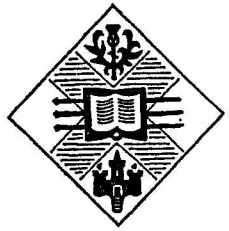

Legal Values in Western Society

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78. Miller, *op. cit.*, 1103. The author warns of the operation of 'a principle akin to Parkinson's law'.
79. Miller, *op. cit.*, 1109.
80. *Op. cit.*, 443.
81. Miller, *op. cit.*, 1246.

9. *Property*

The chief purpose of primitive systems of law was to keep the peace and to settle in an orderly manner disputes arising between members of the community. A clearly defined social hierarchy and a consequent emphasis on status were closely associated with the ownership of property, so property became the central concept of developing legal systems. Indeed, eighteenth-century thinkers, like David Hume and Adam Smith, argued that the protection of property was the main justification of law. For Smith, 'the acquisition of valuable and extensive property . . . necessarily requires the establishment of civil government. Where there is no property, or at least none that exceeds the value of two or three days' labour, civil government is not so necessary.'[1] Conceding that Smith's remark is an overstatement, it must, nevertheless, be recognised that historically the ability of the courts to regulate property rights, whether as a device to preserve order or as a more sophisticated attempt to secure some degree of justice between citizens, has been central to juridical success. Maitland contended that, so far as the history of English law was concerned, the Norman Conquest, and so, one may argue, the development of a central system of royal justice from which the modern English legal system directly developed, occurred not in 1066 but in 1166, for it was in that year that a 'decree went forth which gave to every man dispossessed of his freehold a remedy to be sought in a royal court, a French-speaking court'.[2]

Certainly the conventional Western legal assessment of the importance of property has been high. Property has frequently been regarded as of instrumental value, in that its preservation ensured the continuation of freedom, order, or some other primary value. At times, however, the descriptions and justifications used have appeared to elevate property to the position of a value in its own right. Its primacy was expressed by Blackstone, when he wrote: 'so great moreover is the regard of the Law for private property that it will not authorize the least violation of it; no, not even for the general good of the whole community'.[3] Yet the bases for this evaluation have varied considerably; Roscoe Pound claimed to identify no less than six principal groups of rationalisation.[4] Of these, the two most pervasive and influential have been those of the natural lawyers and of the utilitarians.

SOME JUSTIFICATIONS OF PRIVATE PROPERTY

The natural lawyers derived their inspiration from the Roman Law notions of 'natural acquisition' of property by occupation or specification. According to the occupation theory, ownership rests ultimately on taking control of a thing having as yet no owner. The specification theory holds that a man's ownership of a thing rests on his having produced it. Neither theory is applicable literally to modern conditions, but attempts have been made to adapt them, for instance by saying that when a man acquires certain assets, his control of them gives them a particular character so that he 'produces' them afresh. As will be seen, such an argument is closely related to the metaphysics of Kant and Hegel, but the earlier exponents of a natural law justification of property were far more directly concerned with the political and constitutional implications of such a theory. Grotius, writing in the early seventeenth-century period of European colonial expansion, placed great emphasis on natural rights of property based on discovery and occupation. 'A Romanised, idealised scheme of the titles by which European states of the seventeenth century held their territories [became] a universal theory of property.'[5]

Locke was concerned with the constitutional aspects of property as a limit on legislative sovereignty.[6] Thus, he argued, no man's property could be taken without his consent. Yet only rights to property which could be justified as natural rights were entitled to protection as legal rights. The law should not, for instance, protect possession which had originally been obtained by theft. The natural claim, said Locke, that a man had to his own possessions was based on the fact that they were the fruits of his own labour. He envisaged a utopian justice according to works, but it was based on his ideal of a society of peasant proprietors, each of whom owned no more land than he could himself cultivate, so that it had little relevance even to the great hereditary estates of his day, far less to a complex modern industrial society.

The most characteristic feature of natural law theories of property was, however, their insistence on reciprocal obligations arising from rights of property and the consequent restraints inherent in the very concept of ownership. Aquinas taught that 'men should not hold material things as their own but to the common benefit: each readily sharing them with others in their necessity'.[7] John Erskine, in his *Institutes of the Law of Scotland*, published posthumously in 1773, argued that 'the law interposes so far for the public interest that it suffers no person to use his property wantonly to his neighbour's prejudice'. He went on to recognise what Grotius called *dominium eminens*, 'the universal right in the public over property . . . in virtue of which the supreme power may compel any proprietor to part with what is his own'. For the exercise of this right two conditions were necessary: first, there must be a 'necessity, or at least an evident utility, on the part of the public to justify the exercise of that right; secondly, the persons deprived of their property ought to have a full equivalent for quitting it'.[8]

The utilitarian justification is well illustrated by Hume, who, as we have seen, argued that society developed by 'a general sense of common interest' which induced men to accept the need for rules. Human acquisitiveness, combined with a shortage of natural resources, inevitably led to an unequal division of property, but the peace and security of the community had to be preserved, so the rule was developed that every man should have peaceable enjoyment of whatever he had acquired either by his fortune or by his industry. Hume made no pretence of basing his theory on natural right. Nevertheless, 'the convention for the distinction of property and for the stability of possession is of all circumstances the most necessary to the establishment of human society'. Thence, it was but a short step to the proposition that 'possession and property should always be stable, except when the proprietor consents to bestow them on some other person'. Thus, society had no claims against private property, and that was really best for society. 'This system, therefore, comprehending the interest of each individual, is of course advantageous to the public; tho' it be not intended for that purpose by the inventors.'[9]

The scene was set for the notion of the protection of property as central to the administration of justice and essential to the preservation of individual liberty. Thus Adam Smith said: 'It is only under the shelter of the civil magistrate that the owner of that valuable property which is acquired by the labour of many years or perhaps of many successive generations can sleep a single night in security.'[10] Smith put his argument in the terms of the natural lawyers' justification of property as the fruit of an individual's labour, yet he was in reality arguing for the protection of all property, however acquired, on the ground of its beneficial consequences to the community. Through the encouragement of investment and the good management of property, he considered that everyone, non-owners as well as owners, would benefit.

