HOUSING AND THE JUDICIARY

A study of late nineteenth century judicial practice in Scotland

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ALTERNATIVE PERSPECTIVES

Introduction

The strictly non-practical interests of academic lawyers insofar as they operated as a separate sub-group of intellectual enquiry might be characterised as centring around a number of macro-problems on the nature of law. Within this wide area were contained a number of apparently distinct styles and modes of thought and enquiry. These have been compartmentalised, rather misleadingly, into "Schools" by some writers. This is at best only an analytic tool although there has been a tendency to see these approaches as being in some way rivals for the true soul of academic legal enterprise. The timely comments of Albert Ehrenzweig[762] as well as the rather more polemical utterances of William Twining[763] provide a sanguine counterblast to this form of scholastic formalisation. At a slightly different level, Eira Ruben points out some of the traps which can be involved when the aims and goals of legal and social philosophers are inferred from isolated texts.[764] Her work on John Austin revealing his profoundly political objectives can be counterpointed with the covert eugenic goals of such an apparent liberalising reformer as the prime mover in birth control publicisation, Marie Stopes.[765]

It is, however, not difficult to grasp from the pre-occupations past and present one of the continued concerns of academic lawyers from earliest recorded writings through the Romans to the early Church has centred on questions of the validity of man-made rules. There is clearly within this tradition no specific interest on whether or not rules are the creation of legislatures or judges, elected bodies or state functionaries. The thrust of the concerns of those seeking a higher law or natural rights validation is only marginally concerned with the actual rule creation operation. It only figured insofar as they impinge on the implementation of a priori assumptions such as the notion of democratic law creation. This has seen the light of day most recently within the works of Lon Fuller[766] and Ronald Dworkin.[767]

The central problems within such perspectives involve issues which stretch back to the early Fathers and their Medieval successors

> "As Augustine says, that which is not just seems to be no law at all : wherefore the force of a law depends on the extent of its justice. Now in human affairs a thing is said to be just, from being right, according to the rule of reason. But the first rule of reason is the law of nature, as is clear from what has been stated above. Consequently every human law has just so much of the nature of law, as it is derived from the law of nature. But if in any point it deflects from the law of

> nature, it is no longer a law but a perversion of law." [768]

The problem as recognised anew in the recent debates about the question of civil disobedience, [769] becomes complex where a broadly shared common source of supra-human authority is not mutually accepted. Establishing such a notional consensus has been the goal of latter day natural lawyers and their like. The recent revelations on the background to the Nuhremburg Trials reveal this graphically. [770]

Although there was within many of the works in British legal literature a strong consciousness of historical development, such sustained works of legal history tended to be descriptive rather than analytical in the avowed approach. The classic work on the history and development of the Poor Law published at the commencement of the nineteenth century does not make any pretence to relate the different formulations which the rules took from time to time to social or political phenomena. [771] Nor did the way in which the courts interpreted such questions as 'liable relative' and 'home parish' receive any different treatment. The impetus to systematise historical study of the laws and legal system seemed to come from individuals outwith the mainstream of legal education with their impetus derived from the nationalism of the early nineteenth century in the

post Napoleonic period.

Tinged with the cultural developments associated with this new consciousness, interest in distinct legal cultures increased.[772] The major figures involved inferred, to begin with at least, patterns of development from legal history and particularly from cross-cultural studies spurred on by the political and cultural imperialism of the latter sector of the century.

However, Sir Henry Maine, the primary major figure on the British scene did not concern himself with locating the judicial role in his conspectus and no specific attention was paid to the judiciary as a separate and distinct contributory agency of social decisionmaking. Aside from criticisms of much of this work for historicism, again the judges appear here as marginal support players in the tide of the development of civilised law in the movement from customary law through to the era of enunciated Codes.

