MANCEPT Working Papers Series ISSN 1749 9747

Property and Possession in the First Age of Society: A Note on Adam Smith's Historical Jurisprudence.

John Salter
john.salter@manchester.ac.uk

Introduction

In the *Lectures on Jurisprudence* Adam Smith upheld the majority opinion within Roman law that property acquired by occupation must always begin with actual possession, that is, with a physical attachment of some kind (LJ(A) i.38 and ii.1-2). This principle had also been affirmed by Hugo Grotius and Samuel Pufendorf, the former using it in *Mare Liberum* as part of his case against the claims of the Portuguese to the lands of the East Indies and to the exclusive use of the sea for navigation.[1] The significance of the principle is that people cannot be said to have rights to things growing on the common or to animals in their wild state before they are captured. Property titles cannot be acquired by the performance of labour or by the mere intention to take or have the thing, or indeed by discovery, a point that Grotius made in his case against the Portuguese.

Recently, however, Amos Witztum has argued that Smith's discussion of property acquisition in three important cases: the hunting of wild animals, the acquisition of property in buildings and the initial privatisation of land, contradicts the principle that

property must begin with an actual seizure, and that Smith's discussion of these cases contains 'plenty of textual evidence to suggest that people may have a right to things that are the products of their labor' (2005:284). The context of Witztum's argument is a long standing debate over the nature and scope of Smith's conception of justice.[2] I do not intend to pursue this debate here. Two major works on Smith have appeared relatively recently which contain full and detailed discussions of the central issues. In addition, Samuel Fleischacker's book on the history of the concept of distributive justice situates Smith's treatment of the subject in the appropriate historical context.[3] My aim in this short paper is rather to examine Smith's treatment of occupation in the context of his attempt to theorize the nature of property in the first age of society.[4]

I begin by showing that Smith's discussion of property acquisition in the three examples discussed by Witztum is fully compatible with the standard Roman and natural law principle that occupation must begin with a physical attachment. I then examine the way Smith drew upon the Roman laws of property acquisition in order to construct a theory of the origins of property in the first age of society. In this respect, Smith was following in the footsteps of Hugo Grotius. However, Grotius used a remarkably wide range of sources, including those from the Christian tradition, and his discussion of the origins of private ownership is notable for its fusion of legal sources with biblical accounts of the creation of mankind and the material world.[5] To this end he based his account on the Roman law of *usufruct* as a way of showing how people could make use of the world's resources under the terms of God's common gift without the need to introduce private ownership. Smith, by contrast, drew on the Roman laws governing

occupation in order to produce a radical simplification of the origin and early history of private ownership.

Property and Possession

Hunting

In LJ(A) Smith says that property rights are natural rights but that unlike other natural rights, which he thinks are self-evident, property rights need explanation. It is not obvious why simple acts of occupation, such as pulling an apple from a tree, should give someone the power of excluding others from its use irrespective of all other considerations such as need (i.25). Smith's answer was that the right of occupation was well founded when the person acquiring the thing can form a reasonable expectation of using it and that an impartial spectator would concur with this expectation. In most cases such a reasonable expectation cannot be formed until the thing is physically possessed. This is most obvious in the case off pulling an apple from a tree –our intention to take it from the tree is not enough because someone else might get there first (i.35-38). But the hunting of wild animals is more complicated because the question of when we have them in our power is open to dispute. Hunting had thus been treated as somewhat of an exception by all the natural lawyers, and by ancient and modern jurists.

Witztum confines his discussion of Smith's treatment of hunting to the shorter version of the *Lectures* of 1766 (LJ(B)). Smith asks there whether occupation of wild animals begins on the discovery of the beast or only after it is actually in possession. He says that while lawyers have disagreed about this 'all agree that it is a breach of property to break in on the chase of a wild beast which another has started, though some are of the

opinion that if another should wound the beast in its flight he is entitled to a share, as he rendered the taking of it more easy upon the whole' (LJ(B) 150). Witztum concludes from this that it is possible for people to have claims on animals that are not actually in their possession. He then conjectures that the real explanation of the right is that the reasonable expectation is formed because of the skill and effort of the hunter.