Stripped of its moral overtones, the utilitarian justification of private property finds favour with the courts even today. In *London Borough of Southwark* v. *Williams* the Court of Appeal rejected the defence of necessity raised by homeless squatters who were resisting an action in trespass for their eviction from vacant council property. Lord Denning, M.R. recognised the possibility

of the plea of necessity succeeding in circumstances of 'great and imminent danger, in order to preserve life', when, for instance, casks were thrown overboard to save a failing ship; but the doctrine, he said, must be carefully circumscribed. It would be no defence to a charge of theft to say that one had taken food because one was starving; the plea would be an excuse for all sorts of wrongdoing, so the court must take a firm stand. 'We must in the interest of law and order itself uphold the title to these properties.'[11] Edmund Davies, L.J. added: 'Necessity can very easily become simply a mask for anarchy.'[12] It is submitted, however, that although the court clearly placed an extremely high value on private property, the door was left open for the balancing of sufficiently pressing competing claims. The decision must be seen in the context of the judges' assumption that there exists a comparatively affluent welfare state, where ultimately the community is expected to protect the homeless from the most extreme effects of their homelessness.

Although evaluation by the weighing of competing interests is possible within a utilitarian analysis of property, it is far less so where the justifications are of a metaphysical nature, such as Kant's argument that a thing is so connected with its owner that anybody who uses it without the owner's consent does the owner an injury.[13] Similarly, Hegel postulated that property was one of those rights of an individual which are based upon his being an autonomous being. A person must give himself an external sphere of freedom; only thus can he exist ideally. Indeed this interdependence of freedom and property was central to the nineteenth-century belief in capitalism. 'The free man can be only a man of property, and for a long time it was believed that therefore only a man of property ought to participate in political life.'[14] Thus, well into the nineteenth century both in Europe and America property qualifications for the right to vote continued to be regarded as of positive value.

It is of course open to argument what effect these rival legal philosophies had on the practical legal evaluation of property. As Roscoe Pound has said:

> The Middle Ages were content to accept *suum cuique tribuere* as conclusive. It was enough that acquisition of land and moveables and private ownership of them were part of the existing social system. Upon the downfall of authority, seventeenth- and eighteenth-century jurists sought to put natural reason behind private property as behind all other institutions. When Kant had undermined this foundation the nineteenth-century philosophical jurists sought to deduce property from a fundamental metaphysical datum; the historical jurists sought to record the unfolding of the idea of private property in human experience, thus showing the universal idea; the utilitarian demonstrated private property by his fundamental test; and the positivist established its validity and necessity by observation of human institutions and their evolution. In other words, here as elsewhere, when eighteenth-century natural law broke down, jurists sought to put new foundations under the old structure of natural rights, just as natural rights had been put as a new foundation to support institutions which theretofore had found a sufficient basis in authority.[15]

Once property was firmly embedded in the fabric of society, its protection continued to be accorded a high value, if only by reason of instinctive judicial conservatism. In turn, the need for a predictable system of rules governing property-owning has influenced general modes of legal thought by reinforcing that conservatism.[16] The particular need for certainty in property law was recognised even by so radical a Lord Chancellor as Lord Birkenhead when he conceded that 'it is undoubtedly true that ancient decisions are not to be lightly disturbed when men have accepted them and regulated their dispositions in reliance upon them. And this doctrine is especially deserving of respect in cases where title has passed from man to man in reliance upon a sustained trend of judicial opinion'.[17] The reluctance of the courts to allow any erosion of a man's right to use and enjoy property undisturbed is, however, far wider than is required by such considerations of security of title.

THE CONTENT OF PROPERTY RIGHTS

A useful starting-point for a consideration of modern English property law is the classic case of *Mayor of Bradford* v. *Pickles*. 'No use of property, which would be legal if due to a proper motive, can become illegal because it is prompted by a motive which is improper or even malicious.'[18] The facts were that the defendant landowner deliberately drained his land to diminish the water-supply reaching the land of the plaintiff. The extent of his freedom was stated robustly by Lord Macnaughten. 'Why should he, he may think, without fee or reward, keep his land as a store-room for a commodity which the corporation dispense, probably not gratuitously, to the inhabitants of Bradford? He prefers his own interests to the public good. He may be churlish, selfish and grasping. His conduct may seem shocking to a moral philosopher . . . [The Corporation] are welcome to the water, and to his land too, if they will pay the price for it.'[19]

A slightly more flexible approach, according to Lord Watson, prevailed in Scotland. 'If a landowner proceeded to burn

limestone close to his march so as to cause annoyance to his neighbour, there being other places on his property where he could conduct the operation with equal or greater convenience to himself and without giving cause of offence, the Court would probably grant an interdict. But the principle of *aemulatio* has never been carried further. The law of Scotland, if it differs in that, is in all other respects the same with the law of England.'[20]

It has generally been assumed that the Roman law concept of *dominium* was something absolute, conferring on the owner the right to use and abuse the thing as he wanted, subject only to the limitations of recognised delicts. It has recently been shown, however, that his right to build on his own property was limited by his neighbour's right to a reasonable amount of light.[21] If he wanted to build so high that he obscured his neighbour's lights beyond what was reasonable (*modicus*), he had to obtain from him, usually at a price, a servitude *altius tollendi*. Several civil law jurisdictions recognise the doctrine of 'abuse of rights', whereby a fraudulent or deliberately malicious use of property may give rise to a cause of action.[22] Even in a later English case Macnaghten J. held that *Bradford* v. *Pickles* had no bearing upon actions arising from a deliberate nuisance.[23] Its restrictive effect on fault liability continues, however, to be felt.[24] Parliament has recently ignored the advice of the Law Commission and affirmed the absolute character of private property by abolishing the crimes, established by the Malicious Damage Act, 1861, secs. 3 and 59, of damaging or setting fire to one's own property with the intention of injuring or defrauding any person.[25] No matter how great and legitimate an interest the community may have in an Englishman's priceless collection of Rembrandts, the owner can destroy them at will.

