

THE ABROGATION OF *IMPERIUM*: SOME CASES AND A PRINCIPLE

Mommsen¹⁾ asserts that abrogation, by which is meant removal from office by the act of a constitutional authority²⁾, was applied exclusively to pro-magistrates until the Gracchan period, when by a revolutionary process it was extended to "die eigentliche Magistratur". I believe that this view is forced and obscures an important principle. In its original form (which is the subject of this paper) abrogation was directed against all holders of *imperium*, whether magistrates or pro-magistrates, who while exercising their office *militiae* were guilty of offences against the State³⁾. Since a magistrate or pro-magistrate could not be accused during his term of office⁴⁾, abrogation was introduced in order to deprive him of this immunity, and so to make him immediately available for prosecution. From the constitutional point of view this procedure was essentially a preliminary step in the initiation of criminal proceedings, and can indeed be considered as an integral part of such proceedings. Abrogation was therefore the exclusive concern of the *comitia*⁵⁾, because it was here that offences of the postulated sort were regularly

1) *Staatsr* I. 629f, *Strafr* 1002f. Cf. Neumann, *RE* I. I. 111 ff; Kübler, *RE* 14. I. 416; Ogilvie, *Commentary on Livy* (Oxford 1965) 239.

2) To be distinguished from abdication, which was the termination of office by the act of the magistrate himself. Cf. Mommsen, *Staatsr* I. 626 ff.

3) More precisely, conduct that prejudiced the successful waging of Rome's wars. I have attempted elsewhere to show that actions of this sort were specifically prosecuted as the *crimen maiestatis* from the time of the First Punic War, but the point need not be pressed here. See my doctoral thesis, *A Study of the Crimen Maiestatis Imminutae in the Roman Republic and Augustan Principate*, at present in the course of publication by the Witwatersrand University Press. — When von Stern (*Hermes* 56, p. 251) asserts that abrogation was restricted to proconsuls, and was justified because of the dangers involved in leaving an incompetent commander in control, he overlooks the fact that consuls, at least until the last half century of the Republic, regularly exercised their *imperium* in the field as well as at home, and were just as likely to be incompetent as those whose *imperium* had been prorogued.

4) Mommsen, *Strafr* 352 ff.

5) Specifically the *comitia tributa*.

tried until the last half-century of the Republic⁶). The development can most conveniently be discussed slightly out of strict chronological order, and it is therefore proposed to begin with certain cases which illustrate the principles. An attempt will then be made to identify the case in which abrogation was first proposed, and the case in which such a proposal first succeeded.

In B.C. 209 M. Claudius Marcellus, who held proconsular *imperium* against Hannibal, suffered an initial defeat at Canusium and fell further into disfavour by withdrawing his army from active service⁷). The tribune C. Publicius Bibulus introduced a bill to abrogate his *imperium*⁸), in order to be able to prosecute him⁹). A postponement of the bill having been secured, Marcellus went to Rome to answer the allegations, successfully defended his conduct in a debate with Bibulus at a *contio*, and secured both the rejection of the bill and election to his fifth consulship¹⁰). It should be noticed that Marcellus did not raise any constitutional objection to the proceedings; he simply assumed that the People had jurisdiction, and prepared his reply to the allegations against him. Indeed it might well have been considered a natural extension of the People's criminal jurisdiction when the tribunes introduced a bill of abrogation, for in form and in substance such a bill could scarcely be distinguished from the procedure which initiated criminal proceedings¹¹). There was a proposal in both cases, and the *multae inrogatio* by which a tribune brought a case to trial before the People did not differ in principle from a *rogatio de imperio abrogando* (or indeed from any other bill¹²). There was also a *lex* in both cases, for the trial verdict of the *comitia* was as much a legis-

6) The permanent *quaestio maiestatis*, although created in B.C. 103, did not cover offences that were committed *militiae* until Sulla. And even then the *comitia* exercised jurisdiction concurrently with the *quaestio*, at least over the period with which we are here concerned. A similar position obtained with respect to the *crimen repetundarum*, which also covered offences committed *militiae*.

7) Livy 27. 7. 7, 12. 14 ff, 20. 10, 21. 3.

8) Livy 27. 20. 12: *de imperio abrogando eius agebat*.

9) This is a fair inference, and is supported by Plutarch's assertion (*Marc.* 27. 1 ff) that an actual prosecution was launched. Plutarch was misled by the close similarity between a bill of abrogation and a criminal trial. See below.

10) Livy 27. 20. 12, 21. 1 ff. Plut. *Marc.* 27. 4.

