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Adam Smith and Roman Servitudes

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Adam Smith lectured in jurisprudence during his time as Professor of Moral Philosophy in the University of Glasgow (1752-1764). Jurisprudence covered private law and most of public law, and Smith cites generous amounts of Roman law, English law, and Scots law. The lectures are known to us mainly through two sets of students' notes, based on lectures given in 1762-63 and (probably) 1763-64 respectively¹. These lectures were part of a

* The author is grateful to have had the advice of Peter Stein and John Cairns in preparing this essay.

¹ The two lectures are published together in the critical edition: Adam Smith, *Lectures on Jurisprudence*, ed. R. L. Meek, D. D. Raphael, and P. G. Stein, Oxford 1978, reprinted Indianapolis 1982. The editors have assigned the title 'Report of 1762-63' to the earlier, and 'Report dated 1766' to the later, of the notes; references to these reports are abbreviated below to LJ(A) and LJ(B), respectively. Interest in these lectures is high, because the notes to LJ(A) were discovered comparatively recently, in 1958. The notes to LJ(B) were discovered in 1895, and published in Adam Smith, *Lectures on Justice, Police, Revenue and Arms, delivered in the University of Glasgow*, ed. E. Cannan, Oxford 1896. In addition to these two sets of notes, we possess some extracts from a student's notes to an earlier course of Smith's lectures, perhaps given in the middle 1750s: R. L. Meek, *New Light on Adam Smith's Glasgow Lectures on Jurisprudence*, *History of Political Economy*, 8 (1976), p. 466-77 [= R. L. Meek, *Smith, Marx and After*, London 1977, p. 81-91] ('Anderson Notes'). There are also some brief remarks on the lectures related by Dugald Stewart, professor of moral philosophy at Edinburgh, from an account given to him by one of Smith's pupils: Dugald Stewart, *Account of the Life and Writings of Adam Smith, LL.D.* [1793], in: Adam Smith: *Essays on Philosophical Subjects*, ed. W. P. D. Wightman, J. C. Bryce, and I. S. Ross, Oxford 1980, reprinted Indianapolis 1982, p. 273-76.

larger course of lectures on moral philosophy², and presented the history of laws and institutions in the framework of a certain historical jurisprudence. This historical jurisprudence was not peculiar to Smith; it had been used by some of his contemporaries and predecessors. Montesquieu was probably the first to use it³, and other writers, French and Scottish, quickly took it up⁴. Smith was one of its principal contributors⁵, refining the ideas and combining them with the ethics he had developed in *The Theory of Moral Sentiments*⁶.

² On the content, see Stewart, *Account* (*supra*, n. 1), p. 274-75 (account of John Millar). The moral philosophy lectures covered natural theology, ethics, and jurisprudence, the last of these subdivided into justice and 'political regulations founded on the principle of expediency' (= police, revenue, and arms). The distinction between 'justice' and 'police, revenue, and arms' in Smith's thought is based on ideas developed in *TMS*, ideas which Smith presented in the lectures on ethics. *Ibid.*, 274.

³ Montesquieu, *De l'esprit des lois* XVIII ('Des lois, dans le rapport qu'elles ont avec la nature du terrain'). MacCormick has found suggestions of this jurisprudence earlier, in Stair (see Viscount of Stair [James Dalrymple], *The Institutions of the Law of Scotland*, ed. D. M. Walker, Edinburgh 1981, p. 306-307 (at 2.1.29-32)). N. MacCormick, *Law and Enlightenment*, in: *The Origins and Nature of the Scottish Enlightenment*, ed. R. H. Campbell and A. S. Skinner, Edinburgh 1982, p. 160-63. His larger point is that a belief in a rational natural law is not incompatible with a belief in social change. *Ibid.*, 160.

⁴ The subject has been treated extensively in R. L. Meek, *Social Science and the Ignoble Savage*, Cambridge 1976. Among the French writers after Montesquieu, Turgot is the most prominent: see Anne Robert Jacques Turgot, *A Philosophical Review of the Successive Advances of the Human Mind*, in: R. L. Meek, ed., *Turgot on Progress, Sociology and Economics*, Cambridge 1973, p. 41-59; idem, *Plan d'un ouvrage sur la géographie politique*, in: *Oeuvres de Turgot*, 1, ed. G. Schelle, Paris 1913, p. 259-60. Among the Scottish writers, besides Smith, the most prominent contributors are Kames, Sir John Dalrymple of Cranstoun, and John Millar. See Lord Kames [Henry Home], *Historical Law-Tracts*, 2nd ed., Edinburgh 1761, p. 81-100; John Dalrymple, *An Essay Towards a General History of Feudal Property in Great Britain*, 2nd ed., London 1758, p. 75-78 (under the title 'History of the Alienation of Land-property'); John Millar, *An Historical View of the English Government*, London 1787, p. 27-41 (under the title 'Character and Manner of the Saxon').

⁵ Meek says that a good case may be made that Smith was the originator of the theory in its most famous form: the 'four stages theory'. Meek, *Social Science* (*supra*, n. 4), p. 99. More guarded: A. S. Skinner, *Historical Theory*, in: *A System of Social Science: Papers Relating to Adam Smith*, 2nd ed., Oxford 1996, p. 98-99.

⁶ For discussions of this combination of historical jurisprudence and morals, see P. Stein, *Legal Evolution: The Story of an Idea*, Cam-

This essay discusses Smith's treatment of Roman servitudes and the difficulties he met in bringing servitudes into his historical jurisprudence. These difficulties are not specific to servitudes, but part of a wider problem affecting Smith's project. The problem very briefly is this. Smith was a highly learned man and entirely at home in the sources of antiquity⁷. But he had set himself the difficult task of explaining the 'causes' of laws and institutions, and Roman law gave him a surfeit of information. He sometimes found it difficult to accommodate the information to the theory. Writers in the earlier tradition had an easier task: they made a two-fold division, attributing certain rules to the existence of civil authority, reserving others to the state of nature. Smith aspired to something more difficult and could not be so general in his conclusions: a civilization existed in one or another distinct 'age', and the historical data had to be explained causally with respect to each age.

The success of Smith's historical jurisprudence has always been uncertain. He hoped in his lifetime to complete a book on the general principles of law and government, and he probably intended to treat his jurisprudence more thoroughly there⁸. He was not able to complete the book, and he directed the drafts to be burned before his death. The reasons for his failure to complete the book are not known, and some have speculated that he met a serious obstacle he could not overcome⁹. I suggest below that servitudes caused him to stumble, but not that the wider problem

bridge 1980, p. 39-46; K. Haakonssen, *The Science of the Legislator: The Natural Jurisprudence of David Hume and Adam Smith*, Cambridge 1981, chh. 5-8. References below to *The Theory of Moral Sentiments* (TMS) are to the critical edition: Adam Smith, *The Theory of Moral Sentiments*, ed. D. D. Raphael and A. L. Macfie, Oxford 1976, reprinted Indianapolis 1982.

⁷ See Stewart, *Account* (*supra*, n. 1), p. 272; P. G. Stein, *Adam Smith's Theory of Law and Society*, in: *Classical Influences on Western Thought, A.D. 1650-1870*, ed. R. R. Bolgar, Cambridge 1979, p. 265-73; G. Vivenza, *Adam Smith and the Classics: The Classical Heritage in Adam Smith's Thought*, Oxford 2001, p. 1-6.

⁸ His *Wealth of Nations* fulfilled his goal so far as political regulations were concerned, but not so far as justice was concerned. References below to *Wealth of Nations* (WN) are to the critical edition: Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. R. H. Campbell, A. S. Skinner, and W. B. Todd, Oxford 1976, reprinted Indianapolis 1981, 2 vols.

⁹ See C. Griswold, *Adam Smith and the Virtues of Enlightenment*, Cambridge 1999, p. 30-31, 256-58, and the discussion and literature cited in D. Winch, *Adam Smith's Politics: an Essay in Historiographic Revision*, Cambridge 1978, p. 12-27.

which servitudes represented was a serious obstacle. To the contrary, I suggest that Smith may have recognized the problem and undertaken to solve it by being more selective in his use of Roman law sources.

1. — Smith's two accounts of Roman servitudes

The excerpts from Smith's lectures given below are very slightly abbreviated. I have omitted some of the conventional portions of his account¹⁰ in order to focus on what is unique: *the proposition that servitudes originally gave rise to personal rights*¹¹.

a) Lectures of 1762-63

Smith discusses servitudes under the heading of real rights. In this passage he gives the fullest description of his views¹².

Servitudes are burthens or claims that one man has on the property of another. The Romans considered servitudes as being either real or personal; i.e. as being due by a certain person or by a certain thing. . . . It is to be observed that all servitudes were originally personall; and this will easily appear if we consider the manner in which they have been introduced. Thus to take a common instance, we shall suppose that the farm of one man lies betwixt the high way or the market town and the farm of his neighbour. Here it will be very convenient if not highly necessary that the possessor of the former farm should have the liberty of a road thro the farm of his neighbour. This he may obtain for a certain gratuity from the possessor; and take his obligation to grant him that liberty in time to come. This would be given him not as being such a man but as being possessor of such a farm, and would be stipulated not only for him but for his heirs and successors likewise. And if he should afterwards sell or dispose of his farm he would account that liberty as a part of his possessions, and demand some reasonable compensation for it from the purchaser as well as for the farm itself.—But let us suppose that the proprietor of the servient farm should dispose of his farm, and that he should according to agreement with the

¹⁰ LJ(A) i.17-18 gives a more conventional treatment: it is set out below in the text accompanying note 114, where I discuss its significance.

¹¹ I have reproduced the spelling and punctuation of the critical edition without noting where they would depart from modern conventions.

¹² LJ(A) ii.14-16, 19.

owner of the dom. praed. take the purchaser bound to grant him the liberty stipulated; that the farm in this manner passes thro three or four different hands; and that the 4th possessor refuses to grant him the liberty stipulated. In what manner shall he compel him to perform it. He is bound indeed to the third possessor, but not to him, so that the dom. prae. dom. can have no action against him. He can only come at his right by raising an action against the first possessor, to make him perform the obligation he had come under. He again might compel the 2d, and he the third, and he the 4th; or he might raise an action against the 1st to oblige him to cede to him the obligation the 2d had come under, and then the 2d the 3rd and so on. To prevent such a multiplicity of actions, which would often be very troublesome, it came to be enacted by *actio servitiae* [sc. *actio Serviana*], and afterwards by the *actio quasi servit.* [sc. *actio quasi-Serviana*], first that some and afterwards that the greater part of servitudes should be considered as real rights.

...
All burthens on property, as they can only have taken their rise from a contract, must originally have been personall, as was said, for a contract can produce nothing but a personall right. They became real only by the intervention of the law.

He goes on to discuss other real rights, and concludes:¹³

I have now considered the severall real rights, not only property but also servitudes and pledges, and shown that these were originally merely personall rights, tho by the determination of the legislature, to prevent the confusion this was found to produce, they were afterwards changed into real rights.

b) Lectures of 1763-64

In this set of lectures, some of the relevant discussion falls at the very beginning, by way of introduction to the lectures as a whole.¹⁴

Servitudes are burthens upon the property of another. Thus I may have a liberty of passing thro' a field belonging to another which lyes between me and the high way, or if my neighbour have plenty of water in his fields and I have none

¹³ LJ(A) ii.37.

¹⁴ LJ(B) 9.

in mine for my cattle, I may have a right to drive them to his. Such burthens on the property of another are called servitudes. These rights were originally personal, but the trouble and expence of numerous lawsuits in order to get possession of them, when the adjacent property which was burthened with them passed thro' a number of hands, induced legislators to make them real, and claimable a quocumque possessore. Afterwards the property was transferred with these servitudes upon it.

Further on is a fuller discussion, corresponding to the first of the quoted passages from the earlier lectures:¹⁵

The second species of real rights is servitudes, or burthens which one man has on the property of another. These rights were at first personal, as they were entered into by a contract between the persons. It is necessary that I should have a road to the market town. If a man's estate lye between me and it, I must bargain with him for the priviledge of a road thro' it. This contract produces only a personal right, tho' I should bind him not to sell this estate without the burthen. But here was an inconveniency, for if the land were sold and the new proprietor refused the road, I could not sue him on a personal right upon the former proprietor. Before I can come at the new purchaser I must pursue the person from whom I had the right, who must pursue him to whom he sold it. If the land has gone thro' several hands this is very tedious and inconvenient. The law, to remedy this, made servitudes real rights, demandable a quocumque possessore. . . . [Servitudes] are all naturally personal rights and are only made real by lawyers.