A similar conservatism can be traced in the development of the obligations placed by English law on a man in relation to those who trespass upon his land. It would follow logically from the proposition that an occupier can do what he likes on and within the confines of his own land that he should be allowed to place spring guns or man-traps with impunity.[26] According to Sydney Smith, Mr Justice Best in the early nineteenth century considered spring guns 'lawfully applicable to the protection of every species of property against unlawful trespassers'.[27] Later, however, the same judge, then Chief Justice, upheld a claim for damages by a man injured by a gun activated by a trip wire, 'on the principle that it is inhuman to catch a man by means which may maim him or endanger his life, and, as far as human means can go, it is the object of English law to uphold humanity and the sanctions of religion'.[28]

The duty of humanity has now been used by the House of Lords in *British Railways Board* v. *Herrington* to circumvent the notorious case of *Robert Addie and Sons (Collieries) Ltd.* v. *Dumbreck*, which made a landowner civilly liable to a child trespasser only for 'some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser'.[29] Salmon L.J. in the Court of Appeal described *Addie* as a case which he was unable to read forty years on without a sense of shock. It was a decision which 'may have been all very well when rights of property, particularly in land, were regarded as more sacrosanct than any other human right. This view was widely held in the nineteenth century, and perhaps, even at the beginning of the present century, influenced the minds of those who were no longer young'.[30] Yet, even when overthrown, *Addie* has been replaced by a formulation of duty which is far narrower than the doctrine of objective fault that now generally governs tort liability in English law. The test laid down by the House of Lords is not whether the landowner acted as a reasonably competent landowner would have done in all the circumstances; it is the subjective test of whether *he*, granted all the limitations of his resources and his abilities, did all that it was reasonable for him to do. 'What is reasonable for a railway company may be very unreasonable for a farmer, or . . . a small contractor.'[31] This is a lighter duty than that imposed, say, on a learner driver, who will be judged by the objective test of the skill and competence of an experienced driver.[32] As Lord Reid said:

> Normally the common law applies an objective test. If a person chooses to assume a relationship with members of the public, say by setting out to drive a car or to erect a building fronting a highway, the law requires him to conduct himself as a reasonable man with adequate skill, knowledge and resources would do . . . If he cannot attain that standard he ought not to assume the responsibility which that relationship involves. But an occupier does not voluntarily assume a relationship with trespassers. By trespassing they force a 'neighbour' relationship on him. When they do so he must act in a humane manner—that is not asking too much of him—but I do not see why he should be required to do more.[33]

It may be thought that it is unreal to talk of innocent trespassers—the child or the straying traveller—as forcing a relationship on an unwilling occupier, especially if their presence should have been reasonably foreseeable to him. It may be thought equally unrealistic to describe the retention or acquisition of real property as an involuntary assumption of the risks

reasonably foreseeably arising therefrom and to argue that it justifies placing the occupier in a more privileged position than others who owe a duty of care to those who they should reasonably foresee may be injured by their conduct. Salmon L. J. in the Court of Appeal effectively met the argument that the imposition of a duty of care would impose an intolerable burden on an occupier by pointing out that the Scots, who 'are hardly noted for being impractical or unduly swayed by emotion', had for ten years shown 'that the catastrophes that have been supposed to be inseparable from such a course are entirely illusory'.[34] Scots law recognises a single duty owed to all persons coming on one's property to take whatever care with regard to their safety is reasonable in the circumstances.

Why, then, has such a conception of property, consistent with the prevailing political and economic beliefs of the nineteenth century but difficult to reconcile with modern welfare democracy, had such a profound effect on instinctive legal evaluation? The persistence of laissez-faire notions of property can be explained by the fact that they, and contemporary notions of poverty, were essentially moral rather than political or economic. It was thought that poverty was an inevitable phenomenon which reflected the defective moral character of the poor, and this opinion found favour even with those whose rationalisation of property was utilitarian. J. S. Mill argued: 'It is most true that the rich have much to answer for in their conduct to the poor. But in the matter of their poverty there is no way the rich *could* have helped them, but by inducing them to help themselves.'[35]

Conversely, the possession of property was deemed by legal moralists to carry moral obligations, but the moral obligation imposed was a personal one, and charity was a matter for private conscience, not a matter for the state. Indeed, it followed from the moral analysis of property that only those who, through age or some other infirmity, were incapable of bettering their lot were deserving of charity. As Burke said, 'I do not call a healthy young man, cheerful in mind and vigorous in arms, I cannot call such a man poor.'[36] This view lived on, and influenced the draftsmen of early twentieth-century social legislation. Thus H. Llewellyn Smith, in his presidential address to the Economic and Social Section of the British Association in 1910, said of the proposals that became the National Insurance Act of 1911: 'It is absolutely necessary in the public interest to exclude claims arising from personal misbehaviour.'[37]

The justification for non-intervention by the law in the distribution of wealth was clearly put by Mill: 'What the state may and should abandon to private charity is the task of distinguishing

between one case of real necessity and another. Private charity can give more to the more deserving. The state must act by general rules.'[38] The reality of the laissez-faire philosophy was, however, that it preserved, and indeed emphasised, the differences of status in the community which, it has been argued, were closely associated with the value accorded to property in early law. Charity served to fortify such differentiations of social or political or economic power. In the words of an American judge: 'it is impossible to uphold freedom of contract and the right of private property without at the same time recognising as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.'[39] It was the recognition of this principle which motivated in the nineteenth century a hitherto unknown challenge to the supremacy of property.

THE MARXIST ANALYSIS OF PROPERTY

Whereas, as has been seen, conventional jurisprudence had equated the protection of property with political freedom, there grew in the nineteenth century the directly contrary socialist analysis, typified by Proudhon's famous aphorism that property is theft. Marx and Engels were not deeply concerned with the formulation of a new legal order, which would within the terms of their revolution be transient at most. As Engels put it: 'State interference in social relations becomes, in one domain after another, superfluous, and then dies out of itself; the government of persons is replaced by the administration of things and by the conduct of the processes of production. The state is not "abolished". It withers away.'[40] By their positive attacks on property, however, Marx and Engels challenged the most central of legal institutions and paved the way for the new analysis, necessitated by the realisation that law would continue to exist, even in a communist society. Marx's argument was directed especially at the fact that under capitalism it is not the maker of the product but others who are entitled to it. He thus echoed the doctrine of the natural lawyers, such as Locke, that a man should have no right of property that is not the fruit of his labour.

The most articulate of the Marxist legal philosophers was Karl Renner, who in *The Institutions of Private Law and their Social Functions*[41] propounded the view that the relationship between an owner and his property brings into being a social function, which may not be on all fours with the conventional legal analysis. Thus, in a moneylending transaction ownership may pass to the borrower, but the 'capital function' remains in the creditor. In the hands of its owner property becomes 'in turn a title to power, to profit, to interest, to profit of enterprise, and to rent'. The owner thereby acquires the power 'to rule over a whole society of

individuals (wage labourers, debtors, the market, etc.) and to make them tributary to the owner'. Different types of property will 'imprint a distinct character mask on the owner', depending on whether they are industrial capital, merchant capital, money-changer's capital or landed property. 'The social aspect of an object that in itself is simple becomes complicated; various social relations are centred in it; it reflects its human surroundings like a spherical mirror; like a miraculous sponge it sucks in sweat and tears and sweats out drops of gold. It becomes the fetish, capital'.