11) The distinction escaped Plutarch (n. 9 above) and Dio (n. 43 below).

12) Greenidge, *Legal Procedure of Cicero's Time* (Oxford 1901) 346f.

lative act¹³) as the plebiscite under which abrogation was decreed. Perhaps more significantly, the same issues were covered under both procedures. The allegations which Bibulus put forward when he proposed the removal of Marcellus were charges of criminal conduct, and Marcellus attended the *contio* for the specific purpose of refuting these allegations¹⁴); if abrogation had been decreed and a prosecution had followed, the same allegations would have appeared in the *multae inrogatio*. The fact that the same issues were involved meant in practice that a successful rogation amounted to the *prejudgment* of the criminal charges, for it was not to be expected that the People would reverse itself at the subsequent trial. A similar consequence had long been recognised even in the case of abdication, as distinct from abrogation; for the consular tribunes who abdicated in B.C. 402 on the recommendation of the Senate, heard the plebeian tribune maintain at their subsequent trial that they could not seriously raise a defence in view of the Senate's decree¹⁵). There was even a striking parallel in a matter of custom which was not linked to the technical aspects. It was usual for the accused and his friends to assume mourning garb when criminal proceedings were in contemplation, in the hope of arousing sympathy¹⁶). Similarly, when a bill of abrogation was proposed against the proconsul Lentulus Spinther in B.C. 56, his son "changed his garments"¹⁷). Finally, as an accused often tried to cloud the issue by emotional appeals¹⁸), so Marcellus influenced the People by a recital of his achievements¹⁹).

It was the realisation of these facts, and particularly the effectiveness of abrogation as a *praeiudicium*, that prompted Q. Metellus to raise a constitutional objection when an attempt was made to depose Scipio Africanus from his provincial command in B.C. 204. The case against Scipio was that he had left his province without authority, that he was implicated in the

13) Greenidge, *l.c.*

14) Livy 27. 20. 12: *ad purganda ea quae inimici obicerent*.

15) Livy 5. 8. 13-9. 8, and particularly 5. 11. 10, 12: *praeiudicium iam de reis ... factum esse. eos ... confossos praedamnatosque*.

16) Mommsen, *Strafr* 391.

17) Cic. *ad Q. F.* 2. 3. 1. Cf. *ib. Sest.* 69. 144. In 22 A.D. a praetor who was alleged to have insulted Tiberius put off his robe of office, and demanded to be tried as a private citizen. Dio 57. 21. 2.

18) Greenidge, *o.c.* 472, 490f.

19) Livy 27. 21. 4: *commemoratione rerum suarum*.

extortionate operations of his legate Q. Pleminius against the Locrians, and that he was undermining the discipline of his troops²⁰). Fabius Maximus proposed in the Senate that Scipio be recalled, and that an approach be made to the tribunes for a bill to abrogate his *imperium*²¹). Metellus opposed this on the grounds that in effect it would mean the condemnation of Scipio without trial²²). Although in Livy's context (*l.c.*) it was only the proposed *recall* that would thus prejudice Scipio, this was not the really serious matter; if Marcellus had been able to come to Rome of his own accord after appointing a legate²³), Scipio could have avoided a formal recall by doing the same thing. In fact Metellus was mainly concerned about the intended bill of abrogation, and in this regard he was urging a constitutional objection. He had in mind the principle of *provocatio ad populum*, which had protected citizens against punishment without due trial since the beginning of the third century B.C.²⁴) Metellus knew that any attempt to overthrow this principle was bound to provoke energetic resistance. He therefore argued that a bill of abrogation, because its success depended on the criminal allegations being decided in a manner unfavourable to Scipio, would be equivalent to condemning him without trial. This would endanger a safeguard which had been written into the constitution with much travail. Metellus' argument prevailed, and the Senate adopted his counter-proposal for the despatch of a commission of enquiry²⁵).

A different procedure was followed against A. Manlius Vulso, consul in B.C. 178, perhaps because it was hoped to find a way around the difficulty which had arisen in Scipio's case. During Manlius' consulship a measure was introduced pro-

20) Livy 29. 19. 1, 6; 29. 16. 5, 19. 2, 19. 11, 20. 3, 20. 5; 29. 19. 3 f. Dio fr. 56. 65 (Melber). Plut. *Cat. Mai.* 3. 5 f.

21) Livy 29. 19. 6: *P. Scipionem ... revocari, aique cum tribunis plebis ut de imperio eius abrogando ferrent ad populum.*

22) Livy 29. 20. 2 f: *qui enim convenire ... eum repente ... indicta causa prope damnatum, ex provincia revocari.*

23) Livy 27. 20. 12.