2. — A modern critique

To the proposition that servitudes originally gave rise to personal rights, a modern reader would probably respond as follows.

(1) It is hazardous to speculate about the real or personal character of rights in early Rome¹⁶. In the classical law, where litigation was carried out with clear, written pleadings and where a substantial juristic literature helps us to distinguish one claim from another, distinctions such as 'real' and 'personal' are rela-

¹⁵ LJ(B) 172.

¹⁶ I pass over the question whether it is correct to speak of 'rights' at all in early (or classical) Rome. See H. F. Jolowicz, *Roman Foundations of Modern Law*, Oxford 1957, p. 73. It almost certainly is not, but the point is not relevant to the present discussion.

tively easy to identify¹⁷. But in the pre-classical law, where information is limited and strict legal forms dominated in both transactions and litigation, the modern reader tends to rely heavily on the forms, and does not leap to characterize an institution as real or personal without evidence. To understand what character a servitude assumed in the earliest law, a modern reader would consider, e.g., how servitudes were created, extinguished, or enforced¹⁸.

(2) The view that Roman predial servitudes (the focus of Smith's discussion) were originally personal in nature, but were then made real by law, is an eccentric view¹⁹. The modern view is the very opposite, that predial servitudes, if anything, were historically even more profoundly tied to the property that was their object. The four original servitudes (*iter, actus, via, aquae ductus*) were *res mancipi* and transferred by *mancipatio*: this suggests that ownership of a servitude was originally regarded as the ownership of a corporeal thing (a patch of earth, a spring), the ownership being shared in some respect between the persons involved²⁰. Watson says: 'It seems now to be completely accepted that the four original servitudes were in early law regarded in some way as involving ownership over the objects of the servitudes.'²¹

(3) The Servian action and the quasi-Servian action are miscited by Smith²². These actions relate to pledge and hypothec: the Servian permitted the landlord of an agricultural tenant to

¹⁷ See W. W. Buckland and A. D. McNair, *Roman Law and Common Law: A Comparison in Outline*, 2nd ed. rev. F. H. Lawson, Cambridge 1952, p. 89 (the distinction between *iura in rem* and *iura in personam* is 'clearly expressed throughout the Roman system'). In the *formulae* for actions claiming or denying servitudes, the nature of the right is always clear: *ius esse* or *ius non esse*. See D. Mantovani, *Le Formule del Processo Privato Romano*, 2nd ed., Padova 1999, p. 41-44.

¹⁸ In this respect Smith was at a disadvantage, not having the benefit of Gaius' *Institutes* and in particular Gaius' discussion of the *legis actio* procedure. On the remedies for enforcement of ancient servitudes, see M. Kaser, *Das römische Privatrecht*, 1, 2nd ed., Munich 1971, p. 143; cf. G. Diódsi, *Ownership in Ancient and Preclassical Roman Law*, Budapest 1970, p. 115 (discussing the inadequacy of the *legis actio sacramento in rem* for protecting ancient servitudes).

¹⁹ But see below notes 138 to 144 and accompanying text.

²⁰ M. Talamanca, *Istituzioni di Diritto Romano*, Milan 1990, p. 456-57; Kaser, *Privatrecht*, 1 (*supra*, n. 18), p. 143; A. Watson, *The Law of Property in the Later Roman Republic*, Oxford 1968, p. 184; H. F. Jolowicz and B. Nicholas, *Historical Introduction to the Study of Roman Law*, 3rd ed., Cambridge 1972, p. 158.

²¹ Watson, *The Law of Property* (*supra*, n. 20), p. 184.

²² As noted by the editors: see LJ(A), p. 77 n.83.

recover pledged property from third persons, while the quasi-Servian extended the protection, eventually to cover all property under hypothec²³. Neither action has anything to do with servitudes.

From the above, we might conclude that Smith did not intend what he expressed, but committed an error. We might, for example, conclude that Smith's misunderstanding of the Servian and quasi-Servian actions led him to attribute to servitudes what is true only of pledge and hypothec. I do not believe this is what Smith has done, however. The references to the Servian and quasi-Servian actions are of course wrong but, as I suggest below, their appearance here is probably the result of Smith misremembering his source, rather than a conscious error on his part²⁴. A second possibility is that Smith somehow missed the nuance of 'real servitude' and 'personal servitude', and became confused²⁵. This possibility is supported by a sentence in LJ(A) ii.14, quoted above, where Smith says that servitudes are 'either real or personal; i.e. as being *due by* a certain person or by a certain thing'. But again, I do not believe Smith has fallen into this trap either. Further on in this lecture he shows that he understands entirely the nuance of the phrase 'real servitude': 'A real servitude, *servitus realis*, is not a servitude upon a certain thing, *for all servitudes are due in that manner*, but a servitude which is due to a person not as being such an one but as being the owner of such a farm; it is said to be *due to* such a thing.'²⁶ Several works familiar to Smith also make the distinction between real and personal servitudes very clear, and it is hard to believe he was not aware of it²⁷. That in one place the text reads 'due by' rather than 'due to' is probably a slip, either Smith's or the note-taker's.

²³ J. *Inst.* 4.6.7, 31; D.20.1.10, h.t.21.3, 20.6.4 (Ulpian 73 *ed.*); D.13.7.28 pr. (Julian 11 *dig.*); D.16.1.13.1 (Gaius 9 *ed. prov.*).

²⁴ It might be useful here to mention that in LJ(B) 174 there is a somewhat misleading abbreviation by the note-taker. Smith here refers to the ability of a landlord to claim the stock of his tenant from any possessor, and because the reference is introduced by the word 'anciently', this might be taken as a reference to the *actio Serviana*. However, a comparison with the corresponding passage in the earlier notes, LJ(A) ii.24, shows that he is speaking of Scots law.

²⁵ Perhaps on reading D.8.5.2 pr. (Ulpian 17 *ed.*): *De servitutibus in rem actiones competunt nobis ad exemplum earum quae ad usum fructum pertinent.*

²⁶ LJ(A) ii.52 (emphasis added). See also LJ(A) ii.37-38, where Smith takes pains to distinguish an 'exclusive privilege' from a servitude which, judging by context, is probably a personal servitude.

²⁷ See especially Pufendorf, *De officio hominis et civis* 1.12.8; Gerschom Carmichael, *Supplementa et Observationes ad Clarissimi Viri*

Smith's theory of the origin of servitudes, I argue, was conscious and deliberate. We can identify some of the sources for this theory fairly confidently, and we can also speculate on the reasons why he adopted this theory. Before discussing these matters I give short description of Smith's historical jurisprudence.

3. — Smith's historical jurisprudence

Smith's historical jurisprudence is based on the idea that a civilization provides for its subsistence in a certain way, and that the way it does so provokes the creation of certain legal ideas. This jurisprudence is part of a larger historical theory, according to which a civilization progresses from one mode of subsistence to another—one 'age' to another—with each age giving rise to certain characteristics²⁸. In *Wealth of Nations*, for example, he writes about how the demands of defence are met differently in different ages, how different ages administer justice, and how di-

Samuelis Pufendorfii Libros Duos De Officio Hominis et Civis, Glasgow 1718, p. 142; Francis Hutcheson, *A Short Introduction to Moral Philosophy*, Glasgow 1747, p. 169; idem, *A System of Moral Philosophy*, 1, London 1755, p. 351. Similarly, Johann Gottlieb Heineccius, *Elementa juris civilis secundum ordinem Institutionum*, 6th ed., Leiden 1751, § 392.

²⁸ Smith's remarks on the ages of civilisation are included in many places in his works; some of the more extended treatments may be found in: LJ(A) i.26-35, iv.1-40; LJ(B) 19-30, 149-151; WN V.i.a-b.17; Meek, ed., *Anderson Notes* (*supra*, n. 1), p. 467-68. There are also some brief remarks on the ages of civilization and division of labour in a fragment of Smith's own notes from the 1760s: Adam Smith, *First Fragment on the Division of Labour*, in: Adam Smith, *Lectures on Jurisprudence*, ed. R. L. Meek, D. D. Raphael, and P. G. Stein, Oxford 1978, reprinted Indianapolis 1982, p. 583-84. The subject has been discussed a great deal. Meek discusses in detail the development of these ideas over several centuries in Meek, *Social Science* (*supra*, n. 4). Some of his account is challenged in P. Stein, *The Four Stage Theory of the Development of Societies*, in: *The Character and Influence of the Roman Civil Law: Historical Essays*, London 1988, p. 395-409. Haakonssen discusses Smith's historical jurisprudence with special attention to Smith's projected corpus. Haakonssen, *Science* (*supra*, n. 6), p. 154-77. Other treatments may be found in: Campbell, et al., ed., *General Introduction*, in: *Wealth of Nations* (*supra*, n. 8), p. 11-18; Skinner, *Historical Theory* (*supra*, n. 5), p. 76-105; P. Stein, *Adam Smith's Jurisprudence—Between Morality and Economics*, in: *Jubilee Lectures Celebrating the Foundation of the Faculty of Law*, University of Birmingham, London 1981, p. 142-52; idem, *Legal Evolution: The Story of an Idea*, Cambridge 1980, p. 29-46. A good popular treatment is J. Z. Muller, *Adam Smith in His Time and Ours*, Princeton 1993, p. 117-25.

vision of labour differs from age to age²⁹. These ideas are less polished in the jurisprudence lectures, though the general scheme is the same: a civilization exists in a certain age, exhibiting legal ideas which are in some way appropriate to that age.

Smith does not argue that a civilization necessarily progresses through these ages, or progresses in a certain order³⁰. How far Smith believed these ages determined the lives of those who lived in them is nevertheless a matter of debate³¹. So far as the law is concerned, the better view is that Smith believed certain ages tended to produce certain laws, but many other influences were at work as well³², and in any event individuals always retain the power to make decisions about the law³³. Smith's scheme is therefore 'determinative' of the law only in the sense that a given legal idea would not arrive until a given age, and it is 'progressive' only in the sense that some legal ideas remain and continue to be used in subsequent ages. His historical jurisprudence is therefore not based on the proposition that certain laws are peculiar to certain ages, or that certain ages necessarily produce certain laws, or that laws undergo a certain evolution. It is instead a kind of genetic theory, which attempts to explain the origins—some of the origins—of a selection of legal ideas by reference to mode of subsis-

²⁹ See, respectively, WN V.i.a.1-15, V.i.b.1-17, V.i.f.50-51.

³⁰ See Skinner, *Historical Theory* (*supra*, n. 5), p. 82-83.

³¹ Discussed in J. Salter, *Adam Smith on Feudalism, Commerce and Slavery*, *History of Political Thought*, 13 (1992), p. 219-24. Salter argues that Smith's account of progress is indeed materialistic to a degree, but it is not so determined an account as to leave no room for normative laws.

³² Haakonssen, *Science* (*supra*, n. 6), p. 185-89.

³³ *Ibid.*, p. 186 ('. . . although in our social and historical explanations we shall often be unable to point out the necessary and sufficient conditions of events, we shall yet be able to make these events intelligible by pointing out some of the more or less necessary conditions.');

Stein, *Adam Smith's Jurisprudence* (*supra*, n. 28), p. 151-52, and especially 152 ('Starting from a desire to distinguish what a man can be compelled to do from what he ought to do, he was led to the position that what a man can be compelled to do depends on the economic state of the society in which he lives.');

A. Fitzgibbons, *Adam Smith's System of Liberty, Wealth, and Virtue*, Oxford 1995, p. 126 ('Smith's theory of history indicated not an inevitable economic fate, but the need for moral choice.');

N. MacCormick, *Adam Smith on Law*, in: K. Haakonssen, ed., *Adam Smith*, Aldershot 1998, p. 200-203, and especially 202 ('The more we know and understand of our own circumstances, the more we can make genuinely rational choices guided by a well-founded view of individual or of collective interests.'). Cf. J. Crospey, *Polity and Economy*, rev. ed., South Bend 2001, p. 68-69 ('. . . the element of rational choice in the process of social evolution is precisely what Smith denies.').

tence. That only a selection of ideas is explained in this way requires a brief explanation of Smith's moral theory³⁴.