It seems to follow from Renner's analysis that what is objectionable is not private property itself, but the social and economic relationships arising from the private ownership of certain types of property. This is reflected in what at first seems the surprising article 10 of the U.S.S.R. Constitution of 1936, which provides that 'the personal property right of citizens in their incomes and savings from work, in their dwelling houses and subsidiary home enterprises, in articles of domestic economy and use and articles of personal use and convenience, as well as the right of citizens to inherit personal property, is protected by law'.[42] The only possible explanation is that the social function of inheritance, that of stimulating production and holding the family together, is regarded in terms of communist philosophy as desirable, whereas the capital function is not.

THE OBJECTS OF PROPERTY RIGHTS

Renner's analysis of property is helpful in that it emphasises the economic and social importance of ownership. In this respect, however, it seems far less revolutionary to the common lawyer than to the civilian. Much of the discussion of property so far reviewed has proceeded on the assumption that the common law and civil law systems have similar notions of what is meant by property. In fact, this is far from accurate. The civil law tradition, reflected in the Codes of France, Germany, Switzerland, Italy, and even the Soviet Union, tends to identify ownership with the thing owned, and to limit its definition of things to moveable or immoveable property, as opposed to more abstract rights.[43] The common law, on the other hand, has developed from the tenures of medieval feudalism and has been more ready to analyse ownership in terms of bundles of rights, obligations, and inter-personal relationships arising from the control and enjoyment of property. R. H. Tawney argued:

> [Property] covers a multitude of rights which have nothing in common except that they are exercised by persons and enforced by the State. Apart from these formal characteristics, they vary indefinitely in economic character, in social effect, and in moral justification. They may be conditional like the grant of patent rights, or absolute like the ownership of ground rents, terminable like copyright, or permanent like a freehold, as comprehensive as sovereignty or as restricted as an easement, as intimate and personal as the ownership of clothes and books, or as remote and intangible as shares in a gold mine or rubber plantation.[44]

The resulting flexibility has enabled the common law to accept more easily than civil law systems such abstract rights as copyrights, patents, shares, and options as forms of property. Indeed, the attribution of the characteristics of property to such intangible interests has been a technique of great value in limiting the scope of permissible behaviour.[45] To establish a right of action the plaintiff has often to prove only that he has a right of property and that the defendant has infringed it, without the additional burden of proving intention to cause damage or negligence. It may be inappropriate to ascribe to an abstraction, such as confidential information, the quality of property, but the common law has been able to do so by reason of its willingness to recognise equitable or beneficial entitlements quite independent of a possessory interest.[46] As Roxburgh, J. put it: 'As I understand it, the essence of this branch of the law, whatever the origin of it may be, is that a person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication.'[47] One's quasi-proprietary interest in confidential information is managerial to the extent that one can control its use by seeking an injunction. More subtly, it is beneficial in that another who misuses it is deemed to be a trustee of the profit for the original 'owner'. It is essentially the common lawyer's instinctive understanding of property as a bundle of rights that makes this flexibility possible.

A similar modern use of the analogy of property to secure substantive rights is found in employment law in the concept of a man's 'property' in his job.[48] The traditional English approach is a strictly contractual one. It will grant an employee damages for a breach of his contract of employment, but will not order specific performance of the contract and consequent reinstatement, since specific performance must be reciprocal and that would 'turn contracts of service into contracts of slavery'.[49] However, an award of damages is an inadequate compensation, for instance, where they do not cover the loss of *ex gratia* pension entitlements. This has been recognised by the Court of Appeal in *Hill* v. *C. A. Parsons and Co. Ltd.*, where reinstatement was ordered. The implication, as Sachs, L.J. recognised, is that the employee 'may now be said to acquire something akin to a property in his employment'.[50] Although recent United Kingdom legislation does

not achieve this, the trend is away from a contractual and towards a proprietary concept of employment.[51]

French law defines ownership as 'the right to enjoy and dispose of things in the most absolute manner' (Civil Code, art. 544), a definition which was probably a post-Revolutionary reaction against the limitations imposed on peasant proprietors by the system of feudal tenure. It has been argued that this absolutism of Continental concepts of property is the reason for the absence of any concept of trust in civil law systems.[52] The policy of English law has, on the other hand, been to fragment and separate an owner's diverse interests in his property—such as the right to recover it, the right to manage it, and the right to enjoy it by consuming its fruits. In other words, it distinguishes between the beneficial function of enjoyment on the one hand and the managerial function of recovery and disposal on the other. One must not be misled by the apparently mathematical abstraction of English property law. It is true that 'more than anywhere else we seem to be moving in a world of pure ideas from which everything physical and material is entirely excluded'.[53] Yet property rights under the common law are, and always have been, related to social and economic demands, albeit of the landed and commercial classes. The strictures of the Danish scholar, Vinding Kruse, that 'owing to the strict isolation of the various subjects, law as well as political economy and the other social disciplines have to some extent spoken of property and similar phenomena as a blind man speaks of colours',[54] are less applicable to the common law than to civil law systems.

PROPERTY AS A COMMERCIAL COMMODITY

One of the major problems that has confronted Western property lawyers is the transformation of property from a static endowment, to be passed from generation to generation as a means of preserving power and status, to a commercial commodity which is readily transferable and in which the passage of good title can be assured. By such devices as the Rule against Perpetuities or the breaking of the entail, the common law has long favoured the commercial concept of property. The English property legislation of 1925, by attaching the beneficial function of property to its capital value, represented by the proceeds of sale, while leaving the managerial function free from undisclosed incumbrances, was following the trend of centuries.

