ON THE ORIGIN OF THE CONSTITUTION ALEARUM LUSUS (C. 3,43,1) AND ITS INSERTION INTO THE CODEX JUSTINIANUS

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Summary
The article explores the origin of C. 3,43,1 which is a Latin epitome (Alearum lusus) of an originally Greek constitution of Justinian’s. The main issues discussed are when this constitution was translated, epitomized and by whom and when it was inserted in book III of the Codex. This is done by investigating the traces of the approximate times when the influence of the constitution in legal doctrine is apparent, both in civil and canon law. Furthermore, some commentaries on the Decretum Gratiani appear to reveal further information on the origin of the Latin text. The article aims at contributing to a better understanding of the genesis of the text of the Codex Justinianus as we know it in the early modern editions and Krüger’s 1877 edition.

Keywords
Alearum lusus, C. 3,43,1, Pedro de Cardona

1. – Introduction

The genesis of the Codex Justinianus in its late medieval form, which underlies early modern editions and the 1877 edition by Paul Krüger (1840-1926)¹, is still veiled in mist. The oldest manuscripts, containing a more or less complete text of the Codex, date from between 1080 and 1120. It is still under debate whether this ‘restored’ text resulted from the discovery of an ancient non–epitomized version of the Codex, comparable to the Littera Florentina of the Digest, or was produced by comparing existing versions of the Epitome Codicis as handed down through the centuries². Another mystery is the gradual insertion of Latin translations or Latin epitomes of Greek constitutions, which were probably made in the twelfth century. One of these is the constitution Alearum lusus, which in the Krüger edition is C. 3,43,1. The text in the editions is a medieval Latin epitome. It is thought that the original Greek constitution of the Emperor Justinian (ca. 482-565) has been lost. Hermann Kantorowicz (1877–1940) suggested in a posthumously published article that Alearum lusus was translated by the Catalan jurist Pedro de Cardona († 1183). Hitherto solid proof has been lacking³. The purpose of this contribution is to cast more light on the translating and summarizing of this constitution, as well as its insertion into book III of the Codex.

2. – The content of Alearum lusus compared to Digest 11,5

In the Krüger edition of the Codex the constitution Alearum lusus is the first provision in title 3,43 De aleae lusu et de aleatoribus, a short title almost at the end of the third book. It

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¹ P. Krüger, Codex Iustinianus, Berlin, 1877.
² See on this discussion C.M. Radding and A. Ciaralli, The Corpus iuris civilis in the Middle Ages. Manuscripts and transmission from the sixth century to the juristic revival [Brill’s Studies in Intellectual History, 147], Leiden–Boston 2007, p. 155ff.
deals with the game of dicing and dice players. Among its other provisions, the said constitution ruled that gambling was to be prohibited. It was allowed only in the case of five games, explicitly listed, and for no more than one gold piece (solidum). Furthermore, the constitution ruled that players or their heirs, alternately the magistrates or protectors of the municipalities, were entitled for a period of 50 years to claim back the gaming debts which had been paid to the winner.

There were three significant ways in which the constitution altered the law of the jurists (ius), as compiled in the Digest title on dice players (De aleatoribus, D. 11,5). Firstly, the Digest did not contain a general prohibition against dicing. It mentioned, by contrast, two situations where betting was explicitly permitted, viz. in case of some branches of sport, which were exercised virtutis causa, and at the meal, where food could be the stake of the game. Secondly, the Digest did not forbid gaming for more than one gold piece. In the third place, the Digest did not contain a general ruling that gaming debts, paid to the winner, could be claimed back, let alone subject to such a long limitation period as 50 years. Only in exceptional cases claiming back was possible, for example, when the player was a slave or a child under paternal control, or when the winner had ascendants or patrons who could be sued. Thus, the constitution Alearum lusus seemed to be more restrictive as regards dice playing and gambling.[131]

3. – The appearance of Alearum lusus in manuscripts and editions of the Codex

From the manuscripts of the Codex, which date – at least as regards the principal text of the Codex – to the various periods within the twelfth century, it appears that the constitution was not initially a settled provision of book III. In most cases, we trace the text of Alearum lusus as a marginal addition by a later hand. This holds good for the earliest manuscripts, where the text of the Codex is still copied right across the width of the text area of the membrane and not yet in two columns, such as Montpellier H. 82 (fol. 80r) and Avranches 141 (fol. 47v-48r). We find the same in manuscripts dating from the first half and the second half of the twelfth century. It is not always clear where in book III of the Codex the constitution had to be inserted. Mostly it seems to be an addition to the final constitution of the final title, the lex Nemo humanum (C. 3,44,14). It is sometimes provided with glosses of Azo or Accursius, exclusively consisting of explanations of words. In a number of manuscripts the second lex of C. 3,43, Prohibemus etiam, forms a direct continuation of