Smith accepted that people feel a sense of obligation to do or to refrain from certain acts, and he set out to explain how people come to acquire that sense of obligation. He argued that, though people in different times and places arrive at different moral judgments, the mechanism by which they arrive at those judgments is the same. The mechanism, which Smith explored at length, relies heavily on the idea that people spontaneously experience a fellow-feeling or 'sympathy' with other people. When they see someone doing something (good or bad) to another person, they spontaneously imagine themselves doing it, and spontaneously weigh the propriety of the act. Similarly, they spontaneously imagine themselves the object of the act, and consider how they would feel about it. They then come to a judgment about whether the act should be answered by punishment, reward, or indifference. Their judgment, however, is not based on fixed criteria or their own idiosyncratic feelings, but rather on the experience of having lived in society and having been themselves the object of others' sympathetic observations. Each person who has himself been an object of these observations has thereby received certain ideas of expected behaviour and from them created a second self, which Smith called an impartial spectator. The impartial spectator judges others' behaviour on the person's behalf, so to speak, and communicates his judgment to the person. This is Smith's moral theory at its briefest. For present purposes the most important points to take away are that (1) spectator-sympathy may vary considerably over time and place—only the mechanism for making judgments stays the same; and (2) certain injuries tend to be felt more keenly, and refraining from these injuries falls within the ambit of justice.

History (and particularly mode of subsistence) *sometimes* plays a role in moral judgment. This is because what members of a community regard as an injustice depends on how spectator-sympathy directs them, and spectator-sympathy sometimes varies with the circumstances of the spectator. The way in which a community finds its subsistence alters spectator-sympathy in clear and observable ways, and therefore provides Smith with a framework for explaining why certain historical ages produce cer-

³⁴ The following account is my own; many good accounts are available. For concise discussions see D. D. Raphael, *Adam Smith*, in: *Concepts of Justice*, Oxford 2001, p. 113-25; K. Haakonssen, *Introduction*, in: *Adam Smith, The Theory of Moral Sentiments*, ed. K. Haakonssen, Cambridge 2002, p. vii-xxi. For a longer, recent discussion see J. R. Otteson, *Adam Smith's Marketplace of Life*, Cambridge 2002, chs. 1-2.

tain laws. Not every injustice, however, is so variable: there are some injustices which the spectator feels so consistently that the prohibition against them becomes, incidentally, a universal, or as close to a universal as Smith's system is capable of creating. This is why Smith's ages of civilization explain the genesis of some legal ideas, but not all.

The ages of civilization are: the Age of Hunters, the Age of Shepherds, the Age of Agriculture, and the Age of Commerce. The last of these is not relevant to this essay and, in fact, presents unique problems that prevent any simple summary³⁵. The first three are summarized below.

The Age of Hunters. Those who live in this age sustain themselves by collecting wild fruit, catching wild animals, and fishing³⁶. The idea of 'property' in any exclusive sense is almost unknown³⁷. The inhabitants possess the items they have caught or collected, and if someone were to take an item directly from another's physical possession, the inhabitants would see the act as a transgression. But taking something that is not in a person's physical possession is not seen as a transgression, though it might cause annoyance to one who formerly possessed the item or anticipated possessing it. In this age, therefore, 'property' extends no further than possession³⁸. Moreover, there is nothing at this time that one could call 'government'³⁹.

The Age of Shepherds. Smith regards the step between the Age of Hunters and this age to be the 'greatest in the progress of society'⁴⁰ because the notion of property is no longer limited to possession. The change comes about because, with increasing population, the people who lived by hunting, etc., are forced to make more careful provision for their sustenance. This leads them to store goods and eventually to keep and tame animals⁴¹. These are items of property which cannot always be in one's immediate possession. The inhabitants therefore naturally come to regard it as a transgression for a person to take an item to which another person has established some connection, even when that

³⁵ See especially Salter, *Feudalism, Commerce and Slavery* (*supra*, n. 31), p. 219-24.

³⁶ LJ(A) i.27-28; LJ(B) 149.

³⁷ LJ(A) i.44; LJ(B) 150; WN V.i.b.2.

³⁸ LJ(A) i.41-44, iv.19, 22; LJ(B) 149-150. See also Meek, ed., *Anderson Notes*, (*supra*, n. 1), p. 467 (a similar point, but the significance of 'immediate possession' is not made out).

³⁹ LJ(A) iv.4, 6-7, 19; LJ(B) 19-20.

⁴⁰ LJ(A) ii.97.

⁴¹ LJ(A) i.28, 44-45; LJ(B) 20, 149.

item is not in that person's possession⁴². In short, property in movables is recognized⁴³.

The recognition of property in movables is accompanied by the first appearance of what may be called government⁴⁴. Executive power is exercised by those with large possessions⁴⁵, and there is little or no legislative power⁴⁶. The judicial power is especially noteworthy, because it develops in significant ways over this period of time. The main point is that, with the recognition of property, disputes multiply, and this affects the nature of the tribunals. In the beginning the judicial power is exercised by an assembly of the whole people and there are relatively few causes for disputes⁴⁷. But in time, the number of disputes increases and the judicial power is assumed by certain individuals⁴⁸. In fact, quite soon after the beginning of this age, agreements of various kinds appear: at first, agreements do not sustain any action⁴⁹ but in time testaments, marriage agreements, and other agreements concerning property appear⁵⁰. Exactly how many of these disputes are heard by the tribunals is not clear from Smith's account: the tribunals exist because disputes exist, but Smith does say that 'for some time' the judicial power was limited 'with regard to the private affairs of individuals'⁵¹.

The Age of Agriculture. The hallmark of this age is the recognition of property in land⁵², but it does not come about right away. The benefits of agriculture itself come to a people's attention when they find it difficult to sustain themselves by herds and flocks alone, and when they observe that seeds produce plants similar to the plants that bore them⁵³. The land they tended would at first be held in common, but as individuals begin to make their home in fixed places and collect into cities, the fields they cultivated would lie most contiguous to their respective homes. Then, the

⁴² LJ(A) i.45.

⁴³ LJ(A) i.45-46, iv.43; LJ(B) 150-151; Meek, ed., *Anderson Notes* (*supra*, n. 1), 467.

⁴⁴ LJ(A) iv.21; LJ(B) 20.

⁴⁵ LJ(A) iv.13-14; LJ(B) 20-21.

⁴⁶ LJ(A) iv.14-15, 18; LJ(B) 22-23.

⁴⁷ LJ(A) iv.9-10; LJ(B) 22.

⁴⁸ LJ(A) iv.15-16, 30-31, 34; LJ(B) 26

⁴⁹ LJ(A) iv.10.

⁵⁰ LJ(A) iv.15, 23; LJ(B) 25.

⁵¹ LJ(A) iv.25; similarly, LJ(A) iv.30; LJ(B) 23-24.

⁵² LJ(A) i.51, iv.35; LJ(B) 151; Meek, ed., *Anderson Notes* (*supra*, n. 1), p. 467. Similarly, Kames, *Historical Law-Tracts* (*supra*, n. 4), p. 95; Dalrymple, *General History* (*supra*, n. 4), p. 77.

⁵³ LJ(A) i.30-31; LJ(B) 149.

leaders of these communities would assign portions of land to individuals and families⁵⁴.

Smith's moral theory and historical jurisprudence were an innovation to the course of Glasgow lectures he inherited, but were nevertheless adaptable to the subject. An earlier holder of Smith's chair, Gershom Carmichael (1672-1729), had selected Pufendorf's *De officio hominis et civis* for use in the 'moral philosophy' portion of the lectures⁵⁵, and Pufendorf's distinction between duties owed in a 'natural state' and those owed in an 'adventitious state'⁵⁶ was used by Carmichael and his successors,

⁵⁴ LJ(A) i.50-53; LJ(B) 151. The particular manner in which these assignments are made is discussed below, note 111 and accompanying text.

⁵⁵ Carmichael determined that moral philosophy (broadly) at Glasgow would consist of lectures in natural theology followed by lectures in moral philosophy based on natural law. Carmichael's contributions to the curriculum are discussed in J. Moore and M. Silverthorne, *Gershom Carmichael and the Natural Jurisprudence Tradition in Eighteenth-Century Scotland*, in: *Wealth and Virtue. The Shaping of Political Economy in the Scottish Enlightenment*, ed. I. Hont and M. Ignatieff, Cambridge 1983, p. 74-76; idem, *Natural Sociability and Natural Rights in the Moral Philosophy of Gershom Carmichael*, in: *Philosophers of the Scottish Enlightenment*, ed. V. Hope, Edinburgh 1984, p. 2; J. W. Cairns, *Adam Smith's Lectures on Jurisprudence: Their Influence on Legal Education*, in: *Adam Smith: International Perspectives*, ed. H. Mizuta and C. Sugiyama, Basingstoke 1993, p. 64-65. For the course, Carmichael prepared an edition of Pufendorf supplemented with his own extensive commentary. Carmichael, *Supplementa* (*supra*, n. 27). There is a new English translation of parts of Carmichael's commentary together with other writings: J. Moore and M. Silverthorne, edd., *Natural Rights on the Threshold of the Scottish Enlightenment: The Writings of Gershom Carmichael*, Indianapolis 2002. In the preface to his edition of Pufendorf, Carmichael explains at length his adoption of natural law as the proper basis of moral philosophy. This preface is translated and included in the new edition, *ibid.*, p. 9-20. Pufendorf's natural law continued to influence the Glasgow moral philosophy lectures of Carmichael's successor, Francis Hutcheson (1694-1746), as well as of Smith, a later holder of the chair. See Cairns, *Adam Smith's Lectures*, p. 80 n.31; P. Stein, *From Pufendorf to Adam Smith: The Natural Law Tradition in Scotland*, in: *The Character and Influence of the Roman Civil Law*, London 1988, p. 381-93.

⁵⁶ According to Pufendorf, when mankind lived in a natural state, each man was answerable only to God, not to one another. See *De officio hominis et civis* 2.1.5, 8. Nothing belonged to one person any more than to another. *Ibid.*, 1.12.2. In time, items in lesser abundance come to be divided, with agreements (sometimes tacit) used to divide ownership. The duties created by these agreements are adventitious, which is to say, 'man-made'. This progress from so-called 'negative' to 'positive' community is described in *ibid.*, 1.12.2, 4; idem, *De jure naturae et gentium*

including Smith. Carmichael had inverted Pufendorf's 'duties' into natural and adventitious rights⁵⁷, a scheme continued by Hutcheson, and Smith did not need to disturb the categories; he simply gave them new meanings⁵⁸. As discussed above, to Smith human nature reckons all rights by the same mechanism. Accordingly, the psychological forces which determine the content of any right is the same, whether the right is natural or adventitious. What varies is the certainty of the content. Man's psychology, for whatever reason, consistently recognizes certain rights as compelling; these are 'natural'. Other rights may be no less compelling, and their violation no less unjust, but their content is not so certain because circumstances alter it; these are 'adventitious'. The distinction itself is perhaps not very important in Smith's jurisprudence⁵⁹, but the really striking thing is what Smith has done with these ordinary categories. A person who came to hear or read Smith's treatment for the first time would probably have assumed that *natural* rights deserved and would receive the lion's share of attention for being natural and, so to speak, scientific, the other rights being merely 'man-made'. But Smith announces instead that he will make a scientific study of the man-made rights: a close study of their history can reveal some of their causes, in the same way one uncovers causes in the physical sciences. This must have been quite a surprising change of emphasis, and of course signalled Smith's break with his Glasgow predecessors.

4. — Model rights and historical rights

I argue below that Smith had difficulty fitting the law of servitudes into his historical jurisprudence, or more specifically, that he had difficulty explaining its genesis. To make the argument clear I must say something further about Smith's treatment of

4.4.14. See also S. Buckle, *Natural Law and the Theory of Property*, Oxford 1991, p. 97-100; J. Kilcullen and J. Scott, *A Translation of William of Ockham's Work of Ninety Days*, New York 2001, p. 917-20 (Appendix 2: 'The Origin of Property: Ockham, Grotius, Pufendorf, and Some Others'). The last cited essay discusses at length the antecedents to Pufendorf's theory of property.

⁵⁷ See Moore and Silverthorne, *Natural Sociability* (*supra*, n. 55), p. 6-8.

⁵⁸ See K. Haakonssen, *Adam Smith Out of Context: His Theory of Rights in Prussian Perspective*, in: *Natural Law and Moral Philosophy*, Cambridge 1996, p. 130-34; *idem*, *Science* (*supra*, n. 6), p. 100-103.