However, in the more complete version of the *Lectures* (LJ(A)), delivered in 1762-3, Smith provides a fuller and very different account. He says that in most cases 'the property in a subject is not conceived to commence till we have actually got possession of it. A hare started does not appear to be altogether in our power; we may have an expectation of obtaining it but still it may happen that it shall escape us. The spectator does not go along with us so far as to conceive we could be justified in demanding satisfaction for the injury done us in taking such a booty out of our power' (i.38). Smith goes on, 'We see, however that on this point lawyers have differed considerably.' He then gives us this legal opinion, which he does not do, or is not reported to have done, in LJ(B). He concludes with the remark: 'In most cases however property was conceived to commence when the subject comes into the power of the captor' (i.40).

Having established that the balance of legal opinion was consistent with his own theory, Smith then considers how long property acquired by occupation continues after the initial seizure. He says that in the first age of society property was conceived to end as well as begin with possession. For example, if having pulled an apple from a tree, 'I should happen to let it fall, and an other should snatch it up' this would be a 'very heinous affront' but not a breach of property. Similarly, a wild animal that escapes ceases

to be the property of the one who captured it. Once the animal escapes 'I can have no longer any claim to it any more than to any other wild animal, as there is no greater probability I should snatch it' (i.41-44). It is in the age of shepherds that property is first extended beyond possession. It is then that people agree 'that a cow or a sheep shall belong to a certain person not only when actually in his possession but where ever it may have strayed' (iv.21). Smith stresses, however, that this first extension of property must be a gradual one. It is initially confined to what could be understood as being within the power of the shepherd and thus only to those animals that had the habit of returning (i.46). Eventually this limit was broken and it was enough that the animal was distinguished in some way that indicated that the possessor regarded the thing as his. Smith says that the step between a society of hunters and one of shepherds is 'the greatest in the progression of society, for by it the notion of property is extended beyond possession, to which it is in the former state confined. When this is once established, it is of no great difficulty to extend this from one subject to another, from herds and flocks to the land itself' (ii.97). In this way property would 'in time, be extended to almost every subject' (i.53).

Dwellings

It is in this context that we must see Smith's discussion of the introduction of property to dwellings and eventually to land. In the age of hunters property was confined to personal possessions, such as cloths and instruments, but because people were constantly changing their place of habitation they had no conception of property in land or buildings. In the age of shepherds habitation was 'somewhat more fixed but still very

uncertain' and the 'huts they put up have been by the consent of the tribe allowed to be the property of the builder' (i.47). Consent was needed, Smith says, because it was not obvious why a hut should be the property of someone who had left it unoccupied even for a small amount of time, particularly so given that people were not yet fully used to a life of fixed habitation (i.48).

Witztum's interpretation hinges on the distinction between the cave or grotto, on the one hand, and a built dwelling on the other: 'the house becomes the property of the builder because it is *the fruit of his natural assets* in exactly the same manner as catching animals is the fruit of the hunter's natural assets. Thus, the builder has reasonable *expectations* to enjoy these fruits.' (2005:285). However, Smith makes no reference to the idea that the house becomes the builder's because it is the fruit of his natural assets. The point of the example is to show that the question of the extent to which something continues to be our property when we are not actually using it is a matter of convention. The fact that one had occupied a cave, or a hut that one had build, does not by itself convey the intention or expectation of continued use.

Privatisation of Land

In his account of the introduction of private ownership of land Smith follows Grotius in saying that private property in land begins with the division of the land that was previously held in common by tribes and nations.[6] Prior to this the land was cultivated in common and the crops were divided between the members of the community. Private property began when people settled in cities. Habitation became fixed and people cultivated fields near to where they lived. People then realised that it

would be more convenient to divide the land once and for all rather than go to the trouble of annually dividing up the crops (LJ(A) i.47-50).