24) So Heuss, *ZSS, Rom. Abt.* LXIV, pp. 93 ff, 114 ff, rejecting the Valerian laws of B.C. 509 and 449, and accepting only the third Valerian of B.C. 300. Cf. Bleicken, *RE* 23. 2. 2446; Stuart Stavely, *Historia* III, p. 415. *Provocatio* was extended to monetary penalties shortly after the third Valerian (Bleicken, *o.c.* 2451) or shortly before it (Stuart Stavely, *o.c.* 421).

25) Livy 29. 20. 1, 4-10. Dio fr. 56. 65 wrongly attests the abrogation of Scipio's *imperium* and a decision to prosecute him.

going his command in Gaul for a year. At some time after the prorogation was authorised, but still during his consular year, he incurred odium by campaigning against the Istri without authority and without success²⁶). The tribunes L. Nerva and P. Turdus proposed a bill to cancel the prorogation. Their declared purpose was to compel Manlius to vacate his office at the end of his consular year, so that he could be prosecuted²⁷). The tribune Q. Aelius vetoed the bill, but only after a heated debate²⁸), which suggests that the proposal had attracted substantial support.

The cases so far discussed do not attest any attempt by the Senate to assert a right of abrogation as against the People. Indeed it is clear from Scipio's case that the Senate specifically recognised the People's exclusive jurisdiction; for the proposal was that the Senate work in collaboration with the tribunes in order to secure the removal of Scipio. Such an attitude on the part of the Senate is quite understandable, since the exercise of a right of abrogation by the Senate would, in effect, have amounted to the usurpation of the People's criminal jurisdiction. But in the earlier period, before the *lex Hortensia* of B.C. 287 and the consequent establishment of tribunician criminal jurisdiction on a firm basis, the removal of a magistrate by reason of his conduct *militiae* was a contentious issue. The dispute goes back to B.C. 402, when the Senate took steps to depose the consular tribunes M. Sergius and L. Verginius, who were held responsible for the defeat at Veii. The Senate, in a resolution which was aimed primarily at Sergius and Verginius, advised all

26) Livy 41. 1. 1-5. 12, 6. 2, 7. 7, 7. 9.

27) Livy 41. 6. 2f: *rogationem promulgarent ne Manlius post Idus Martias (prorogatae namque consulibus iam in annum provinciae erant) imperium retineret, uti causam extemplo dicere, cum abisset magistratu, posset.*

The sequence of events in the text is not that which is generally accepted, but seems inescapable. To reject Livy's assertion that prorogation had already been authorised (Mommsen, *Staatsr* 1. 629. 4; Neumann, *o. c.* 112) is to make the bill pointless; the tribunes will not have asked the People to declare its intention not to prorogue Manlius' command if and when it was asked to do so, and there is nothing else that could have been proposed. It is also not possible to accept the view (Broughton, *MRR* 1. 398) that the prorogation had already come into operation. Abrogation was proposed after the Senate's directive that one of the consuls was to come to Rome for the elections (Livy 41. 6. 1), but before Manlius' colleague Junius went to Rome for this purpose (*ib.* 41. 7. 4ff), and therefore at a time when Manlius was still consul.

28) Livy 41. 6. 3: *magnis contentionibus.*

the consular tribunes to resign²⁹); it is probable, although not directly attested, that the decree was prompted by an augural pronouncement that the consular tribunes were *vitio creati* because of defective auspices at their election³⁰). The other consular tribunes resigned voluntarily, but Sergius and Verginius refused to do so. They changed their minds, however, when threatened with the appointment of a dictator who would compel them to abdicate. They were subsequently prosecuted by the tribunes for what had happened at Veii³¹). This case was not in itself an innovation, for magistrates had previously resigned when pronounced *vitio creati*³²), and continued to do so even in the late Republic³³). The novel aspect in the case of the consular tribunes was the threatened appointment of a dictator. This threat must have been one which could be carried out, for the whole purpose of Livy's account is to show that nothing less than an effective proposal was able to sway Sergius and Verginius³⁴). The proceedings were therefore very much like compulsory removal from office, as far as the practical result was concerned³⁵). There is another point of resemblance between enforced abdication and abrogation. Sergius and Verginius particularly feared the *ignominia* which they would incur if they agreed to resign³⁶); and *ignominia* was precisely the consequence that was most feared by those against whom bills of abrogation were proposed³⁷). The Senate, then, was the first to introduce a

29) Livy 5. 8. 7-9. 1.