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4 See on Roman law concerning dicing in general J.L. Zamora Manzano, La regulación jurídico-administrativa del juego en el derecho romano [Monografías de Derecho romano, Derecho administrativo y fiscal romano], Madrid 2012.
5 D. 11,5,2.
6 D. 11,5,4pr.
7 D. 11,5,4.
9 Berlin, SBPK, lat. fol. 272 (fol. 62v) has only a short marginal gloss “de alee lusu et aleatoribus hic constitutio greca De religiosis ac sumptibus funerum”.
10 For example Wien, ÖNB, cvpl 2267 (fol. 59va), Berlin, SBPK, lat. fol. 274 (fol. 60vb), Vaticano, BAV, Vat. lat. 1427, Berlin, SBPK, lat. fol. 275 (fol. 52va-b), Montpellier H. 83 (fol. 66v), Paris, BNF, lat. 16910 (fol. 64rb) and London, BL, Harley 5117 (fol. 60r).
11 For example Paris, BNF, lat. 4523 (fol. 59rab) and Paris, BNF, lat. 4527 (fol. 66rb).
12 For example Montpellier H. 82, Wien, ÖNB, cvpl 2267 and Paris, BNF, lat. 4527.
Moreover, the constitution may be provided with directions as "sequitur constitutio nova super titulum de relig. etc." or "Autentica Justiniani imp." with the Latin inscription "Imperator Justinianus (Augustus) Johanni pp.". In manuscripts, dating from the end of the twelfth and beginning of the thirteenth centuries, the position of Alearum lusus becomes more prominent. In Alba–Julia, II.4 (fol. 61v) it is written in letters larger than those of the principal text and the scribe indicated that it should, as a title, be located just before the title De religiosis. In Vaticano, BAV, VAT. lat. 1428 (fol. 87r) it is provided with the Latin inscription and, combined with the lex Prohibemens etiam, it seems to form a complete title with a heading of its own "De alee lusu et aleatoribus Rubrica".

[132] The early modern editions initially reflected more or less the image of the medieval manuscripts, although the text now seemed to be an integrated part of the Codex itself. It was no longer placed in the margin, but, together with the lex Prohibemens etiam (C. 3,43,2), followed the lex Nemo humanum (C. 3,44,14), as lex XV of the title De religiosis, at the very end of book III. Some later editions, however, show a new humanist approach.

In 1562 the French scholar Jacques Cujas (1520–1590) had published a treatise on prescription and limitation periods, which was entitled πραγματεία de praelectionibus. In this work he also discussed the exceptional long limitation period of 50 years, mentioned in the constitution Alearum lusus, and noticed a difference of opinion between two Byzantine scholars from the time of Justinian, viz. Anatolios and Thalelaios. According to the first, the limitation period for reclaiming gambling debts was 50 years. This, according to Cujas, was confirmed by the Latin epitome of the constitution itself and by the two Greek sources, he quoted. The first was the Rhopai (Ai Pozai) a compilation of Justinianic provisions dealing with prescription and limitation periods and erroneously ascribed to the antecessor Eustathios (11th century). To his treatise Cujas had added a revised edition of the work. The Greek words quoted say that money paid in prohibited games can be recovered at any time up to 50 years. The second quotation is taken from the Nomocanon, a compilation of ecclesiastical and secular legislation, from as early as the seventh century. Probably Cujas quoted the text from a Greek manuscript, possibly Paris, BNF, grec. 1331. In 1561 only two Latin translations of the work were edited. The quotation says that the claim lapses after 30 years, because, if this had not been intended by the corresponding text of the constitution in the Basilica (B. 60,8,5), it would have explicitly added that the remedy could exceed the period of

14 Avranches 141 (fol. 47v-48r).
15 Montpellier H. 83 (fol. 66v).
16 Wien, ÖNB, cvpl 2267 (fol. 59va), Fulda 2° D.4 (fol. 80v) and London, BL, Harley 5117 (fol. 60r).
19 In the critical edition it is Rhopai 44,1; see F. Sitzia (ed), Le rhopai, Naples 1984, p. 165.
21 In the critical edition it is Nomocanon 13,29; see I.B. Pitra (ed), Iuris ecclesiastici graecorum historia et monumenta, Tom. II, Rome 1868, p. 630.
30 years\textsuperscript{22}. [133] According to the fragment from the *Rhöpai*, although not in the words literally quoted by Cujas, the Basilica would reflect the opinion of Thalelaios, where it does not mention the 50–year term.

The edition Lyons 1627 of the *Codex* was provided with the Accursian Gloss, but at the same time it was based on investigations of French humanist jurists as Antoine Leconte (1517–1586), Jacques Godefroy (1587–1652) and Cujas. Apart from the medieval Latin text of *Alearum lusus* in various versions, it included fragments from the Basilica and the Nomocanon\textsuperscript{23}, provided with Latin translations, which were supposed to reflect the same Justinian constitution. In this edition we find *Alearum lusus*, together with *Prohibemus etiam*, twice, viz. as a separate title before C. 3.44, which was apparently the correct location according to the new humanistic reconstruction and, as Cujas explained\textsuperscript{24}, also in conformity with the order of the Perpetual Edict, and also as *lex XV* of the same title, as in conformity with the medieval manuscripts\textsuperscript{25}.