The acceptance of property as a commercial commodity does not, however, resolve the problem of protecting a bona fide recipient on the one hand, and, on the other, of protecting the original owner from loss of title by fraud, mistake, or theft. The classic situation is that of a rogue, a man of straw who is himself

not worth suing, who fraudulently induces the owner of property to part with possession, sells it to an innocent transferee, and then pockets the proceeds, leaving the two dupes to fight between themselves over who should bear the loss. To some extent this dilemma can be resolved by a system of registration of title in land and shares, ships and motor cars. This gives the transferee an opportunity of ascertaining what interests are capable of transfer and by whom, and, if he does not avail himself of such registration, places the risk on himself. The process is not new. Henry VIII designed a general register of conveyances as a complement to the English Statute of Uses.[55] In Scotland all deeds transferring and discharging rights in land have, since 1617, had to be registered in the public Register of Sasines. However, the registration of all property which is the object of commercial transactions is a practical impossibility, and, in the absence of registration, the problem remains of who is to bear the risk of third party depredations as between the transferor and the transferee. As Professor Lawson has pointed out, there is no rational answer to this problem, and 'different laws have gone different ways and elevated their solutions to the level of articles of faith'.[56] In civil law systems the bona fide purchaser is normally protected, whereas the common law has traditionally favoured the original owner. Even this proposition is subject, however, to substantial exceptions, such as the Factors Act and the doctrine of market overt. The tacit recognition that in a commercial transaction the seller is more likely to be insured against the risks of fraud or theft, or is otherwise more likely to be able to distribute the loss over the market, has led to a greater readiness by the common law courts to hold that title passes even to a rogue.[57]

What emerges from this discussion is that, even in the deceptively simple context of the ownership of a motor car, conventional formulations are inadequate. Both the transferor and the transferee may have a legitimate claim to the protection of their title. In medieval civil law and in modern French law (Civil Code art. 2280) a compromise is struck. An owner of stolen property can recover it—in other words, assert his rights of possession and enjoyment—from a bona fide purchaser, provided that he compensates him for what he has paid for it. Thus the innocent transferee's purely commercial beneficial rights are given recognition. Devlin L. J. has argued that 'the plain answer is that the loss should be divided between them in such proportion as is just in all the circumstances. If it be pure misfortune, the loss should be borne equally; if the fraud or imprudence of either party has caused or contributed to the loss, it should be borne by that party in the whole or in the greater part'.[58] Yet in England

property rights have been seen 'in black or white according to the logic of the law', and any system of apportionment awaits legislation.

It has also come to be realised to an increasing extent throughout Western law that, in fact, the benefits and burdens of ownership may not be what a conventional legal analysis would suggest. It may be thought that the jeweller who is held to have passed title in a valuable ring to a rogue will suffer loss, yet in all probability he will be insured against such risks,[59] and his only loss will be an increase in his next year's premium, which, in turn, will be passed on to his customers by an increase in prices. The implications of insurance for civil responsibility have already been discussed,[60] but, as has been seen in the decision in *Herrington*, their effects on rights of property have not yet been fully recognised by either the legislature or the courts.

CORPORATE PROPERTY

The managerial and beneficial functions of property in an advanced capitalist society are becoming more and more diversified. It is indeed doubtful if Western law has succeeded in adapting the values of a capitalist, or even a pre-capitalist society, to the needs of high capitalism or welfare democracy.[61] In fact, the failure to analyse this constitutes one of the chief weaknesses of Renner's theories on the capital function. This is well illustrated by his example of a shareholder in a corporation, who in law owns only his share certificates and not the assets of the corporation, but who Renner believed still exercised the capital function. Yet, today, even a substantial shareholder in a corporation will in all probability have no say in its internal management, in its employment of labour, or in the effect of its activities on the community at large. As Professor Julius Stone has said: 'Ownership, degenerated into the right to a dividend, remained to the shareholders; control was in those whose use of blocks of shares enabled them to be or to appoint directors and management.'[62] Nowadays the true capital function is vested in managers who may have no shares at all, and who will in all probability have no majority shareholding. 'Capitalism may still be there, but the capitalist has vanished.'[63]

Western law has therefore been obliged to ask in whose interests corporate enterprise should be conducted. Professor Gower observed: 'The law has answered this question by saying that it is the company as a whole whose interests shall be paramount, and that, in general, the interest of the majority of members should be taken to be that of the company.' However, 'what the law says and what in fact occurs are very different things'.[64] By using minority blocks of shares, controlling the procedure for

proxy voting, or acquiring a controlling interest through holding companies, managers or the determined minority whom they represent can without much difficulty out-manoeuvre a divided or apathetic majority of shareholders, even at a general meeting. Such devices may occasionally cause a public outcry, as in the *Savoy Hotel* case of 1953, and within narrow confines the law will attempt to prevent the oppression of minority shareholders.[65] However, it is an elementary principle 'that the court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so'.[66] Unless the directors act *ultra vires* the objects of a company, most shareholders are in reality stripped of the managerial function of their shareholding.

In whose interests, then, is a corporation managed in law? Clearly, on no legal theory could the directors be regarded as the beneficiaries of a corporation's activities; it is established law that they stand in a fiduciary relationship to the company in the performance of their duties.[67] Can it then be said that the workers at large have any legal entitlement, beyond their wages, as a result of their investment of labour in a corporate enterprise?

If workers are made a payment which can be said to be in the interests of the company as a whole and aimed at promoting its prosperity, as where a company is a going concern and future labour relations will thereby be improved, this will be *intra vires*.[68] If, on the other hand, a payment is purely gratuitous, as where a company has ceased trading and it is intended to compensate employees for their redundancy beyond the requirements of the law, it will be *ultra vires*, and incapable of ratification even by a majority of shareholders. Plowman J. said: 'The view that directors, in having regard to the question what is in the best interests of their company, are entitled to take into account the interests of the employees, irrespective of any consequential benefit to the company, is one which may be widely held . . . But no authority to support that proposition as a proposition of law was cited to me . . . and in my judgment such is not the law.'[69]

Experiments have been carried out, especially in the German coal and steel industries, in so-called 'co-determination', that is, a partnership of capital and labour in which workers, or at least the trade union officials who represent them, have some degree of control over the management of the enterprise.[70] A similar scheme is envisaged in Titles IV and V of the draft Statute before the Council of Europe for the formation of a new legal entity—the European company. The scheme envisages a greater degree of effective control, both for the shareholders and the workers, who would both have the right to appoint members of a

supervisory board on a ratio of two shareholders to one worker. This board would, in turn, keep a permanent watch over the managerial board, with powers of investigation and, in certain circumstances, dismissal. Politicians in the United Kingdom have recently shown interest in such schemes. It is thought, however, that the prospects of success for this apparently attractive structure are small. On the one hand apathy and diversification of shareholding make it likely that the shareholders' representatives on the supervisory boards will be nominees of what would in any event be the controlling interest; while on the other hand, the Western trade union movement, even in Germany with its tradition of *Sozialpartnerschaft*, has in the past shown no great enthusiasm for co-determination, and is unlikely to give the draft Statute much support. It may be, however, that legal attempts to transform labour relations from a 'conflict' to at least a 'contractual' relationship will succeed.[71] Some influential American trade unionists are now converted to co-determination as a means of influencing from within the 'corporate conscience',[72] particularly of the great multi-national companies. This could in turn lead to a revolutionary allocation of the managerial function to labour as well as capital, and, in part, make Locke's utopian concept of property justified by labour a twentieth century reality.