30) Ogilvie, *o. c.* 645.

31) Livy 5. 9. 2-8, 11. 4-12. 2.

32) *ib.* 4. 7. 3.

33) See, for example, Cic. *Div.* 2. 35. 74. The abdication of the praetor P. Lentulus in B.C. 63, in order to enable Cicero to execute him for his part in the Catilinian conspiracy (Cic. *Cat.* 3. 4, 4. 3. 5), will have been induced by an augural pronouncement.

34) Even if the action taken by the dictator Cincinnatus against the consul L. Minucius in B.C. 458 was suspension (Mommsen, *Staatsr.* 1. 262. 2; Neumann, *o. c.* 111) rather than enforced abdication (Broughton *MRR* 1. 39), the case of Sergius and Verginius is in itself sufficient authority for the assertion that a magistrate who had *maior potestas* could constitutionally depose an inferior.

35) Cf. Livy 5. 9. 8: *vim maiorem ad coercendos magistratus*. Mommsen's assertion (*Staatsr.* 1. 627ff) that abdication was „immer ... ein Act des freien Willens“ is unrealistic from a practical point of view, and may even be wrong in strict theory. For when the dictator M. Claudius Glicia abdicated under pressure in B.C. 249, the *Fasti Capitolini* (Broughton, *MRR* 1. 215) officially recorded him as *coactus abdicare*. Cf. Livy *Per.* 19; Suet. *Tib.* 2.

36) Livy 5. 9. 3.

37) Livy 2. 2. 10; *Per.* 11. Oros. 3. 22. 7f. Cf. Cic. *Sest.* 69. 144.

remedy against those who were guilty of misconduct *militiae*, and the procedure resembled abrogation in its practical effect, even if the underlying principle was not the same³⁸). But even in this early period the Senate's action did not go unchallenged. For during the debate in the Senate, when attempts were being made to persuade Sergius and Verginius to resign voluntarily, the plebeian tribunes intervened and threatened to imprison them. Thereupon the consular tribune C. Servilius Ahala advised the plebeian tribunes not to interfere in a matter which was the business of the Senate³⁹).

The intervention of the plebeian tribunes in B.C. 402 suggests that the possibility of action by the *concilium plebis* was being considered, and was already a political issue, as early as the end of the fifth century B.C. But tribunician interference in the area of *vitio creati* does not seem to have occurred again, and it was not until the beginning of the third century B.C. that the first proposal for the abrogation of *imperium* was submitted to the People. This happened in B.C. 292, when the consul Q. Fabius Maximus Gurgus was defeated in Samnium. The sources agree that action of some kind was either taken or contemplated against him, and also agree that when his father Q. Fabius Maximus Rullianus offered to serve as his legate, the proceedings were dropped⁴⁰). As to the nature of the proceedings, Dio⁴¹) says that Gurgus was recalled and criminal proceedings were initiated *apud populum*. In view of a magistrate's immunity from prosecution, it must evidently be supposed that Gurgus was removed from office before steps were taken to institute criminal proceedings against him. But it may be possible to go even further than this, for Dio (*l.c.*) gives a valuable clue as to the nature of the "criminal proceedings" when he makes the curious statement that *Gurgus was not given*

38) At a later stage the Senate went even further, for the attempt to secure the resignation of the consul C. Flaminius in B.C. 223, on the ground that he was *vitio creatus*, was specifically described (no doubt by an Optimate source) as "abrogation". Livy 21. 63. 2. But neither this case nor the Senate's abrogation of Cinna's consulship in B.C. 87 affects the principle under discussion, for there was no allegation of misconduct *militiae* against either Flaminius or Cinna. Cf. Livy 21. 63. 2, 7, 12; App. *BC* 1. 65.

39) Livy 5. 9. 4f.

40) Dio fr. 33. 3of (Melber); Zon. 8. 1; Livy *Per.* 11; Oros. 3. 22. 6-8; Eutrop. 2. 9. 3; Val. Max. 5. 7. 1; Plut. *Fab.* 24. 3.

