

SOME OBSERVATIONS ON THE CIVIL LAW ATTITUDE TOWARDS SELF-REDRESS AND SELF-DEFENCE

by

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Andreas B. Schwarz was one of those rare scholars who, while remaining a master in the technicalities of ancient law, was also able to extend his researches and writings to more modern legal history and to modern law, one form of which it was indeed his main duty in his later years to expound. It is indeed remarkable that one person should have been an acknowledged expert in the law of the papyri, expounded some of the most interesting relations between English legal thought and that of the Continent, and written some of his most illuminating work on the pre-history of the modern codes. He was a comparative lawyer of the highest type, for he brought to the task both wide learning and unusual powers of sympathetic imagination.

We were friends for many years and it is with the deepest grief and affection that I dedicate this slight comparative essay to his memory*.

One interest of the subject I have chosen is that it exhibits an admitted difference between the Roman and the so-called "Germanic" systems, for the Germanic systems do in fact allow a larger scope to the individual acting without judicial authority than

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did the Roman. But we can also find here a salutary warning against making too much of such differences. Nineteenth century writers, and nationalists of one sort or another in Germany more recently, have tended to ascribe them to deep-seated racial antagonisms, but in truth chance has often played the greater part. In the present case chance took the particular form of an emperor who was more of a moralist than of a lawyer and gave vent to an outburst against self-help when he was sitting in judgment. The history of the subject illustrates also the curious fate that can attend individual texts of the Corpus Juris, and especially how sometimes one of doubtful relevance and even considerable obscurity may be dragged out of its seclusion and quoted over and over again in support of a particular doctrine, simply because that doctrine seems necessary to the interpreters and authority must, by hook or by crook, be found for it.

As civilized beings we tend to think that recourse to a court is normally necessary for the redress of wrongs, but it is not in fact true to say of Roman any more than it is of common law, that self-redress is, in principle, forbidden; the retaking of his thing by an owner without violence is as lawful in the one as in the other system. But it is true that in its developed state Roman law allowed comparatively few exceptions to the rule that an act primarily unlawful does not become lawful because it is done for the purpose of enforcing a right, and in fact it has often been held that in Roman, as opposed to Germanic law, self-redress is in principle unlawful.¹ The excuse for this view lies in the famous judgment (*decretum*) of Marcus Aurelius to which allusion has already been made. It is more notable for its dramatic quality than for the technical precision of its formulation. "Do you think," said the emperor to a party who had pleaded that he had done no violence, "that there is violence only when men are wounded? There is violence whenever a person claims what he thinks is owing to him otherwise than through a judge."² He then proceeded to start un-

1) Gierke. Deutsches Privatrecht I. 335.

2) "Tu vim putas esse solum si homines vulnerentur? vis est tunc quotiens quis id quod deberi sibi putat non per iudicem reposit., D.4.2.13; cf. D.48.7.7 The "decretum" is quoted twice.

ending trouble by laying down that claims thus unlawfully enforced should be forfeited, a rule which, when applied to ownership, means, for instance, that if I take my umbrella out of your possession without judicial authorisation, it immediately ceases to be my umbrella.³ However, whatever may be the technical defects of Marcus Aurelius' formulation, he certainly did wish to discourage self-redress, and those who desired to exalt his enactment into a general principle forbidding it altogether could find other texts to support their view. Paulus, for instance, is quoted in one passage as saying "Private individuals should not be allowed to do what can be done officially by a magistrate, for fear of providing an opportunity for serious disorder."⁴ The words were originally written with respect to an interdict of some sort, but they are put by Justinian's compilers in that title of the Digest which includes the legal maxims, and were thus no doubt intended to be generalised, and when generalised they can be construed as a prohibition of all sorts of self-redress. Another text often adduced for the same purpose is a rescript of Diocletian's, which tells a woman that after her husband's death, she cannot simply retake property that had been given to him by way of dowry, but must bring an action against her husband's heirs.⁵ The mistake she evidently made was one that appears natural enough when we remember that the husband's ownership of the dotal property was something of a technicality, and that Justinian could speak of its having remained "naturally" in the wife's ownership,⁶ but retaking without an order of the court was not permitted.

