HOUSING AND THE JUDICIARY

A study of late nineteenth century judicial practice in Scotland

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Abstract of Contents

In order to understand the various perspectives and hypotheses which have been advanced concerning the practice of the judiciary in determining social issues in the Courts, the study attempts to explain the nature and extent of the work done on the judiciary in Britain. This analysis proceeds at the political level and goes on to consider the professional and educational issues which affected this area of study in the pre-democratic era in Britain.

Having noted the paucity of the early studies on the judiciary, the situation of the rights of tenants in dwellinghouses in the period 1850 - 1915 is dealt with. The limitation of rights to claim damages under the contract of lease is examined in detail. In contrast to this loss of rights, the statutory position of tenants dealing with the provision of housing for the working classes is also examined. The actual operation of the working of both the regulatory aspects of the law and permissive powers to provide housing are examined with particular emphasis on the perceptions and activities of professionals, moral entrepreneurs and the parties most directly affected, landlords and tenants. This section notes that the paradox between statutory and judicial work was less substantial than, at first sight, it seemed.

Although the division is largely heuristic, the work of writers and theorists in the democratic era is then examined to see to what extent the judiciary and their work have yielded theoretical perspectives. Although on the surface they have attracted considerably more academic attention, the epistemological and empirical shortcomings of these hypotheses are critically surveyed. An attempt is made to see how we might use these perspectives to illustrate the work of the Scottish higher judiciary over the period in question.

The study concludes that, whilst previous attempts to ground judicial theory in their practice, have been limited, the situating of the work in this area of habitability of houses within the context of the perceptions and struggles of the specific epoch involved, provides us with a clearer understanding of the ways in which the judiciary can operate in an apparent value vacuum. The implications, though, of the suggestion in the study that in this field the notion of bias does not seem supportable, are explored and the study suggests tentatively that judicial assertiveness would seem to relate to the politicisation of the issues involved.

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A Note on Sources

I have tried, wherever possible, not to simply reproduce the work already available on the operation of housing policy in nineteenth century Scotland. This work tends to concentrate on the Glasgow experience. I have tried to present the picture both in the smaller urban as well as rural settings to give an overall picture of the practice of the sanitary authorities across the whole of Scotland.

Wherever possible I have consulted original sources particularly in the sections on the work of the various landlords' and tenants' organisations. This information is not always very comprehensive since records appear to have been destroyed over the years. Enough exists, though, or can be inferred from secondary sources to indicate whether the picture being presented is reasonably accurate. Thus, the Minutes of Evidence to such bodies as the Guthrie Committee allow one to find out how widespread and how active tenants' and landlords' groupings were, despite their minimal records.

Similarly, I have supplemented the information in the case reports from newspaper reports and journal accounts of these actions in some cases to supplement the occasionally meagre background information. In addition I have examined the original processes at West Register House in Edinburgh. In some instances these have been

very full and informative whilst in others there is a good deal less.

In common with Bob Wilson's study of the English judiciary in the 1960s, I found that the Scottish judges of the late Victorian era appeared to have been largely 'private' individuals who seldom committed themselves on public issues in correspondence or public addresses. I have examined the various collections of private papers in Scotland where the judiciary make an appearance but regrettably no collections of the specific individuals involved appears to exist.

Introduction

The subject of this work is the performance of the upper judiciary in Scotland on the issue of insanitary housing in the period from 1850 to the outbreak of the Great War. My aim, in examining this area in some detail, has been to see how satisfactory accounts of judicial decisionmaking on civil issues in Britain are, as well as to draw inferences from the specific study. This time and area were not chosen at random. I had come across the general principle of mutual obligations of landlords and tenants as to habitability of dwellinghouses in the context of teaching Private Law. However, it seemed that almost all the restrictions on tenants' rights to recover damages under their contracts stemmed from this particular time before the Great War. While working on the development of modern housing and the Rent Acts, this also appeared to be the time when, as in other areas of life, rights were either secured by or granted to the working classes. This seemed to echo notions which have been current for a number of years that there was some form of cultural or social 'gap' between the upper judiciary, on the one hand, and other voices and forces within society.

Apart from the specific area of housing rights, I had encountered a number of difficulties squaring the various divergent accounts of judicial practice with my own observations in a number of fields of private law. The limited scope of the dominant explanations used seemed to suggest either that this was an area in which a plethora of theories had been left to moulder on library shelves or else, in fact, very little work had been done on the judiciary in Britain.

Upon discovering that the latter was the case, it seemed important to me to provide an account of why it seems likely that, from the sphere of pre-democratic politics there was relatively little systematic analysis of the judicial role or function. The modern notion of the value of the imprimatur of the apolitical judiciary seemed to have its specific source within the constitutional struggles of the seventeenth century. With their resolution the judiciary seemed to 'disappear' as political counters. Even with the advent of a form of class politics in modern democracy, the weight of this tradition has successfully rebuffed most attempts to bring the judiciary under permanent political scrutiny.

Whilst this account can expect to receive support from the professional legal educators, one might have imagined that within liberal legal studies, some shafts of realism might have demystified the judicial role. That this did not appear to have happened, seemed to require examination. Accordingly, in addition to noting possible political sources for the judicial "wallflowers," the nature and extent of non-professional legal education in Britain was briefly examined. This enterprise turned out to be both recent and limited. Taken along with the dominant intellectual interests of its few practitioners, the judge appeared as a figure of minor interest to most legal academics.

For largely professional reasons, such analyses appear to have remained arcane. In fact, it is only in the past century that any full-time systematic work has been done on the current legal systems in Britain with Universities virtually moribund in legal studies until after 1850. Since the resuscitation of legal studies, again, the judiciary have not featured as a major item of scholarship. This section on the developments in legal education attempts to indicate what other interests dominated those whose work did involve the judicial enterprise. Although through the first

period of legal education the concerns of the profession dominated, this did not mean that no work was done on the judiciary. Little extensive systematic analysis emerged in this period although there were hints that the subject was not entirely unproblematic. It was not until the political and education developments of the post war era that we find legal academic study devoting time and attention to the problems of the judiciary in a democracy. The study attempts to delineate this development and see to what extent it produced ways of theorising on the operation of the judicial role. The study then looks at the specific area of change in the landlord/tenant relationship in Scotland and at the apparent paradox of judicial limitation and legislative extension of rights in respect of insanitary housing.

In order to place these decisions in their concrete social context, the thesis then goes on to look at both the ideological and practical background of the extant sanitary control mechanisms, available at the time, to buttress or supplant the contractual relationship of landlord and tenant, where there were questions about the habitability of the dwellinghouse.

Although the splitting of the judicial theory into specific time frames is a heuristic device, the

situation of the judicial and sanitary practice and ideology at this juncture serves to highlight the contrast between the generalised limited approach of theorists in legal studies with the concrete reality of unfit housing. Thereafter, follows the delineation of the modern perspectives on the judiciary with their superficial critical patina and general absence of idolatry. This change of style, however, tends to promise more than it actually delivers, by way of systematic theory. The study concludes with an assessment of judicial theories both in light of their own internal epistemological deficiencies along with their limitations as devices to account for the decisions in the period and area under review and an attempt to provide an alternative perspective on the judicial role, based on this empirical study of judicial and social practice in its political and economic context. Essentially, it rejects the notion of splitting specific segments of social life into internally analysed discrete areas, opting for the practice of examining the totality of the social process in order to make assessments of political and economic developments such as those of insanitary housing treatment.

What seems to emerge from the overall examination and 'testing' of general theories about the judiciary is that most of those posited seem to proceed with minimal empirical support. By examining this specific area of social life, it has been possible to cast some doubt over some of the cruder mystificatory and political accounts of judicial work. The judiciary emerge as operating within their social context in a quite clear way, but not as mere ciphers. Whilst much of the critical work over the years has exposed the limitations of the reificatory tradition of adherents of the 'common law as common sense' it has tended to lay itself open to simple refutation. It has failed to explain how it is that the 'partial' judiciary have been able to appear as fair and even-handed in so many areas. In this study their work reflected the nature of the perception of the problem of insanitary housing. The issue was not argued in terms of a form of labour/capital dispute. Recognition of such a reality may help sceptical assessments of the judiciary to be less one-dimensional, without accepting mystificatory rhetoric.

THE INVISIBLE POWER

The judiciary in Britain seem to provide a perfect, straightforward example of a group of powerful decision-makers who figure prominently within any account of politics in the British State. The crucial position of the judiciary in decisionmaking does not appear to be affected by commitment to either pluralist, conflict-based or Marxist theories of state. Whether power is conceived of asdiffused between competing minorities, whether or not one adopts the notion of circulating or oligarchic elites or simply situates the socio-political order as subservient to the primacy of the economic structure, it is of no great matter. In all these accounts a role must be given, of some import, to that group of individuals who determine the exact intention of the sovereign bodies within constitutional arrangements. The way in which, _____ _____the kinds of decisions which the Courts have been assigned and the absence of formal_____ subservience would seem to indicate _____,_____ a sector of state power which is relatively autonomous. The reasons for this mooted autonomy, its extent and its specific nature, its permanence of transitoriness - all

these are questions which one might, perhaps, have legitimately expected to have exercised those interested in the operation of the State in Britain. This has most certainly not been the case until the past decade and, even within this era, is strictly limited. The scope and limitations of such work will be examined but suffice it to say that study of the British judiciary still remains minimal.

The adherents of a pluralist account of the State might find for the judiciary a problem in their position of life tenure. The operation of a notional consensus by the judiciary might be of interest to a conflict theorist. Marxists might be expected to see in the judiciary a paradigm of the tension between "hollow liberal" claims of the rule of law and the methods of the ruling class in exercising power indirectly through an apparently independent group of technical functionaries. However, rather than produce answers to these questions it has been the fashion to "sloganise" about the judiciary. They have been portrayed as alternatively independent, irrelevant or even mere puppets, conscious or unconscious, depending on the account.

Part of this study will examine the operation of the judiciary in Britain in a crucial aspect of social life and will attempt to account for this apparent lack of interest with a major decisionmaking group. This seems important in that it may provide pointers to the

ways in which judicial power is mediated in the current epoch, as well as some understanding of legal ideology

Legal Theory and Practice

It is, perhaps, wisest to bear in mind that the very different concerns of academic lawyers from those of practising solicitors and barristers advocates might be expected to produce different focuses for studies on the judicial decisionmakers. Briefly, a theoretical orientation rather than a straight practical one would seem more likely from academics. What we in fact tend to find is that the judiciary figure within the academic lawyers scheme, insofar as they are relevant to or not relevant to theories of law in the sense of "what is a law". At the practical end of the enterprise we find the judges largely buried by minutiae. It is fictions that expand or are rationalised; doctrines which are followed, rejected or explained. The judiciary exist at this level of legal analysis as the bearers of inexorably progressing rules or principles. It is the rule which is visible not the decisionmaker. Between them the academic lawyers and the practical law teacher have been slow to recognise the practical as well as theoretical possibilities which can flow from an examination of the judicial role from a behaviouristic stance, where this might be feasible. Nor should the position of the judiciary themselves be forgotten. Never slow to explain their function and role within the

State they have tended to provide a powerful counter-vailing force to such enquiries on the judiciary as have been made. [1]

> "It seems to me that the rule in Addie's case has been rendered obsolete by changes in physical and social conditions and has become an encumbrance impending the proper development of the law". [2]

> "As I understand the judicial functions of this House, although they involve applying well established principles to new situations, they do not involve adjusting the common law to what are thought to be the social norms of the time. They do not include bowing to the wind of change. We have to declare what the "law is, not what we think it should be." [3]

These statements in the same week in the highest civil court in the land encapsulate a central problem which has exercised British jurists. Exactly why there has been such staunch adherence on the part of the majority of the senior British judiciary to the declaratory theory of the courts requires some explanation. It also seems to provide one of the key reasons why jurists have tended to concentrate their attentions in fields other than in the nature of the judicial process. The current tension between executive and judiciary to which Bredemeier adverts [4] is of fairly recent origin, largely coincident with the emergence of the active State in place of the night-watchman role played at the turn of the century in Britain. The current role of the State has not always been so extensive.

Both liberal theorists and Marxists recognise

the vastly different role now played by the organised public power structures - the State. Questions as to the quality of change which has taken place in this century do not affect the fact that there is in crude, simple quantitative terms far more State activities, far more State regulations, far more State involvement in economic, social interaction than was the case in the late nineteenth century. [5]

Wolfgang Friedmann, writing of the problems for the rule of law in a mixed economy perceived an expansion of the traditional state role of umpire to that of regulator and latterly provider and entrepreneur. [6]

The new State role, though, is of recent origin, although it had certain precursors within the late Tudor era in England. The mutually supportive relationship which Bredemeier observes, however, is not within the British context, a development which parallels the expanded State. The tradition to which Viscount Dilhorne is the heir has its roots further back in the past. Whilst accepting the possible contribution of the Bredemeier perspective for focusing the nature of recent, specific executive/judiciary conflicts and conflict avoidance mechanisms and processes, it does not provide a total explanation for limited judicial claims in law-making, bearing in mind the very recent extension of representative democracy to Britain.

There are other reasons for the adherence of both the judiciary and many jurists to a limited judicial role in British legal process. The dominance of the southern partner in the Scottish civil court set-up has ensured that the pre-union relationship of the Judiciary to other aspects of the State machine in Scotland, for all intents and purposes, has been overlaid by the English experience. This, combined with the obfuscatory nature of the use of Institutional writers in Scottish courts, has resulted in no major challenge from within Scotland to the English account of the judicial role. This role seems to stem from specific Constitutional struggles in seventeenth century England which were "incorporated" into Scotland by the Act of Union, without any comparable struggles in Scotland.

The Judiciary, the Common Law and the Constitution

Whilst the judiciary, Legislature and Executive have in the recent past tended to be mutually supportive, it seems that the specific historical circumstances of the legal profession, judges and jurists in the conflicts in the seventeenth century between the "court" and the "country" provide a compelling explanation of the strange popularity of the declaratory theory of case-law.

The notion of a "total" legal system

has limited plausibility to anyone involved in drafting simple rules for a Society or club. To hardheaded, practical lawyers, the notion that the common law ever held within its bosom all the answers seems unrealistic. As Stephen suggested, speaking of the state of common law in the seventeenth century

> "When Coke wrote, the law was in such a state that anyone who possessed a technical acquaintance with it and would take the trouble to give anything which could be regarded as a popular expression of it might exercise great influence upon it." [7]

The appeal, then, of the common law may have to be sought in political theory and practice rather than in any compelling legal theory associated with the common law. Of course, here it is worth re-emphasising the point made earlier about artificial subject boundaries. The notion of a 'pure' legal theory is of recent origin and those who argued for and against the primacy of the common law had few illusions that what they were discussing was a political instrument. The question appeared to be who was to be in charge of the use of this instrument? To what uses was it to be put? Legal theory in this era was largely indistinguishable from political theory. The major legal questions of constitutionality contain within them questions of sovereignty and authority and the nature of legal obligation. The resort to

legal authority rather than to naked power provides some sort of starting point in making sense of that most apolitical construction, the common law.

Modern legal theorists are familiar with mechanistic approaches to the judiciary. Since it is this very notion of mechanistic legal development or rather non-development, which has, until recently, been a source of the common law's imperviousness to attack as an imperial code, its socio-political origins are worth investigating. The relegation of the decisionmaker from the process to an almost clerkly role would seem to be crucial in sustaining the apolitical notion of a customary code in which fresh policy choices are <u>not</u> made every day which profoundly affect the lives and conditions of vast numbers of individuals. The significance of all this becomes even more apparent when we realise that we are talking not of a social code amenable to democratic challenge. The current symbiosis of which Bredemeier talks has been absent from the operation of the common law and its operators the judges until the last half century with the extension of universal adult suffrage only achieved in 1928 in Britain[8] and the concept of "one man one vote" only being adopted in 1948.[9]

THE SOURCE OF THE MECHANICAL JUDGE

> "by the turn of the century English society was witnessing a growth of tension in the relations between members of the governing class, and between society and the State." [10]

The kinds of tensions of which Knafla and others[11] speak being inherent in the society of the early seventeenth century although exacerbated by the personalities of the individuals most directly involved in day to day politics might well have found their solution in other forms than a regicide, a restoration and finally a coup d'etat. It seems misleading to centre discussion around such issues as the "divine right to rule" or the competing authenticity of statutes and the common law. It is, perhaps, most helpful to regard these forms of argument as symptoms rather than causes of the competing claims of the emerging state and the property owners in late Elizabethan society. Arguments were plucked from the shelves apparently at random to buttress specific groups on specific issues. It would be a mistake though to simply consider these arguments as cynical rationalisations. Rather there was a general failure on the part of many of the major protagonists to recognise the inherent contradictions in many of the positions taken up in the struggles for political power at this time. There seems to have been an almost naive belief that the crucial question of sovereignty could be solved through some sort of

version of the Medieval notion of a balanced polity. Perhaps this can be put in perspective in view of the success of latter day sociologists of the consensual functionalist persuasion like Talcott Parsons and even more recently Edwin Lemert and Edwin Sutherland.[12]

In place of a simple split between anti-Royalist or even anti-Absolutist Parliamentarians on the one hand and Monarchists or Absolutists on the other we have a complex situation where most Parliamentarians were Monarchists. Most Parliamentarians were supporters of the prerogatives of the King. Individuals tended to differ in the exact extent of a specific prerogative and the specific areas where the common law judges chose to invalidate Statutes of the Parliament and operate generally.

The seventeenth century upheavals had their roots in unresolved questions. From the relative chaos of the fifteenth century there had been a long period of calm and increasingly effective government under the Tudors. The areas of state concern had expanded to cover social welfare as well as industry. At the same time as the functions of central government had been expanding so, paradoxically, had those of those groups represented in Parliament. It was with these large landowners, whose holdings had been swelled by the dissolution of the monasteries and enclosures that the monarchy of the Stuarts had to deal. The question of

government supremacy seemed to be treated as one essentially of 'give and take'. It was, without mutual goodwill, a virtually inoperable form of effective government as the reign of Charles I amply illustrated.

What is particularly interesting, for us today, is how what was, in crude terms, a struggle for the right to have the final say, a struggle for power, was for the most part argued about as if it were a problem of law. This derives, in part, at least from the notion of government as a balance of interests. Not of course, simply, the interests with a loud voice, but those which were entrenched in the common law as having certain guaranteed rights thereunder. On the one side of the equation there was the King with his prerogatives and on the other side were the rights of the subjects. The prerogatives covered such matters as making appointments to the council, the law courts, other departments of government and to the church as well as the summoning and dismissal of Parliament. They were the subject of discussion but it was only very late on that they were directly challenged by Parliament

Coke expressed accord with the absolute nature of the prerogative on such matters as late as 1621 and one of the most committed Parliamentarians, Sherland, stated in 1628

> "The Kinge may make warr, may make peace, call parliaments, and dissolve them these are of the highest nature, for there the Kinge is the lex loquens." 13

This was related to the general common law by a legal historian of the day, William Lambard

> "The most part of Causes in complaint are and ought to be referred to the ordinarie processe and solemne handling of Common Law, and singular distribution of Justice; yet have there alwayes arisen, and there will continually, from time to time, grow some rare matters meet to be reserved to a higher hand, and to be left to the aide of absolute Power, and irregular Authoritie." 14

This view seemed to have received general acceptance at the beginning of the seventeenth century in that its implications did not seem to have been fully appreciated. Sir Edward Coke, that doyen of Parliamentary control suggested, in 1621, that the King's power to commit persons on grounds of state without giving reasons was fine

> "It was against the Books of Law, that the Party Council should be restrained ... That it will hinder the finding out of divers Mischiefs both of State and Commonwealth if the Mittimus must contain the Cause of every Man's Committment." 15

Clearly then there was no eternal 'principled' stand against such operations by those who ultimately opposed the King.

When we come to look at the rights of the subjects we are in a similar kind of paradoxical position. Just as Parliamentarians support the monarchy and the prerogatives of the King we find that the common law is fully accepted as central and authoritative by Royalists. James I himself remarked that both King and parliament have a

> "union of interest ... in the lawes of the Kingdome, without which as the Prerogative cannot subsist, soe without that the Lawe cannot be maynteyned." 16

His staunch supporter, Francis Bacon, opined similarly in 1616

> "if (the Common Laws of England) be rightly administered they are the best, the equallest in the world between the Prince and People; by which the King hath the justest Prorogative, and the People the best Liberty ..." 17

The much vaunted rights of the common law seemed to consist of property rights. The notion of due process for criminal activities combined with the traditionally harsh penal code indicated that it was hardly the area of personal liberty that was the common law is major concern. It provided sustenance to the view that, where the King and his prerogative possessed no rights, there, the subject ruled supreme. That is to say, the common law protected property rights of subjects which were themselves full and

absolute. The only possible challenge could come from the prerogative. Now this might seem trite except when it is allied with the directions of prerogative and even statute on the one hand and the control thereof on the other. There was little question, in practice, that the Stuart Kings had any intentions of ignoring the longstanding practical limitations on their actions. Rather they strove to circumvent or abolish some of the traditional restrictions on the King's power. Parliamentarians worked to increase these legal restraints. Interestingly enough, must of this struggle took place in the Courts in such issues as Bate's case and the Ship Money case. This was in line with the limited recognition of the voluntary nature of taxation raised through Parliament as Charles I himself agreed in 1629

> "my intention in my speech at the ending of the last Session concerning this point was not to challenge Tonnage and Poundage as of right, but de bene esse; showing you the necessity, not the right by which I was to take it, until you granted it to me." [18]

There is no vestige here of a feudal conception of King as fount of property rights and privileges. The question thus emerges which source of right is to be preferred in the event of fundamental disagreement. The King has specific rights over foreign policy and summoning Parliament, but he had no guaranteed source of finance. That source of finance,

Parliament, however, was subject to his whim so that its power was passive rather than active. When the balanced polity failed over policy differences there was no ultimate arbiter. This was where the common law was summoned up. By both sides.

Now, apart from its inaccessibility to the general non-Latin, non-Lawfrench reading laity, the common law to which both Royalists and Parliamentarians appealed was far from precise. The inadequacy of reports in the sixteenth century did not help. The actual sources of the common law were extremely open textured and its basis vague in the highest degree. Coke might speak of the common law as "the perfection of reason" but the problem as James I himself opined to the Commons in 1621 was that

> "... reason was so variable according to several humours that it were hard to know where to fix it. Find me a precedent and I will accept it." [19]

If there ever had been a time when there was universal agreement on what was 'reasonable' that time had certainly passed by the time of the Stuart accession. The 'reasonableness' of the 'general welfare' contained within the Stuart exercise of the prerogative to provide effective finance for expansionist government had to be set against the 'reasonableness' of the sanctity of private property.

When asked to decide specific questions the problem was dealt with as Christopher Hill points out in pragmatic rather than dogmatic manner

> "Judges did not turn to the legal record with absolutely open minds to find out what past practice really had been: if they had done so they would have found hopelessly conflicting answers. As practical men, facing urgent practical problems, they took what they wanted from the available records of the past, as theologians took what texts they wanted from the vast arsenal of the Bible." [20]

The possibilities within the variegated verdure of the common law reports to support the Royal position on an extended prerogative were there, at least before the suppression by Coke of decisions and authorities with which he was not in accord in his Institutes. So successful was his compilation that in later years there were complaints from jurists including the illustrious Blackstone that many of Coke's so called precedents had

> "an instrinsic authority in courts of justice, and do not entirely depend on the strength of their quotations from older authorities." [21]

Some, like the dictum that it was not lawful to predict the date of the end of the world or even announce that it was at hand, had no support other than Biblical texts.

The fact that the common law courts in the crucial decisions of the early Stuart period opted to limit rather than extend the prerogative of the King was not done altruistically nor were its implications restricted to challenging absolutist power. The common law-Parliament alliance sprang from the mutually compatible goals of the profession of common lawyers and property owners. Coke adapted English law

> "... to the needs of a commercial society. In so doing he had to challenge everything that impeded the development of a world in which men of property could do what they would with their own: monopolies and gild privileges, arbitrary taxation and arbitrary arrest, paternal control over the economic life of the country. This brought the common law into conflict with the prerogative and its courts, the Church and its courts; it was natural and inevitable that Coke should turn to the House of Commons for support as soon as he had failed to achieve his aims within the government." [22]

Although this account seems to be in accord with the evidence it runs the risk of tending to reify the common law and separate it from the specific function which it served and the groups it largely protected. There was nothing intrinsically less absolutist in principle about submitting to the common law than the prerogative courts when one looks at such common law decisions as Darcy v. Allen [23] where the right of a man to live by his labour was pronounced so fundamental that it stood against the monopoly granted by the patent of the queen, and even against

statute. This parallel use of 'common right and reason' either to reject or construe a statute was no guarantee against the absolutism of "magistratocracy".

Instead the shift of Coke from Court to Commons and the need for all the legitimacy available set Parliament and Common law courts on a temporary common path. As it was realised rapidly by the Levellers the supremacy of the law in itself could be used against Parliament in a more profound way than the occasional meddling with statutes.[24] Nonetheless, in the actual intellectual battles of the early seventeenth century as well as the formal forensic combats the value of the symbolism of the ancient and mystical common law was a much sought after prize.

Although the law reform era of the Interregnum promised to end the common law system and its operators under pressure from the Levellers, like Lilburne and the Diggers and Gerald Winstanley these proposals fell along with the political waning of the revolutionary impetus of the Republic. With the Restoration and subsequently the 1689 coup d'etat again there was a renewed appeal to the symbolic common law to sustain the myth of the legality of the new regime.[25]

> "Resolved, That James the Second, having endeavoured to subvert the Constitution of the Kingdome, by breaking the original Contract between King and People, and by the advice of Jesuits, and other wicked Persons, having violated the fundamental Laws, and having withdrawn himself out of this Kingdom, has abdicated the Government, and that the Throne is thereby become vacant." [26]

In the light of the usefulness of the common law in the power struggles of the seventeenth century and its 'magical' properties the last thing on the agenda for those whose power and position was based on its glorious fictions was subjecting the rules and personnel of the potion to rigourous examination.

TRANSMUTING THE MECHANICAL JUDGE INTO LEGAL THEORY

What followed from this series of major political events centring on the constitutional arrangements of the state apparatus was a process of post-hoc rationalisation and elaboration of those versions of the role of the common law which had helped the Parliamentary side in their struggle for power in the early part of the century. Whilst I am not putting forward a crude materialist aetiology for the constitutional upheavals of the seventeenth century it is clear from the foregoing sections that what we have in this period is a specific struggle for certain political goals by specific groups in the country with only limited and sketchy ideological support. This contrasts noticeably for example with the voluminous

and elaborate literature which preceded, accompanied and followed the great debates on the relationship between Church and State in Europe in the thirteenth century.[27] Christopher Hill comments on the significance of the sociology of intellectual history

> "... I am sceptical about pedigrees of ideas - A is influenced by B who got his ideas from C, and that explains action Z. It is always easy to construct chains of causes once you know what you have to explain. Nor do ideas evolve in a vacuum. 'The great philosophers, were not revealing unknown lands: they were mapping those known. If the old regime had been threatened only by ideas, the old regime would have run no risk. The poverty of the people, the political malaise, were also needed to give the ideas leverage. But the ideas set men in motion.' Ideas do not advance merely by their own logic ... anybody of thought which plays a major part in history - Luther's Rousseau's, Marx's - 'takes on' because it meets the needs of significant groups in the society in which it comes into prominence." [28]

Within the realms of sociological work a variation on this theme has been suggested more recently within the context of the positivistic subordinate 'service' sociology of post-War America.

> "... police and sociology are functional alternatives. Sociological research thrives on a low level of social unrest, widely diffused; but when, as in recessions and depressions, unrest changes from passive to active, when resistance breaks out in overt acts, in strikes, revolts, riots and revolutions, then the 'weapons of the intellect' which sociological research supplies to the authorities becomes increasingly functionless." [29]

At this point it will suffice to point out that a place clearly exists for "rationalising theory". Whilst this is by no means the only function of theory, as Hill makes plain, it nevertheless has a part to play in legitimating the socio-political arrangements within the State at any given epoch.

The Legal Basis of the Constitution

The control of education and entry into the legal profession by the profession itself had the effect of encouraging an account of the Constitution within legal education in which the common law was crucial. Blackstone wrote of the continuity of the post 1688 Revolution politico-legal set-up in such a way as to obliterate the fact that to all intents and purposes politically the State was overthrown and replaced by a completely fresh set of political arrangements. [30]

The relative absence of the academe from legal education had the effect of intensifying the practical approach to the role of the judiciary.[31] Their submissive role as functionaries in the complex that was the common law went unchallenged within the practical legal education processes of the eighteenth century. It seems highly likely, though, in fairness, to suggest that this judicial invisibility might well have suited the Royal side in the constitutional struggles referred to above.

The judiciary 'disappeared' in the regal formulations of Bacon and Ellesmere under the fiction that the judge's authority comes from his being in the shoes of the King.[32] Such a fiction in Constitutional form was hardly conducive to intense study of the extent and stimuli for judicial policy changes.

Post revolutionary legal education was practically orientated.[33] It took the constitutional arrangements for granted along with the declaratory theory of the common law. Since the acceptance of such a notion is essentially a political stance it is not clear to what extent it was actually accepted at an intellectual level. However, since the major thrust of the educational process was not demystification of taboos and old beliefs any challenges to its credibility remained muted. In a sense it is not important whether or not the declaratory theory was accepted at the intellectual level provided that no alternative analysis emerged. The impact of a victory by default could be said to have the same impact as a genuine subscription to the notion of the law residing in the hearts of the judges.

The success, then, of what constituted in part at least a reification of the common law appears to have its roots in political expediency, nurtured in the practical legal education which was a feature of the eighteenth and nineteenth century lawyers

background. For present purposes it does not appear that the dominant picture of legal thought or legal education is simply the classically misleading one of the victorious ideas of eighteenth and nineteenth century legal and politico-legal theorists and practitioners. What constitutes the field of issues and concerns both at the practical and academic level is the selection of the economically, politically and intellectually 'powerful'. Those in the position to dictate the terms of public debate whether it be within Parliament, the academe or the media are those who control the agenda.[34] The effective absence of an alternative perspective to the mechanistic view of the judiciary following the seventeenth century upheavals is undoubted. The complex of political reasons combined with alternative intellectual pre-occupations seems to be wedded to the professional view of the law's function in a pre-democratic era. Why it was that political discourse did not provide a conduit for a more realistic view of the legal policy choice exercise relates to the minimalist State function indicated above, but the impact of legal studies, broadly viewed, was to reinforce the artificial mechanistic account of the seventeenth century political victors.

LEGAL EDUCATION
England and Wales

(i) The Professional Era

There are differences of opinion as to the quality of legal education between the sixteenth and nineteenth centuries. Exactly how long the aural tradition lasted is not clear with its instruction largely through pleading, moots and bolts coupled with 'readings' lasting a number of weeks during the vacations. It would seem that the form of legal education had not radically altered by the Civil War. The law teaching available at the Inns of Court was in the practical aspects of English law and pleading.[35] The Universities with their traditions in canon and civil law taught only civil law after the split with Rome. Neither was the education available in the English Universities noted for its excellence.

> "They educated the gentry and the governing class for their place in public or country life; they were a pleasant set of clubs for the numberous idle and well-to-do, and they were the central training schools for the ordinands of the established Church of England." 36

However, for those with a practical bent their English law was picked up at the Inns of Court, initially through the aural method. After the introduction of printed law texts in 1600 this gave way. Apart from the limited availability of such

texts and their cost to the aspiring lawyer the common law system was extremely complex and bedevilled by a total lack of system in its textual presentation. Part of this admission that the common law had "not yet been reduced to a scholastic method, so as to be taught systematically" [37] seems as bound up with self-protection as any innate difficulties in reducing the law into some formof system. Coke again in his reply to James I in 1607 emphasised the arcane almost magical nature of the essential common law

> "Then the King said he thought the law was founded upon reason, and that he and others had reason as well as the judges. To which it was answered by me that true it was God had endowed his majesty with excellent science and great endowments of nature, but his majesty was not learned in the laws of his realm of England and causes which concern the life or inheritance or goods or fortunes of his subjects are not to be decided by natural reason, but by the artificial judgment and reason of the law - which law is an art which requires long study and experience, before that a man can attain to cognizance in it." 38

Law study appears to have been unequivocally positivist insofar as the common law could be discovered through the mists of complexity. The Inns of Court adopted a non-critical stance towards their subject-matter. There was no place within such a syllabus for doubts about the constitutional propriety and desirability of the power of judges or Ministers of the Crown. Such criticisms and doubts

as came to figure prominently in politics in subsequent epochs do not appear to have been nurtured in the law training received at the Inns of Court.

With only Civil Law available in the Universities and with the Inns hardly imbued with a critical academic spirit the system's drawbacks were obvious even when the method of pupillage became widespread

> "The practice of reading in chambers with an older barrister established itself as a permanent instrument of legal education. It helped to produce the great lawyers and judges of the early and mid-nineteenth century; but, when unaccompanied by more academic methods, it did little more than instruct the average lawyer in a trade. The heads of the profession recognised that the law could hardly be called a learned profession. This peculiar development doubtless did much to create a tension between the practitioner and the academic lawyer that has no counterpart in any other profession, does not exist in the same degree in other countries, and had greatly retarded the humane and systematic study of law in England." [39]

The creation of the Vinerian Chair in 1758 in English law at Oxford with the subsequent tenure by Blackstone would seem to have augured well for an end to the total civil/common law dichotomy of the academic and practising lawyer but this post like the later Downing Chair at Cambridge was treated as a sinecure and there was no class in English law until 1850. [40]

The civil law tradition had itself ended in the nineteenth century as well. The Regius Professor of

Civil Law at Oxford, Dr. Phillimore, giving evidence to the Select Committee to inquire into the Present State of Legal Education in 1846 stated

> "For nearly a century there has been no regular class of students who have attended lectures in civil law." [41]

Dr. Phillimore had continued this tradition during his tenure of the Regius Chair.

It is, perhaps, not surprising that the University contribution to legal doctrine and theory from the sixteenth to nineteenth centuries was negligible in England. Significantly, all that we have direct is the work of Blackstone in connection with the Vinerian Chair. The fact that there was so little by way of competition would seem partially to account for the prominence within subsequent juristic thinking of the declaratory theory of the nature of the judicial role.

Surveying the legal education provision in the middle of the nineteenth century, the Select Committee on Legal Education found that

> "the present state of legal education, professional and unprofessional, is extremely unsatisfactory and incomplete and in striking contrast and inferiority to such education in all the more civilised States of Europe and America. The student is left to his own individual exertions and no legal education worthy of the name of a public nature is to be found." [42]

University reforms in legal education followed swiftly thereafter.

(ii) The beginning of modern University law teaching

When the teaching of English law did come to the ancient Universities though it remained a secondary method of preparation for a legal career. For those interested in such a career it was more normal, since reading law was no help in qualifying nor regarded as prestigious, to read classics and cram their law in London. This was hardly conducive to a critical approach to such matters as the policy input of the judiciary. The style of teaching and areas covered bear out this view for those who in fact did read law.

Broadly speaking, the subject-matter, which was within the combined School of Law and Modern History begun in 1853 was taught historically. The curriculum of the joint School was as follows:-

> "For common Degrees: English History, from the Conquest to the end of the reign of Henry VII, together with that part of Blackstone which treats of the law of Real Property; or English History from the death of Henry VII to the accession of the House of Brunswick, together with that part of Blackstone which treats of the rights of Persons and the law of Personal Property. Justinian's Institutes may be substituted for Blackstone. The most approved edition of Blackstone to be used.
>
> For Honours: Candidates must take up what is required, as above-mentioned, for a common Degree. History from the Birth of Christ to the year 1789; Jurisprudence, and especially the Laws of England; the Law of Nations; Adam Smith's Wealth of Nations.[43]

Although the pattern was similar in Cambridge, the study of law was less wedded to the concept of the classical education in such institutions as London University, founded in 1826 and with a Chair of Jurisprudence created in that year. The influence of Austin's work, which was rapidly absorbed into the Oxford and Cambridge syllabi, an alternative to the practical texts available, was the greater since it provided some semblance of the learned profession lacking in the law. [44]

The elevation of legal education from its simple practical orientation in the nineteenth century to the status of an academic discipline in its own right might have been expected to produce some fresh theoretical standpoint on the judicial role. Within the schema of John Austin we find only minimal discussion of the judicial function.

(iii) The Twentieth Century Approach

English professional education continued in its path of vocational training and avoided adopting a critical stance in respect of either its subject-matter or the role and function of decisionmakers. [45] However, there existed an alternative to the practical professional view of legal education within the expanded body of Universities and Colleges since the middle of the nineteenth century. Often, though the impetus to commence academic legal studies came

from the local profession as in Liverpool which was instrumental in getting legal studies started after the founding of the University College of Liverpool in 1881.[46] A department of Law was actually commenced here some 11 years later managed by the representatives of the local Law Society and articled clerks body and the University itself. Although the orientation was mainly towards such practical subjects as Real and Personal Property, Common Law and Procedure and Equity there was also provision made for future teaching in non-practical classes like Roman Law, Constitutional Law and Jurisprudence. When the University attained full status in 1903 a Faculty of Law was established and law degrees awarded. Again the predominant strain was practical after a grounding in the first year in Roman Law, English Constitution, History of English Law and Jurisprudence. A similar sort of pattern emerges when one examines the creation of many of the other recent English Universities and their Law Faculties where although Jurisprudence always retained a place it was normally in the first year of the course the dominant approach appears to have been analytical judging from the literature available. H. A. Hollond was concerned that Jurisprudence did not get its rightful important place in the syllabus at Cambridge from students, either

> "... experience shows that learning which a law student does not regard as having a potential conversion value into guineas is apt to be scimped by him." 47

At Oxford a course in General Jurisprudence and the Theory of Legislation was taught in first year in Law Moderations despite the preference expressed by Sir William Holdsworth for Roman Law at this stage.

> "... the student, at the beginning of his career, has not got sufficient knowledge to appreciate even the most elementary jurisprudential theories. The inclusion of a paper on elementary jurisprudence in the first examination seems to me to be very much like an attempt to teach a student to read before he has learnt the alphabet." 48

Slightly unexpectedly Cambridge never made Jurisprudence compulsory where it could be taken in Part II of the Law Tripos as an alternative to Legal History or Roman-Dutch Law. 49

Although as Julius Stone pointed out, the ground of most Jurisprudence courses was "analytical jurisprudence with some subsidiary treatment of historical jurisprudence", 50 Hughes did suggest that as far as he was concerned at Leeds the essence of jurisprudence was to be

> "anti-historical, critical, formal, logical study and analysis of law and legislative science ..." 51

He recognised that this was less than a clear guide to teachers of the topic and suggested that

> "... each law school must make of the subject what it can, recommending anything from Hegel to the Golden Bough according to taste. At least, in supplementing the study of the principles of English law by historical and critical treatment one has gone far, if the work be well done, to fill up the quantum of a university course." 52

This freewheeling attitude to the possibilities of Jurisprudence if not their taught reality was no doubt in the mind of Professor Buckland, the Roman Law scholar when he discussed the role of jurisprudence in the curriculum. Noting that the subject appeared in some form in all University courses but in neither of the professional courses of the Bar or Law Society he explained this discrepancy

> "... it is at first sight surprising that neither of the two bodies, whose business it is to certify men as qualified to practice, should think it necessary for them to study the fundamental principles of the subject. Some light is thrown on the matter when we consider the extraordinary variety of names which the subject has in the different curricula - Jurisprudence, Analytical Jurisprudence, Historical Jurisprudence, General Jurisprudence, Comparative Jurisprudence, Theory of Law and Legislation." 53

This breadth and apparent absence of clearly articulated purpose no doubt contributed to the alienation of many vocationally directed students to

Jurisprudence and its apparent eschewal of "real problem solving". Some other reasons in the inter-War period were postulated relating to the inadequacy of the taught subject matter

> "Jurisprudence, as traditionally taught in England is not a very popular subject with students. Much that they are expected to read is out of date, and, though Comparative Jurisprudence is alive, something more than Austin or Bentham seems essential on the other branches of the subject ... It is tempting to suggest that the Society of Public Teachers of Law might find time to consider the teaching of Jurisprudence and possibly draw up a curriculum with a view to the improvement of its study and to making its great importance more generally recognised." 54

The major stimulus to the growth of Law Schools themselves from their traditional seat in the Ancient Universities was connected with the inadequate state though of professional training.

The Solicitors Act of 1922 had a great impact resulting in the opening of Law Faculties or departments in some dozen Universities and Colleges.[55] This Act required those qualifying as solicitors undertaking articles to attend at an approved Law School. However, even though the number of Law Schools mushroomed in this inter-War period, the actual numbers of staff and students involved was not great. Apart from the older Universities of Oxford, Cambridge and London, the other Law Schools at Universities only boasted some 60 law teachers between 12 institutions

to teach all subjects, professional and academic by the mid thirties.[56]

The expansion of the law teaching brought about by these changes in both the provision of public education and legal training requirements did not appear to have greatly altered the approaches to Jurisprudence. The period up until the Second War was relatively barren as far as the production of fresh approaches to Jurisprudence in books produced in Britain was concerned. The approaches to the actual teaching of the subject do not appear to have done anything to contradict the earlier rather sour judgments on the dominant analytical approaches.[57] To this end we must bear in mind the major function and numerical input into law teaching at this stage as indicated above. The problems adverted to by Hollond and Buckland were echoes by Professor Hazel in discussing the relationship between law teaching and professional practice. He suggested the abstraction of much Jurisprudence and its lack of apparent relevance meant that average law students were suffering in their legal education from effective exposure to the notion that English law was apart from and independent of any systematic knowledge of general principles

> "To most of our pupils the speculations of the Deductive School are, as James I said of Bacon's philosophy, 'Like the Peace of God, passing all understanding'; while at the other

> extreme, we have the ultra-Historical School minutely investigating the unseemly customs of primitive tribes. Equally impractical is the extreme Analytical School ignoring history and facts and offering a mere barren catalogue of blank forms." [58]

These ideas were also heard shortly after the War when Stallybrass discussing Law in the Universities suggested that one of the reasons behind the limited range of approaches to Jurisprudence stemmed from the potential of the students

> "... the men, and I think all the other Oxford Law Tutors will agree with me, are not of Scholarship Class, and I think that accounts for the fact that Jurisprudence at Oxford - the home of philosophy - tends to consist of analytical jurisprudence ..." [59]

The actual reality of these obscurantist approaches was discussed shortly after the Second War in a survey of the teaching of Jurisprudence in England and Wales in 1951.[60] By that time the teaching of the subject was largely situated within the third year of the LL.B. degree and there were deviations from this practice in only one University,[61] where it was taught in first year. Although, from the recommended reading for the various courses there seems to be a strong adherence to the traditional approach there were beginnings of the use of viewpoints other than the analytic. Thus, whilst Salmond's Jurisprudence figured most frequently in recommended reading the work of Scandinavian, American, French

and German legal theorists also figured. The difficulty of attempting to avoid compressed "potted" versions of a variety of legal writers led Professor Denis Browne of the University of London to explain a year later that he preferred one relatively detailed study text rather than a multitude of "snippets".

> "... whatever may the ridicule and contempt to which my choice may expose me, my own text will be Austin's "Province of Jurisprudence determined" ..." 62

This was explained not in terms of its intrinsic worth but because it was accessible and had a backlog of critiques available. He went on to defend a traditional analytic approach to a Jurisprudence course with "sources" and "legal concepts" included. Apart from the omission of a consideration of the nature of justice these remarks went largely uncriticised by the major figures in the teaching of Jurisprudence at that time. [63]

These attitudes and approaches to the overall purpose and function of Jurisprudence meant that little attention was paid to the judiciary in the first century of what one could call "academic legal education". The causes have their roots in the goals of legal education, the numerical and institutional significance of academic Law Schools and in the interests and orientations of those involved in the teaching of the

major area likely to produce a critical analysis of the judicial role, Jurisprudence. The incidental support of the major data providers for much law teaching, the judiciary and to a lesser extent the legislature, compounded this way of seeing the judicial role in formal terms.

SCOTLAND

(i) Background

The cultural and political factors which existed in Scotland with her far greater reception not only of Civil law material, but civilian method, set the stage for a similar lack of regard to the mechanics of the judiciary. The relative unimportance of the English inductive method and preference for broad principle in the early days of the development of Scottish legal rules meant that the role of the judge was traditionally seen as less significant within the legal process. This, allied with the availability of systematic expositions of Scots law from the Institutional Writers like Stair, Erskine and Bell in civil matters and Hume and Alison in criminal areas meant that the need to "hide" judicial creativity was less than south of the border. Whether or not the two methods have now become synonymous is a moot point. Certainly there does seem to be evidence to suggest that the earlier

Scottish antipathy to precedent is not a matter of historical doubt although this position has not been held consistently even by the most eminent of Scots lawyers.[64] The theoretical basis is certainly there with such doctrines as Cessante ratione legis cessat lex ipsa, although their use has latterly been sparing and restricted to technical areas rather than matters of wide social impact.[65]

Thus, with the Civilian influence combined with the source of the Institutional writers judicial decisionmaking has never had the total impact on the legal process as its counterpart south of the border. What the past century and a half has witnessed has been the interpenetration of two systems with basically distinct methodologies and the gradual replacement of the Scottish one with that from England. The resistance to this has been both academic and forensic, express and implicit.[66] The way in which that process has occurred relates significantly with the lack of any systematic defence of the Scottish system in her educational programmes up until very recently.

Whether or not the abandonment of a principle based decisonmaking system would have altered the broad policy lines developed in the common law decisions in Britain over the recent past is another matter. Although a number of commentators seem to

have a faith in the judiciary as repositories of socially "responsive" legislation it should not be forgotten that doctrines like common employment, contributory negligence and volenti non fit injuria were not simply sustained by precedent butemanated from primary judicial decisions.[67] There does not seem to be anything innately good in the concept of principles except the point in common with precedents that they may help to limit Khadi justice.

(ii) Legal Education

Introduction

The emphasis in legal education has alike been on professional practice rather than analysis. However, somewhat different factors have militated against the judiciary as a topic of study in their own right. One feature which has tended to inhibit the concentration of the judicial policymaking function has been the strong Scottish tradition of writing by practising lawyers in the form of "Institutional writings". These works have been compilations of the haphazardly reported cases in the past and have been accorded high status in the Courts. The process, however, is somewhat complex since in many instances what the institutional writers posit as the rule in a specific instance is derived both from specific decisions in past cases, as well as pure speculation.