41) fr. 33. 30: τοῦτον μεταπέμψαντες εὔθυνον. κατηγορίας τε αὐτοῦ πολλῆς ἐν τῷ δήμῳ γενομένης κτλ.

a bearing. This could not have happened at a criminal trial, for it cannot be supposed that an accused was ever denied the right to speak in his defence. But it could quite easily have happened at a *contio*, for no one had the right to address an informal assembly unless called upon by the presiding magistrate⁴²). The occasion will therefore have been a *contio* at which a bill for the abrogation of Gurges' *imperium* was discussed⁴³). As against Dio, however, Livy⁴⁴) says nothing of proceedings before the People, and simply attests a debate in the Senate on a proposal to recall Gurges. This in itself does not necessarily matter, for recall by the Senate could merely have been the prelude to a bill of abrogation, exactly as was proposed in Scipio's case. The real difficulty is the speech of Rullianus, by which he managed to get the proceedings against his son dropped. For where Dio (*l.c.*) assigns this speech to the *contio*, Livy⁴⁵) locates it in the Senate. Dio therefore attests that Gurges was in fact recalled, and that this was followed by the *contio* at which Rullianus intervened; while according to Livy it did not go as far as the actual recall of Gurges, because Rullianus' intervention prevented this. Someone has taken Rullianus' speech out of its true context. In view of the consistent exercise of jurisdiction by the *comitia* in matters of abrogation, the tendentious source should be assigned to Livy rather than to Dio. There is another piece of evidence which suggests that there was an attempt to abrogate Gurges' *imperium*. In B.C. 217 the tribune M. Metilius, who wanted to take criminal action against the dictator Fabius Maximus⁴⁶), said that he would have introduced a bill to abrogate Fabius' *imperium*, if only the People had been of the same mind as in the past. The precedent to which Metilius thus

42) Greenidge, *Roman Public Life* (London 1911) 159f.

43) Dio seems to have shared Plutarch's inability to distinguish between a bill of abrogation and a criminal trial. Cf. n. 9 above. — As Lange (cited by Neumann, *RE* 1. 1. 111) is not available to me, I am not aware of the reasons which apparently led him to the conclusion that Dio attests the actual abrogation of Gurges' *imperium*. But see n. 47 below.

44) *Per.* 11. Cf. Oros. 3. 22. 7f.

45) *l.c.*: *cum ... senatus de removendo eo ab exercitu ageret, ... pater ... eo maxime senatum movit, quod iturum se filio legatum pollicitus est, idque praestitit.* Cf. Oros., *l.c.*

46) Fabius will have exposed himself to a charge of *maiestas* when he said (Livy 22. 25. 2) that he did not believe Minucius' report of a victory over Hannibal, but that if it were true he feared success more than failure. There were also other allegations against him. Livy 22. 25. 3ff; Plut. *Fab.* 8. 3f.

referred will have been the bill which was proposed against Gurges⁴⁷).

The cases so far discussed attest proposals for the abrogation of *imperium*, but not the actual acceptance of such a proposal by the People. It is generally assumed that the *imperium* of M. Aemilius Lepidus Porcina was abrogated, either in B.C. 137 during his consulship⁴⁸), or in B.C. 136 during his proconsulship⁴⁹). If so, this was the first successful assertion of a principle which had been advocated for well over a century. But this noteworthy event is ignored by sources which might have been expected to mention it, and its occurrence is known only from a passage in Appian which has to be "improved" in order to fit in with the chronology. I do not believe that the *imperium* of Lepidus was abrogated at all, in either his consular or his proconsular year. He was certainly prosecuted for his conduct *militiae*, but I shall attempt to show that this was not preceded by his forcible removal from office.

The consuls in B.C. 137 were Lepidus and C. Hostilius Mancinus. Mancinus was defeated by the Numantini in Hither Spain, and concluded an ignominious peace which the Senate repudiated against the noxal surrender of Mancinus. Lepidus was sent to Spain to replace Mancinus, attacked the Vaccaeii in defiance of the Senate's directive, and suffered a severe defeat at Pallantia⁵⁰). Appian says that when news of this defeat reached Rome, Lepidus was deprived of his command and consulship, and thereafter returned to Rome as a private citizen, and was prosecuted and fined⁵¹). This is the only attestation of the de-

47) Livy 22. 25. 10: *si antiquus animus plebei Romanae esset, audaciter se laturum fuisse de abrogando Q. Fabi imperio*. It may perhaps be argued that Gurges' case would not have supplied Metilius with a precedent unless it had gone as far as actual abrogation. In that case it would have to be supposed that Rullianus' speech was delivered after the abrogation, and persuaded the People to reverse its decision. But the whole tenor of Dio's account is against this, for he is clearly describing proceedings at which some action *against* Gurges is being discussed, rather than an attempt to reinstate him.

48) Appian *Iber.* 83.