THE RE-ASSESSMENT OF PROPERTY AS A VALUE

The widening of acceptable spheres of state activity, coupled with vast accumulations of wealth and the associated severance of the beneficial and managerial functions of property in advanced capitalist societies, has led to a radical re-evaluation of property in Western law. For centuries, it is true, some degree of public right over private property has been recognised and, as has already been mentioned, the owner's obligations were an essential element of natural law theories of property. Thus, Grotius argued that 'the property of subjects is under the eminent dominion of the state; so that the state, or he who acts for it, may use and even alienate and destroy such property . . . for the ends of public utility'.[73] The circumstances in which the state could exercise such power were, however, severely limited, and it was not until the nineteenth century that Western legal systems came to recognise a more general right of state interference with property rights.

Concepts of property have, moreover, continued to develop during the present century. In 1919 Pound's second postulate for American law was that 'in civilised society men must be able to assume that they may control for beneficial purposes what they have discovered and appropriated for their own use, what they have created by their own labour, and what they have acquired

under the existing social and economic order'. It was not until 1959 that he recognised that there might well be objections to his postulate, especially to the quasi-natural law concepts of appropriation and creation which had significance in 'pioneer America', but which were of far less relevance in an 'urban industrial society'.[74] One of the most important factors in this process was a transition from a laissez-faire to a welfare concept of society. This involved a recognition that poverty was neither a moral nor an inevitable phenomenon, that it could and ought to be eradicated, and that the state was the only institution capable of regulating the economic forces which gave rise to poverty, or of instituting any effective redistribution of wealth. Yet, as late as 1906, a Wisconsin statute imposing an inheritance tax graduated to the amount of the inheritance was struck down as unconstitutional on the ground that it violated natural rights of property and inheritance, 'existing in the people prior to the making of any of our constitutions'.[75] Even today, English law recognises nothing wrong in tax avoidance, for 'every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be'.[76]

The experience of global war and rapid population increase have brought home to governments the fact that the wastage of natural, agricultural, and industrial resources is a matter of public and no longer just of private concern, and have induced them to interfere increasingly with the use of private resources. In the words of article 14(2) of the West German Constitution of 1949, 'Property shall involve obligations. Its use shall also serve the common good.'[77] Sometimes even in capitalist or mixed economies, governments have sought the ownership of property to achieve social ends, although it may well be correct that many historical instances regarded today as exemplifying state ownership are more properly analysed as a species of guardianship for social purposes. The emphasis on state ownership is the result of the medieval confusion of the power of the sovereign to regulate the use of things (*imperium*) with ownership (*dominium*).[78] A theoretical distinction can be drawn between governmental activity designed on the one hand to acquire resources on its own account, and on the other to resolve disputes between various citizens or groups within society. The former may be described as the government's enterprise capacity. Obvious examples are cases in which it acquires land for building roads, schools, or army barracks, or nationalises an industry. The latter may be called its mediation capacity, as where planning controls are designed to protect neighbours from nuisance, or to preserve health or safety standards, or where fair rents or minimum wages are

fixed by statute. In reality, however, the impact on the property owner whose rights are affected is identical and to draw a practical distinction between the two functions, saying, for instance, that the former gives rise to a claim for compensation while the latter does not, is impliedly to proceed on the unjustifiable assumption that one is a legitimate aim of government while the other is not.[79]

In view of the increasing power of the private corporation, the need for the state to interfere with property rights has recently come to be more widely recognised. As Berle puts it: ' "socialist" control, that is, direction given and enforced by government, appears to be the single alternative. Ownership has little or nothing to do with it and may not even be affected.'[80] Indeed, the emergence this century of concentrated private corporate power as a challenge to the very sovereignty of the state has done much to persuade the law to abandon concepts of the inviolability of property. In 1941 Justice Frankfurter recognised that a private corporation, which substantially controlled the nation's ship-building industry, might even hold the United States' Government to ransom.[81] As a result of the post-war development of multi-national corporate enterprise, 'the international company is rapidly replacing the nation state as the basic operating and accounting unit in the international economy'.[82] For instance, General Motors has a turnover greater than the annual budget of a country as industrially advanced as the Netherlands. Individual states are, therefore, at grave risk of becoming politically incapable of exercising effective control over corporate enterprise within their jurisdictions. Moreover, the fact that multi-national corporations have no legal status as such, but operate through tiers of national subsidiaries, makes means of regulation, such as the discovery of accounts, complex and often impossible within the present framework of concepts of corporate identity. Just as the threat by private capital to state autonomy led to vigorous federal action by the Roosevelt administration in the United States, so states may well be forced into international co-operation to control multi-national capital. Certainly trade unions are now talking in terms of internationally organised collective bargaining and industrial action to redress the balance,[83] an example of such action being the Dunlop–Pirelli disputes of 1972. If governments were to follow their example, supra-national legal control would inevitably necessitate a totally new analysis of property. It is already clear that traditional Western evaluations, exemplified by the Western interpretation of article 17(2) of the 1948 Universal Declaration of Human Rights to require the payment of compensation on state expropriation of the assets of foreign nationals, are not likely to find universal acceptance.

Granted, however, that increased state activity and the need to control private corporate power have caused radical invasions of property rights by the law, to what extent can these be reconciled with the traditional legal evaluation of property as 'sacred and inviolable'? It is submitted that the key to the problem lies in the separation of the beneficial and managerial functions of property. Grotius' formulation of the prerogative of eminent domain insisted that 'the state is bound to make good the loss to those who lose their property'.[84] In other words, by compensation the beneficial function is respected, even though the managerial function is taken away. Thus in *Burmah Oil Company Ltd.* v. *Lord Advocate*, although the House of Lords carefully reviewed the exercise of prerogative powers against property since 1660, it could not find a single instance of the state taking or interfering with land without payment. Lord Reid recognised that 'people in influential positions may have been very willing to give their services but they were very sensitive about property'.[85] Although it was held that property was subject to the maxim *salus populi suprema lex*, any loss occasioned was 'to be shared equally among the beneficiaries with whom is included the private owner despoiled, so that it falls on the state and not on the individual'.[86] Yet, at the end of the day even the beneficial function is subject to a relative evaluation against competing claims. So Parliament, retrospectively reversing the decision in the Burmah Oil case by the War Damage Act, 1965, affirmed that the value of state security in wartime prevailed over the right to compensation.