⁵⁹ Haakonssen suggests the distinction was used by Smith to emphasize to his students that some rights are more dependent on history than others. Haakonssen, *Science* (*supra*, n. 6), p. 102.

rights. His jurisprudence, as just discussed, is a historical account of the development of rights, but in his account a right can be two very different things, and the distinction is important for purposes of the present discussion. He can speak of a right (such as a property right or a contractual right) in a general way, abstracted from any legal system, as in the statement 'Private property in land never begins till a division be made from common agreement . . .'.⁶⁰ But he can also speak of a right historically, that is, a right as it actually exists or existed in a given legal system: 'By the civil law the first promises that sustained action were those entered into in presence of a court . . .'.⁶¹ The first, 'abstracted' right is a kind of model: whether a person possesses a right of this kind depends on whether the right corresponds to an 'injury', as defined in Smith's theory of morals. Certain injuries (and therefore rights) are good for all time (natural), because spectator-sympathy always recognizes them as such, while other injuries depend on the circumstances (adventitious)⁶². In either case, these model rights serve Smith's argument in two ways: (1) they allow Smith to speculate about the development of historical rights whose history is otherwise unknown, and (2) they reveal how some historical rights have deviated from the model⁶³.

Smith begins by setting out the model rights he intends to discuss⁶⁴. Both courses of lectures (the second less so than the first⁶⁵) follow to some degree an outline taken from Hutcheson, who himself followed an outline in the tradition of Grotius and Pufendorf⁶⁶. A man can be injured in three different ways:

⁶⁰ LJ(B) 151.

⁶¹ LJ(B) 177.

⁶² On natural and adventitious rights in Smith's system, see Haakonssen, *Science* (*supra*, n. 6), 100-103. There is quite a different use of 'natural' in Smith's works: his 'natural jurisprudence' is an attempt to set out principles of moral decision-making, principles which, though 'natural' and remaining the same, produce results that are to some degree historically determined. See K. Haakonssen, *What Might Properly be Called Natural Jurisprudence?*, in: K. Haakonssen, ed., *Adam Smith*, Aldershot 1998, p. 176-78; Stein, *Legal Evolution* (*supra*, n. 6), p. 44-46.

⁶³ TMS VII.iv.36: 'In no country do the decisions of positive law coincide exactly, in every case, with the rules which the natural sense of justice would dictate. Systems of positive law, therefore, though they deserve the greatest authority, as the records of the sentiments of mankind in different ages and nations, yet can never be regarded as accurate systems of the rules of natural justice.'

⁶⁴ The outline is discussed in detail in Haakonssen, *Science* (*supra*, n. 6), ch. 5.

⁶⁵ See Meek, ed., *Anderson Notes* (*supra*, n. 1), p. 461-66.

⁶⁶ Haakonssen, *Adam Smith Out of Context*, (*supra*, n. 58), p. 130.

1. as a man
2. as a member of a family (adventitious)
3. as a citizen or member of a state (adventitious)

The first of these is subdivided further.

1. as a man, in one of three respects:
 - a. in his person (natural)
 - b. in his reputation (natural)
 - c. in his estate (adventitious)

The injuries a man may suffer 'as a man' cover much of private law, including injury to the body, restriction on freedom, affront to reputation, as well as property and contract rights. This outline, though borrowed by Smith from his predecessors, fits his theory of morals extremely well. The first two injuries a man may suffer as a man—in his person, in his reputation—are 'natural' for Smith as they had been for Hutcheson⁶⁷. In Smith's case, this is because these kinds of injuries receive a more determinate measure of spectator-sympathy, as Smith makes clear in *The Theory of Moral Sentiments*⁶⁸:

The most sacred laws of justice, therefore, those whose violation seems to call loudest for vengeance and punishment, are the laws which guard the life and person of our neighbour; the next are those which guard his property and possessions; and last of all come those which guard what are called his personal rights, or what is due to him from the promises of others.

For example, when a man strikes another man, the quality of the injury is such that spectator-sympathy always recognizes it as an injury. Neither 'mode of subsistence' nor, one presumes, any other factor, will alter the fact that an 'injury' has taken place. It is 'non-contingent'⁶⁹. All of the other rights in the outline are adventitious. They are measured by the same spectator-sympathy

⁶⁷ Francis Hutcheson, *Philosophiae Moralis Institutio Compendiaria*, 2nd ed., Glasgow 1745, book 2, ch. 4; idem, *System* (*supra*, n. 27), book 2, ch. 5; idem, *Short Introduction* (*supra*, n. 27), p. 141-43.

⁶⁸ TMS II.ii.2.2.

⁶⁹ This description of natural and adventitious rights in most respects follows Haakonssen (*supra*, n. 6), p. 100-103. I prefer 'non-contingent' to, e.g., 'non-historical', to make clear that natural rights are perhaps independent not only of mode of subsistence, but non-historical factors as well: fortune, rank, etc.

as the natural rights, the only difference being that the spectator, when placed in different circumstances, will judge the injury differently. Spectator-sympathy in the Age of Hunters is different from spectator-sympathy in the Age of Shepherds, and the injuries recognized in each age will differ accordingly. Adventitious rights are in this respect 'contingent'⁷⁰.

These are what I call model rights. The literature on Smith does not ordinarily distinguish model rights from historical rights, but I do so here, not to complicate things, but to highlight an important part of Smith's project. Historical rights are marked by historical accidents and carry refinements the legal system saw fit to add for whatever reason. A legal system can put a number of different rights under a single rubric (consider, e.g., what falls under Roman 'accession'), and it can classify a right in any number of unusual ways. This means that when Smith attempts to classify, e.g., Roman-law rights according to his system, he cannot always accept the way the sources have chosen to characterize those rights. He must sometimes accommodate the historical data to the model by looking behind the forms. This does not detract from the enterprise in any way, quite the opposite: it is a necessary step in demonstrating how historical rights developed, and it shows off Smith's critical powers⁷¹.

Smith's discussion of *hereditas*—a historical right—is an example. Smith introduces *hereditas* among three other real rights (*dominium*, *servitus*, *pignus*)⁷², but tells us right away that his interest in it is limited. The rights of an heir after he has entered into an inheritance, Smith says, are not different in quality from the rights of his predecessor. But before the heir has entered into

⁷⁰ The question 'exactly what are they contingent on?' would return us to the matter of determinism, see notes 30 to 33 and accompanying text. That adventitious rights are to some degree contingent on history is clear, but I cannot otherwise attempt to answer this question here.

⁷¹ In two places in the earlier set of notes, there is some genuine ambiguity about historical and model rights. In the first, LJ(A) i.12-13, Smith seems to say that a certain litany of natural rights can be 'reduced to the *three* above mentioned', ostensibly referring to the three ways a man may be injured 'as a man'. If taken literally this means that the rights of a man in his estate are natural. From context, however, it is clear that 'three' is a slip for 'two' and that 'estate' is excluded from natural rights. In the second passage, LJ(A) i.24, however, Smith makes this statement: 'The only case where the origin of naturall rights is not altogether plain, is in that of property.' Haakonssen takes this as a mistake by the student, Haakonssen, *Science* (*supra*, n. 6), p. 205 n.10, but the statement is a correct one, so long as we take Smith to mean 'Some rights which legal systems treat as property rights are in fact natural.'

⁷² LJ(A) i.19-20, ii.26-41; LJ(B) 9-10, 174-175.

the inheritance, and while he is deciding whether to accept it, this 'real right' takes on a special character and can be reckoned what Smith calls an 'exclusive privilege'. In this respect it is like a monopoly, an intellectual property right, or other 'option' granted to certain individuals to the exclusion of others. Hence Smith chooses to speak of 'exclusive privilege', instead of *hereditas*, as the fourth category of real rights⁷³. At this point a reader might expect to find that the right of the heir, being a 'real right', is a right that a man enjoys 'as a man, in his estate', and is therefore *adventitious* according to the system of rights. But this is not the case: though most exclusive privileges owe their existence to civil government and are therefore adventitious, the privilege of the heir who has not yet entered into the inheritance is a *natural* right. It is analogous, according to Smith, to the right of a man who is pursuing a wild animal but has not yet brought it into his possession; another may not step in and take it⁷⁴. This is not, Smith insists, a breach of property, but it is an injury all the same⁷⁵; Smith would presumably class both rights as among a man's (natural) right to liberty, or some other right belonging to 'a man, in his person'.

This is an example of Smith's method: he examines various rights as a legal system presents them, and by careful analysis shows what underlies the superficialities. Historical rights are broken down and fitted into the model. In the example just given, Smith shows how a natural right lies hidden in the Roman law of property. One should note, however, that it is not one of Smith's principal tasks to uncover natural rights and distinguish them from adventitious ones: he is far more concerned with adventitious rights alone⁷⁶. He is particularly concerned to show in what respect an adventitious right is adventitious, by uncovering what circumstances—above all, mode of subsistence—provoked a given right to be recognized. This requires him to examine the historical rights, break them down, and assign the individual parts to one or another historical age.

The best example of this is Smith's treatment of occupation. It is treated in both sets of lecture notes, but much more thoroughly in the earlier. The various rules by which a person ac-

⁷³ LJ(A) i.19-20, ii.27-28; LJ(B) 8, 9-10, 149, 174-175. In the second course of lectures, the transformation is complete, and Smith no longer speaks of *hereditas* as the fourth real right at all, but as an example of exclusive privilege.

⁷⁴ LJ(A) i. 20, ii.28-29; LJ(B) 9-10, 174.

⁷⁵ LJ(A) ii.28-29; LJ(B) 174 (editors' emendation). See also LJ(A) i.41-42, 43-44 (same point made in discussion of occupation).

⁷⁶ Haakonssen, *Science* (*supra*, n. 6), p. 103.

quires ownership by occupation are considered separately and assigned a place chronologically.

In the Age of Hunters:

(1) At first, ownership is not acquired until actual possession is acquired, and a mere expectation that something will come into one's possession is not enough to engage the sympathy of the spectator⁷⁷. Under these conditions ownership is lost when possession is lost⁷⁸.

(2) But in time, the sympathy of the spectator broadened, so that even when possession, once obtained, was temporarily lost, the (former) possessor was still regarded as having some sort of claim so long as he had some hope of recovering the thing⁷⁹.

In the Age of Shepherds:

(3) When people began to keep animals, a class of animals arose ('mansuefactae [naturae]') which return to their possessor even when let out of his power: these came to be regarded as owned by the possessor⁸⁰. At the very beginning of this time (with which the Age of Shepherds begins), all animals would be either *mansuefactae* or *ferae*. When properly tamed (*mansuetae*) animals appear, they are treated as owned by their possessor in the same way as animals *mansuefactae* with a habit of returning⁸¹.

(4) 'But in process of time, when some species of animals came to be nowhere met but in the state of mansuefactae, they lost that name and became mansuetae.'⁸² This brings about a 'great extension of the notion of property', because an animal which had been out of a person's power for a long time could be regarded as belonging to that person still, so long as that person could be distinguished in some way as its master⁸³.

Smith is here taking a specific historical right—the right to property by occupation in Roman law—and, by considering where spectator-sympathy would lie, attributing individual rules to different historical ages. He does the same elsewhere; in the case of contract, for example, he says that the first periods of society did

⁷⁷ LJ(A) i.37-40; 42-43.

⁷⁸ LJ(A) i.41: 'At first property was conceived to end as well as to begin with possession. They conceived that a thing was no longer ours in any way after we had lost the immediate property of it.' LJ(B) 150: 'Among savages property begins and ends with possession' In the same passage, however, Smith notes that some 'lawyers' have regarded it as a breach of *property* to intervene in the chase of a wild beast that another has started.

⁷⁹ LJ(A) i.41, 43-44.

⁸⁰ LJ(A) i.44-46.

⁸¹ LJ(A) i.45-46.

⁸² LJ(A) i.46.

⁸³ LJ(A) i.46, iv.21; LJ(B) 151.

not perceive that an injury took place when a person broke his promise, and even when spectator-sympathy did first acknowledge the injury, it acknowledged it only in the case of *verborum obligationes*, where the expectations of the parties were clear⁸⁴. Delict likewise gives Smith an opportunity to attribute certain rights to certain ages⁸⁵.

Appreciating the nature of this exercise is important for understanding Smith's treatment of servitudes, to which I now return.

5. — The sources of Smith's account of servitudes

To recall: Smith argued that servitudes originally gave rise to personal rights. I suggested above that Smith deliberately adopted this view and did not wander into it by mistake. Here I set out what I believe are two of his sources. The first, I believe, was his principal source.

1. Samuel von Cocceji, *Introductio ad Grotium Illustratum* (1748)

Smith included Samuel von Cocceji (1679-1755) among a small number of writers whose jurisprudence he regarded as 'of note'⁸⁶. He says: 'There are five volumes in folio of his works published, many of which are very ingenious and distinct, *especially those which treat of laws*.'⁸⁷ Whether Smith intended the last clause as a kind of joke is not clear; I tend to read it as a dig at Cocceji's natural law. It is also not clear whether Smith confused the son with the father (the son having both annotated the fa-

⁸⁴ LJ(A) ii.46-49, 56-63; LJ(B) 176-177. This is discussed in Stein, *Adam Smith's Theory of Law and Society* (*supra*, n. 7), p. 267; *idem*, *Adam Smith's Jurisprudence* (*supra*, n. 28), p. 149; MacCormick, *Adam Smith on Law* (*supra*, n. 33), p. 204-205.