In his edition of the *Codex* (1877), Paul Krüger followed the humanistic approach by letting the constitutions *Alearum lusus* and *Prohibemus etiam* constitute a separate title (*De aleae lusu et de aleatoribus*) just before C. 3.44. He emended the Latin inscription of the former, which he considered corrupt. For one phrase of *Alearum lusus*, viz. “Episcopis locorum ... utentibus” (C. 3.43,1,3), a *locus geminus* was found in C. 1.4,25. This justified the adoption of the Greek inscription from C. 1.4,25 for the entire text of *Alearum lusus*. For the edition of the actual text of *Alearum lusus* Krüger used only three medieval manuscripts. His manuscript H is in London, BL, Harley 5117, in which the text can be found at the end of book III in the margin (at the bottom of fol. 60r). Krüger’s manuscript W is in Vaticano, BAV, Vat. lat. 1427. According to Krüger the text is written in the margin of this manuscript\textsuperscript{26}. However, this is not the case. Actually it cannot be found at the end but at the beginning of book III (fol. 68rb) and not in the margin but within the text area on a membrane [134] the scribe had originally left blank\textsuperscript{27}. It is provided in the margin with a direction as to where it belongs: “Hec lex posita in fine ante illam rubricam de religiosis et sumptibus funerum quia loguitur de aleatoribus”. The information concerning the location of the text in the third manuscript, Krüger’s manuscript G, which is nowadays Fulda 2\textsuperscript{o} D.4, is correct. The text is again located


\textsuperscript{23} These were Basilica 60,8,5 and Nomocanon 13,29.

\textsuperscript{24} Paratitla in libros IX Codicis Justinianii repetitae praelectionis ab ipso edita, ad C. 3.43, in: Jacobus Cujacius, *Opera Omnia* Tom. III, Lyons 1614, column 58. Leconte is said to have been the first who, in his edition of 1562, gave the text a rubric of its own before the title *de religiosis*. See F.A. Biener and K.W.E. Heimbach, *Beiträge zur Revision des Justinianischen Codex*, Berlin 1833 (reprint Aalen 1970), p. 82

\textsuperscript{25} *Codicis Justiniani repetitae praelectionis libri duodecim*, Lyons 1627 (reprint Frankfurt/M 2006), column 757–759 and 763–764.

\textsuperscript{26} See the explanatory note to line 13 on p. 295 of the edition.

\textsuperscript{27} Fol. 67vb ends with C. 3.6,2 (crossed out). Fol. 69ra continues with the last part of C. 3.6,1 (also crossed out), followed by C. 3.6,2 (this time not crossed out). Fol. 68 contains all kind of texts which do not belong to this part of the *Codex*. On fol. 68r we see subsequently D. 1,18,18, D. 1,18,19, D. 1,18,12, the Authentica *Habita* (post C. 4,13,5) of Emperor Frederick Barbarossa (1122–1190) and the constitution *Alearum lusus* (together with *Prohibemus et*).
on a folio the scribe left blank (the verso side of fol. 80) and again it is provided with a direction as to where it belongs: “Hec constitutio debet esse supra de relig. et sump. fu. et ibi debet legi”\(^\text{28}\).

The Latin text as edited by Krüger implies that, should those who paid a gambling debt or their heirs be negligent in re-claiming it, the municipal authorities can bring an action. This version of the text is based on only one reading. Krüger’s apparatus to C. 3,43,1 indicates that there are other Latin text versions in the manuscripts, but it does not state that in quite a number of these there is no subsidiary remedy for the municipal authorities \((\text{aut his negligentibus a patribus seu defensoribus locorum})\), since the remedy is given to “those who paid or their heirs or their sureties” \((\text{his qui dederunt uel eorum heredibus uel fideiuosoribus eorum})\)\(^\text{29}\). In other manuscripts there is no mention of municipal authorities either. Instead the remedy is alternately granted to the legal representatives of those who paid \((\text{procuratoribus seu defensoribus eorum})\)\(^\text{30}\).

4. – What can the glossators of Roman law teach us?