A similar limit on the protection of the beneficial function is to be found in the American treatment of the state's 'police power' over property. The Fifth Amendment of the United States Constitution provides: 'Nor shall property be taken for the public use without just compensation.' Yet even this apparently stark protection of the beneficial function has been held not to apply to state intrusions which fall short of a complete 'taking', but nevertheless severely restrict the owner's rights of management and enjoyment. 'If government prohibits the continuance of a business which has been established for a long time, or outlaws certain businesses altogether, or prohibits the use of land for any of the purposes which give it substantial economic value, it may not have to pay a penny.'[87] The most convincing explanation of this undermining of the supremacy of property is that it arises from a balancing of competing values. As Justice Holmes stated:

> All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighbourhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough

to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the state. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. For instance, the police power may limit the height of buildings in a city without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest and the police power would fail. To set such a limit would need compensation and the power of eminent domain.[88]

In an era of radical international change in the economic and political realities of property ownership, it is difficult to predict where such a relative evaluation of property will lead.

NOTES. *Chapter Nine*

1. *The Wealth of Nations*, Bk. v. Chapter 1 (ed. J.E.T.Rogers, 1869, 293).
2. *History of English Law*, 1898, I, 84 (the assize of novel disseisin).
3. *Commentaries on the Laws of England*, I, 139–40.
4. *Introduction to the Philosophy of Law*, revd. ed. 1954, 114ff.
5. Pound, *op.cit.*, 115–16.
6. *Treatise of Civil Government*, secs. 132–42. Jean Bodin in *De Republica* (1591, I, Chapter viii) propounded the acceptance by the sovereign of obligations of private law concerning property and possession as an exception to his formulation of omnipotent legislative sovereignty.
7. *Summa Theologiae*, IIa 2ae 66.2 (Aquinas, *Selected Political Writings*, ed. D'Entrèves, 1948, 169).
8. II. I. 2; P.Stein, 'The general notions of property and contract in eighteenth century Scottish thought', *Jur.Rev.*, 1963, 1ff.
9. *Treatise of Human Nature* (1740) III,2 (ed. L.A.Selby-Bigge, 1888, 486, 491, 514, 529).
10. *Loc.cit.*, *ante*, n. 1.
11. [1971] 2 All E.R. 175 at 179–80.
12. *Ibid.* at 181.
13. Pound, *op.cit.*, 117.
14. C.J.Friedrich, *The Philosophy of Law in Historical Perspective*, 1958, 146; cf. Swift's aphorism, 'Law in a free country is, or ought to be, the determination of the majority of those who have property in land,' *Thoughts on Various Subjects, Moral and Diverting* (1706).
15. *Op.cit.*, 113–14.
16. For a vivid example, *Caerphilly Concrete Ltd.* v. *Owen* [1972] 1 W.L.R. 372 at 375–7, *ante* p. 41.
17. *Bourne* v. *Keane* [1919] A.C. 815 at 860; cp. P.Stein, *Regulae Iuris*, 1966, 17–19.

18. [1895] A.C. 587, per Lord Watson at 598.
19. *Ibid.* at 600–1.
20. *Ibid.* at 598. This is probably an unduly narrow understanding of the doctrine of *aemulatio*, T.B.Smith, *Scotland, the Development of its Laws and Constitution*, 1962, 531.
21. A.F.Rodger, *Owners and Neighbours in Roman Law*, 1972.
22. *Ante*, p. 103; W.Friedmann, *Law in a Changing Society*, 2nd ed., 1972, 103–5.
23. *Hollywood Silver Fox Farm* v. *Emmett* [1936] 2 K.B. 468.
24. *Langbrook Properties Ltd.* v. *Surrey County Council* [1969] 3 All E.R. 1424.
25. B.Hogan, 'Malicious Damage: The Law Commission's Working Paper' [1969] *Crim. L.R.* 283 at 285. Under the Criminal Damage Act, 1971, sec. 3, it is now only an offence to destroy or damage one's own property if one intends thereby to endanger the life of another or is reckless as to whether the life of another would be endangered.
26. Lord Morris in *British Railways Board* v. *Herrington* [1972] 1 All E.R. 749 in 763.
27. E.S.Turner, *Roads to Ruin*, 1966, 26–7. Best J. subsequently denied using these words, which do not appear in the report (*Ilott* v. *Wilkes* (1820) 3 B. and Ald. 304).
28. *Bird* v. *Holbrook* (1828) 4 Bing. 628 at 643.
29. [1929] A.C. 358, at 365, per Lord Hailsham L.C.
30. *Herrington* v. *British Railways Board* [1971] 1 All E.R. 897 at 900–1 (Ct. of Appeal).
31. [1972] 1 All E.R. at 777, per Lord Wilberforce. Note the similarly subjective test of a landowner's liability for the escape of fire from his land, *Goldman* v. *Hargrave* [1967] 1 A.C. 645 at 663.
32. *Nettleship* v. *Weston* [1971] 3 All E.R. 581 (*ante* p. 127).
33. [1972] 1 All E.R. at 758, cf. Lord Pearson at 782.
34. [1971] 1 All E.R. at 905; the reference is to the Occupiers Liability (Scotland) Act, 1960, (*ante* p. 108).
35. *Dissertations and Discussions*, 1859, 181, 199 cited by C.Woodard, 'Reality and Social Reform, the transition from laissez faire to the Welfare State', 72 *Yale L.J.*, 1962, 286 at 292.
36. *Three Letters on a Regicide Peace*, cited by Woodard, *op.cit.*, 297.
37. We owe this reference to Mr. J.Fulbrook.
38. *Principles of Political Economy*, 1865, 585, cited by Woodard, *op.cit.*, 300; for the work of the Charity Organisation Society in the nineteenth century, also C.L.Mowat, *The C.O.S., 1869–1913*, 1961.
39. Pitney J. in *Coppage* v. *Kansas* (1915) 236 U.S. 1 at 17; cf. Woodard, *op.cit.*, 302: 'Charity permitted necessary redistributions of wealth under circumstances that maintained the social status quo'.
40. *Socialism: Utopian and Scientific*, 1882, cited by Friedrich, *op.cit.*, 148.
41. Ed. O.Kahn-Freund, 1949, 196–7.
42. Friedmann, *op.cit.*, 105ff.
43. Friedmann, *op.cit.*, 94; Amos and Walton, *Introduction to French Law*, 3rd ed., 1967, 87.
44. *The Acquisitive Society*, 1921, 56–7; for comments on the jurisprudential character of such varied rights, A.M.Honoré, 'Rights of exclusion and immunities against divesting', 34 *Tulane L.R.*, 1960, 453ff; J.Raz, *The concept of a legal system*, 1970, 175ff.

