

THE PROSECUTION OF ROMAN MAGISTRATES-ELECT

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IN HIS ARTICLE "The Prosecution of Roman Magistrates" (*Phoenix* 22 [1968] 32 ff.) Mr E. J. Weinrib discusses the position of magistrates-designate (51 ff.), referring to my note on Cic. *Att.* 4.15.9, in which, following Mommsen, *Strafr.* 353, I cited Paulus (*Dig.* 3.3.54) as evidence for their immunity from prosecution, and added: "It is true that prosecutions of *designati* sometimes took place, but I know of none which did not concern alleged misconduct in the election itself; such cases, it may be suggested, constituted a recognized exception within the rule." Mr Weinrib comments:

The Digest passage mentioned, however, should be scrutinized more closely. It reads: *neque femina neque miles neque qui rei publicae causa afuturus est aut morbo perpetuo tenetur aut magistratum initurus est aut invitus iudicium pati non potest, idoneus defensor intellegitur*. Paulus here nowhere says that a magistrate due to enter office is immune from prosecution. He is listing classes of people who are disqualified for one reason or another from acting as representatives of others (*defensores*) in civil litigation, especially in *causae liberales*. If anything, he implies that magistrates designate *were* liable to trial since he distinguishes between a person who is about to assume a magistracy (*magistratum initurus est*) and a person who cannot be haled into court (*invitus iudicium pati non potest*).

Although the correction is warranted in so far as the conclusion to be drawn from the Digest passage is a matter of inference, not direct testimony, I doubt whether Mommsen is so easily disposed of. The classes of people excepted by Paulus, so he will have argued, were disqualified as *defensores*, not "for one reason or another," but for one reason only—because they could not be summoned as defendants (*rei*) themselves, the *defensor* standing in lieu of the *reus*: *defendere est eandem vicem quam reus subire*, says Ulpian in the same chapter of the Digest. Women and those who had "sworn chronic ill-health" (cf. Cic. *Att.* 12.13.2) are thus accounted for. That soldiers were tried by military courts in cases of assault is plainly stated in Juvenal's sixteenth *Satire*; it would appear on this showing that the same privilege applied in civil actions. As regards persons due to leave on state service, Mr Weinrib argues from the case of Caesar in 61 B.C. (Suet. *Iul.* 18.1; Plut. *Caes.* 11.1) and Vitellius in A.D. 68 (Suet. *Vit.* 7.2) that they *were* liable to legal proceedings for debt. Suetonius' words about Caesar, *incertum metune iudicii quod privato parabatur* imply that an ex-magistrate who had been allotted a province was liable to prosecution in the interval between his retirement and the grant of *imperium*. Exemption may have been intro-

duced later. In Vitellius' case Suetonius says nothing about litigation by the creditors; they lay in wait for him and tried to detain him, demanding their money. If persons due to serve abroad were ineligible as *defensores* for some other reason, what could that reason have been? The same question applies to magistrates-designate.

Mr Weinrib's argument that, when Paulus differentiates between *qui magistratum initurus est* and *qui invitus iudicium pati non potest*, he implies that the former *could* be brought to trial, might be applied to the categories previously mentioned, some at any rate of whom certainly could not. Surely the final category is intended to cover all exempt persons not specified already (it is odd that magistrates in office are not specifically included).

The theory advanced in my note that prosecutions of magistrates-elect for misconduct during the elections constituted a special case, seems to stand up to examination, in so far as a search as systematic as I have been able to make in the records of trials (actual or threatened) under the Republic has produced nothing to contradict it. The following are the cases I have found:

M. AEMILIUS SCAURUS. Elected Consul in 116. Prosecuted for *ambitus* by an unsuccessful competitor, P. Rutilius Rufus. After his acquittal he in turn prosecuted Rutilius (Cic. *De Orat.* 2.280, *Brut.* 113; Tac. *Ann.* 3.66).

C. MARIUS. Elected Praetor in 116. Prosecuted for *ambitus* and narrowly acquitted (Val. Max. 6.9.14; Plut. *Mar.* 5).

HORTENSIUS. Elected Consul in 109. Prosecuted and condemned ("wohl wegen Ambitus"), M. Aurelius Scaurus replacing him in office (see Münzer, *RE* 8.2465.58).

M. ANTONIUS. According to Cic. *De Orat.* 2.274 he was prosecuted for *ambitus* during his Censorship in 97. Mr E. S. Gruen (*Historia* 15 [1966] 41, n. 58, thinks this improbable, and would place the trial before Antonius took office. But prosecutions of Censors in office are well attested. See the cases in 213 (Liv. 24.43.2), 204 (*id.* 29.3.7; Val. Max. 7.2.6), 169 (Liv. 43.16.16), and 54 (Cic. *Fam.* 8.12.3).