Investigation into the writings of the glossators provides an indication as to when the constitution must have become known and more widely spread. The glossator Placentinus († ca. 1180)\(^\text{31}\) wrote his *Summa Codicis* during his first stay at Montpellier. The manuscripts and the early modern edition of the work (Mainz 1536) contain a commentary on title C. 3,43. However, \([135]\) we know that this version of the work is a later elaboration\(^\text{32}\). The very fact that there is a commentary on C. 3,43 does not mean that in 1180 it was already known that at the end of book III of the *Codex* there would be a title on dicing and dice players. Placentinus’ commentary on C. 3,43 neither mentions nor interprets the text of *Alearum lusus*, but rather seems to reflect the provisions of D. 11,5\(^\text{33}\). First Placentinus described the two instances in which the Digest explicitly stated that playing for money was permissible. With regard to the games, where according to the Digest this was the case, he made one exception namely pugilism, which in his *Summa Codicis* was termed *reccitrare*, and which, according to Placentinus, was practised in the province. In betting on the other games mentioned, the provision of a surety was additionally permitted: *guadia* as the Lombards called it\(^\text{34}\). Subsequently, Placentinus stated that, if someone had contractual capacity, was of age, in full possession of his faculties, was no prodigal and played for money and lost, he could not be summoned for payment, not even if he had made a promise by stipulation. However, if he paid his gaming debts or provided a pledge, he would have no remedy to claim something back. This was substantiated by only one argument: “although it was not allowed to play for

\(^{28}\) See about the addition in the Fulda manuscript Dolezaek, *Repertorium I* (supra, n. 8), p. 199.

\(^{29}\) Fulda 2° D.4, fol. 80v, Berlin, SBPK, lat. fol. 275, fol. 52va-b, Paris, BNF, lat. 16910, fol. 64rb and Alba–Iulia, II.4, fol. 61v.


\(^{34}\) The *guadia* or *wadia* was the promise by a surety to hand over a *festuca* (stick) to the recipient of the promise, which handing over symbolized the obligation by which the two were bound.
money, this was no universal prohibition”\textsuperscript{35}. Thus, Placentinus more or less acknowledged a kind of general prohibition against gambling, but in two respects he disregarded the constitution \textit{Alearum lusus} and stood by the provisions of the Digest: he did not generally grant an action to claim back gambling debts, and for the cases where betting was allowed, he did not state that this was restricted to one gold piece. This implies that Placentinus was either not yet familiar with the text of \textit{Alearum lusus} or he ignored it, possibly because it was not yet considered a binding provision of the Justinianic legislation.

\cite{136} The \textit{Summa Codicis} of Azo (ca. 1150-1230), which came into being probably between 1208 and 1210\textsuperscript{36}, displays a totally different approach. Azo rejected Placentinus’ view on two grounds. First, the winner who received the money could not defend himself by saying that the plaintiff’s own turpitude prevented him from bringing a claim. This argument could indeed be used by the one, sued under a \textit{condictio ob turpem causam}, when the plaintiff was claiming back what he had given to encourage the defendant’s turpitude. But when something was given in order to enter into a forbidden contract as in the case of gambling, this was different. Moreover, for this case Azo explicitly referred to what he called “the Greek constitution”, granting a reclamation period of 50 years\textsuperscript{37}. Beyond doubt this “Greek constitution” was \textit{Alearum lusus}.

The difference of opinion between Placentinus and Azo can be explained as a difference in interpreting the \textit{Codex}, but is seems more likely that Placentinus was still unaware of the existence of the constitution \textit{Alearum lusus} or did not consider it a binding provision of the \textit{Codex}, whereas it is clear that Azo was familiar with the text and accepted its authority. The change of approach between the days of Placentinus and those of Azo, can be the result of granting \textit{Alearum lusus} a well established position at the end of book III of the \textit{Codex}. Thus, our provisional conclusion could be that the constitution \textit{Alearum lusus} was translated, summarized and inserted into the \textit{Codex} somewhere between 1162 and 1210.

5. – What can the canonists teach us?

It may not seem very obvious to investigate the writings of the canonists in the hope of finding more details on a civil law constitution as \textit{Alearum lusus}, but nothing is further from the truth. The canonists also discussed the question of reclaiming gambling debts, viz. in their