49) Mommsen, *Staatsr.* 1. 629. 4; Neumann, *o.c.* 112; von Stern, *Hermes* 56, pp. 250f; Broughton, *MRR* 1. 487, 488. 4. A non-committal attitude is taken up by Klebs, *RE* 1. 1. 566.

50) Appian *Iber.* 80-82; Livy *Per.* 56; Oros. 5. 5. 13.

51) *Iber.* 83: 'Ρωμαῖοι δ' αὐτὰ πωθόμενοι τὸν μὲν Αἰμίλιον παρέλυσαν τῆς στρατηγίας τε καὶ ὑπατείας, καὶ ἰδιώτης ἐς Ῥώμην ὑπέστρεψε, καὶ χρῆμασιν ἐπέζημιούτο.

position, and even then it has to be supposed that it occurred after the prorogation of Lepidus' command in Spain; this assumption is necessary because of Livy's assertion⁵²⁾ that it was as proconsul that Lepidus campaigned against the Vaccaeii, and also because of serious chronological difficulties⁵³⁾. The only other reference is that of Orosius⁵⁴⁾, who says that Lepidus was punished for his defeat, but without giving any indication that this occurred before his vacation of office in the normal course. There is nothing else. Cicero, observing that Lepidus was a considerable orator and that Ti. Gracchus was his pupil, goes on to notice that Gracchus was implicated in the Numantine treaty; and in the same context he remarks that Lepidus, during his consulship, opposed the ballot law of L. Cassius Longinus⁵⁵⁾. But despite these references to the events of Lepidus' consular year, Cicero makes no mention of the fact that Lepidus was deposed. As for Livy⁵⁶⁾, he followed the same order of events as Appian at the crucial point: the defeat at Pallantia, followed by the proceedings in Rome for the noxal surrender of Mancinus⁵⁷⁾. But where Appian interposes the deposition of Lepidus and his punishment, Livy, if the Epitomator is to be believed, said nothing⁵⁸⁾. Livy's omission is particularly strange in the light of his narrative at this point. He first discussed the successful campaign of D. Iunius Brutus against the Callaici, and then turned immediately to the failure of Lepidus at Pallantia, contrasting it pointedly with Brutus' success⁵⁹⁾. The curious part is that Livy completely failed to mention that Brutus, after concluding the campaign against the Callaici, joined forces with Lepidus against the Vaccaeii and was equally involved in the

52) *Per.* 56. Cf. Oros. 5. 5. 13.

53) See particularly Münzer, *RE* 10. 1. 1021 ff. Cf. Broughton, *MRR* 1. 487, 488. 4. The crisp point is that D. Iunius Brutus, proconsul in Further Spain, took part in the siege of Pallantia with Lepidus, but only after a campaign against the Callaici which itself must have extended into B.C. 136. There is also reason to believe that the "dark night" on which the Romans raised the siege of Pallantia coincided with an eclipse of the moon which is known to have occurred in B.C. 136.

54) 5. 5. 13: *accepta clade gravissima improbae pertinaciae poenas luit.*

55) *Brut.* 95-7, 103.

56) *Per.* 56.

57) Cf. Livy *l.c.* with Appian *Iber.* 82f.

58) The full notice is: *dissimili eventu M. Aemilius Lepidus pro cos. adversus Vaccaeos rem gessit, clademque similem Numantinae passus est.*

59) *Decimus Iunius Brutus ... feliciter adversus Gallaecos pugnavit. Dissimili eventu M. Aemilius Lepidus ... passus est.*

defeat at Pallantia⁶⁰). Brutus' part in this disaster does not seem to be in doubt, even although he was more fortunate than Lepidus; for no action appears to have been taken against him, and indeed he celebrated a triumph for his reduction of the Callaici⁶¹). Livy's reticence here should be compared with his ready mention of the fact that in B.C. 129 the same Brutus went to the aid of the consul C. Sempronius Tuditanus and enabled him to convert defeat into victory⁶²). That Livy's source was not hostile to the Junii is evident, and it is not without significance that the same Tuditanus is the constitutional lawyer and annalist whom Livy is known to have consulted⁶³). But even if Tuditanus was Livy's source, and even if the kinship of Brutus and Lepidus⁶⁴) made it particularly desirable to suppress the unequal treatment of the two commanders, it cannot be supposed that Tuditanus deliberately concealed the deposition; for as the author of the *libri magistratum*⁶⁵) he will have had a special interest in the first successful abrogation of *imperium*, and will not have permitted his loyalty to the Junii to interfere with his exposition of the law. He may, however, have had less difficulty in omitting the mere prosecution of Lepidus after he had vacated office in the normal course, for no new legal principle was involved there. If a tradition favourable to the Junii suppressed the fact that there had been such a prosecution, this will also explain why it is precisely in Cicero's *Brutus* that the misfortune of Lepidus is omitted at a point where its attestation might have been expected.