⁸⁵ See Cairns, *Adam Smith's Lectures* (*supra*, n. 55), p. 70-71. Delict is historically a division of 'obligations', which means (historical) delictual rights fall under rights that belong to a man in his estate. See LJ(A) ii.88; LJ(B) 181. The Romans of course treated under delict many acts which we treat as crimes, and it is therefore no surprise that Smith treats crimes in this section. Some of these historical rights are nevertheless 'natural'. See, e.g., LJ(A) ii.93. When Cairns says that Smith treated these natural rights as injuries to estate for 'ease of exposition', Cairns, *Adam Smith's Lectures* (*supra*, n. 55), p. 71, he is essentially right. The specific reason, however, is that historical rights largely dictate the organization of this part of Smith's lecture.

⁸⁶ LJ(B) 4. He cites Grotius, Hobbes, Pufendorf, and 'Baron de Cocceii'. LJ(B) 1-4.

⁸⁷ LJ(B) 4.

ther's works on Grotius and added twelve *dissertationes* of his own)⁸⁸. In the earlier course of lectures Smith cites Cocceji only once⁸⁹, though the editors have pointed out other places where Cocceji's influence might be present. From the comment just quoted it seems certain at least that Smith admired Cocceji.

The passage which I believe was Smith's principal source for his treatment of servitudes is in the twelfth *dissertatio* in Cocceji's *Introductio*⁹⁰. The *dissertatio* is titled 'Systema de iustitia naturali et romana', and the relevant section is titled 'Ubi probatur, servitudes natura non esse jus in re'. *The text and a translation are set out as an appendix to this essay*. Cocceji's argument, very briefly, is that both personal and predial servitudes, by natural law, gave rise only to personal rights and were therefore effective only between the agreeing parties, but that the civil law made these rights real. His arguments are of two kinds, formal and practical. His formal argument is that the agreements which the Roman jurists chose to treat as servitudes are only a selection of a broader class of similar agreements, and that many agreements in this broader class gave rise only to personal rights: this shows that the jurists selected the agreements we now call servitudes,

⁸⁸ The notes of the second course of Smith's lectures, from which the quoted statement is taken, do not always reproduce Smith's words verbatim: the notes have undergone some rewriting and often summarize matters which the earlier set of notes describes more fully. See Meek, et al., edd., *Lectures on Jurisprudence* (*supra*, n. 1), Introduction, p. 6-7. The works of father and son could easily have been conflated in the rewriting.

⁸⁹ LJ(A) i.87, on prescription.

⁹⁰ Samuel L. B. von Cocceji, *Introductio ad Henrici L. B. Cocceii . . . Grotium Illustratum, continens dissertationes prooemiales*, Halle 1748, Diss. XII, 4.3.6 (§§ 302-305). The twelfth *dissertatio* is a re-publication of a 1740 work, *Elementa jurisprudentiae naturalis et romanae* which, after its inclusion in the *Introductio*, appeared again as a single volume in 1750 under the title *Novum systema jurisprudentiae naturalis et romanae*. See *Allgemeine Deutsche Biographie*, 4, Leipzig 1876, p. 374 (a slightly different publication history—perhaps more accurate than that given in the *ADB*—is given by Haakonssen, *Adam Smith Out of Context* (*supra*, n. 58), p. 137 & n.31). Which of these works Smith in fact relied on is not clear, though the *Introductio* was in Smith's library. See Hiroshi Mizuta, *Adam Smith's Library. A Catalogue*, Oxford 2000, p. 59. Cocceji's argument in the *Introductio* expands on a remark he appended to his father's commentary on Grotius. See Heinrich von Cocceji, *Grotius Illustratus, seu commentarii ad Hugonis Grotii de jure belli et pacis libros tres*, 1, Wratislava 1744, p. 79 (at Grotius 1.1.4): *Jure naturae servitudes non pertinent ad jura realia, sed omne jus hic oritur ex pacto, unde tantum oritur obligatio personalis*.

and gave them special treatment⁹¹. His practical argument is that, so long as servitudes gave rise only to personal actions, they were inconvenient to the owner of the servitude. Two different points fall under this head. (1) If the burdened property were sold, the benefits of the servitude came to an end. (2) If a third person disturbed the owner of the servitude, that owner could sue only the owner of the servient estate, who in turn would have to sue the disturber, or cede the claim to the servitude owner⁹².

The general message of Smith's account is of course the same as that of Cocceji's account: all servitudes once gave rise only to personal rights but were subsequently made real. What is largely missing in Smith's account is something we would not, in any event, expect to see; where Cocceji argues that servitudes were 'by nature' personal, Smith mostly argues that they were 'originally' personal⁹³. Aside from the general message, some of Cocceji's points have found their way into Smith's account.

(1) Smith may have adopted part of Cocceji's formal argument. In the earlier set of notes Smith says that all burdens on property must have 'taken their rise' from a contract, and 'must originally have been personall . . . for a contract can produce nothing but a personall right'⁹⁴, and this closely resembles Cocceji's 'servitus sua natura nihil aliud est, quam pactum . . . , ex omni autem pacto saltem oritur actio personalis'⁹⁵. (2) Smith's debt to Cocceji is clearer when we look at Cocceji's practical arguments.

⁹¹ This is my own fuller account of what I take to be Cocceji's formal argument. See Cocceji, *Introductio* (*supra*, n. 90), § 303, and especially § 305 (*Jurisconsulti Romani quatuor saltem casibus usum rei alienae inter jura in re retulerunt. . . . Cum igitur saltem in quatuor illis casibus specialibus constitutum sit, ut actio realis detur, non in aliis, (ubi tamen eadem juris naturalis ratio est,) hae ipsae exceptiones probant, constitutionem illam esse mere civilem.*). A second formal argument, put forward for real servitudes only, is that when certain restrictions on servitudes are ignored, a personal action remains. *Ibid.*, § 304 (*Hanc autem . . . manet.*).

⁹² Cocceji, *Introductio* (*supra*, n. 90), § 304 (*Hac forma posita . . . cedere debet*) (real servitudes), § 305 (*Nam hoc quoque . . . possessori servitutis*) (personal servitudes).

⁹³ Smith's historical jurisprudence is of course inconsistent with the idea of a 'state of nature', as he points out in LJ(B) 3. Nevertheless, in one passage the notes record that servitudes 'are all naturally personal rights'. LJ(B) 172.

⁹⁴ LJ(A) ii.19.

⁹⁵ Cocceji, *Introductio* (*supra*, n. 90), § 303. There is, however, nothing in Smith like Cocceji's argument that predial servitudes are by nature personal because a personal action remains when the servitude breaches certain requirements.

Like Cocceji, Smith attributes the reform to 'legislators'⁹⁶. Smith's words, 'induced legislators to make them real, and claimable a quocumque possessore', closely recall Cocceji's words, 'actionem realem dedere Legislatores Romani praedio dominanti, ejusque possessori, ut servitatem a quocumque possessore vindicare possit'⁹⁷. The reasons for the reform are again similar in the two accounts, but surprisingly it is the differences rather than the similarities which prove the connection. The two accounts are the same on the main point: the utility of a servitude is easily lost if it gives rise only to a personal right and the servitude owner cannot sue the offender directly. The utility can be regained only by a succession of personal actions (Smith: 'multiplicity of actions'; Cocceji: 'ambages'⁹⁸) or by the person who is bound to the servitude owner ceding his right of action to that owner (Smith: 'oblige him to cede to him the obligation'; Cocceji: '[dominus praedii servientis actionem] cedere deberet'⁹⁹). But in the detail these two accounts are somewhat different. As mentioned above, Cocceji describes two *alternative* circumstances in which the utility of a predial or personal servitude is lost. In the first, the owner of the burdened property becomes an offender by alienating the property; in the second, a third person is the offender and the servitude owner is forced into a circuit of actions. Unfortunately, it is not immediately clear from Cocceji's Latin that these are alternatives: he joins the two with only *sed* and a reader is apt to read the second alternative as a continuation of the first¹⁰⁰. This in fact is what Smith has done: he has conflated the two examples and taken Cocceji to mean that the *turbans* of the second is the buyer of the first. To give any sense to Smith's argument, however, the buyer-*turbans* must be bound by contract to observe the servitude, and thus Smith adds a new fact, that the owner of the servient estate 'take the purchaser bound to grant [the servitude owner] the liberty stipulated'¹⁰¹. The result is a somewhat con-

⁹⁶ LJ(B) 9; cf. Cocceji, *Introductio* (*supra*, n. 90), §§ 304, 305. See also LJ(A) ii.37 ('by the determination of the legislature').

⁹⁷ LJ(B) 9; Cocceji, *Introductio* (*supra*, n. 90), § 304. By 'Legislatores' Cocceji probably means the compilers of the *Digest*. I am grateful for Professor Feenstra's guidance on this point.

⁹⁸ LJ(A) ii.16; Cocceji, *Introductio* (*supra*, n. 90), § 305.

⁹⁹ LJ(A) ii.16; Cocceji, *Introductio* (*supra*, n. 90), § 304. The phrase *actionem cedere debere* is found in the *Digest* (see D.43.18.1.1 (Ulpian 70 *ed.*)), so Smith did not necessarily get it from Cocceji.

¹⁰⁰ In his account of both predial and personal servitudes, Cocceji introduces the second alternative with *sed et si*; he possibly had in mind a German word with a more disjunctive force (*außerdem? dennoch?*) not carried by *sed*.

¹⁰¹ LJ(A) ii.15.

trived example, where successive sellers and buyers carefully observe the servitude in their contract terms, but a single buyer nevertheless impedes the servitude. The case for law reform is perhaps not so pressing here. In any event, the nature of the discrepancy between Smith's single example and Cocceji's two-fold example demonstrates Smith's debt to Cocceji in an interesting way. The nature of the discrepancy, moreover, shows that the two writers are not themselves indebted to some third source.

Smith's reliance on Cocceji also explains how Smith came to miscite the Servian and quasi-Servian actions in LJ(A) ii.16. In the section immediately following the section on servitudes, Cocceji speaks very briefly about pledge ('Ubi demonstratur, per pignus naturali ratione non constitui jus aliquod in re')¹⁰². Smith's account of pledge is again very similar to Cocceji's¹⁰³. It is in this section that Cocceji mentions how first the Servian and then the quasi-Servian made the rights of the creditor real¹⁰⁴. It is reasonable to infer that Smith, having consulted Cocceji's accounts of both servitudes and pledge, misattributed part of the second account to the first.

2. Lord Kames, *Historical Law-Tracts* (1758)

Lord Kames (1696-1782) was sponsor, adviser, and friend to Smith for much of Smith's professional life¹⁰⁵, and parts of his *Historical Law-Tracts* share the spirit of Smith's historical jurisprudence¹⁰⁶. The third tract is titled 'History of Property'. In the relevant passage¹⁰⁷ Kames is discussing the relation of property and possession, and in particular the proposition that property was not always acquired with possession. This leads to a discussion of theft, and remedies for pursuing the person into whose hands stolen goods have fallen. In a lengthy footnote to this discussion¹⁰⁸, he discusses the development of certain relevant Roman institutions, in particular the *condictio furtiva*, *restitutio in*

¹⁰² Cocceji, *Introductio* (*supra*, n. 90), Diss. XII, 4.3.7 (§§ 306-308).

¹⁰³ Cf. *Ibid.*, § 306, with LJ(A) ii.19-20. Both authors repeat the 'circuit of actions' argument.

¹⁰⁴ Cocceji, *Introductio* (*supra*, n. 90), §§ 307, 308.

¹⁰⁵ I. S. Ross, *Lord Kames and the Scotland of his Day*, Oxford 1972, p. 91-95; W. C. Lehmann, *Henry Home, Lord Kames, and the Scottish Enlightenment*, The Hague 1971, p. 61.

¹⁰⁶ Kames' attitude to the growth of law and its foundation in morals is discussed in Ross, *Lord Kames* (*supra*, n. 105), p. 202-21. *Historical Law-Tracts* was in Smith's library. Mizuta, *Adam Smith's Library* (*supra*, n. 90), p. 137.

¹⁰⁷ Kames, *Historical Law-Tracts* (*supra*, n. 4), p. 83-88.