\begin{itemize}
  \item Placentinus, \textit{Summa Codicis}, Mainz 1536 (reprint Turin 1962), ad C. 3,43 (fol. 129): “(…) Ludere in alea non est permisssum pro pecunia, praeterquam in familia et uescendi causa et praeter quam si quis certet hasta, uel pilo faciendo, currendo, saliendo, luctando, quod uirtutis causa fiat, ut ff. eod. l. ii (D. 11,5,2), non recalcitrando, sicut fit in provincio. Sed et in praedicitis sponsorium, quam Longobardi gaudias (lege: guadias jh) vocant, facere licet, ex caeteris non licet ut ff. eod. l. iii (D. 11,5,3). Sed paterfamilias, maior, mentis compos, non prodigus, in pecuniam ludendo uictus fuerit, licet conueniri non possit, etiamsi stipulatio intercesserit, puto tamen quia si soluerit, pignusue dederit, remedio carebit. Licet enim ludere in pecuniam sit prohibitum, non est perpetuo prohibitum (…)”.
  \item H. Lange, \textit{Römisches Recht im Mittelalter} I, Munich 1997, p. 262.
  \item Azo, \textit{Summa Codicis}, Turin, 1578, ad C. 3,43-44 (fol. 65 vb), n. 22-23: “(…) Si autem paterfamilias in ludo amiserit, ait P. non dari repetitionem eius quod in ludo est amissum, quia licet sit prohibitum ludere, non tamen est perpetuo prohibitum. Item et alia ratione, quia turpitudo uidetur obstare agenti. Sed hoc forte locum habet in condictione ob turpem causam, cum dedi ut quid turpe facias. Sed si dedi contrahendo, ubi lex contractum prohibit, contrarium est, ut infra de agri. et censi. l. Quemadmodum (C. 11,48[47],7). Item graeca constitutio usque quinquaginta annos uidetur dare repetitionem. Nec obstat quod legitur in ff. quarum rerum actio non da. l. Si filio § i. (D. 44,5,2,1). Nam et si in alea rem uendiim, aut ludam, et res uincatur, non teneor de euictione, quia emptor suo periculo uidetur rem emisse. Item nec ibi erat prohibita uenditio, sed ludus. Item et si rem lusero, ibi non denegat repetitionem”.
\end{itemize}
commenataries on a text in the *Decretum Gratiani* (D.35 c.1). Moreover, in canon law scholarship we find a change of opinion, comparable to the difference between the teachings of Placentinus and those of Azo. Huguccio († 1210) had not yet pronounced on the question in his *Summa decretorum* (between 1188 and 1190)\(^3^8\), but [137] we do find an opinion on the subject ascribed to the canonist Bazianus († 1197), who was active in Bologna between 1180 and 1190, i.e. at the time or just after Huguccio wrote his *Summa decretorum*. As in Placentinus’ *Summa Codicis*, the claim is denied. The money should not be returned to the loser, but has to be given to the Church or the poor, as ruled elsewhere in the *Decretum*. The fact that the loser had no remedy to reclaim was supported by the argument that the cause of the payment was turpitude and in a case where two individuals were tainted, the actual possessor, that is the recipient of the gambling debts, has the better position\(^3^9\). This argument was derived from Roman law. The maxim quoted — *melior est conditio possidentis* — was reminiscent of various texts in the *Corpus iuris civilis*\(^4^0\). In a commentary on the *Decretum* dating from around 1205, viz. the apparatus *Ius naturale* of Alanus Anglicus, there is even an explicit reference to Placentinus’ opinion, that what the loser paid to the winner cannot be recovered. Moreover, we find here a reference to the “Greek constitution” in the *Codex* title *De religiosis et sumptibus funerum*, which rules that gambling debts, paid to the winner, can be recovered for a period of 50 years. Beyond doubt this is a reference to the constitution *Alearum lusus* and, although it did not prevent Alanus Anglicus from following Placentinus’ teachings, it is clear that he was aware of the existence of the text, its content and its place at the end of book III of the *Codex*\(^4^1\).

Thus Alanus seems to be the first decretist to be aware of the text of *Alearum lusus*. At the same time he is the last one who defended Placentinus’ opinion. Soon the canonists started to adopt a view that came close to the one of Azo and was in conformity with the Greek constitution. But is there anything else they reveal about the origin of the text? In this respect, two commentaries [138] show interesting directions, which could not be traced in the writings of the glossators. The first is the Parisian apparatus *Animal est substantia*, previously known as the *Summa Bambergensis*, which dates from the period 1206–1210. In the Bamberg manuscript of the apparatus the constitution *Alearum lusus* was qualified as recent (*nova*) and

\(^3^8\) Huguccio, *Summa decretorum* ad D.35 c.1 (Vaticano, BAV, Lat. 2880 [folio numbers hardly legible], Admont 7, fol. 51ra, Vaticano, BAV, Arch. S. Pietro C114, fol. 44va and Paris, BNF, lat. 15396, fol. 39vb): “alee: Set numquid tenetur quis reddere, quod in tali uel alio illicito ludo acquirit? Credo quod sic; alius non digne satisfaciet, si reddere poterit. Sed numquid in tali acquisitio transfertur dominium? Credo quod sic”.

\(^3^9\) The opinion of Bazianus is recorded in the *Glossa Palatina* (ca. 1214). See *Glossa Palatina* ad D.35 c.1 (Vaticano, BAV, Reg. lat. 977, fol. 24vb, Vaticano, BAV, Pal. lat. 658, fol. 9va and Laon 476, fol. 21vab): “Pone ergo, quod aliquis amisit ad aleam. Numquid potest repetere? Bazia[nus] dixit quod non, set pecuniam sic acquisitam dixit ecclesie uel pauperibus errogandam, arg. xiiii. q. v. Non sane (*C.14 q.5 c.15*). Nam dicit turpem esse causam et ideo meliorem possidentis conditionem”.

\(^4^0\) Cf. D. 12.5.3, D. 12.5.8 and D. 12.7.5pr.

it was stated that it should actually be placed in title *De religiosis* which it was not\(^\text{42}\). As we saw above, according to Alanus it was. In which other part of the *Codex* the author of the *Animal* had found the constitution is not clear, but we know it was sometimes added to an entirely different part, such as in Vaticanico, BAV, Vat. lat. 1427 and in Fulda 2\(^\text{\textdegree}\) D.4. In the Bernkastel-Kues manuscript of the *Animal* the constitution was qualified as “edited in Greek”\(^\text{43}\), while according to the Liège manuscript it was a constitution of Justinian’s, which a certain cardinal (*quidam cardinalis*) had translated into Latin\(^\text{44}\).