Nevertheless, this process provided "cover" for the judicial decisions themselves.

Perhaps more important than simply the acceptance of the legitimating factor of Institutional writings has been the lack of size of the Scottish legal enterprise in manpower terms. In view of the size of the profession in the nineteenth century the amount of books and journals produced was impressive. The legal profession in Scotland was described in the middle of the nineteenth century as consisting of "about 10 judges, 120 practising advocates and 1,500 certificated agents"[68] (i.e. solicitors). At this time writing proceeded on a wide variety of topics of a practical kind, from banking to game law and providing commentaries on the latest legislative developments. The two major law publishers' lists each contained over 30 titles in the last two decades of the century.[69] However, the judiciary themselves do not appear to have figured in this creative period. The tendency in topics not specifically Scottish may well mean that there is a tendency for the legal education circles to utilise common topics from works south of the border. Thus there has not been a strong distinctive tradition of Constitutional law works in Scotland and works on the legal system and the operation of the Courts are rather limited.[70]

Generally, these form part of larger enterprises either in totality or on a wider topic.[71] Thus we have a brief discussion of the question of the judiciary in T. B. Smith in terms largely of the debate about precedent and its relation to "principle".

The implications of this for any discussions of the work of the Scottish judiciary are that parallel work in England may well be the only source of data. In addition the whole trend of legal education and writing in England requires examination in order to balance the picture of the overall goals and objectives of British legal scholarship. Certainly this cultural and material domination emphasised immanent aspects within the approach to judicial decisionmaking in Scotland with the creators merging into the background courtesy of Institutional writers. This process has only recently been recognised as a significant problem.[72] For the most part legal education appears to have followed professional lines in the apparent belief that a separate legal structure and some distinct common law doctrines ensured no contradictions within a wider common system.[73]

(iii) The State of University Legal Education in the mid-nineteenth century

The Royal Commission on Scottish Universities of 1831 discovered that the reputation of the Scottish

Universities rested largely on long dead famous figures like Adam Smith and John Millar at Glasgow and Baron Hume and John Erskine at Edinburgh. At Edinburgh they discovered that in Public Law

> "... there has been no regular course for about 46 years." [74]

At Glasgow, all that was ever lectured on was Scottish Law and spasmodically Roman Law although technically the Chair was actually in Civil or Roman Law.[75] The Civil Law Professor up in Aberdeen ex Professor Dauncy explained

> "I have never been called upon, nor have I given any lectures ..." [76]

Similarly at that institution there had been no class in Public Law "for many years".[77]

The Royal Commission suggested that Edinburgh was the only University capable of mounting a full course of instruction in the "Science of Law".[78] Although they suggested that it was not desirable that students should enter the legal profession "without any acquaintance with the general principles of Jurisprudence" they make no specific recommendations as to how this is to be cured and make no recommendations beyond urging classes in Civil Law and Scotch Law.[79] Indeed they recommended that on the death of the Professor of Public Law

> "... this Professorship ought to be entirely suppressed ..." 80

The international and comparative law elements of this course were to be taken over by the Professor of the Law of Scotland.

The Journal of Jurisprudence commented with regret on the substitution of the Chair of Public Law with one of Conveyancing at this time. In the same article it is suggested that the practical bent of legal education does not limit itself to the designation of the Chairs but to the style of teaching

> "The science of law, in the abstract, or general jurisprudence, is totally ignored in this country." 81

In his introductory lecture on Civil Procedure at Edinburgh University, Coldstream[82] explained that although many of the Chairs had existed in the eighteenth century, this had not actually meant that any teaching went on. In the Public Law case he instances the tenure of 17 years of Lord Meadowbank who could only command a very small class and lectured for only two sessions. He and other holders seem to have eschewed lecturing. As for Civil Law it was not until the end of the eighteenth century that the lectures began to be delivered in English following the example of Glasgow University. The occasional nature of teaching covered the Constitutional Law and

History Chair (then designated revealingly Universal Civil History and Greek and Roman Antiquities). Much of the difficulties may have stemmed from finance and the problems of Cosmo Innes in the Chair after 1836 had their source in the discontinuance of the salary by the Corporation of Edinburgh after they had gone bankrupt

> "At first he lectured gratuitously, and so long as he did so, he had a large class. When afterwards he demanded the usual fee, he is said to have had a mere handful of students. He then lowered his fee, but none came; and on returning to his original practice of free attendance, his benches were filled." [83]

Similar sorts of problem are recorded by Coldstream who discontinued lecturing after bringing out his handbook on Procedure since this could be got for a smaller fee than his lectures.[84] Even after he resumed teaching again after his lay-off this proved to be impossible due to very small numbers enrolling owing to the increased fees. As both Coldstream and others revealed, this was a branch of the law which students did poorly in the Law Agents' Examinations. The need to charge fees was hardly surprising in view of the level of endowments for the Chairs of Conveyancing in both Glasgow and Edinburgh which produced a sum of £105 for each of thesewhich even by the standards of the day was a very low fulltime wage for a professional man.[85]

The notion then, of a long and healthy tradition of legal scholarship within Scottish Universities linking the names of Erskine and Adam Smith with Gloag and Cooper is not borne out in fact. With such a recent start to legal education at Scottish Universities for the profession it is perhaps not surprising that devotion to more academic aspects of the legal process have until recently received limited attention.

(iv) Revival of University Legal Education

Little followed from the 1831 Royal Commission Report and it was some thirty years later that the notion of granting law degrees as something other than an honorary distinction was recommended in the Scottish Universities Commission of 1863. With some prompting from a Report of the Faculty of Advocates in 1859 the Commission recommended replacing this system by an instructional degree in Law.

The recommendations of the Commissioners resulted in the setting up of an LL.B. degree under Ordinance No. 75 on 20th March 1863. This degree which required possession of a prior Arts degree was not seen as a narrow vocational activity

> "it should be considered as a mark of academical and not of professional distinction." 86

To this end there were three compulsory full classes and three compulsory half classes. Civil Law, Scots Law and Conveyancing were to receive full treatment whilst 40 lectures were to be devoted to Public Law, Constitutional Law and History and Medical Jurisprudence.

Implementing the Reforms

(a) Edinburgh

The success of the LL.B. degree was limited at Edinburgh in its early years and we find only 24 persons graduating in the first ten years of its operation.[87] Grant suggests that the goals of those taking law subjects was vocational rather than academic

> "... the great mass of the students attending the Law classes were persons with strictly professional objects in view who had not previously graduated in Arts, and as the M.A. degree was a necessary preliminary to the degree in Law, as ordained by the Commissioners almost all the Law Students were disqualified from taking it." [88]

The result was that a lower degree was instituted to allow those with strictly professional objects to graduate as well as just take classes in Law. The success of this degree in its first decade was not startling either, since the Law Agents' Act 1873 gave the same privilege of reducing the period of Apprenticeship to any person who simply attended three Arts classes.

> "The attendance on the classes of Constitutional, Public and Civil Law is very small. This is only the natural result of the narrow view which the University has hitherto taken of legal education. Men can hardly be expected to take such a devoted interest in jurisprudence as to pursue its study without the hope of tangible reward. Mere class honours, no matter how substantial, ever will ever make up for the absence of a degree, which alone stamps the work of a specialist as genuine. The LL.B. degree is unpopular." 89

This sort of view received support in the following year

> "The conditions of the degree of B.L. are too lax; those of the degree of LL.B. are too severe." 90

The range of topics covered in the University law degree was very much a carry over from the earlier days and this "academic" tendency reflected in both the examination and syllabus material. The extensiveness of the studies does not appear to have been too arduous due, no doubt, to the part time approach to legal education right up until the middle of the twentieth century so far as Scotland was concerned. The ordinances of the University of Edinburgh prescribed that

> "The course of study for the degree (LL.B. - PR) extends over three academical years and includes attendance on a distinct course in civil law, the law of Scotland and conveyancing, during courses of not less than eighty lectures each; in public law, constitutional law and history, and medical jurisprudence, during courses of not less than forty lectures each ..." 91

These would amount to what currently comprises three full classes and three "half classes" which would be taken in one full academic year of fulltime study. The content of the non-professional areas included little relevant to the judiciary

> "Public Law:- 1st Natural Law in relation to Ethics on the one hand, and to Positive Law on the other 2nd Public International Law ... 3rd Private International Law ...
>
> Constitutional Law and History:- The 13th and 14th Books of Montesquieu's "Spirit of Laws", and the 7th and 8th Chapters of Hallam's "Constitutional History" ... 92

The nature and extent of the coverage given to these heads can be gleaned from the examination set in 1868

PUBLIC LAW

(1) Natural Law

... 2 Enumerate and explain the leading methods by which the law of nature has been sought to be discovered or investigated." 93

CONSTITUTIONAL LAW AND HISTORY

Hallam Chapter VI	... 2.	What were the "Benevolences" of James VI's reign, and how was Oliver St. John connected with them? ...
Montesquieu Books XI and XII	... 2.	Does Tacitus attribute to his Germans anything like the balanced and regulated Constitution of England as it is? ... 94

The coverage of the course was subject to criticism from a number of different positions, although at least Edinburgh had five Chairs established unlike the other Scottish Universities which varied from none to two.[95] Edinburgh's apparent depth of legal teaching, however, includes what were referred to as

> "the ornamental and historical departments of legal science."[96]

Specifically singled out was the compulsory element in legal education Civil Law.

> "The Civil Law course, though excellent as a foundation for more practical studies, could only be regarded as an ornamental adjunct to legal study."[97]

Taking aside Conveyancing which "embraced only a small and technical department of study" the limitations of the Edinburgh law instruction were seen as failing to deal effectively with the Scottish system in any detail. Thus, of the six classes required all covered matter which was of "background" rather than obvious "direct" aid to the prospective practitioner.

The teaching of Jurisprudence at Edinburgh also fell under the umbrella of Public law and the course covered both Public and Private International law as well as Philosophy of Law under Professor Lorimer.

The Philosophy of Law was in turn, initially, divided into Natural law and Positive law and covered such matters as the discovery of the law of nature as well as the conditions required to be satisfied for enacting just positive law.[98]

Although there was an expansion over the years at Edinburgh the approach to the topic of Public Law remained more or less constant.[99] The coverage broadened out into inter-disciplinary studies too with lectureships in Agricultural law and Industrial law in the Faculties of Science and Arts degree courses. In addition to the Professors there were a couple of lecturers appointed to work in the areas of Public Law and Scots Law.[100]

Just as Miller dominated the course of Jurisprudence at Glasgow for quarter of a century, so too at Edinburgh the Public Law Chair incumbent for over thirty years was James Lorimer whose interests ranged far and wide into international relations and international law.[101].

(b) Glasgow

Lecturing in Conveyancing had been commenced

outwith Glasgow University in 1817 financed by the Faculty of Procurators and it was under their patronage that the Chair, established in 1861 was brought into the Faculty of Law.[102] Progress was slow in both the LL.B. degree and also the B.L. The student numbers were on the increase in the latter part of the nineteenth century going from 84 in 1865 to 170 in 1875 and 239 in 1885.[103] It was, however, not until 1875 that William Galbraith Miller was the first of Glasgow's LL.B. graduates.[104] The B.L. degree was instituted at the same time in both Edinburgh and Glasgow after Edinburgh had indicated in 1872 their intention to press for an individual change for their own Faculty rather than alter Ordinance 75 under which Law degrees were constituted for all Scottish law Faculties.[105]

The success of the degrees at Glasgow was not immediate and there was only a trickle of graduates over the years - 60 in the first ten years when the B.L. was taken which did not take place until 1874. The LL.B. was even less successful with 39 graduates in the ten years after the first graduation. In the next decade the B.L. numbers climbed to 84 and the LL.B. graduates numbered 70. At the same time the number of annual Arts graduates was around 50 in the first period and in excess of 100 in the latter period.[106]

The Public law class commenced in 1878 under the supervision of Glasgow's first LL.B. graduate, William Galbraith Miller.[107] Initially this class covered both the Law of Nations and Jurisprudence but these were split in 1893, although it was not until 1953 that Jurisprudence achieved Chair status. The text for the class was Miller's own Philosophy of Law although subsequently it was joined by Holland's Jurisprudence and Maine's Ancient Law. After Miller retired the texts included Kant's Philosophy of Law. The major interests of the class can also be inferred from the sorts of material included within the Degree examinations. In the first Public law examination the Public law class was split into five component elements - Philosophy of Law; Private International Law; History of Law; Public International Law; Constitutional Law.[108] The Philosophy of law does not suggest an initially analytical approach with questions on the principle of property and classification of obligations.[109] The approach a decade later suggests a similar practical orientation with questions on International law, suicide and history of institutions.[110]

By the end of the century with the separate class of Jurisprudence, the examination was split into discrete sections based on the division into philosophy

of law, analytical jurisprudence and historical legal study. It is this first section which offers some notion of a rejection of formal analysis as the sole means of juristic activity, with questions on the connection between jurisprudence and psychology and the causes of differences between the positive law of one country and another. The overall orientation is with the concern with the nature of the will and its expression in law. After the retiral of Miller in 1903 the same sort of interests are found in the course.[111] These kinds of approach had their supporters

> "In doing what they have done the legal profession in Scotland has done all, or almost all, it could have done for the furtherance of legal education upon a liberal basis." [112]

The Scottish Law Review had its doubts

> "Our Scotch teachers of jurisprudence deal with the philosophy of law or the principles of the science of jurisprudence as a whole, and they seem to exclude from their courses of instruction the analysis and generalisations of Austin and Holland." [113]

This approach was not without its critics

> "Scotland may well be proud of the scientific superiority of her jurists; but it can hardly be denied that the English empirical jurisprudence is more immediately useful in the practical work of the profession." [114]

(v) Professionalising the Degree

The specifications of the 1894 regulations did not significantly alter the position of those subjects likely to be concerned with the process of judicial decisionmaking.

The Commissioners under the 1889 Act were not particularly happy about the B.L. degrees which they found established at Edinburgh and Glasgow.[115] They decided that it should be retained but proposed to widen the scope of the LL.B. degree as well as the B.L. The new factors in Ordinance 39 of May 1893 were the introduction of broader options.

The LL.B. regulations provided for a compulsory core which included Jurisprudence either to be studied at the General or Comparative level in a course of not less than 40 lectures. The other core subjects were Law of Nations, Civil Law, Law of Scotland or England, Constitutional Law and History and either Conveyancing, Political Economy or Mercantile Law plus any two from a group of optional subjects. The B.L. Regulations at the same time under Ordinance 40 provided a similarly non-specialist course requiring Law of Scotland, Conveyancing and Civil Law plus a half course in Forensic Medicine from the above list of half classes. There were significant changes to the B.L. Regulations which expanded its coverage but not its overall structure. The complaint of

Professor Dewar Gibb, thus, continued to be part of the B.L. Regulations until the replacement or abolition of the degree in the second half of the century.

Referring to the option of studying either Jurisprudence or Forensic Medicine, he suggested

> "It is as though a medical student could choose between Medicine and Forensic Medicine." 116

(vi) Professional Legal Education

The coverage required by the Faculty of Advocates for general study was the degree of M.A. or B.A. or alternatively Latin, Greek Ethical and Metaphysical Philosophy and either Logic or Mathematics plus two languages from French, German, Italian and Spanish. In addition to the general education requirement the aspiring advocate in the middle of the nineteenth century required to attend classes in Scots Law, Conveyancing as well as Civil Law, Constitutional Law, International Law and Medical Jurisprudence. When he produced evidence of attendance he was examined in Civil Law, Private International Law and Scots Law.[117]

The vicissitudes of the professional training were encapsulated by Brownlie in his article "Universities and Scottish Legal Education".

> "The term solicitor first appears towards the end of the sixteenth century. They grew up around the local judicatories learning their trade by apprenticeship, which was not, however, made compulsory until 1825. There was no organised curriculum until the Procurators Act of 1865, which gave the General Council powers in legal education. But in 1873 the Law Agents Act placed the control of solicitors in the hands of the court and legal education was stereotyped for the next 60 years. The Solicitors (Scotland) Act of 1933 returned control to the General Council under that Act and finally the Legal Aid and Solicitors (Scotland) Act, 1949, transferred it to the Law Society with whom it now rests." [118]

The solicitor's branch of the profession were traditionally reticent about obtaining University degrees and seemed to prefer the apprenticeship system of qualifying whilst working fulltime in an office. As late as 1929 over 80% of the solicitors practising in Edinburgh held no degree although these figures had altered markedly by the end of the Second War and the profession is almost wholly graduate at the time of writing.[119] Overall the study requirements for the solicitors do not appear to have been particularly onerous as regards University attendance Thus the W. S. Writers to the Signet required applicants for indenture to have

> "attended two full winter courses in literature at a Scotch University"(or equivalent including Latin - PR). [120]

An alternative was to have been a pupil at either the High School of Edinburgh or Edinburgh Academy when the

requirement of University courses was cut down to one. This was then to be followed by the actual period of Apprenticeship. The Solicitors before the Supreme Court operated the same sort of system[121] with a requirement to have attended either at the University classes in Latin and Mathematics plus one of Logic, Moral Philosophy, Natural Philosophy, Chemistry, Rhetoric or Natural History or to have a certificate of competence from a recognised teacher. Knowledge of law involved having to have attended at least one course of lectures on the law of Scotland and Conveyancing plus either a second years attendance at one of these courses or attendance in Civil Law. This plus the apprenticeship in an office and a certificate that the applicant was of good moral character. Before the Procurators (Scotland) Act 1865, for all other solicitors outside Edinburgh the legal requirements were similar in that the subjects required were Scots Law, Conveyancing and Civil and Criminal Procedure. University attendance was required at the classes of Scots Law and Conveyancing. In addition the general education requirement involved examination in English Composition, History of Rome and of England and Scotland, Geography, Arithmetic, Bookkeeping, Latin, Logic and Mathematics.[122]

The ancient Faculty of Procurators continued to deal with admissions in their area and required

attendance at University classes of Latin, Logic and one other subject along with two classes in Scots Law and Conveyancing. The general examination for those who had not graduated from University covered Latin, History, Arithmetic, Bookkeeping, Geography and English Grammar and Composition.[123]

(vii) Summary

Thus we can see that after the reorganisation of University law teaching the professional requirements were not such as to encourage study of the component parts of the rule producing structure and the courses available to those with an academic rather than practical inclinations stressed aspects of the legal structure which ignored the role of the judiciary in decision-making. As we shall see the dominant interests of those dealing with Jurisprudence seem to have been centred around the Austinian and Hegelian and Kantian approaches to the subject of legal philosophy. The numbers of those who actually completed degrees in the first years of the reformed degree structures was not large. At Edinburgh in the first decade only 25 students graduated LL.B. out of a potential pool of some 1,556 according to Professor Lorimer's estimated figures to the Royal Commission in 1876.[124] The next decade only saw a slight increase to 34 LL.B. graduates,[125] although

their numbers were supplemented by 23 B.L. graduates under the later regulations allowing a less intensive course for those without a prior Arts degree. The numbers who opted to go into the profession through this route eventually equalled those taking the Arts/LL.B. combination.

Although these patterns of study continued until after the Second War they were not without their detractors.

Lord Cooper criticised the training, both academic and practical which was offered to students in the immediate post War era although his remarks remained pertinent for a number of years after their original expression

> "In place of a well-thought-out and logical scheme of study, the curriculum is forced to conform to the haphazard arrangement in which the chairs were founded - several of them in the eighteenth century." 126

The whole nature of the legal education enterprise was brought under discussion by Professor Dewar Gibb in an article on "Reform in the Scottish Law School" where he declared that the overall goals of law teaching

> "... should strive to give an insight into legal principle and a grasp of the broad outline of the law in all branches where principle and an outline are discernible." 127

Such an approach was clearly typified by Jurisprudence whose importance Dewar Gibb was keen to enhance scorning the situation where in the Ordinance 40 B.L. degree it was possible to substitute Medical Jurisprudence for Jurisprudence.

It was with these strictures in mind that the post War debates on Scottish legal education were conducted ending in the replacement of part time LL.B. degrees with a prior Arts requirement and parttime B.L. degrees by fulltime legal study from 1960 onwards.[128] Such developments as we shall see were rather more conducive to a less mechanical approach to the produce of the Courts, although the Nationalist movement had provided a catalyst towards these ends since the end of the War.[129]

Academic Views of the Judicial Role

The judiciary have not until recently been a focus for much interest in those involved in either legal training or legal or social philosophy. What interest there has been in the judiciary has tended to be situated within one of two specific perspectives. The first perspective was broadly analytical. In dealing with questions of "what constitutes law" the role of judicial decisionmaking was recognised within certain analytic schemata. Although, the style of the various thinkers schemata varied considerably their goals remained ultimately analytic and their field of enquiry limited to providing answers to the sorts of questions indicated.[131] In addition to this dominant perspective within the field of English jurisprudence, a continued strain of writing and work has always existed which was reformist. The political aspects of this work aimed as they were at the content of the legal framework tended again to concentrate their energies on influencing and criticising the legislative arm of the State. Within the legal profession and among legal and social writers there was a tendency which centred around the notion of improving the operation of the State apparatus. Based on the simple notion of "equal treatment of individuals before the law" this work

was situated within a firmly entrenched tradition in the Courts themselves. Amongst the concerns of this perspective, which continue to be highly vibrant today,[132] are such matters as lack of access to the Courts and legal advice, unequal distribution of the repressive apparatus of the State as well as concern at the unrepresentativeness of those administering the laws.

Lord Justice Scrutton expressed one aspect of this tendency in his enigmatic remarks to Cambridge law students back in 1920.

> "The habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish. This is one of the great difficulties at present with Labour. Labour says 'Where are your impartial Judges?'. They all move in the same circle as the employers, and they are all educated and nursed in the same ideas as the employers. How can a labour man or a trade unionist get impartial justice? It is very difficult sometimes to be sure that you have put yourself into a thoroughly impartial position between two disputants, one of your own class and one not of your class."[133]

Here, then we have one aspect of the 'problem' of the non-elected judiciary - their class basis. More vociferous amongst legal academic writing has been the concern neatly expressed by A. V. Dicey in his masterly polemic on Law and Opinion in the Nineteenth Century England"[134] that the judges were

'out of date'.

> "... we may, at any rate as regards the nineteenth century, lay it down as a rule that judge-made law has, owing to the training and age of our judges, tended at any given moment to represent the convictions of an earlier era than the ideas represented by parliamentary legislation." 135

Allied to these themes we have a strong and persistent plaint throughout the recent critical era that the judiciary is drawn from a too narrow a section of the legal profession.

The critical tendencies indicated here are, however, by no means equal partners in the literature or research. What has occurred has been rather a separation of the issues depending on the goals and outlook of the observers.

The question of minor alterations of the personnel of the upper echelons of the judiciary to include solicitors as well as barristers/advocates takes its starting point from a perspective on the judiciary which conceives as their 'problem' nothing other than their unusual social life and business life eating at the Inns of Court and only meeting clients with and through a solicitor. The notion of the 'problem' of the judiciary as being 'outdated' often is no more than a variation of this theme. Both are postulated within a framework which is firmly situated within a reality of consensus of social

and political values. The limitations of these problematics do not appear to have been solved by the introduction of the notion of 'class' into the debates. Just as judges are in some way 'out of date' or 'not in touch with social reality' they alter within the proto-class perspectives into something similarly vague.

Either the judiciary have been missing from the picture of the operation of the political decisionmaking system as active participants or they have appeared in some sort of functional account of social groups where consensus is assumed and social forces are static. This also appears in a somewhat more sophisticated form in pluralist accounts of law and society. Here we have a world of independent interfaces like "law" and "society". Just as one of these can be 'out of tune' with the other so also elements within the framework of "law" like the "judiciary" can be out of alignment with the smooth working of the part or artefact "law". More sophisticated analysis of social forces and groups tends to relegate judges to a mechanistic position where they act simply as bearers of class social forces[136] or their role overall is minimal in the overall structure of politics.[137] Of course, as indicated there is no intention in many of the writers who comment on the judiciary to do anything

other than construct accounts of other sorts of phenomena[138] or have been addressing other sorts of problems entirely.[139] Nevertheless there is a tendency for often quite isolated and unsystematic "asides" on the judiciary to be treated as if they were the products of fully documented and worked through theories of the judicial role. Typically, the frequency with which Scrutton's enigmatic remark has appeared as well as Dicey's assertion about the conservatism of the judiciary are apt to suggest that the British Judiciary have been studied in some depth and firm conclusions reached about them. The work of Professor Griffith appears to be the only attempt to provide such a wideranging systematic account of the judicial role in practice today.[140]

In order to substantiate this general suggestion that the taught perspectives on the judiciary that they have finally emerged have been limited in both volume and concerns, as indicated, it is necessary to examine the major work used in Law Faculties and Law Schools which provides some form of theoretical approach to the judiciary, whether this be explicit or less obvious. Most of this work comes from the mainstream of Jurisprudence, although there have been notable exceptions from Political Science. Nevertheless, in line with the limited development of a sociology of law within Britain, political

scientists and sociologists have tended to steer clear of the judiciary and the work that has been done has been firmly within the American tradition exemplified by Glendon Schubert.[141][142]

THE PRE-DEMOCRATIC ERA

Before the era of universal suffrage, the undemocratic aspects of judicial decisonmaking seem to have been regarded as unproblematic.[143] This seems to hold for writers not noted as anti-democrats like A. V. Dicey.

(i) Austin and the post-Austinian non-problem

Albert Ehrenzweig in "Psychoanalytic Jurisprudence" reminds us that what must be remembered in examining the various contributions of scholars to any particular debate is that there are in effect several "accounts" of particular positions.[144] What was said and how this is presented in criticism and the possible inferences which may be made in this category is, of course, limited One might suggest that one of the inferences which has to be drawn from the work of the first substantial work of Jurisprudence of the modern era namely John Austin is that since within his Command Theory all laws are the command of the sovereign, direct or indirect, then the notion of a judicial contribution to this process is severely limited. Since the indirect laws such as judicial pronouncements must have the

approval, albeit tacit, of the sovereign within this theory then it would seem to follow that the judiciary are in a subservient position. Perhaps it is a sign of the limitations of this a priori schematisation that this logical subservience seems to allow for a good deal of autonomy.

> "I must here observe that I am not objecting to Lord Mansfield for assuming the office of a legislator. I by no means disapprove of what Mr. Bentham has chosen to call by the disrespectful, and therefore, as I conceive, injudicious, name of judge-made law. For I consider it injudicious to call by any name indicative of disrespect what appears to me highly beneficial and even absolutely necessary. I cannot understand how any person who has considered the subject can suppose that society could possibly have gone on if judges had not legislated, or that there is any danger whatever in allowing them that power which they have in fact exercised, to make up for the negligence of the incapacity of the avowed legislator. That part of the law of every country which was made by judges has been far better made than that part which consists of statutes enacted by the legislative. Notwithstanding my great admiration for Mr. Bentham, I cannot but think that, instead of blaming judges for having legislated, he should blame them for the timid, narrow, and piecemeal manner in which they have legislated, and for legislating under cover of vague and indeterminate phrases, such as Lord Mansfield and which would be censurable in any legislator." 145

Notwithstanding the possible surprise at reading this urging of judiciary as apparently unfettered legislators at the behest of the arch-positivist Austin, these remarks become markedly confusing when considered in the light of Austin's criticism of the energetic legislating Lord Mansfield.

> "By the English law, a promise to give something or to do something for the benefit of another is not binding without what is called consideration, that is, a motive assigned for the promise, which motive must be of a particular kind. Lord Mansfield, however, overruled the distinct provisions of the law by ruling that moral obligations was a sufficient consideration. Now moral obligation is an obligation imposed by opinion, or an obligation imposed by God : that is, moral obligation is anything which we choose to call so, for the precepts of positive morality are infinitely varying and the will of God, whether indicated by utility or by a moral sense, is equally matter of dispute. This decision of Lord Mansfield, which assumes that the judge is to enforce morality enables the judge to enforce just whatever he pleases." 146

Far from reconciling this apparent incompatibility Austin leaves us with no light as to exactly what value free cornucopia of principles will allow the judiciary to continue their work of legislating without falling into the relativist trap Austin adverts to. Although there is nothing in the "Province of Jurisprudence Determined" and "The uses of the Study of Jurisprudence", we can perhaps get something of a tentative explanation when we look at Austin's other indirectly related work. Eira Reuben has traced the political purposes and assumptions which underlie his whole approach and view of law in her essay "Austin's Political Pamphlets". [147] This light on the work of Austin means that to some extent at least the support from Austin for judicial creativity is not some curious aberration but part of a specific political approach to such issues as universal suffrage. Nothing fully articulated as to the grounds to be relied on by the judiciary are extant

in Austin's work, however.

The work of Austin has a major influence in that it directed the concerns and interests of British jurisprudence for over a century. As indicated in the previous Chapter there have been other trends and directions than the analytic strain. Nevertheless the Austinian schemata to which many writers responded centred around questions of sources and nature of legal rights within the polity. In spite of the strong political goals of Austin in other matters, his legal work and its tradition, willing or unwilling, eschewed the policy aspect of lawmaking whether or not dealing with the legislature or the other sources of rights and obligations. Little wonder that, as we have already observed where there was little politics of law, the notion of judicial politics was in turn highly circumscribed.

Writing in "Elements of Law" in 1871, based on lectures given in India, William Markby covers the activities of the judiciary within his section of Sources of Law.[148] Again the whole content is analytic and a clue to his views may be gleaned from his comments on politics and the law.

"15. When I speak of law, I mean that law, which is set by a sovereign authority to a political society I mean a nation, which is in the habit of obedience to that sovereign authority. If the nation refuse obedience, or obey some other authority than these, it either ceases to be a political society, or the sovereign

authority is changed.

16. No theory of religion, or of morals, or of politics, is involved in these views of law. They are alike true for Hindoos, Mahommedans and Christians; for the subject of a monarchy and the citizen of a republic. They merely mark out the field of labour for the lawyer; they leave clear the field of politics and religion for the statesman and the priest. It is only when one or the other seeks to outstep the proper boundaries of his office, that he will find himself in conflict with these principles." 149

This standpoint on the judicial role does no more than suggest that judicial decisions form a source of law. His concern is not with what politics the common law was and is based on but rather on the judge's source of authority for their lawmaking. He adopts an Austinian delegation position. This seems to mean that the introduction of political and moral positions into the decisionmaking process is thereby legitimated.

> "The judge, who derives his power to pronounce upon the law from the sovereign authority, is obliged to decide, even when all his efforts to discover the rule of positive law have failed, or where there are rules which conflict, or where the interpretation of the rule is doubtful. It is a perfectly safe assumption in such cases, that the sovereign power, if it had declared its will in the form of a positive law, would have done so in conformity with the divine precept. And a judge so in conformity who acts upon the divine precept in such cases, is fully within the limits of his authority. He is doing that which a sovereign judge would undoubtedly himself do under the circumstances, that is, he is deciding the case according to that which is believed to be right and just." 150

Clearly this apparent carte blanche to the

policymaking of the judges clearly only has any consistency with the law/politics dichotomy Markby referred to earlier if we impute to Markby simply a "gaps" notion of lawmaking.Thus he is only talking to occasional and, in a sense ,exceptional situations where the judge is able to become a statesman or priest. Despite these tantalising hints as to the apparent acceptance of judicial policymaking where lacunae in the positive law are felt to exist by the judiciary Markby does not dwell on the specific forms such political interventions have taken or do take in practice. Like Austin their existence is acknowledged, and like Austin he welcomes such activism. Its precise content again is unclear.

(ii) Some hints of "Realism"

More or less contemporary with Markby we find the same sort of approach in the "Science of Jurisprudence" by the Professor of Jurisprudence at University College, London, Sheldon Amos. Despite some interesting adversions in other fields Amos's approach is again analytic and in the Austinian mould.

> "The Science of Jurisprudence may be said, broadly, to deal with the necessary and formal facts expressed in the very structure of civil society, as that structure is modified and controlled by the facts of civil government and of the constitution of human nature and the physical universe ... Law ... is a body of commands formally published by the Sovereign Political Authority ... 151

The judiciary's contribution is noted to this process as one the "Sources of Law" namely "the immediate group of circumstances through which a legal rule acquires its essential character as such".[152] Here "Judicial legislation" includes the following "conscious or unconscious" elements.

> "(1) Extensive or restrictive Interpretation ...
>
> (10) Direct legislation, under the cloak of conforming to a so-called "Law of Nature", "Natural Reason", "Natural Justice", "Common Sense", or "General Utility".[153]

This is "realism" of a most explicit kind - some years before Oliver Wendell Holmes' "The Path of Law" in 1897[154] came out" with the clear essence of the reality of the creative judicial role. Unfortunately, exactly what the nature of these elements of judicial policymaking are is not revealed to us in the "Science of Jurisprudence" apart from hinting that the confusion of Morals and Law is undesirable - he discusses the celebrated Somersett's case 1771 without acknowledging that Lord Mansfield's "discovery" that the negro slave had a legal right in addition to a moral right to his freedom involved in itself any political implications.[155]

In his popular version of the above work published under the title of "The Science of Law" in 1874 Professor Amos again reiterates the "independence" of law and morals considerations.

> "I have throughout insisted upon, and elucidated in all the ways I could, the position that a moral constitution of society is, in conception if not in time, anterior to, and independent of, a legal one; 156

Nevertheless there are indications of the place of the political decision within his account of the legal system in England.

> "If the community progress, the law must needs expand and become a more and more exact expression of the moral sensibilities and economical habits of the people.
>
> This expansion can only be effected in two ways - that of direct legislation, proceeding from the supreme political authority, and of indirect legislation, proceeding from the judges who are called upon to execute the law." 157

Apart, though from positing the judiciary as a major force in the source of law Amos does not exactly indicate the politics of their decisionmaking except by way of general implication.

> "The judge ... having a vast number of laws to execute, some of them only on very few occasions, is more arrested by the special operation of a law in the particular instances which come before him, than by the general consequences of the law which he is less bound to think about ... Nor is it alone the true bearing and effect of a law that can be better appreciated by him who executes than by him who makes, but a truer apprehension of the detailed wants of society and of the character of men and women, as affected by the general operation of the laws, is likely to be acquired by the judge, who is ever in contact with society in its most concrete shape, than by the legislator, who only looks upon mankind in masses." 158

Apart, though, from this broad, and highly unusual view of the respective alienation of judiciary and legislature from the articulated difficulties of social groups, this is the only discussion which this topic receives.

One of the more popular and lasting works also exhibits a "non political" approach. The first and subsequent editions of Holland's Jurisprudence deal with the judiciary within the context of traditional approaches to the legal enterprise.

In his first 1880 edition, Professor Holland's wideranging Jurisprudence in his descriptive style and analysis has little to say on the judiciary and his discussion of precedent as a source of law is cursory and adds minimally to an understanding of the specifics of the judicial process. Rejecting the judicial fiction of the eternity of common law he suggested

> "Judges, acting as delegates of the State, have ... invoked, as the ratio of their decisions not only Equity, or the generally acknowledged view of what is fair but also customs ..." 159

No kind of criteria are suggested for quite how this process does or might take place at the practical level, although in later editions he refers to some old unspecific judicial assertions as to their power to introduce new offences. Similarly when he refers to the value of equity as a device to meet the problems

where "the law of the State was found to be in opposition to the views of equity entertained by the people or by leading minds among them". The tantalising criteria adopted in recognising such problems and responding to them by the body principally concerned, the judges, are not indicated.

An apparent late-Victorian tradition of unspecific Realism is hinted at in a passage by Sir Frederick Pollock in his 1882 "Essays in Jurisprudence and Ethics". Whilst discussing the problems of bad amateur drafting of statutes he points to the failings of the 1865 Act to amend the law of partnership and concludes

> "It is hardly possible to maintain that our undigested case-law is certain enough for all practical purposes when the wisdom of Parliament itself can be thus deceived on a matter of great practical and commercial concern."[160]

One can infer from this that with the uncertainty of the common law, here the judiciary will indeed be involved in lawmaking. The question of policy also seems to be implied since there is no likelihood that politically and morally difficult cases will never be riven with uncertainty - quite the reverse in fact would seem more likely expected.

Firmly within the approach of Austin to the nature of the jurisprudential enterprise is the work of Edward Clark the Regius Professor of Civil Law at Cambridge. His "Practical Jurisprudence" has a strong

Roman law strain and deals with such matters as the definition and origin of law as well as the forms such law takes. The sub-title of the work is "A comment on Austin" and this is in fact what informs its concerns and structure.[161] It follows from the adoption of this framework that such matters as case law and its characteristics are dealt with as well its pros and cons.

Clark is in broad agreement with Austin as to classification of "judiciary law" although he prefers the term "case law". Clark though is less happy with Austin's notion of "spurious interpretation" which was defined as "Law formed by judicial decisions upon questions which arise out of statute law, where the judge decides according to his own notion of what the legislator ought to have established".[162]

> "the somewhat unnecessary impression of <u>arbitrariness</u> conveyed by these words ..."[163]

This problem, though, is only posited in terms of a conflict between the meaning of the literal words and the spirit of the legislation. What we are talking about, Clark seems to suggest, is a choice between two extant positions in which the judge has no creative hand. Elsewhere, though, he does entertain that where questions are involved with the "equity of the statute" then this can mean no more than applying "a common-sense or reasonable view of the circumstances of the case".

This he accepts

> "would be considered a rather audacious ground of judicial decision by some lawyers, more especially, perhaps, in England." [164]

However, he does suggest that this is really what the whole judicial enterprise is bound to be about

> "I conceive, however, that "a reasonable view of the circumstances of the case" has been at the bottom of most of the decisions upon which our rules of English equity were founded: nor do I see how it can ever cease to be one ground of decision, until every possible case can be provided for by a previous rule." [165]

Beyond this, Clark runs through the "bread and butter" criticisms of judicially created law with specific reference to the applicability of such criticisms in the latter part of the nineteenth century. Nothing from this gives any hint as to the actual ways in which judicial work does or even should proceed although all the matters continue to be of significance in questions of efficient judicial administration - the understaffing of the courts; judicial decisions as ex post facto legislation; uncertainty of judicial rules and their voluminousness as well as their limited applicability.

For his part, Sir John Salmond in his First Principles of Jurisprudence of 1893, [166] has nothing to say

on judges and in his later Jurisprudence he adds little except in the context of precedent. Writing in 1902 in the first edition of what also became a standard student text, he covers the source of precedents themselves. In distinguishing between declaratory and original precedents he points out that only the latter

> "develop the law; the others leave it as it was, and their only use is to serve as good evidence of it for the future." 167

Where new principles are involved Salmond addresses himself to the problem of what their basis is in reality. He suggests

> "They are in truth nothing else than the principles of natural justice, practical expediency, and common sense." 168

This stems from the obligation of judges to administer "justice according to law". If there is no specific law then justice must be administered "according to nature". Now, Salmond acknowledges that these laws of nature, or natural justice, as he sometimes describes them pose problems in elucidation

> "... the rules of natural justice are not always such that any man may know them, and the light of nature is often but an uncertain guide." 169

Accordingly, when put in this difficult position, the courts, instead of trusting to their own unguided instincts to determine the content of natural justice,

seek guidance and assistance in other fields. Such pervasive influences as foreign law, judicial obiter dicta and textbooks writers come into this category. In addition

> "In like manner, the courts give credence ... to any other forms of ethical and juridical doctrine which seem good to them ..." 170

Not of course that the judiciary are keen on making such value judgments explicit which Salmond finds surprising but explicable

> "... the official utterances of the law contain no adequate acknowledgements of this dependence on ethical influences ... The chief reason for this peculiarity is doubtless to be found in the fictitious declaratory theory of precedent ..." 171

It is this adherence, then, to the declaratory theory which inhibits the courts from providing satisfactory "realistic" explanations of the processes involved in their decisionmaking.

> "So long as judges affect to be looking for and declaring old law, they cannot adequately express the principles on which they are in reality making new." 172

Salmond himself does not attempt to fill in this gap with inferential work and basically leaves us with an immanent critique on a realist model.

(iii) The Scottish Approach

As we have noted, the separate Scottish legal system had its own distinct academic arrangements which

were much less overshadowed by Austin in the overall approach to jurisprudence.[173] The works used in Scotland were those of the early Scottish jurisprudence teachers. Interest in the judiciary was not marked.

The Regius Professor of Public Law at Edinburgh during the latter part of the nineteenth century, the eminent International lawyer, James Lorimer also published a treatise on the principles of Jurisprudence. Published in 1872 the Institutes of Law is not easy to classify. It covers a wide range of topics in achieving its aims as a text-book. Lorimer conceived Jurisprudence as covering the discovery

> "... of the doctrines of natural law and their general and permanent action, ... their local and temporal realisation, i.e. positive law, properly so called, in all its branches. Jurisprudence thus embraces legislation, whether the subjects with which it deals be political, economical, or social, national or international, civil or ecclesiastical, public or private, general or particular, as well as jurisdiction and execution ..." [174]

Lorimer explains that the really important questions to be examined are those concerning the harmonisation of the positive law and the laws of nature. This comes down to a pragmatic judgment on the grounds of expediency, he suggests.[175] Much of the Institutes is taken up with the process whereby the natural law is discovered. The goals of the study are deemed to be the realisation of the law of nature by special human enactments. To avoid the erroneous conception of what the law of nature

actually is in general and in specific circumstances and where social changes are involved, Lorimer sets out to lead the student to the natural law. In attempting this ambitious project Lorimer has little time for the specific day-to-day details of the municipal law and adverts only spasmodically to specific empirical matters and only once to the judicial function. Lorimer suggests that the judicial role cannot break the bonds of positive law and administer the law in accordance with his own conception of the law of nature of the will of God. The results would be disastrous

> "That the ... judge should sometimes as an individual dissent from the ruling voice of his country men is ... inevitable; and if on the occurrence of every such difference or every such difference of opinion, however trifling, he thought it necessary for conscience' sake that he should vindicate his own views, or even decline to accept theirs, the woolsack would be converted into a bed of thorns, and human society would be impossible." [176]

Where the judge does depart from the law, Lorimer explains that this is to enable justice to be done. The exact criteria do not appear to be explained and Lorimer appears to glide over the distinction between "justice of a 'higher and finer' kind" and "the ordinary justice of the law". The judge may legitimately operate the latter, but not the former conception. Amongst Lorimer's voluminous remarks on justice and natural law no criteria are immediately discernible which could be used to test judicial behaviour.

Certainly it is not a project with which Lorimer associates himself except with general injunctions on the objects of positive law

> "The ultimate object of positive law is ... liberty ... But liberty being realisable only by means of order, order is the proximate object of positive law, its object as such." [177]

The Philosophy of Law of William Miller published in 1884 treads more familiar ground although it is not specifically Austin-orientated. He addresses himself in this expanded version of his Glasgow University lectures to certain clear goals

> "What is Law, as dintinguished from a particular law? ... Whence does it derive its authority? ... Whence is our knowledge of law derived? ... By what faculty do we declare one act to be right and another wrong? Are legal judgments merely a portion of our moral ones? These questions, and such as these, belong to the philosophy of law." [178]

The lectures cover some matters familiar in Analytic Jurisprudence syllabuses - obligation; person; rights - as well as rather less expected topics - the State and Law, Morality and Religion. In addition, Miller deals with the Legal Forms and <u>inter alia</u> the role of the judicial enterprise within his schemata. He takes a realist stance to the question of judicial work

> "It is now an admitted historical fact that the great bulk of our laws have been laid down by judges acting in a judicial capacity." [179]

The problem, though, is not of fact but of extent. Miller suggests referring to Austin's complaints about the lack of boldness of the judiciary stemming from their innate conservatism points to the advantage to the polity of "the opinion of an upright and skilled man".[180] He suggests that judicial legislation is both on the increase and desirable in itself since

> "On many subjects those who administer the law are the best legislators." [181]

However, Miller does not furnish us with any information as to the criteria which were or might be utilised by judicial legislators nor in what sense the judiciary are "the best legislators."

One of Miller's colleagues at Glasgow University, Professor Herkless, also adverts to the judiciary briefly in his lectures on Jurisprudence published on his death in 1901 under the title "Jurisprudence or the Principles of Political Right". He writes on such topics as Reason, Will, Spirit, Right and the State but whathe says on the judicial function is fleetingly enigmatic

> "As between the functions of the executive and those of the judiciary, a clear line cannot always be drawn on the ground of practice, but on the ground of theory the division is well enough marked." [182]

Apart from a discussion of Kant's elaboration of the separation of powers Harkless does not provide any other information to flesh out this observation.

In his own later work Miller returns in more depth to the topic of the Jurisprudence in "The Data of Jurisprudence". Miller here deals with six separate topics - the physical basis of right; right; duty; law; custom; the aim of law. Within this framework his goals are non-deontological

> "... to enumerate, classify, and account for the various shapes which the matter under investigation has assumed..." 183

However, Miller does mention the problem of what a judge is to do when there is no express law and the only alternative is to fall back on the "natural law". This occurs during a discussion of the work of Thomas Hobbes on Natural Law and he evinces no view of his own on this matter, unfortunately.

(iv) The Early Critical Phase

Although drawing on a separate tradition of constitutional law this early "Realism" was given a rather harder edge in the writing of A. V. Dicey.

In his Harvard Law School lectures at the turn of the century, published in 1905 and in a "corrected" form in 1914 as "Law and Opinion in England" Professor Dicey is concerned to beat back the dangers of democracy.