Appian's context⁶⁶) implies that Lepidus was deposed in his absence, for it was only when he was already a *privatus* that he returned to Rome to stand trial. This gives rise to a serious difficulty. Abrogation *in absentia* was admittedly possible; for

60) Appian *Iber.* 80: Lepidus persuades Brutus to join him; *ib.* 81: Lepidus believes that when the Senate sent him instructions not to attack the Vaccaei, it did not know that Brutus was co-operating with him; *ib.* 82: Lepidus and Brutus decide to raise the siege of Pallantia.

61) Broughton, *MRR* 1. 487, 488. 5.

62) *Per.* 59: *C. Sempronius cos. ... primo male rem gessit, mox victoria cladem acceptam emendavit virtute Decimi Iuni Bruti, eius qui Lusitaniam subegerat.*

63) On Tuditanus see Schulz, *History of Roman Legal Science* (Oxford 1946) 46, 90; Münzer, *RE* 2 A. 2. 1442f; Weissenborn-Müller, T. *Livi A. U. C. Libri* (Berlin 1908) 27.

64) Appian *Iber.* 80.

65) Schulz, *l. c.*; Münzer, *l. c.*

66) *Iber.* 83.

Ap. Claudius Pulcher, who held pro-praetorian *imperium* after B.C. 89, refused to go to Rome when a tribune proposed a bill of abrogation, and was quite lawfully, as Cicero thought, deposed in his absence⁶⁷). But this was a special case, for Pulcher deliberately boycotted the proceedings⁶⁸). This was clearly not the motive of Lepidus, for Appian says that he afterwards went to Rome for the trial. It is possible that Appian was confused. The proceedings against Lepidus will have begun with a proposal in the Senate that he be recalled, and that the tribunes be requested to initiate a bill of abrogation. When Lepidus learnt of his recall he may have felt, in view of the gravity of the defeat at Pallantia and his undeniable disregard of the Senate's instructions⁶⁹), that it was a waste of time to attend the *contio* in the hope of persuading the People to reject the bill. He may therefore have resigned his command voluntarily and returned to Rome as a *privatus* to stand trial. Appian, finding a reference to a *senatus consultum* in his source, wrongly assumed that it was a formal act of abrogation; he was misled by *agique cum tribunis plebis ut de imperio eius abrogando ferrent ad populum*⁷⁰).

Appian's position is further weakened by the case of Q. Servilius Caepio, proconsul in Gaul in B.C. 105, who was held responsible for the disaster of Arausio⁷¹). Caepio's *imperium* was undoubtedly abrogated, and the ensuing prosecution resulted in the confiscation of his property⁷²). This case is relevant to the problem of Lepidus because of Livy's assertion⁷³) that the action taken against Caepio was the first since Tarquin, that is, without precedent. Although Livy's context seems to imply that the

67) Cic. *de dom.* 31. 83.

68) *ib.*

69) If the Numantine disaster was "the bitterest disgrace in the whole of Roman military history" (Schulzen, *CAH* 8. 351), and if Pallantia was *cladem similem Numantinae* (Livy *Per.* 56), it is clear that Lepidus was guilty of serious misconduct. The contemptuous letter which he despatched to the Senate, rejecting the instructions given to him by the mission which had been specially sent to dissuade him from attacking the Vaccaei (Appian *Iber.* 81), will have served to aggravate his offence.

70) Cf. n. 21 above.

71) Sall. *Iug.* 114; Livy *Per.* 67; Vell. 2. 12. 2; Oros. 5. 16. 1-7; Licin. p. 11 F; Dio fr. 89; Plut. *Luc.* 27.

72) Livy *Per.* 67: *Caepionis ... damnati bona publicata sunt, primi post regem Tarquinium, imperiumque ei abrogatum.* Ascon. 78 C: *Q. Servilio ... cui populus ... imperium abrogavit.* Cf. Rhet. *ad Herenn.* 1. 14. 24; Val. Max. 4. 7. 3.