Even more details on *Alearum lusus* can be found in the *Glossa Palatina* of Laurentius Hispanus (ca. 1180-1248), dating from about 1214. First this apparatus stated that the constitution *Alearum lusus* was recently (*nouiter*) translated, secondly that this was done by someone by the name of “b. de cardona” and in the third place that it ruled that the limitation period for reclaiming the money from the winner was 30 years, while that for reclaiming pledges was 50 years\(^\text{45}\). This deviates from the Latin text of *Alearum lusus* as we traced it in the manuscripts of the *Codex*. Nowhere was there mention of reclaiming pledges, while the limitation period for reclaiming gambling debts was always 50 years. The details given by the apparatus *Animal est substantia* and by the *Glossa Palatina* evoke questions that ask for further investigation. Who was the scholar who summarized and translated the Greek [139] text of *Alearum lusus*? And why is the paraphrase of the text, as reproduced by the *Glossa Palatina*, deviating from the versions of the constitution we know from the *Codex* manuscripts?

### 6. – Who epitomized and translated *Alearum lusus*?

If Kantorowicz is in the right in his posthumously published article, our “b. de cardona” would be one and the same as Pedro de Cardona, who is known to have translated other Greek constitutions. His name can be traced at least two or three times in medieval legal sources.

The earliest record can be found in the *Lectura Institutionum* of the glossator Johannes Bassianus (end of twelfth century). Johannes referred to a Greek constitution of Justinian, ruling that, in case freed persons have no children, their patrons are their intestate heirs. Moreover, he stated he had added the translation of this constitution to the title *de bonis*

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\(^{42}\) *Animal est substantia* ad D.35 c.1. Bamberg, Can. 42, fol. 32vb; the transcription is derived from the edition on the internet by Chris Coppens ([http://www.medcanonlaw.nl/Animal_est_substantia/ Distinctiones.html](http://www.medcanonlaw.nl/Animal_est_substantia/Distinctiones.html), consulted August 2012): “*alee. (…) Et notandum quod omne illud quod amisset aliquis ad aleam, potest repetere usque ad l. annos, sicut dicit constitutio nova domini Iustiniani que sic incipit Alearum ludus. Que constitutio debet esse in Cod. De religiosis (C. 3,44) et non est. (…)***”.

\(^{43}\) *Animal est substantia* ad D.35 c.1, Bernkastel–Kues 223, fol. 22rb (the transcription is again derived from the internet edition): “*Si quis luserit ad aleam ea que amissit potest repetere usque ad l. annos ex constitutione quadam domini Justiniani in greco edita que sic incipit: Alearum ludus, que debuisset poni in Codice in t. De religiosis et sumptibus funerum et aleatoribus (C. 3,44).***”

\(^{44}\) In this manuscript the word *cardinalis* is not abbreviated as c. or car., but written at length. See *Animal est substantia* ad D.35 c.1, Liège 127E, Cat. 499, fol. 28rb (this is my own transcription): “*Si quis uero luserit ad aleam ea que amittit potest repetere usque ad l. annos ex constitutione quadam domini Justiniani in greco dicta que sic incipit: Alearum ludus, que debuisset edem titulo de religiosis et sumptibus funerum et aleatoribus (C. 3,44). Et quidam cardinalis transtulit legem illam in latinum***”.

\(^{45}\) *Glossa Palatina* ad D.35 c.1 (Vaticano, BAV, Regin. lat. 977, fol. 24vb, Vaticano, BAV, Pal. lat. 658, ad fol. 9va and Laon 476, fol. 21va): “*Item dicit constitutio, nouiter de greco in latinum translata per quendam b. de cardona, quod usque ad xxx annos potest repetere quis, quod in alea amisset. Et pignora obligata in eam causam usque l. annos repeti possunt. (…)***”.
libertorum in his own copy of the Codex. Unfortunately, only one manuscript of the Lectura Institutionum contains further but rather cryptic information concerning the involvement of a certain Petrus de Cardona. From the wording it is gathered that this Petrus de Cardona was the translator. Also this Latin constitution Veteris iuris alterationes (C. 6,4,4) was an epitome. The existence of Codex manuscripts, containing this text, appears from a remark by Jacobus de Ardizone (ca. 1220) in his Summa feodorum. He referred to this text and said that it was located in the margin (custodia, i.e. between the glosses) of his copy of the Codex. An extant copy of such a Codex manuscript is Göttingen, 2° Cod. ms. jurid. 273. Cujas edited the Latin text of the constitution, which he said he had found in quibusdam membranis, together with the corresponding Greek text of the Basilica (B. 49,128). Krüger adopted it in his edition of the Codex. The Leiden Professor Willem Matthias d’Ablaing (1851-1889) was the first who noticed that the name of Cardona or Cardona was mentioned in the Lectura Institutionum of Johannes Bassianus.