The difficulty of democracy is that in attempting to right the tyrannies of minorities it reveals to the electorate the strength of numbers and

> "has taught them (the "new" electorate) that political authority can easily be used for the immediate advantage, not of the country but of a class." [184]

The natural corrollary of this is the rise of socialism flowing from giving the franchise to all irrespective of income

> "Collectivism or socialism promises unlimited benefits to the poor. Voters who are poor, naturally adopt some form of socialism." [185]

Dicey specifically adopts a descriptive framework to examine the Acts of Parliament of the first thirteen years of the twentieth century as his primary concern. In his introduction to the 1914 edition we find him, however, describing the Old Age Pension Act as an "evil". Its main problems appear to him to be the fact that unlike receipt of the Poor Law proper the pension does not disqualify the pensioner from either voting nor even becoming a Member of Parliament. Apart from this problem Dicey notes that the original restrictions on receipt of pensions as to character have been relaxed now so that

> "The title to an old age pension hardly depends at all upon the character of the pensioner" [186]

The posited relationship between what Dicey terms "public opinion" and legislation turns out to be a correlation between competing social codes and formal legal codes. It should be noted that Dicey's method consists in tracing the shifts and changes in legislative content and inferring from these that "public opinion" had changed. This, he suggests, may have a negative aspect in that without the impetus of public opinion there may be no legislative initiative irrespective of the franchise position

> "The failure of Parliament during the eighteenth century to introduce reasonable reforms, for instance, was due far less to the prejudice of members of Parliament, or even of the electorate, than to the deference which statesmen instinctively, and on the whole wisely, paid to the dulness or stupidity of Englishmen, many of whom had no votes, and were certainly not able to dictate by constitutional means to Parliament." 187

What is interesting, though, about Dicey's work is its attempt to rescue the lawmaking process, particularly where our subjects the judiciary are concerned, from the realms of reification and resituate them, however crudely, back within the real world of acting men. Although, as we shall see, the insight of Dicey into the interaction between economic, moral and political forces with the formal legal products of the legislative and judicial bodies in the country can be questioned for its doubtful theoretical bases it remains a fuller articulation of the genesis of

specific legal policy than we have before in the literature.

In addition, a number of passages on the judiciary and their relationship to "public opinion" are particularly memorable. His lecture on Judicial Legislation contains the following :-

> "The judges are the heads of the legal profession. They have acquired the intellectual and moral tone of English lawyers. They are men advanced in life. They are for the most part persons of a conservative disposition." 188

As we shall see in the following half century little advance seems to have been made in the level of judicial policy analysis and this continues to be a bedrock of judicial policy writing. Freed from the constraints of populism on one hand and in no way responsible to an electorate judicial legislation differs from Parliamentary work in a number of significant respects according to Dicey. It aims, firstly, at a greater degree of the maintenance of "the logic or the symmetry of the law". It also aims in his view at securing certainty rather than amending the deficiencies of the law. Neither of these two are particularly exceptionable. However, his final distinguishing characteristic deserves a little more attention in that it promises to provide a significant guide as to the nature of judicial politics.

> "The ideas of expediency or policy accepted by the Courts may differ considerably from the ideas which, at a given time, having acquired predominant influence among the general public, guide parliamentary legislation." 189

More specifically he suggests that:-

> "It is quite possible that judicial conceptions of utility or of the public interest may sometimes rise above the ideas prevalent at a particular era." 190

The illumination shed by Dicey on this theme is of a limited nature. He refers to the system of trusts invented and worked out by the Courts of Equity and the commercial law work of Lord Mansfield. The counter constituencies involved here consist of "ordinary Englishmen" and "old toryism embodied in Acts of Parliament". Apart from being countercultural opinion leaders the Courts also try to preserve the old values such as the rules as to duty of an agent towards an employer

> "which are admitted by every conscientious man to be morally sound, but which are violated every day by tradesmen, merchants, and professional men, who make no scruple at giving or accepting secret commissions;" 191

Dicey concludes that "the morality of the Courts is higher" than that of traders or of Parliament, which is complaisant about the whole situation. To cap it all the Courts are blamed for allowing their ideas to fall below the highest and most enlightened public

opinion of a particular time. The example he chooses is very revealing of his unarticulated assumptions. He castigates the judiciary for attempting to maintain the laws against regrating and forestalling when they were condemned by economists. 192

However, despite these strictures Dicey seems to draw back from his initial tone of approval and condemnation of specific judicial lawmaking where he suggests that:-

> "... beliefs are not necessarily erroneous because they are out of date; there are such things as ancient truths as well as ancient prejudices." 193

He places his approving/condemnatory remarks in the specific context of his overall goals - although there does seem an element of self-contradiction involved in this schema

> "... the essential matter to bear in mind is neither the merit nor the demerit of judge-made laws, but the fact that judicial legislation may be the result of considerations different from the ideas which influence Parliament." 194

The allusive "aside" that Dicey is prone to in his lectures on the relationship between judicial, Parliamentary and public opinion provides some pointers.

> "If a statute ... is apt to reproduce the public opinion not so much of today as of yesterday, judge-made law occasionally represents the opinion of the day before yesterday." 195

This notion of judicial time lag is one which recurs in discussions of the judiciary up to the present day and it is part of Dicey's achievement that this idea appears to stem from him. Dicey does not provide us with any systematic data on this.

One of the major critical works on this whole trend which deals analytically with the legal structure and eschews any explicit moral philosophy and social scientific approach does contain a section on the creativity of the judiciary. Jethro Brown in an Excursus in his edition of Austin "The Austinian Theory of Law" published in 1906, "The English Judge as Law-maker" addresses himself to the questions:-

> "whether, and if so, within what limits and by what authority, judges may add to the existing law by the indirect process of judicial decision." 196

Brown recognises that no code seems likely to exist which deals with all possible eventualities and that any base line principles on which they might hope to posit their decisions will themselves be subject to progressive modification and development. This he suggests is an inevitable consequence of the drying up of any single spiritual source of both temporal and moral authority. No suggestions are made for how such a situation of ideological pluralism can be dealt with by the judiciary. Their difficulties are stated as existing when Brown talks of the source of judicial authority

> "The judges, as part of the governmental machinery of the country, are, to a large extent, creatures of their time and place, animated by the time-spirit, subject to the prejudices and passions, endowed with the ideas, the hopes, and fears of their day and generation. In devising rules through the means of precedent, they give effect to principles which are a part of the social atmosphere around them." 197

No hints as to the impact of such a view are given although it is noteworthy that in another part of this work a reference to Dicey's "Law and Opinion in England" published in the previous year is made. This section is a very strong echo of Dicey's assertions about the judiciary.

In line with his other basic introductory work 198
Sir Frederick Pollock's "First book of Jurisprudence" is addressed to the general reader as well the would-be specialist in his general account of the general legal notions and the nature and use of legal authorities Pollock briefly discusses the role of the judiciary He merely points out that judges should not appear where they have an interest and he quotes with approval the dictum of Willes J. in Lee v. Bude and Torrington Ry Co. 1871 L.R. 6 C.P. where he suggests that the judiciary are subservient to Parliament. Beyond this his work does not touch on the judicial role.

A rather more illuminating view of the judicial process does come from the pen of Sir Frederick Pollock in his Columbia University Lectures published in 1912

as "The Genius of the Common Law". Pollock employs a florid metaphor to expound the nature of the common law.

> "We are here to do homage to our lady the Common Law; we are her men of life and limb and earthly worship." 199

Pollock is concerned to examine the problems which the Common Law had faced in the past and present

> "Now this brings me to the pith and sum of my enterprise, which is to consider her adventures in these and other perils, early and late ... She has faced many foes and divers manner of weapons;" 200

In the modern era Pollock is able to identify certain specific modern day problems with which the common law is confronted

> "... we have to consider the open enemies of law and legal order in modern times. We do not mean ordinary criminals, for lawbreakers, occasional or habitual, do not undertake at this day to subvert the law, but only do their best to thwart or evade it in their own particular interests." 201

What Pollock has in mind are fulminators of discontent

> "Much more subtle, and more dangerous (than those who complain about the law because they lose a law suit) because mixed with worthier motives than merely personal interest, is the dissatisfaction of such men as mislike the law when legal justice withstands the demands of their trade or their class." 202

This is bound to happen given the contradiction which Pollock suggests exists between sectional interests and the function of the law.

> "Law, being bound to regard the good of the commonwealth as a whole, must needs curb the partial ambition of both individuals and sections." 203

Into this notion of a judicially revealed "natural interest" Pollock does introduce Dicey's time lag explanation of the judicial problem as well as a recognition that conflict does not automatically dissolve into consensus in a forensic or similar setting.

> "It is true that in controversies of this kind there may be real conflict of social and economic ideals, and that the doctrines prevailing in the Courts will almost inevitably be those of the older rather than the younger generation." 204

However, Pollock does see a way round this apparent difficulty for the judicial process in that

> "... there is no presumption either way that one or the other view is the sounder or contains more permanent elements of truth!!" 205

He also suggests that the legislative record in the area of exacerbating "class grievances" has been worse than the judicial one since legislative solutions have

> "always been dictated by the prevalent opinion among the governing classes and interests ...". 206

The truth is, Pollock suggests, when looking at whether the common law is individualist or socialist

> "... it is both and neither ... the Common Law does its best to secure equality of legal rights, but disclaims any power to secure equality of conditions for all men." 207

It embodies some kind of centure ground eschewing the notion of swinging its authority behind any particular socio-political dogma and remaining strictly pragmatic

> "Our lady is a shrewd old lady, and has seen too many failures to be over-sanguine about any plan for putting the whole world straight." 208

The result of this kind of atheoretical activity has been the emergence of the Common Law with all its benefits.

> "The Genius of the Common Law has somehow contrived to extract from all the theoretical confusion a body of law which is quite well understood by those who handle it, and quite sufficient for everyday needs, and has the reputation of being, on the whole, just and merciful." 209

Typical of this has been the response of the Common Law to business requirements in, for example, the field of Agency. The "success" of the Common Law can be measured here.

> "Beginning with very simple principles, it has grown to be capable of dealing with the most intricate commercial relations and finding solutions acceptable to men of business as just and to lawyers as workmanlike and scientific." 210

Pollock does not venture any other explanation of the criteria involved.

(v) The Heirs of the Reificatory Tradition

The inter War period was not marked by the emergence of many texts in Britain in the jurisprudential field. What was written can be seen as either a continuation of the analytic descriptive tradition or as stemming directly from a critical political stance. In the former category we have fresh editions of Salmond and Holland as well as an explicit attempt to render the study of jurisprudence more accessible to students in the form of "The Elementary Principles of Jurisprudence" by George Keeton published in 1930.[211] This had its beginnings, like Markby's long running book, in a series of lectures to students in the colonies. In Keeton's case the book was based on lectures to students in Hong Kong University. Keeton covers the formal relationships between the State and the law as well as fundamental juristic conceptions and the arrangement of law. This is largely a standard form of division - with the sources of law, precedent and sovereignty all covered under the broad section on the State. The second

Part on such juridical conceptions as rights, duties, legal personality, ownership, negligence and so on is largely descriptive. The final section is a brief indication of the major features of English family law, criminal law, property law and contract and other branches of municipal and other forms of legal regulation in the international community. It is thus, only in the section on the State that we find discussion of the judicial role. The role of the judiciary is broadly described both within the theoretical and realistic framework

> "... There is also the body which interprets and applies the law, or Judiciary ... In the past, primary attention has been given in Constitutional Law to the study of the Legislature in accordance with the view that the other two divisions of Government existed for the purpose of enforcing the rules laid down by the Legislature. Now, however, there seems a tendency to regard the process of Government from a different standpoint, and to see in the Legislature a vehicle for the purpose of arming the Executive with the necessary powers for carrying on the administration of the country - a function to which the Judiciary must also lend its assistance." 212

In his discussions of the actual work of the judiciary, however, this theme is not carried through. Instead we have a modified creative role ascribed to the judiciary

> "Precedents develop the law rather than reform it. Thus the function of case-law is, generally speaking, to fill in the gaps left by the legislature." 213

Keeton seems to vest the developments of case-law by the judiciary with an autonomous organic quality as a result of the method of case-law

> "The mode of procedure is to turn questions and matters which were previously of fact into questions and matters of law. Not infrequently such a procedure ... leads the law into a corner from which there is no escape except by legislation, as in the famous Taff Vale Case (1901 A.C. 426) in which the House of Lords held that the funds of a registered Trade Union were liable for the torts of the union officials committed on its behalf ..." 214

This approach is overlaid with a hint of functionalism within the body of the common law which is regarded as a symbol and likened to Savigny's Volksgeist

> "The judges make law, it is true, but their creations take the form of developments of existing rules, and are always in conformity with the general principles underlying the whole body of a nation's law. To this extent the Common Law in England is adequate for all occasions ..." 215

Keeton defends the judiciary against the attack on their decisions as undemocratic by suggesting that this criticism is not "so much a defect of case-law as a characteristic of it".

> "Democracy, especially in legal matters, holds no certificate of infallibility, and a law made by a person who has spent his life studying the science of law may be at least as intrinsically just as one made by a body of legislators, mostly ignorant of their country's laws as a whole, and influenced by any considerations except those of abstract justice." 216

However, beyond this mingling of professional scientism and anti-democratism, Keeton does not provide us with any more than hints as to the working out of the judicial role in practice. Suffice it to say his approach regards the issue as unproblematic.

Professor Jenks' ambitiously titled work "The New Jurisprudence"[217] of 1933 covers much of the ground traditionally expected in works of Jurisprudence - sources of law; forms of law; rights and duties; and classifications of law. In addition there are three chapters on "methodology" though these consist simply of the problems of the analytical, historical and comparative approaches to legal system explanation along with a proto-sociological account of the nature of law and the state.

As for the judicial process his account of this is highly formalistic and consists of expounding the problem in terms of competing precedents. His assessment of the merits and defects of judicial law reiterates the points made by Dicey some years before as to voluminousness, its ex post facto nature etc. The judicial role is acknowledged as involving certain problems relating to impartiality. Jenks suggests that the need for complete impartiality precludes the possibility of democratic accountability. Jenks favours the notion of security of tenure since it provides useful safeguards to the citizenry.

Judges independent of the executive power

> "... in times past, have undoubtedly, stood between the Executive and the private citizen as a shield and buckler for the latter. They have secured the almost complete confidence of their communities, not only in their integrity, but in their fairness, their diligence, their skill, and their impartiality." 218

Essentially given the prerequisites of a separation of powers then Jenks does not seem to consider that any problems really centre around the judicial aspect of lawmaking in this work.

This kind of approach carried over in various forms after the War and did not have its dominance challenged until the 1960's. Professor Potter's "The Quest of Justice" in 1951 again touched on the nature of the judicial process in his examination of the salient lessons which emerge from an examination of legal history.[219] Potter divided the law's historical past into several epochs of development - the Dawn of Justice and the Ages of Faith, Reason and Hope. In addition he explained what he understands to be the nature of justice and law. He adopted a relativist moral stance on justice accepting "the inevitable limitations of human 'justice'".[220] Within this sceptical framework it is worth noting the broad nature of Potter's developmental schemata of the quest for justice

> "(i) in the twelfth and thirteenth centuries, which I name the Dawn of Justice, because it belongs to the opening era of the Common Law; (ii) in the fifteenth and sixteenth centuries, which I venture to dub the Age of Faith, since law was regarded as the inspiration of God; (iii) in the eighteenth century, which may be called the Age of Reason, when our law became a reasoned, if not a reasonable, system; and (iv) the twentieth century, or the Age of Hope, when men have seen in the law reform and penacea for human ills, social, political and even moral." 221

Within this development we find the English judge playing a traditional role as the disinterested and independent decisionmaker. His position was seen as essentially unproblematic. What was much less beyond disputation, though was the emergent significance of Ministerial power in the post-War legislative welfare-orientated explosion.

> "It is, perhaps, well to remember that where Ministers are to decide matters affecting the person or property of the individual they do not show the same disinterestedness and independence now conferred upon his Majesty's judges. It is the combination of rules, so early established, that a man should not be judge in his own cause and that he should be independent of outside influence, that confers upon English judges their prestige." 222

In his afterthought, however, Professor Potter did acknowledge that there did exist a body of clear policy matters which depended on imponderables that were not aposite for judicial enquiry.

> "Whether the decision affects a licence

> to trade or a licence to build or a licence to alter the character of a building, the ingredients that go to make up the answer involve such a variety of elements, most of them not wholly certain, that no man could say what is the right answer. It is a matter of opinion on which the same individual may well arrive at different results at different times." 223

Apart from this recognition of the problems involved in a notion of the "Rule of Law" Potter does not in his brief work pursue the practical implications of this justiciable/non-justiciable dichotomy.

The emergence of a recognition that a real issue existed in the nature of the judicial role in the modern world was highlighted with the extension of Ministerial work. Lord Denning expressed the problem in stark terms

> "Properly exercised the new powers of the executive lead to the Welfare State: but abused they lead to the totalitarian State." 224

The appropriate balance can only be struck by the Courts

> "So long as the judges hold the balance there will be no police State in England." 225

These perceived problems in the post-War era united both the defenders of the judiciary and their critics in conflict over the judicial role to

such an extent that the issue achieved some prominence in legal debate and teaching. [226]

(vi) Radical Critics

The attempts to go beyond the mythologising about judicial decisionmaking suffered both from their lack of volume and their specifically socialist source in such a traditional field as legal study.

The prolific political scientist and socialist theorist Harold Laski concerned himself with the nature of the State and its various component parts. His works, both elementary and more fully developed are studded with lengthy passages on law and also the judicial process. Laski's remarks on the judicial role are situated within a specific conception of political life within a Parliamentary democratic structure. It follows from this according to Laski that

> "... every State should possess a vigorous and independent judiciary. The government must be suable in the courts for tort and breach of contract in the same fashion as the most humble member of the community. The judges themselves, if they are appointed must also be irremoveable by, the executive." [227]

The reason for the need for an independent judiciary is that the sovereignty of the State must be amenable to the "Rule of Law". The specific way in which the judiciary can operate to effectualise this power control function, leads Laski to opt for

an "independent" judicial role.

> "The position of the judiciary is different (from the executive). Its whole purpose is impartiality. It is deliberately set aside from the normal process of conflict out of which law emerges." 228

This notion of the judiciary mediating, as it were, above political conflict to ensure protection from executive power does not mean that Laski does not recognise an active judicial creativity. The source of judicial decisions are firmly socially located

> "... the judge will decide, where he is not ... obviously bound down by statute or precedent, by his conception of what ought to be the law; and that conception will be determined by what William James called his sense of the "total push and pressure of the cosmos." 229

These innovative activities will continue to be available within the modern State as State activism expands

> "The larger, therefore, the field in which the legislative assembly can lay down rules of general guidance, the more will the courts be able to respond to the popular sense of justice." 230

Laski does sound a clear warning to such activity

> "No constitution ever enacts a static philosophy; and those responsible for its judicial interpretation must always be careful lest they mistake their private prejudice for eternal truth." 231

Situating these influences within the specific problems faced by judges in lawsuits, Laski reflects again the notions of Dicey as to Judicial "old fashionedness".

> "... it is the judge's experience of life that determines his attitude to the problems of law. Most people's philosophy both in its conscious assumptions and its much more significant unconscious prejudices, is fairly fixed at forty; and thirty years later the average judge will belong to a generation of which the general outlook is very different from his own." 232

Although, interesting to read in both the Grammar of Politics and his later work Laski does not get beyond asserting and to some extent demonstrating that the judiciary possess and evince

> "... unconscious leaning towards the assumptions of capitalism." 233

He cites such areas as labour relations and the control of local government. The substantiation is unsystematic and limited, although of course it does provide a starting point for an elaboration of such points. 234

Laski again is able to provide a telling demonstration of his basic theme in "Parliamentary Government in England" 235 without abandoning his initial method and advancing his points of over a decade. Rather reminiscent of the work of Dicey, we find

references in subsequent work on the judges to Lord Justice Scrutton's statement as to the class problems of the judiciary. The refreshing candour of the remarks of Scrutton were however, no more than an aside in a work which has little to do with the politics of judicial behaviour. Lord Justice Scrutton continued his remarks on the problem of class loyalty in labour/capital disputes.

> "Even in matters outside trade-unionist cases it is sometimes difficult to be sure, hard as you have tried, that you have put yourself in a perfectly impartial position between the two litigants." 236

Although this hinted at a broadening out of the whole debate as to the socialised preferences of the judiciary this prospect was cut short by Scrutton. He was addressing Cambridge law students on the topic "The Work of the Commercial Courts". As far as the difficulty of class in commercial matters he asserted revealingly

> "This difficulty does not arise in the Commercial Court." 237

What Scrutton was doing in this piece was to introduce his specific topic by suggesting that it should contain four attributes at least.

> "Its judges should be incorruptible and impartial : that is one. The law they administer should be accurate, and founded on recognised principles : that is two.

> Justice or judgments should be given quickly : that is three. And justice should be accessible to citizens cheaply : and that is four. And if you find a system which combines these four attributes, I think you have got a good legal system." 238

It is in this context then that Lord Justice Scrutton's self-doubts about judicial bias must be situated. That is all he had to say on the subject apart from urging judges not to put wrong laws right using their own moral preferences. Little else can be gleaned from the rest of the lecture of Scrutton's view of the overall problems of the judicial process "The Work of the Commercial Courts" is of an anecdotal rather than systematic nature. The only clue, perhaps, to Scrutton's own moral preferences came near the end where he discussed the legal profession which his audience will be joining

> "You are about to enter one of the noblest and one of the most loyal professions in the world. You will hear people - members of the Labour Party particularly - say lawyers are unproductive. It is not true; we are productive of justice." 239

One of the more interesting departures from the limited approaches of British jurisprudence came shortly after Sir William Beveridge succeeded in introducing the serious study of law into the London School of Economics. One of his proteges, W. A. Robson, produced a significant and unusual exercise in British "realism" in his study of the powers

exercised by bodies connected with the Executive branch of government in a direct way. His work "Justice and Administrative Law" was published in 1928 [240] The aim of the book was to deal with the developments which had taken place in expanding the judicial functions exercised by government departments as well as other public and private bodies. Although Robson's major concern was to examine the causes which led to this apparent alteration in the determination of citizen's rights and duties from their traditional locus in the Courts of Law he did take the opportunity to examine the judicial process insofar as it was involved in supervision of the developments which he adverted to. The approach goes beyond what he described as "a purely legal one"

> "it has been found necessary to make considerable excursions into the realms of psychology and political science. The judicial process cannot be understood merely by reference to judicial institutions." [241]

Although he restricted himself to the general area of administrative justice his remarks do mark a significant change in the approach which is rather more sympathetic than the more widely publicised polemic by Gordon Hewart against the replacement of the Courts of Law in new fields of decisionmaking which was published in the following year under the rather more arresting title "The New Despotism".[242] Robson admitted

the existence of factors other than purely mechanical and technical ones existing within the judicial process. He discussed the Psychological background to the decisionmaking which embraced both Courts of Law as well as other forms of tribunal. In all of these Robson recognised that one assumption which was never entirely specified was the notion of "acting judicially". Robson attempted to specify what he had in mind in discussing what he suggested could be termed "the judicial temper" or the "judicial spirit". Robson breaks this concept down into a number of constituent elements which he suggests mark the distinction between judicial and arbitrary decisionmaking. These consist of a need for consistency, equality, certainty and reasons as well as excluding imponderable factors dependent on personal tastes and individual feelings. Robson summed up this catalogue of true judicial character

> "The judge ... must exercise his functions in a way which fulfils the need for consistency, for equality, and for certainty. His administration must be objective and impartial, and he must state explicitly the reasons for his decisions. He must suppress his personal emotions and instinctive prejudicies and encourage his sense of fairness. He must do right to all manner of men "without fear of favour, affection or ill-will." [243]

What, then, Robson was involved in in this exercise was not an analysis of judicial practice but rather a delineation of the requirements for the

satisfaction of his conception of the "good judge". At the time when the work appeared it marked an unusual recognition that the judicial role, whether in tribunal or Court of Law, could involve factors other than purely technical considerations. Whilst one might wish to suggest that even the attainment of the goals which Robson set out failed to confront such central features as the "unarticulated major premise" and the unspecified worldview of the judge it is not necessary at this stage to conduct a debate with any possible empirical data which Robson might have produced since his goals were advisory rather than empirically based analysis.

Elsewhere in the work Robson contrasted the actual formal characteristics of the judges in the Courts of Law with their administrative counterparts as regards such broad matters as financial independence and job security and immunity in respect of his official functions as well as the requirement of judges to have no personal interest in litigation as well as the absence of delegation of tasks by a judge in a Court of Law. These were of course only "the outward features of the judicial process"[244] and beyond this Robson did not venture. His main aim being to deal with the "alternative" system of administrative justice rather than analyse the reality of the Courts of Law's traditional features.

Implicit though in Robson's argument was the assumption that the Courts can be taken, to some extent, at face value, in that he suggested that

> "... if we find that the administrative organs of justice have developed the tradition and the ability to arrive at decisions in a judicial manner, we need spill no tears of regret merely because they do not bear the institutional characteristics of the former courts of law. What society needs is the operation of the judicial spirit far more than the insistence upon the mere outward feature of a formal court ..." 245

In discussing "the good judge" he went into a little more detail drawing on such empirical data as existed and which indicated the approach of the judiciary to the control of Administrative Tribunals. This was from its early beginnings in the latter part of the nineteenth century described as non-interventionist exemplified by Board of Education v. Rice[246] in 1911 and Arlidge[247] in 1915. These confirmed dramatically the power of Tribunals and Ministries to make decisions with minimal interference from the Courts. Tribunals or Departments

> "need not follow the methods adopted by the courts but may employ any rules which appear fair and convenient for the transaction of business." 248

However, apart from noting that the Courts seemed unwilling at that stage to take an active role in policing the discretion of the various arms of the

Executive power, Robson did not subject this to any theoretical analysis. The reasons for approach and the criteria involved were not broached.

One of the fruits of the upsurge in comparative law following the First World War and the inception of the various international bodies like the League of Nations and the International Labour Organisation was the study by sometime ILP pamphleteer[249] R.C.K. Ensor of "Courts and Judges in France, Germany and England".[250] Ensor indicated that he was writing within an atmosphere of an "inchoate movement of unrest developing from several sides against our judicial system".[251] In his largely descriptive study Ensor pointed out two specific ways in which "incompetence may creep in" - namely "politics and old age". The criterion for this judgment of incompetence was general feeling at the Bar

> "... any one who was at the Bar twenty five years ago will be aware that at that time there were at least three, and arguably four, judges on the Bench of the High Court whom no practising barrister thought fit for their position."[252]

As to the nature and impact of this disabling element "politics" we see that Ensor was talking here in terms of party politics

> "By 'politics' it is meant that the Lord Chancellor who had selected them, did so rather because they belonged to his political party than because any one could suppose

that they were otherwise the best appointments." 253

This politics problem, though, Ensor confidently suggested was no longer the concern it once had been

> "... politics now counts for much less than it did. Some special credit seems due under this head to the late Lord Oxford and Asquith. Himself a practising barrister and the only one to become Prime Minister in modern times, he had a strong feeling for the honour of the profession, and was careful to see that every judicial appointment made during his tenure of office, whether by himself or his Lord Chancellor, was such, irrespective of politics, as to command professional approval. At the same time the opening for political misappointments remains, and always must while the Government of the day has carte blanche to fill judicial vacancies as it pleases." 254

In his conclusions, examining the contrasting merits and defects of the three legal systems judicial administration aspects he was more explicit echoing the remarks of Lord Justice Scrutton

> "The continental judge may be more subject than his English brother to governmental influence. But he does not obtain his judgeship from politicians as a reward for political services. The English judge, in what still forms a serious proportion of cases, does. In the case of the Lord Chancellor, he remains a politician throughout his tenure of office. The Lord Chief Justice and the Master of the Rolls under modern conditions do not; nor do the other judges. But most of them have been party men - some of them pretty strong party men - in their time." 255

The problem, though, was one of indirect rather than direct influence on his judicial work

> "The danger of this system is not subservience, but animus. That, at different periods, a good deal of party or class prepossession has been displayed on the English Bench, can scarcely be disputed. Usually it was unconscious, no doubt; but it has been none the less unfortunate for that." 256

The specific area which Ensor adverted to was the series of legal decisions in the nineteenth century against the trade unions and at the beginning of the twentieth. He concluded

> "These were a factor second to none in the genesis of the Labour Party." 257

As the source, presumably, of the "inchoate movement of unrest ... against our judicial system" this was a past practice to be regretted. However, Ensor provided only these brief fleeting comments on the English judiciary and did not support these assertions with any tangible empirical data. This method was later found in much of the post Second War critical approach with its source firmly within the courts' role in industrial struggles.

Summary

The above works then provided little sustained discussion of the judicial role. What little comment there was tended to be minimally documented if at all. Even where the approach to the judiciary was critical it seems that the overall political analysis which informed these critical approaches combined to leave the judiciary

as subject for study. This view of the judiciary as a purely instrumental mechanism within a state characterised by a class legal system has continued to dominate much critical thinking on the judicial role. Even less informative was the strain of thinking who denied not so much that there could be a policy element within judicial work but that this element contained any problematic areas or involved a body of decisionmakers of questionable status.

We will be seeing below the ways in which work on the judiciary appears to have changed since the expansion in legal education in the 1960s. However, many of these changes are of style rather than substance and involve little more than possible adjustments to the judicial "closed shop". For the rest there is still a dearth of data on exactly how the judiciary operate over time on specific issues. This work now attempts to carry out such an operation in connection with the judicial record on insanitary housing in Scotland between 1850 and 1914. This should both supplement the need for detailed studies of judicial policy work, particularly in less immediately obvious areas of social life, as well as providing a possible set of data against which to examine some of the broad judgments on judicial policymaking which have been made, implicitly or expressly.

DEAR LANDLORD

Introduction

From about 1850 to 1915, at a time when statutes were being produced by Parliament whose avowed intention was to improve the conditions of working class housing,[258] the judiciary in Scotland appeared to transform the law of landlord and tenant. What started out as a simple mutual obligation with the obligation to pay rent balanced by the obligation to provide a tenantable and habitable dwelling in return, became elaborately restricted. At the end of the process there were so many limitations on the tenant's rights that he could be said to have been stripped of much of what he had apparently started out with.

This paradox seems as though it may well provide some sort of clue as to the whole nature of judicial decisions covering as it does a central economic and social phenomenon as mediated through a variety of agencies including the courts. It occurred at a time when political and social stability was being challenged in the workplace and in the arena of institutional politics.

The specific topic of study is of particular interest in that there may be a simple one-dimensional "anti-tenant" or "pro-landlord" explanation if it is *prima facie* possible to so categorise all the relevant

decisions. The study does not support this and looks at whether or not this whole trend can be understood in terms of 'legal doctrine development' or significant external factors. They are then discussed in terms of the traditional explanations like Dicey's notion of "superlag" and a variety of social class views. None of these seems to be very helpful for empirical and more important theoretical reasons and this whole area is resituated within its social and political history to cast light on the judicial practice.

The habitable house - the common law position in the mid 19th century

At this time, the question of the standard of habitability imposed by the common law is covered in a number of discrete areas of legal practice within the work of the standard text on landlord and tenant of the time, Robert Hunter's Landlord and Tenant.[259] Hunter deals with the topic under such heads as the extinction or deduction of rent, and the recognised grounds of damages between lessor and lessee. Within this larger canvas, Hunter reveals what the position of a dissatisfied tenant in an uninhabitable house appears to be at this period.

On the question of when a deduction of rent or even extinction of such an obligation was appropriate, Hunter suggests the basis for such practice lies in an apparently universal "equitable doctrine"[260] stemming from

the writings in Scotland of Stair, Mackenzie, Bankton, Erskine and Kames.[261] Hunter specifies five rules which can be inferred from the Institutional and forensic data.[262]

1. Where there is loss caused by damnum fatale then exemption or deduction can be claimed.

2. Where loss is less than total but plus quam tolerabile then this also gives rise to exemption or deduction.

3. An abatement can be claimed where there is "sterility for during one or more years of the lease" although he does concede this is possibly a dubious proposition.

4. The cause of the loss must not have been such as might be deemed to be within the contemplation of the tenant such as soil deterioration again, in an agricultural lease.

5. Loss caused by such matters as supervenient legislation or judicial decision does not allow a rent deduction.

He cites amongst his collection of ancient agricultural precedents[263] and a couple of cases involving urban leases on the question of the right to abandon

> "Fourth, in urban subjects, destruction, injury, or detriment so great as to render them useless for the purpose intended, entitles the lessee to abandon. An urban subject was let. Before the term the tenant informed the factor for the landlord that it was infested with noisome vermin, a number of which he exhibited to the factor a few days after the term. The evil proved so excessive that the house was quite uninhabitable; intimation was made to the landlord that it "was quite untenantable", and "as such" it was accordingly given up. The landlord did not then, or even after the tenant had left the house, undertake to remedy the evil, but, on the contrary, involved the tenant in a series of law proceedings. It was held that the tenant was entitled to abandon the lease by reason of his house not being

> habitable on account of the vermin by which it was infested, and that as the evil was one which could not easily be cured, he was not bound to remain until an attempt was made to cure it." 264

As we shall see this is a slightly esoteric interpretation of the judgments in Kippen v. Oppenheim[265] but it does convey the strong notion of the contract as "two-sided" at the beginning of our period of study on the question of abandonment.

Hunter's exceptions and modifications to this rule on abandonment include the de minimis rule

> "where the injury loss, or detriment is of a nature comparatively small, there will be no abatement." 266

On the question of the obligation of a tenant to return to property which has become uninhabitable and requiring refurbishing, Hunter suggests that there is authority to the effect that a tenant is not bound to repossess the property after the break for repair.[267]

On grounds of damages between lessor and lessee apart from the generalised point seen already that damages emerge from non-possession or restricted possession, Hunter provides little by way of guidance. Apart from such successful claims as where a landlord was liable where he illegally unroofed his tenant's dwellinghouse - Bisset v. Whitson 1842 5 Dun, and Bell 5, Hunter does not stray beyond problems specifically related to agricultural leases. We find some assistance

as to the general nature of unclaimed rights in his discussion of Clugston v. Gould 1826 2 Sh. and Dun 308 and Baird v. Graham 1852 1 Stuart 578 where delay and acquiescence barred tenants' claims in line with the general common law rules of contract. [268]

As for the general rules as to meliorations to the subjects, Hunter chooses this section to state the very clear mutual nature of the landlord and tenant relationship as it appeared at this time in the cases.

> "Where there is no contrary stipulation, the lessor must not only deliver to the lessee the subject in a habitable condition, but must uphold it in tenantable repair during the currency ... In (other) cases (relative to deduction of rent) it was assumed that the lessee was entitled to be compensated for necessary repairs. And a lessee having made repairs and alterations upon a house possessed by him, it was held that, if they were necessary, he was entitled to be repaid the expense." [269]

The cases which he cites and the other Institutional authorities seem to bear out this relatively uncomplicated approach to the landlord and tenant contract.

It may be a function not so much of the law, but rather the author that the treatment of the topic of defects in the subjects of leases is dealt with in Hunter in this unsystematic and limited manner. After all, in his introduction to his own work on the subject "The law of leases in Scotland" first published in 1887, Rankine discusses why he decided against simply bringing out a fifth edition of Hunter's work.

> "The result of much study thereof and of repeated consultation with practitioners, whose opinion seemed to me decisive, was to convince me that a reproduction of its voluminous pages, brought down to date, would be a misfortune rather than a boon to the profession. Its value as a storehouse of authorities cannot be gainsaid and will never be superseded. But it is pedantic, operose, and ill-arranged. Too often its plan consists in setting down a string of rubrics in order to date, without regard to logical sequence, and without any attempt to seek out the principle or rule, which alone makes a decision worth quoting;." 270

Certainly the differences between the third edition in 1860 and the final fourth edition in 1876 of Hunter shows no attempt to re-arrange the authorities in any method other than the original one conceived by Hunter and re-applied in his second edition of 1845 from the original of 1833 . Although it could be argued that in the area of our study little of significance took place, nevertheless, the organisation of Hunter certainly does little to assist in classification of legal rules as a practical rather than formal exercise.

The development of the rules on the obligations and rights in relation to the condition of urban property let out is evident in the work of Rankine, mentioned above, and the less opaque style of same, mean that we have a separate chapter in the first 1887 edition of this new work. Chapter XI contains some three pages on Repairs as they affect urban leases.[271] By the time of Rankine's final edition in 1916 this

coverage has increased by threefold. This reflects the expansion in the case and statute law in this area over this period of time. Whilst Hunter, for all the problems of organisation of material, may have had few direct contentious cases within this area by the time we reach Rankine's third edition there are in the region of one hundred cases, a large proportion of them decided since Rankine's first edition.

Developments in mutual obligations 1850-1914

We can now examine these developments in the rules and doctrines applied to this branch of contract and see how it was that the position of tenants altered over this period. As we shall see the developments were not a long series of limitations on tenants but do involve clearer specification of the landlord's duty in some instances. Exactly what the "state of play" at the outbreak of the First World War was we shall see at the end of this Chapter. The cases have been organised along the lines of the major doctrinal points of dispute, and cover 1. Volenti non fit injuria; 2. Defect obvious at commencement of the tenancy; 3. Lack of notice; 4. Retention of rent; 5. Liquid rent and illiquid damages; and 6. Tenant's negligence.

1. VOLENTI NON FIT INJURIA

Within the common law of delict or reparation it is possible that a claim may fail when the injured party

accepts the risk - "volenti non fit injuria" - is the traditional brocard. This notion of closing out the options of a tenant whose landlord was not fulfilling his side of the mutual obligation by failing to provide a tenantable and habitable dwellinghouse does not appear to have been canvassed in Scotland until the latter part of the nineteenth centry. No mention of this possible defence appears in Hunter's Landlord and Tenant or in other authorities.

(i) Early doubts on volenti

Its first appearance was in a somewhat tentative form in a blanket defence by a proprietor of a Glasgow house where a serious accident resulted in a young girl's death in 1869.[273] Tiny McMartin fell through a gap in stair rails where there was railing missing which left a nine inch gap. She was seven years old. An action was brought on the basis of fault for a solatium payment by the father rather than on the contract itself. However, what was interesting about the defence was that, in addition to putting forward such pleas as lack of knowledge of the proprietor and contributory negligence of the young girl to her accident, Hannay relied on the English case of Mangan v. Atterton[274] for the proposition that the "tenant knew the state of the stair, and had acquiesced in and consented to the condition in which his premises were kept".[275] The Second Division took a dim view of all the

defences of the proprietor including the Volenti claim although it was not explicitly dealt with in any of the judgments except where the duty of the proprietor to those using the common stair is stated in strong terms

> "When this proprietor found the stair not properly fenced it was his duty to repair the banisters. He was bound to do so, to insure the safety of all who had a right to be there, whether invited or not. Policemen, tax-gatherers, officers of the law serving process, and such like, might all have a right to be there ... This little girl was lawfully there, and was thus under the protection of the law ..." [276]

No mention is made in any of the judgments of Mangan although clearly the decision in McMartin indicates a rejection of the line taken there by the Court of Exchequer who had held a whitesmith not liable where he exposed goods for sale in a streetmarket. This comprised a machine which included crushing rollers and cogs, in which a young boy of four caught his fingers and had them crushed resulting in their requiring to be amputated. Baron Martin suggested the "accident was directly caused by the act of the boy himself". Similarly nothing which his colleague Baron Bramwell says is actually support for any kind of notion of "Volenti non fit injuria". [277]

The matter of volenti was raised in a somewhat more oblique form in the Granger case a decade later. [278] The initial action of damages by the tenant was ultimately dropped on appeal to the Second Division.

Nevertheless, the reaction of the Court to the landlords' notions of the proper interpretation of the mutual obligations emerging under a landlord and tenant contract where there was a major problem of habitability, might be expected to be a useful pointer to the kinds of standards of defect and notice which might be subsequently expected in similar sorts of situations and particularly for our interest here, as to what kind of action would be expected as reasonable where danger could be said to be patent.

Dr. Granger took possession of a house in October 1876 for six years with a tenant's break in 1880. He wrote intimating he was going to do this, in January 1880, unless there was some further reduction. This letter also pointed out the defective drainage system and the impossibility of using fires in two rooms due to smoke annoying the family and neighbours. Despite this, at the end of the month he wrote accepting a smaller deduction than he had been seeking but taking it only on the understanding there would be no increases and possibly a reduction in the following year. Finally, after further correspondence, Granger agreed to become a tenant for only two years hence at the reduced rent. When accepting this, he intimated his daughter was laid up with typhoid fever and insisted on outside inspection and necessary drain repairs. Four days later he left the premises. A day later his youngest

child died of typhoid fever. The tenant intimated he would not regard himself bound to pay rent thereafter. The landlords did not accept responsibility for harm to the children and also held the tenant liable for rent. The tenant meantime removed his furniture. The house was put in order by replacing drains and this took two months. When this was ready in April the landlord called on the tenant to resume occupation. He refused. In an action for rent the Sheriff held for the landlord and not for the tenant's conjoined action for damages for illness caused to his family. He did allow a deduction for the period when the tenant could not occupy the premises when the defects were being sorted. The tenant appealed against the order to pay the rent on the grounds that the landlord had failed to supply a tenantable house and was not entitled to enforce his right to rent.

Now this case which the Lord Justice Clerk pointed out was important "because the sanitary state of houses in large cities has attracted considerable attention" [279] appears to have been decided on the relatively unspecific grounds of the demands of humanitarian expectations

> "Upon this nice question, whether the father of a family who are alarmingly ill - one already dead - is justified in removing them from the house which was the cause of their illness, and is bound, when the cause of the illness is removed to return to the house, though, for but a short time, the solution of this action, involving a sum of £15, depends.

> I am of opinion that a tenant so disturbed in his possession, with his family struck down by illness, is not bound to return to the house the moment the disturbing cause is removed, particularly if there is nothing to oblige him to remain in the house for more than a few weeks ... Upon the ulterior question, which is plainly more interesting tc the parties (than the rent PR) - that is whether the tenant is bound to return to the house and to pay rent for two more years - I am of opinion that, although prima facie he would appear bound to return to the house ... I think he is no longer bound. Nothing having fcllcwed upon the letter of 6th February (his letter entering a new lease - PR), in the circumstances, the serious and increasing sickness in the family, arising from the bad state of the house, entitled him to resile ..." 280

His colleague, Lord Craighill, is more specific in suggesting that the case can be answered on more technical grounds concerned with the length of interruption which can be expected in the middle of a lease whilst repairs are carried out.

> "... is he bound to return to it when after the lapse of two months, the house has been made habitable? I think there was sufficient failure on the part of the landlord to warrant the tenant in not returning to the house. His occupation, which was to be continuous was interrupted for no less a period than two months. That is an interruption which the landlord had nc right to insist that his tenant should agree to. " 281

Which of these two lines of thought could be deemed prime will become clearer when we examine the subsequent decisions in this area, but suffice it to say at the present time, they represent a non-technical and a technical approach to this specific problem.

(ii) Volenti accepted

A further decade elapsed before the Second Division again had to deal with a case where this notion of the loss of a right through voluntary action was brought up in Webster v. Brown 1892. [282]

Mrs. Webster was the tenant of a yearly lease from Whitsunday 1890 to Whitsunday 1891 of a house in Garnethill, Glasgow. On 9th March 1891 she alleged she fell and received serious injuries on the steps leading to her house. Complaints were allegedly made by Mrs. Brown and the other tenants. The landlord visited the property and promised to have the steps renewed in Autumn 1890. This was actually done shortly after the accident. The tenant alleged in the Sheriff Court that the landlord failed to carry out his duty to put and keep the house in good tenantable condition and repair including a good and safe mode of access. The landlord denied fault. In the Court of Session the landlord suggested that the tenant was well aware of the condition of the steps for a long time prior to the accident and should have left and sued the landlord for damages.

The notion of a different standard of obligation towards tenants as opposed to the public seemed to be implicit in the judgments from the Second Division members who made remarks on the claim rejecting it. No cases were actually mentioned in the judgments

which applied a "common-sense" line urged on by the landlord's suggestion that the appropriate action for a disaffected tenant was to do what Dr. Granger had done and quit the premises although he will have to determine a number of imponderables such as the question of whether the defect is "trifling" and when a "reasonable time" has elapsed after his complaint.

> "It is not alleged that between the date on which the accident happened any change had taken place in the state of the stairs. Thus for nine months she had continued to use them. If a person becomes tenant of a house and if defects in the house or its approaches become known to him, there are two courses open to him - (1) he can remain in the house which implies that he considers the defects trifling, and is willing to overlook them; or (2) he can give the landlord notice to have the defects remedied, and if the landlord does not make the necessary alterations within a reasonable time he can leave the house. I do not suggest that the tenant in discovering the defects should instantly leave the house and charge the landlord with the expense of acquiring a new tenancy; but he is bound within a reasonable time to bring the matter under the notice of the landlord, and, upon getting no remedy, to leave the house, or remain at his own risk." 283

Lord Trayner makes a similar analysis but he specifically equates knowledge with voluntary acceptance

> "I think, therefore, she acted in the face of a known danger, and must take the consequences. It is the duty of a tenant who discovers a serious defect in the condition of the house when he enters into possession immediately to give notice of the defect to the landlord and insist on it being repaired, and if the landlord fails to repair the defect within a reasonable time, the tenant may leave the house

> but continues, notwithstanding the defect, to occupy the house, the tenant must just take the consequences." [284]

(iii) Refining the defence of 'volenti'

The issue of volenti was proferred in a case some five years later which came to Court on the alleged deficiency of the subjects let to a tenant which led to injury of the tenant's wife.[285] The distinction on the facts appeared to be the crucial element here with the First Division introducing a rider to the broad principle of the applicability of a straightforward version of volenti in landlord and tenant matters.

In this case, Shields v. Dalziel, it transpired in February 1896 the tenant complained that the ceiling in one room was in an apparently insecure condition. The factor first of all suggested that there was little wrong with the ceiling but later undertook to have it seen to. Nothing was done and again the apparently worsening condition was pointed out to him in April and an urgent request made to have this looked to. Finally without any work being done on the ceiling in November 1896, a portion of the ceiling fell and injured the tenant's wife. The Lord Ordinary sustained the landlord's plea of irrelevancy. The landlord relied on Webster and that the tenant had accepted the tenancy with the ceiling in its insecure condition and being a patent and known defect the intimation to the landlord made no difference. The tenant suggested

that the true analogy was with McMartin and that the defender undertook to remove the risk and it was in reliance on this undertaking that the tenant remained.

The tenant also introduced the notion from the field of employment law that knowledge of a defect was not the same thing as acceptance of the risk of same and did not necessarily act as a bar to recovery of damages.

In a judgment even shorter than that of Webster, the First Division distinguished that case on the grounds of the tenant's acting in reliance on a specific undertaking

> "... although it has been pointed out that the statement involves a considerable lapse of time, and a carrying forward, through much procrastination, of the landlord's promise, I think the fair meaning of the record is that not merely the promise but the legal undertaking to execute the repairs was extant as a term of the tenancy when the accident occurred ... The case of Webster seems to apply to a very different state of matters, for the theory of the judgment is that the tenant accepted the house in its apparent and visible condition, which was exactly the same when the accident happened as when the tenant entered. The bad stair was the cause of the accident, and it was no worse then than it was, and was seen to be, at the time of the accident. In the present case the condition of the house was not the same, for the ceiling fell; what was visible when the tenancy began was a risk; and against this risk the landlord bound himself to protect the tenant ..." [286]

Only a fortnight later, the Second Division similarly distinguished Webster in Hall v. Hubner [287] but like Shields did not actually cast doubt on the

base line from which the landlord's argument operated. The facts though were seen as the significant clue to the decision.