> "The epoch of Customary Law, and its custody by a privileged order, is a very remarkable one ... The law, thus known exclusively to aprivileged minority, whether a caste, an aristocracy, a priestly tribe, or a sacerdotal college, is true unwritten law ... From the period of Customary Law we come to another sharply defined epoch in the history of jurisprudence. We arrive at the era of Codes ... a direct result of the invention of writing." [773]

The concerns then, the goals and structures employed by this early work in historical jurisprudence yielded little analysis of the judicial role and only minimal indirect data. The judiciary have been subsumed within the life and death of doctrines for practitioners. For the historians of the legal process they tended to be swallowed up within the life and death of perceived general trends, like the move from status to contract[774] or from repressive to restitutive sanctions.[775]

Not surprisingly, perhaps, the concerns and interests of political and social philosophers have been less law-centred than those of jurists and practitioners of law. However, there have been areas of overlap in such areas as sovereignty and the 'good life'. In addition to the question of law-centredness, the notion of democracy has only recently become a central facet of political life. Until this occurred questions of specific concrete decisionmaking tended to be subsumed within wider debates over sovereignty between such competitors for formal political institutions as the ecclesiastical authorities and temporal rulers and Parliament and King, the traditional landed ruling class and the manufacturing commercial classes.[776]

Since the resolution of these debates in the early part of this century into broad acceptance for the time being, at least,of universal adult suffrage the specific concerns of political thinkers have turned towards threats to the principle of democratic decisionmaking. Not, of course, that the twentieth century has been remarkable for unanimity about the appropriateness or effectiveness of the limited forms of representative government which have passed for democracy. Major differences, however, in the experiences of the constitutional debates within the United States and Britain has meant that there has been an increased impetus to judicial study in the United States well before behaviourism entered the social sciences as a major influence on work. The notions of judicial review implanted in the United States Constitution institutionalised the Supreme Courts of the States, as well as the Federal one,as central decisionmakers within the American political setup.[777]

Although legal education remained firmly wedded to the profession and production for this particular market, the great expansion of higher education in the sixties in Britain permitted a wider range of academic study to be undertaken in Colleges and Universities. The precise aetiology of these changes only relates marginally to the goals of legal education

and the professional connection. Although much law teaching and research continued on the dominant paths indicated, some of the areas neglected have since received coverage.

Jurisprudence itself has not only altered in its own content but has also flowered in some instances into Sociology of Law. The changes have not been rapid, though or dramatic.

Jurisprudence was compulsory in almost all LL.B. degree courses in the mid-sixties.[778] The Survey of Legal Education taken at this time revealed that the subject of Sociology of Law does not make a separate appearance anywhere at this time. The situation had changed somewhat by the time of the follow up study in the early seventies.[779] At that date some four optional sociology of law courses existed along with a compulsory Jurisprudence element at 75% of the University Law schools. The same sort of proportion of compulsory Jurisprudence was found in the Polytechnic law courses with some 80% of courses requiring Jurisprudence in the degree.

Although the emergence of Sociology of Law as a separate academic topic is of very recent origin, it might be thought that the sociology of law "element" within Jurisprudence might reflect a change of interest and emphasis without there having been any

change in course title.[780] Although there is some evidence of this process having taken place, the most recent systematic survey of the teaching of Jurisprudence in British Universities seems to suggest that the traditional emphasis on Hart, Austin, Kelsen, and the Hart/Devlin morality debate continues. Thus, at the end of the Second World War we find

> "less than half touched on economics, sociology, or anthropology."[781]

The Judiciary and the democratic challenge

Judicial Defenders

One theme which had recurred in the inter-war era received considerable attention with the threat to the lawyers' dominance in decisionmaking machinery under the Welfare State.[782] This conflict between democratic forms of government and Executive power was articulated again by judges and politicians in attempts to define the judicial role in practice.

In his 1960 Rosenthal Lectures,[783] Lord Radcliffe attempted to examine the role of lawyers in a situation where there were competing value systems other than the liberal political democracy. The threats to the values enshrined in the latter systems were discussed in terms of the contribution which lawyers, specifically, the judiciary could make to the sustenance of these

values. Radcliffe wondered whether or not the time was past when judges could boldly make their determinations on the grounds of principle rather than precedents which enshrined the economic or social attitudes of an earlier epoch.

Lord Radcliffe wondered whether or not it might be possible to rework open-ended notions from the past like the "doctrine of public policy". He was not surprised that the unelected judiciary did not overtly acknowledge their creative role.