¹⁰⁸ *Ibid.*, p. 85-88 note.

integrum, and the *actio metus*. The last of these was available against a good-faith possessor, and so, in Kames' opinion, was hardly different from *rei vindicatio*. He then writes:¹⁰⁹

Hence it is, that, in the Roman Law, the *actio metus* is classed under a species denominated, *Actiones in rem scriptae*, a species which has puzzled all the commentators, and which none of them have been able to explain. . . . All actions pass under that name, which, originally personal, were, by the augmented vigour of the relation of property, made afterwards real.

We also discover from the Roman law, that other real rights made a progress similar to that mentioned concerning property. There was, for example, in the Roman law no real action originally for recovering a pledge, when the creditor, by accident or otherwise, had lost the possession. It was the Pretor Servius who gave a real action.

There are no real similarities of language between Kames and Smith; what recommends this as a source is the fact that, like Cocceji, Kames discusses the general progress of personal rights into real rights, and that he joins to the discussion a reference to the Servian action. This passage, along with Cocceji's account of pledge, may also have prompted Smith to misremember the proper context of the Servian and quasi-Servian actions.

6. — The problem

Why did Smith adopt Cocceji's argument? He does not tell us, and it is possible of course that he was simply persuaded by what Cocceji had written. But that Smith needed the argument is easily shown. The problem, very briefly, is that it would have been difficult for Smith to include servitudes in his historical jurisprudence if he had relied uncritically on their treatment in the Roman sources. Roman law of course treats predial servitudes and certain personal servitudes as rights in the immoveable property of another¹¹⁰. To Smith, the existence of immoveable property presumes that a civilization is moderately advanced: immoveable property is not recognized until the Age of Agriculture. The difficulty arises from the fact that servitudes are needed before property in immoveables is recognized. There are two areas of conflict,

¹⁰⁹ Ibid., 87-88 note. On *metus* and 'actio in rem scripta', see D.4.2.9.8 (Ulpian 11 *ed.*).

¹¹⁰ See, e.g., *J. Inst.* 2.3.3, 2.4.2; D.8.1.3 (Paul 21 *ed.*); D.8.2.2 (Gaius 7 *ed. prov.*); D.7.1.3 pr. (Gaius 2 *rerum cott.*).

or more accurately, two areas where Smith may have tried to mend a conflict. The first is not serious and I mention it only as a possibility.

According to Smith, property in land was introduced in the Age of Agriculture by a gradual process¹¹¹. First, the community as a whole gave to individuals particular rights over the surface: the right to plough, sow, reap the fruits, and pasture. In time, the possessors of these rights came to be regarded as the owners of the surface. Finally, by accession the remainder of the land—the trees, stones, minerals—became the property of the owner of the surface. This evolutionary account is interesting and even credible, but it is nevertheless impossible to reconcile with the Roman sources. The order of events (limited surface rights, then a general proprietary right in the land) is essentially an argument that servitudes preceded land ownership, and is therefore at odds with the usual account of, e.g., the right to take the fruits of the land, or the right to pasture, which presume the prior existence of land ownership. This poses a problem for Smith: because some of these limited surface rights are what we regard as servitudes, Smith perhaps did not wish to leave unchallenged the suggestion that servitudes were *always* rights in the immoveable property of another. Cocceji's account of the origin of servitudes would solve the problem, because personal rights avoid any implication of property in land.

This is the lesser of Smith's problems, however: predial servitudes alone will have caused him genuine trouble. This is because, if we follow Smith's account, something like predial servitudes were needed before the Age of Agriculture had even begun. In the Age of *Shepherds*, animals are the principal item of wealth. Animals also happen to be one of the principal subjects of the law of predial servitudes: neighbours typically have to make accommodations with one another about the drawing of water and the driving and pasturing of animals. We might therefore presume that, from time to time, neighbours in the Age of Shepherds would require something like a servitude so that one neighbour could, e.g., drive his animals over his neighbour's land. But there is a problem: if ownership of land was not recognized in the Age of Shepherds, then there is no such thing as 'neighbour's land', no basis for ownership rights to be relaxed, and thus no opportunity

¹¹¹ For this account, see LJ(A) i.66; LJ(B) 152. The account of the development of property in land in the Anderson Notes is quite different: see Meek, ed., *Anderson Notes* (*supra*, n. 1), p. 467 (labour expended on the area about the house causes neglect of public fields).

for these accommodations ever to arise¹¹². In other words, these accommodations were badly needed, and yet unavailable.

Smith, I suggest, recognized the problem, but recognized also that to put the problem this way relied overmuch on the developed law. Disputes about pasturing, driving, and watering animals, and the accommodations needed to resolve these disputes, would arise wherever land is *possessed*: ownership is not essential. In the first course of lectures, we notice, he gives examples of servitudes between neighbouring *possessors* rather than owners, and in fact speaks more frequently of possessors than owners, e.g.¹¹³:

. . . the possessor of [one] farm should have the liberty of a road thro the farm of his neighbour. This he may obtain for a certain gratuity from the possessor; and take his obligation to grant him that liberty in time to come. This would be given him not as being such a man but as being possessor of such a farm

It is clear, moreover, that inhabitants of the Age of Shepherds, though not owners of land, do possess pieces of land for themselves and their animals¹¹⁴:

The life of a shepherd requires that he should frequently change his situation, or at least the place of his pasturing, to find pasture for his cattle. *The property of the spot he built on would be conceived to end as soon as he had left it, in the same*

¹¹² Haakonssen, *Natural Jurisprudence* (*supra*, n. 62), p. 177: ' . . . there can hardly be disputes over property in land as long as a society has not got the idea that land is the sort of thing which can be owned; and consequently even the most exemplary application of the principles of the impartial spectator will not by itself extend the law of property to land.'

¹¹³ LJ(A) ii.14-15. In the second set of lectures this is not so clear. The language is often ambiguous as to whether the neighbours own or only possess the land, but the illustrations are not reproduced very fully.

¹¹⁴ LJ(A) i.48-49. The version in LJ(B) 150-151 is much abbreviated. See also Dalrymple, *General History* (*supra*, n. 4), p. 76:

During this period [sc. pasturage], as soon as a flock have brouzed upon one spot of ground, their proprietors will remove them to another; and the place they have quitted will fall to the next who pleases to take possession of it: For this reason such shepherds will have no notion of property in immoveables, *nor of right of possession longer than the act of possession last.*

manner as the seats in a theatre or a hut on the shore belong no longer to any person than they are possessed by him. They would not easily conceive a subject of such extent as land is, should belong to an object so little as a single man. It would more easily be conceived that a large body such as a whole nation should have property in land. Accordingly we find that in many nations the different tribes have each their peculiar territory on which the others dare not encroach (as the Tartars and inhabitants of the coast of Guinea). But here the property is conceived to continue no longer in a private person than he actually possessed the subject. A field that had been pastured on by one man would be considered to be his no longer than he actually staid on it.

In short, the possession of neighbouring lands, in the ordinary course of things, would have required neighbours to make agreements with each other, particularly agreements in the nature of *actus*, *aquae haustus*, and *ius pascendi*¹¹⁵. Agreements of various kinds existed in the Age of Shepherds, as already discussed¹¹⁶. The obstacle was in the Roman sources: if Smith relied on them uncritically, he would have to accept that the inhabitants of the Age of Shepherds were incapable of making these kinds of agreements, because immoveable property was not yet recognized. Therefore to avoid the objection that servitudes could not have existed in this age, presuming as they do the existence of immoveable property, he put forward the explanation that servitudes originally gave rise only to personal rights.

7. — Progress of Smith's views

The progress of Smith's views on servitudes can be described to some extent, though only tentatively. In the earlier course of lectures, Smith summarizes how he intends to discuss servitudes in a later lecture. But the account he gives here is not the same as the account he eventually gave; it is instead an entirely conventional one¹¹⁷:

Property is to be considered as an exclusive right by which we can hinder any other person from using in any shape what we possess in this manner. A man for instance who possesses a farm of land can hinder any other not only from intermeddling with any of the products but from walking across his field.

¹¹⁵ *J. Inst.* 2.3 pr., 2.

¹¹⁶ Above, notes 49 to 50 and accompanying text.

¹¹⁷ LJ(A) i.17-18.

'Tis from the relaxation or yielding up some part of this exclusive right in favours of a particular person that the right of servitudes has arose.

The 2d species of real rights therefore is servitudes. These are precisely the giving up some part of the full right of property. As if a mans farm lies betwixt me and the publick road or any market town, I may by agreement or by law (as we shall hereafterwards observe) obtain a servitude (that is, relaxation of his exclusive right) by which I am allowed to travel on horse or foot or drive carriages thro' his farm.

In the later course of lectures, the passage corresponding to this one¹¹⁸ summarizes Smith's view that servitudes originally gave rise to personal rights. The passage quoted here, on the other hand, repeats the standard view that all servitudes are a relaxation of a right of property¹¹⁹—a view omitted from the later accounts¹²⁰. It is possible that at the time he gave this conventional account (27 December 1762¹²¹) he did not yet appreciate the problem in chronology that 'real rights in the immoveable property of another' would cause. If this is right, the problem came to his attention at some time between that day and 18 January 1763, when he gave the new account, having taken guidance from Cocceji¹²².

Cocceji's guidance may have created problems of its own, however. There is virtually no discussion of *personal* servitudes in Roman law in either course of lectures, so far as I am aware¹²³. It

¹¹⁸ Quoted above accompanying note 14.

¹¹⁹ More or less like the account given by Hutcheson, *System*, 1 (*supra*, n. 27), p. 351.

¹²⁰ Cf. LJ(A) ii.38 (servitude 'always implies that there is a jus in re aliena constitutum'). Since this contradicts the 'originally personal' thesis, I take Smith to be referring to the modern law, which the context supports.

¹²¹ In giving this date I am following the suggestion of the editors. See Meek, et al., edd., *Lectures on Jurisprudence* (*supra*, n. 1), Introduction, p. 18.

¹²² Similarly, Smith's account of pledge in LJ(A) i.18-19, accompanying his conventional account of servitudes, is itself conventional: this supports the idea that he did not consult Cocceji until after this lecture.

¹²³ There is one sentence in LJ(A) ii.16 which alludes to Roman personal servitudes:

Most of these [predial servitudes EM] besides many others are in use amongst us. {The life rent or 2dly the use of a house or other subject, as the opera servorum, may also be considered as servitudes as soon

is particularly surprising to find no discussion of Roman usufruct¹²⁴. Personal and predial servitudes are different in many respects, but from Justinian onwards the usual textbook treatment keeps them together¹²⁵, and this is certainly what Hutcheson (whom Smith follows so closely¹²⁶) does¹²⁷. Does the omission of Roman personal servitudes say anything about the progress of Smith's views?

There are two innocent explanations for the omission: (1) Smith had nothing to say about personal servitudes because they had no special qualities which any historical age could be said to 'determine'; or (2) personal servitudes presented no special problems as predial servitudes did, and thus there was no urgent reason to discuss them. The less innocent explanation—which I suggest is the correct one—is that Smith, though agreeing with Cocceji that all servitudes originally gave rise to personal

as it is lawfull, as it certainly may be, to sell a superiority with such a burthen}

The corresponding passage in LJ(B) 172 says more briefly 'Life rents on estates and many other things are also servitudes, and are properly personal.' A 'life rent' is the Scots equivalent of *usus fructus*; 'use of a house or other subject' must be a reference to *habitatio* and *usus*; and *opera servorum* is what is usually more fully given as *opera servorum vel animalium*. All of these are Roman personal servitudes, but confusingly Smith is not discussing Roman law. He has begun a discussion of *feudal law*, and is speaking of the sale of the rights of a feudal superior, where the property is burdened by a life rent. The '2dly' muddies things by introducing three Roman rights. To make matters more confusing, the bracketed sentence does not appear on the page with the main body of the text, but on the reverse. This means that its position in the text is not absolutely certain (though by reference to the corresponding passage in LJ(B) the sentence belongs either where it is printed or after the sentence immediately following). My best judgment is that Smith has added Roman servitudes to the discussion to show hypothetically how they would be treated in feudal law. He is nevertheless silent on how they arose in Roman law, which is my point above.

¹²⁴ There is the briefest mention in LJ(A) iii.85, and discussions of life rent in Scots law in places, but no proper discussion of the Roman institution anywhere, so far as I am aware.

¹²⁵ See Pufendorf, *De officio hominis et civis* 1.12.8; Heineccius, *Elementa iuris civilis secundum ordinem Institutionum* (*supra*, n. 27), § 392; Arnold Vinnius, *Institutionum imperialium commentarius academicus et forensis*, J. G. Heineccius recensuit, Leiden 1726, *ad Inst.* 2.3.