According to Witztum, this shows that private ownership of land began with an agreement, not with individual acts of seizure, thus undermining the principle that property acquisition in the case of land must begin with seizure. However, this is to confuse the principle that *occupation* must begin with seizure with the entirely different proposition that individual acts of seizure were the origin, in the sense of the *historical* origin, of private ownership in land (which is roughly Pufendorf's view). The question of how an individual can lawfully acquire property such as land under a legal code is a different question from how the institution of private property in land began historically. Grotius and Smith thought that occupation of land came into play only after the initial division was made and it applied to land that was not divided in the first division.

Property in the First Age

The broader implications of Smith's use of the Roman law sources in discussing occupation appears when we turn to the way in which he used them to construct an historical account of the origins and early development of private ownership that both built upon and revised the theory of Hugo Grotius.

Grotius begins by saying that God conferred upon human beings a common or general right to the earth's resources. As a consequence of this right 'each person could take whatever he wanted for his own needs and what had been taken 'another could not take from him except by an unjust act' (*De Jure Belli*, II.II.II.1). The exercise of this primitive use right must begin with the actual seizure of the thing, that is, with 'the

connexion of body with body' and it continues only so long as this connection is maintained. (II.VIII.VI). It was, therefore, adequate only so long as men were content to live simply. (II.II.II.4). But the desire for a more refined way of life led to the invention of agriculture and grazing and some commerce, and it was these developments, according to Grotius, that led to the agreement to introduce private ownership (II.II.II.2 and 5).

The primitive right to seize and use the earth's resources is not, in Grotius's theory, a private property right of the kind entailed by ownership. Both must begin with an actual seizure, but ownership 'is not lost when possession is lost; rather, ownership gives us the right to recover possession' (II.VIII.III). In *Mare Liberum* Grotius says that the original right was a limited kind of sovereignty which amounted to 'the privilege of lawfully using common property' (*Mare Liberum*:23). He notes that the civil law concept of a use right is a particular right held against another person. However, the right to use the fruits of the common without owning the substance of things could, by analogy, be understood as a kind of use right. Under Roman law, however, the right to use the fruits of another person's property carried the obligation to preserve the substance. Strictly, therefore, there could not be a use right, as Justinian says, 'in things used up by being used' (*Institutes*: II, 2.4).[7] Grotius is alluding to this feature of Roman law when he remarks that since 'there are some things, the use of which consists in their being used up' it became apparent that 'a certain kind of ownership is inseparable from use. For 'own' implies that a thing belongs to some one person, in such a way that it cannot belong to any other person.' He then says that by 'the process of reasoning' this primitive idea of ownership was extended to things such as 'clothes and movables and some living things' which, although not used up, 'become less fit for future use.' He then comments that after the first extension had come about 'not even

immovables, such, for instance, as fields, could remain unapportioned.' (*Mare Liberum*: 24-25).[8]

The introduction of private property thus gave people the right to the things they seize, not only while they actually possess them, but as long as they indicate their intention to recover possession in ways that others recognize - a 'mere act of will' is insufficient. Thus, shepherds must mark their flocks in some way to indicate that they regard them as their own and that they intend to recover possession. And in the case of land, erecting buildings, or fences to determine boundaries is required to indicate that occupation is permanent (25-26). The most important implication of this change was that it extended ownership from the spontaneous fruits of the common to the substance of the common, that is to land. Grotius insists, however, that this momentous transition 'did not come violently, but gradually, nature herself pointing out the way' (24-25).

We can see from what has been said so far that Smith's account of the age of hunters has much in common with Grotius's natural state before the introduction of private property. For both authors there was an original state of the world, understood as an actual stage in human development, in which the only economic activities were hunting and gathering and in which property began and ended with possession. Agreements are needed at the point when people begin to engage in activities that necessitate an extension of property beyond bare possession. This was a gradual process, not just in the sense that it involved a series of steps, which was a commonplace in natural law theories, but because it entailed an expansion in men's conceptual powers.