Lord Radcliffe appeared to be recognising, albeit in a somewhat veiled manner, that there were severe problems in separating off 'public policy' from judicial decisions

> "But supporting that this clear distinction is not really maintainable, that the law itself, which has to be interpreted, can never be quite free from some active recognition of what the public interest requires and that its categories of right and duty cannot altogether escape review in the light of those requirements." 784

He referred to the 'realist' speech of Baron Parks in Egerton v. Earl Brownlow 4 H.L. Cas. 1 (1853) where there was an explicit recognition of the nature of competing world views and backgrounds influencing decisionmaking on such matters as what is best for the community good. The specific difficulties though of even established legal doctrines, like the restraint of trade doctrine were examined by Radcliffe and he

concluded that the notion of pure legal principles was highly misleading, subject to variables like economic development as well as social thought. Since then, these legal notions have a shifting substance, then the separation off of the legal from the non-legal was logically suspect. This was in accord with Radcliffe's adoption of the description of law as "a mode of treating legal problems rather than a body of fixed rules".[785] However, apart from writing in a challenging way against the limited legal formalism which such judges as Viscount Simonds had enuciated in Magor and St. Mellons,[786] Lord Radcliffe did not provide us with any more than hints as to defects. His words countered complacency but suggest no solution in themselves nor did they do more than hint at the likely gap between some judicial apolitical rhetoric and the reality of decisionmaking.

This kind of approach has continued in both the major descriptive works on the operation of the Legal System as well as in work addressed to precisely the same sorts of questions Lord Radcliffe faced.

Writing in 1969,[787] Louis Jaffe compared the performance of English and American judges as lawmakers basing his remarks on lectures delivered two years previously at Oxford. He contrasted the activism of the great age of English judges with their then

current limited creativity. To point up this stark contrast Jaffe examined the work of the American Supreme Court. This whole analysis was posited within an activist/restrained problematic. The move from the "great judge" of the mould of Coke, Bacon, Holt, Mansfield, Blackburn and Willes was a matter of regret for Jaffe who saw the need for what he described as judicial activism in a democracy. The activism was necessary to prevent minorities being oppressed within majority-based democracies, as well as individuals, and rather more controversially providing "leadership in the solution of social problems requiring the use of law". Society was characterised by Jaffe as a plurality of ascending and descending groups

> "The conditions of life in society are continuously changing. Power is lost and gained; exploited minorities become majorities, themselves prepared to exploit." 788

Insofar as individuals received according to Jaffe certain protections under the common law, these altered their substance as wealth or technical increases or decreases occurred leading to redefinition of spiritual and material needs. In addition to this, even the majority power holders required judicial assistance.

> "The judiciary may provide the leadership which is needed if the majority is to find and to realise its purposes." 789

However, these majorities were for the most part elite led coalitions in which there might well be indifference to matters which were not of immediate and obvious concern, as expressed by a vocal interest group. He cited the instance of victims of negligence

> "... the victims of negligent activity are not a structured group able to organise for legislative reform. And disinterested persons - scholars, lawyers - will find it difficult to prevail against the well-focussed opposition of the organisations favoured by the status quo. This is an ideal opportunity for reform by the judiciary." 790

When it came to the criteria by which the judiciary should pursue this activist line, pushing the common law to its limits and pursuing the "goals" of the legislation, the judges were able said Jaffe to adopt the attitude

> "that the Constitution, the common law, and even the statutes embody principles sufficiently general to allow for growth as the occasions present themselves." 791

They had to subject themselves in this general goal pursuit to two requirements

> "First: the decision must be based upon a principle already found in the existing law ... Secondly: logical consistency does not suffice to establish legitimacy." 792

But where this latter situation obtained and there were conflicting inferences possible from the legal materials

> "then the stage is set for invocation of the non-legal considerations, moral, economic, and social." 793

Jaffe counselled the wise and clear reference to an existing principle as a means of avoiding criticism, as well as in some way providing a "safeguard against judicial usurpation and caprice".[794]

In addition Jaffe suggested that when he consulted his own stock of moral values and principles to make his decisions the judge would do this with a knowledge of what was "more or less widely accepted".