Mrs. Agnes Hall, wife of the tenant of a shop and house in Kelso, fell through a step in the house and brought an action for damages for her fall into the cellar when said step gave way. The staircase was in a defective and ruinous state but this had been so for some years and the tenant had complained to the landlord's factor and asked to have the wooden stair repaired or renewed. The factor and solicitor's clerk visited the premises in August 1895, a month before the accident. The Sheriff upheld the plea to the relevancy of the landlord, whilst the Sheriff allowed a proof. The Sheriff Substitute relied on Webster while the Sheriff saw it as an "emerging defect" which was notified to the landlord and that the landlords pleas as to knowledge and contributory negligence would come out in a proof.

The Lord Justice Clerk preferred the notion of the "emerging defect" even though, like Webster, the item complained of was stairs. However, the Lord Justice Clerk determined that

> "... the circumstances are different (from Webster - PR) ... a tenant continued to use stone stairs leading to her house, which were so worn as to be obviously dangerous judged both by the eye and by the feeling of the foot, long after entering upon her tenancy, and did not take the course which was open to her of rejecting the tenancy. She knew the danger, because it was

well known springs some distance away. The water supply at the wells was found to be dangerous and condemned. Instead of providing such a supply this pump well was simply cleaned out and the pump repaired. Smith was assured that this was only a temporary expedient. From October 1896 the whole family suffered a chronic bowel complaint and the wife was seized with typhoid fever in August 1897 and died on August 30th.

The School Board pleaded volenti as well as suggesting the averments were irrelevant.

The Second Division rejected the damages claim although nowhere in any of the judgments is there any specific reference to the Webster case despite the similarity of basic position and reasoning

> "The obligation upon him to live in a house provided by the Board went along with their obligation that the house provided should be fit to live in. But if he was satisfied that the house was not one in which he and his family could live with safety, and that is his averment, then I cannot hold that he was entitled to go on exposing his family to that danger, and claim damages from those who provided the house for the consequences of his exposing himself and his family to it ... If he remains he must be held to do so because he chooses to remain, and so remaining he takes the risk which he knows exist. His proper course is to quit a house that he holds to be unsafe." 290
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> 291

Similarly in McManus v. Armour there was further support for the case of Webster although for the first

time in any of this kind of cases there was a dissenting judgment.

Mrs. McManus raised an action for damages arising from an accident in the wash house of her property in Bridgeton when her foot got stuck in a hole in the floor. The landlord had been told of the defect repeatedly during the tenancy from Whitsunday 1898 till August 1900 when the incident occurred. The landlord suggested the case was irrelevant and the Sheriff Substitute and Sheriff agreed suggesting it was the tenant's own want of care that led to the accident.

Not only did the Second Division follow Webster but it was suggested by Lord Moncrieff that

> "even if we had not had that case to guide us I should have come to the same conclusion." 292

This is also stated by Lord Trayner so that it is clear that a decade after the initial decision none of the charm of the volenti principle appears to be fading as far as the Court of Session was concerned. The Lord Justice Clerk even regarded McManus as something of an extension of Webster as he explained

> "The pursuer chose to continue her tenancy and to use the washing house and did so use it, in the knowledge of the fact that this defect existed in the floor. I am unable to see any sound distinction between this case and (Webster) ... Indeed I think this case is a fortiori of that one, for in the case of the steps the tenant could not reach her house without actually

> using the steps, whereas in this case the washing house could be used without there being any necessity of stepping where the defect was." 293

Significantly the dissenting judgment of Lord Young is not on any doubts about the principle of volenti but on the simple factual question of whether or not the tenant knew of the defect before her accident and whether or not it had existed for a long time.

(v) Limiting volenti

After these clear reiterations of Webster and the volenti principle's affirmation in these two cases, we find that in a number of causes up to the first World War specific facts enabled the distinguishing of the Webster line. 294 In Caldwell v. McCallum we find a tenant succeeding in a claim where, like Shields, an issue arose concerning the state of repair of a ceiling. When retaking the house Caldwell, a clothier in Glasgow, stipulated that some decoration and repairs be undertaken by the landlord. One of the factor's assistants called at the house to discuss these and the tenant's daughter pointed out the apparently insecure condition of one of the beams in the drawing room - the plaster was cracked and there were widish spaces between the cracks. The assistant said these were all right and that there was no danger. In March the room was decorated and the cracked beam was painted without being repaired. In August 1900 the ceiling plaster work fell in and caused

damage to the furniture. The tenant sued for the loss caused as part of the obligation was to keep the house in good and tenantable condition. The Sheriff upheld the landlord's plea that the proper action was not relevant applying Webster v. Brown and was supported on appeal by the Sheriff who felt that the fact that the landlord had not undertaken to repair the beam was significant and made Shields v. Dalziel distinguishable. The tenant complained in his appeal that the danger was one not patent to an unskilled eye and the tenant was entitled to rely on the assurance from the landlord. This was a Shields/Hall situation. The landlord said Webster ruled and the tenant accepted the ceiling in an apparently insecure condition and it made no difference that he had pointed it out to the landlord. The risk was patent and known. Also the landlord relied on Russell v. Macknight[295] and McManus v. Armour.

The Lord Justice Clerk felt that the question revolved around whether or not a change of condition had taken place in the item allegedly defective

> "This case I think differs from those founded on by Mr. McLennan and the Sheriffs. These were all cases where the accident happened without any alteration having taken place in the premises - at the time of the accident the house was just in the condition in which it was taken by the tenant (Webster, Russell and McManus) ... Now here the circumstances are different, the accident being due to a change in the condition of the house ... The pursuer's daughters ... pointed out to the assistant a crack in the ceiling, which they indicated as

> being in their opinion a possible source of danger. The assistant however assured them that there was no danger, and no need to do anything. Now, this was a matter requiring skill, which the pursuer and his daughters could not be expected to have. It may be that the factor was not himself a man skilled in such matters, but it was his duty to find out whether there was danger or not, and if he or his assistant chose to give an assurance of safety without due inquiry he took the risk of an accident happening ..." [296]

Lord Moncrieff makes the point that in this line of cases the differences between cases is not entirely crystal clear

> "... I think the Sheriffs have thrown out the case upon a misconception of certain decisions ... I am not surprised at this, because certainly the distinctions which have been made in these cases have been very fine. But I cannot agree with the Sheriffs that the case of Webster is in point ...(a case) clearly ... of seen danger ... here the pursuer was led to believe that the ceiling was safe ... " [297]

Slightly surprising, one could say, is the fact that again there is a dissenting judgment as in McManus. That case went against the tenant and there was dissent, whilst Caldwell is for the tenant's claim and the dissent is from the same judge, Lord Young. [298] However, as indicated, the dissent in McManus was not on a question of principle and Lord Young's adherence to the volenti principle is made clear in his judgment

> "The pursuer in February retook the house on condition that the landlord should execute certain repairs ... That is his statement as to the time when he first became aware of the

> dangerous state of the ceiling. But he lived on in the house, although he was afraid that the plaster might fall, until August, when it came down. I think this is not such a case as to make it desirable that we should interfere with the judgment of two Sheriffs in a matter which is very familiar to them."299

(vi) The Uncertain Years

Although he had earlier followed Wester in the case of Shields[300] five years before, in Hamilton v. Nimmo[301] in 1902 Lord Kincairney, in the Outer House, adhered to the line centred around alterations in the item of complaint. Here a common stair leading to the tenant's house collapsed and injured the tenant's daughter. The central flag stone in the stair had apparently become gradually weakened through use and though this was known to the landlord, who personally factored the property he did nothing about this. The Lord Ordinary allowed an issue. Clearly there was a significant factual difference of some note between this "stair" accident and that in Webster which led Lord Kincairney to reject the landlord's cases of Webster, Russell v. MacKnight and McManus v. Armour and decide

> "... the case falls under Hall and Shields rather than under the other cases cited by the defender (Webster; Russell and McManus). In those cases there was no alteration or decay in the building averred such as we have here." 302

The narrowness of this whole field was again emphasised by the Second Division decision in the case three years after Hamilton of McKinlay v. McClymont.[303]

There is an element here of déja vu in that the factual situation appears to be very close to that in Shields.

The tenants of a single apartment resided in a property for some months when a portion of the ceiling fell and caused shock, annoyance and inconvenience to the tenants. The landlord called later that day and the accident was pointed out to him. He indicated that the matter would be seen to. On the following Thursday still nothing had been done and further bits fell and injured the tenants daughter and wife requiring medical care and causing shock. The Sheriff Substitute allowed a proof but was overturned by the Sheriff. The tenant still remained in the house when the action was begun in December. The Sheriff felt that the tenants should have moved from a house that had started falling about their ears. Despite the variety of cases in the recent past the Sheriff felt one consistent purpose ran through the cases "men are not to get damages for injuries which they should have foreseen, and could have avoided by moderate prudence".[304] In an appeal the tenant claimed that he was entitled to rely on the landlord's undertaking[305] and that after McKimmie he would have been acting unreasonably in removing in face of an offer to repair.

In view of the plethora of case law both ways it is not entirely surprising when the Second Division declined to throw out the claim on the grounds of relevancy

> "... In (the) cases of visible danger it also required some action on the part of the person himself to cause the accident which did the injury ... I think this case is very like Shields v. Dalziel ... I must say that this is much too delicate a case to allow it to be decided on mere relevancy." 306

Lord Kyllachy was of the same basic opinion but is less clear about which line of authority was appropriate here.

> "... I say nothing for or against the decisions which have been cited to us, each of which of course depended on its own circumstances. Having regard to the alleged circumstances of the present case I think it enough to say that it appears to me to be too delicate a case to be decided without proof.'307

The same sort of point was made in the following year in Grant v. McClafferty[308] where the question of the landlord having given an undertaking was involved in circumstances which on the face of it, were not unlike those of Webster.

In a yearly tenancy Mrs. Grant sued for a fall after she broke her leg when the defective condition of the stair resulted in a fall. The landlord claimed that the condition of the stair was open and obvious to every tenant and the tenant was volenti.

The criteria for volenti, however, were specified in line with the earlier cases of "landlord assurances" like Shields, Hall and Caldwell. The Lord President explained in the First Division the impact on volenti of

such a situation

> "The tenant may be volens in the sense that he has taken, or continues to occupy the premises in a dangerous condition. That would be a good defence. But when it is alleged, as in this case, that the tenant had pointed out the defect to the landlord, and that the landlord had promised to repair it, and that it was relying on the promise that the tenant continued to occupy the premises, it is impossible to say that the tenant was on his own admission volens. [309]

Whilst the judgments in Grant v. McLafferty were not notable for the references to the authority, in the case determined only a month later by the same Division (and with two common judges in the two cases) Cameron v. Young[310] canvassed authority widely. Here the tenants complained of the smells of the house rented to them and despite complaints and promises to have this seen to, nothing was done. The tenant's son caught scarlet fever. An ultimatum was issued to the landlords but before this could be implemented the pursuer caught typhoid and was in hospital for 12 weeks.

The First Division appeared to have had no difficulty in situating the status of the volenti doctrine within the overall mutual obligations of landlord and tenant and adumbrating a set of reasons for such a principle

> "By the law of Scotland it is an implied term of the contract of location that the subject let is to be maintained in tenantable condition, and it follows that where a house

> occupied by a tenant becomes insanitary or otherwise dangerous and unfit for occupation, the tenant may treat the contract as broken, and will be entitled to compensation for the expense to which he has been put in finding another residence. He will not, in the ordinary case, be entitled to compensation for suffering from disease or accident attributable to the faulty condition of the house if he remains in it in the knowledge that the house in insanitary or insecure. Good reasons can be given for the recognition of this rule of law. One of them is expressed in the maxim, volenti non fit injuria. Another is, that in claims of damage for breach of contract such damages only are allowed as may be taken to be within the reasonable contemplation of the parties when the contract was made ... There is also the rule ... that a party must do what is reasonable to minimise the loss and damage chargeable to the other contracting party. These reasons all point to the duty incumbent on a tenant who knows that he is exposed to danger to take immediate measures for protecting himself against the apprehended casualty." 311

Lord McLaren went on to explain the exceptions to this overall doctrine and the questions which arose in consequence

> "But again there are cases where removal is not necessary as a protective measure. If the ceiling of one of the rooms of a house becomes insecure, a sensible tenant would close the room and arrange with his landlord to have the ceiling renewed as soon as possible. And even in the case of an insanitary house which the tenant is entitled to quit if the landlord offers to have the faulty pipe or drain instantly repaired, and the tenant agrees to remain in the house and does remain, and contracts disease in consequence of his continued occupation, one of two questions may arise - First, did the landlord promptly perform his promise to make repairs? Secondly, did the landlord induce the tenant to stay on by taking the risk on himself and waiving his objection that the tenant must act as necessary for his own protection? ..." 312

His colleague, Lord Kinnear, chose to rest his support for the aggrieved tenant on somewhat different grounds, however, utilising the distinction between sciens and volens which was propogated in the employment case Smith v. Baker.[313]

> "... It is a perfectly good defence to such an action that the pursuer has undertaken to relieve the landlord of that obligation. He may so agree either at the time when he takes over the property or after a danger has arisen which was not foreseen at that time ... The fact of his remaining in a house which is not in tenantable condition may be a fact to be taken into account as an item of evidence in considering whether he has made any such agreement. But that he has agreed is a matter of fact which must be proved, and I am of opinion that it is not proved by proving the averment that he knew the house was in a condition which might cause danger ... I think these decisions (supporting 'tough' line - PR) have been overruled by Smith v. Baker ... the doctrine that mere knowledge that the house is out of repair will form a good defence is, I think, excluded by the decision in Smith v. Baker, which establishes that knowledge of a danger is not in itself conclusive evidence that the party exposed to it has taken the risk upon himself, and so relieved those who might otherwise have been responsible by reason of negligence." 314

Oddly enough, although the case of Smith v. Maryculter is spoken of as being overruled by Smith v. Baker, no mention appears to be made directly by any of the First Division as to the status of Webster - which was of course enunciated after Smith v. Baker.

In the Outer House two months after Cameron, while the latter was going on appeal to the House of Lords (on a question of title to sue of a tenant's wife) Lord

MacKenzie dealt with a case on very similar lines.[315] Here, in Soutar v. Mulhern an action of damages was brought by a tenant for loss and injuries following his daughter's bout of diptheria caused allegedly by the faulty drains in the house. There had been repeated repairs following a Local Authority order to put in new drains. The landlord's plea to the relevancy was rejected and a proof allowed to determine exactly what the facts disclosed

> "It may be that on the proof the defender may be able to shew he was not to blame, but as I read the record the averments amount to a case of defects which repair would not remedy, existing to the knowledge of the landlord, who nevertheless gave an assurance that the drains were all right. This seems to make the present more like the cases of ... (Shields and Caldwell) than Webster and McManus. It may turn out on the evidence that such an assurance was given to the pursuer that he was not bound to leave the house." [316]

Finally, the two decades of activity in the Courts between landlords and tenants on the vexed question of the applicability of volenti were brought to an end with a "stair" case, Dickie v. Amicable Property Investment Building Society.[317]

In August 1909 negotiations took place for a tenancy of Edinburgh property and Dickie agreed to take the property provided that several minor things were put right including a loose railing or bannister and on the next day entry was taken. After a few days non-action, the tenant called on the factor and was

promised this would be seen to. This continued for a couple of months. In October 1909 a man called and examined the railing and nothing followed except further promises until the landlord's factor himself called and agreed the railing was in a shaky and dangerous condition. Finally in January 1910 the tenant fell and was severely injured when the railing gave way.

The signs of judicial weariness are evident from the remarks of Lord Salvesen in the Second Division where he runs through the position which again seemed to depend on what length of time was reasonable in the circumstances for a defect to subsist.

> "The action belongs to a class with which we have been long familiar. A tenant is injured, as he alleges, owing to the landlord having failed in his implied obligation to make the subjects of the lease tenantable, or because of an express undertaking ... that he should do so ... It was strongly contended that if a landlord refuses to implement a contractual obligation to put the house which he has let into a habitable condition, and the tenant thereafter continues in occupation of the house, he does so at his own risk; He ought either to leave it or repair it at his own expense and take his chance of recovering his account from the landlord. So it was said here that the landlord's delay in putting right the defects which are complained of amounted in the circumstances to a refusal, and the pursuer's duty was to have treated it as such, and either to have removed the danger or himself from the house ... I think he was entitled to assume that the promise which had been given would be implemented, and the fact that he still entertained hope that it would be implemented for a month after the promise was made is not conclusive against him." 318

With this the period of great volenti activity comes to an end and we find only two further reported cases during the next half century which leave volenti as a living operative defence at the time of writing.[319] [320]

2. DEFECT OBVIOUS AT THE COMMENCEMENT OF TENANCY

Closely allied to the question of the voluntary acceptance of risk is a slightly different formulation of the basic idea in the defence which was put forward in a few cases at the same time as volenti at the end of the nineteenth century. It is not entirely easy to separate the two issues involved in these defences except in their technical formulation. Their impact is exactly the same - they involve an acceptance of the risk flowing from the defect in the subjects let. All that is really different is that in the case of volenti we are dealing with defects which arise during the tenancy, whilst under this defence, it is of the essence that it exists at the start of the tenancy. There is an implication, that such a defect shall be sufficiently obvious not only to be perceived, but to be perceived as potentially hazardous.

Bearing this in mind it should be noted that both pleas were put forward in the 1872 case of McMartin v. Hannay.[321] Oddly enough, they were conjoined in the landlord's case both relying on the English case already mentioned of Mangan v. Atterton. As indicated there is little in the judgments in Mangan (which incidentally only amount to some 185 words in both opinions). Like the volenti claim it is not easy to infer from these judgments any rule in terms of a defect obvious at the commencement of the relationship except possibly these

remarks of Lord Bramwell talking of the machine which mangled the young boy's hand

> "The defendant is no more liable than if he had exposed goods coloured with a poisonous paint, and the child had sucked them."322

The point is never made clear in the judgments of the Second Division and is only rejected implicitly by the complete failure of the landlord's defence in this case.

The Undistinguishable Defence

Subsequent tenants whose landlords claimed this defence were not so fortunate. Again these cases were concentrated in this particularly litigious era for landlords and tenants. In 1896 the wife of a tenant Russell[323] brought an action of damages for his death as a result of a fall on the common stairs leading to their house in South Queensferry. She claimed the cause was failure to have a hand rail on each wall as well as inadequate lighting. There was no change in the condition of the railless stair with its 19 stone steps between two walls. No complaint was ever made to the Advocate landlord on the absence of rails. The lighting aspect was dropped as it was not part of the landlord's obligation to provide a lit stair. The pursuer won the first round. The tenant suggested that he was entitled to a safe house and that if a defect was patent then he did not need to complain to the landlord. The landlord

claimed he was entitled to notice of a defect and relying on Webster a dissatisfied tenant must leave or remain at his own risk. The jury opted for the tenant.

The landlord relied on both the notion of a defect accepted at the time of making the contract and entering the property as well as the Webster requirement that a tenant remained in face of an unremedied defect at his own risk. The First Division sought to ignore the specific point of Webster and instead took this variant of the transference of risk specifically rooted in contract. They preferred not the acceptance of an ensuing breach but rather the notion of a contract with part of its essentials, as it were signed away ab initio. This was substantiated by the total lack of any form of remonstrance about the defective state of the property from the tenant

> "... I could understand that there might have been a case for the tenant if, from complaint or remonstrances with the landlord against the continuance of the stair without a railing, it might have been a matter of inference that the house was not accepted in its existing condition, but, as the facts came out, it appeared that no complaint had ever been made on this head. The house was taken by the deceased himself without any railing on the stair, and there is no evidence that it was any worse at the date of the accident than when he entered into the contract." 324

Lord Adam is even more trenchant on this point

> "The deceased man became tenant of the house, and must have been satisfied at that

time with the condition of the stair."[325]

Unfortunate though the contract might have been for the tenant, since it resulted in his death, Lord McLaren echoes the words of the classic English decision Jones v. Robbins[326] where the letting of a tumbledown house was declared to be perfectly legal when he explains the position of a disadvantaged tenant

> "... The contract between the defender and the deceased was a contract to hire a house with no rail on the stair case. There was no illegality in making such a contract, and if a tenant hires a defective house he is in the same position as a workman, in the analogous contract of the hiring of labour, who accepts a known danger ..." [327]

The full force of this doctrine was shown a decade later when another death resulted from a defective stair in Mechan v. Watson.[328] Mechan, the tenant, sued his landlord for damages to his child who fell through a space between the wall of the landing leading to the top flat. The normal gaps between railings was of 5½ inches but was wider at the edge. [329]

Whilst reiterating the point that landlords could not be expected to ensure the safety of their tenants, any defects in the state of the property had also to be brought to the landlord's attention.

It followed from the adoption of this policy position as to the remedy of defects that even where there were patent defects even these required to be

brought to the landlord's attention. The remedy for the pursuer was spelled out by Lord McLaren

> "When the pursuer came to take the house, if he thought the railing at this particular point insufficient as a protection for his child, he should have made it a condition that the landlord should alter it according to his wishes. Had he made this demand, the landlord might have declined to give him what he asked, preferring to let the house to a tenant who was content to take the use of the stair as he found it." [330]

The time to act was at the beginning of the tenancy otherwise the implication was clear

> "... If the pursuer required any structural alteration on the house it was for him to say so before he took it, and it must be held that he took the house because he was satisfied with its arrangements as regards the staircase as well as in other respects ..." [331]

Lord Pearson went further when he suggested that the tenant had not only failed to show the landlord had failed in his duty but that it was he who had been the one who has not fulfilled his duties

> "The pursuer is the defender's tenant in the subjects. He took the subjects as they stood, and it is not said that he so much as called the landlords attention to the stairhead railing, which he now avers to have been all along in "an unusual, defective and dangerous condition." [332]

This line was followed some two and a half years later in a similar kind of tenant loss in Davidson v. Sprengel.[333] The tenant's daughter was burned to death as a result of the gas bracket on the first floor of a

flat at 108 Rose Street, Edinburgh. She was sent for sweets in November. A local 1891 Act put an obligation on landlords[334] to provide stair lighting. The landlord claimed the averments were irrelevant or were the tenant's fault or that he knew of the defects alleged and continued to occupy the premises. The tenant had been in the property from Whitsunday 1907 to November when the accident occurred.

The First Division rejected this claim unanimously both relying on the precedent of Mechan v. Watson and in the case of the Lord President on a fully articulated version of this principle of the 'obvious defect'.

> "But it seems to me that there is a fatal blot in the case which makes it quite irrelevant, and it is this: The pursuer here was a tenant, and had been in this house for a period of several months, from Whitsunday to November. It is therefore perfectly obvious that he must have had more than ample opportunity of seeing the position of the bracket, and ample opportunity of seeing it when the gas was lighted: and yet there is here no trace of the averment - with which we are quite familiar in other cases of this kind - that he had called the attention of the landlord or the factor to this danger on the premises, and had been then lured on, so to speak, to remain in the house by an unfulfilled promise to repair. Accordingly, we have here a state of things of which the pursuer had never complained, and which apparently he had been quite happy to contemplate every time he came into the house. If, then, the accident had happened to the pursuer himself, it is quite clear that in the circumstances he would have been both sciens and volens."[335]

No instances appear to be recorded at this time or since where this doctrine has been rejected or distinguished although statutory obligations in housing conditions have

indirectly altered its real impact.

3. LACK OF NOTICE

As already indicated, the question of whether or not the landlord can expect precise specification of the alleged defect has been treated in a surprisingly varied way during this period. The continuum stretches from the landlord as tenant's insurer and inspector of his rented property through to a passive recipient of specific complaints with a reasonable period in which to act on these.

(i) Success without notice

At the beginning of our period of examination the Second Division were asked to deal with a slight variant on the theme of notice which recurs throughout the cases, namely, the question of whether or not a landlord has been given sufficient opportunity to act upon a complaint. In the case of Kippen v. Oppenheim[336] there was a lease from Whitsunday 1845 to Whitsunday 1846 which at entry was overrun and infested to a great extent with black beetles, clocks, (sic) or cockroaches as well as bugs along with an offensive and nauseous smell and damp in one of the bedrooms such that it could not be used for sleeping. The Sheriff found the house was in a condition that residence in it would render life substantially uncomfortable. The tenant never actually took entry since all these items manifested themselves

to the serving woman who was sent to prepare the house. The Sheriff found for the tenant but was overturned on appeal but restored by the Lord Ordinary. The Sheriff did not feel the tenant was entitled to at once throw up his lease without calling on his landlord to remedy the nuisance. The Lord Ordinary seemed to have been affected by the landlord's reaction to complaints when he suggested that "the tenant is a Jew - and that his statements are 'false and injurious' and that if there is not a retraction then he will be sued".[337] This is indeed a feature of the defence which suggests that the complaints are "a pretence". The question of the willingness or not of the landlord to effect nuisance removal is not ever an issue.

By making his initial complaint the Court seem to have been satisfied that the contract here never "got off the ground". The Sheriff, on appeal, had suggested that "The rule of law is this: If the house is inhabitable when the term of entry arrives, the contract subsists - if it is uninhabitable, the contract is at an end".[338] None of the Second Division seemed to have any particular difficulties adhering to this "mutual contract" view. Lord Moncrieff was brief and to the point

> "... I think the tenant gave the landlord sufficient opportunity of having the nuisance removed. After writing to him and receiving in return the reply which he did, he was not bound to apply again."[339]

Lord Cockburn seems to have been similarly impressed by the offensive nature of the landlord's reply so that it is not entirely clear if a "non-offensive" reply might have altered the landlord's position.

> ... when the tenant made a complaint to the landlord and received from him an answer in which he abused him for his religious opinions, and said, I will serve you with an action of damages for traducing my house, he was not bound to apply again. 340

This point is left in doubt when the final judgment is noted from Lord Medwyn who entirely concurred and then added

> "...the nuisance, it appears from the proof, could not have been cured very readily or easily." 341

Given the minimal reasons of the Kippen decision, it is interesting to note the similar stance adopted in the Reid v. Baird[342] case some twenty years later where the tenant of a shop and house in West Calder suffered damage from defects in the roof construction and its state of repair. The landlord denied these claims and suggested that any damage was caused by damnum fatale viz., the weather. As a result of this state of affairs the gutters were apt to overflow into the house as they did in December 1873 and in January 1875 and the latter produced the damages

action. The Sheriff Substitute supported the tenant. The landlord claimed the tenant should have cleared the cause - a heavy fall of snow from his roof. No notification of the earlier overflow had been given. The landlord fulfilled his duty if the house could resist ordinary weather, he claimed.

The Second Division seemed to have regarded this case as something of a borderline decision but nevertheless in the one judgment delivered the Lord Justice Clerk supported the notion of defective construction which obviated the need to give notice.

> "... there is no doubt that the flooding of this house and shop was caused by the faulty construction of the roof. That seems to be admitted on both sides ... it cannot be said that a house is properly built if it will not resist even an exceptional snowstorm ... On the whole matter although this a very narrow case, and if the Sheriff - substitute's judgment had been the other way I should have had great difficulty in overturning it ..." 343

The posited consensus between landlord and tenant on the faulty construction of the roof is in conflict with the defence of the landlord which specified "the roof was of proper construction and was in a complete state of repair". The real conflict centred around whether or not the landlord's duty to provide a habitable house extended to keeping out "extraordinary" weather or simply "ordinary weather". This chopping of the admitted facts alters the whole complexion of the

debate in this difficult area and could be said to have serious consequences for subsequent tenants who attempt to use this "strong" ratio where notice has not been given.

(ii) Specifying the Complaint

In a dispute ten years later the Courts lent encouragement to the notion that tenants were entitled to have a truly habitable house and compensation for failure so to provide if he actually complained. In Gourlay v. Ferguson, John Ferguson, a produce broker, took a house at 146 Holland Street, Glasgow at Whitsunday 1886. Soon after entering the tenant found that there were bad smells in the house. He complained and requested the landlord to have the drains looked at. This was done but the operations were not successful and several members of the tenants family became ill and one of them, a boy of eight, died at the end of October. The drains were finally sorted out in December 1886 after sanitary notices were sent. The tenant sued in the Sheriff Court where he was awarded £150 damages of which £100 was for solatium and £50 for actual expenses incurred. The First Division upheld the judgment of Sheriff Lees but reduced the award to £100. The reasoning of the Sheriff was a simple application of the mutuality of the bargain once the defect was brought to his attention.

> "In letting a house he warrants it to be habitable, and if it is so, but some defect supervenes, it would be unfair to hold him responsible till he is made aware of it." 345

The matter was compounded by the fact that the landlord had employed a workman who had indeed discovered a defect in the drains but who failed to ascertain whether there was any other defect. Accordingly the landlord was held responsible to the tenant.

However, the Second Division dealt in a very different way with a similar set of circumstances in an appeal before them only six months later.

In Henderson v. Munn[346] the tenants of property in Rothesay let from year to year from 1883 found in 1887 that there were disagreeable smells and that there were defects in the drainage system. The landlord was told of this. He did nothing and maintained that there was nothing requiring attention including getting the local authority sanitary inspectorate in. The effect was that the tenant's family became ill with diptheria and two of the children (7 and 11) died in January 1888. The house was taken as a lodging type operation and some of this trade was lost too.

Any notions that might have been inferred from Ferguson that the tenant could expect a causal link to be accepted between his family health and his property's condition were rudely dispelled in Henderson.

> "I am of opinion that this statement is entirely and absolutely defective.It is not said in what respect the drains were defective, nor indeed that any fault in them produced the disagreeable odours and the other results complained of. It is said that a complaint was made to the local authority, but it is not said what the local authority did, or whether they thought it necessary to do anything in answer to this complaint, and it is assumed that because these children died of diptheria that their death was caused by defects in the drainage ..." 347

Lord Young waxes even more eloquent, though it is not entirely clear to what extent his anger at the tenant of a small value flat for bringing an action against his landlord is central to his decision

> "I am of the same opinion, and I confess that from the first I have thought that this record was entirely defective in its statements and proceeded on a radically erroneous idea. The house here is a small flat of the value, we were told, of £300, and the tenant of this flat is holding over the head of her landlord an action for damages for £1,000 - more than three times the fee simple value of the property ... She then brings this action against the landlord apprently on the principle that a landlord insures the lives of his tenants and their whole family against the evil consequences of continuing to live in the house after they believe it to be in an insanitary condition ..." 348

This apparent divergence between the Divisions was the subject of judicial comment and a Court of Seven Judges was convened in 1889 in McNee v. Brownlie's Trustees[349] a dispute where similar circumstances prevailed as in Gourlay. Here in McNee premises consisting of a shop and house behind in North Woodside Road, Glasgow were let from Whitsunday

1886. The tenants had to leave in October 1888 owing to the insanitary condition of the premises, which had defectively jointed drains. From March until October 1888 the tenant made complaints to the landord's factor and was promisedthe matter would be dealt with. Tradesmen were sent but their operations proved ineffective. The family suffered illness, although there were no deaths, but, rather, expenses connected with the running of the shop. In an action for damages of £200 the landlords claimed that the tenants were barred from their claim through having remained in the property nine months as well as claiming that repairs had been effected upon the drains. Sheriff Spens faced with the apparently conflicting lines of Munn v. Henderson and Gourlay v. Ferguson opted to hear the facts of the case before pronouncing on the question of relevance. The landlords appealed to the Second Division and claimed there was no issuable matter. They suggested there was no allegation of fault on their part. Although like Sheriff Spens the Court of Seven Judges was unwilling to decide the question of relevancy and allow a proof their judgments were singularly uninformative. Only Lord Young did anything more than remit the case back to the Sheriff for proof.

> "I am content that that course should be taken, but my own impression was that the case came before seven judges on the general and to my mind interesting question of law whether a landlord, when he lets a house, insures the

> health and lives of the inmates against the consequences of bad drainage in the ordinary case and without any special averment of fault." 350

Even though none of his colleagues seems to share this view of the Court of Seven Judges' function, Lord Young explains his view of the question which he thought should be dealt with before sending the

> "... case back to the Sheriff for proof without deciding anything." 351

Lord Young's view about the extent of the landlord's responsibilities express the difficulties involved in determining the precise extent of the mutual obligations of the parties where allegations of insanitary conditions were made, and where, as frequently occurred the existence or extent of the defect was in dispute

> "I can understand that if the drainage is so bad or becomes so bad that the tenant has to leave and seek a residence elsewhere, he may refuse to pay the rent because a well drained house has not been supplied to him. Assume that, but does the liability of the landlord extend to health and life? If it does, it appears to me, at least at first sight, to add a liability and a terror to house-letters of which we have no example in the reports." 352

The importance of the Sanitary Authorities as experts enabled a tenant to succeed five years later where a tradesman had been employed to remedy a complained defect.[353] Maitland became a tenant at Whitsunday 1895. After some months, first his son, then he

himself suffered illness attributed to the drains. In May 1895 the Burgh Authorities had examined the drains (and thereafter the defective kitchen grease-box was repaired) but did not communicate the sanitary authority report to the builder which mentioned a leak in the main drain sufficient to pass sewage into the rooms above.

Even though this case Maitland v. Allan only resulted in illness and not, as so often death, the Lord Ordinary seems to have taken a strongly pro-tenant line since the landlord employed a tradesman to carry out a repair to the allegedly defective drains

> "The landlord, was I take it, bound by an obligation implied by law to provide the tenant with a house which, so far as he knew or had reason to know was in a sanitary condition. He may not have been held to warrant that the drains were in order, but he at least warranted that they were so in so far as he knew or had reason to know. I cannot hold that, in the circumstances, the defender discharged himself of the obligation resting upon him as landlord and lessor of the house. It is not necessary to decide what might have been the result in law if he had employed a competent tradesman; giving him all the necessary information, and instructing him to make a thorough examination and a thorough repair. The unfortunate fact is that the tradesman employed, whether competent or incompetent, was not told what the defender himself knew ..." 354

It is not clear from this judgment, any more than say Henderson v. Munn what features of the cause determined this particular line to be taken. There seems to be no compelling reasons within the general

doctrine of sufficiency of notice.

The process of causal connection being established is much less arcane in one action in contrast to the Munn case in the approach of Lord Kincairney in Robb v. Edinburgh Railway Access and Property Co. Ltd.[355] The tenant took the house in Largo Place, Leith in November 1894. At about this time changes were made to remedy defects in the drainage system. Thereafter, the tenant and his family enjoyed poor health and in January and February 1895 both his children died from diptheria. The tenant, a plumber, examined the drains himself and brought this to the attention of the sanitary authorities. The premises were declared unfit for human habitation. Looking to the balance of probabilities, Lord Kincairney felt that the defective drainage caused the deaths of the children and that the tenant was not barred by his own fault in staying in the house after his doctor advised him to leave. He in fact left after one child had died and the other was hospitalised

> "... I doubt whether he could be expected to leave the house even on the advice of his medical man, without taking some steps to ascertain what the condition of the drainage really was. It is to be remembered that it had just been overhauled, and was presumably in order." 356

Although the Sanitary Journal report and the opinion and interloctor of the Lord Ordinary do not disclose the nature of the tenant's complaints to

the landlord this is inferred from one remark in the opinion which indicates that the tenant did complain and was reassured in some way

> "... I consider that when the pursuer applied to the defenders' factor he was misled by his (no doubt honest) assurances." [357]

(iii) Tightening the causal link

The need to be more specific rather than have a general "common sense" link between defect and damage was again examined in the same year by the Second Division.[358] In Baikie v. Wordie's Trustees a house and shop lease in Leith was used for a bird dealer's business. The birds though began to droop and pine away and finally in a few days they all died. The tenant claimed this was due to the defective drainage although the same occurred on two separate occasions after a plumber had fixed a gas pipe. Previous tenants were alleged to have made complaints about the drainage. There was also a report by the burgh engineer on the tenant's complaint which suggested that the drains were in bad order and allowed sewage-gas to pervade the premises. The landlords claimed there was no specific averment of fault on the part of the landlord and that since they were not bound simply ex dominio the claim lacked relevance. The lease was for one year Whitsunday to Whitsunday. The tenant left in November anda damages claim was lodged.

There is certain exasperation in the sole judgment delivered by Lord Young who again echoes his doubts about the applicability of an action of damages stemming from the contract of landlord and tenant.

> "I am of opinion that such an action can only rest on actionable culpa, and that culpa must be plainly set forth on the record." 359

However, Lord Young explains that no such clear averments of culpa exist

> "Now, taking it as it stands, besides the averment which I have read (complaints of previous tenants about insanitary condition of the premises) and which I think insufficient, we have nothing except that the buildings and drains were old, and that the drains had not been examined for seven years. There is nothing actionable in a landlord letting a house in that state ... at last it was found that the drainage was defective. I have said that that might have entitled the tenant to go into a new house, and to have an action for the cost of removing." 360

What is interesting though, is that while no action for damages will be entertained, it seems that the tenant is thought to have a possible right to remove from the property and bring an action for such removing

> "I should wish to point out with regard to his leaving in November 1896, that I mean to say nothing here with regard to the right of a tenant to leave a house and to have the cost of removing, and also the possible increase of rent he may have to pay, if he can shew good cause for removing ... I have said that that (death of birds PR) might have entitled the

> tenant to go into a new house, and to have an action for the cost of removing and for any additional rent paid." 361

Exactly what it is about an action of damages that puts it solely within the territory of culpa is never specified.

This limitation of a dissatisfied tenant's claims to an action based on fault rather than contract are again stressed in the following year in Burns v. McNeil[362] where Sir John Burns brought an action for the rent of a villa against a tenant who claimed that this exceeded the expense he had been put to because the house became uninhabitable due to bad water and bad drains. It was in Wemyss Bay and let for five years from 1893 Whitsunday supplied with water from the landlord's estate. There were no complaints till December 1895 when his four children got diptheria, sore throat and other ailments. The water was condemned and the sanitary inspector discovered defects in the drains. From January to June 1896 the tenant occupied a house in Glasgow. He did not actually leave because of drains but water failings.

In contrast to the kind of complaints and opportunity given to the landlord in such a case as Kippen v. Oppenheim (albeit with its special features) there is some clear alteration of the obligation laid on landlords to remedy defects in this case.

> "The mere fact of drains getting out of order does not necessairly involve any culpa on the part of a landlord; culpa arises only if he receives due notice of the defects and fails timeously to repair them ... It seemed to his lordship that the landlord himself having done nothing to injure the quality of the water, and its deterioration having resulted from an ordinary act of tillage on the part of his agricultural tenant, who was in possession before the date of the urban lease, the defender had no claim for damages against the pursuer. I am, further, of opinion, that there has been no withholding of a material portion of the subject let, viz., the house and appurtenances including the water supply as it stood. The water becoming temporarily undrinkable did not make the house uninhabitable: it only made it necessary to obtain drinking water elsewhere ... It is not every accidental failure in the accessories of a house, nor every kind of diminution of its enjoyment, that constitutes a withholding of a material portion of the subject let ..." 363

The tenant, from these cases, was in an interesting, if paradoxical situation as far as an unfit tenancy is concerned.

> "If a tenant, without fault, on his own part, is deprived of a material portion of the subject let, even though the landlord is equally free from blame ... the tenant is undoubtedly entitled to answer an action for rent by claiming an abatement proportional to the deprivation which he has suffered ... but a tenant is not entitled to claim damages against a landlord except on the ground of culpa ..." 364

This is clearly an extension of the notion of the requirement to give notice and stands at the far end of the continuum from the notion of the landlord as the tenant's insurer.

The approach in Baikie received support a couple of years later in the Outer House before Lord Kincairney in Forbes v. Fergusson[365] where a dwellinghouse lease was entered into in Whitsunday 1898. The tenant noticed signs of dampness in August 1898 and complained to the factor. It was discovered that the ventilators were closed up. This was seen to and the landlord's factor promised that the house would be put right. The tenant stayed on, but, as his wife's health deteriorated, on medical advice, he left taking his furniture. He then sued the landlord for the damage suffered by the damp condition of the house.

The Lord Ordinary accepted the plea that the claim was too vague and lacking in legal relevance. He explained what he considered the procedure for a dissatisfied tenant was

> "... the pursuer's remedy was to leave the house and that if he did not he took the risk of the consequence of its insanitary condition of which he was aware ... I consider these cases (Henderson; Baikie and Smith v. Maryculter) to be more in point than Shields v. Dalziel and Hall v. Hubner ..." [366]

He does not explain why he so considers the authorities.

By way of confirmation of the generally emergent high standard of proof which appeared to be necessary to establish a connection between defect and alleged harm we find a tenant's action failing before

Lord Kincairney in the Outer House in Irvine v. Caledonian Railway Co.[367] two years later. He failed, though not on the relevancy of his allegations but on the lack of connection between defect and illness. Here the tenant of a house in Leith Walk, Edinburgh, was in the house from 1900 to 1901 and then signed a further Whitsunday to Whitsunday lease for the following year but left after only six months. In Autumn 1901 two of tenant's daughters became ill and the property was discovered to be very damp. The tenant took the house to be unhealthy, left and raised this action claiming his daughter's illnesses were a result of this dampness. No plea to the relevancy was tendered by the landlords here.

The Lord Ordinary followed the line of Baikie in suggesting that culpa had to be demonstrated in a damages suit.

> "I do not doubt the house was very damp, and I do not deny the pursuer's right to leave it in November ... In a case such as this damages are not due by a landlord except on the ground of culpa ... the cause of the damp in this case has not been clearly proved ... it cannot be affirmed that a landlord can be made liable in damages as for fault merely on that account (it being an old building without modern appliances to prevent damp - PR) 368

However, it is not entirely clear whether the Lord Ordinary used this ground or the lack of notice or acceptance of risk by the tenants as well as unsubstantiated nexus

> "... The previous tenant had occupied the house for ten years and had ... never complained of the damp. What is more, the pursuer had lived in the house for more than a year before he discovered signs of damp, and the defenders could not be said to be in fault for not discovering what the pursuer living in the house for more than a year did not know. No complaint on the subject reached the defenders' factor until after the illness of the pursuer's daughters, and it is not easy to see how he could be in fault before that ... but he seems to have met with an unexpected difficulty arising from the presence in the house of the pursuer and his family. He offered them another house to be occupied while operations were being performed, but the pursuer refused to go into it, alleging what appears to me to be the most preposterous reason, namely, his two sons objected to it because it was a mile further from their work ... the factor received no complaint or notice until after the harm was done, if indeed it was caused by the condition of the house. I think it clear that there is no proof that the state of the house had anything to do with the illness of the daughters, but even taking it to be so, there is no ground in law for holding the defenders liable ..." 369

(iv) The evaporation of fault

In a sense this line of argument, confused as it in fact is virtually ended with the decision in 370 1910 of Wolfson v. Forrester which appears to be regarded as the locus classicus on the question of notice. Interestingly enough, since it now tends to form the base line of obligation arguments and since it was taken on the grounds of wind and water tight, the notion of fault being essential, appears to have somehow vanished. Wolfson was the tenant of a ground floor shop in Stockwell Street, Glasgow which was partly below ground level. A conductor pipe became

choked in March 1907 and was repaired by cutting a section of pipe away and replacing this hole with a loose slate. The pipe became choked again in December 1908 when the workshop floor was flooded to the extent of three inches - the water had entered through the hole made for the entry of the gas pipe. The tenant claimed that the landlord had failed to provide premises in habitable and tenantable condition. They had failed to repair the pipe properly in 1907 and should have made inspections of the repair. In addition the pipes of the tenant above had burst in March and September 1907 and had been finally found in 1909 January to be defective. The landlords claimed that they had fulfilled their contract and had had tradesmen out to the building within a reasonable time of the complaint. The Sheriffs agreed the averments were irrelevant. In the appeal to the First Division the tenant claimed that the landlord was bound to provide him with wind and water tight premises and that this was a warranty and no negligence had to be specifically proved. In addition the landlord was bound to keep the premises in a tenantable condition and since the landlords knew of the hole in the wall, had not done the necessary to keep the premises tenantable. The landlords claimed that they had to be specifically warned of the defects alleged.

The Lord President rested the case, as of course, it had been put to him, firmly on the grounds of the

mutual obligations of landlord and tenant to repair and to give notice.

> "By the law of Scotland the lease of every urban tenement is, in default of any specific stipulation, deemed to include an obligation on the part of the landlord to hand over the premises in a wind and water tight condition, and if he does not do so there is a breach of contract and he may be liable in damages. He is also bound to put them into a wind and water tight condition if by accident they become not so. But this is not a warranty, and accordingly he is in no breach as to this part of his bargain till the defect is brought to his notice and he fails to remedy it ... He was entitled to employ a tradesman to remedy that defect, and if he employed a proper tradesman, and it is not said he did not, then he is not liable for the negligence of that tradesman's servant which causes another and quite different defect." 371

He was not a lone voice in this reworking of the difficult question of the tenant's remedy, though this final crucial decision involved commercial premises rather than dwellinghouse property.

> "The obligation of the lessor of urban property, apart from special stipulation, is to provide a reasonably habitable and tenantable subject, and one which is wind and water tight, and to keep it in that condition. But if it ceases to be so, it is the tenant's duty to bring the fact to his notice, and unless the tenant does so no liability attaches. The lessor does not guarantee the premises. There is a further limitation on the lessor's liability, that if there is a patent defect in the premises the lessee cannot complain ... In a question between neighbouring properties, it may be sufficient defence to an owner that he has employed a competent tradesman to do a proper and necessary piece of work, for his liability depends not on dominium solely, but on dominium and culpa combined. But between

> lessor and lessee I do not think that this defence would hold good." 372

Thus the law in this field had sufficiently altered over the years between a lax pro-tenant line, through to a very hard line clear connection allied to the obligation to demonstrate specific culpa, back to some sort of middle position by the time of the writing of Rankine's third edition in 1916.

4. RETENTION OF RENT

When examining the ways in which the relation of the landlord and tenant altered over the years in respect of the habitability of the dwellinghouse, we must look at the less direct areas where conflict between landlord and tenant took place. As we have seen much complex casuistry has flowed on the question of the appropriateness of meeting a claim for rent with one for damages for defects and resultant loss, but this was not the only defensive strategy adopted throughout this period. Universally recognised as being consistent with the mutual nature of the landlord and tenant contract was the right of retention of rent by tenants.