However, Grotius's primitive right was an anterior common right and his use of the Roman law of *usufruct* was a means of explaining how men could make use of this

common gift without entering into a universal agreement about its distribution. Having eliminated the original common right from the picture, Smith saw that it was unnecessary to give a separate explanation of property acquisition in the first age of society. The Roman law of occupation could be used to show how people could seize and use things on the common. Moreover, the distinction between the occupation of wild animals and the occupation of other things could be used to construct an *historical* theory of the early development of property. The crucial distinction, as we have seen, is that in the case of wild animals the physical attachment must always be maintained, whereas in most other cases it is possible to maintain ownership as long as the intention to do so is clearly indicated. But the intention or willingness that lies behind particular actions, as Grotius had emphasized, is devoid of social and moral significance unless there is, at least tacit, agreement about which actions are to be taken as valid expressions of the occupier's intent. So the right men had originally, prior to any such agreements, could only have been the limited form of ownership, or possession. Initially, therefore, all things were regarded in the same way as wild animals continue to be, and ownership did not extend beyond possession.

Conclusion

Smith thus achieved a radical simplification of the historical account of property. Occupation meant getting 'any thing into our power that was not the property of another before', and bare possession was merely the simplest and first form of occupation (LJ(A), i.25). However, as I have argued, Grotius had already advanced the theory that men could, at least, begin to occupy the world without the consent of others. They could, at least, take

the things they needed and keep them for as long as they maintained possession, and this was adequate for the first societies in which men hunted and gathered the spontaneous products of the common.

It is because Grotius and Smith thought that a limited idea of ownership existed in the first societies prior to agreements, that they were able to provide a genuinely evolutionary history that is more than just a series of agreements as it is, for example, in Pufendorf's theory. They were able to argue that the first ideas of mine and thine arose from the first and simplest uses of the earth's resources and that the development of property, through a series of agreements, was a natural development of these first ideas. It is in this sense that we can interpret Grotius and Smith to be proposing a theory in which, as Knud Haakonssen (1985: 243) has remarked, property is a 'natural offspring of human activity'.

References

Brito Viera, M. 2003. Mare Liberum vs. Mare Clausum: Grotius, Freitas, and Selden's Debate on Dominion over the Seas'. *Journal of the History of Ideas*, 64:361-77.

Buckle, S. 1991. Natural Law and the Theory of Property: Grotius to Hume. Oxford: Clarendon Press.

Fleischacker, S. 2004a. *On Adam Smith's Wealth of Nations: A Philosophical Companion*. Princeton and Oxford: Princeton University Press.

Fleischacker, S. 2004b. *A Short History of Distributive Justice*. Cambridge Mass. and London: Harvard University Press.

Griswold, C. L. Jr. 1999. *Adam Smith and the Virtues of Enlightenment*. Cambridge: Cambridge University Press.

Grotius, H. 1925 *De Jure Belli ac Pacis Libri Tres*, vol.2. trans. F. W. Kelsey. Oxford: Clarendon Press.

Grotius, H. 1916. *Mare Liberum* New York: Oxford University Press.

Haakonssen, K. 1981. *The Science of the Legislator: The Natural Jurisprudence of David Hume and Adam Smith*. Cambridge: Cambridge University Press.

Haakonssen, K. 1985. Hugo Grotius and the history of political thought. *Political Theory*, 13:239-65.

Hont, I and Ignatieff, M. 1983. Needs and justice in the Wealth of Nations: an introductory essay. In *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment*, eds. Hont, I. and Ignatieff, M. Cambridge: Cambridge University Press.

Meek, R.L. 1976. *Social Science and the Ignoble Savage*. Cambridge: Cambridge University Press

Metzger, E. 2004. Adam Smith on Roman Servitutdes. *Tijdschift voor Rechstgeschiedenis* 72:327-57.

Pascal, R. 1938. Property and society: the Scottish historical school of the eighteenth century. *Modern Quarterly* 1:167–79.

Pufendorf, S. 1934. *De Jure Naturae et Gentium libri octo, vol. 2*. trans. C. H. Oldfather and W. A. Oldfather. Oxford: Clarendon Press.

Salter, J. 1994. Adam Smith on Justice and Distribution in Commercial Societies. *Scottish Journal of Political Economy* 41:299-312.

Salter, J. 1998. Justice and Price: Comment on Jeffrey T. Young. *History of Political Economy* 29:675-684;

Salter, J. 2000. Adam Smith: Justice and Due Shares. *Economics and Philosophy,* 16:139-146.