¹²⁶ See Meek, ed., *Anderson Notes* (*supra*, n. 1), p. 461-66.

¹²⁷ Hutcheson, *System*, 1 (*supra*, n. 27), p. 351; *idem*, *Short Introduction* (*supra*, n. 27), p. 169-70.

rights¹²⁸, was unable to make the case for personal servitudes. Cocceji gives the same argument for both kinds of servitude: they were easy to frustrate, and awkward to enforce, until they were made real¹²⁹. The argument is adequate for most personal servitudes—*habitatio, usus, opera servorum*—but for *usus fructus*, the most common one, the argument does not work at all. This is because *usus fructus* is not simply a right to possess and use, which could conceivably be the object of a simple bilateral relation, but a right to take and become *owner* of fruits which would otherwise be another's property¹³⁰. Cocceji's argument misses the fact that if a usufruct had ever created personal rights and personal rights only, it would provide no fruits to the usufructuary and would be no usufruct at all¹³¹. This suggests the possibility that Smith, though happy to adopt Cocceji's theory as it related to predial servitudes, preferred to stay silent on the origins of personal servitudes.

8. — The wider problem, of which servitudes is an example

I have been discussing a problem with servitudes alone, and it would be wrong to exaggerate the problem or to suggest that Smith was overly bothered by it. The nature of the problem is nevertheless revealing, because it shows that Smith's historical jurisprudence brought him face-to-face with certain opponents that his natural-law predecessors had less trouble with: the Roman lawyers. Carmichael, for example, was unhappy with Pufendorf's belief that agreements between men to limit their

¹²⁸ LJ(A) ii.14.

¹²⁹ See Appendix.

¹³⁰ See, e.g., D.7.1.7 pr.-2 (Ulpian 17 *Sab.*).

¹³¹ My main point is that Cocceji does not give a cogent argument for the 'personal' origin of usufruct (and that Smith saw through it), but I should not leave the impression that 'usufruct created a right of ownership' because the institution is more subtle than that. The usufructuary only became owner of the fruits by taking them; what qualified as a fruit was circumscribed; and whether a usufruct was an incident of ownership or an independent right was, and is, disputed. See Kaser, *Das römische Privatrecht* (*supra*, n. 18), p. 447-51; W. W. Buckland, *A Text-Book of Roman Law*, 3rd ed. rev P. Stein, Cambridge 1963, p. 269-71. An unusual description of usufruct, from some years ago, says that usufruct was not even itself a servitude, but that 'usufruct *had* a servitude', namely the physical possession of the corpus, by means of which the usufruct was exercised. K. Kagan, *The Nature of Servitudes and the Association of Usufruct with them*, *Tulane Law Review*, 22 (1947), p. 94-110. The description is a reasonable attempt to show that usufruct is not ownership, but necessarily carries ownership within itself.

ownership took place in society, but not in a state of nature. Carmichael suggested that such 'agreements or dispositions' could indeed take place in a state of nature, and he mentions servitudes as an example of this¹³². Carmichael's argument is a simple one; to make the point that a bare 'servitude-like agreement' could exist in a state of nature, he did not have to do battle with the juristic literature; all the lawyerly refinements in the law of servitudes could, so to speak, be left among the great mass of adventitious rules and ignored. Similarly, Heineccius has only to make the point that servitudes were naturally created by an act of will, and to dismiss all the rules as the 'subtle creations of jurists'¹³³. Smith's natural jurisprudence, on the other hand, was more ambitious and in many respects harder to prove. Whenever Smith sought to give a *historical account* of a Roman rule or institution, he ran the risk of coming up against a *contrary historical account* in the Roman sources. Contrary accounts are not intrinsically fatal to Smith's enterprise; the right history is not necessarily the one a jurist gives or the legal forms imply. But it may take argument and effort to show why the sources have it wrong. Some contrary accounts Smith chose to ignore, as for example he chose to ignore the fact that some 'lawyers' regarded intervening in another's chase as a breach of property (though according to Smith property did not exist in the earliest age)¹³⁴. But the anomaly of a right in immoveable property existing in an age before immoveable property was recognized was serious and could not be ignored.

I mentioned above that Smith uses his historical jurisprudence for two purposes: (1) to speculate about the development of historical rights whose history is otherwise unknown, and (2) to show how some historical rights deviated from the model¹³⁵. The first of these is difficult to accomplish when the subject is Roman law. *The thesis that certain rights tend to arise under certain conditions is not an easy thesis to maintain in the face of a highly developed legal literature, and that is the lesson of Smith's treatment of Roman servitudes.* Smith's single most successful effort to bring Roman law into his historical jurisprudence is his treatment

¹³² Carmichael, *Supplementa* (*supra*, n. 27), p. 133-34.

¹³³ Johann Gottlieb Heineccius, *Elementa juris naturae et gentium*, Venice 1802, p. 221 (§ 282). The passage refers to § 279, where the author discusses the view that what passes by *traditio* is only what the person wills. *Ibid.*, p. 219.

¹³⁴ Above, note 78. The 'lawyers' are also ignored in LJ(A) i.65, 75-76 (accession); i.73-75 (specification).

¹³⁵ Above, note 63 and accompanying text.

of the Roman rules of occupation, described in detail above¹³⁶. Was it his only real success? The editors of the *Lectures* have noted that Smith altered the second course of lectures in a way that downplays the four ages as a framework for private law. Where in the earlier lectures the discussion of the four ages introduces acquisition of property generally, in the latter the discussion has been altered so as to introduce occupation only¹³⁷. Though mode of subsistence is still used in the latter course of lectures to explain other rules of private law, the change of emphasis is clear.

In closing I note that Smith's remarks on the original nature of servitudes are not entirely contrary to current opinion. Watson, for example, accepts the common view that originally servitudes in some way involved ownership over the object of the servitude, but expresses doubts about one argument which supports the view:¹³⁸ the argument that, because early law recognized ownership as the only real right, and because in early law the four original servitudes could only be transferred by *mancipatio*, those servitudes necessarily vested ownership in part of the land¹³⁹. He begins with a 'mode of subsistence' observation: 'As a social and economic fact those things which came to be legally recognized as the four original servitudes are of extreme importance in a primitive agricultural society.'¹⁴⁰ He then argues that *mancipatio* was probably the only available method for transferring a servitude, whatever its character. He concludes¹⁴¹:

Given the social importance of the four original servitude situations, the resulting need for a legal method of creating servitudes, the fact that no other possible direct method of creating servitudes existed, and that individuals must have tried to create servitudes by *mancipatio*, I think it could easily happen that 'servitudes' created by *mancipatio* would be given legal recognition even without there being the slightest feeling that the servitude was a corporeal thing or that what was being transferred was ownership of the land over which the way or aqueduct passed.

¹³⁶ Above, notes 78 to 83 and accompanying text.

¹³⁷ Meek, et al., ed., *Lectures on Jurisprudence* (*supra*, n. 1), Introduction, p. 30.

¹³⁸ Watson, *The Law of Property* (*supra*, n. 20), p. 92-94.

¹³⁹ Kaser, *Privatrecht* (*supra*, n. 18), p. 143.

¹⁴⁰ Watson, *The Law of Property* (*supra*, n. 20), p. 92-93.

¹⁴¹ *Ibid.*, p. 94.

Diósdi is another sceptic of the prevailing view, and some of his views recall Smith's, though he avoids the anachronism of Smith's real/personal distinction¹⁴²:

It is indeed questionable whether the idea of walking or going o[n] the strip of land designed for it was the primary meaning of *via*. In other words in this case, I think that the act is a more concrete idea than the thing necessary for realizing it.

He goes on to challenge the view that ancient servitudes were corporeal¹⁴³, arguing as Watson does that they were treated as *res mancipi* only so that *mancipatio* could be used to transfer them. He concludes that they came into existence as 'independent rights', perhaps lacking a definite form of legal protection¹⁴⁴.

Both writers are making a different point than Smith, that originally predial servitudes were not necessarily corporeal rights. But the exercise is broadly the same: both writers show that one can give a sociological account of the development of servitudes that goes contrary to the legal sources; that what the jurists said or what the legal forms imply is not the final word; in short, that Smith's battle was winnable.

9. — Appendix: Cocceji on servitudes

Samuel L.B. von Cocceji, *Introductio ad Henrici L. B. Cocceii . . . Grotium Illustratum, continens dissertationes prooemiales*, Halle 1748, Diss. XII ('Systema de iustitia naturali et romana'), 4.3.6 (§§ 302-305).

The text below is a short discussion of the nature of servitudes by Samuel von Cocceji. He makes a similar but more brief observation in Heinrich von Cocceji, *Grotius Illustratus, seu commentarii ad Hugonis Grotii de jure belli et pacis libros tres*, 1, Breslau 1744, p. 79 (at Grotius 1.1.4). Grotius is here speaking of *ius* as a right which has reference to a person; in this sense a right is a moral quality belonging to a person to have or to do something lawfully. These rights belong to persons, notwithstanding the fact that a right may, as in the case of a predial servitude, relate to a piece of property. To Grotius' comment *ut servitutes praediorum, quae jura realia dicuntur*, Heinrich von Cocceji comments that these rights, though real, do give rights to persons. Samuel von Cocceji takes issue with this: *Jure naturae servitutes non pertinent ad jura realia, sed omne jus hic oritur ex pacto, unde tantum*

¹⁴² Diósdi, *Ownership* (*supra*, n. 18), p. 114.

¹⁴³ *Ibid.*, p. 113-16.

¹⁴⁴ *Ibid.*, p. 116.

oritur obligatio personalis. He then refers the reader to the text set out below. His footnotes are included below but modernized.

a) Text

UBI PROBATUR, SERVITUTES NATURA NON ESSE JUS
IN RE

§ CCCII. Jurisconsulti Romani praeter *dominium*, et, quae domini species est, *haereditatem*, adhuc duas alias species juris in re constituerunt, nimirum *servitutem* et *pignus*. Nos demonstrabimus, haec *iura in re* ex mera ratione juris civilis originem traxisse: Primo autem de *servitute* agemus.

§ CCCIII. SERVITUS sua natura nihil aliud est, quam pactum de usu rei suae in alium transferendo, ex omni autem pacto saltem oritur actio personalis. Neque enim usus alii permittitur alia intentione, quam ut utatur vi pacti; unde non magis jus in re oritur, quam ex pacto commodati, et locati, quo utilitas rei meae vel gratis, vel pro mercede in alium transfertur.

§ CCCIV. Ratio autem, cur Jurisconsulti Romani ei, qui *servitutem* talem quaesivit, ius in ipsa re competere voluerint, in ap-
rico est. Nam

I.) In *servitutibus praedialibus* Jurisconsulti Romani supponunt (a) duo praedia¹⁴⁵, <(b)> eaque vicina¹⁴⁶; (c) ut servitus utilitatem habeat¹⁴⁷; et quidem (d) perpetuam¹⁴⁸.

Hac forma posita, Jurisconsulti Romani crediderunt actionem personalem non sufficere ad utilitatis illius perpetuae effectum consequendum: Nam (1) dominus praedii servientis, alienando praedium, intervertere servitutem quae praedio meo perpetuam utilitatem procurare debet, posset: Sed et (2) si tertius me in servitute turbaret, vel usum rei prohiberet, actio non contra turbantem, sed contra dominum praedii, intendenda esset, et hic demum actionem contra turbantem intentare, vel eam cedere deberet¹⁴⁹.

Ne igitur per indirectum quis privetur utilitate praedio suo utili, eique perpetuo destinata, actionem realem dedere Legisla-

¹⁴⁵ J.2.3 pr.; D.8.2.23.1 (Pomp. 23 *Sab.*).

¹⁴⁶ D.8.3.5.1 (Ulp. 17 *ed.*).

¹⁴⁷ D.8.1.15 pr. (Pomp. 33 *Sab.*); D.8.3.5 (Ulp. 17 *ed.*); D.8.1.8 (Paul 15 *Plaut.*).

¹⁴⁸ D.8.2.28 (Paul 15 *Sab.*).

¹⁴⁹ Vide D.7.1.12.5 (Ulp. 17 *Sab.*); D.47.2.62(61).8 (Afric. 8 *quaest.*); D.19.2.60.5 (Lab. 5 *post. Iav. epit.*), etc.

tores Romani praedio dominanti, ejusque possessori, ut servitutem a quocunque possessore vindicare possit: Atque hinc quasi traditionem quoque requirunt (quia ius in re non nisi traditione constituitur,) pro traditione autem ipsis est usus actualis, vel patientia domini¹⁵⁰.