During this period we find the Courts adopting a clear "mutuality" line in questions which came before the courts as to retention rights - although perhaps it should not be forgotten that there was

nothing to prevent the right being excluded in the lease contract according to the authorities. This whole area is characterised by a highly pragmatic approach and is almost always concerned, it seems, with agricultural property. The one case which is an exception to this is a commercial lease so that it is clear that disputes as to retention and its legal implications did not emerge from urban leases. The adoption of this tactic in 1915 on an organised scale suggests it may have been a reality in practice even if no litigation ensued. [373]

In Sivright v. Lightbourne [374] there was an agricultural lease where the landlord agreed to put property in good and tenantable repair and as he failed to do this the tenant retained his rent. The landlord sued for this rent.

The First Division were of the opinion that a proof should be allowed to allow the tenant's allegations to be tested

> "If a party comes into Court saying that there is a lease under which the subjects are let to him unconditionally, no claim of the kind we have here can be listened to. If a claim of damages is made in such a case, it must be by a separate action. But it is stated here that it was made a condition of any rent being paid that the houses should be put into tenantable condition." [375]

The same sort of line was taken in the commercial lease which came up for consideration by the Second Division in 1915 in Haig v. Boswall-Preston.[376] In this particular instance a lease was signed and agreed in 1911 for the occupation of premises in Pitt Street, Glasgow from Candlemas 1911 to Whitsunday 1915 with a break at the option of the tenant Boswall-Preston at Whitsunday 1912. The property was accepted subject to the landlord doing needful repairs to the roof, which was "persistently leaking". In November 1912 the tenant wrote saying they were going to retain rent and consign same in bank. The disrepair was alleged to have been constant since the start of the lease though the landlords had executed temporary repairs from time to time. The Sheriff Substitute upheld the defence of the tenants but was overturned by the Sheriff. Landlords who took over the original unsigned lease claimed that they had carried out their obligations and anyway were entitled to assume that the tenants were quite happy since they were in possession and their only duty was to keep the premises in such condition - which they did when there were complaints by sending a workman to do repair.

There did not seem to be any doubts about the facts of the situation as regards the condition of the premises

> "The question ... is what was the state of the premises in the half year when the rent was withheld. I have no doubt about that ... It is clear, I think, on the evidence that they were not in the condition into which the landlord was bound to bring them and in which he had to keep them ... There certainly was a failure to keep the premises wind and water tight in a reasonable sense as between landlord and tenant ..." 377

Even the question of the fact that the landlords were not simply supine in their approach to this conflict but rather differed in their estimation of the needs of the property was easily dealt with

> "... I do not ignore the difficulty caused by the absence of written complaints by the defenders or the special circumstances caused by exceptional storms and burst pipes. But I am, satisfied that the Sheriff Substitute has come to a sound conclusion on the evidence as a whole when he says: "There were many complaints by the tenant and a considerable number of repairs by the landlord but I do not think that these were sufficiently radically (sic) or made the roof sound." 378

As can be readily gleaned from these examples, typical of the case law of this epoch we find a non-restrictive attitude amongst the judiciary. This is a contrast to much of the material in the residential segment of letting contracts which we already examined.

5. LIQUID RENT AND ILLIQUID DAMAGES

One of the areas where the issue of the mutuality of the landlord and tenant relationship was constantly highlighted during the study period was in the defence of tenants to rent claims with damages

counterclaims for derogation from their full contract rights. It was an established Scots contract rule that, where an obligation was specific, it could not be met under law with an unspecific claim. Thus, in the parlance of the nineteenth century contract lawyers where an obligation was liquid it could not be met by an illiquid claim for damages.

Rather like the situation in the rules as to the mutuality of the landlord and tenant contract generally contained in a decision like Kippen v. Oppenheim,[379] we find that a very clear and unequivocal statement of the law is contained in an early case before the period of study but which formed the basis on which all subsequent discussions on "liquid versus illiquid" proceeded. In Graham v. Gordon[380] the tenants of a farm lease stated that the buildings were to be put into 'good tenantable condition'. The lease started in 1832 and although the landlord agreed to have the various repair work done in the first half of the nineteen year tenancy nothing was done. The tenants, the Grahams, raised an action of implement and damages in 1838. The action was successful at first instance and on appeal and the landlord appealed to the Lord Ordinary who with the First Division accepted the tenant's notion. In a brief and incisive judgment Lord Mackenzie summed up the matter

> "The answer to the landlord's claim for the year's rent, - I have not got the whole farm. I have got part of it, but not the whole. Your claim for the rent is not liquid, for you have not performed your counterpart obligation, by delivering to me the farm in the state agreed on. I think the plea is distinguishable from any claim of damage extrinsic and not connected with the rent ..." [381]

Where appropriate as a corollary, the common law was prepared to recognise the right of the tenant to rescind the contract where there was an essential failing by the landlord to provide adequate possession where damages alone were inappropriate.

The question of the extent of breach which would entitle a dissatisfied tenant to give up the lease was demonstrated in a disputed commercial lease in Davie v. Stark[382] in 1878.

Stark was a tenant of Davie's at a shop in 92 High Street, Edinburgh for a 10 year period from Whitsunday 1872. Davie had bought 92 and 94 High Street and the original February 1872 lease Stark had signed with the previous proprietors prohibited the letting of the neighbouring shops as a drapers. However, Davie opened up such a business in 94. Despite repeated objections the pursuer continued. In April 1875 Stark wrote saying that unless Davie desisted on or before

May 1st 1875 he would hold himself entitled to renounce the lease and vacate as at Whitsunday 1875. This he did on Davie's reply that he was aware of no infringement of the lease. Could the claim of the tenant being one of damages and illiquid be set off against the pursuer's claim for rent or was the breach such an integral part of the lease that the landlord could not enforce the tenant's part of the lease while declining to perform his own obligations? Or were the obligations merely collateral which in view of the trifling nature of the allegations was to be dealt with by a claim for damages and interdict?

The decision in favour of the renouncing tenant appears to have centred around the extent to which the breach was fundamental to the contract.

> "I have come to the conclusion that the defender was entitled to rescind the contract because there was a substantial violation by the pursuer of one of the fundamental conditions of the lease ... the defender is entitled, without seeking to enforce implement of the stipulation in question, to throw up the position of tenant ... Rescission no doubt, is a strong measure, and is only competent where the stipulations violated are material or essential. The breach of minor and incidental stipulations, although it may be a ground for damages, will not justify recission of the contract." 383

The non-pecuniary aspects of mutuality were also dealt with in McKimmies Trustees v. Armour[384] which has elements of many similar 'illness' cases. Here Armour was the tenant of a house in Glasgow from Whitsunday 1895 and subsequently from Whitsunday 1898 to Whitsunday 1899. He paid rent at Lammas 1898 and on 17th October 1898 he left the house taking his furniture. The landlord raised an action in the Sheriff Court to have the furniture brought back and for his back rent and that due to Whitsunday 1899 by sequestration. The defender suggested that the landlord failed to keep the house suitable for occupancy. Some six months after the original tenancy in 1895 the tenant had complained to the factor of the damp and smell. Larger ventilation gratings were provided. These complaints continued for the next two years. Towards the end of August and September 1898 the dampness and smell were becoming more offensive. Illness attributed by the tenant's doctor to the condition of the house was occurring. More fresh grates were then installed but the Sanitary Inspector of Pollokshaws found the house dangerous to health and this was confirmed by the Medical Officer of Health who stated the house was not in a fit state for habitation at the start of October.

The landlord's factor persisted in suggesting larger grates would solve the problem and since he expressed no intention to carry out any more improvements on the house the tenant left. The Sheriff Substitute and Sheriff both found the landlord entitled to his rent. The landlord suggested inter alia that a tenant should wait till the effects of remedial work became apparent before leaving.

The variability of the facts in considering the overall question of reasonableness is emphasised by the First Division

> "I do not see why the tenant of a house, whose doctor has told him that it would be bad for his health to occupy it, was bound to remain. It is always a question of circumstances ... I cannot see that the tenant was bound to remain simply because the landlord said he was going to do something ..." 385

It should be noted that the landlord here was concerned not to meet a damages claim in this instance but to compel the tenant to return to the property and plenish same.

> "... in such circumstances, a landlord would in general be disposed to meet the tenant and to come to an understanding, or to appoint some neutral person in their confidence to see what was to be done to remedy the mischief. I think that if a landlord took that position, and the

> mischief was one that admitted of a remedy in a short time, it might very well be that the tenant would not be justified in persisting in terminating the contract ... the tenant having offered proof that the house was in so insanitary a condition that he was obliged to give notice to leave, it lay upon the landlord to prove the contrary, if he desired to retain the tenant." 386

Lord Kinnear lays down a broad rule for cases in such a mould which emphasises this concept of reasonable conduct by both parties albeit in somewhat vague terms

> "... if, in the course of a tenancy, a house has become uninhabitable from some emergent cause which was not known to the parties at the beginning of the contract, and if that defect be remediable, then, if the landlord looks into the matter and ascertains what is the cause of the defect which exists, and if there is reasonable ground for believing that he honestly intends to set it right, then it would be improper for the tenant to say "I will not give time to put matters right, but will go at once". I do not know that there is any rule of law governing the relation of landlord and tenant at this stage, except this, that both parties must be reasonable and that if the landlord undertakes to put the house into a habitable condition, the tenant should give him a sufficient opportunity to do so." 387

Not all avenues of defence for landlords of deficient property, then, were so readily available over this period.

6. TENANT"S NEGLIGENCE

The defence of the landlord against a claim by his tenant that the loss has resulted from the negligence of the tenant himself is so broadly accepted that the matter has only been disputed at the level of technical disagreement over property use. Although as we have seen landlords are at common law in Scotland implicitly obliged to provide subjects that are tenantable (and where appropriate in dwellinghouse property habitable), this does not extend to situations where tenants put the property to an exceptional or unusual use. Typically the matter has come up in commercial leases like Corrie, Mackie & Co. v. Stewart.[388]

In a Dundee jute warehouse let of nine months in 1884 the tenants were unwilling to pay the rent since the flooring gave way when loaded to only half its cubic capacity. The lease was from 28th February and the floor gave way in early April. Half the rent was not paid. The crux of such problems was essentially factual rather than legal.

Summary of the changes in the landlord/tenant relationship

The time under study could be described as the heyday of contract and it ends with the demise of the

free market notion in private rented housing in 1915. What is interesting is that, at a time when the statutory incursions into the landlord and tenant relationship by the way of regulation of standards of hygiene as well as in the provision of housing for the working classes, the conception of housing as some form of "social right" and an appropriate area for protecting the vulnerable from the ravages of the market, appears to have been markedly absent from the case law of the Scottish Courts. The reason is even more significant than the parallel developments in England typified by the famous statement in Robbins v. Jones[389] that

> "there is no law against letting a tumbledown house, and the tenant's remedy is upon his contract, if any."[390]

The significance of this statement was that since there was no obligation on a landlord to write into his contract a convenant as to good repair, a tenant was likely to be without such potential protection in the "crowded" lower end of the house letting market. By contrast, in Scotland we had a situation where the obligation to provide a habitable and tenantable property i.e. not one which was tumbledown, was implied at common law. The Courts had in their hands, as it were, a weapon for the

protection of tenants from the problems of the market. At a time when both the legislature were introducing controls over the working of the market in favour of those with minimal bargaining power and at a time when in other sectors of social life, such as in the workplace, there are modifications of the harsh side of contract - as in Smith v. Baker 1891[391] and its Scottish equivalent Wallace v. Culter Paper Mills 1892,[392] we find the Scottish judges introducing a variety of defences or at least supporting such pleas to enable the socially powerful grouping of landlords to avoid their initial basic common law obligations. Rankine makes the very point as to the lack of need of such legislation as the Housing of the Working Classes Act 1885 in Scotland section twelve.

> "The rule, as applied to urban tenements, is that they shall be put into habitable and tenantable condition by the landlord at entry. The common law is not confined as in England to furnished houses. So that the twelfth section of the Housing of the Working Classes Act, 1885, was not needed in Scotland, however salutary a reform it may have operated in England." [393]

In place of the simple mutuality which existed in a somewhat oblique manner, in Hunter, by the time we read Rankine's third edition of 1916, although we are in the era of rent control and security of tenure, which signalled

the end of the free market, the contract had itself, apparently, been narrowed down in a number of important ways. The defence of volenti non fit injuria which figures in neither Hunter nor in the first edition of Rankine is a significant doctrinal development which took place within this period. The related defence of the "defect obvious at the time of commencement of the lease" is also found, significantly, used successfully after the broad doctrine of volenti itself has been distinguished. Throughout this period, any notion of waiving the requirement to give notice to a landlord of any defect, rather than impose a duty on landlords to inspect their property, receives only limited oblique support in the form of the adoption of the notion of inherent defect. This version of res ipsa loquitur could not be said to be a "reliable" precedent by the time we reach the end of our study period when weighed against the constant reassertion of the notice obligation. These major limitations allied with the reaffirmation of the doctrine of the tenant's negligence as a bar to a claim, suggest that the late nineteenth century and beginning of the twentieth century was not a very fruitful one for tenants in the Scottish higher Courts.

However, before any simplistic explanation of

these developments is inferred, it should be pointed out that there are limitations to these very doctrines indicated above, as well as support for other indirect modes of tenants' protecting their position where their landlord was reticent in seeing to his habitability obligations. Thus, there are decisions which both support volenti, side by side with ones which distinguish it and cast some doubt on its value as a defence. The alleged distinction between rent as a liquid obligation which cannot be met by an illiquid claim for damages, does not fare well during this period and retention of rent is not diminished.

It seems, therefore, that we will have to look further than any kind of monocausal pro-landlord/anti-tenant explanation for the operations of the judiciary in this period. In fact, this kind of crude class orientated explanation does not meet the vagaries of the decisionmaking very effectively over this period of time, and it is necessary to examine the decisions over in question to determine whether any common factors appear to provide a more persuasive explanation, than the most obvious one. Although, as we have said, the data does not suggest a straight 'one-sided' explanation, it does nevertheless remain a factor which will be borne in mind

when we start to examine the various factors involved in the developments between landlords and tenants of residential property over this period.

HOUSING IN CONTEXT

When we attempt to situate the decisions of the Scottish judiciary within their context we have to examine a number of specific related areas. Clearly it is vital to see the problems which the various tenants and landlords experienced over the issue of whether the property in question was habitable and whose interim responsibility this was. Not only do we need to see these issues in the context of the overall general public health situation in the period under review but we need to know what sorts of action were available to the public authorities. What other channels of assistance or compulsion were at the command of the dissatisfied tenant or the recalcitrant landlord. Not only do we need to know what the powers in the hands of public authorities were but what the impact of these in practice was, is important. How extensively were such powers used to deal with unsatisfactory housing conditions rented out to tenants ?

Just as the judicial decisions on the mutual rights and obligations of landlords and tenants did not take place within a vacuum, neither did the problem perception and strategies of the enforcers

of sanitary control legislation spring ready formed from the statute book. How the policies were

formulated and operated in practice needs to be situated within the pressures and debates in which the local authorities found themselves at this time.

The formal and practical account of the alternative regulative system available in the landlord/tenant relationship can in turn be seen in the context of the public discourse of the time. It is evident that with an apathetic constituency and with minimal debate there may be little incentive for any public regulatory department to expand its activities and little encouragement so to do. Apart from the role of regulatory departments themselves we examine the various other individuals and bodies who might fall into the broad category of disinterested reformers or "moral entrepreneurs".

(i) Introduction

There are two distinct types of enterprises which are involved in the comments on the housing situation in the nineteenth and early twentieth century. One set comes from those whose direct benefits from improving the housing of the poor were only likely to be marginal on the face of it. The most ubiquitous example would be a "learned body" like the Glasgow Philosophical Society (later the Royal Glasgow Philosophical Society) whose members came from within various professions and discussed a

number of topics of social concern as well as specific scientific interest in the course of their activities. They were, however, something more than a learned society with their sense of moral purpose and their proselytising zeal. On the other hand there are groups which, whilst also commenting and making suggestions as to various changes in policy and practice, stood to gain in their professional lives as opposed to personal position from any such alterations made. It is worth noting this dichotomy within the body of moral enterpreneurs since we would expect there to be a firmer commitment to expansion of the professional role of public interference in the health of the populace from those whose working lives basically depended on increased functions. This is precisely the sort of situation which Troy Duster observed in connection with the expansion of functions of the Federal Narcotics Bureau in the 1930's.[397] The absence of any personal material gain or any professional status improvement can be seen if one contrasts the position with that of an organisation in Britain like the National Viewers' and Listeners' Association.

Unlike the groups most closely connected with the day to day issues of the habitability of housing, the tenants and the landlords' representatives on the ground, the Factors, the perceptions and prescriptions of the 'pure' moral enterpreneurs

like the Glasgow Philosophical Society relied not simply on direct action at the point of conflict but on access to the forces of ideological domination - both the mediums of newspapers and also other vehicles of influence - Royal Commissions, Select Committees, special Commissions on Housing and the Poor. The expansion of "Politics" as a method of working class organisation during the twentieth century should not make us forget that the process was in its infancy during this period.[398] For the moral entrepreneurs the making of reports and the organisation of their professional work into digestible policy-orientated data was their daily work in their various fields.

The various published proceedings were well publicised in the national and local Press and so when we look at the topics of papers of bodies like the Glasgow Philosophical Society and the Association of Sanitary Officers we know that these views were extensively aired in public and helped to set the bounds of the debates on the problems of housing. These contributions were important, then, not just because of their source and their accessibility to the reading public but in the way in which they were able to largely confirm the structures of decisionmaking. The important question in any debate is what is defined as the problem.

The notion of whose opinion was to be counted in problem definition was made clear in an address to the Glasgow and West of Scotland Master Plumbers' Association in 1902 when Councillor John Primrose explained the advantages of having a local Commission to examine the housing of the very poor. That Commission he felt should have on it members of the Town Council, along with citizens who had devoted time and money to the problem along with a representation of the Landlords' Association. No mention here of any of the representatives of Labour or tenants.[399]

On a slightly different issue there was practically no discussion of the possibility of alternatives to private speculative building as the source of housing before the Great War.[400] Even apparent precursors to municipal housebuilding like the Glasgow Improvement Trusts work were part of a very specific and minimal attempt to clear dens and rookeries of their problem populace rather than to rebuild. No building by the Trust took place until over twenty years of the Trusts operations had elapsed and then only with the prospect of making a profit and relieving the ratepayers of the burden of clearance.[401] It is clear from the discussion at the time that the question of a municipal obligation was never seriously on the agenda.[402] The collapse of private working class housebuilding transformed this position without any

debate owing to the particular emergency circumstances which obtained and which in turn transformed the methods of decisionmaking on housing matters with the rise of effective bodies for representation of tenants and working class interests.[403]

However, during the period which we are examining, the contribution of tenants to the defining of the debate seems to have been at most limited. The legislative and policy changes which were instituted seem to owe more to the definitions of the problem of housing as essentially a public health problem of cleanliness. This problem in turn was "caused" by overcrowding or at least exacerbated by same. The prime dirtiness and propensity to overcrowd was essentially laid at the door of the poor who were blamed for their own moral decadence which permitted them to live in this way. This theme came through strongly over the years in the various papers from the Glasgow Philosophical Society, from both individual and organised Sanitary Officers and Medical Officers as well as 'interested' individuals like the Chairman of the Glasgow Workman's Dwellings Company, John Mann ,Junior. This strong tide of the personal theory of uninhabitability predated even Octavia Hill's outburst against the hygiene of the poor and seems to have had little rejoinder.[404] There was a sense in which the argument lacked a pure class

dimension parallel with earlier discussions of the problems of paupers. In the 1832 Poor Law Report we find the problem of paupers ascribed not to the labouring class as a whole but to the "rotten apples" in the barrel. Like rotten apples, such individuals being slothful and immensely strong, dominant personalities could infect previously good workmates. In the context of the pre 1832 problem of parish labour we find Gresham's law of paupers or in a more modern context the "domino theory" of the working class

> "Whatever the previous character of a man may have been he is seldom able to withstand the corruption of the roads; two years occasional employment there ruins the best labourer." 405

The reason for this moral decay was clearly specified

> "... collecting the paupers in gangs for the performance of parish work was found to be more immediately injurious to their conduct than even allowance or relief without requiring work; Whatever be the general character of the parish labourers, all the worst of the inhabitants are sure to be among the number; and it is well known that the effect of such an association is always to degrade the good, not to elevate the bad." 406

The impact of such a "labelling" process is described in one fascinating study in a modern Glasgow local authority scheme, rejoicing under the collective designation of "Wine Alley" in Govan. Sean Damer

describes the way in which the external label is accepted within the community but its application is shifted to some other part of the scheme. One interesting point in Damer's thesis which he was unable to clearly determine was where the label of the Broomloan scheme as a bad scheme actually came from

> "When I went to live at the south end of the scheme ... my neighbours told me that it was the people at the north end of the scheme who were the bad lot ... Similarly the people in Kellas Street blamed the people in Broomloan Road for the scheme's bad name ... the people in Broomloan Road were convinced that the denizens of Kellas Street are the real animals who cause all the trouble. Nobody knows where the 'trouble' is or what exactly are its constituents ... there is a generalised suspicion directed at the point furtherest from them." 407

(ii) Moral Definition

At the defining end of the process of problem outlining we find that whilst there are strong elements of professional expertise within the Glasgow Philosophical Society the role of the Society as moral entrepreneurs is not always as clearcut as the schemeta of "pure" and "professional" moral entrepreneurs outlined above. A number of individuals operated and inhabited both worlds bringing to each their own particular professional and advocatory skills. Thus some of the most notable names in public health are both active local authority officials and officeholders in the Society and sometimes landlords too.

408

The Glasgow Philosophical Society does not appear to have had any direct counterparts in Edinburgh whose Royal Society was purely scientific.[409] The Glasgow body was started in 1802 on 9th November when

> "a meeting called by circular was held in the Prince of Wales Tavern, Glasgow, to consider the advisability of establishing a society for the discussion of subjects bearing upon the trade and manufactures of the country and the improvement of the Arts of Science."[410]

The records for the first forty years do not appear to have survived according to the report of the Librarian of the Society in 1892 but from 1840 onwards the various papers and proceedings of the Society and its specialist sections survive. The membership of the Society reflected its significance both in numbers and "quality" of membership. The actual numbers for a locally based learned society are selfevidently extensive and all the more so when one looks at the kind of individuals who were members. They included men able to influence the direction of public policy in politics, education, local authority practice. As regards membership, volume went from 259 in 1850 up to nearly 1000 in 1900.[411]

(a) Undifferentiated Guilt

An interesting pointer not only to the views of moral entrepreneurs but to the early practice

of public health legislation in Glasgow can be gleaned from the writings of the first Health Officer of Glasgow, the Professor of Practice of Physic at the University of Glasgow, Dr. William T. Gairdner in an early paper to the Society on the topic of "Defects of House Construction in Glasgow".[412] The significance and public interest in the topic of housing conditions is mentioned by Dr. Gairdner and is described as a relatively recent phenomenon. However, he made it clear that the problems were moral as well as physical. At the bottom of the difficulties lay the question of overcrowding. This was difficult to deal with, he suggested, due to predelictions of many city inhabitants

> "... there are scores of thousands of persons in this great city ... literally prefer discomfort - absolutely prefer overcrowding; they regard it in the light of a positive inconvenience to have more than one room for the family ..." [413]

The consequences of this was the liability to epidemic disease, moral decline, an inevitable craving for alcohol and finally religious apathy. The overcrowding in the countryside was soluble.

> "As to the most squalid Highland hut, there is the hillside to go to; there is the neighbouring burn to carry away impurities; there is the grass meadow, the riverside, the trout to catch in the burn for the children ..." [414]

It was clear then that what really exercised the Glasgow Health Officer was not simply the physical dangers to life of insanitary living conditions but rather the moral turpitude which seemed likely to flow from these conditions where habits

> "are often aboriginally bad, especially where, as in the case of Glasgow, many of them come from Highland shielings and from Irish cabins." 415

Since we have seen that burns and trout counteracted the physical limitations of the rural housing, it is obvious that it was the moral deficiencies of the people that were at fault. When the Highlanders and Irish arrived in the city with these habits

> "... the effect of these bad habits is intensified, and in most cases bad habits are meanwhile created, by the transfer of these rural aborigines to the town habitations. Hence from generation to generation, a progressive deterioration, and finally an almost total loss, of the instincts of the family." 416

This echoed some of the themes of Friedrich Engels writing a quarter of a century before in the context of the urban cotton towns of Lancashire in his description of the conditions of working class life. It is interesting, though, to note the distinct causal patterns which were adopted by the medical man and the young manufacturer. One dwelt on the moral defectiveness of the working

class and saw this as the primary cause, whilst in the Condition of the Working Class in England, Engels dealt with the incursion of immigrants within the context of the competitive structure of early English capitalism

> "... the Englishman who is still somewhat civilised, needs more than the Irishman who goes in rags, eats potatoes and sleeps in a pig-sty. But that does not hinder the Irishman competing with the Englishman, and gradually forcing the rate of wages, and with it the Englishman's level of civilisation, down to the Irishman's level." 417

Thus the immigrants might bring to the cities lower expectations of physical comfort but it was the slave nature of the economic system which enforced these expectations rather than their own moral degradation.

Dr. Gairdner is reported in the Report of the Dwellings Committee of the Charity Organisation Society in 1873 bemoaning the haphazard impact of the demolitions required by the railway companies for their lines and stations in Glasgow

> "these destructions have been attended with great and unmerited suffering to the respectable poor, and have given a bad name to what is nevertheless the only true process of reformation for our towns, viz. to make them in time literally uninhabitable for those dangerous classes who at present live in them by sheer force of chronic neglect ..." 418

This became a major theme of the next forty years to those involved in public health and housing.

(b) Distinguishing the two categories

This harsh approach to all tenants was subsequently modified to provide an explanation of urban housing problems centred on a specific morally defective section of the labouring classes. The period up until the Great War saw an apparent total embracing of this kind of aetiology ranging from those involved in providing housing as well as those regulating its occupancy. The level of sympathy with those in late Victorian cities varied but the dominant analysis was constant. The Sanitary Officer of Glasgow, Peter Fyfe, rejected Gairdner's simplistic account. Discussing the "wretched people" who were found in breach of the overcrowding regulations in the night raids of the Inspectors perceived the complexity of the situation

> "... many cases of distressing and real poverty are so inextricably mixed up with such (i.e. moral degenerates - PR) that it is almost impossible to make a distinction legally."[419]

This attempt at categorisation was one of the factors in determining the policy of warnings both at the hands of the Inspectorate and subsequently in many cases before the Magistrates.

Commenting on the work of the Sanitary Inspectorate in the same year, 1888, Dr. Russell suggested that in connection with the "Report on the Operations of

the Sanitary Department, for the year ending 31st December 1887"

> "It is better to retire to one's study with this unpretentious pamphlet than with Karl Marx or Henry George." 420

In the sense that the Report brings to life the physical realities of life in a large industrialised connurbation it certainly graphically points up the difficulties of human life. What, though, is absent from the Reports and which was implicit within the Proceedings of the Philosophical Society is an account of <u>why</u> such conditions obtain. We have seen the way in which the causes were articulated by his predecessor. Russell pointed to the problem of the moral soul of the population - here those at the bottom of the tenanted houses pile - those in ticketed houses.[421] Explaining the relatively high rents of small inadequate dwellings which were "made down" from previously satisfactory housing Russell explained the problem

> "He pays not only interest on his property poverty, but on his character. Those, 75,000 people comprise not only the criminal class, but the whole social <u>debris</u> of this large city;" 422

In the manner of Peter Fyfe, Dr. Russell was prepared to allow that there was a difficulty of actual poverty involved in this process of obtaining accommodation at low wage levels with interrupted

employment and trade cycles

> "some ... are bravely struggling with poverty..." 423

It is not from them though that problems emerge but from the much larger group of individuals

> "... far more who alike bankrupt in character and in fortune. They are the nomads of our population ... They
> "Fold their tents, like the Arabs, and as silently steal away." 424

Dr. Russell explained that this detritus must remain exploited at the bottom of the housing market because of their character failings which mean that as long as landlords have a choice they will choose other tenants because of "commercial reasons". The only solution seems to be a harsh reforming regime on the lines of that practiced in London. Dr. Russell asks

> "Why have we not an Octavia Hill in Glasgow?" 425

This is the only basic model which can solve what Dr. Russell perceived as the prime cause of the housing probems of the lowest class of tenants - the 75,000 inhabitants of the ticketed houses in the city. The problem then was only partially about physical conditions and rather more about the personal failings of the tenantry. It was with this analysis in mind

that prescriptions for the future solution of the problem was situated.

In view of the position of Dr. Russell, Peter Fyfe and in the earlier era that of Dr. Gairdner this dominant definition of the problem coloured the kinds of public debate which was most likely to take place on the topic of housing conditions. If the problem rested basically with the tenants then the pressure to change habits and conditions could be laid at this door rather than with the sellers of living space, the landlords.

This kind of analysis was widespread. A similar sort of view was propounded by John Honeyman writing on "Sanitary and Social Problems" in 1888. Honeyman, a notable architect, was the President of the Sanitary and Social Economy Section of the Society, as well as a Director of the Glasgow Landlords Association and "a keen Conservative". Perhaps in view of this his description of the solution of inadequate housing for the poorer classes in municipal housing as not simply inadvisable but

> "... nothing is more certain to aggravate all the evils which we at present deplore than the erection of dwellings for the working-classes by our Corporations." 426

At the heart, though of Honeyman's view was the notion that

> "... the root of the evil (high mortality of the poorer classes - PR) is to be found in the 'poverty of the poor'." 427

The solution then to this poverty according to Honeyman was "the better distribution of wealth". However, how he proposed to effect this vital change within the confines of the market system to which he was dearly wedded was less than clear

> "We really need - and the need becomes pressing - something more radical still (than better distribution of land - PR), something which shall affect every class of society, from the highest to the lowest and every variety of industry and commerce in the way of regulating the distribution of wealth, so that it shall conduce to the greatest good of the greatest number." 428

With these stirring words in mind it comes as a little bit of an anti-climax to discover the conditions which had to be met before this new Jerusalem could be pursued.

> "... it is well that we should ever remember that it is vain to expect that anything of this kind has the slightest chance of success if it either violates economic laws or in any degree discourages individual enterprise." 429

Honeyman wished to achieve this new form of social relationships by <u>reducing</u> regulation of the market and thus increasing the chances of the poorer classes obtaining employment through a "greater diffusion of money and enlightened public opinion."

> "I need hardly point out that you cannot increase the wages of the poor by throwing difficulties in the way of their getting work, no more can you facilitate their better housing by providing them with dwellings which they cannot afford to pay for." [430]

So it is that we find Honeyman firmly embedded in the market unable to see how the condition of the poor could be improved by direct action as to either income or even housing since the more you burden landlords the more you burden tenants.

> "It matters not who pays the money in the first instance. It will never be paid by anybody who does not see his way to get it out of his tenants." [431]

Situated within a market system with a minimalist state this is quite unexceptionable as witness the reclassification of the "insurance stamp" of employers as a wage cost rather than an indirect wage benefit.[432] Only philanthropy could deal with the "inexorable laws of political economy" in a way which both benefitted the unfortunate tenant whilst preserving those vital rules of economics

> "They are not to be got rid of at pleasure, and when violated they exact the penalty surely and remorselessly." [433]

His colleague and the Vice-President of the Sanitary and Social Economy Section expressed very similar sorts of implicit social analyses in his

paper to the British Association in 1889 on "Improved Dwellings for the Poorer Classes". D. G. Hoey echoed the words of Dr. Gairdner in his schemes for model dwellings for the "respectable unskilled labourer and the struggling widow". Not only did Hoey plan model dwellings but he saw the necessity for this enterprise being peopled by "model poor" since he recognised

> "the practical difficulties arising out of the evil habits, and thriftlessness, and lack of capacity, of a great proportion of those who, in the words of Dr. Gairdner, are thus deprived of the possibility of bringing up a healthy and well-trained family." [434]

His overall scheme, first enunciated in one form in 1870 and "revamped" over the years was based on "strict commercial principles" and the houses required to "give a fair return for the outlay". The final description which Hoey gave to those whom his plans could help

> "the industrious and honest poor who have seen better days, and are familiar with better surroundings than their present ones." [435]

Not only would these class of individuals provide a basis for a sound investment for the philanthropic but they

> "would work their nails off their fingersends, to show their appreciation, in the practical form of regular and punctual payment of rent." [436]

(c) Social control and self-defence

The difficulty of meeting the two aspects of the rented housing equation was recognised early on by James Sellars when addressing the Glasgow Philosophical Society in 1884 on The Dwellings of the Poor. The relationship between rent and income was made plain by Sellars

> "The very people who have most need of better houses are, generally speaking, the class who can least afford to pay for them ..." 437

Sellars, however, retained a belief in the moral causation element in the housing question where he explained that

> "from their personal habits, even if they could afford to pay for them, would soon make any house they occupied foul and unwholesome. Indeed when we consider the poverty stricken condition of the very lowest stratum of society, and their physical and moral depravity, it seems impossible to provide better and cleaner houses at a rent which they can afford to pay, and useless to provide them at any rent until they are better and cleaner themselves." 438

Sellars saw that State aid or municipal intervention might well be relevant in this context to deal effectively with the public nuisance which the lowest strata of society caused in bourgeois environs. The impact of these people was more than geographical in an interdependent economy, Sellars pointed out.

> "The message boys who bring your fresh milk and hot rolls in the morning may have emerged from some foul haunt an hour before. You cannot avoid coming into contact with the inhabitants of these places, in some way or another, every day of your lives." 439

Thus despite the fact that Sellars doubted whether or not houses for this class could pay he considered the social evil they presented, so dire that it was worth making "some money sacrifice". The actual form these dwellings were to take is a theme which was floated at this time and recurred in the work of William Smart and John Mann, Junior. 440

> "I do not see any reason except the financial one why large groups of buildings which I will call barracks, for want of a better name, should not be erected in certain districts, in which the houses would be built of the most indestructible materials - for that is essential - and arranged on the best sanitary principles, with suitable baths and wash-houses attached to each group, and which would be under constant supervision and inspection, in order to compel attention to sanitary rules." 441

This arrangement would make the tenants easier to inspect and would put them in a better frame of mind to receive religious instruction and give them less reason to frequent the public house.

In similar vein, the editor of the Sanitary Journal, Dr. MacLeod, in an editorial in June 1885 on the Royal Commission "on the Housing of the Poor" in Scotland, pointed out that the terms of

reference of the Commission were doomed to failure unless it was made clear exactly which sections of the working class were covered in the remit. There should be no failure to specify a distinction between the "destitute, industrious able-bodied and the destitute, lazy or criminal able-bodied". One group were meet for the parish authorities to deal with, the other for the criminal authorities.[442]

This notion of the problems of housing stemming from the insanitary dwellers of the rookeries, persisted in the various analyses which occur in the Society's various Papers. In the writings of Dr. Gairdner's successor as Medical Officer of Health to Glasgow Corporation and also President of the Philosophical Society, these views take on a more paternalistic air. Writing in 1887 and addressing himself to the arguments of Herbert Spencer as to the evil of sanitary administration by the State, Dr. James Russell rejected this non-interventionist stance in favour of helping those who were unwilling to look after themselves

> "The principle to be stictly followed both in the case of the personal and the local administrative unit must be not to do anything for them, but make them do it for themselves ... (but) ... To trust to voluntary association, without legal sanction which shall coerce the unwilling minority, who have the power to undo all that the majority are doing, soon works its own cure by a reductio ad absurdum. There will always be stupied or wicked people

> who must be coerced, not for their own sake, but to save the wise." 443

Much the same notions were echoed in the following year by the Sanitary Inspector for Glasgow, Peter Fyfe, addressing the Society on the "Sanitary Work of aGreat City". Whilst Fyfe supported the powers sought in the Burgh Police and Health Bill before Parliament in 1888 and castigated the ignorance and carelessness of landlords and farmers in rural areas where diseased food was supplied and which was outwith the Bill he still saw the Sanitary Department as being concerned to provide strenuous social control

> "... those who have brought their misfortunes upon themselves and their families through drunken and degraded habits (and I am afraid I must say their name is Legion) ought to be steadfastly prosecuted." 444

John Mann,Junior with his experience in slum property management took a sanguine view of the need to deal with the dispossessed as insanitary buildings were condemned and demolished. The problem was one not simply of concern but of danger

> "... these wretched people must be rehoused somehow, if not from motives of humanity, then from the necessity of self-defence. Their houses, habitually overcrowded and abused, are plague spots, centres of infectious disease, and a source of great danger to the community." 445

It was not just the physical danger though which exercises John Mann but the lumpenproletariat who existed along with the "well-doing artizan" who had an income almost equal to the 'lower middle class'. What worried Mann was

> "... those distinctly lower in the social scale - the inhabitants of the slums, who, to a casual observer, are all sordid and degraded, so rampant are vice and crime, thriftlessness, dirt, and drunkenness. But it is a mistake to denounce, without qualification, the improvidence and profligacy of the masses. The slums contain a strain of goodness and purity; there is leaven in the lump." 446

Mann perceived two classes below the skilled aritsan. One consistedof the industrious, reputable and decent poor and the other illdoers, disreputable, vicious and criminal who were lazy, improvident, destructive and disorderly in their habits. Again the one bad class has a downward pull on the other and it was not always possible to distinguish between the classes. The point, though of this split of the lower orders, was to make it clear who could be catered for by model dwellings and those who could not. Thus we can see a gradual evolution from the simple assessment of all slumdwellers by Dr. Gairdner into relatively sophisticated triple classification by John Mann. However, Mann did concede that even the lazy, improvident class must be housed but was able to offer no hope from either philanthropic experiments

in New York, London, Leith, nor even the Improvement Trust in Glasgow itself. Noting as had his forerunner Dr. Russell,that the poorest paid most because of their intrinsic personal lack of worth he could see no way apparently for solving this group's difficulties, without stringent intervention in their lives.

> "The tenants of the "worn-out" "made down" ticketed houses require to pay a penalty for their poverty, their want of character, their disorderly and destructive habits and those who do not pay are burdened with rent which their neighbours escape paying." 447

All he suggested was an elaboration of Octavia Hill on a wider scale. The local authority could install caretakers to ensure that the policy of renovation of old properties might be able to deal with the poorest class, even the improvident. However, this was less than clear. What needed to be done was to introduce improvements in a certain way such as

> "at first only the most rudimentary improvements, and to comply only with the most urgent of the sanitary requirements. Then, by giving all the tenants a chance, gradually wiping out hopeless cases, it becomes possible, slowly and steadily, to introduce improvements as the character of the tenants rises, and as they prove themselves able to appreciate and safeguard the improvements." 448

So it seems by "wiping out" the worst cases then it might be possible to deal with one of the

root causes of the housing problems of the poor - namely, their own degradation. In pursuit of this moral improvement the use of caretakers was indicated as essential

> "Generally, control can hardly be too stern and strict; but to have its full effect it must be directed by a kind and sympathetic heart ... they (caretaker and his wife - PR) supervise the people generally, and press steadily against ingrained habits of filth and disorder; the dirty or disorderly tenant never knows when the caretaker may look in ... those who are hopeless and irreclaimable are ruthlessly ejected ..." 449

Mann summed up his whole policy which he admitted might seem hard but this was tempered with the notions that in addition to knocking down property there must be rebuilding to house the populace and that slum landlords must "realise their responsibilities".

> "I say ... scatter the people; drive them out of their dens; crush out the disreputable and the dissolute by the most unbending discipline;" 450

Mann was not too worried if the final resting place of the "rejected" tenants, to be provided by the local authority, did not meet the strict need to pay their way because of the indirect benefits afforded

> "in the control they would afford of their occupants." 451

So we find in this advocacy of limited municipal housing the most elaborate control system without actually interfering with private enterprise.[452]

This was a theme which John Mann reiterated during the next decade and from his position in the Society as Vice-President and his presentation of papers he was no lone "fringe" figure riding a hobby horse as the support from other members in influential positions indicated.

Amongst these support elements was the Adam Smith Professor of Political Economy at the University of Glasgow, William Smart, whose addresses to the Society on the problems of housing in Glasgow were credited with impelling the Corporation to institute its own Commission of enquiry into the housing of the Poor in 1903/4.[453] Not only were his views highly regarded in 'official' circles but we also find reports of his writings and lectures in some of the more generally available general cum-specialist journals. His address on The Housing Problem and the Municipality was summarised and deemed by the journal Property in May 1902 to be satisfactory

> "... for those who desire a fair statement of the "problem", the pamphlet is to be commended." [454]

His ideas were contained in the Proceedings of the Royal Philosophical Society of Glasgow where he

explained in an openended discussion on "Housing Problems" exactly what the nature of the problem was as regards housing in a rather less emotive tone than other moral enterpreneurs

> "... the general Housing Problem is ... in congested areas of high rents, there are many thousands of people whose wages have not risen; men and women whose wages cannot rise much ... because the men and women in question are not worth more ..." 455

Thus it was suggested that those at the bottom of the economic pile were less vicious than Gairdner or Mann painted them. They were the victims not of their own moral failings but rather of the structural developments of capitalism which did not value their skills or which valued but lowly such skills

> "This class has a special claim on us because their misfortunes are so greatly one of the consequences of our progress. They are the failures incidental to the factory system which has made us, on the whole, so rich. How are these people to be housed?" 456

Professor Smart made it clear that the poor he was concerned with housing were the "decent dispossessed poor". The other sector of the poor provided entirely different problems. Whilst Smart agreed that society had a responsibility to the decent poor he felt no such obligation to those who brought their plight on their own heads through "character deformation".

> "... there is another class among the thousands to be turned out - the criminal and the vicious. I do not see that we owe them anything, but we cannot very well get rid of them ..." [457]

Along the lines of John Mann Junior he suggested

> "... something between a jail and an independent dwelling, namely, a shelter." [458]

From the ensuing discussion he seemed to be representing the dominant view of the Society's members when he suggested

> "We are all, I think, agreed that these two classes should not be housed among the decent poor." [459]

Although prepared to accept the role of the municipality in the provision of certain utilities such as gas, water and public transport, Professor Smart was less happy about public money being used to provide a "sectional benefit" by providing housing.

> "In ordinary cases, I should say that this argument is quite conclusive against municipal housing". [460]

However, despite the existence of a battery of controlling legislation the problems of the poorest sections of the community continued to flourish with "farmed-out houses" [461] and back-lands. [462]

> "What is worse, however, is that the overcrowding laws and the sanitary acts cannot

> be put in force by humane magistrates, because there are no houses for these people to go to at rents within their means." 463

Whilst accepting that the overall social impact of the badly housed affected all and could thus justify municipal intervention in housing, Smart was careful to distinguish between the decent poor and the improvident contaminating class. To house every poor person who applied was dismissed as

> "socialistic and illogical." 464

Of the two alternatives of building for the "decent poor" and building for the "dissolute poor" and making it impossible for the latter to get a footing elsewhere, Smart opted for the cheaper scheme of housing the smaller group of disreputables. The major plank of the successful housing of the poor Smart saw in an effective policy of "segregation". This class could not be denied "sanitary shelter" and in this situation their actions could be controlled. Smart suggested an indestructible house to ensure there was no damage caused by the inmates. Although these "barracks" were not to be penal settlements they were seen as self improving reformatories for the criminal and prostitute class. They were to be housed as long as they paid rent and conducted themselves so that life was not made unbearable for their neighbours. Those who failed to conform

were to be evicted from the city since they would have been rejected from all previous houses.

This analysis was so clearly undisputed that the sorts of points which did emerge from the ensuing debate centred around the difficulties of getting the "reckless class" into the "barracks" voluntarily and whether it might be possible for some of them to rub shoulders with the respectable and thereby "reform".[465] This latter point received little in the way of support. Some even went so far as to suggest that within the insanitary houses there were practically none of the respectable poor anyway. This point by the Vice-President of the Sanitary and Social Economy section demonstrated the tenacity of the original causal connection between the condition of dwellings and the inmates.

At a less elevated level than the Royal Society we again find the same sort of moral imperatives put forward as the root problem for housing conditions in an article in Property in 1902.

In an address to the Royal Sanitary Institute, A.E. Hodson wrote on the Sanitation of the Dwelling and suggested the basic problems lay in moral and economic change

> "So soon as we become a sober nation and give a living wage tothe workers, we shall find

> the greater slums and dens of infamy swept out of the country, as I am convinced that no honest, sensible human being desires to live in slumland; and it is to the people we must look for reform, because if any permanent benefit is to be secured it is by changing the character of man, where a man's own character and defects constitute the reason for his bad habits.'466

Again although there was a "nod" in the direction of wage levels as an inhibitory factor in keeping dwellings in a sanitary state or at least allowing the choice to be made to avoid the insanitary, it was to the tenant's personal characteristics that again we find attention being directed. A moral rather than material revolution was seen as the solution.

This inclusion of matter, though, other than the solely personal is a feature of the brief analysis of the problem of the paradox which William Fraser attempted to unravel in a paper some five years later. Following the disastrous property years of 1903, 1904, 1905 and 1906 Fraser tried to see why it was that overcrowding and surplus capacity could exist in the city at the same time. Whilst he did not suggest that his answer to this paradox was a total one he did return firmly to the spiritual world of the tenant. The tenant was spending money which could be put towards renting an empty property towards luxuries. This meant that they were not occupying as much property as seemed reasonable to

Fraser

> "The standard set of two persons per room is not high ... Poverty, no doubt, causes many to fall short of this standard;" 467

But whilst this poverty was a genuine reason for not occupying a larger property there was some suggestion that the poverty was self-induced

> "... part of that poverty is due to early improvident marriages where very young couples undertake the responsibilities of family life without the means or prospects of fulfilling them ..." 468

Even where this was not the case the poverty was seen as a result of profligacy in other ways

> "... in other cases the expenditure on luxuries very often takes the place of a much-needed extra outlay upon house room. The amount spent upon alcoholic refreshments in comparison with house rent may be taken as an example of what I mean." 469

In line with his further views a moral account is provided with an elaboration of his "barrack" ideas in 1909 by John Mann, Junior in a series of articles in the Glasgow Herald.[470] It is fair to suggest that one important source of ideas and strategies about housing conditions bore a moralistic aetiology throughout the period under view which helped to provide a specific context to which decisionmaking in both the Courts and at the local environmental standards level-

-sanitary departments must be related. The absence of articulated feasible alternative perspectives on the causation and treatment of insanitary dwellings in late nineteenth century Scotland seem to suggest a monopoly of both the scope of the problems at issue as well as of their solution. The dominant moral perspectives of the most productive writers and speakers on housing conditions at this time were also buttressed by individuals with a more direct interest in the analysis of the problem as one of moral defect. This certainly applied to the providers of insanitary dwellings, the landlords.

