THE PROSECUTION OF MAGISTRATES-DESIGNATE

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IN A VERY WELCOME ARTICLE on "The Prosecution of Roman Magistrates-Elect" (*Phoenix* 24 [1970] 162–165) Professor D. R. Shackleton Bailey has reiterated and enlarged upon a view previously expressed, the correctness of which I had questioned (*Phoenix* 22 [1968] 51 f.). He holds that in the time of Cicero magistrates-designate were immune from prosecution in all *quaestiones* except the *quaestio de ambitu*, and he appends an extremely useful list of *ambitus* trials of *designati* attested in the late Republic. On *ambitus* trials we are in complete agreement, but I had argued that there is no need to assume that electoral bribery was the only charge on which *designati* could be prosecuted.[1]

Shackleton Bailey locates the evidence for a general immunity for magistrates-elect in Paulus' list of those who are disqualified from acting as *defensores* (*Dig.* 3.3.54), among whom is the person *qui magistratum initurus est*. Since *defendere est eandem vicem quam reus subire* (*Dig.* 3.3.51.1 [Ulpian]), Shackelton Bailey infers that the *magistratum initurus* could not be a *defensor* simply because he could not be a *reus*. Therefore, he argues, the *ambitus* court in which many Republican *designati* appear as *rei* must constitute an exception to the rule.

This argument is lucid but not completely acceptable. The list given by Paulus also mentions women and the chronically ill, and Shackleton Bailey declares that these people could not be *rei* either. But he presents no evidence that the chronically ill could not be sued, and it is known that women were allowed to be *rei* in *iudicia imperio continentia* (Ulp. 11.27). The Digest indeed has a long catalogue of those exempt from civil prosecution, composed in large part from a quotation of Ulpian (*Dig.* 2.4.2, reproduced below, 147). Ulpian's list of ineligible *rei* and Paulus' list of disqualified *defensores* are so different that one cannot reasonably suppose that they enumerated people of identical liability. Ulpian, for instance, does not mention the chronically ill at all, and the only class of women in his list is the bride (*eam quae nubat*), thus creating the unmistakable impression that all other women could be summoned. This seems to tell heavily against Shackleton Bailey's contention that "the classes of people excepted by Paulus ... were disqualified as *defensores*

[1]One should also notice that in Shackleton Bailey's list there are a few cases where the charge is not attested specifically as *ambitus*. The case of Hortensius and the *fasti* of 108 B.C., for instance, has given rise to notorious and fantastic speculations. For an appraisal, see Michael Swan, "The Consular *Fasti* of 23 B.C. and the Conspiracy of Varro Murena," *HSCP* 71 (1966) 235, 239 f.

. . . for one reason only—because they could not be summoned as defendants (*rei*) themselves."

That disqualification from being a *defensor* was not dependent on disqualification from being a *reus* seems clear also from *Dig.* 3.3.51 pr (Ulpian): *minor viginti quinque annis si defensor existat, ex quibus causis in integrum restitui possit, defensor idoneus non est, quia et ipsi et fideiussoribus eius per in integrum restitutionem succurritur.* Here a minor is barred from being a *defensor*, even though there was no rule preventing him from being a *reus*. The person suing a minor would have to reckon with the possibility of a *restitutio in integrum*, but he was not thereby prevented from the act of suing. Presumably the reason for disqualifying a minor from acting as a *defensor* was to avoid the unfair situation in which the victorious plaintiff would not be able to take advantage of the personal liability of a *defensor* (who could move for a *restitutio in integrum*) and would thereby be forced to relitigate against the *dominus*. The cases of the woman and of the minor show that it is unfounded to assume that disqualification from being a *defensor* derives from an inability to be a *reus*. One cannot therefore deduce from the fact that *designati* could not act as *defensores* a general rule exempting them from prosecution.