45. J. A. Jolowicz, 'The Law of Tort and non-physical loss', XII *J.S.P.T.L.* 1972, 91 at 100.
46. See *Boardmann* v. *Phipps* [1966] 3 All E.R. 721; *Seager* v. *Copydex Ltd.* [1967] 2 All E.R. 415; *Baker* v. *Gibbons* [1972] 2 All E.R. 759; and articles by G. Jones, 86 *L.Q.R.*, 1970, 463 and P. North, XII *J.S.P.T.L.* 1972, 149. The Younger Committee on Privacy recommended that this topic be referred to the Law Commission.
47. *Terrapin Ltd* v. *Builders' Supply Co (Hayes) Ltd*, cited by Roskill J. in *Cranleigh Precision Engineering Ltd* v. *Bryant* [1964] 3 All E.R. 289 at 301.
48. See *Encyclopedia of Labour Relations Law* (ed. B. Hepple and P. O'Higgins), paras 1–017ff and 1–381ff.
49. Per Fry L.J. in *De Francesco* v. *Barnum* (1890) 45 Ch. D. 430 at 438.
50. [1971] 3 All E.R. 1345 at 1355.
51. Industrial Relations Act, 1971, s. 106 (4) provides, in the event of unfair dismissal, for a recommendation of re-engagement. Recommendation 119 of the International Labour Organisation Geneva Conference of 1963 favours reinstatement after unfair dismissal.
52. V. Bolgar, 'Why No Trusts in Civil Law?', 2 *Am. J. Comp, L.*, 1953, 204.
53. F. H. Lawson, *The Rational Strength of English Law*, 1951, 79. For a modern view of the advantages of different forms of wealth, A. B. Atkinson, *Unequal Shares*, 1972, chapters 2 and 3.
54. *The Right of Property*, 1939, 6.
55. C. H. S. Fifoot, *English Law and Its Background*, 1932, 205 ff.
56. *Op. cit.*, 101.
57. *Phillips* v. *Brooks* [1919] 2 K.B. 243; *Lewis* v. *Averay* [1971] 3 All E.R. 907.
58. *Ingram* v. *Little* [1961] 1 Q.B. 31 at 73.
59. See *Lake* v. *Simmons* [1927] A.C. 487.
60. *Ante* pp. 85 and 126ff.
61. Kahn-Freund's introduction to Renner, *op. cit.*, 3.
62. *Social Dimensions of Law and Justice*, 1966, 428.
63. A. A. Berle, *The Twentieth Century Capitalist Revolution*, 1955, 27, cited by Stone, *loc. cit.*; Atkinson, *Unequal Shares*, *cit.*, 38–43.
64. *Principles of Modern Company Law*, 3rd ed. 1969, 499.
65. See Board of Trade Inspector's Report, Gower, *Principles, cit.*, chapter 24; H. Rajak, 'The Oppression of Minority Shareholders', 35 *M.L.R.*, 1972, 156.
66. *Burland* v. *Earle* [1902] A.C. 83 at 93, per Lord Davey.
67. Per Romer J. in *Re City Equitable Fire Insurance Co. Ltd.* [1925] Ch. 407 at 426.
68. *Re Lee Behrens and Co. Ltd.* [1932] 2 Ch. 46 at 51.
69. *Parke* v. *The Daily News Ltd.* [1962] 2 All E.R. 929 at 948. See now the Redundancy Payments Act, 1965.
70. See Gower, *Principles, cit.*, 62–64; Friedmann, *op. cit.*, 342–345; and the *Report of the Royal Commission on Trade Unions and Employers' Associations* (The Donovan Commission) 1968, Cmnd. 3623, chapter 15, with the misleading suggestion that the German experiment involves worker participation in management as opposed to control of management.
71. E.g. the *Industrial Relations Code of Practice* (H.M.S.O. 1972), para 10: 'The principal aim of trade unions is to promote their members' interests. They can do this only if the undertakings in which their members are employed prosper. They therefore have an interest in the success of those undertakings and an essential contribution to make to it by co-operating in measures to promote efficiency.'

72. For this concept, Berle, *The Twentieth Century Capitalist Revolution*, *cit.*
73. *De Jure Belli ac Pacis*, III. 20, 7. (tr. W. Whewell).
74. J. Stone, *Human Law and Human Justice*, 1965, 280–2.
75. *Nunemacher* v. *State* 129 Wis. 190 at 200, cited by Stone, *op. cit.*, 97–8.
76. *I.R.C.* v. *Duke of Westminster* [1936] A.C. 1 at 19, per Lord Tomlin; cp. *Ayrshire Pullman Motor Services* v. *C.I.R.* (1929) 14 T.C. 754 at 763.
77. Art. 14 (2), cited by Friedmann, *op. cit.*, 195.
78. *Pound, op. cit.*, 111.
79. J. L. Sax, 'Takings and the Police Power', 74 *Yale L.J.*, 1964, 36 at 61ff.
80. *Power*, 1969, 258.
81. *U.S.* v. *Bethlehem Steel Corporation* 315 U.S. 289 at 312ff.; J. Stone, *Social Dimensions of Law and Justice*, 1966, 427.
82. *International Companies; Report of a Conference*, (T.U.C.), 1970, 3.
83. K. W. Wedderburn, 'Multi-national Enterprise and National Labour Law', 1 *Industrial L.J.*, 1972, 12.
84. *Loc. cit. ante*, n. 73. Sax argues that this limit on the eminent domain placed by Grotius, Pufendorf and others was not intended to preserve the interest ot the owner but was an expression of their fear of arbitrary power in times of emergency and 'ill-considered, hasty or even discriminatory impositions created by the pressing necessity of the state to get a job done . . .' *op. cit.*, 54–7.
85. [1965] A.C. 75 at 101.
86. Per Lord Kilbrandon, 1963 S.C. 410 at 429; cf. the French principle of 'equality in the face of public charges', *ante*, p. 102.
87. Sax, *op. cit.*, 36.
88. *Hudson County Water Company* v. *McCarter* (1908) 209 U.S. 349 at 355.