, Bibliothèque Nationale de France lat. 16910, fol. 24va (not signed). The Stuttgart gloss is another proof that in the early days of glossing, the jurists sigla were placed before the gloss.

Odofredus provided more biographical information about Irnerius when he commented on another difficult text in the *Codex*. The text is short, pithy, and difficult<sup>31</sup>:

Non videtur circumscriptus esse minor, qui iure sit usus communi (A minor does not seem to be misled who may have acted according to common right)<sup>32</sup>.

As was the case in other texts Irnerius was attracted by its difficulty. Odofredus thought he understood Irnerius' inclinations and attributed his attraction to focus on difficult texts because of his training as a logician<sup>33</sup>:

Well students, many things must not be said about this law, nevertheless lord Irnerius because he was a logician and teacher in our city in the arts before he taught law wrote a sophisticated gloss that is more obscure than the text. He did not want to gloss the text except in the negative. And this is what he wrote: "consequentiam tollit non repetatis non oppositum infert quia pars eius est"<sup>34</sup>. This gloss was

<sup>31</sup> Cod. 2.21(22).9: "Non videtur circumscriptus esse minor qui iure sit usus communi". This text must have been shortened from a much longer passage in this constitution.

<sup>32</sup> Cf. the translation in *Codex of Justinian* (ed. 2016) 1.535.

<sup>33</sup> Odofredus to Cod. 2.21(22).9 (ed. 1480) fol. 62vb: "Or signori plura non essent dicenda super lege ista. Dominus tamen Yr. quia loicus fuit et magister fuit in ciuitate ista in artibus antequam doceret in legibus. Facit unam glosam sophisticam que est obscurior quam sit textus et noluit ipse glosare nisi super negatiua. Et scripsit hoc modo: 'consequentiam tollit non repetatis non oppositum infert quia pars eius est'. Et hec glosa variis modis est exposita per dominum Jo. et Azo. Et licet dominus Jo. fuerit literata persona in artibus et etiam ex subtilitate ingenii sui in expositione huius glose non fuit subtilis. Dominus tamen Azo satis obscurat eam similiter. Ego tamen consueui exponere eam sic. Et aduertatis textum cum glosa: "consequentiam tollit, non oppositum infert, quia pars eius est". On glosses "sophisticae" see Andrea Padovani, *Modernità degli antichi: Breviario di argomentazione forense* (Bologna 2006) 157-169.

<sup>34</sup> Irnerius' gloss is found in Stuttgart, Württembergische Landesbibliothek Iur. Fol. 71 fol. 35rb: "y. § consequentiam tollit, non oppositum infert quia eius pars est". This gloss should make scholars pause who conjectured the "y." was meant to be a paragraph sign. Cf. Dolezalek, *Repertorium* I 472 notes the same siglum on fol. 3rb in the Stuttgart manuscript and in Biblioteca Apostolica Vaticana Borghes. 273, fol. 155vb. On this passage also see Witt, *Two Latin Cultures* 241-242. Odofredus quotes the gloss twice in two slightly different versions. The last quotation is what I have found in all the manuscripts, i.e. omitting "repetatis;" e.g. Vienna, Österreichische Nationalbibliothek 2267 fol. 35rb: "Consequentiam tollit non oppositum infert quia pars eius est". Paris,

explained in various ways by lords Johannes <Bassianus> and Azo. Although Johannes was a learned person in the arts and had a subtle mind his explanation of this gloss was not subtle. Lord Azo obscured the text in a similar fashion. I, nevertheless, have been accustomed to give the following explanation and you should consult the text and the gloss: “consequentiam tollit, non oppositum infert, quia pars eius est”.

Odofredus was right. The constitution is obscure and Irnerius’s text was even more obscure. However, Odofredus wrote a short history of Irnerius’s importance in the development of legal thought on the text. He concluded that not only had Irnerius challenged earlier jurists to understand his points, but his points were worth taking seriously. Odofredus went on to give his students his version of what he thought Irnerius was arguing at great length. He did not name Irnerius the “*lucerna iuris*” without reason.

In the title concerning court procedure at the beginning of book three Odofredus raised the issue of court expenses. Roman law held that the person who lost a case should bear the expenses for the trial<sup>35</sup>. Odofredus commented that Irnerius composed an elegant gloss that pointed out two exceptions to the rule: a contumacy or just ignorance<sup>36</sup>. A signed interlinear gloss in the Stuttgart manuscript must have been what Odofredus found so elegant: “y exceptionem facit contumacia absentis iuxta (sic) ignorancia”<sup>37</sup>. “Iuxta” for “iusta” might be a clue that the scribe who copied this gloss was from the Veneto.