In view of this, what does Ulpian mean when he says *defendere est eandem vicem quam reus subire*? Ulpian introduces this in order to show that *defensor mariti in amplius quam maritus facere possit non est condemnandus* (*Dig.* 3.3.51.1). In other words, the *defensor* is said to "have the same liability as the *reus*" because he cannot lose more than the *reus* (i.e., the *dominus*) would have lost if the latter had contested the suit without representation. The plaintiff is thus prevented from winning from the *defensor* more than he would otherwise have won on the merits of the case if the *defensor* had not intervened. The word *reus* in Ulpian's formulation refers not to the *defensor* but to the *dominus*; it does not define the status of the *defensor*, but it reminds us that the status of the *dominus* is still pertinent to the issue. Ulpian's words are therefore not germane to the list of ineligible *defensores* produced by Paulus, including the man *qui magistratum initurus est.*[2]

But even if Shackleton Bailey's interpretation of Paulus' list were vindicated, it would not justify the sweeping conclusions which he draws. The list appeared in the fiftieth book of Paulus' *Ad Edictum*, and the jurist was discussing litigation in *causae liberales*.[3] This of course raises the possibility that the *defensores* mentioned were appearing not

[2]The wording and the positioning of Ulpian's formulation are significant. Ulpian does not say *defendere est fieri reus*, and he does not place it in the case he has just finished discussing to explain why a minor cannot act as a *defensor*.

[3]O. Lenel, *Palingenesia Juris Civilis* 1 (Leipzig 1889) 1061.

only on behalf of the defendants but also on behalf of the plaintiff, in which case the extract is entirely irrelevant to the problem under discussion.[4] Moreover, even if one concludes from this extract that the enumerated categories could not be *rei*, this would debar them from being prosecuted in *causae liberales* but it would not in itself prove that they could not be prosecuted in *any* civil litigation. Even less would it prove that they could not be *rei* in criminal *quaestiones*.

Some evidence is available dealing with private suits other than *causae liberales* which indicates that those about to assume an official position were liable to prosecution. An extract of Ulpian reads:

in ius vocare non oportet neque consulem neque praefectum neque praetorem neque proconsulem neque ceteros magistratus qui imperium habent qui et coercere aliquem possunt et iubere in carcerem duci: nec pontificem dum sacra facit: nec eos qui propter loci religionem inde se movere non possunt: sed nec eum qui equo publico in causa publica transvehatur. praeterea in ius vocari non debet qui uxorem ducat aut eam quae nubat: nec iudicem dum de re cognoscat: nec eum dum quis apud praetorem causam agit: neque funus ducentem familiare iustave mortuo facientem. [*Dig.*2.4.2].

Both in its present position in the Digest and in its original location in the fifth book of Ulpian's commentary on the praetorian edict this sentence is from a context dealing specifically with the mechanics of the *in ius vocatio*.[5] In this full and explicit statement, the specific purpose of which is to list those who are immune from prosecution in private litigation, the magistrates-designate are conspicuous by their absence. Only magistrates in office are mentioned. The rationale for their exemption is that they have *imperium* and the power of *coercitio*—and these are not attributes of magistrates-designate. In view of the detail in Ulpian's list and its purpose, one can surely conclude that *designati* were not included because they were not in fact exempt.

Two historical incidents support this conclusion. Vitellius' creditors tried to delay his departure for Lower Germany in A.D. 68 (Suet. *Vit.* 7.2.). Shackleton Bailey discounts this on the grounds that "Suetonius says nothing about litigation by the creditors." But the biographer remarks that Vitellius rid himself of the creditors' importunities *non nisi terrore calumniae*. The last word is a reference to the *iudicium calumniae* which

[4]It might then be argued that Paulus' list catalogues those who could not prosecute. But Paulus' list does not tally with the list of ineligible prosecutors in *iudicia publica* given by Macer in *Dig.*48.2.8; in particular the crucial classes of *qui rei publicae causa afuturus est* and *qui magistratum initurus est* are not in Macer's list. Moreover Macer's list is itself a product of the Empire and cannot be adduced in an enquiry on the state of the law in Cicero's time. He says, for instance, that magistrates in office could not accuse, whereas magistrates were still acting as prosecutors in the first century A.D. See now Shelagh Jameson, "22 or 23?" *Historia* 18 (1969) 206 ff., on this point refuting R. A. Bauman, "Tiberius and Murena," *Historia* 15 (1966) 420 ff.