(iii) Professional Perspectives

Views of a more "professional" kind on the issue of housing standards and their achievement through legislation and education were a feature of the meetings and publications of the Sanitary Inspectors Association for Scotland. This body was instituted in 1874 and held its first meeting in January 1875. It changed its name to the Sanitary Association for Scotland in 1878 and widened its membership to Medical Officers of Health and all those who took an

interest in sanitary matters. Although the actual Sanitary Inspectorate figured prominently amongst its membership it did not take the form of a "trade protection" group. Its concerns were largely

with the effective administration of the sanitary legislation and this involved consideration of the overall position of those inhabiting insanitary houses. The approach of the Sanitary Association was rather less inclined to load the blame for the problems of housing onto the moral failings of tenants. Coming into work contact with landlords and factors in their daily work, sanitary inspectors took a rather more critical view of the providers of housing accommodation than some of the moral enterpreneurs. The Sanitary Association published a monthly journal of news and views from March 1876 which revealed the general professional orientation of the Association

> "The Sanitary Association has never been under the patronage of dukes or lords, and it has never secured the influence and support of some ofthe leading sanitarians in Scotland." [472]

Apart from the Sanitary Journal the Association also published their Transactions from 1896 onwards. This publication allowed the monthly Journal to concentrate more on news and information rather than provide a forum for long general papers on the goals and problems of the sanitary movement and its practitioners.[473] Parallel to the Sanitary Association, from 1893, the Sanitary Inspectors formed themselves into their own grouping, the Sanitary Inspectors' Association. Their function was similar to that of the Sanitary

Association with annual meetings at which papers on sanitary matters were read and both bodies concentrated on public education rather than Parliamentary agitation.

Although there were negotiations by the Sanitary Association from time to time with the Sanitary Institute of Great Britain, affiliation never took place. With a wholly separate set of legislation and administrative units in Scotland the focus of the Association tended to be very much a local one. In order to facilitate meeting on a regular basis in addition to Annual Meetings, district associations were formed in the West and East of Scotland which met more regularly. Apart from its dominance in terms of membership, the sanitary inspectorate was successful in obtaining a scheme to enhance the status of their profession in 1891. Prior to this the qualifications of Sanitary Inspectors had only been obtainable south of the border but from this date certificates of competency were issued upon successful completion of written and oral papers. The Association were confident that their certificate would be generally beneficial

> "Our labour will save the time and trouble of County Councils, County Districts, and Burghs, when choosing a sanitary inspector, in wading through piles of certificates and recommendations. Let the advertisement for a sanitary inspector state that no-one need

> apply who cannot produce a certificate of competency in sanitary science." 474

The kinds of topics which were selected for the Annual Congresses went beyond the purely technical and in one typical year we find addresses on "Sanitary problems among the Poor"; "The Ticketing of Small Houses"; "Farmed-out and other sub-let Houses" and "The Unskilled Labourer and the Vicious". 475 What was particularly significant in the choice of material was that over the years we can infer the approach of those charged with the obligation to actually put the legislation into practice when addressing their professional peers. Dr. Chalmers, for example, in his paper on the "Sanitary Problems of the Poor" not only situated the sanitary problem as a moral one but asked for preventive and preemptive powers to deal with insanitary conditions

> "Overcrowding, domestic dirt, and insanitary houses still abound, but their distribution renders their detection increasingly difficult. Now, again, by the process of dealing only with results, we can only carry on a rearguard action with all of these. Our claim is that sanitary administration prevents disease; should we not also claim the right to prevent the production of conditions which induce it, instead of simply removing them?' 476

This analysis seemed to represent the approach of the sanitary authorities in its combination of environmental and moral factors and provides a

pointer to the way in which the legislation was approached by the authorities. Thus we find a contradiction between the analysis and the methods available to "solve the insanitary housing problem". The legislation provided for closing of houses and for finding those guilty of overcrowding in contravention of the "ticketing" provisions. As William Kelso demonstrated in Paisley the state of the property could not be ascribed to the tenant but rather to the relationship between wages and rental return levels on property to landlords. In his work in ticketing in Paisley, in the first decade of the century, the Sanitary Inspector recognised the problems of many tenants as economic and acted accordingly.[477]

This is not to say that the combined environmental/moral view held total sway professionally in the early twentieth century. The Inspector of Poor for Glasgow, J.R. Motion, explained the causes of insanitary conditions succinctly

> "It is not so much the insanitary conditions of the city as the kind of people who live in it. The insanitary slums arise from the way these people live, principally in congested places, and where common lodging houses are situated.
>
> There are too many facilities for the lodging of the depraved class ... This class should be shut up." 478

Similar sorts of analysis are also found in the

writings of the Sanitary Association, although as we see from the Local Government Board Reports the greater proximity of the Inspectorate to the insanitary dwellings and their occupants seems to have made them more receptive to combined moral structural explanations of bad housing. We find the President of the Sanitary Inspectors' Association of Scotland, J. P. Lawrie, echoing the approach of John Mann Junior in his advocation of barracks for the poorest class.

> "Taking the housing question, what did they find? Simply that so long as insanitary houses with squalid surroundings were in the market, there was no difficulty in occupying them with the individuals known by the euphonious name of "slummer" ... before the hardened slummer could be trusted in a good house he must be educated up to it by strong measures if need be ... This class formed a menace to the public health and morals, and should be treated as criminals." [479]

As one would expect, though, despite their strong interest in the social aspects of their sanitary work, the Sanitary Inspectors' Association heard papers of a technical nature too as their 1903 programme indicates. Papers were given on matters like "Should the Anti-Syphonage Pipe be abolished" and "Should the Present Method of Ventilating Drains and Sewers be Discontinued" along with "Past and Present Workshops Law" and "The Use and Abuse of Water". In addition to the President's Address one

inspector gave a paper entitled "Great Cities and their Influence : A Plea for Better Housing" advocating suburban developments with rail links to avoid the situation where "the skilled mechanic was compelled to allow his children to associate with the worst slum children".[480]

The barracks notions continued to dominate the thinking of the Sanitary Association up until the Great War combined with hints about Labour Colonies and overtures on eugenics. Speaking of the dwellings to be provided for evicted slum dwellers, the Convener of Edinburgh's Public Health Committee explained

> "I think those buildings should be on the barrack system, that these thriftless people should be obliged under compulsion to regulate their lives under certain hours, certain conduct of behaviour, and that they should be kept in the one place, and you will be able in that way to try and lift these people up".[481]

These arguments shaded into early eugenics in suggestions by the Convener of Inverness Public Health Committee, Alexander Fraser, as to what should be done with the populace to preserve the strength of the State and the Family

> "I would ... advocate most earnestly a State control of parentage.'[482]

Alexander Fraser was no lone voice in the wilderness. Apart from his position as Convener of Inverness Public Health Committee, he was also elected President of the Sanitary Association of Scotland in 1912 and used his Presidential Address at the Annual Meeting in Montrose to urge the removal of the morally deficient to labour colonies. They were the cause of much of the housing problem

> "behind the lack of suitable houses lies the difficulty that these poorest people have only the lowest standard of living, and wherever they go they bring that standard with them. The consequence is that when they obtain a footing in a property the condition of that property very quickly deteriorates, and, although attempts are made by means of inspection to compel the unfortunate owners of such properties to make the premises decently habitable, the fact that slums exist, and often spring into existence in new localities in all our towns, notwithstanding every effort to remove or prevent them, is eloquent testimoney that something more than housing is involved in the causation of the evil." 483

The landlord was often unfairly blamed for the state of his house but Fraser rejected this and placed the onus squarely with the intemperate tenantry for whom the labour colonies would be suitable and which would indirectly benefit the respectable poor.

> "The removal of persons unfit to maintain themselves or requiring to be treated in labour colonies would still leave a large number of persons requiring better housing ..." 484

The real influence of the Sanitary Association stemmed from the fact that unlike the members of the Philosophical Society, it was the Sanitary Inspectors who effectively determined the limits of sanitary policy and it is clear that if the occupants of the Sanitary Department formed a view against wholesale "hustling" such a policy was unlikely to be operative until a system of strong centralised control was instituted. Neither the Board of Supervision nor the Local Government Board provided such close control. [485]

It is clear from his frequent contributions on practice and his analysis that a man in a position like Peter Fyfe in Glasgow had a significant impact on policy in the city towards insanitary housing.

Fyfe in his paper to the Association of House Factors and Property Agents in 1901 on the "Back Lands and their Inhabitants" revealed the problems of sanitary administration at the turn of the century in Glasgow. Backlands - properties erected in the hollow squares behind tenement blocks usually two stories in height were described by Peter Fyfe as

> "those relics of past private greed and public neglect." [486]

He addressed himself to the main arguments tendered in favour of retaining the property namely the fact

that they were legal, they provided a service to a certain class of the populace and that if they were removed there would be no places for the displaced populace to go of equal size and equivalent rent. One of the difficulties which Fyfe was able to highlight was the relativity of applying standards with such parameters as "unfit for human habitation" as well as the tortuous path on which any complainant against backlands had to embark on to get such property demolished. More interestingly even we find that Fyfe's evidence suggested that there was very little difference in those inhabiting the backlands from the "frontland" properties. Fyfe concluded

> "... in respect of rentals and earnings, there is little or nothing to choose between them." 487

Nor was there much evidence of distinctions as far as Fyfe could observe between the "respectability" levels of the two classes of tenants. Whether or not, though, the backlanders qualified for the prized "Factors" line was not a matter which Fyfe discussed and could well provide an explanation as to why families with similar income and rental outgoings for less desirable properties would apparently choose to live in backlands. From the visual evidence 488 they do not really seem to be latter-day Mews cottages,

although there are vague suggestions about a "culture of the backlands" made by Fyfe and others.[489]

The availability of alternative accommodation at equivalent rents was a matter on which Fyfe seemed to initially suggest that the landlord was on stronger ground

> "... the slum landlord ... is a public benefactor until the public build for the labouring classes ..."[490]

To deal with this aspect of the problem of backlands, Fyfe recommended building by either a powerful body or the Corporation placed under the supervision of caretakers. Until that date Fyfe advised a policy of caution

> "The grimy inhabitants ... who crowd in our back lands, what is to be done for them or with them? They cannot be turned out on to the streets! Insurrection lies that way, and the butchert and devil's work which comes of contact with the military. No! they must remain in their absolutely cheerless abodes until the day of salvation comes."[491]

The impact of the structural problems of the working class tenant was recognised by Fyfe where he explained the reason for his sanitary practice towards backlands which were damp

> "There are many of such houses we would have closed long ago had we been convinced that the persons who inhabit them could, find within the city sanitary dwellings at rents within their means."[492]

The solution which Peter Fyfe proposed for the disreputable and degraded tenants was not to build barracks for them nor to house them with shelters nor normal houses but to adopt reformative approaches

> "My solution of this most difficult problem is to seek powers from Government to place all vicious, incorrigible, and known non-rent-paying persons in reformatories or working colonies, where work must be done ..." 492

In the event of this proposal meeting with failure, the Sanitary Inspector suggested an amalgamation of those with effective power over the location of the incorrigible elements

> "If Government is not prepared to grant these powers and pay a part of the cost, then I see no other reasonable way of dealing with them than closing the slums they at present inhabit, and asking all proprietors to co-operate with municipal authorities to make it extremely difficult, if not impossible, for them to retain a footing in the city."493

For this class Fyfe did not consider that municipal housing would solve the problems of the idle and evil who were encouraged by slums to live and propagate. This was to be retained only for the selected poor on the lines suggested by John Mann, Junior.

The approach of the Glasgow Sanitary Department under Peter Fyfe had not altered by the time of the Municipal Commission on the Housing of the Poor which reported in 1904

> "The continued occupancy of so many insanitary and illegal houses in Glasgow is largely owing to an unwillingness on the part of the officers responsible for the enforcement of the Act to make use of their powers, because of their belief that there is not a sufficiency of suitable accommodation for the people who would be dispossessed, at a rental which they are able, or, in the case of some of them, willing to pay." 494

Nor was there any marked change in this attitude over the years judging by Fyfe's remarks at Sanitary Association meetings, Sanitary Inspectors' Conferences and the Royal Commission on Housing.

The importance of the dominant analysis was precisely that it appeared in almost an unchanged form, as the analysis of the Municipal Commission into Housing of the Poor and contributed to the approach of the other official bodies with responsibilities towards ensuring sanitary accommodation for tenants. With John Mann and William Smart involved in providing an alternative to a municipal solution to housing supply 495 and interacting with individuals like Sir William Tennant Gairdner and Peter Fyfe in charge of the Public Health operations in the city, their opportunities for influencing sanitary policy in the short term and long term were considerable. As we can see with Peter Fyfe this analysis did not necessarily rebound to the tenant's disadvantage. The situation, though, of solutions firmly within a continued private enterprise supply system affected the perception of what

obligations could realistically be placed on the housing suppliers whilst still allowing them to receive "return on capital". With the moral defects argument, whether in strong or modified form, the sanitary problem resolved itself into one of providing barracks or labour colonies for resocialising recalcitrants. The importance for this on arguments about municipal housing and its nature and scale, is of indirect significance to our concern with the sanitary conditions of tenants. Not only was the hand of the sanitary department stayed during times of housing shortage but also the notion of any standards outwith the bounds of strict profitability became an unattainable goal. The matter was expressed succinctly by a Sheriff operating the 1909 Housing legislation in Hamilton

> "I do not think that section 15 (implied condition of reasonably habitable) was intended to enable a local authority to emulate and enforce a new standard of habitability every few years ... I cannot accede to the startling doctrine that the general terms of this section enables the local authorities to make what are practically "repairing bye-laws" for old houses." 496

(iv) Spiritual Counsels

The direct contribution of the churches in Scotland does not appear to have been marked at the national level and we can infer from what studies

were carried out by the Free Church and by the Church of Scotland that the major concerns of the churches were centred on the spiritual rather than the strictly material. However, the connection between the two elements, although more recently fashionable,[497] was noted in connection with drink. At the request of the Synod at Lothian and Tweedale in an Overture to the General Assembly of the Free Church on the Houses for the Working Classes, a select Committee was appointed of twenty members, 13 Ministers and 7 Elders. This latter group included a Sheriff and a Professor whilst the Convener was Dr. James Begg. Begg subsequently became Moderator of the Free Church and was described as "practically the founder of the Scottish Reformation Society and the Protestant Institute of Scotland".[498]

The remit of the Special Committee was

> "to inquire into the state of the dwellings of the working classes in Scotland with special reference to the existence and extension of the Bothy system, the bearings of this upon the morality of the people and the best means for securing a remedy for existing evils."[499]

They reported in May 1862. The Report to the General Assembly of the Free Church was made by the Convener of the Committee, the Minister for Newington, Edinburgh, Reverend James Begg. Their report revealed some of the more traumatic effects of bad housing conditions

> "About the end of last year the falling of a large, old, decayed, and eroded tenement in High Street of Edinburgh, by which thirty five individuals were hurried to premature graves, had a great effect in awakening the public mind of Scotland to a sense of mischief arising from our ruinous and overcrowded city dwellings." [500]

The problem was perceived as one of under-supply of dwellings in contrast to the expanded numbers of city inhabitants. However, there were some doubts as to how the "pestilential masses" could be cleared from their "immense human jungles" since it was recognised that simply to destroy the houses of the poor would drive them into the remaining accommodation if the dwellings were not replaced. In addition there was a rejection of the notion that the dwellings were required to be in the Old Town of Edinburgh due to proximity to work. The Report urged that in providing rehousing in outlying areas this would be, in fact, near where men in fact worked in the New Town and Leith Walk. Aside from certain philanthropically inclined investors, the Committee felt that the solution for this problem lay with co-operative ventures themselves and pointed with admiration to the work of the Co-operative Building Society's building in Stockbridge, Edinburgh in 1861.[501] Since these buildings were built for sale there was clearly much in the Committee by-word for aspiring workers wishing to be housed - "CO-OPERATION and SELF-DENIAL". The problem was that the Scotch working

man was not astute enough in practising thrift and self-denial whereby he could have saved money to buy a house. Within the context of the rural labourer where housing was likely to be provided by the farmer for whom the labourer worked, the theme of social responsibility again recurred but in a slightly different neo-feudal form.

> "We are responsible for doing what we can, at least, to promote both the temporal and spiritual welfare of those under our charge, to remove temptations out of their way, and for using our best influence towards elevating them in the social scale. We can imagine nothing finer than for a large farmer to act as a patriarch - like Abraham or Boaz - amongst his people, loving and being loved. The people are most susceptible of such kindness and attention, and the willing and cheerful service rendered in return will be found an ample compensation." 502

Again in the rural context the Committee pointed out the long-term advantages of providing good cottages in addition to the likelihood of preventing the spread of infectious disease

> "... a good cottage not only prevents evils, but promotes a great amount of good. A man proceeds to acquire furniture, and to have something at stake. He is not so ready to flit at every term, and therefore he takes care to make himself more useful and agreeable. Farmers will soon discover that whoever has the best cottage will get the pick of the market in choosing servants." 503

They called in addition to self-help for a Royal Commission on the housing of the Working Classes.

Apart from this Dr. Begg himself was active in speaking and agitating for working men to co-operate and start up building societies as well as writing at the personal level.[504] The long term impact within the Free Church even of such a powerful personality as James Begg does not appear to have been great. Such co-operative ventures as he did stimulate in Edinburgh and Dundee seem to have owed their impetus to Begg, private individual, rather than the Free Church of Scotland. No other national initiative seemed to have been made by the outbreak of the Great War.[505]

As far as the Church of Scotland was concerned their contribution during this period was also to produce a Report through the medium of the Glasgow Presbytery on the Housing of the Poor. Again, the impetus to examine housing came from another spiritual concern, namely non-Church-going.

The concern of the Presbytery of Glasgow manifested itself in a speech delivered to the General Assembly of the Church of Scotland on the subject "Non-Church-Going" and Housing of the Poor" by the Minister of Park Parish in Glasgow, Dr. Donald MacLeod in

support of an overture by the Presbytery of Glasgow, in May 1888. The Presbytery were concerned that about 25% of the population of Glasgow was living in single apartment houses as well, with the resultant moral degredation, intemperance and wretchedness prevailing. They called on the General Assembly to remit the subject to the Home Mission and Life and Work Committees, with instructions to report to the General Assembly. Dr. MacLeod perceived the problems of the poor as centring round three specific evils

> "Non-Church-going; The housing of the poor; and Intemperence." 506

Glasgow was described as a microcosm of the Scottish housing/religious/drink problem. Dr. MacLeod noted that the numbers of people who attended no church and those living in one-room were very similar at around 120,000. These he saw as figures not merely coincidental but forming a cause and effect. The aetilogy was not entirely moral

> "Undoubtedly life in one room suggests poverty and want of churchclothes, and these must prove quite as great hindrance as religious indifference." 507

In fact, MacLeod saw the housing issue as the central core in the complete relationship of non-church-

going and drink. The public house was the only area where the husband could get some peace and relaxation and he admitted that the "Cotter's Saturday Night" [508] was hard to imagine in a room several stairs up a Glasgow close.

Whilst shrinking from embracing a mechanical environmentalism and stressing the importance of the spiritual aspects of the Church's work, Dr. MacLeod noted that Christ cared for the body as well as the soul and that the housing issue deserved the attention of the Church.

The role of the Church was to create a right public opinion, though, rather than to become a house building agency themselves or attempt to "improve" the poor themselves "while leaving them to swelter in their dens" with tracts and good advices.

The Overture from the Presbytery of Glasgow was discussed at the General Assembly on May 30th 1888. The General Assembly resolved

> "... having taken into consideration the information regarding the causes of non-church-going, commends the subject anew to the consideration of all the inferior courts and particularly invites and enjoins Presbyteries, after special enquiry and conference regarding non-attendance upon ordinances ... and the causes which contribute to it, to take such action as seems possible and desirable, and to report to the next Assembly, through the Home Mission Committee." [509]

Apart from some concern expressed about the immorality of the bothy system expressed in 1892,[513] the matter did not engage the attention of the General Assembly again during this period. At the local level, Ministers from the Church of Scotland were involved in tenants groups in Paisley[514] and Greenock[515] in the periods of agitation over missives before the Great War.

Very much connected with the Church initiatives there was in all the major cities some form of limited charitable work carried out from the 1880's generally by the Social Union, or, as in Glasgow, the Kyrle Society. This work appeared to be on the lines of Octavia Hill whereby the bodies in Edinburgh, Dundee and Glasgow involved themselves largely in rent collecting and property management.

The Glasgow Kyrle Society was instituted in 1881 and its objects were to "endeavour to improve the condition of the poor by bringing to bear within their houses and places of meeting the influences of natural and aristic beauty, and by such means inspiriting them with elevating tastes". The Society was divided into five sections:- 1. Music 2. Decoration; 3. Window-gardening; 4. Sanitation; 5. Woodcarving. With the Lord Provost as their President the work of these ladies from Glasgow's West

End was much applauded by Professor Smart whose wife was a leading light.[516]

Modelled specifically on Octavia Hill's work and starting in 1885 in Edinburgh, this kind of rent collection was undertaken by the Edinburgh Social Union. They did not own or build any property and charged between 5% and 7% for the services. It enabled the Social Union also to collect accurate information as to the lives and habits of working men and their families.[517]

In Dundee, by 1905 no model dwellings or philanthropic enterprises erected houses for the working classes although in 1874 the Working Men's Building Company did do a little building for the upper end of the artisan market without any great financial success. The only apparent impact of the charitable concerns was with the Dundee Social Union. It commenced in 1888 and was "engaged in efforts to improve housing conditions in Dundee". It operated along similar lines to its counterpart in Edinburgh along the path set by Octavia Hill. Their objects were to collect and perform the ordinary duties of landlord in as efficient manner as may be,working on ordinary business principles featuring weekly collection of rents and enforcing hygienic rules.[518]

(v) Self Defence

(a) Organisation

UNION IS STRENGTH

These stirring words were heard at the end of the Presidential address not of a militant tenants' faction but from the suppliers of dwelling houses, the landlords. Throughout almost the whole of the period under examination we can witness an initial flowering of landlords' organisations and their spread over all of Scotland. Organisation in defence of property was not confined to Scotland or simply to specifically Scottish issues but was found in the larger and more generalised groupings like the Liberty and Property Defence League and Vigilance. In Scotland a start was made in Glasgow and it was the Glasgow Association which seems to have been the dominant leading strain throughout this period. No doubt this was a result of its sheer size as compared with later kindred groupings in areas like Hawick and Kilwinning.

The setting up of the first organisation of landlords appears to have been stimulated by the first major piece of control legislation, the Glasgow Police Act of 1862, which introduced "ticketing" of small houses for overcrowding.

> "Although not specially mentioned in the records the fact that the Association took its rise in the same year as the Glasgow Police Act of 1862 came into force, makes it probable that the proposed encroachments on the rights of property owners by that Act, stirred up those interested to adopt means for self protection." 519

This was the judgment of the President of the Glasgow Landlords' Association Annual General Meeting in January 1883 when he reviewed the "coming of age" of the Association. In fact in the beginning the organisation was an even more local affair. The first form of organisation was the Eastern District Landlords' and House Factors' Association in Glasgow. In December 1865 the Directors resolved to extend all over the city of Glasgow and adopted a new name in keeping with their extended role - the Glasgow Landlords' and House Factors' Association. In the decade that followed much work was done on very specific issues. For example by the prior Police Act 1843 section 243, the police were entitled to deal with clandestine removal of furniture by defaulting tenants, both by day and night. This was a way of defeating the landlords' major means of getting actual payment of unpaid rent through sale of the tenant's household goods. This right of hypothec was the major cause of the "moonlight flit" as a means of preventing the landlords exercising his right by displenishing the subjects and leaving nothing for

the landlord to realise. This role of the police force was removed in the Glasgow Police Act of 1862 but following the exertions of the Association it was restored in the 1866 Act.

Much of the work of the Association was directed at the legislators both in the form of deputations and petitions. Typically in 1870 deputations from the Association were sent to London to oppose the Arrestment Abolition Bill. This was only partially successful in that an upper and lower limit of 20/- per week was fixed limiting arrestment of wages below this sum. The problem here was that the legislation aimed to control extortion by credit shop-keepers of the working classes but incidentally weakened the recovery possibilities of landlords. On the management side, the sign of true professionalism was introduced in a fixed scale of charges which was universally recognised and adopted for the management, sale and purchase of property.

In 1875 a new Association was formed solely for House Factors[520] and for the next forty years the two groups went their own separate ways organisationally. The Association was renamed the Glasgow Landlords' Association and the house factors took the name the Association of House Factors in Glasgow. However, on many issues they worked closely together even to the extent of having a

joint bank account in addition to their individual association accounts. The first major issue on which they co-operated was the amendments made in 1878 by the Police Board of Glasgow to the existing building regulations. The two Associations along with the Faculty of Procurators, the Glasgow Institute of Architects and five affected landowners objected and a five day enquiry before a Sheriff was heard. After the recommendations of the Sheriff the amendments were withdrawn by the Town Council.

Throughout its history the objects of the Association remained constant along with the relatively low subscription of 5/- per annum or £3 for life membership

> "to resist all attempts at unequal or unjust taxation of house property, to endeavour to remove the burdens by which it is at present unfairly oppressed to give mutual advice and council (sic) in cases of difficulty, and generally to take cognizance of all legislation affecting house property." 521

To these ends the Glasgow Landlords' Association was organised on a Ward basis. In each of the city's geographical wards there was Committee with a Chairman and four members whose specific job was to spread the message of the Association and to attract new members. The policy making body of the Association consisted of the President, two Vice-Presidents and a proportion of

the elective directors. This Committee met every two months and determined general policy lines as well as responding to specific issues as they occurred. This took the form of press statements or even the calling of a General or Public Meeting or Conference. The office bearers tended to have a strong element of continuity as well as high public profile. Typically the President during the latter part of the nineteenth century for over twenty years was one man, Bailie John Dansken.

In January of each year from their inception, the Association held an Annual General Meeting to which members were invited as well as any members of the general public interested in property rights protection. These seemed to have been exercises in proselytisation in that there is no evidence of contentious internal disputes cropping up at any of these meetings. In addition to a summary of the work of the Association over the past year and a half in the Directors' Report the discussion ensuing seems to have been limited to the floating of possible issues in the politest manner possible. The issue of the early sending out of missives which occurs from time to time in the Minutes of the Annual General Meeting was an example of business-like decorum.

This seemed to reflect the limited range of issues on which it was felt that the Association could usefully campaign. It was purely a voluntary organisation to which many landlords and property owners did not belong as we can see from the "membership drives" which recur throughout its early history. The response, thus, to the problem of early missives was one of sympathy but a statement that such matters were beyond anyone's control in a free market for rented property.

During the 1880's the major concern of the Association seems to have centred around the question of taxation inspired by the revised City Improvement Scheme of 1880 which was initially posited on the basis of owner-financed taxation. In response, as well as lobbying and organising meetings against such a scheme, the Association, in conjunction with the Association of House Factors in Glasgow had prepared and printed a pamphlet which was the first of a series of Occasional Papers entitled "Taxation in Glasgow". The broad principle of the first Improvements Scheme, financed by an occupier rate, was adopted in the event to the applause of those attending the eighteenth Annual General Meeting in January 1880.

This was a buoyant time for the Association. Its membership doubled in 1880 from the 1879 level

and went over the five hundred mark. The kinds of peripheral issues which the Association took up covered such diverse topics as the high cost of property adverts, the ever present missives and vandalism - attributed to a low level of policing and ineffective prosecution policy. A harder line was advocated against this problem which occurred "chiefly in working class localities" in a joint Memorandum to the Lord Provost from the Association and the House Factors. Although the Association seems to have been active and successful in many of its avowed goals it was run as a low cost "response" organisation rather than an extensive innovator. Annual receipts over the last quarter of the century hover around the £100 mark and outgoings never exceeded these. For the year of 1881, for example, we find income of £99, expenses of £95 with a reserve of £55 and a joint account with the House Factors of £91. In view of the lobbying of members of Parliament and promotion of the Removal Terms Act 1881 it seems likely that much of the personal expenses involved were borne personally by the active members.

One feature which we find a recurrent feature of the work of the Glasgow Landlords' Association was the holding of Conferences for all the kindred associations on matters of general concern to all

their interests. One such we find in September 1885 with delegates from Greenock Landlords' and Factors' Association, Paisley Property Protection Association, Dundee Factors' Association, Govan Landlords Association, Wishaw Landlords' Association and House Factors' Association, Partick Landlords' Association as well as the Association of House Factors in Glasgow and the body who initiated the meeting, the Glasgow Landlords' Association. [522]

Three themes were under discussion which was aimed "to have the views of the different Associations". The most pressing matter was the proposed General Police Bill which was threatened to be reintroduced. Although many of the amendments of the Glasgow Landlords' Association had been conceded there were still some outstanding issues such as maintenance of footpaths and sewers by owners and the liability of landlords for rates of small houses or where leases were for less than one year as well as for cleansing the interior of such small houses.

In addition a decision on the liability of unoccupied property for poor rates seemed to cause some problems although it seemed that there was no clear issue stated by the Second Division on the principle on which the Secretary of the Board of Supervision had based his policy statement in a letter

to the Inspector of the City Parochial Board of Edinburgh. What seemed to be of concern was that in the case in question there had been no full argument owing to the lack of finance of the complainer. In discussion, it was urged that, if need be, a test case should be brought out in the Supreme Court.

So far as the remaining matter was concerned, local taxation, the policy of tax on income not property, was discussed and embodied in a resolution of the Conference. There seemed to be considerable confidence on this issue as a result of the success of the campaign over the years, chiefly by the Liverpool Land and House Owners' Association, in getting this policy adopted by the political parties.

Apart from the specific property goals of the Association, we can gain an impression of its general orientation towards social policy from one of its activities in 1881 in connection with the Free Education (Scotland) Bill. The Association opposed this with a petition to Parliament and lobbying M.P. s at Westminster. Their objections were centred on cost and within a particular view of the social process

> "(the) Free Education (Scotland) Bill is premature and quite uncalled for ... were this bill passed ... it would extinguish the

> private schools which even now find it hard to compete with the public schools ... it is known that of the children in attendance at the public schools the most irregular are those whose education is free ... the passing and adoption of this measure would go far to destroy the spirit of independence in all classes." [523]

Apart from local recruitment drives, there was a widespread expansion during the decade of "kindred associations". In 1881 seven of these were formed and by 1888 we have eighteen Associations in existence in Scotland. [524]

The Alloa Landlords' and House Factors' Association

Ayr Landlords' and House Factors' Association

Dundee Landlords' Association

Dundee House Factors' Association

Association of House Factors in Edinburgh and Leith

Govan Landlords' Association

Middle Ward Landlords' and Factors' Association

Hawick Landlords' Association

Inverness Landlords' Association

Johnstone Landlords' Protection Association

Kilwinning Landlords' and House Factors' Association

Landlords' and House Factors' Association of Kirkintilloch

Partick Landlords' Association

Paisley Property Protection Association

Rutherglen Landlords' and House Factors' Association

Stirling Landlords' and House Factors' Association

Wishaw Landlords' and House Factors' Association

The actual goals and constitutions of the various Landlords' Associations appear to have been on exactly the same lines judging from the Paisley and Airdrie Associations.[525] Some of the Landlords' Associations do not appear to have led very active lives but rather reacted to the level of local business and with organisations, leaving policy to Glasgow.

The Paisley Property Protection Association was formed in 1882 and its objects were

> "to resist all attempts at unequal or unjust taxation of house property, to endeavour to remove the burdens by which it is at present unfairly oppressed, to give mutual advice and counsel in cases of difficulty, to protect its members from any unjust infringement of their rights, and against bad tenants, and generally to take cognizance of all legislation affecting House Property." [526]

The Association seems to have been a somewhat pragmatic affair with a floating subscription levied at the rate of 1 shilling for each property not exceeding two storeys and 6 pence per storey additional for more than two storeys

> "The Contribution is not to be an annual one, but a contribution is only to be asked from time to time as the demands on the funds may require." [527]

Indeed when the Guthrie Committee took evidence on houseletting in 1906 the then Secretary thought that the Association had been in existence for about 10 or 12 years.[528]

For their part, the Partick and Govan House Factors Association had come into existence due to agitation in 1887 by tenants for the provision of one month's notice to tenants who had to move.[529]

As indicated the large Liberty and Property Defence League was founded at this time in England and its founding year in 1882 the Association took out a 5 guinea subscription. With its rapidly acquired membership of some 300,000 and Westminster headquarters was in a healthier position to oppose general incursions on the rights of property through national legislation.[530]

In its main work of opposing any local control through legislation - as for example the 1882 Police Bill - the Association opposed anything which would result in additional expenditure generally. In 1883 we find them successfully resisting a scheme to purify the water of the River Clyde with "enormous sums of money and consequent heavy taxation ... thereby saved to the city". Their whole philosophy seems to have been based on a simple premise that if it cost any money it should be opposed. In addition, we get

hints of a laissez faire, liberal ideology in the Association in remarks on a Bill to enable Sanitary Inspectors to examine all properties in their area. The President put the matter thus

> "I think you will agree with me that it carried the principle of State intervention to an absurd extent ..." 531

The Bill was withdrawn. In the same vein the Trespass (Scotland) Act 1865 was "reactivated" in Glasgow after it was discovered that the police were extremely unwilling to interfere in the disputes between landlords and the occupiers of their property, in the Glasgow district, unlike their Dundee and Edinburgh colleagues. 532

Despite the relatively limited financial resources which were apparently available, the Association employed a Law Agent from 1885 onwards whose work was directed mainly at the Parliamentary threat to property rights.

> "Arrangements have been made with Hansard for the transmission to us of all Parliamentary Bills at the earliest date; these are forthwith examined by our law agent, who reports the result to the directors for their guidance." 533

This particular form of monitoring expanded greatly during the 1880s with such Bills and the Parochial Board (Scotland) Bill, Glasgow Police Bill,

Burgh Police and Health (Scotland) Bill, as well as proposed new railway and subway schemes and local taxation alterations and the broader issue of the "Land Question" in the year of 1886, for example, some 596 Bills were considered by the law agent, James Murdoch. [534]

The contentious nature of much of the work on which those with property interests to protect were embarked, was reflected in the attacks made on the Association and its goals even by members of the Sanitary Department. [535]

(b) Housing Policy

The general reaction of the Landlords' Associations to the question of housing and the poor was to deny that there were any problems. The only blemish might be some tenants.

The clear backdrop of the operation of the market could be seen in the confident prediction of early 1885 where levels of rents are related to the supply of houses.

Looking at the diminution of empty houses between 1880 and 1885 from 13,000 to around 6,500 the Association's President took an optimistic view for the future year

> "If they took into consideration the natural increase of the population there was a prospect that in the near future houses would be generally taken up, and then there would be some chance of an increase of rent." 536

The response of the Association to the Royal Commission on the Housing of the Poor was one of injured pride since the Commission determined not to hear evidence from bodies such as the Association and the House Factors. A joint letter was sent from the two bodies to the Chairman, Sir Charles Dilke warning him of the possible unreliability of evidence concerning Glasgow without the benefit of the Associations balancing any evidence tendered to the Commission and subjecting testimony to cross-examination.

Apart from sounding this broad warning, the Associations were concerned in their letter to indicate the effectiveness of the City Improvement Trust in clearing the worst housing, without leaving the displaced population short of housing. The same went for the railway demolitions of the 1860s and 1870s when

> "The houses which were demolished were in great part hovels - the hot-beds of disease, the refuge of crime, the haunts of misery." 537

The provision of housing for those displaced by these various schemes, was described as unproblematic by the Associations, based on the existence of a surplus of housing above population

> "During the whole period of the Improvement Trust's operations there has been ample dwelling-house accommodation. From 1866 to 1873 - the first seven years of its operations - the annual average of unoccupied buildings within the city amounted to 2,000, according to the official returns; and the number has been steadily on the increase, owing to the excessive number of buildings which have been erected." 538

No mention was made, however, of the size of these empty properties and their condition and suitability for occupation. The problems, if any, then, were not through lack of housing. Nor were they relevant to the majority of tenants

> "The majority of ... houses are inhabited by the independent and self-supporting working classes, whose social economy in the mangement of their houses is satisfactory alike to the landlords and to the sanitary authorities." 539

The problems arose in another quarter and could be explained in terms of personal deficiencies of the sub-class

> "... the remainder are occupied by tenants of a lower class, who are intemperate, filthy, and destructive in their habits. They neither appreciate cleanliness nor convenience. They are unsettled in their occupations, and their continual migrations from place to place give them great facilities for escaping payment of their debts or implementing their obligations; indeed the great bulk of them are habitually on the move, for the express purpose of escaping from their obligations of all kinds, old and new. Over this dirty and improvident class the landlords have little control, and the sanitary authorities don't seem to care actively to interfere in regulating their conduct." 540

Since these difficulties stemmed from the pathological character of the tenantry of the lower section there was nothing which the landlords could do except be allowed to move them on in the event of rent failure or nuisance. The good tenants would benefit from such a change

> "The housing of the well-doing poor would be greatly facilitated by an amendment of the law, so as to enable landlords to remove expeditiously and inexpensively tenants, who can prove to be a moral and physical nuisance to the neighbourhood." 541

The burden of this account of the pioneering slum clearance of Glasgow and the rehousing situation and the problems stemming from the lumpenproletariat were the reasons why the Associations advocated a policy of no change

> "Our Associations, after carefully considering this question in all its aspects, are unable to discover any plea upon which additional buildings for the humbler classes could be erected in Glasgow either by the State or private enterprise." 542

This kind of State intervention which was deemed acceptable was certainly not of an entrepreneurial nature but rather of a strict social control nature

> "... State interference in such a matter (building - PR) we consider to be uncalled for and impolitic. Under the existing law there are ample powers vested in the authorities to prevent the continuance or creation of insanitary dwellings; but the

> health of the community, and the comfort and amenity of populous neighbourhoods, will never be preserved till power is given to actively interfere with, and control tenants of filthy and abandoned habits." 543

(iii) Marketing the Landlord

In the year when the Royal Commission on the Housing of the Poor was gathering data, the Association emerged with what seems to have been a preemptive strike at critics. At their Annual General Meeting on 21st January 1885, Ex-Provost Dick explained the fundamentally beneficial impact that the Association's policies had for all classes

> "He supposed the tenants of the city would imagine that the Association met from time to time for the main purpose of devising how they should increase the rents, and how they should fight them; but he thought, from the reports submitted that day, and from the whole proceedings of the Association, it might almost be a joint meeting of tenants and proprietors (Hear, hear). The main object of the Association was to guard the interests of property occupiers as well as property owners (Applause)." 544

Quite how Ex-Provost Dick reconciled the major concern of the Association in attempting to make all rates occupier bornerather than related to ownership with the benefit of tenants, was not at first apparent. But the Ex-Provost went on to elucidate

> "All the bills that were promoted affecting house property affected occupiers as well as owners, because it had hitherto been the rule to put all taxation upon occupiers

> and owners of house property. That was an injustice which he thought both classes ought to try to remedy in future legislation." 545

His colleague, Councillor Gardiner, supported this sentiment and also sought a rapprochement with the tenantry wishing to clear up the apparent misconceptions which had been picked up about the Association

> "He expressed a hope that the tenants would see the Association, instead of concocting some scheme of clearing themselves of taxation and throwing it on the tenants, were doing quite the reverse. They wished on the contrary, that taxation on property should be reduced as a whole, and placed on all kinds of income. That point was a good deal overlooked by the tenants, who seemed to think that the sole aim of the Landlords' Association was to get large rents and have as little taxation as possible ... their aim was to equalise taxation, rather than shift it from one class to another." 546

In view of the work of the Association on Parliamentary Bills, it was not entirely surprising that the Association had projected this image of minimal outlay at all costs rather than diffused benefaction to all classes. The response to their earlier policies certainly seemed to have moved the policy of the Association from their adoption at the beginning of the 1880s of the notion of occupier borne local taxation to a system of "Assessment according to Income".

At the end of 1887 in a Memorial from the Association to the Government at Westminster, the

policies embraced the notion that the raising of money for local purposes should be

> "... by an assessment on nett income from all sources, no matter whether the income is derived from the ownership of real property, or of personality, or from the exercise of a profession, trade, or other occupation, or from filling an office, or receiving a pension, or from labour. Let each person's income be rated according to its amount, as the only fair and just mode of contributing to the burdens imposed upon society." 547

This radical move to income taxation with its potential for redistribution, was less surprising when one reads in the same Memorial the relationship between the landlords and capitalists as perceived by the Association

> "The incidence of Local Taxation is in many cases, exceptionally unjust. For example, the occupants of warehouses, shops, or hotels, are assessed on very large rents, while their individual income may be really very small. A man may be called on to pay rates on an annual rental of, say, £2,000, and his income may not actually amount to £500; while a capitalist with an income of £10,000, may only pay on an office rent of £100. So, also, in the case of dwelling-houses, this principle is most inequitable; it is no test whatever of a ratepayer's ability to pay. He may have a small income, but he may have a large family, and require a large house at a corresponding rent, and be obliged to pay accordingly." 548

Here we can see a clear division within the property owning classes with competing interests, where the state was more than a minimal nightwatchman

one and involved regulation on a modest scale. The landlords, acting as a fraction of a class moved from an earlier solution of sharing the burden or even offloading it "downwards" on tenants. They shifted their strategy against those in a closer social station to themselves but with different interests on matters of detail. This divergence of interests between fractions of the dominant classes was to have its crucial impact at the beginning of the Great War. We find a conflict between landlord and capitalist. The resolution of the problem of working class unrest and workplace militancy triggered by dissatisfaction over the operation of the housing market on Clydeside and other industrial centres, was made in 1915 in favour of industrial production and specifically <u>against</u> the landlord.[549]

This, of course, ties in with an analysis of exactly who it was that the Landlords' Association represented. It would appear that the Association was classically "petit bourgeois" in composition and aims although many of their goals were shared by the larger investinglandlords who did not involve themselves with the Association.[550]

In January 1887, the Association defended their policies as being aimed for the general public welfare rather than being simply to protect their own

interests. In their activities it was stated that

> "not a single Parliamentary measure has been criticised or affected in any way by the Landlords' Association in a manner detrimental to the tenants' interests; 551

Not content with this notion that their goals have been general rather than sectional, the President continued

> "... in fact, although the Landlords' Association had had a very considerable influence on the legislation of the country as affecting property every one of the Bills opposed might as well have been opposed by an association for the defence of tenants' rights as by the Landlords' Association (hear, hear)." 552

This was expressed so forcefully for specific reasons related to the criticisms to which the Association had been subject over the previous period

> "... he was aware from the reading of reports of certain public meetings that had been held throughout town, that a very considerable amount of misconception prevailed regarding the purposes of their Association." 553

This defensive posture was echoed in the following year when the positive aspects of the Association were stressed in the Directors' Report to the Annual General Meeting on January 18th 1888.

> "The Directors believe that sanitary dwellings should be provided for all classes of the community." 554

What they are opposed to seems to be this state of affairs coming about as a result of some form of compulsion on property owners. It is never entirely clear, apart from the inference that the market will deal with unfit dwellings, quite how sanitary policy was to be advanced. Given the apparent relationship between trade fluctuations, wage levels, consequent ability to pay and rental levels and return on property investments to houseowners, these connections were ignored. The problem could not be dealt with by regulation by local or national state according to the Directors

> "... they conceive that over-legislation on this point would be dangerous." 555

It is not entirely clear what form the "danger" is to take and to whom except by inference again. This address concludes

> "THE INTERESTS OF HOUSE OWNERS NEVER STOOD IN GREATER NEED OF BEING SAFEGUARDED" 556

With this in mind, a number of members of the Association were appointed to the Commission to enquire into the Housing of the Poor in Glasgow set up by the local governing body of the Church of Scotland, the Presbytery in 1888. 557

From 1890 onwards until the Great War, the records of the Landlords' Association do not appear to have survived and one must rely on reports in the Press of their meetings and interventions as well as their submissions to such bodies as the Presbytery Commission on Housing in Glasgow and the Municipal Commission. Their officers, membership and goals continued constant during this period.

The main concerns in the last decade of the nineteenth century centred around both minor innovations at the purely local level as well as the question of taxation of land values.[558] Whilst continuing their opposition to expansion of Improvement Trust activities in Glasgow, the Association were concerned with such matters as a proposal in 1899 to put half the cost of stairlighting on the owners of property. As far as the various Cross Bills on shortening lets were concerned, these were regarded as "extraordinary and uncalled for".[559]

Landlords, though, felt that they were ill done by in their public image and they welcomed the idea of a Municipal Commission into the housing problem which would allow a searching examination into the provision of houses. This, they felt would vindicate their view that the problem was more likely the people than any shortfall of houses. They were, however, less than impressed with the strong

Corporation presence on the Municipal Commission and noted that there was not a single member with practical knowledge of small dwellings.[560] The feeling that the wrong impression was given by their title led the landlords to change their title in 1907 in line with their lower profile up until the Great War which signalled the beginning of their decline as a source of housing.

