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TRANSACTIONS

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1888.

I. — *The Lex Curiata de Imperio.*

By WILLIAM F. ALLEN,

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It is well known that the Roman magistrates, after entering upon their offices, procured the passage of a law defining their powers with precision. In the case of the censors this law was passed in the *comitia centuriata;* in the case of all the other patrician magistrates, in the *comitia curiata,* an assembly which existed in the later centuries of the republic for hardly any other purposes than this, and which accordingly sank into a purely formal assemblage, in which the several curies were represented by an equal number of beadles, *lictors.* Nevertheless, this purely formal act was regularly insisted upon down to the close of the republic. The law was of the same general character, whether passed by curies or centuries, and whether dealing with the *imperium* or not. Nevertheless, as it is best known in connection with the *imperium* of the consuls, praetors, and dictators, it has come to be known by the inexact title of *lex curiata de imperio.* The phrase *de imperio* is not properly a part of the title, but simply describes the scope of the law in reference to this particular group of magistrates; in the case of the aediles and quaestors, as well as of the censors, it would necessarily be *de potestate.* Nevertheless, it is only with regard to the *imperium* that the question can have any practical impor-

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tance. Upon assuming office all magistrates entered without delay upon the exercise of the administrative and purely civil functions of their office, and the neglect to pass this law, or its failure through intercession of the tribunes, can have worked no practical reduction of their powers. The *imperium*, on the other hand, carrying with it the right to command troops and to inflict the death penalty, was too formidable a power to be exercised by any one who had not been formally invested with it. Consequently, while the law in question was, in relation to other offices, so pure a formality that it is known to us only as a piece of antiquarianism, the law *de imperio* is an act frequently mentioned, and possessing a real historical importance.

Here it is to be noticed that in the period after Sulla the consuls and praetors within their year of office possessed only the civil *imperium*, that is, general executive and administrative power within the limits of Italy; for them, therefore, it made no difference whether they secured the passage of this law or not, until the time came for them to go to the government of a province in the following year. This the possession of the *imperium*, which did not require to be renewed, enabled them to do without interruption. There is no doubt that the law, being now a mere formality, was often neglected; Cicero says (leg. agr. ii. 12, 30): *consulibus legem curiatam ferentibus a tribunis plebis saepe est intercessum.* In this case no embarrassment would result until it came to acts which rested distinctly upon the military *imperium*, such as holding the *comitia centuriata* (which power was, of course, contained in the limited *imperium* of this period), and taking the government of a province. Since our discussion therefore is exclusively confined to the right to exercise these powers, we will speak of the law in question by its familiar if inexact title, as *lex curiata de imperio.*

It has usually been held that this law actually conferred upon the magistrate the powers of his magistracy, the election and inauguration in the office being only inchoate and incomplete acts. Mommsen, however, in his *Römisches Staatsrecht* (i. p. 52, first edition), takes the ground that it is not to

be looked upon as an act of legislation, but rather as an obligatory act, which the citizens cannot refuse to a magistrate who has already entered upon his office: [*Als eigentlicher Volksbeschluss darf er nicht aufgefasst werden, sondern vielmehr als eine Verpflichtung, die die Bürgerschaft dem verfassungsmässig ins Amt gelangten Beamten nicht verweigern kann:*] and that it in strictness of speech gives the magistrate no right which he does not already possess [*Auch giebt der Act streng genommen dem Beamten kein Recht, das er nicht bereits hat*]. It is with diffidence that one differs from a scholar of Mommsen's authority; but as it is upon a question of interpretation rather than of fact, and as it is a frequent charge against this great man that he is prone to push his pre-conceived theories beyond what is warranted by the evidence, I will venture to present the grounds upon which I conclude that the *lex curiata de imperio*, even if it had become a mere formality, was nevertheless a necessary act, and did really confer the *imperium;* that without it the authority of the magistrate was incomplete.

Mommsen admits indeed that his proposition does not admit of positive proof [*geradezu beweisen lässt dieser Satz sich nicht*]: he maintains, nevertheless, that it follows by necessity from the nature of things, and is supported by the evidence of several well-established instances. If the city should be attacked before this law had been carried, it is not to be supposed that its defence would be omitted for the lack of a person qualified to take command. As to this it can only be said: *Salus populi suprema lex.* The case is quite analogous to that of a province left by the sudden death of its governor without any legitimate commander; in such a case, as Mommsen has himself shown (p. 179), there must of necessity have been some way of temporarily filling the vacancy. We may compare also the formula *videant consules ne quid res publica detrimenti capiat*, by which the Senate bestowed the military *imperium* upon the consuls, in great emergencies, during the period after Sulla, when these magistrates possessed only the civil *imperium.* It may be assumed that if the magistrates lacked the formal power to

command troops, the Senate would have bestowed upon them this extraordinary authority.

The first example which Mommsen adduces to support his view, is that of Caius Flaminius, consul B.C. 217, who entered upon his office at Ariminum and who, consequently, could not have carried the *lex curiata* for himself, as was certainly usual and as is assumed to have been requisite. But this assumed necessity is by no means proved. In the case of the inferior magistrates, who had not the power to convene the assembly, the law must of course have been presented for them by one of the consuls, and it is hard to see why the same cannot have been done by a consul for his colleague, as indeed had been Mommsen's opinion previously. The objection that the senatorial faction would not have been inclined to overlook an irregularity in the case of so obnoxious a person as Flaminius cannot have much weight in regard to a body inspired by so lofty a sense of patriotism as that which the Roman Senate displayed the next year towards a still more obnoxious consul, Varro. It is to be noticed that in the irregularities charged against Flaminius by the senatorial leaders (Livy, xxii. 1, 5) — *quod illi iustum imperium . . . esse?* — there is no mention of the want of the *lex curiata.* The objections are purely formal: *magistratus id [i.e., auspicium] a domo, publicis privatisque penatibus Latinis feriis actis, sacrificio in monte perfecto, votis rite in Capitolio nuncupatis secum ferre; nec privatum auspicia sequi, nec sine auspiciis profectum in externo ea solo nova atque integra concipere posse.*

Another instance is that of the consuls of B.C. 49, Lentulus and Marcellus, who continued to exercise authority during the following year as proconsuls, notwithstanding that they had neglected to procure the *lex curiata* before leaving Rome at the beginning of their term of office. But this case tells on the other side. The senatorial government at Thessalonica abstained from organizing for the year 48, by the election of new magistrates, for the reason that the failure to procure the *lex curiata* made it impossible for them to hold the *comitia centuriata* (ὅτι τὸν νόμον οἱ ὕπατοι τὸν φρατριατικὸν οὐκ ἐσενηνόχεσαν, Dio Cassius, 41, 43). The lack of