Jaffe did point out though that he was concerned to merely defend the 'bold judge' but did not vilify the conservative. The new process should be permissive rather than mandatory, allowing judges to boldly go or stand firm as they choose.

Jaffe's notions of the former greatness and the potential great English judges was to be obtained by inference rather than explicit categorisation. Greatness seemed to be coincident with "progressiveness" and keeping "up to date" with modern trends.

> "Where it (the trend of judicial innovation) is progressive, where it was concerned for 'the little man' (as is the case today in America), it may reinforce public faith in the administration of justice. Where it is conservative or reactionary it may lead the ordinary man to believe that the law is the instrument of the powerful, and belief in judicial honesty may be impaired." 795

Jaffe merely illustrated a couple of examples from his "Hall of Judicial Fame" to show what greatness used to be - Baggs case; Coggs case; Ashby v. White as well as references to Mansfield's creation of quasi-contract and attacks on real property law. Interesting though this selection of specific aspects of judicial innovation was it was not entirely clear whether or not what was desirable was the innovation or the substance of the change.

Academic reformism

The dominant approach in the past decade from the mid-sixties onwards has been the emergence of a consistent strain of criticism from within the ranks of the legal academe directed at the operation of institutions rather than simply on the movements of legal doctrines and principles.

> "(In 1962) ... For the first time for many years, the public seemed concerned with re-examining the operation of courts and judges, the law and lawyers. For a long time, the operation of the legal process had seemed to be too sacrosanct to be questioned. Suddenly in late 1962 and 1963, both the popular press and academic writers began to examine the alleged defects in the English legal system;" 796

The reformist perspective took place within context of a wider intellectual revolt against established orthodoxy in the sixties in Britain. This 797 process associated with movements in culture did not

make an immediate impact in the legal sphere. Here was a world firmly rooted in hierarchy and ancestor-worship. The traditional non-critical "cosy" approach can be found in Derriman's "Pageantry of the Law" which sought to explain the significance and history of such institutions as the wearing of the wig, the robe and the black cap. The purpose of the work was

> "... to explain enough of the historical and legal setting to enable the costume, customs and ceremonies of the Law to be seen in their true values ..." 798

The situation was characterised by the journalist Anthony Sampson in 1962 in "Anatomy of Britain".

> "The Law is the most striking example of a profession which has become trapped in its conservatism and mystique. Its proud independence and remoteness have given it magnificent strength as a bastion of liberty and justice; but have also made it very unsusceptible to pressures of change ... while the Law has become a much more self-contained profession, split off from politics, it still likes to cling to its old authority and prestige, rather than to interest itself in the exciting new developments of society. The Law, more than any other profession, is imprisoned in its own myths and shibboleths, and while the benchers preserve their traditions, and the solicitors tie up their thick paper in pink tape, their protected world has become increasingly irrelevant to the great corporate world outside ..." 799

The judiciary were symptomatic of a closed legal society

> "Judges have always come from a small and

> conservative section of the community - and their section shows no sign of enlarging ..." 800

What we had was a fresh and popular articulation of broad themes already extant within the legal academic and political world. What was different though was the status implicitly sought by the new reformers. These new critiques of the legal system were apparently formulated within the canons of social science and not partisan politics. The tone then was scientistic, perhaps, but the goal was reformist. Abel-Smith and Stevens, although they wrote in a statistically oriented way, have clear and acknowledged objectives.

> "We do not pretend to have written a history without a purpose; our choice of subject matter has been influenced by our interest in possible reforms." 801

It would be misleading, however, to assume that this meant there would be no systematic analysis of the forces involved in the legal enterprise and the social power embodied in the legal structures. This was precisely what Abel-Smith and Stevens claimed to have done

> "... we have tried to spell out the detailed history (from 1875 to the present), the ideas of its dominant personalities and the cause which led to the final decisions. Thus much of the book is devoted to unsuccessful attempts to secure reforms.