Instead of being known by the explicit title of a Landlords' Association, it was determined in October to adopt the name the "Glasgow House-Owners' Association". The explanation for this change after some four decades under the banner of being landlords was a

> "desire to appear under a more accurate and appropriate name and to become a more effective means of defending the legally acquired possessions of the members ..." [561]

The Directors explained that the term landlord more generally referred to owners of great tracts of agricultural land or to the owners of public houses at least part of which group attracted odium to the whole concept of a landlord. Accordingly

> "the trader in tenemental property cannot with accuracy have the highsounding and unpopular designation applied to him." [562]

This change of image was seen as important in the light of the more general nature of the movement throughout the country and the overall policy of opposing municipal socialism. Clearly the broader the designation could be pitched, the more members might potentially conceive themselves as coming within its ambit, whether or not they were involved in the trade in houses or were simply holders of small blocks of property. As a tactic this was a clear success, as was reported in the following January at the Annual General Meeting where an increase in membership of some 140 members followed the name change. [563]

(iv) The View from Below

When we come to discuss tenants and their effectiveness during this period we are dealing with an invisible social group. We do not find any permanent grouping or organisation of tenants throughout this period. We do not find any well publicised Occasional Papers or Annual General Meetings with published Minutes. Instead we come across occasional references to apparently *ad hoc* organisations which appear for a single issue or campaign, and then disappear. This is not to say that these groupings were not effective. [564]

The difficulty of a permanent organisation as opposed to a campaign is a feature of the weakness

of current consumerist movements. It "works" when there are two sides with some form of bargaining emerging from their symbiosis. The problem was broadly summed up by Karl Renner in a parallel context, discussing the absence of choice that Labour had within a capitalist political economy

> "The employment relationship is an indirect power relationship, a public obligation to service, like the serfdom of feudal times. It differs from serfdom only in this respect, that it is based upon contract, not upon inheritance". 565

This same lack of conviction in the enterprise at stake is one which has also occurred in relation to the "poverty business" and the legal services movement in Britain in the nineteen sixties and particularly nineteen seventies. Here, in the latter part of the nineteenth century, not only was there a preference for reform of housing through control of political institutions but unlike more recent advocates of the 'political way', when this was practiced, in the era in question it had the benefit of being a novel procedure. The notion that numerical strength could be translated into political power, which in turn dissolved economic and social power was untried. Campaigning for the Independent Labour Party or the British Socialist Party was the more obvious approach for the activist concerned with conditions of labour

both living and working, rather than organising the tenantry.[566]

However, we do find that on specific issues they formalised themselves into associations. Their nature was in the nineteenth century essentially transitory and evanescent. Exactly the same sorts of features obtain in the latter half of the twentieth century.[567]

Within an essentially action-orientated movement, the importance and value of leaving permanent records of the existence of the movement and its goals and aims is suborned to the day to day "problems" faced by the organisation.[568] This has at least two important implications. It means that at a later date, research "back" into such a movement is less than straightforward. Much of their work though may not be visible at all particularly, if it involves obtaining informal "successes". Successful 'tactics' were not the sort of thing which would necessarily appear in written history.[569]

One early example we have of tenant activity in defence of their position comes from Edinburgh in 1860.[570] On 15th July 1858 a public meeting was called by a jeweller, Thomas Marshall, in Buccleuch Street Hall to express the feelings of working men on the overcrowded and uncomfortable nature state of their

dwellinghouses. That meeting appointed a Committee to investigate and report on the whole subject which was duly done by September 23rd of the following year. The Committee was strongly artisan in its composition as was their conception of the housing problem. The Committee members consisted of men from largely well established "trades". Thus, although their report which was published in 1860 was described as a Report of a "Committee of the Working Classes of Edinburgh", this Artisan Committee membership must be borne in mind. In addition in their "market research" which is reported in an Appendix to their Report they obtained the views of individuals in some 500 properties covering such occupations as engineers, coachbuilders, glassblowers, glasscutters, brewers, plumbers and other trades. In addition the levels of rents which were indicated vary from £6 to £20 a quarter which indicates housing well above the "problem" dwellings which were largely the concern of the sanitary authorities and reformers.

571

The actual report itself noted the significance of concern for the lower orders at this time but is situated within a recognition of the "facts of life" of profit-based private property enterprise. Thus, there is a concern throughout to work within lines that would appeal to those realists who hoped to obtain

investments

> "to yield as profitable a return as any other description of property." 572

The whole report rested on a scepticism about the long term future for any system resting on the philanthropic whims of those with property

> "There exists in our day such an amount of benevolence and charitable feeling towards the lower classes of society, that many wealthy and benevolent persons will subscribe for such objects without expecting any return ... this principle - can never be lasting." 573

Although talking mainly of the artisan section of the working class, the Report was concerned to reject the association between poverty and moral degradation which featured so strongly in the writings of the more dominant moral entrepreneurs. The Committee

> "... do not conceive that, because a house is humble, perhaps poor or even squalid, it is necessarily a hotbed of profligacy and criminality.' 574

This streak of objective realism contrasted with the crude typologies offered by most other writers, based on the inherent character defects of the lower orders and even discussed the "bad side" of working class tenants as opposed to their more refined neighbours

> "It cannot be concealed that the majority of working people are not the best description of tenants." 575

The cause, though, is ascribed to factors other than the purely personal and relate to the objective circumstances of working class life

> "They are subjected to uncertainty of employment; to irregularity in their payments, proceeding from illness, or other incidental circumstances; while it must be confessed, they are more destructive to property than the class above them, arising from their frequent removals, and from the greater number of their children." 576

In line with this "realistic" approach, the proposals of the Committee did not attempt to challenge the dominance of private enterprise but suggested an Edinburgh Association for Building Houses to the Working Classes offering a proper return. 577 Even though they were concerned at the state of housing, generally, they did conclude that stoical acceptance of such conditions was the order of the day

> "... there is ... exhibited the patient endurance which those who know the working classes best will alone give them credit for." 578

But there was hope for the future indicated in both their survey report and their conclusion as to working class tenants

> "The pleasing fact is also discovered that they are fully alive to their position." 579

In some sense the hopes of the Committee were realised. In Edinburgh the subsequent activities of the Edinburgh Co-operative Building Company and the Edinburgh Workman's House Improvement Company provided some housing for aspiring artisans in the second half of the nineteenth century, although this affected the living conditions of less secure sections of the working class only marginally. Building for sale was well beyond their reach.[580]

The matter which did engage the energies of tenants and local Trades Councils was not so much the physical condition of housing in Scotland but rather the problems which emerged from the nature of the contract and its timing and obligations. As the Minutes of the Glasgow Landlords' Association and Trades Councils in the West of Scotland at Glasgow and Paisley indicate, this issue simmered away for many years before the final appointment of the Guthrie Committee in November 1906. One aspect of the grievance, which was highlighted in evidence to the Guthrie Committee, came from George Kerr of the Partick Labour Representation Committee[581]

> "... a workman is often tied to a house for twelve months which is not very suitable; it may be draughty and damp, and this grievance would be rectified by shorter lets. The people would require to be provided with better houses or they would remove to where they could get better houses. These are the cases which never

actually come to statistics of removal, because they grin and bear it. They have to." 582

William Kelso summed up the whole missive question most succinctly when addressing fellow Sanitary Officers

> "... the system prevailing in Scotland is that of yearly lets, and the houses generally have to be signed for three or four months in advance. The principal or removal term is 28th May. Of course, there are a number of houses let under a voluntary system of monthly lets, but as a rule this applies to the poorer or cheaper class of small houses. So many and great have been the hardship to tenants occasioned by requiring to take a house for a year - and so long in advance - that an agitation has been going on for years to get shorter or monthly lets recognised by the Legislature, instead of being merely voluntary, or at the option of the owners ..." 583

The problem for tenants centred around labour mobility and the need for those whose employment and health could not be guaranteed, to be able to adjust their expenditure accordingly. 584

The formation of the Paisley Tenants' Protection Association in 1901 was specifically spurred by the proposals of the Landlords' Association to make tenants send in their missives at Whitsunday. 585 This agitation for shorter lets to suit the payment and work patterns of the tenants was the main cause of agitation and organisation by tenants groups in Scotland in the first decade of the century.

Thus we find nationally attended meetings on this topic in Glasgow in September 1902 and February 1904 as well as local organisation and negotiation. The Glasgow Tenants' Protective Association, formed at the same time, explained the limited nature of both their goals and tactics. When asked what led to the formation of the Association the Secretary and Treasurer, Andrew Baillie explained

> "Just public opinion, people having a grievance and the only constitutional way we had of bringing it before the powers that be." 586

The membership of these organisations was not great - the Glasgow Association claimed around 1,000 members. At Paisley their membership included "16 members of the Town Council, one or two ministers and some landlords who are in favour of shorter lets and we have members down to the lowest working class". 587

Over the years the flag of the tenants had been carried by the M.P. for Camlachie in Glasgow Alexander Cross. He brought in Bills to provide for shorter lets in 1894, 1897, 1898, 1900, 1905 and 1906. As he explained to the Guthrie Committee

> "in the years ... I did not bring forward the Bill, I was largely influenced in not doing so by the hope of an amicable settlement through the Landlords' Associations." 588

The issue continued to dominate landlord and tenant affairs up until the Great War. When one examines the deliberations of the Paisley Trades and Labour Council, the only issue in connection with housing which exercised them in the period after the Guthrie Committee Report was the question of missives.[589] When a communication was received from the Workmens' National Housing Council, "urging increased activity in the matter of housing of the people" in June 1911, no action was taken beyond an inconclusive discussion.[590] At the parochial level, even, there was little enthusiasm for taking up housing issues with the local authority. On a complaint of lack of activity by the Sanitary authorities in the town, the suggestion that the Secretary write to the Sanitary Inspector was rejected in favour of an indirect approach to the local M.P.[591] Again despite receiving copies of the Housing Journal and further calls from the National Housing Council urging the Trades Council to pass resultions regarding grants for housing, no action was taken.[592] Nor was any interest taken in the offer from Fred Knee to lecture at any indignation meeting which might be held in Paisley protesting against landlords' actions.[593]

The significance of the missive question can be seen from the formation of a joint working body consisting of the Trades Council and the Tenants Defence Association. This overshadowed the work

of the Standing Committee on Housing which had been charged with the work of considering schemes for municipal housing in early 1912[594] but which did not report before the outbreak of War. When the Convener of the Housing Committee offered to address the Trades Council on municipal housing a direct negative was successfully moved.[595] Instead throughout the first half of 1912 there were meetings and discussions with the Landlords' Association as well as labour bodies on the implementation of the 1911 Act. There was even an "indignation meeting" held to press this point, to which a motley group of representatives of tenants were invited, ranging from Trade Union branches in Paisley, the I.L.P., the B.S.P., the United Irish League as well as the Orange Lodge. They were all included in the platform delegation.[596] Despite the organisation and enthusiasm of the various parties, the campaign appears to have been unsuccessful due to what the Joint Committee's reporter described as '"blacklegging" of one tenant upon another'[597] and the Joint Committee was wound up at the end of April 1912 without even objecting to the level of commission sought by the house factors for collecting the rates for houses under the 1911 Act.[598]

The Tenants' Protective Association like the Trades Council concentrated on the missive question

rather than on wider issues for a considerable period. There was an indication of their overall goals in the year after the implementation of the House Letting and Rating Act in the autumn of 1912. Their seal of approval was available, they indicated, to those candidates in the local elections supporting amongst other minor items

> "(1) ... the quarterly collection of all rates in "cumulo" the same to be paid to the Municipal office (2) the erection of workmen's dwellinghouses by the Corporation and (3) the Corporation taking charge of the stair-lighting and the cleaning of back-doors the same to be charged on the general assessment." 599

Glasgow Trades Council, for their part, reflect a similar kind of approach to housing matters over the years. The issue is mentioned in connection with the "missive question" when a constituent body passed a motion urging the Glasgow Town Council to press ahead with a Bill to abolish yearly lets and substitute one month's notice on either side to terminate. 600 In the following year a sponsor for the appropriate Bill was found in Alexander Cross. Although the Bill failed to succeed the Council noted

> "that committees have been formed in different parts of Scotland by householders in order to carry a remedial measure. It may also be said that the landlords and house-factors of Edinburgh, becoming alarmed at the agitation have consented to make the date of retaking houses the 16th of March

instead of the 2nd February, as at present." [601]

The following years saw the same issue dominating the housing concerns of Glasgow Trades Council. [602] At the beginning of the twentieth century, the perspective broadened out somewhat with the Glasgow Trades Council initiating a Conference on the Housing of the Working Classes with representatives of the Land Nationalisation Society, Trades Unions, Co-operators and other Trades Councils.[603] This resulted in the setting up of the Housing Council for Scotland composed of representatives from Trades Councils and Co-operative Associations. This was to be led by an Executive of twelve - six from the co-operative movement and six from Trades Councils.

The extent of the significance of the housing issue may be gauged from a demonstration organised by the Trades Council in support of the request by Glasgow Corporation for £¾ million for building of working class houses to let at moderate rents. This demonstration attracted some 25,000 people on a Saturday afternoon on September 2nd 1902.[604]

For the rest of the first decade of the century the extent of the unemployment problem appears to have overshadowed any broad strategic work which the Housing Council may have undertaken and housing is only mentioned again in the context of the reform of

the missive system. [605]

Although the broader view was taken by labour organisations and political parties of the working classes, their discussions tended to centre on the question of the extension of municipal housing rather than the reformation of private rented housing.[606] This applied both north and south of the border and to the Workmen's National Housing Council as well as the National Housing Reform Council. The latter body favoured co-operation as the method of solving the housing problems of the working classes. The Workmen's National Housing Council drew its support from a more radical base with its leadership involved in the S.D.F. The organisation was founded in 1898. [607]

It was a federation of Labour Organisations including Trades Unions, Trades Councils and Co-operative Societies, whose basic object was the provision by public authority of good houses for all the people. It sought to do this through legislation, with a special emphasis on the poorer section of the working classes. In addition, it urged local authorities to use their existing powers for building houses with a greater sense of responsibility as regards slums. One of its problems, though, was that it suffered from limited financial support

> "With an average income of less than £200 a year Council has had a great effect in arousing the interest alike of politicians, Government officials and the public, in the problem of better housing of the people as a whole." 608

This level of income was the subject of a stern admonition in one of the Housing Council's pamphlets. Talking of the "chronic poverty of financial resources ... being altogether inadequate for the work requiring to be done", the authors explained

> "The affiliated bodies, some of them, pay at a rate of a penny per head per annum; all, however, are not so generous. Some private sympathisers occasionally encourage us with donations, and more would be welcome." 609

Although they were a nationwide body as their literature stated, they extended only as far north as Carlisle.[610] During their effective lifetime up until the Great War, the Workmen's National Housing Council succeeded in keeping the issue of housing a 'live' one in British politics, although their precise impact is not easy to assess. As A. S. Wohl notes, it tended to be inward looking after its initial sallies into politics and never achieved anything like a mass following or high profile as an organisation of moral entrepreneurs.[611] David Englander in his work on the Council suggests

> "Its policy was designed to place high quality municipal housing within the reach of all primarily through the elimination of the profit motive governing the financing of housing programmes. After 16 years of ceaseless agitation none of these objects had been realised though some progress towards them had been made." 612

Its apparent parallel counterpart, north of the border, the Scottish Housing Council, was formed in 1900 under the auspicies of the Glasgow Trades Council. Its work, again, does not appear to be well documented but those instances of its work and the attention paid to Scottish housing from the turn of the century until the Great War and beyond into the Rent Act introduction, seem to imply that it operated more closely in connection with organised labour than the Workmen's National Housing Council. Until the start of the War, though we find little done by the Council at a national level, although a number of local Housing Councils were set up in places like Greenock. Significantly, for the situation, in 1915, separate organisations were set up in Glasgow and Partick by militant women on the housing issue, whose demands were of a more radical nature. The extent of their work did not become fully apparent until the outbreak of War. In 1914 we find them writing to Glasgow Corporation with demands for the institution of "fair rent courts" and requesting the Corporation to proceed with providing housing for the working classes. These

requests were passed on to a Special Committee of the Corporation dealing with employment during the "present crisis".[613] Effective national organisation in the form of Scottish Labour National Housing Council, did not come until 1918.

Thus, when Sir Alexander Cross addressed the South Govan Tenants' Protection Association in February 1913 their main concern still appeared to be the House Letting and Rating Act of 1911. There was little hint here of the riots and ructions which they initiated and which, it has been forcefully argued, were instrumental in bringing about rent control in 1915. The same sort of approach was apparent when a few weeks later Cross addressed the Annual meeting of the Glasgow and District Tenants' Association. The spirit of conciliation and co-operation to achieve limited goals which had been mentioned in South Govan, was again evident as the Association's report revealed that a joint committee had been suggested to the Landlords' Association to deal with "differences between landlords and tenants". The limitations of the organisation was seen in Cross's assurance that

> "the usefulness of the association had not yet come to an end as there were still a great many matters in connection with which tenants would need advice and assistance."[614]

It is important to note that the organisation which brought about the gains of the first Rent Act, represented a very sudden conjunction of industrial and social issues with a well-orchestrated leadership and specific goals rather than years of work towards a solution to the problems of private rented housing. This may well help to explain the form of the rent control that was introduced rather than any acceptance of the schemes of the Workmen's National Housing Council for fair rents. Work on the housing issue by tenants had for all intents and purposes assumed that the private renting of housing was beyond redemption as it embodied the "sin of landlordism".

(vii) Spreading the Word

There were a variety of effective sources to keep landlords and property owners up to date with current sanitary policy and action on insanitary houses adopted and advocated in Scotland. Tenants were also served by the interest of some local newspapers in the questions of legal practice and forensic decision-making in relation to the housing problem. The most systematic information available, came through the "trade journals" of the professionals in the field, the Sanitary Inspectorate. The daily papers also covered housing cases in the Courts and the views and meetings of landlords' associations, although the

coverage of tenants' groups was less thorough even after the turn of the century when such groups were widespread.

The availability of information on developments in both the legal position of landlords and tenants and on housing policy generally, was available in a variety of specialist papers whose appeal was reasonably general, as well as local papers. Some combined the notion of high specialisation with a strong local connection. One interesting publication along these lines was the Bridgeton Single Tax Review and Advertiser. This was a local paper for the east end of Glasgow with local news, jokes, football reports and articles. Almost every one of these articles however, was on the subject of the idea of the "single tax" advocated by Henry George.

Henry George had visited Glasgow to deliver lectures.[615] His ideas were available in regular form in the journal "Single Tax" which continued till after the Great War. Perhaps the feeling of "overkill" from reading exactly the same theme each month, determined its limited life span between September 1889 and February 1891. During its shoft life, though, we can glean a couple of interesting pieces. In an article on "The Dwellings of the People" in October 1889, the idea of fixing a "fair rent" is suggested as a way of protecting tenants in insanitary houses who have little

other choice available to them in the property market other than similar insanitary houses.[616] The notion of a highly effective and reasonably efficient practice by the Sanitary Inspectorate, was put in some doubt by the comments of local councillor, Bailie Morrison, speaking in February 1890, where he posed the question

> "Why should not the sanitary authorities be empowered to shut up houses that were instrumental in sending to a premature grave thousands of human beings and why should not the proprietor be compelled to put their property into a sanitary condition." [617]

A paper which may have picked up some of this readership in the east end of Glasgow, began in publication in 1892 and continued reporting local sporting, humourous and social events as well as a good coverage of legal matters ranging from "social security" fraud to landlord and tenant disputes. Important Court of Session decisions were reported as well as Sheriff Court ones in the new paper, the Parkhead, Bridgeton, Shettleston and Tollcross Advertiser. Typically, we find a dispute over rent payment by a tenant of dairy premises. When an epidemic of fever broke out in 1892, the local authority closed down the dairy as a precautionary measure. What the tenant complained of was that he should be relieved of paying his rent since, although the epidemic was passed, it was useless opening as his customers would not come back again. As the Sheriff put it

> "In the matter of milk, people are naturally afraid to run the slightest risk." 618

This understandable lack of confidence was clearly not helped by the death of two of the tenants own children. The decision went against the tenant since there was no question of any fault on the part of the landlord. The Sheriff sympathised with the tenant to the extent of publicly criticising the landlord and not granting him his costs

> "... although in the circumstances I cannot but think it would have been a neighbourly thing on the part of the pursuer to have practically expressed his sympathy with the defender in his misfortune by waiving his claim for this rent, I am unable to say that he is legally bound to do so ... there being no objections to the premises, I regard the outbreak of a fever epidemic and the arising of circumstances requiring the temporary suspension of the business of a dairyman was one of the risks of such a business ..." 619

At a slightly different level, information of a most detailed and informative kind could be obtained by residents of the west end of Glasgow from their local newspaper, the Partick Star. [620] Although more insular in its case coverage, this reported the deliberations of the Police Commissioners who determined Sanitary policy in great detail. The style of reporting was of direct speech on such related matters as the desirability of the applicants for posts and the need for specific

qualifications for such sensitive jobs as sanitary officers' assistants.

The range of contemporary commentaries on housing included such journals as the Scottish Property Gazette which appeared weekly and was subtitled the "Building Trades Review and Land Record". This commenced publication in October 1891 and comprised a comprehensive account of the operations of the property market. It covered such matters as the sale prices of lots of property exposed for sale at roups as well as movements in the costs of labour and materials. Along with the local interest and national news, cases affecting the landlord and tenant relationship received full coverage as well as a feature entitled Sanitary Notes, which indicated the state of health and prosecutions in specific areas in Scotland. The wider notion of housing as a problem beyond the purely economic and sectional interest of the building trade was reflected in the wide range of articles and reports on sanitary reform. The audience aimed at by the paper was extremely wide and the paper was described as

> "A weekly Journal for Solicitors, Accountants, Land Owners, Auctioneers, Factors, Proprietors, Trustees, Bondholders, Investors, Architects, Builders and Building Trades, Civil Engineers, Surveyors, Sanitary Reformers; Colliery, Banks, Insurance, Railway, Shipping, Real Estate and Financial Agents; Public Companies and Corporations, &c., &c.,"

An assessment of the state of the property market was also found dealing with the position across Scotland generally.

The Scottish Property Gazette gave something of the flavour of the local authority dealings with uninhabitable houses in their reports. In 1892 they discussed a number of cases brought under Section 32 of the 1890 Housing of the Working Classes Act. Reporting on houses which were damp, with broken plaster, roofs leaking, and ceilings broken and hanging in a dangerous fashion. There was no defence entered and the

> "usual notice was issued allowing the tenants a month to vacate the premises, after which the houses would be closed as unfit for human habitation." 621

In other cases brought again on dampness as well as sewage saturation from the Molendinar Burn, there was a request for a suspension of action by the owners. Their agent explained that they had recently come into the properties and needed time to consider what action to take. The Medical Officer countered that there was no possibility of doing the remedial work, anyway with tenants in the buildings. A compromise was reached with a closing order effective from the date when the tenants had reached their appropriate month's notice, whereafter the houses

would be closed as unfit. A combination of the sanitary approach and strict legal formalism.

Although on less ambitious lines than the Scottish Property Gazette, there is a similar wealth of information about the state of the property market at the turn of the century in Scotland to be found in a publication which commenced in November 1901, aimed again initially at the building trades. The monthly journal "Property" was described as a monthly illustrated record of the Building Arts and Crafts. Its interests also covered the problems of housing as well as aesthetic matters. The range of leader articles, in its first years covered such topics as the "Housing Problem", the works of Ruskin and interestingly enough "The Spitting Habit". This latter was prompted by the conviction of a sanitary inspector for spitting on a tramway conveyance. In addition to these articles the journal Property provided extensive coverage of the properties offered for sale by roup and the sums realised. There was extremely full information enabling any potential seller or buyer to gauge exactly how the market was moving at any one time.

This service continued as the paper changed its character somewhat to become rather more aesthetically orientated and adopt the soubriquet "The Scottish Architects' and Builders' Journal" and advertised itself as "the leading building paper in Scotland."

It was in this period that we find the earlier full coverage of legal decisions in clear concise manner had almost entirely disappeared. Thus we can see that beyond the level of organised opinion a range of professional and local information was available to investors and occupiers of rented housing. The kind of public health practice which was reported was, as we shall see, a varying and uncertain quantity for a variety of reasons.

PUBLIC HEALTH LAW AND PRACTICE

Introduction

The central feature of the period, between 1850 and the Great War, in housing, was the elaboration of a variety of statutory controls upon the standards of sanitation of both old and new buildings. Housing conditions and the provision of sufficient healthy accommodation, particularly in urban areas, were deemed objects of legislative attention in a series of Acts and a number of Commissions and Inquiries. Housing standards and the problems of rapid urban growth with a minimal service infra-structure were during this period a 'political issue'. The issues were essentially brought up and piloted through Parliament[622] or channelled to the various Commissions and Inquiries[623] by moral entrepreneurs. The statutes which they produced were 'moral' statutes owing their genesis not to pressure from below but to a combination of compassion and social imperialism.[624]

The difficulty though, for our purposes, rests not so much with the legislative and inquiry process which has been documented elsewhere, but with the mediation of national policy initiatives at local level. The elaboration of ideology at the parochial level and the specific local practice which this informed has to be seen in the context of the

novel and limited role of central Government in directing social policy.[625] It is this dimension which it is necessary to explore to see exactly what the reality was behind the paradox of legislative rights counterposed to common law rights' emasculation at the hands of the judiciary. We have seen that the superficial view of the cases involving tenants rights during this time as some sort of exercise in judicial partiality to the property rights of landlords, is not so easy to substantiate. In this section it is proposed to examine the complementary aspect of the paradox, namely the extent to which the existence on the statute books of measures like the Artisans' and Labourers' Dwellings Act[626] and the Housing of the Working Classes Act[627] and the inquiry process, denoted some clear-cut positive gains for tenants. Gains, indeed, there were in terms of the removal of a variety of insanitary dwellings and areas and improvement of sanitary conditions of dwellings but stemming from the perception of the housing problem as one of degeneration of sections of the working class. This, allied to the contagion theory of deviant individuals and groups, led to measures to fend off such processes. The goals of the moral crusaders, though, had to contend with more than simply a recalcitrant underclass. The structure of local and national government gave a very different shape to enactments and edicts from

that of the modern welfare state. This is a significant factor which needs to be examined when we look at this aspect of the apparent housing paradox in nineteenth century Scotland. 629

General

As indicated, we have a paradox in the apparent extension of rights of the public at large under statutory guidance, in the securing of minimal standards of habitability in the housing of the nation and the closing down of the effectively recognised rights of tenants at common law under their contracts. What we need to examine is exactly what changes took place during this period in both the possibilities of extended statutory legal control of housing conditions and the actual procedures adopted at the point of difficulty. Some of the elements of this prima facie paradox may thereby be clarified. It should provide a more satisfactory way of situating the judiciary and their decisionmaking within the context of their day.

One of the first things which strikes one in looking at the legislation of the period is the way in which statutes were either adoptive or local.[630] We find crucial measures which appeared at an early stage, like the Public Health Act 1867, was not obligatory on the various local authorities in Scotland and that it is not until along after its passing into law that it is to be found throughout Scotland. In addition, the kinds of response which local conditions dictated, meant that in Glasgow for example, we have a special piece of legislation enacted in 1862 on the

recommendation of their specially appointed Committee on Nuisances which dealt with such matters as not only the appointment of a Medical Officer but the institution of a direct form of overcrowding prevention - the ticketing and night inspection system.

During the period under consideration the actual mechanics of regulation were somewhat rudimentary. Administration depended on whether the settlement was urban or rural. Basically in burghs authority was entrusted to police magistrates and police commissioners. These individuals under the Police Improvement Act 1850 and the General Police and Improvement Act 1862, might not be the same as the town's bailies and councillors. This situation was altered in 1892 when the Burgh Police Act reverted to the traditional pattern of having a single authority, the Town Council. In the rural areas measures to deal with public health were entrusted to parochial boards, based on the parish boundaries of the Church of Scotland. The Local Government Act 1889 transferred this power to county councils leaving parochial boards with only poor relief functions.

From the beginning of the period under discussion, we have legislation which appeared to provide some power to local authorities to deal with insanitary dwellings. In 1848 an Act had been passed to deal with the "speedy removal of certain nuisances and the prevention of contagious and epidemic diseases",

entitled the Nuisance Removal and Prevention of Act.

However, this legislation, along with other legislation on the topic at the time was a matter for local initiative. As far as Paisley was concerned

> "... little advantage was taken of these new and extended provisions for dealing with the various matters enumerated." 631

These matters included such items as foul drains, ditches, gutters, privies or ashpits or any accumulations of dung, offal, refuse, which were basically injurious to health. The notion of selecting one particular house or close within the "dens and rookeries" of the towns and cities of Scotland, would have been difficult given the overall standard of working class housing and in the light of medical knowledge. The use of overcrowding control methods seems to have constituted much of the activities of the local authorities control of insanitary dwellings.

The legislation which made work possible on these lines was essentially broad in its lines as with the Nuisances Removal etc. Act 1856 under which Inspectors of Nuisances could be appointed. In the case of Glasgow a Committee on Nuisances was set up to determine policy and in 1863 the first Medical Officer in Glasgow was appointed.[632] This system in Glasgow was operated until 1870 by three police officers selected from the

force and acting under the instructions of the inspector of nuisances and the medical officer of health.

In addition to this national legislation there was in Glasgow a series of Police Acts culminating in the General Police and Improvements Act 1862. Legislation was at this time charactertised by a tendency to both being permissive and complicated by the existence of alternative or parallel local legislation. The 1862 Act for example was adopted in Paisley in some two years after being passed and the police in both Glasgow and Paisley had separate local acts dealing with their powers. In the case of Paisley the Act of 1806 had dealt during its life with such matters as street cleaning, the prohibition on thatching roofs with straw and the daily clearing of privy-middens as well as prevention of nuisances. Although Paisley appears to have abandoned the practice after the arrival on the scene of national legislation, in the case of Glasgow their separate legislation continued along with the other major cities of Edinburgh, Aberdeen and Dundee. Thus we find in the 1860s Glasgow not only with their separate Improvement legislation in 1866 but in that same year their own police Act with sanitary provisions which took the place of the 1867 Act which was not adopted by Glasgow. The separate notion did not just apply to Glasgow or the

earlier days for the smaller towns as we can see with the Edinburgh Improvement Act in the year after Glasgow, albeit on a more limited scale.

The Public Health Act 1867 was described as "a great landmark in the sanitary history of Scotland". 633
It gave the local authorities extended powers to remove nuisances, regulate offensive trades, and carry out a number of other health-related activities like constructing sewers and provide water supplies. The Act empowered the local authorities to appoint medical officers of health and sanitary inspectors. The body charged with the duty of overall supervision of these functions was the Board of Supervision and they could require these appointments to be made where it was thought by them to be necessary. The Board of Supervision had been formed under the revamped Poor Law in 1845 and continued until 1894 to carry out these two separate supervisory functions. These powers of supervision were transferred to the Local Government Board under the Local Government Act 1894, whose membership was rather more prestigious consisting of the Secretary for Scotland, the Solicitor General for Scotland, the Under Secretary for Scotland and three appointed members to include both an advocate and a medical practitioner. Although there were a number of changes made by the adoptive Burgh Police Act 1892, the major consolidation in public health came with the

Public Health Act 1897. This provided more extensive powers to regulate building by local authorities with bye-laws for this purpose. The basic theme, of the public health legislation was reactive. Complaints either made by the public or through the local authorities' own officials provided the indicators of possible insanitary dwellings. The method of treatment was by way of a notice served on the owner of the property instructing him to remove the offending nuisance. In the event of failure to rectify a complained of nuisance, the local authority then proceeded to bring the matter before the local magistrates or Sheriff.

(i) Housing as a Nuisance

The Work of the Sanitary Officer - General Approach

The authorities were dealing with death rates for the urban areas of some 25 per 1,000 in the 1880s. In Glasgow, _____ for those living in the quarter of the city's population living in single apartment dwellings this rate was 38 per 1,000. In addition the overall death rate for the city disguised the much higher rates in the slum districts like the Bridgegate area of Glasgow's city centre where the rate was 53 per 1,000 as compared with districts like Kelvinhaugh and Sandyford in the West End of the city with 20.4 in 1871-2 and 14.4 in 1899-1901. When the central area round the Bridgegate was

demolished and reconstructed under the City Improvement Trust, the figure for the untreated area reached 53 per 1,000 whilst the treated area fell to 14.4 per 1,000. 634 The same sorts of overall figures can be found in Scotland as a whole with similar area and house size skewing.

	1868-72	1873-77
Glasgow	31.0	27.8
Edinburgh	25.9	22.1
Dundee	27.8	24.1
Aberdeen	22.6	21.7
Greenock	29.4	27.3
Paisley	28.4	28.6
Leith	24.5	22.2
Perth	23.4	24.3

635

During the period under consideration, these figures fell dramatically all over, as instanced by the overall death rates for Paisley.

	Paisley
1875-79	26.8
1880-84	24.93
1885-89	24.20
1890-94	21.28
1895-99	20.08
1900-04	19.18

It is against this background that we find the official "standards" being set. They required to negotiate changes both by education of the tenantry and persuasion of the landlords and owners of insanitary property. The apparent inappropriateness of high standards of sanitation stem from a complex conjunction of factors. The perception of the problem by local and national politicians and "experts", as well as the lack of viable alternatives for those in the most insanitary property led to a high degree immunity of landlords from strong pressure through criminalisation. The "softly softly" approach can be gleaned through the Reports of both the national and local Inspectors and the extent of closing activities when this was pursued.

When we look at the various bodies whose lot it was to enforce or utilise this innovatory legislation, we must bear in mind both the scale of the problems facing the sanitary authorities and the understanding of the technical questions of disease carrying. In some respects we can see that the concentration of resources on the overcrowding aspect of insanitary housing, reflected both the limitations of experience and manpower available and the knowledge of the causal chain of the various 'killer diseases'

which were both intermittent in some cases and chronic in others. At the most superficial level we can see the relationship between the mutual obligations of landlords and tenants so far as habitability was concerned in the light of the general housing conditions facing the official sanitary authorities and informing them and others involved in housing standards with criteria for assessing what in the specific context of the late nineteenth and early twentieth century was "fit for human habitation". The perceptions of the local authorities themselves and their 'overseers' from 1871 the Board of Supervision for the Relief of the Poor and Public Health and after 1894 the Local Government Board for Scotland provided the framework for determining what could be expected of landlords by way of providing sanitary dwellings. Clearly the specific local orientations of the local sanitary officers and medical officers of health mediated this problem perception. In the case of Glasgow, as we have seen, the ascription of the problems of insanitary dwellings to the moral character of their inmates by William Gairdner meant there was a concentration on what were perceived to be "achievable" goals by the officials in Glasgow. As the Lord Provost, Sir James Bell, emphasised in 1896, limitations on external physical factors caused by the feckless classes severely restricted the possibilities of the work of the

authorities generally.[636] Thus we find in Glasgow and Paisley as well as such places as Dundee, Montrose[637] and Greenock,[638] the employment from the first days of the Sanitary Inspectorate of Lady Inspectors who

> "by persuasion and the use of sentiment endeavoured to get the poor to keep their houses sweet and clean ... it was only when all these persuasive arts failed to effect the cleanliness desired that the (the authority - PR) had to fall back upon the hustling methods of the warrant and the police court." [639]

Instructions to Medical Officers of Health and Sanitary Inspectors were made by bye-laws under the Local Government Act 1889 and required a copy of all the Reports to local authorities to be sent on to the Board. The Annual Reports of the Sanitary Inspector had to cover a wide range of matters in addition to matters relating to housing, indicating the broad functions of the Inspectorate.[640]

For their part the instructions as to the content of their reports do not seem to have been so explicit for Medical Officers although the Board required a copy of their Annual Report too. Some idea of the extent of work carried out in relation directly and indirectly to housing, can be gleaned from the expenditure on "removal of nuisances" during the year ended 14th May 1890.[641] Out of a total global expenditure of £250, 182/- on salaries, drainage, water supply and hospitals the sums expended on dealing with specific insanitary

items amounted to £11,314. The more detailed bye-laws of the Board as to how the Medical Officers and Sanitary Inspectorate should carry out their duties were by way of recommendations rather than obligations and covered such areas as overcrowding

> "6. On receiving information from the Sanitary Inspector, that his intervention is required in consequence of the existence of any nuisance injurious to health, or of any overcrowding in a house, the Medical Officer shall visit, as early as practicable, take such steps as authorised by the statute in that behalf as the circumstances of the case may justify and require." 642

Similar sorts of advice is tendered through the bye-laws to the Sanitary Inspectorate

> "13. The Sanitary Inspector shall, if directed by the Local Authority to do so, superintend and see to the due execution of any works which may be undertaken at their instance for the suppression and removal of nuisances within the district." 643

The relationship then between the reformed Local Government structure and the Board of Supervision was largely advisory and left much of the effective decisionmaking in the hands of the local officials. Even when there are complaints, the practice of the Board was to remit these back to the offending Local Authority to see to.[644] In addition, the Board's own Inspectors reported on sanitary defects and transmitted their findings to the local authorities for their attention. In all their reports the power

of the Board to secure some form of satisfactory standards of nuisance removal is indicated by the removal of sanitary inspectors who failed to perform their duties. The numbers were not large but was evidence of the dilatoriness of some individual areas to look to sanitary conditions.[645] In addition the approval of the Board required to be sought where a Local Authority wished to appoint a Sanitary Inspector without statutory qualifications. The problems though of the Board in matching their standards with those in the districts under their supervision, although apparently satisfactory in regard to nuisance complaints, did not seem to be successful in all respects. The Board spoke in 1892 of local authorities offering "passive resistance to the measures of Sanitary reform recommended"[646] and the resort to legal action against recalcitrant authorities in the Court of Session. The Board explained that they were only likely to take this drastic action as a final resort and when the matter was of general importance to the health of the community.

The sorts of problem which the Board and the local inspectors faced covered the persistent fatal health problems of typhus, typhoid, diptheria and scarlet fever as well as occasional cholera and yellow fever and plague[647] scares and sporadic smallpox outbreaks. At the less traumatic level, the Board continued as provider of model bye-laws for local

authorities concerning the appointment of Medical Officers of Health and Sanitary Inspectors under the Burgh Police Act and their duties.

The relationship between the local level and the Board appeared to continue throughout the final decade of the nineteenth century without overt friction. The task of the Board involved digesting a vast amount of data each year from the Medical Officers and Sanitary Inspectors' Reports amounting to almost 400 in number and in one standard year reported as covering "some 2,500 printed pages, octavo size, exclusive of tabular matter". The success of the relationship between local level and the Board was seen in the exceptional mention of the resort in 1902 and 1904 to court proceedings against the Burgh of Kirkcudbright for failure to deal with a "toom" and middens. This sort of failure, which was normally cleared up by negotiation as indicated may not be unconnected with the part-time nature of the Medical Officers and the Sanitary Inspector-
648
ate. Dissatisfaction with the information being provided by the Medical Officers and Sanitary Inspectors however in 1903 resulted in a fresh set of Circulars laying out the subject-matter of their Annual Reports which the Board received. These included such matters as

> "e. an account of the house accommodation for the labouring classes in the burgh and any

> proceedings under the Housing of the Working Classes Acts, or otherwise." [649]

The relationship between the Local Authority and the Board, though, tended to progress through stages of negotiation before any legal proceedings were resorted to, as witness the issue of the Ladybank water supply and drainage system which was a chronic bone of contention

> "... For many years ... the inadequacy of the water supply and drainage of Ladybank has been the subject of correspondence between us and the Local Authority of that burgh." [650]

The matter was ultimately resolved to the satisfaction of the Board although not before an action in the Court of Session had been begun. The same kind of negotiation was reached at a rather earlier stage when in 1905 concern was expressed by the Board about the insanitary conditions of the ashpits and middens in a number of Lanarkshire mining villages. The Local Authority here with the prompting of the Board were able to persuade the colliery owners to arrange to have methodical and proper cleansing and scavenging arranged for these villages.[651] Much of the work, though, of the Board was involved with making provisions and providing advice and circulars for such scourges as pulmonary phthisis[652] which was a notifiable disease under the Infectious Diseases Act 1889 and the plague

which broke out in Scotland in 1900, 1901, 1905 and 1907.

Discussing the whole operation of inspections and removal of nuisances, the County Sanitary Inspector for Aberdeenshire explained, the way in which local conditions could mediate the overall policy of the Board in their work. He noted the vagueness of the term "nuisance" and he noted the difference between the standards of local work and "sanitarians". He suggested

> "It would be unfair to expect owners of property in rural districts to carry out works in the same thorough way in which owners execute similar work in towns, which have been under sanitary bye-laws for many years." 653

Another interesting local variation is seen in the account given by the Sanitary Inspector for Kirkcudbrightshire of his treatment of nuisances which for the year of 1892 covered such items as

> "... bad water, defective drainage, damp houses, and servant men's sleeping places." 654

His own particular approach was, he explained to write to the property owners whose properties had been reported by his "information source" the Police Constables, asking what they proposed to do about the nuisance. Depending on the reply, he then would visit personally where there was denial of nuisance or

nothing was done. However, if the nuisance was admitted and if it was promised that it would be attended to or removed these he proceeded to visit "leisurely".

> "I consider they will, as honourable parties, carry out their intentions." 655

Apart from overt sympathy with the owners of property, the Medical Officer for Renfrewshire explained the difficulty of attempting to enforce bye-laws on overcrowding on single room properties with lodgers previously licenced as lodging houses.

> "... these regulations were not made very stringent to begin with. But it was often very difficult to put them into force at all. It was not easy in the case of poor old infirm creatures, with one apartment, who had kept lodgers for years with the sanction of the Local Authorities, and who cried out there was nothing before them but the poorhouse, and they would die by the roadside rather than go there. I am bound to admit that I have not been able to 'deal energetically' with the whole of them yet." 656

The Medical Officer for Stirlingshire at the same time explained the kind of work which was involved in nuisance removal in regard to dwelling houses

> "... windows which were formerly heremetically sealed have been made to open, damp walls have been lathed and plastered, houses below the ground-level have had the earthed-up soil taken away, rhones and rain-gutters have been insisted on, drains have been repaired and trapped, ashpits have been reconstructed and removed further from dwellinghouses, closes and lobbies have been whitewashed." 657

However, despite this impressive list of works undertaken, Dr. McVail did admit

> "... only a fraction of this work has yet been overtaken ..." 658

From a slightly unexpected source, perhaps, we find a Report from the Medical Officer for the County of Nairn, in 1893, discussing the difficulties of the carrying out of sanitary improvements in the houses of the poorest class. He noted that landlords who were only receiving nominal or low rents for insanitary properties might be under no pressure from the tenant to carry out improvements. If the sanitary authorities require improvements the effect

> "will probably add another unit or units to the already crowded closes in one of the neighbouring towns." 659

His remarks were supported by another rural Sanitary Inspector discussing the situation in Sutherland and reiterated in 1900. This same mediating on the 'pure' sanitary approach is seen in remarks in the report from the Medical Officer for Renfrew

> "In consequence of the difficulty of obtaining housing for the tenants who would be displaced by the closure of the houses at Busby, I did not feel justified in calling upon the proprietors to close them. The lack of suitable house accommodation for the poorer, and less desirable, class of tenants, is one of the most serious problems which confronts us

> in the county. The houses just referred to, for example, are admittedly in a grossly insanitary condition, dangerous to the health of the inmates, a menace to the health of the general community, yet we have to suffer them to remain in occupation." 660

Other Medical Officers, even as late as the last decade of the century echoed this approach. The Medical Officer for Stirlingshire explained his attitude to the Housing of the Working Classes Act 1890 which provided

> "It shall be the duty of every medical officer of health of every district to represent to every local authority of that district any dwellinghouses which appear to him to be in a state so dangerous and injurious to health, as to be unfit for human habitation." 661

Dr. McVail explained his operation of this clear direction in the statute.

> "It is not, however, my intention to attempt at once to use the Act with regard to all houses to which, strictly speaking, it may be held applicable. Some considerations must be had for the difficulties to which displaced tenants might be put in getting other house accommodation." 662

A much wider view than the technical one of actual danger to health as such was postulated

> "It therefore appears to me that the Act should not be too constantly nor too hastily resorted to, but rather that, as a rule, time should be given for a general good effect, which its occasional application may be expected to have, on the standard of house accommodation for the working classes

throughout the county." [663]

A similar, though somewhat bizarre approach was taken in the following year by the Sanitary Inspector for the island of Arran who also took a teleological view of the legislation

> "In the Arran district we have two families of that ancient class of folks known as cave-dwellers of the remote ages. As the caves are dry and in a measure comfortable I have not as yet taken steps to have them removed, as at present the house accommodation on the west side of the island is very scarce, and if the families were ejected they would have no place to go." [664]

The interpretation of the legislation in accord with the Inspectorate's view of conditions in the local areas also had an impact where the dominant moral causal view of insanitary housing was accepted.

The Sanitary Inspector in Kirkcaldy explained in cheerful wise

> "As the ancient Roman satirist said "There is wonderful unaninimity among the dissolute". Wherever you find them, you will also find united resistance to regular habits of clealiness, and an almost unanimous desire to herd together like pigs." [665]

The Medical Officer is less sure of the causation. He contrasts two pit villages near Kirkcaldy - one clean and the other unsatisfactory and wondered

> "The majority of the houses in this village are dirty and ill-kept, as well as in disrepair. How far the bad house produces the bad tenant, how far the bad tenant produces the bad house, it is hard to say. Doubtless each reacts upon the other." 666

As the Medical Officer indicated, however, those in this village include houses with earth floors and with no rhones.

This attitude along with that in the other areas resulted in the prosecution in Port Glasgow of 57 tenants who failed to keep their courtyards clean and free from rubbish. They were taken to court and fined 2/6d. each. 667

The co-operation of the populace as late as 1908 was complained of in the annual report of the Sanitary Officer for Port Glasgow

> "It is a pathetic fact that such intolerable nuisances as want of water-closet accommodation, foul privy-middens, dark, damp apartments etc. are seldom complained of, yet these and other nuisances exist, although in a decreasing number of insanitary tenements over the burgh." 668

His colleague, the Medical Officer of Health, saw the insanitary issue as an ongoing problem due to the habituation of slum-dwellers to bad conditions

> "... alas, the insanitary habits engendered by long residence in the slum property of Port-Glasgow will survive for many a year ..." 669

This view which we encounter amongst earlier "moral entrepreneurs" such as the Philosophical Society of Glasgow and the directors of the Workmen's Dwellings Company was reiterated by the Glasgow Inspectorate. Discussing the Cowcaddens Ward of the city, the Assistant Sanitary Inspector explained that the ward's slum property was

> "tenanted by a class of people who belong to, or are living on the border line of, the 'submerged tenth' - embracing the lazy, the thriftless, and the dissolute. These have always, through their vices, been almost the despair of the social reformer, and are no less the despair, as far as domestic and personal sanitation is concerned, of the Sanitary Inspector who moves about amongst them ..." 670

Looking at one specific area over this period is instructive in revealing the change from "paper control" through to much more effective practice.[671] In Paisley with a fulltime Inspector of Nuisances and Lodging Houses, we find that in the first years after appointment much time appeared to be given over to the removal of animals and dung. The co-operation of the police was ensured by having Captain Ingram, Superintendent of Police as the Inspector from 1859. Ingram reported that he requested all beat constables to make a note of all offensive dungsteads and other nuisances as well as the number of pigs kept and report same. As well as this the Inspector dealt with

unfit food and organised street cleaning. However, although this seemed to be a guide to how the Inspector in Paisley spent his time he had his difficulties

> "in getting nuisances removed, on account of the expense to landlords and factors" ... in nine cases out of ten, nothing was done." [672]

His Committee on Nuisances appeared to be reluctant to enforce removal and/the expense of compulsory procedure.