As regards self-redress by anything in the nature of distraint, early Roman law had indeed known of a process called "seizing a pledge," which was an extra-judicial method of enforcing a few privileged claims,⁷ but this had long been obsolete even in the

3) Cf. J.4.2.1.; 4.15.6; C.8.4.7; and for some of the complications resulting from this reintroduction of the "talio" principle, E. Levy, *West Roman Vulgar Law* I.250 et seq.

4) D.50.17.176.pr. It is not known which interdict was being discussed.

5) C.5.18.9.

6) C.5.12.30.pr.

7) "Pignoris capio", Gaius IV, 26-29.

classical period, and there is really no warrant for anything of the sort in the Roman sources. To post-Roman writers, however, presumably because they saw distraint constantly being exercised under "Germanic" systems, this seemed an impossible state of affairs, and they commonly say that self-redress is permissible in case of *necessity*, i.e. if irreparable damage would result from waiting until state help could be invoked.⁸

Traditionally the text quoted in support of this doctrine is one which, at most, on the face of it, presupposes that it is lawful for a creditor to stop an absconding debtor and take money from him. It does not even imply this at all clearly, and all it actually says is that if one of a number of creditors does take money in this way, it makes a difference (from the point of view of the other creditors' remedy) whether he does this before or after bankruptcy proceedings have got as far as putting the creditors in possession of the debtor's estate. In spite of its doubtful cogency, however, this text is constantly quoted as giving the right of self-redress in exceptional circumstances, and it is sometimes bolstered up by another, that did indeed give such a right, but in such a very peculiar case that an impartial interpreter could hardly have found a general rule in it. The case is that of a defaulting member of a city council, and the emperors say that, if the provincial governor is absent, the defaulter may be arrested (evidently without authority) and brought up for investigation later.¹⁰ Even more interesting, however, as an example of medieval reasoning, is the argument that self-redress is an example of a man's being judge in his own case, and that although this is generally forbidden,¹¹ it may be permissible in some circumstances, in particular if the judge cannot be found in time.

It is also sometimes said that self-redress is permissible if it has been agreed upon beforehand, so long as it is kept within the limits of the agreement, but again textual authority is meagre.

8) Cf. Windscheid, I.623; Dernburg, I.221.

9) D.42.8.10.16.

10) C.10.32.54.

11) C.3.5.1. unica.

Generally it is confined to a text¹² which does indeed say that unpaid creditors who make an entry in accordance with the terms of an agreement are not guilty of violence, but adds that they ought to obtain the authority of the provincial governor. It is in fact remarkable how little the Roman sources have to say about agreements expressly providing for execution without recourse to the courts in case of default by the debtor, seeing that we know from the papyri that they were a very common feature of Greek practice, and continued to exist in Egypt up to the end of the third century.¹³

One particular type of agreement, however, which might lead to self-redress of a sort, was well known to the Romans. This was a mortgage of chattels brought into the premises (*invecta et illata*) by the lessee of a building as security for the rent. On default the landlord, as mortgagee, had the right to possession which he could enforce without judicial authorization at least to the extent of preventing removal of the property. In classical law it appears that the agreement had to be express,¹⁴ but it was evidently very common in the city of Rome, and Justinian enacted that it should be implied in all cases.¹⁵ From his law it has passed, with variations, into many modern systems.¹⁶

In self-defence (as opposed to self-redress) violence is certainly, in general, permissible. "All statutes and all rules of law," says Paulus, "allow people to repel force by force."¹⁷ Consequently, if your slave attacks me and I kill him in self-defence, I shall not be liable under the *lex Aquilia* for destroying your property. But how far exactly does this go? In early law very probably there was no more to be said; killing an attacker was a lawful, not an unlawful, damage to property.¹⁸ But by Justinian's time, and

12) C.8.13.3.

13) Taubenschlag, *Law of Greco-Roman Egypt*, I.410.

14) F. Schulz, *Classical Roman Law* 411 (1951).

15) C.8.14.7.

16) E.g., Art. 2102, French Civil Code; Art. 2705, La. Civil Code of 1870; §561, German Civil Code; §272, Swiss Civil Code.

17) D.9.2.45.4.