Salter, J. 2001. Hugo Grotius: Property and Consent, *Political Theory* 29:537-555.

Smith, A. 1974. *Lectures on Jurisprudence, Report A 1762-3 and B 1766.* Edited by Meek, R.L. Raphael, D.D. and Stein, P.G. Oxford: Clarendon Press.

Stein, P. 1980. *Legal Evolution: The Story of an Idea*. Cambridge: Cambridge University Press.

Straumann, B. 2006. "Ancient Ceasarian Lawyers" in a State of Nature: Roman Tradition and Natural Rights in Hugo Grotius's *De iure praedae. Political Theory*, 34:328-350.

Tuck, R. 1979. Natural Rights Theories: Their Origin and Early Development. Cambridge: Cambridge University Press.

Tuck, R. 1993. *Philosophy and Government 1572-165*. Cambridge: Cambridge university Press.

Tuck, R. 1999. *The Rights of War and Peace: Political Thought and International Order From Grotiuss to Kant.* Oxford: Oxford University Press.

Witztum, A. 1997. Distributive Considerations in Smith's Conception of Economic Justice. *Economics and Philosophy* 13:242-259.

Witztum, A. 2005. Property Rights and the Right to the Fruits of one's Labor: A Note on Adam Smith's Jurisprudence. *Economics and Philosophy* 21:279-289

Young, J. T. 1986. The impartial spectator and natural jurisprudence: an interpretation of Adam Smith's theory of the natural price. *History of Political Economy* 18:365-382.

Young, J. T. 1995. Natural Jurisprudence and the Theory of Value in Adam Smith. *History of Political Economy* 27:755-73.

Young, J. T. 1998. Justice and Price: Reply to John Salter. *History of Political Economy* 29:675-684.

---

[1] The principle Roman source is Book 41 of the *Digest*, esp. D. 41. 1. 5. 1. For Grotius's discussion see *Mare Liberum*, Chapter 5 and *De Jure Bell,* II.VIII.III and IV. Pufendorf gives his opinion on *De Jure Naturae,* IV.VI.8-10. For recent discussion of Grotius's arguments in *Mare Liberum,* and of the responses it provoked, see Brito Viera (2003), Straumann (2006).

[2] Hont and Ignatieff, (1983) Salter, (1994, 1998, 2000), Witztum, (1997, 2005), Young, (1986, 1995, 1998).

[3] Griswold (1999), Fleischacker, (2004a), Fleischacker, (2004b). Fleischacker (2004a: 186) points out that Smith's position on occupation in the case of hunting is opposed to the views of Locke, Hutcheson and Hume, who all allow, although for different reasons, that property can begin before the point of actual seizure. My concern in this paper is with the way Smith was returning to the older and more dominant tradition of the *Digest* and of the modern natural law tradition for which the *Digest* was such an important source.

[4] Smith's Historical Jurisprudence, including the Four Stages Theory, is discussed by Pascal (1938), Meek (1976), Stein (1980), Haakonssen (1981), Metzger (2004).

[5] Grotius's theory of property is discussed in Tuck, (1979, 1993, 1999), Buckle, (1991), Haakonssen, (1985), Salter, (2001). Grotius's use of a wide range of sources was not just eclecticism, but was the result of one of the methodological approaches he adopted, See *De Jure Belli, Prolegomena.* For a general discussion of Grotius's use of biblical sources see Buckle, (1991)

[6] *De Jure Belli*, II.II.II.3. Grotius's discussion is clearly influenced by the biblical sources that he routinely relied upon. Pufendorf gives a different account, *De Jure Naturae,* IV.IV. 6 and 9

[7] Justinian also says, however, that 'convenience led the senate to resolve that it should be possible to arrange a *usufruct* even in these things.'

[8] Grotius's refers to *Digest* 7.5. He also refers to the *Summa Theologica* of Thomas Aquinas (II.II.Q78) and to Pope John XXII who used Aquinas's authority to deny the claim of the Franciscan's to have renounced property. John claimed that using things that are consumed in use excludes others and thus entails a form of *dominium*.