At the beginning of his comments on the title “The Jurisdiction of Judges and Competent Courts” Odofredus wrote<sup>38</sup>:

Bibliothèque Nationale de France lat. 4536 fol. 38rb: “y. § consequentiam tollit non oppositum infert quia pars eius est. y. (interlin.)”; Douai, Bibliothèque municipale 579 fol. 34va: “§ consequentiam tollit oppositum non infert quia pars eius est. y. (in a much later hand)”.

<sup>35</sup> Cod. 3.1.13.6.

<sup>36</sup> Odofredus to Cod. 3.1.13.6 (ed. 1480) fol. 7ra: “Glossauit his tamen dominus yr. elegantibus verbis, exceptionem facit a regula contumacia, et iusta ignorantia, quod dicit aperte ista duo faciunt cessare quod victus victori in expensis solitis non condemnatur, facit exceptionem a regula iusta contumacia”.

<sup>37</sup> Stuttgart, Württembergische Landesbibliothek fol. 40va; also a marginal signed gloss in Paris, Bibliothèque Nationale de France lat. 4536, fol. 45va: “§ exceptionem facit contumacia absentis et iusta ignorantia. y.”.

<sup>38</sup> Odofredus to Cod. 3.13 (ed. 1480) fol. 25rb: “Sed delegatus non potest delegare nisi sit delegatus a principe... non est descriptio iurisdictionis quia dicit lex “iurisdictionis est ius dandi iudices” (Dig. 2.1.3)... Vnde ponitur ibi species diffinitionis et ideo ibi eleganter yr. scripsit.”

A delegate cannot delegate unless he may be delegated by the prince... It is not a description of jurisdiction because the law states that jurisdiction is the right of appointing judges... Consequently categories of definition are placed there as yr. has elegantly written at the same place.

In Munich and Paris manuscripts there are glosses attributed to Irnerius in which he discussed jurisdiction of judges delegate<sup>39</sup>:

Y. Full jurisdiction is properly of the emperors; ordinary jurisdiction, as in the governors of provinces; delegated jurisdiction as in minor judges; jurisdiction from consent as in an elected judge, who is otherwise a judge, it is special and extraordinary. Or in any case through a rescript of the prince. y.

The Munich and Paris manuscript add another remarkable gloss attributed to Irnerius at the same place<sup>40</sup>:

Y. Jurisdiction is power and authority connected with the necessity of justice, namely restoring equity. y.

Later jurists repeated Irnerius' gloss again and again in their discussions of jurisdiction, power, and public authority beginning in the twelfth century and extending to Bartolus in the fourteenth<sup>41</sup>. They

<sup>39</sup> Munich, Bayerisches Staatsbibliothek, Clm 22, fol. 51va, Paris, Bibliothèque Nationale de France lat. 4536 fol. 48va: "y. (om. Munich) Est iurisdictio plena et propria imperatorum; est ordinaria ut in presidibus prouinciarum; est delegata ut in pedaneis; est ex consensu ut electo cum et alias iudex est, est alias specialis et extraordinaria ueluti que sit per rescriptum principis. y.". Vienna, Österreichische Nationalbibliothek 2267 fol. 46va and Paris, Bibliothèque Nationale de France lat. 4534 fol. 41rb have the gloss but do not have Irnerius' siglum. There are small differences in the wording of the glosses.

<sup>40</sup> Ibid.: "y. (om. Munich) Iurisdictio est potestas cum necessitate adiuncta iuris scilicet reddendi (reddenda Munich) equitatisque statuende. y.". This gloss has been known for a long time and a longer version to the *Digestum vetus* Dig. 2.1 was printed by Besta, *L'opera d'Irnerio* II 20 and also by Hermann Fitting, *Summa Codicis des Irnerius mit einer Einleitung* (Berlin 1894) xli, also from the Digest in Vat. lat. 1408, but the shorter text.

<sup>41</sup> Pietro Costa, *Iurisdictio: Semantica del potere politico nella pubblicistica medievale* (1100-1433) (Milano 1969) 95-97 and passim is the most detailed discussion of the subject. Modern authors also have looked back to Irnerius: Sara Spuntarelli, *L'amministrazione per legge* (Università di Camerino Dipartimento di Scienze Giuridiche e Politiche 4; Milano 2007) 23; Nicola Picardi, *La*