Q. SERVILIUS CAEPIO. His prosecution by Scaurus (Ascon. 19) may have been for *ambitus* in his election to the Praetorship in 92 (Münzer, *Adelsparteien* 300), but neither charge nor date is certain (Gruen, *Historia* 15 [1966] 57, n. 151, *Roman Politics and the Criminal Courts* [Cambridge, Mass. 1968] 206, 308).

L. MARCIUS PHILIPPUS. Elected Consul in 92. Prosecuted for *ambitus* by Q. Servilius Caepio and acquitted (Flor. 2.2.5).

P. SEXTIUS. Elected Praetor ca. 90. Prosecuted for *ambitus* by T. Junius and convicted (Cic. *Brut.* 180).

C. VERRES. Elected Praetor in 75. Said to have bought off a bribery prosecution (Cic. *Verr.* 2.1.101, 4.45).

C. CALPURNIUS PISO. Elected Consul in 68. Twice prosecuted for bribery during the election, he "bought off conviction" (Dio 36.38.3).

P. AUTRONIUS PAETUS and P. CORNELIUS SULLA. Elected Consuls in 66. Both convicted of *ambitus* under the lex Calpurnia and replaced (Sall. *Cat.* 18.2, etc.).

Q. GALLIUS. Elected Praetor in 66. The date of his prosecution for *ambitus* by M. Calidius (he was defended by Cicero) is, however, in doubt.

L. LICINIUS MURENA. Elected Consul in 63. Prosecuted for *ambitus* by Ser. Sulpicius Rufus, an unsuccessful competitor. Defended by Cicero and acquitted (Cic. *Mur. passim*).

L. SERGIUS CATILINA. Candidate for Consulship in 63. Threatened by Cato with prosecution for *ambitus* a few days before the election.

Q. CAECILIUS METELLUS SCIPIO. Elected to an office (probably Aedileship rather than Tribunate: see L. R. Taylor, *Studies in honour of B. H. Ullman* 1 [*Studia e Litteratura* 93] 79 ff.) in 60. Prosecuted, doubtless for *ambitus* by M. Favonius, an unsuccessful competitor. Acquitted.

A. GABINIUS. Elected Consul in 59. C. Cato tried to prosecute him for *ambitus*, but was deterred by mob violence and obstruction on the part of the Praetors (Cic. *Q. Fr.* 1.2.15, *Sest.* 18).

L. CALPURNIUS BESTIA. Prosecuted by Caelius Rufus for *ambitus* in 56, Cicero defending. The case was heard on 11 February (Cic. *Q. Fr.* 2.3.6), and Bestia must have been acquitted since Caelius prosecuted him again later in the year (Cic. *Cael.* 1). Bestia may have been an unsuccessful candidate for the Praetorship (cf. *ibid.* 26), for which elections had probably been held near the end of 57.

CN. PLANCIUS. Prosecuted in 54 under the lex Licinia *de sodaliciis* by an unsuccessful competitor for the Aedileship. But Plancius probably held that office in 55 (see L. R. Taylor, *Athenaeum* n.s. 42 (1964) 12 ff.).

P. VATINIUS. Elected Praetor for 55 at comitia held early in the year. There was an unsuccessful movement in the Senate to declare Praetors then elected *privati* for sixty days after election to enable prosecutions to be instituted (Cic. *Q. Fr.* 2.8(7).3; cf. Plut. *Cat. Min.* 42). Vatinius was actually prosecuted for *ambitus* in the following year.

C. CLAUDIUS MARCELLUS. Elected Consul in 51. Prosecuted by M. Calidius, an unsuccessful competitor, and acquitted (Cic. *Fam.* 8.9.2. [Caelius]). Calidius was then himself prosecuted and acquitted. The charge was doubtless *ambitus* in both cases.

SERVAEUS. Elected Tribune in 51. Prosecuted and condemned (Cic. *Fam.* 8.4.1 [Caelius]). The charge is presumed to have been *ambitus* (so Münzer, *RE* 2A. 1754.63). Curio was elected into the vacancy.

AP. CLAUDIUS PULCHER. Prosecuted by Dolabella for *ambitus* in 50 and acquitted (Cic. *Fam.* 3.2.1). The charge may have been in connexion with Appius' election to the Censorship (hardly with his election to the Consulship in 55).

The negative evidence that prosecutions of magistrates-elect were restricted to *ambitus*, is of course, not conclusive. It may gain some support from Plut. *Cat. Min.* 42, where there is mention of a legal period after election to office during which such prosecutions could be brought (presumably sixty days: see above, p. 164): μή διαλιπόντας τὸν νόμιμον χρόνον, ἐν ᾧ δίκαι τοῖς δεκάσασι τὸν δῆμον ἦσαν. Each *quaestio* was governed by the law under which it was established (Weinrib, *op. cit.* 35 ff.), so it need only be supposed that the law or laws governing the *quaestio de ambitu* differed in the matter of exemptions from those governing other *quaestiones*.

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