[5]Weinrib, *Phoenix* 22 (1968) 35; Lenel, *op. cit.* (above, n. 3) 2.436.

punished vexatious litigation (Gai. *Inst.* 4.174–175). Vitellius' use of this as a method of intimidating his creditors is possible only if they had sued him or were threatening to do so. In either case Suetonius' statement is evidence of a very pertinent kind indeed. Similarly Julius Caesar, so it was rumoured, made a hasty exit from Rome to assume his pro-magistracy in Hispania Ulterior in 61 B.C. in order to escape suit by his creditors (Suet. *Iul.* 18.1, Plut. *Caes.* 11.1). Shackleton Bailey apparently admits the force of this example because he cannot explain it away except by speculating that "exemption may have been introduced later." But this hypothesis is no less fatal to his argument, for he believes that *designati* were exempt from prosecution in the last generations of the Republic: this cannot really be the result of a post-Caesarian exemption.

One further text is relevant to the question of whether *designati* were immune from prosecution in civil suits. Ulpian writes (*Dig.* 47.10.32):

nec magistratibus licet aliquid iniuriose facere. si quid igitur per iniuriam fecerit magistratus vel quasi privatus vel fiducia magistratus, iniuriarum potest conveniri. sed utrum posito magistratu an vero et quamdiu est in magistratu? sed verius est, si is magistratus est qui sine fraude in ius vocari non potest, exspectandum esse quoad magistratu abeat. quod et si ex minoribus magistratibus erit id est qui sine imperio aut potestate sunt magistratus et in ipso magistratu posse eos conveniri.

There are three points to be noticed. Once again, only magistrates in office are here discussed, and there is no hint that the position of *designati* might give rise to similar problems if they behaved *iniuriose*. Presumably there was no question but that *designati* could be prosecuted. Secondly, Ulpian lays it down that minor magistrates can be prosecuted in office but the higher magistrates could be summoned only after retiring from office. The distinction between lower magistrates and higher ones is that the former have *imperium* and the latter lack it.[6] In other words, what frustrates the summoning of a higher magistrate is that he may exercise the prerogatives of his office in his own defence. This type of behaviour is not available to a magistrate-designate, who is after all still a *privatus*, and accordingly *designati* would not be exempted from a summons to litigation. Thirdly, and surely decisively: the text shows that some magistrates were liable to prosecution even during their term of office. Ulpian's opinion here is confirmed both by a passage in Aulus Gellius (13.13) discussing precisely this problem and by a comment of the jurist Javolenus in *Dig.* 18.6.14 (13) to the effect that aediles can be sued on an *actio legis Aquiliae*. If some magistrates in office were not immune from prosecution, then *a fortiori* there could have been no general exemption for magistrates designate.

[6]Aul.Gell. 13.15.4. As Ulpian says in another passage (*Dig.*2.4.2, quoted above in full): *magistratus qui imperium habent qui et coercere aliquem possunt et iubere in carcerem duci.*