The overall approach to public health was expanded though in 1866 when a Medical Officer of Health was appointed. His first task was to organise a house to house visitation, partly to obtain information on the houses and also to give advice on the impending cholera. This survey revealed "deplorable" housing conditions and in 1870 we find housing being built for "working men" of the respectable tradesman or artisan class. The experimental speculation was not successful. The population of the town was steady at just under 50,000. Even with the more sophisticated work of the Inspector's joint Nuisance Removal and Cleansing Department these advantages were not always fully appreciated. One of the local authority scavengers

> "... tells how the public resented it, and protested against being robbed of the value of the refuse in the midden steads. The scavengers were frequently assaulted for taking away from the people that which had been a source of income to them. On more than one occasion the scavengers found the person in

> charge of the midden-stead standing guarding his filthy and foul-smelling accumulation with a loaded blunderbuss, threatening to shoot anyone who dared rob him of his valuable treasure." 673

However, it seems that a change of heart was effected with the passage of time. For the rest of his work the Inspector seems to have been involved in discussions of the possibilities of constructing special cholera and smallpox hospitals and dealing with the nuisance of dark smoke. Basically with epidemics of smallpox as in 1874, the operations of the Sanitary Department seem to have been confined to the streets of the town rather than its houses. It is only with the advent of effective main drainage in the 1880s that we seem to find the possibilities for looking to the housing itself occurring.[674] By 1892 all the town had drainage work commenced. The severe limitations, though on what could be done at this time was seen in the Report by the Medical Officer of Health to the Board of Supervision in 1879.

> "Back Courts - At present there is a want of direct power in dealing with back courts, and power of a more summary character is wanted. The Local Authority should have the same power, after due notice, to make all necessary improvements on an insanitary back court as they have in regard to the front pavements, namely, power, in default, to execute the necessary work, and power to debit the expense to the landlord." 675

The years after 1885 until the end of the Great War are characterised by the Chief Sanitary Officer of Paisley as a "period of progress" as far as Paisley was concerned, As we have seen from our look at the public health operations in Scotland as a whole, this is in line with this national pattern. It was in 1885 that after turning down this notion in previous years, it was agreed to appoint an Assistant Sanitary Inspector, "belonging to the tradesman class". It was to this post that Kelso was appointed. This brought the strength of the staff up to three - one Inspector, one Assistant and a Clerk/Office boy.

Kelso reported that in carrying out visits to properties where the owners or factors were complaining of the restrictions of the Sanitary Inspector three members of the Sanitary Committee were wont to go on these visitations

> "in order to strengthen his position and demands for removal of nuisances and sanitary improvements generally." 676

Apart from duties connected with infectious diseases, the work consisted of inspecting back courts, closes, stairs and house-to-house visitations. The condition of the back courts was "almost beyond description"

> "About 100 notices were served on tenants or occupiers during the first month and every month for several years afterwards

> regarding the dirty condition of these back courts and common privies, describing their duty under the Act, and the pains and penalties that would follow unless they conformed." 677

In addition to demonstrating the daily experience of the Sanitary Inspector in attempting to get "a cleaner condition of things" we get an interesting insight into the minds of the Town Council when a builder proposed to put a water-closet in each of a new block of houses

> "This, about the first of its kind, was not looked upon favourably by a number of the members of the Town Council, and fears were expressed that it would give rise to nuisance in the houses." 678

The extent of activity beyond warnings and cajoling, though can be seen from the exceptional event that Kelso reports of actually some old insanitary buildings being closed up in May 1886. He also went on to document the infrequency of this occurrence. The possibility of great activity was clearly limited when the Medical Officer of Health in the 1880s had

> "a large private practice to attend to, (and) could not be expected to do much more than statistical and advisory work for his salary of £80 per year." 679

Property owners and factors for their part were less than enthusiastic in applying themselves to maintaining clean houses although those prosecutions that are recorded seem to have been for relatively trifling matters such as failure to whitewash common stairs and common passages. Few followed the line of one Minister of the Church who was unwilling to comply with the requirement to close property which had no ashpit, was of a single storey, and with a thatched roof and was deemed beyond remedy. One of his arguments in his negotiations with the authorities was that he was providing a service to poor people by offering that cheap class of house. With the threat, though, of the Sheriff Court he finally complied after the Chief Sanitary Officer asked whether or not his teaching of "peace on earth good will towards men" was compatible with letting these hovels. Whenever Kelso reported threats of closure, the threat of court action seemed to be necessary to persuade property owners to comply with the requests of the "Sanitary" which seem to have been directed at only the very worst house as in early 1890 where on the site of an old private slaughter house it

> "was found to be occupied by an enterprising lodging-house keeper, and fitted up with four beds, although it had only an earthen floor, and was in a very damp and dilapidated condition." 680

In 1891, for example, out of some 3,460 notices issued generally and a further 398 to abate or remove nuisances, only one case ever got the length of Court, concerning the keeping of pigs in a manner so as to be injurious to health. The scale of closures began to pick up in the last decade of the nineteenth century from five houses closed in 1895 to 58 in 1898. By the final year of the century the Local Authority adopted the optional sections of the Housing of the Working Classes Act and in the following year a Standing Committee of the Town Council was appointed to deal with the Act and cover such matters as the problems of those displaced from closed up buildings. Reporting the closing of some 60 dwellings in 1899 the Sanitary Inspector noted

> "... in most cases the old and insanitary dwellings were taken down and replaced by new ones with all modern conveniences. The new houses, however, as a rule are so much higher rented that the result is merely to shift the people with the insanitary ideas which have grown upon them, from one locality to another, which soon becomes little better than the one they left." 681

Kelso's own solution was on the William Smart/ John Mann Junior lines with the notion of management of the barracks in the hands of the local authority. In the first part of the twentieth century the number of closures up to the Great War was variable, depending on availability of accommodation elsewhere,

from four up to 139.[682]

One perspective from another 'official' source reveals sanitary practice in its early stages in Glasgow. The School Board of Glasgow commented rather acidly on proposals to open their playgrounds to any children in 1887. The Board's Vice-Chairman commented on the paradox of school hygiene standards and those required in housing of the same schoolchildren

> "It has struck me as somewhat strange that Government through one of its Departments should be insisting so strongly upon the provisions in our Public Schools regarding the health and well-being of the children. They must have ten square uards instead of eight square feet,the careful separation of the sexes, the necessary latrines and lavatories, and yet Government seems to pay no regard to the manner the children are lodged in their parents' dwellings ... (referring to the "Bitter Cry of Outcast London" he continued ...)
>
> A Commission was appointed, but the cry seems to have died away as so many other cries have done, and the dwellings of the poor are no better than before." [683]

In an attempt to highlight this situation, a letter was sent from the Vice-Chairman, William Mitchell, to the Chairman of the Health Committee of Glasgow and to the Sanitary Inspector pointing out the appalling condition of some city centre dwellings. The reply of the Chairman was interesting in its frankness

> "I am altogether in sympathy with you, but you can form no idea of the landlord-power against us, and the protection the law

> gives to property over human life and decency." 684

The Sanitary Inspector, Peter Fyfe, also pointed to the difficulties in certain areas of his work

> "In such localities where the harlot and thief make their abode, scenes of the most revolting description in back courts are matters of continual occurrence." 685

Fyfe was fatalistic about the whole enterprise of his Department in this particular context

> "So long as tenements exist, and as long as back courts in such localities ... are open to the public street (and there is no law to prevent this) so long will women refuse to use a court privy or court W.C., and so long will they use house utensils, which the more careless and degraded will, in spite of Sanitary Inspector or Police Constable, empty into the stair-sink, or over the window." 686

More specifically he reported the battle which his Department had completed in June 1887 after 15 months of "great pressure and hard fighting", improvements were secured in backland property at St. Margaret's Place. Upon the request of the Sanitary Inspector a Sub-Committee of the Health Committee visited the property and discovered it

> "from general disrepair, bad drainage, and want of through ventilation, unwholesome in itself ..." 687

It was recommended to have the backland property demolished and was heard in Court some eight months

later. After visitation of the property by the Sheriff and plans being submitted by the owners of the property, the property was finally deemed satisfactory in June 1887 with four W.C.s and two large ashpits installed for the 194 persons residing in the property. No doubt this extreme difficulty in securing their objectives, led the Health Committee Chairman to explain that he was less than enthusiastic for the correspondence to be made public

> "There is much objection in our Sanitary Department to publish details of our work, as it tends to give offence, and we get neither the sympathy nor support from a large section of the public for whose benefit we work." 688

This question of administration of the legislation was seen as the major difficulty by one of the more prolific commentators on public health law and practice in late nineteenth century, one of the Sheriffs-Substitute at Glasgow, Walter Spens. His writings are found in the publications of the Sanitary Association and the Philosophical Society of Glasgow as well as in The Sanitary System of Scotland : its defects and proposed remedies 1876.

Speaking to the Social Science Congress in Edinburgh in 1880 Sheriff Spens pointed out the defects of having no "Central Health Authority" to solve the problem of small authorities' "wilful and systematic neglect to

work public health duties". These faults were clear in both urban and rural areas and in the latter were attributed to "utter inefficiency of the rural sanitary authorities". In rural areas the problem was often compounded by sheer lack of size to allow adequate machinery for sanitary control. This was combined with the failure of "gentlemen of education, position and influence" to take any interest in Local Authority matters leading in turn to community alienation. To solve these sorts of problems Sheriff Spens put forward proposals of an administrative kind and he clearly highlighted one of the reasons why the provisions of the statute book differed from the experience of those in insanitary property at the beginning of the era of sanitary control in Scotland.

The perception of the administrative failings of early legislation featured in a number of writings by Medical Officers and Sanitary Inspectors until the turn of the century. These included comments on the status and role played by Sanitary Inspectors in Scottish towns and villages. The Medical Officer of Health of Aberdeen, in 1884, cited the example of a Sanitary Officer responsible for a health resort of 4,000 population whose remuneration was £5 per annum. The same applied to a town like Perth where the

population exceeded 30,000

> "With the exception of a very few who are paid £7 and £8 a year, most of the sanitary inspectors in rural districts are paid less than £5 a year." 690

Payment as low as £1 per annum is instanced along with one Inspector who explained that

> "I am Sanitary Inspector for this district, but have no fixed salary. The Board generally allow a certain sum for any work that may be required but being a rural district there is seldom a case." 691

The public then were dependent in many instances on the attitude of the appointee and any pressure brought to bear on him

> "... unless he is a man of most philanthropic turn of mind, and an enthusiast in sanitary matters, he will be unlike the majority of men if he does not pocket the five pound note and do as little as possible."692

This combined with lack of training and the inspector being inured to the defects of the area and their "naturalness".

> "There is a district in the North of Scotland where typhoid fever and diptheria are always very prevalent. The sanitary inspector is a shoemaker, at a salary of £3 per annum. So much is the official interested in his district, that it was four years before the Parochial Medical Officer of the district became aware of the existence of such an individual in such a capacity." 693

Although Simpson indicated other sanitary deficiencies in administration, the extent to which this was typical is not clear, although as we can see from William Kelso, a town the size of Paisley was far from expansive in its sanitary staff. The extension of the areas of sanitary administration which both Simpson and Sheriff Spens had advocated was effected in the Local Government Act 1889. The county replaced the parish as the area of rural administration and the Sanitary Inspector for Kilbarchan in Renfrewshire looked forward to a supercession of the old days when

> "... in most country parishes, the sanitary inspector has been inspector of poor, collector of rates, and registrar of births, deaths and marriages ... he was under the necessity of making his sanitary duties to some extent subordinate to his other work." 694

In fact, in the 1st Annual Report on the Health and Sanitary Condition of the County of Renfrewshire by the Medical Officer of Health, A. Campbell Munro in 1891, two Sanitary Inspectors were appointed for Renfrewshire with three assistant inspectors. The demand for the posts was considerable and Dr. Munro reported over two hundred applications for the posts. The novelty of real enforcement along with visitations by inspectors seem to have come as a surprise to the rural populace. Discussing a number of Sheriff Court

cases the Medical Officer of Health explained

> "Unless these prosecutions had been undertaken, the work of the department would simply have stagnated. People appear to have been accustomed in the past to trifle with and ignore the requirements of the Local Authorities ..." 695

These four Sanitary Inspectors, with their fulltime appointments, actually replaced some 16 Inspectors whose salaries appear to have been rather more generous than in some of the other areas referred to by Dr. Simpson and averaged out at some £25 per annum. Dr. Munro noted the difference here

> "Parochial Renfrewshire had therefore been, in this matter, more liberal and enlightened than most counties." 696

So far as the deficiencies in the law were concerned the limitations both in terms of statute and manpower were recognised by both Sanitary Inspectors and other officials. After the early years of local intransigence it was pointed out in 1879 by the Sanitary Inspector at Glasgow, Kenneth MacLeod, that of the relevant Local Authorities in Scotland slightly over a quarter of them had made no move to operate the Public Health Act enacted some twelve years before. In addition, although there were sanitary inspectors appointed for about three quarters of the authorities, this was a misleading statistic in that

in many places inspectors of poor had the title of sanitary inspector but neither received remuneration for this nor did they have any duties.

> "In these districts, persons aggrieved with a nuisance, would look in vain for help from the Local Authority. Accumulations of filth, structural defects, manure heaps, defective drainage, and other offences injurious to health, would all be allowed to remain stagnant; ..." 697

The Sanitary Inspector at Paisley, William Kelso, confirmed that before 1885 the work undertaken in an area as populous as Paisley was of a very limited nature.[698] Addressing the Sanitary Association of Scotland in 1892, Peter Fyfe discussed the powers of the central administration to deal with "vacillating and refractory local administrations" and found the situation appeared to compare unfavourably with England. The Board of Supervision had no voice in Parliament as compared with the English Local Government Board with a larger staff and Parliamentary representation and less hemmed in through appeals to the Courts.

As the Sanitary Association of Scotland revealed at their annual Congress in 1892, there was disquiet at the relatively less important role of the Board of Supervision in Scotland as compared with their counterparts south of the border

> "In England the Local Government Board controlled public health administration; in Scotland the Board of Supervision. At the head of the English department there was a member of the Government, with a seat in the House of Commons. At the head of the Board of Supervision there was an excellent chairman, but not immediately connected with the Government, and with no position in the representative house." 699

However, it was not simply the status of the Scottish set-up which worried the Sanitary Association but also the extent of their operations

> "On the staff of the English department there were two principal secretaries, one of whom had a seat in Parliament, and eleven under the private secretaries, three of whom had seats in the House. The Scotch department had one secretary, with no voice in Parliament. The English Board had a most efficient staff of twelve medical inspectors, one engineering inspector, and the services of an expert in bacteriology. The Scotch Board had four inspecting officers under the Public Health Acts, whose powers in this direction were heavily handicapped by having imposed upon them the general superintendence of the relief of the poor." 700

All this was, of course, necessary to counteract the "evils of extreme decentralisation" which permitted local authorities to vacillate and act in lazy and careless fashion.

Dealing more extensively with the question of a Central authority for sanitary work, Sheriff Spens discussed the Board of Supervision in an address to the Sanitary Association of Scotland in September 1893. As Sheriff Spens explained the role of the

Board of Supervision arose almost by accident when the Nuisance Removal Act of 1856 was passed

> "... because the Board of Supervision was there, it was hit upon as the body to whom health duties were to be entrusted." 701

The Board being composed of The Lord Provosts of Edinburgh and Glasgow, the Solicitor General for Scotland and three Sheriffs meant that the effective running of its sanitary supervision fell to the permanent secretariat and the legal minds of the Sheriffs. For practical purposes then four lawyers ran the Board of Supervision in the view of Sheriff Spens. In effect this limited their control over the medical practices or non-practices of Scottish local authorities. The actual assistance which the Board could call upon extended to one part-time Medical Officer of Health and the possibility of using the time of four poor law inspecting officers. It was only in 1892 under the Burgh Police Act that it became obligatory rather than optional for all districts to appoint medical officers of health and sanitary inspectors.

Sheriff Spens' call for a Department of State for public health matters was echoed in 1895 by the County Sanitary Inspector for Linlithgowshire in June 1895, John Frew who dealt with the various kinds of hindrances which sanitary inspectors encountered

in their work. One important source of difficulty he noted was the inadequacy of legal powers in the counties where authorities were required to operate the old 1867 legislation whose provisions had not kept pace with advances in sanitary science. He cited the requirement not only to demonstrate that a nuisance existed but that it was injurious to health with the time consuming business of court appearances to go through during which time the offending nuisance continued unabated.[702]

One other aspect of the difficulties attending the work of Sanitary Inspectors in rural areas was highlighted in the Sanitary Journal where it was pointed out that those producing sanitary problems were often those responsible for their eradication

> "Their masters are the heritors, the owners of the village houses and of all the nuisances that apertain to them. They are the principal taxpayers, too; and if a new water supply or drainage system is required, it is out of their pockets that the money must come. The consequence is that the medical officer and the inspector may be led to understand that if they show too much activity, they may look out for troubles; that, on the other hand, if they do very little work, their pay will be secure; and that if they do none at all, their salary will have a fair chance of being raised. It is, therefore, to the monetary interest of all concerned that sanitary reform should be simply non-existent."[703]

Whilst in smaller areas the power of removal under the 1867 legislation rested with the Board of Supervision only, for areas with a population above 10,000 removal was allowed

by the Local Authority. One zealous Inspector found this power a real threat

> "... In the Board there was a member who himself was the originator of a frequent nuisance. In his zeal, the inspector had the temerity to try to prevent or abate the nuisance, and the result was that after every attempt the member in question proposed at the Board meeting that the inspector's salary be reduced by £20." 704

The replacement of the Board of Supervision by the Local Government Board in 1894 whose composition was a little different met some of these objections but was again an underpowered and overworked body for strong control and consistent standards, particularly after the turn of the century.

In the years before the Great War we find a significant expansion of the functions of the Local Government Board into such fields as the supervision of the Old Age Pensions introduced in 1908 as well as the work required under the Unemployed Workmen Act 1905. Most significantly, from 1911 onwards there was a separate section dealing with the issues arising from their supervision of the operation of the Housing 705 and Town Planning Act 1909. The steady relationship between the Board and the local authorities continued and was even the cause of some surprise to English colleagues from local authorities in England and Wales whose experience was very different.. This was

revealed at a Conference on Housing held in Glasgow in 1901

> "At that conference a resolution was proposed condemning the action of the Local Government Board in restricting the progress of municipal housing. The Scottish delegates were bewildered, for, far from finding their Local Government Board obstructive, they had rather been accustomed to look to it to back them up in their fight against local inertness and indifference." 706

The notion of the problematic status of the Sanitary Inspectorate received a degree of confirmation from the conflict which occurred in Dundee between the Public Health Committee and the sanitary inspector, Thomas Kinnear, in 1908. Although the actual dispute was on a financial dispute concerning remuneration for enforcing the Butter and Margarine Act 1907, Thomas Kinnear indicated the sorts of difficulties which he had experienced in his long tenure of office in Dundee in a letter to the Dundee Public Health Committee.

> "During a considerable portion of the past forty years I have been subjected to an active and almost incessant and unmerciful persecution for my unswerving efforts in trying to raise the sanitary state of the city to a higher degree of efficiency ... During this long, lively period I was often advised to change my policy (taking it easy and not driving the improvements so hard);" 707

(ii) Closing Houses

The closure of insanitary housing was provided for in both local and national legislation. The provisions of the Housing of the Working Classes Act 1890 applied to both burghs and rural districts. Local authorities were enabled to issue closing orders on properties which were in a state such as to be so dangerous or injurious to health as to be unfit for human habitation. This information could be ascertained either through the inspections of the sanitary inspectorate or report from the Medical Officer of Health or four or more householders to the Local Authority. In the event of the Local Authority being of the view that a house was in such a condition they had to make an order prohibiting the use of the house for human habitation until, in their judgment, it had been rendered fit for that purpose. Appeal against the Closing Order lay to the Sheriff. On the house being rendered fit for human habitation the Local Authority could withdraw the Closing Order, with appeal to the Sheriff for refusal to do so. No direct power appeared to exist to actually eject tenants under this legislation in either its 1890 or 1909 form.

The closing procedure under the Act only seemed to provide for the fining of the tenants from whom in many cases fines could not be recovered and

imprisonment was deemed to be "inadvisable".[708]

Up until this date there had been reliance on local legislation like the ticketing procedure which operated in Glasgow and Greenock.[709] Local legislation to close houses existed in a number of larger towns like Glasgow, Edinburgh and Dundee. Both national and local legislation exhibited similar problems.

Peter Fyfe explained the difficulty involved in operating the closing provisions of the Glasgow Police Act 1890

> "It has been felt that the powers given under this section must now be exercised with great discretion, as suitable and cheap house accommodation for the lower classes is becoming very scarce and in some localities almost unobtainable." [710]

The limitation on the closing or demolition powers of the Corporation or Improvement Trustees was noted by the Chief Sanitary Officer when addressing the Glasgow and West of Scotland Architectural Craftsmen's Society in 1899, when he revealed the reality of the empty property statistics. Out of the 105,000 one and two room dwellings in Glasgow which contained ½ million inhabitants out of a city population of 700,000, there were 2,700 of these unoccupied. However, this margin of some 2% empty property was mainly in more expensive properties and only 480 of these empty dwellings rented at £6 per

annum or less and were geographically skewed so that on the south side of the Clyde only 36 such houses were to be found. Working on rental figures of around 10% of income, this meant that with wages of labourers of between 17/- and 25/- a week, rent levels above £6 began to get out of their financial reach, since at these income levels the margin for "misspending" was narrower than artisans and tradesmen. After the initial activity in the decade following the 1890 local Act, when some 600 houses were closed dispersing 1,500 persons elsewhere, the difficulty of the process at the turn of the century with limited accommodation was such that Fyfe said

> "latterly the task has been a painful one, in the face of the appeals of the poor people, and their sad anxiety born of the growing difficulty to find a new house at a rent low enough for their means." 711

Such properties were not being provided by the Corporation in their limited pre-War building programme, whose rents came out as some 12% of the average wage of the poorer labourer and those of the Glasgow Workmen's Dwellings Company were also a little above the 10% level and discriminating in tenant selection.

The Convener of the Backlands Committee of the Glasgow Corporation, William Burrell, explained that he believed that where tenants were turned out, they moved up market although this meant a sacrifice of some of their drink money. On the more general

problems of what to do with the "submerged tenth", Burrell had confidence that if all the slums were demolished leaving only sanitary housing behind, it would force these tenants to move into better properties. He rejected hustling people out of the city and barracks as well as more Corporation building. As he pointed out, the occupants of the Corporation houses were largely well-to-do tradesmen or public servants and shopkeepers as well as a proportion of "respectable poor" rather than the slumdwellers. [712]

The view taken by Glasgow Corporation of their limited rehousing obligation was similar. The policy of the Health Committee was explained in November 1903 by Mr. W. F. Anderson

> "A week ago the committee spent two hours in the Lyon Street district, and they saw houses there which at no price should be occupied. The committee were in this difficulty that it was no part of their duty to provide houses for those people ..." [713]

His colleague, Mr. Bilsland, was also conscious of the problems of those in unhealthy areas who were dispossessed. Whilst he did not feel that the solution lay with Corporation building at the lower rent levels, he considered a certain very limited responsibility rested on the Corporation

> "... they were conscious that some of the tenants of these houses by being removed

> might be put in extremely straitened circumstances. They had made arrangements for having the movements of all the people dispossessed reported on and in any cases in which there was hardship which a tenant was not capable of overcoming, the officials would put them in touch with some of the charitable organisations of the city." 714

The experience of driving the poor into even worse housing from overcrowded conditions was experienced not only with closure but also overcrowding. In Glasgow with its ticketing system as well as other towns which adopted the ticketing procedure meant displacement. The Paisley Police and Public Health Act 1901 provided for the application of overcrowding control to that town. Under this measuring and ticketing took place in 1903 and some 2,207 houses were dealt with in this initial burst of activity. Some 30% of these small houses were found to be overcrowded.[715] How to deal with such individuals was again not so simple

> "Many of the people in these overcrowded houses have small incomes and large families, and it seems almost impossible, if not hopeless, to look for such people getting a shift into houses suitable for them until cheaper houses are provided than the kind that are being built at present." 716

By 1906 the numbers of ticketed houses had been extended to 3,235 houses and there were over 7,204 visits made by the Inspectorate, revealing high levels of overcrowding when night inspections were carried

out. A drop, though, by 1914 was attributed not so much to the tactics of the Inspectorate but rather to the outbreak of War. One aspect of the obligation to take a house for a year came up in the Paisley Town Council, where William Kelso was given discretion to not operate the ticketing system enforcement procedure where an individual was bound to pay rent for an overcrowded property till the following Whitsunday. One such individual had had to obtain another house at a larger rental and in the meantime his old landlord still held him to his contract. It was here agreed that Mr. Kelso should be allowed to suspend enforcing ticketing until the following Whitsunday where a tenant was unable to make an arrangement with his landlord.[717] In his reports, William Kelso explained that in about half the cases where he moved for closure as unfit for human habitation, delay was granted to enable the owners to further consider what they intended to do with the property.[718] Similarly, although on inspection, over 100 houses in Paisley in 1910 were considered unfit for human habitation, only about half this number were either closed or remedied. Kelso does not make it clear what happened to the rest of the insanitary dwellings.[719] Similar sorts of closure percentages occurred in the years up until the Great War, at which time the local authority suspended more or less operating closure.[720]

The same sort of combination of persuasion and some compulsion continued right up to the Great War under the wider powers of the 1909 housing legislation. Thus we find in the five years before the War about 20% of the Inspectorate's escalating representations resulting in houses being made fit without the need to issue a Closing Order. Of the rest, about 50% were issued with Closing Orders and a further 10% or so were voluntarily closed up or demolished by the owners without further compulsion beyond the initial representation. [721]

	Representations	Made fit	Closed Vol.	Closing Orders made
1910	338	200	58	78
1911	996	207	168	414
1912	1995	346	224	939
1913	2520	255	216	1002
1914	2971	396	157	1848

In addition to these, a number of towns used their local legislation. As the Annual Reports revealed, the number of appeals and success rate of these by owners against local authority determinations, would indicate either that the

> "local authorities are exercising their powers judiciously " [722]

or that the situations where an order was sought was

in only the very worst type of condition. Writing at the beginning of the century, Mabel Atkinson attributes the causes of lack of support from tenants as a result of their economic position

> "... in public health work inspectors are necessary to institute prosecutions, secure the prompt suppression of nuisances - partly because a private individual will not trouble to move unless a smell becomes very annoying indeed, partly because in some cases his position prevents him from prosecuting his landlord for failing to provide proper sanitary accommodation, for the landlord would promptly eject him and put in some more complaisant and less fastidious tenant." 723

Not only this but the role of the sanitary inspector was expressed in terms of a passive sifter of complaints rather than a nuisance discoverer

> "It is not, as a general rule, his (the Inspector - PR) work to personally discover breaches of the Act he is administering. The intelligent co-operation of the public is necessary, for even the best of inspectors is not ubiquitous." 724

Interestingly in fact for our purposes, looking at the overall position of the mutual obligations of landlord and tenant that we have been examining often in the context of defective access and approaches to dwellinghouses, Atkinson opined

> "No possible number of inspectors could ensure, for example, that every one of Glasgow's common stairs was in a sanitary condition." 725

(iii) Slum Clearance

The power to have property demolished as being insanitary existed under the 1890 legislation where a Closing Order has been in force for three months and where the necessary remedial steps were not being taken to render it fit or it continued to be dangerous or injurious to the health of the public. The Local Authority had to order the demolition of the building with the owner having a right of appeal to the Sheriff. Local Acts also provided for demolition in Glasgow, Dundee and Aberdeen, in the case of Dundee with no right of appeal to the Sheriff.

In addition to the purely negative provisions of the law directly relating to the sanitary condition of housing, there were measures designed to permit local authorities to take down and improve working class dwellings in the adoptive Torrens Act, the Artisans and Labourers Dwellings Act 1868 which applied to Scotland. The Act dealt with the dwellings which were unfit for human habitation by way of providing for these actions against unfit houses. The Act was not adopted in Glasgow, Edinburgh or Paisley, which had Improvement Acts under legislation in 1866, 1867 and 1877, respectively. Thus it was that prior to 1890, in Glasgow, all slum clearance was actually carried out under the local Improvement

Acts of 1866 and 1882.

We find no use made of either the limited Torrens Act nor of the legislation which extended the power to deal with unhealthy areas as opposed simply to houses. In its Scottish form, this latter was entitled the Artisans and Labourers Dwellings Improvement (Scotland) Act 1875. Again, this Scottish version of the Cross Act was only adopted in Aberdeen, Leith and Greenock. The Cross Act was postulated on the unrealistic notion that slums could be purchased and rebuilding take place without any form of subsidy. As the Glasgow Improvement Trust[726] had discovered and as the Edinburgh Co-operative Building Company demonstrated by moving steadily up-market in their house construction programme,[727] the problem of building and renting at a profit to the non-artisan working class was considerable. Building for this market was hardly a safe form of investment and was characterised by slumps and occasional booms, depending on the overall state of "trade".

In addition, the machinery for action under the legislation was extremely cumbersome and by the time the Royal Commission on the Housing of the Working Classes reported in 1884-85, only 9 improvement schemes had been started in the whole of Britain including the 2 in Scotland, Leith and Greenock. It should be noted that all these improvement schemes were

postulated on the continuance of the private enterprise sector as providing the majority of housing in the future, as in the past. Even from the "Committee of the Working Classes of Edinburgh" in their Report in 1860 on the "present Overcrowded and Uncomfortable State of their Dwelling Houses" we find their pessimism about the future prospects for working class accommodation is situated within a firm acceptance of the market system in house provision

> "... the property ... should be made to yield a fair profit to the capitalist, even although it were necessary to base their calculations on somewhat higher rents than they did." 728

The problem of the "gap" between a "fair return" on capital and wage levels was left unsolved.

The operation of the 1890 legislation in Glasgow was somewhat different, partly as a result of their Improvement Trust and the view of the legal advisers of Part I of the 1890 Act dealing with unhealthy areas that the legal process was "tedious, circumlocutory uncertain and expensive". 729 In consequence Glasgow did nothing under Part I and used only the individual dwellinghouse, Part II closure provisions. Glasgow chose not to utilise Part III of the 1890 Act which gave local authorities power to acquire whole insanitary areas and erect thereon dwellings for the working classes.

Despite its improvements on previous legislation the 1890 national legislation,was castigated by the Lord Provost of Glasgow, Samuel Chisholm as

> "so cumbrous and costly that it was practically inoperative in Glasgow." 730

A colleague on the Corporation suggested that

> "the present method of dealing with insanitary areas is so extravagant and unsatisfactory that Parliament should devise some inexpensive tribunal on the spot to decide what areas are insanitary, and enable local authorities to proceed at once to deal with them." 731

Apart from the suggestion about the tribunal, this was adopted as a motion at a conference of the housing of the working classes held under the auspices of the Sanitary Institute in London in 1900.

In Edinburgh in only one instance under their 1867 Improvement Act did they exercise their power of erecting buildings and commercial enterprise carried out these tasks. In the one block of model buildings they did build,the Charity Organisation Society Report explained the impact of the building of the thirty six houses

> "... a block of model buildings for working men was erected, which was eagerly bought up by skilled mechanics ..." 732

So far as displacement under the Improvement Act was concerned, there was a provision that no more than 500 of the population could be ejected at one time without a certificate from the Sheriff that accommodation was obtainable in the neighbourhood. Despite this, those displaced in Glasgow had increases in rent of from 20 to 50 per cent in most cases.[733]

Edinburgh Corporation examined the question of erecting tenements with resident caretakers and examined the position in other authorities. In operating an Improvement Scheme under the 1890 Housing of the Working Classes Act, the question of what to do with the cleared sites of the insanitary dwellings was considered in the light of the requirements in the Edinburgh Improvement Scheme Provisional Order Confirmation Act 1893. The Council could not displace more than 350[734] persons in any period of six months, in any one area without the permission of the Sheriff of the Lothians and Peebles, unless other suitable accommodation had been provided for such displaced persons. Where this was not possible and the numbers displaced rose above 350 persons at any one time, the Council were required to erect, lease or acquire houses for such persons and let these out to the displaced.[735]

Looking to the other sources of cheap housing, the Sub-Committee noted the various voluntary and

philanthropic ventures which provided such housing, though noting that no housing under £10 had been erected by the private sector for a number of years past, it recommended the Corporation undertaking this venture themselves. The recommendation does not appear to have been acted upon very extensively.

After 1890, in Edinburgh progress was effected both through the national legislation as well as Edinburgh's local Act of 1893, coupled with the extension of the North British Railways through which "large inroads have been made upon some of the most congested districts".[736] The Corporation saw a difficulty

> "The problem before the Corporation is how to prevent the classes dishoused under the improvement schemes falling into their old ways ... There can be no doubt that large numbers of the poorest among the people need to be protected, not only from themselves but from becoming sources of disease which may spread far beyond their own neighbourhood."[737]

Despite their early reticence, the Corporation of Edinburgh opted unwillingly to erect more houses at the end of the nineteenth century and by 1900 owned 237 houses rented at, from £5 to £10-10/- per year.[738] In addition to their work, the North British Railway erected 118 new houses with rents from in the same range consisting of 44 single-ends and the rest two roomed dwellings. A rather wider range of

rents could be found in a philanthropically orientated body, St. Giles Dwelling House Company, which provided 112 houses with rents as low as £3-10/- and going up to £12-2-9d, consisting of new and renovated property. 739

Local authority keenness to involve themselves in building was less than wholehearted and this is reflected in the number of properties erected as well as the approach of councillors. In 1903 Councillor Brown of Edinburgh explained, in an address on "The Housing of the Working Classes" to the Edinburgh Working Men's Club and Institute, that the building undertaken on cleared sites in Edinburgh was only done because of the legal compulsion

> "... the Town Council could not help themselves in this matter. They were most reluctant to put their hands in the mortar tub, but they were compelled by the force of circumstances to do so." 740

As Councillor Brown explained, the local authority who cleared away houses of the working classes had to either provide new houses "or satisfy the Secretary for Scotland or Sheriff that there were sufficient houses of the class in question available within a given radius for the population to be displaced". Thus in their first housing venture in 1895 the Edinburgh Town Council had been so unwilling to provide housing, that the Secretary for Scotland had ordered an inquiry into the matter. Finally after a great deal

of trouble, the Corporation had succeeded in persuading the Secretary that they were making sufficient provision, even though they pulled down more houses than they erected. Their notion was to encourage private enterprise to take over cleared areas to provide housing. As soon as the Corporation were satisfied that there was no longer a scarcity of houses of the relevant class, it halted its work abandoning any further aspects of schemes which they had. This lack of keenness to become involved in providing housing, clearly had an impact on the selection of areas as slum clearance areas. As Councillor Brown commented, the matter was not entirely in their hands

> "The promotion of slum schemes was not a matter which was left entirely to the initiative of the Town Council. The Housing of the Working Classes Act provides that where twelve ratepayers or two Justices of the Peace or a medical officer of health complain of the existence of an unhealthy area, the Corporation must take the necessary steps to promote an improvement scheme for that area ..." 741

In practice this appears to have had no impact in Scotland.

Under the 1909 legislation the provisions for large scale clearance were strengthened to provide an obligation on local authorities to provide either an improvement scheme for slums or re-house those displaced in their actions. As for the individual

house, the local authority could call on an owner to remedy insanitary conditions. If he failed within a reasonable time a closing order could be pronounced after which the house could not be inhabited. This closing order was subject to appeal to the Sheriff. However, this situation was avoided as the case of Sharp v. Provost of Edinburgh revealed, where the local authority using their own appeal-free Act avoided having their decision scrutinised.[742] In most areas where no such special situation existed and any appeal was rejected, the house could then be closed and ultimately demolished. The contrast between Edinburgh and other parts of the country was recognised as significant, since Edinburgh could both close , demolish and compulsorily acquire at site value, rather than as a rent-producing subject, provided they used the site for dwellinghouses for the same classes of persons or as an open space. For other cities and towns the property owners were less worried

> "So long as he knows that the Corporation can do nothing but shut up his property and that they dare not do this where the result would be to turn persons out into the street, he feels comparatively safe."[743]

This persistent problem halting development schemes of rehousing again depended on the local attitudes. Peter Fyfe in Glasgow with his policy of not exacerbating the difficulties of the poorer tenants,[744] contrasted with

the action taken in Edinburgh. In 1892 Edinburgh Town Council had demolished some 706 houses in the Old Town ultimately erecting on the space 192 new houses. Five years later in Stockbridge they had demolished 156 houses, replacing these with 119 new houses, whilst building 66 houses in Portobello where they demolished 64 dwellings. This more generous attitude to replacement had not been carried through in their Greenside/Paul Street schemes, where 281 properties were demolished and 94 houses provided in their place.[745]

One of the problems, which the Convener of the Edinburgh Public Health Committee, Dr. McConnell noted, though, with the displacement provisions, was that the Acts did not assist those who wished to differentiate in their housing policies between the various classes of tenants

> "... the responsibility of the undertakers as to re-housing following upon demolition is not confined under the Act to the "decent" or the "respectable". It involves the housing of all who are displaced, irrespective of moral character or financial stability."[746]

Essentially, the change of standard which the 1909 Act introduced, centred around the right to close houses until they were rendered fit for human habitation rather than the less embracing 1897 standard that they were merely no longer a "nuisance or injurious or dangerous

to health". The earlier position permitting patching, allowed unscrupulous owners or builders to re-open properties which were still slums but which were no longer dangerous.

One of the few local authorities in Scotland or England to take any action under the 1875 Cross Act was Greenock. The Medical Officer of Health, Dr. James Wallace, recently appointed noted the Act

> "... I saw an excellent opportunity was afforded for getting rid of the chief plague spots of disease and vice." 747

The population displaced amounted to over 3,000 and houses were built by the Corporation in the area housing about 1,000. Apart from this aspect, the expense of the whole operation was enough to deflect Greenock into using other legislation to deal with insanitary houses

> "But for the costliness of the scheme - due in my opinion to the iniquitous system of valuing for such a purpose - I would have made representations as to other spots requiring improvement, but ... I did not consider it advisable to press further on the general ratepayers..." 748

In the twenty years from 1876 to 1895, 435 houses were closed in Greenock as being uninhabitable, whilst 950 were served notices to improve and this was done successfully even though Dr. Wallace regarded the process as "rather tedious and dilatory". In

addition to this, in 1877, Greenock under their own Police Act of 1877 obtained powers such as ticketing and lodging house licencing and gradually attempted to cast off the epithet as the "most filthy and unhealthy town in Scotland",[749] since as the Sanitary Journal pointed out in 1881, "there was perhaps no town in Scotland where infectious disease raged more frequently or more fiercely, or with more fatal effect than in Greenock"[750] prior to 1867.

It seemed that "housing suitable for the labouring classes" had ceased to be built in 1910 according to the Medical Officer for Greenock in his annual report. The supply of new housing at the bottom end of the market had dried up and yet there were almost 1,000 vacant houses in 1909 as compared with only 123 in 1902. Also, over half of these vacant properties were let at below £10. The cause was seen as the considerable amount of building which had gone on for the "better class of tradesman" and the notion of tenants "rising" to better houses was suggested by Dr. Cook to be in operation.[751]

The trauma of their early encounter with the costs of operating the Cross legislation appeared to dissuade Greenock from attempting to deal with their housing conditions. They were one of the very few Councils which had the experience of a Local Government

Board inquiry into their failure to deal with their insanitary overcrowded housing. Whilst these complaints were sustained in their Report, the Commissioners were of the opinion that, whilst the incoming employers of labour had done little to house their workers

> "It is a generally accepted fact that the provision of the better-class houses can be made upon an economic basis with reasonable certainty, and the Commissioners do not think it is good policy for the Corporation to acquire the habit of providing, and to be expected to provide, for the very poorest class at uneconomic rents." [752]

Nonetheless, the Commissioners felt that there was a clear obligation on the local authority to commence and pursue a policy of providing houses for the working classes until "normal conditions are restored". [753]

In Aberdeen, apart from providing for the better construction of future dwellings in their local Act of 1881 prescribing building in backlands and specifying such items as ceiling heights, use was made of the Cross Act to clear out a "nest of filth and fever" known as the Shorelands scheme back in the 1880s. [754] Rather more revealingly their moves in the 1890s against another congested district was started up by the necessary number of ratepayers who turned out to be actually the proprietors of the slum property of the vicinity. Although this was done and the

property was represented to the Council as an unhealthy area for improvement in 1889, it was not until 1894 that the Town Council received the Report. This arose from the desire of the Council to ensure that they would not be called upon to deal with a variety of similar areas throughout the city. This entailed an examination of the rest of the unhealthy areas and houses throughout the city. In the interim, using the local 1881 Act powers, 170 individual houses were closed. This local legislation had the advantage of providing no appeal mechanism and in April 1893 these properties were all closed, the authorities being satisfied that there was abundant vacant property at suitable rentals for the evicted tenants.

The problem with using these tough local closing powers was that the local Act gave powers to close but not demolish. The difficulty was obvious

> "Now closed empty houses, more especially of a dilapidated character, are a nuisance, both from a public health and police point of view. They soon cease to be closed except in name; the windows get smashed, the panels of the doors broken in, and the interior becomes a receptacle for filth, slops, dead cats, and abomindations of all kinds. The proprietor, deriving no rent from the house refuses naturally enough to do anything in the way of repair, and the building tends to fall to pieces." 755

Ultimately, Aberdeen chose to operate the Housing of the Working Classes Act 1890 and put forward

an improvement scheme under this legislation where the compensation was a great deal less generous to the landlord. Instead of being based on the actual rental of the often overcrowded property, the figure was a notional one based on what the landlord would have been entitled to had the building not been overcrowded, this figure to be fixed by an independent arbitrator appointed by the Secretary for Scotland. If the property were insanitary a further deduction was provided for to cover the cost of rendering the building sanitary. Houses unfit for human habitation attracted only site value plus the value of materials. In addition to this compensation advantage a local authority in their improvement scheme were entitled to extend the area taken over if they could show that this rendered the scheme more efficient or to provide ventilation and access. However, in 1897 at Whitsunday, some 50 or 60 families were thrown homeless and had to be accommodated temporarily in the Municipal Buildings and property which had been closed as insanitary was re-opened for their accommodation. 756

As in Glasgow and Edinburgh, the Aberdeen Town Council was prepared to enter the business of providing a small number of dwellings themselves and a number of houses were proposed and accepted in 1897 - 32 single-ends; 16 single rooms with closet; 24 two room dwellings. By 1911 there appear to have been 62

dwellings in Aberdeen.[757] A common lodging for 250 males was also erected to help take the dishoused from the improvement scheme since as indicated the surplus of housing accommodation had evaporated. The relationship between the activities of the Corporation and the "two classes" of tenants was perceived as less than immediate by Beveridge. He saw Corporation tenants not coming from the slums but from the better class of house which when thrown vacant could take in the ex-slum dweller on the model of Liverpool experience.[758]

The Housing Committee of the City of Liverpool reported that in 1901, though the Corporation of Glasgow had made great strides in housing, only part of the population of the city had been covered

> "Provision has been made for the poorer class of working-men i.e. those earning from 21/6d to 24/- BUT THERE IS A STILL POORER CLASS WHICH GLASGOW HAS NOT YET ATTEMPTED TO DEAL WITH EXCEPT TO "KEEP THEM MOVING." [759]

Indeed commenting on the Clydebank scheme to provide Corporation housing in 1905, the County and Municipal Record noted

> "Corporation housing schemes at the present time are not by any means so numerous that one may be allowed to pass unnoticed in these columns." [760]

In fact, apart from the building in Glasgow and Edinburgh, only Leith and Dundee had schemes for such

building in preparation at the time. John Butt's assessment of the very limited extent of municipal housing provided in Glasgow appears to have been borne out nationwide in Scotland.[761]

Summary

The significance of examining the practice of the various arms of the public health control bodies is in the insight which this offers us into the perception of problems during this period. We discover that although legislation existed dealing with the Housing of the Working Classes and although there were mechanisms available for the rectification of leonine contracts which failed to deliver the goods in terms of obligations as to human habitability these were subsumed within the interpretation put on their role by the local and central officials. These roles were in turn affected not simply by the bald facts of the legislation but also by the arguments which were waged within the circles of professional public health and housing. Thus the form the legislation took on the ground was shaped by the view that many of the problems of poor housing conditions were created or at least exacerbated by the individual moral failings of the poorer classes. In addition the alternatives within the almost wholely private enterprise housing market determined to a large extent the approach which

the officials took to what standard of health habitability was required of housing stock. There are, as we have seen, frequent references to the pointlessness of the authorities enforcing standards where the end result is not an unhealthy home but destitution in the streets. All these factors can explain how it was that the apparent paradox of judicial action and legislative direction was not quite what it seemed.

Instead of being wreckers of legislative intent, the judiciary can be seen as operating quite specifically within the same sort of problem perception. In their espousal of a contract model for housing decisionmaking by dissatisfied tenants, they were simply following the lines which continued to be laid down until the end of the Great War. What was almost wholely absent from the considerations of politicians and public health officials and commentators before the Great War was any alternative to this contract model of housing provision. Insofar as the provision of housing by the municipal authorities became an issue of policy with the Labour Party and the Independent Labour Party, this did not occur until the twentieth century. The momentum of the call for municipal housing was by no means under way before the first decade of the twentieth century was over. What was discussed was simply an extension to the minimal contribution to municipal housing already

provided through the Improvement Trusts in Glasgow and Edinburgh. It was not until a systematic and detailed study was undertaken across the whole of Scotland covering both industrial and agricultural workers, towns as well as cities, that the difficulties of private house provision for renting became clear as a national rather than local issue.