> Again and again the same attempts are made and defeated by much the same forces and for much the same reasons. In this field history repeats itself - ad nauseam." 802

Here then was a suggestion of a clearly grounded theory of the society based on these empirical investigations. Within this perspective one might expect then the role and function of the judiciary to be articulated. The theoretical position which Abel-Smith and Stevens utilise is less than explicit.

The judiciary are criticised for their attempts to characterise a variety of economic matters as non-justiciable as typically in the line taken by Lord Justice Fry in Mogul Steamship Co. v. McGregor, Gow and Co. 1889 23 Q.B. 598 at 626 where he suggested to

> "draw a line between fair and unfair competition between what is reasonable and unreasonable, passes the power of the court." 803

The understandable exasperation with the convenient fact that the question of non-justiciability seemed only applicable where the interests of capital were involved rather than where labour were attempting to secure a better position within the productive relationship led Abel-Smith and Stevens into a polemical stance where the judiciary and its activities were posited within a problematic centred on notions of judicial activism and passivity.

> "Illogically, however, while the judges were reluctant to interfere with business associations, they had far less compunction about interfering with the activities of trade unions." 804

Abel-Smith and Stevens expressed concern that this approach had led to the narrowing of the role of the legal profession. The Courts failed to develop a sustained and comprehensive system of administrative law. They were bypassed as a result of distrust by the Liberal Party based on intuition as well as the judicial "wrecking" record on compensation under the Workmen's Compensation Acts 1897 and 1906. Not only was the anticipated speed, simplicity and effectiveness of the scheme hampered by simple pressure of cases on the Court system but there was a split in the House of Lords into pro-Employer and pro-Employee wings. In line with the kind of analysis to be found in the Franks Report, 805 Abel-Smith and Stevens tended to concentrate on these aspects of subsequent political decisions to avoid situating decisionmaking over welfare legislation within the traditional Court structure.

Although one may criticise the simple formulation of the theory of judicial exclusion on empirical grounds, 806 it does remain true that the symbolism of the judiciary has remained a potent factor within the loose imprecise class politics which have been a

feature of party politics in Britain at certain times within this century.[807] Whatever the analytic deficiencies of the characterisation of the judiciary as crude class warriors the practical use of such a formulation has a certain value within a strictly reformist perspective.[808] The limitations of the problematic are more clearly exposed when we see what proposals are posited to deal with the judicial limitations.

Occasionally expressed in terms of keeping up with changed social conditions, Abel-Smith and Stevens perceived the work of the House of Lords as adopting a passive line in public law after the first decade of the century but remaining a contributor in the field of private law until

> "... the advent of Hailsham as Lord Chancellor in 1935 and Simon in 1940 spelt an end to the creative period." [809]

Abel-Smith and Stevens correlate the decline of the work and creativity of the Courts with a rise in public confidence leading, again, to a restoration of economic and public law work with the Restrictive Practices Court and the Tribunals and Enquiries Act in the fifties. This, along with an enunciation by a variety of judicial writers and also other commentators on the lawmaking reality and obligations

of the judiciary, seemed to confirm Abel-Smith and Stevens in the soundness of their method as a satisfactory explanation of the judicial role. The nature of the discourse confirms the analysis. Typically the question could be asked in terms of changing social attitudes to "modern" notions like the abolition of capital punishment. If this issue could be presented as one of "up to dateness" then by being sympathetic or unsympathetic the judiciary were classifiable on this particular continuum.

However, Abel-Smith and Stevens did seem to recognise in this work that the judiciary have certain limitations as on sentencing. Talking of the proposal by a County Court judge for a reintroduction of corporal punishment in 1956

> "Fortunately for Britain's reputation abroad, Members of Parliament refused to accept judicial expertise in criminology." 810

Not only did comments as to the appropriateness of certain types of punishment bring the judiciary to the attention of the media but also their length and variability. This and a variety of other matters were mentioned by the authors without explicit comment except insofar as they further contributed to the general trend against the whole legal penumbra. Abel-Smith and Stevens, however, did not throw any further light on the actual position of the judiciary

within the social and economic order except to imply where a succession of "bad" decisions were made then the "politics" of the judiciary may become a matter for "public concern". They pointed to the journalistic mileage obtained from the jailing of two journalists for failing to disclose their sources to the effect that