18) This is the "first theory" mentioned by Dr. F. F. Stone, in his article, *The Aggressor Doctrine*, 21 *Tulane L. Rev.* 362 (1947); at p. 364, where he quotes D.1.1.3. and 9.2.4.pr.

perhaps as early as the classical period, there had been considerable refinement, and we are probably justified in saying, as is generally done, that no greater force is permitted than is sufficient to ward off the threatened danger. The texts do not put the principle quite in that general form, but Justinian, after saying that there is no liability if you kill a highwayman (who is somebody else's slave), adds "at any rate if you cannot escape the danger in any other way."¹⁹ The same limitation applies in Justinian's law to the right to kill a thief who comes by night, which the Twelve Tables had given unconditionally. Originally this right was probably not regarded as having anything to do with self-defence, but was a permitted case of self-help or vengeance; in the later law, however, it is felt to depend on the general rule of self-defence, and therefore to be justifiable only subject to the same limitations.²⁰ It is curious to notice that an echo of this famous provision of the Twelve Tables survives in the French Penal Code, which lays down²¹ that the plea of "legitimate defence" includes cases in which injuries have been inflicted on a person who breaks in during the night, and it is still controversial whether this means that the presumption of lawfulness is conclusive or that it may be rebutted by showing that in the particular circumstances such a violent defence was not necessary.²²

Another Roman text often cited in this connection is a rescript of Diocletian's,²³ allowing a lawful possessor to repel forceful aggression by force, into which the rather obscure words with the moderation of blameless defence"²⁴ have been interpolated. These words may be held to support the limitation of force to what is necessary to avoid the threatened danger, but they have also sometimes been quoted to uphold a further limitation that the force used must not be incommensurate with the seriousness of the wrong threatened, so that killing, for instance, is not justifiable

19) J.4.3.2. Cf. "cum aliter tueri se non possent" in D.9.2.45.4. cit.

20) D.9.2.4.1. Compare 48.8.9 with Collatio 7.3.2-3.

21) Art. 329.

22) Mazeaud, *Responsabilité Civile*, I (1947) 453.

23) C.8.4.1.

24) "Inculpatæ tutelæ moderatione".

even if it is the only way to prevent a minor theft. The existence of this further limitation is not always recognized, and the German Code, it is worth noticing, does not express it, though it does have a corresponding limitation on the permission it gives to infringe other persons' rights in case of necessity, *i.e.* in order to avoid damage which is much more serious than that inflicted by the infringement.²⁵ The "aggressor principle," based mainly on a famous text from Alfenus,²⁶ is also, in a sense, a limitation on the right of self-defence. It had been used a generation earlier by Quintus Mucius, who even applied it in order to decide which owner was liable to the other in an action *de pauperie* when two people's bulls or rams had killed each other in a fight.²⁷ But it was older than that, at any rate in Greece, where Athens had a rule placing the blame on the man who had "first resorted to unlawful use of his hands."^{27a}

In the Roman system questions of self-redress and of self-defence are often bound up with the rules of the possessory interdicts. In the classical law forceful, but not armed, retaking of land was generally permitted, for it was an answer to the interdict *de vi cottidiana* (which complained of ejection by unarmed force) to plead that the plaintiff had previously ejected the defendant. In Justinian's law no such plea was allowed whether the force complained of was armed or unarmed,²⁸ but it was the rule that permissible self-defence included the *immediate* retaking by force of property of which one had been forcibly deprived. Julian indeed, in the classical period, had taken the view that in a fight it is only the final outcome which counts, and that momentary capture is not therefore ejection of the other party.²⁹ But this subtlety evidently did not suffice for Justinian's compilers (or some earlier editors), for the rather cruder rule permitting any immediate

25) Subject to compensation, see German C.C. §228 on "Notstand" and contrast §227 on "Nothilfe".

26) Stone, *loc. cit.* supra note 18, at 365.

27) D.9.1.1.11.

27a) See, e.g. Lipsius, *Das Attische Recht* 645.

28) See, e.g. Buckland, *A Textbook of Roman Law* 735 (1932).

29) D.43.16.17.

retaking was interpolated into another text,³⁰ and that rule has survived into the German civil code.³¹

These observations, it is scarcely necessary to add, are not intended as a contribution to the modern law of the subject, either civil or common, but purely as an essay in the history of legal ideas. It may happen, however, that history here, as in other cases, can be an aid to clarification of thought.

30) D.43.16.3.9.

31) §859.