Hanc autem constitutionem esse mere civilem, patet (1) ex forma lege praescripta, qua cessante actio personalis manet. Nam (2) servitus, quae in praediis non vicinis constituitur, actionem producit mere personalem¹⁵¹: Aequae ac (3) servitutes, quae praedio meo utiles non sunt, uti si paciscor cum vicino domino, ne per fundum suum eat, aut ibi consistat¹⁵²; ne suo fundo fruatur; ne in suo fundo aquam quaerat; ne viridaria tollat; ut locum suum amoeniorem reddat mei prospectus causa, etc¹⁵³. Huc quoque pertinet pactum, ut spatiari, coenare, pomum decerpere in vicino liceat¹⁵⁴. Sed et (4) mera actio personalis mihi datur, si servitus non habet causam perpetuam¹⁵⁵. Si vero (5) servitus, seu jus percipiendi utilitatem in praedio alieno, sua natura jus aliquod in re ipsa nobis concederet, id quoque verum esset in praediis non viciniis, et licet praedium inde perpetuam utilitatem non haberet.

§ CCCV. II.) In *servitutibus personalibus* ratio juris civilis itidem clara est. Nam (1) Jurisconsulti Romani quatuor saltem casibus usum rei alienae inter jura in re retulerunt (a) in *usufructu*, si usufructus, i.e. jus utendi fruendi re aliena, salva substantia, alicui pacto conceditur: vel quoties res, quae usu consumuntur, ea lege utendae conceduntur, ut vel res in genere, vel earum aestimatio restituatur, quod negotium *quasi usufructus* vocatur, ubi cautio loco proprietatis est, quae ex natura rei salva esse nequit. (b) In *usu*, si jus utendi fruendi re aliena salva substantia, *ad quotidianas necessitates* alicui permittitur. (c) In *habitatione*, si non totus aedium usufructus, sed saltem pars ea, quae in habitando consistit, conceditur. (d) In *opera servorum*, si itidem non totius servi usufructus sed ea pars, quae in *operis* consistit, alicui conceditur.

In omnibus reliquis casibus actio manet personalis, uti si per *commodatum* res alii utenda gratis conceditur, item si per *locationem* usus rei pro mercede in alium transfertur; porro, si per pactum jus decerpenti pomum in vicino horto permittitur¹⁵⁶. Etc.

¹⁵⁰ D.8.1.20 (Jav. 5 post. Lab.).

¹⁵¹ D.34.1.18 [sc. D.34.1.14.3 (Ulp. 2 fid.)].

¹⁵² D.8.1.15 (Pomp. 33 Sab.).

¹⁵³ D.8.1.15.1 (Pomp. 33 Sab.).

¹⁵⁴ D.8.1.8 pr. (Paul 15 Plaut.).

¹⁵⁵ D.8.2.28 (Paul 15 Sab.); Gothofredus *ad h. l.*

¹⁵⁶ D.8.1.8 pr. (Paul 15 Plaut.).

Cum igitur (2) saltem in quatuor illis casibus specialibus constitutum sit, ut actio realis detur, non in aliis, (ubi tamen eadem juris naturalis ratio est,) hae ipsae exceptiones probant, constitutionem illam esse mere civilem. Ratio autem, cur (3) Jurisconsulti Romani hos quatuor casus inter jura in re retulerunt, eadem videtur fuisse, quae in servitutibus realibus: Nam hoc quoque pacto utilitas quaedam perpetua in utentem transfertur, (sua enim natura non nisi morte finitur) quam dominus rei fructuario per indirectum auferre posset, rem alienando: (nam emtor non teneatur stare pacto antecessoris) quo casu fructuario nil nisi actio personalis superesset, ad id quod interest. Sed et si tertius aliquis hunc fructuarium impediret, hic contra solum dominum rei, dominus autem demum contra turbantem agere deberet¹⁵⁷. Has ambages tollunt legislatores Romani, dando actionem realem possessori servitutis.

Sane (4) ob has utilitatis rationes Jurisconsulti Romani etiam in aliis causis, quae sua natura obligationem personalem producunt, jus aliquod in re constituerunt. Haec enim ratio est, cur conductori vel emtori superficiei, si aedificat, plantat, vel alio modo aliquid imponit, actio realis detur: *Si quis enim in superficiei usu turbatur, actione personali ex conducto vel emto cum domino agere, et dominus cedere suas actiones superficiario tenebatur*¹⁵⁸, *sed longe utilius visum est (quia melius est possidere, quam in personam experiri) quasi in rem actionem polliceri, atque ideo Praetor actionem realem inde dedit*¹⁵⁹. Jure naturali igitur conductor vel emtor jus reale in *superficiem* non habet, (superficies enim naturali jure cedit solo¹⁶⁰) sed Praetor ex singulari illa ratione dat actionem realem.

Sed et porro, Emphyteusin, quae nihil aliud est quam locatio perpetua, inter jura in re retulerunt¹⁶¹, ac dominii speciem declararunt; ne in arbitrio domini sit usum illum perpetuum alienando intervertere, et ne fructuarius per ambages usum illum sibi afferere opus habeat.

Pari ergo ratione pro servitutibus vindicandis actiones reales, nimirum actiones confessoriae et negatoriae, datae fuit.

¹⁵⁷ Vide D.7.1.12.5 (Ulp. 17 *Sab.*); D.19.2.60.5 (Lab. 5 *post. Iav. epit.*).

¹⁵⁸ D.43.18.1.1 (Ulp. 70 *ed.*).

¹⁵⁹ D.43.18.1 (Ulp. 70 *ed.*).

¹⁶⁰ D.43.18 i.f. (Gaius 25 *ed. prov.*).

¹⁶¹ D.6.3.1.1 (Paul 21 *ed.*); D.13.7.16.2 (Paul 29 *ed.*).

b) Translation

WHERE I SHOW THAT BY NATURE SERVITUDES ARE
NOT REAL RIGHTS

§ 302. The Roman jurists established two further kinds of *ius in re* other than *dominium* and *hereditas* (itself a kind of *dominium*): they are of course *servitus* and *pignus*. I will show that these *iura in re* derive entirely from the reasoning of the civil law. I must address servitudes first.

§ 303. By nature a SERVITUDE is simply an agreement whereby the use of one's own property is transferred to another, every agreement giving only a personal action. And the other person is allowed the use only on the understanding that he use the property according to the agreement. A real right does not arise here any more than in an agreement to loan or to let, where the benefit of my property (whether for free or for a charge) is passed to another.

§ 304. And the reason why the Roman jurists would want a person who sought such a servitude to have a right in the thing itself is clear. Namely:

I.) In the case of *praedial servitudes* the Roman jurists imagined (a) two estates; (b) close to one another; (c) that the servitude would convey a benefit; and (d) that this benefit would be perpetual.

With this outline in mind the Roman jurists believed that a personal action would not adequately ensure that the benefit would be perpetual: for (1) the owner of the burdened estate, by conveying the estate to another, would be able to subvert the servitude, which ought to be securing a perpetual benefit for my estate. Moreover, (2) if a third person had disturbed me in the use of my servitude, or prevented my use of the property, my claim would have had to be directed, not against the man disturbing me, but against the owner of the estate, and only then would the owner have been obliged to bring a claim against the man disturbing me, or cede the claim to me.

Therefore lest anyone be deprived indirectly of the benefit accruing to his estate, and so that he could enjoy the benefit in perpetuity, the Roman legislators¹⁶² gave a real action to the dominant estate and its possessor, so that he could assert his ownership of the servitude from any possessor whatsoever. And

¹⁶² See note 97 above.

therefore they also demand something like tradition (because a real right is created only by tradition), but they regard actual use, or forbearance by the owner, as the equivalent of tradition¹⁶³.

That this arrangement is merely civil is made clear by (1) the legal requirements, failing which a personal action remains. For (2) a servitude which is established for two estates which are not close to one another gives rise to a mere personal action. The same is true of (3) servitudes which do not benefit my estate, for example if I agree with the owner next door that he shall not go across his own land, or not remain there; that he shall not enjoy his own land; that he shall not obtain water from his own land; that he shall not remove trees, a removal which would make his property the more pleasant for my view¹⁶⁴; etc. The same is also true of an agreement allowing one to stroll, dine, or gather fruit on a neighbouring property. Moreover, (4) a mere personal action is granted to me if the servitude is not aimed at securing something in perpetuity. But (5) if a servitude, that is to say a right of obtaining a benefit in the estate of another, had by nature given one some right in the thing itself, the right would have extended to non-neighbouring estates, even if the estate did not enjoy a perpetual benefit.

§ 305. II.) In the case of *personal servitudes* the reasoning of the civil law is equally apparent. For (1) in only four cases did the Roman Jurists include the use of another's property in the category of real rights: (a) in *usufruct*, where the usufruct (i.e., the right to use, and to the fruits of, the property of another, but not the substance) is granted by agreement to someone; or whenever things which are consumed by use are given to the user on the condition that a thing of the same kind, or its equivalent, is restored, a transaction which is called 'quasi-usufruct' (where a *cautio* is given for the property which, because of the nature of the thing, cannot be preserved); (b) in *usus*, where a person is allowed, *for ordinary needs*, the right to use, and to the fruits of, the

¹⁶³ In the cited passage (D.8.1.20) Javolenus expresses the opinion that the exercise of the right should be regarded as the equivalent to tradition of possession.

¹⁶⁴ The last of these examples is confused; in the cited passage, Pomponius has left off speaking about the issue of 'benefit', and is now addressing servitudes which attempt to make the servient owner do something (such as remove trees). Cocceji seems to believe Pomponius is still talking about 'benefit' and, in an effort to force the example to make sense, has given the very contrived example of a servitude not to remove trees, where the removal would effect a benefit to the neighbouring property.

property of another, but not the substance; (c) in *habitatio*, where not the entire usufruct in a building, but only that part which constitutes occupancy, is granted; (d) in *opera servorum*, where similarly not the usufruct of the whole slave, but that part which constitutes *daywork*, is granted to someone.

In all of the remaining cases there is but a personal action, as when one is granted the use of another's thing gratuitously by *commodatum*; similarly when the use of a thing is transferred to another for a charge by *locatio*; further, when one is allowed by agreement to pick the fruit in the neighbouring garden, etc.

Therefore because (2) it was decided that in only four specific cases a real action would be given, and not in others (though the same natural-law reasoning obtains there), these very exceptions show that this arrangement is merely civil. The reason, moreover, why (3) the Roman Jurists classified those four cases as real rights appears to be the same as in the case of real servitudes: in this kind of agreement, too, a kind of perpetual benefit is transferred to the user (by its very nature ended only by death), a benefit which the owner of the thing is able indirectly to spoil for the fructuary by selling the thing (for the buyer is not bound by the agreement of his predecessor), in which event only a personal action, for the amount the matter is worth, remains to the fructuary. Yet even if some third person should impede that fructuary, he would be obliged to sue only the owner of the thing, the owner then being obliged to sue the one disturbing the fructuary. The Roman legislators got rid of this merry-go-round by giving a real action to the possessor of the servitude.

It was clearly for these reasons of utility that the Roman jurists extended the idea of real rights to other causes. This is the very reason why the *conductor* or buyer of a *superficies* is given a real action if he builds, plants, or otherwise installs something on the property. *For if anyone was disturbed in the use of a superficies, he was required to sue the owner by a personal actio ex conducto or ex empto, and the owner was required to cede his actions [against the one disturbing] to the superficiary, but to offer an action quasi in rem seemed much more useful (because it is better to be in possession than to undertake a personal action¹⁶⁵), and in fact the Praetor subsequently gave a real action.* Accordingly, by natural law the *conductor* or buyer does not have a real right in the *superficies* (indeed by natural law the *superficies* cedes to the

¹⁶⁵ Cocceji's *possidere* makes more sense with the knowledge that, in his source, an interdict is under discussion. See D.43.18.1.1 (Ulp. 70 ed.): *Sed longe utile visum est, . . . quia melius est possidere potius quam in personam experiri, hoc interdictum proponere et quasi in rem actionem polliceri.*

land), but in each case the Praetor gives a real action for the reasons cited.

What is more, they [sc. the Roman Jurists] included emphyteusis, which is simply a perpetual hire, among the class of real rights, and they declared it a kind of ownership, lest the owner take it upon himself to subvert that perpetual use by transfer, and lest the fructuary have the task of recovering his use by a circuit of actions.

So for the same reasons, real actions were permitted for the vindication of servitudes; they are of course the *actiones confessoria* and *negatoria*.