> "the judiciary is the handmaiden of the Executive ... (and) ... the citizen's highest duty is to the state." 811

Much the same points are made in relation to other areas of criticism on specific issues whether they were on trade union matters and the loss of the right to jury trial in damages cases. The terms within which the debate took place, including the replies made by or on behalf of the judiciary led Abel-Smith and Stevens to suggest that towards the end of 1963

> "although the storm blew over, the image of judicial impartiality and independence was further damaged." 812

In fairness, it should be pointed out that 1963 was not a "good year" for the Government and Establishment generally.[813] The judicially orientated "flak" needs to be seen in this light, and the judiciary have many of the qualities which Tom Wolfe talks of to act as "flakcatchers".[814]

In concluding their remarks on noting the acceptance by the Labour Government of the policy of providing a 25% pay rise to the judiciary which came in for some criticism from their own back benches before being passed

> "No doubt some felt that the new Act re-established the reputation and confirmed the priestlike position that the judges had come to occupy within the British Constitution. But the preceding years of criticism practically ensured that the judges would never again be treated to the sycophantic praise which had followed them everywhere in the early 1950s. Public scepticism had been too far aroused." 815

Abel-Smith and Stevens conclude by suggesting that what has bedevilled the legal enterprise in England and Wales has been a failure or reluctance to examine basic assumptions

> "The lack of analysis of role or function was perhaps nowhere more obvious than among the judges." 816

Certainly their study is important in the lack of respect which it observes with regard to the rhetoric of the judiciary and their spokesmen as existing in some suprapolitical realm of logic and common sense which was somehow inscribed in the hearts of the individual judges. Whether or not Abel-Smith and Stevens have been successful in any wider terms in providing some framework of analysis against which

we can measure the activities of the judiciary will be examined when we consider the difficulties of erecting a theory of the judicial role from the variegated and yet limited sources which are thus far available to us within the British legal system writing.

From a methodological viewpoint we find that their follow up work "In Search of Justice" is posited on the same bases as "Lawyers and the Courts". Whilst the former attempted to historically trace the role which law, lawyers and the courts play in English society, the second study examines the extent to which the English legal system "might be made more responsive to changing needs".[817] Clearly the reformist interests of the authors again dominated their work. They were concerned to produce programmes for reform which could be operationalised rather than simply a picture of the dynamics of the legal profession or the Courts or legal education. The work was essentially descriptive as well as containing a chapter of prescriptions for improvements entitled "The Road to Reform" as well as a chapter on "The Future of Courts and Tribunals". Nevertheless, to these ends they did ask a number of pertinent questions about the judiciary which seem to offer something quite substantial.

> "We are concerned not with the doctrines of the substantive law, but with the process by which litigation of legal issues is operated and developed by the judges. How effectively do the judges perform the task of applying the law to the facts of each case? How skilled are the English judges as evaluators of fact? How objective are they as decisionmakers? How far do judges, and how far should judges, consciously make law? And in so far as they do make law, what type of law do they make? By what standards do the judges exercise their discretion?" 818

Answers to this range of questions should provide us with some elaborate picture of the judicial function and the factors involved therein.

Rejecting the "slot machine" view of judicial practice and discussing the role of the judiciary in dealing with policy issues in their work on the courts Abel-Smith and Stevens dealt with the notions of objectivity and impartiality in the decisionmaking process

> "The claim that judicial decisionmaking is inherently different from all other forms of decisionmaking or that it has some absolute or unique claim to objectivity and impartiality cannot be maintained. This is not to suggest that the judges are in any way corrupt or are consciously biased in favour of any person or interest. But incorruptibility is not the same as absence of bias. The judges, like the rest of us, have their views about what is good for society and these views are considerably influenced, in their case as well as in ours, by the political and social assumptions of their class, family and social contacts." 819

Having established that the dominant judicial background for the English judiciary was "largely upper-middle-class ... educated at public schools", Abel-Smith and Stevens examined the "Judges in Action".