Pedro de Cardona also features as the translator of another Justinian constitution, viz. that of C. 3,10,2. In an addition to this translation, Zenonis diue memorie, the manuscript London, BL, Harley 5117 (fol. 47r) contains the following words “Constitutio a domino Petro de Cardona transleta de greco in latinum”. This Latin translation was also handed down through medieval manuscripts. It was printed in 1571 by Leconte. In the nineteenth century the German jurist Hermann Wilhelm Hach (1800-1867) was the first who noticed Cardona’s name in the London manuscript. Krüger added to his edition the text from Leconte’s edition.

The name Petrus de Cardo, possibly Pedro de Cardona, is also mentioned in a gloss of Bernard of Compostella antiquus (early 13th century), the teacher of Laurentius Hispanus. It appears in the Compilatio prima (ad 1 Comp. 3,22,2) in the manuscript Modena, BE, a.R. 4,16–lat. 968 (fol. 37ra). According to this gloss, edited in 1943 by Stephan Kuttner (1907–1996), this Pedro applied the solution of D. 28,2,13 to an inheritance case.

What we know about the life of Pedro de Cardona does not cast more light on the probability he was indeed the one who translated and epitomized Alearum lusus. His father was Ramón Folch, Viscount of Cardona. His mother was Sibila, the daughter of the Count of Urgel. Pedro was canon of Vich. He studied or taught law in Montpellier in connection with Placentinus, became abbot of Husillos and in 1178 chancellor of Castile. Pope Alexander III

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46 Johannes Bassianus’ Lectura Institutionum ad Inst. 3.7 in Leiden, D’Ablaing 3, fol. 12ra: “Sciemund est patronos succedere libertis non habentibus liberos ab intestato ex constitutione iustiniani in greco posita immo in C. de bonis libertorum de novo posui, quia Petrus de Cardona ipsam desperando tulit”. In the manuscript Leipzig 921 (fol. 172vb) the last line is lacking.


48 The constitution Veteris iuris alterationes with inscription can be found at fol. 34vab. See about this manuscript: F.C. von Savigny, Vermischte Schriften III, Berlin 1850, p. 8-9.

49 Observationum et Emendationum Liber 20, cap. 34, in: Jacobus Cujacius, Opera Omnia Tom. IV, Lyons 1614, column 1882–1889.

50 Krüger, Codex (supra, n. 1), p. 515–517.


52 H.W. Hach, Kurze Nachricht von einigen, in Englischen Bibliotheken aufbewahrten, Handschriften, welche Theile des Corpus juris civilis enthalten, Zeitschrift für geschichtliche Rechtswissenschaft 5 (1825), p. 131-241, at p. 213-214. As stated above also the constitution Alearum lusus can be found in this manuscript (at fol. 60r). Both texts seem to be copied by the same hand as the principal text.

(ca. 1100–1181) had him ordained sub-deacon with the intention of binding him to the papal Curia. In 1181 he was elected archbishop of Toledo, which election he accepted. However, he was not consecrated and resigned. In December of the same year he was created cardinal–priest by Pope Lucius III (1100–1185) under the title of St. Laurence in Damaso. He died on 26 June 1183. In the necrology of Vich he is recorded as Doctor legum magnificus54.

[141]

7. – Which text version of Alearum lusus is reflected in the Glossa Palatina?

As stated above, there are some remarkable differences between the Latin epitome Alearum lusus and the paraphrase of the same constitution, given in the Glossa Palatina. The latter mentions a limitation period of 30 years instead of 50 years for claiming back gambling debts. Moreover, it pronounces upon the possibility of claiming back pledges, a topic which was not even mentioned in the Latin epitome. It is not easy to think of an explanation for these differences.

First, we do not know which Greek materials constituted the basic texts underlying the new Latin constitutions in the Codex. Krüger was of the opinion that the scholars of the twelfth century in Western Europe had Byzantine indices (summaries), translated into Latin, at their disposal. Before the twelfth century traces of Greek constitutions were still lacking in the manuscripts55. According to the more recent view of Kantorowicz, the translators of the twelfth century used manuscripts of the Codex which still contained parts or all of the Greek fragments.56 None of such manuscripts has survived. In order to make it clear that such manuscripts indeed existed, Kantorowicz referred to a gloss, stating that the glossator Bulgarus († 1166) lectured on C. 6,4,4, a constitution which others did not have at their disposal. This gloss (ad C. 6,4,4) was traced by Louis Le Caron (Charondas, 1534–1613) in one of his manuscripts: “deficit graeca constitutio, quam legit Bulgarus, sed alii non habent”57. As we have seen, however, in the manuscripts the term constitutio greca is commonly used in connection with Latin translations or Latin epitomes and actually this term does not denote a constitution written in Greek, but a constitution which was originally composed in Greek.