73) *Per.* 67.

unauthorised remedy was the confiscation, and not the abrogation, it is evident that the Epitomator has not put these two events in their correct order, for the condemnation of Caepio cannot have preceded the abrogation of his *imperium*. In any event, the Epitomator's sequence is not the decisive criterion. The deposition of Tarquinius Superbus was a "precedent" for the abrogation of *imperium*⁷⁴) as well as for the confiscation of property in capital cases⁷⁵). But it is only in relation to abrogation that Livy's *primi post regem Tarquinius* can have any significance. There was more than enough historical precedent for confiscation in capital cases⁷⁶), so that not even the most ardent supporter of Caepio could have suggested that he was the first "since Tarquin" to suffer this penalty. But the criticism would have been valid in the case of abrogation, for there was no historical precedent whatever – unless the *imperium* of Lepidus was abrogated. The very fact that this criticism could be made at all, little more than a quarter of a century after the supposed deposition of Lepidus, surely means that the Populares were *not* able to cite the case of Lepidus as a precedent for their action against Caepio. There is another piece of evidence which also suggests that Caepio's case established a new precedent. In B.C. 104 the tribune L. Cassius Longinus introduced a law which, by providing for the exclusion from the Senate of those whom the People condemned, or whose *imperium* it abrogated⁷⁷), tacitly asserted that the People's competence to abrogate *imperium* was no longer open to controversy. This *lex* was proposed as a direct result of Caepio's deposition⁷⁸), and it may therefore be supposed that the criticism attested by Livy had made it advisable to put the matter beyond doubt.

Despite the case against Appian, it should be noticed in conclusion that a useful argument in his favour could be developed if it were possible to date Pallantia to Lepidus' *consular* year. In such an event the following evidence would be in point: L. Cassius Longinus, tribune in B.C. 137, introduced a ballot law which was vigorously opposed by Lepidus⁷⁹). Ill-will

74) Livy I. 59. 11.

75) *ib.* 2. 3. 5, 5. 1f; Dion. Hal. 5. 4. 3–6. 2.

76) For a full list of examples see Fuhrmann, *RE* 23. 2. 2491 ff. Cf. Waldstein, *RE* Supp. 10. 101 ff.

77) Ascon. 78 C: *ut quem populus damnasset cuive imperium abrogasset in senatu ne esset.*

78) Ascon. *l.c.*

79) Cic. *Brut.* 25. 97.

between Cassius and Lepidus persisted, for in B.C. 125 Cassius, as censor, took action against Lepidus, who was then augur, for letting a house at an excessive rental⁸⁰). Cassius is therefore the obvious choice as the tribune who would have proposed the abrogation of Lepidus' *imperium*. The matter goes further, for Valerius Maximus says that Cassius, in a capacity not specified, prosecuted Lepidus *apud populum*, at a date not given, for building an excessively high house; Lepidus was condemned and ordered to pay a heavy fine⁸¹). There is contamination here. It was clearly possible for Cassius, as tribune, to bring Lepidus before a *iudicium populi*, but it is equally clear that he had no authority to do so as censor. It is also doubtful whether the criminal categories tried by *iudicia populi*⁸²) covered a *crimen nimis sublime exstructae villae*, even if such a charge existed. The excessively high house is therefore a variant of the excessive rental which, according to Velleius⁸³), was dealt with by Cassius as censor. And the condemnation and heavy fine in the *iudicium populi* were in respect of Lepidus' conduct in Spain. Cassius will therefore first have secured the deposition attested by Appian, and will then have brought the prosecution known to Appian and Orosius. But all this requires the deposition of Lepidus during his consular and Cassius' tribunician year, which cannot be reconciled with the chronology of Pallantia. In the result, therefore, Caepio should be accepted as the first holder of *imperium* to have been deposed, with Lepidus as a doubtful predecessor.

University of Sydney

R. A. Bauman

80) Vell. 2. 10. 1.

81) 8. 1. 7: *illud populi iudicium, cum M. Aemilium Porcinam a L. Cassio accusatum crimine nimis sublime exstructae villae in Alsiensi agro gravi multa affectit.*

82) See the lists supplied by Rein, *Criminalrecht d. Römer* (Leipzig 1844) 481 ff; Zumpt, *Criminalrecht d. röm. Rep.* (Berlin 1865-9) 1. 2. 305 ff; Mommsen, *Staatsr* 2. 1. 320 ff; Botsford, *Roman Assemblies* (New York 1909) 246 ff; Siber, *Analogie usw.* (Abh. d. phil.-hist. Kl. d. sächs. Akad. d. Wissensch. XLIII, 3, 1936) *passim*; Brecht, *Perduellio usw.* (Münch. Beitr. z. Papyrusforsch. 29, 1938) 281 ff.

83) 2. 10. 1.