Finally, *quaestiones*. Shackleton Bailey bases his case on Paulus' list of ineligible *defensores*. As we have seen, there are two weaknesses in this: the list is probably irrelevant to *rei* and it deals with civil litigation in *causae liberales* rather than with the rules governing the permanent criminal courts. Aside from the *quaestio de ambitu*—where the instances have been admirably dealt with by Shackleton Bailey—the evidence is sparse, but there seems to be nothing to justify assuming that *designati* could not be prosecuted on any charge but electoral bribery. Rather the contrary. In the *lex Acilia repetundarum* there was a list of magistrates who could not be accused *dum mag(istratum) aut imperium habebunt*. One should note that the law says *habebunt*, not *habebunt habituri sunt*.[7] This may account for the plea of those who were prosecuting M. Aemilius Scaurus for extortion in the summer of 54 B.C. when he was a candidate for the consulship: *timere ergo se ne Scaurus ea pecunia quam a sociis abstulisset emeret consulatum et, sicut pater eius fecisset, ante quam de eo iudicari posset magistratum iniret* (Asc. 19C). The last clause indicates that a politician achieved security from the judicial process only when he formally entered upon his magistracy, not when he won election.[8] Similarly with the *quaestio de adulteriis*. In response to the president of the court, a rescript of the emperor Tiberius laid down the special procedure to be followed if a public official should be accused of this crime: there is no indication that magistrates-designate could cause similar perplexities.[9] Most significantly of all, even magistrates during their term of office were not uniformly exempt from

[7] *Lex Acilia Repetundarum* 8 (see Bruns *Fontes*[7] 60). The argument is not quite decisive, since we do not know what was in the lacuna at the end of line 8 and the beginning of line 9.

[8] The significance of the phrase *magistratum inire* is especially familiar to readers of Livy. The prosecutors of Scaurus wanted to finish the case before the consular comitia (Asc. 19C) but this reflects practical considerations not juridical ones. A consul-designate would be a very hard man to convict (this is presumably the point of Cicero's comment on the case, *Att.* 4.15.9); and the Sardinians were afraid that if they allowed Scaurus' campaign to continue so that, in the atmosphere of prodigious bribery in 54, he succeeded in "buying the consulship with their money" (Asc. 19C), he would not have sufficient assets to make restitution even if they did win a conviction.

My colleague Professor C. P. Jones has kindly drawn to my attention the frantic efforts of C. Sempronius Rufus to avoid prosecution in the last months of 51 B.C. *quod videbat, si extraordinarius reus nemo accessisset, sibi hoc anno causam esse dicendam* (Caelius in Cic. *Fam.* 8.8.1). This is usually explained by supposing that Sempronius was looking forward to a more sympathetic president of the court in 50, but it is also possible that he was himself a magistrate-designate and would not gain exemption from prosecution until he actually entered office.

[9] *Dig.* 48.5.39.10 (Papinian): *si quis in honore ministeriove publico sit, reus quidem postulatur sed differtur eius accusatio et cautionem iudicio sistendi causa promittit in finem honoris et hoc ita Tiberius Caesar rescripsit.* Magistrates-designate could have been provided for by simply writing *sit futurusve sit*. On a possible context for this rescript see Weinrib, *Phoenix* 22 (1968) 36.

prosecution in the *quaestiones*. The principate of Augustus, for instance, saw the trial of a quaestor in the *quaestio de sicariis*.[10] In view of this it would be unreasonable to postulate that magistrates-designate enjoyed an immunity from prosecutions before the *quaestiones* which was not available to magistrates in office.

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[10]Dio 56.24.7. In my article in *Phoenix* 22 (1968) 44 f. I adduced the trial in 58 B.C. of Caesar's *quaestor* (Suet. *Iul.* 23.1) as another example of magisterial liability. This was not quite proper, since this quaestor may have been Caesar's *quaestor* during the consulship of 59 and therefore no longer in office at the time of the trial. Cf. M. Gelzer, *Caesar: Politician and Statesman* (Cambridge, Mass. 1968) 97; E. Badian, *CQ* 19 (1969) 200–201. Although it would strengthen my present case, I cannot in all conscience bring myself to accept the very interesting and ingenious arguments of R. A. Bauman, *The Crimen Maiestatis in the Roman Republic and the Augustan Principate* (Johannesburg 1967) 93 ff., that the quaestor concerned was actually Caesar's legate P. Vatinius (tr. pl. 59 B.C.).