It is possible that Laurentius Hispanus had seen a corrupt version of Pedro de Cardona’s translation, but the deviations of his paraphrase from the Latin translation could not be found in any Codex manuscript. It is striking that Laurentius Hispanus’ paraphrase comes closer to the


55 Krüger, Codex (supra, n.1), p. XXII; see also M. Conrat (Cohn), Geschichte der Quellen und Literatur des römischen Rechts im frühen Mittelalter, Leipzig 1891 (reprint Aalen 1963), p. 121 and note 2.

56 Kantorowicz, Greek Justinian (supra, n. 3), at p. 195.

57 According to Biener Bulgarus, who did not master Greek, must have lectured on the Latin translation. See F.A. Biener, Geschichte der Novellen Justinian’s, Berlin 1824, p. 579. See also Savigny, Geschichte IV, (supra, n. 32), p. 408 note a.
text of Nomocanon 13,29, i.e. the text which the humanist jurists considered as going back \[142\] to the same Justinianic constitution. The latter speaks in connection with the claiming back of gambling debts about a period of 30 years, although the verbatim text says “continuously and even for more than 30 years” (ἀδιηνεκῶς καὶ πέραν τριακονταετίας). Moreover, it rules that “a given security is void and is given back” (καὶ ἡ γενομένη ἐπὶ κόττῳ ἀσφάλεια ἀκυρός ἔσται, καὶ ἀποδόθαι)\[58\].

8. – Conclusions

Alearum lusus is clearly a Latin epitome of a Greek constitution which was handed down in the twelfth century. The Kantorowicz’s hypothesis that Pedro de Cardona must have been the translator is more or less confirmed by the writings of the canonists we have traced. The author of the Animal mentioned quidam cardinalis as translator and that does include Pedro de Cardona, since in 1181 the latter was created cardinal. The Glossa Palatina even mentioned the name of Cardona. Only some doubt is caused by the fact that two manuscripts clearly reflect a different initial for his first name viz. b. instead of p.\[59\]. In a third manuscript the initial is not very clear\[60\]. Supposing that Pedro de Cardona was indeed the author of the Latin epitome Alearum lusus, it must date from before the year of his death (1183) and it must have been spread during the following decades. The substantial change of opinion it caused, can be dated for the civilians between 1162 and 1210 and for the canonists around 1205.

If Pedro de Cardona was indeed the translator, this also implies that the word cardinalis in early thirteenth century manuscripts of Canon law may be referring to our Catalan translator, unless the text of the Liège manuscript of the Animal is corrupt, because the scribe had misinterpreted an abbreviated form of the name of Cardona from the original he copied and transformed it into cardinalis. This is of importance since the glossator with siglum c. or car. for cardinalis was identified by André Gouron (1931–2009) as indicating Raymond de Arènes from Nimes\[61\]. We should not exclude the possibility that cardinalis may also stand for Pedro de Cardona.

The text of Alearum lusus as we know it from the Codex manuscripts and the one of Laurentius Hispanus’ paraphrase in the Glossa Palatina of the Decretum may go back to divergent sources of Byzantine origin. Pedro de Cardona may have seen the original Greek text, Laurentius Hispanus a Latin \[143\] index with a reading more close to that of the Nomocanon. Another possibility would be that both scholars departed from the one and the same text tradition, related to the version of the Nomocanon, but that the epitome of Pedro de Cardona started to deviate from the original, either through his own doing, a later elaboration or by clerical error. “Continuously and even for more than 30 years” transformed into “50 years” and the remark on “a given security” simply vanished. At the same time Laurentius Hispanus could have misinterpreted the Greek text. “Continuously and even for more than 30 years” was reduced to “30 years” and the giving back of security was provided with a limitation period, viz. 50 years. Whatever may have been the case, it is not illogical to suppose – as did

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\[58\] See Pitra, Iuris ecclesiastici graecorum historia et monumenta II (supra, n. 21), p. 630. A comparison between C. 3,43,1 and Nomocanon 13,29 can be found in R. Meijering, Anatolius and Peter of Cardona on sports and sportulae. C. 3.10.2 and 3.43.1, Subseciva Groningana 6 (1999), p. 77-90, at p. 87ff., however without pronouncing on the phrasing of the limitation period in both texts.

\[59\] These manuscripts are Vaticano, BAV, Reg. lat. 977 and Vaticano, BAV, Pal. lat. 658.

\[60\] At least on the microfilm. This manuscript is Laon 476.

Paul Krüger when editing the *Codex* – that in the twelfth century there were some learned jurists in Western Europe who had access to Byzantine materials\textsuperscript{62}.

\textsuperscript{62} Most of the manuscripts referred to were consulted on microfilms. I would like to thank the Max Planck–Institute for European Legal History at Frankfurt am Main, where part of the investigations took place, Andreas Schminck (Academy of Sciences, Göttingen) for his help and advice and Margaret Hewett (University of Cape Town) for further advice and correcting the English of my text.