> "Where have the views or values of the judges conflicted with policies developed by the democratically elected legislatures in related fields? The areas where it is easiest to produce examples are in crime, taxation and family law." 820

In these areas with their war on crime through stiff sentences, development of fresh crimes and extension of recognised offences as well as in their narrow formalistic approach to taxation matters it seemed that the judiciary were out of step with the public opinion/legislative intention matrix. Abel-Smith and Stevens continued this vein of criticism

> "Divorce is another area where some of the judges have been hesitant to accept change." 821

They concluded as to these specific activities and the ensuing claims as to the frustration of Parliament's intentions

> "Such allegations raise doubts about the independence of the judiciary, even in the most traditional sense." 822

This practice, they suggested, was further compounded by the habit of judges of "sounding off"

from their judicial thrones on moral issues where they have the opportunity in areas like divorce as well as less controversially, perhaps, in criminal matters.

All this was viewed as undesirable in that it could only serve to reinforce traditional stereotypes of the judiciary held by the commercial community and the working classes if the judiciary continued to fulfill the role of "eccentric old dodderer". [823] The result was even more dramatic than merely a question of symbolism since they asked if this would

> "help politicians to overcome their reluctance to give new administrative matters to the courts, or to convince the new generation that the judges have a major role to play in modern Britain." [824]

Apart from their implicit critique already discussed and the criteria already applied of public/ legislative opinion the authors were less clear about future developments. They discussed widening the Bench pool selection area and concluded it might not be any more helpful as "the typical solicitor is not likely to have a more progressive outlook than the typical barrister". [825]

There was not a great deal of optimism as to the prospects of success in attempting to solve these problems through a radical change in the social

composition of the bench since

> "if the Bar today is not as socially aware as it might be it is not just the fault of its background." 826

Rather than concentrate on selection from a wider professional clique Abel-Smith and Stevens discussed the whole question of the process of selection rather than just the possible candidates.

Procedures should be evolved which were not directly democratic but rather that these should be painstaking and fair and seen to be such involving such notions as actual applications, references and testimonials.

Rather more interesting from the point of view of situating their approach to the "judicial problem" within a specific framework was the authors' notions of judicial training as a panacea for social alienation. The notion of "advanced staff training" is what they envisaged to deal with problems which seem to be posited within the problematic of intellectual and professional isolation.

In much the same pragmatic reforming tradition is the work of Michael Zander. His empirical contributions have ranged wide across the board focussing on such issues as the utilisation and knowledge of the Rent Acts in working class areas

as well as the lack of provision of legal services in such areas.[827] His most relevant work in this context is "Lawyers and the Public Interest" published in 1968 which studied the various restrictive practices in the legal profession. Within these specific parameters Zander discussed various aspects of the judiciary in his treatment of such restrictive practices as the "Two counsel rule" and "Partnerships at the Bar". Zander's criteria for his subject matter was quite explicit. After rejecting the notion of looking at such contentious matters as the entry restrictions of the profession through examinations or other tests or such items as acting where there is conflict of interest. These are dismissed as "too obvious for discussion" and "so plainly in the public interest that there is nothing to discuss".

> "The book concentrates, in other words, on those rules which do seem to need consideration because there is at least a question as to whether or not they are indeed in the public interest." [828]

Since the book had its genesis as a Memorandum to the Monopolies Commission into restrictive practices in the legal profession, we can assume that this was the criterion which Zander postulated as representing the "public interest" as it provided the framework for analysis

> "The book therefore attempts to a critical evaluation of rules and practices that seem to the legal profession to be in the public interest and, judged by the same test, seem to the author to require reform." 829

Zander suggested that future prospects of promotion to the Bench inhibit professional self-criticism. In relation to the rule against partnerships at the Bar, Zander opined

> "An indirect though not entirely inconsequential result of introducing partnerships could be to make the barrister more courageous in his attitudes to the problems of his own profession. Barristers are affected at every stage of their careers by fear of consequences if they appear too critical of authority. At the beginning they risk not being given a seat in Chambers. One they have been taken into Chambers they worry about not offending the senior members or the clerk. Later they are concerned not to spoil their chances of getting silk or of being appointed a Bencher of their Inn. Even the silk is inhibited by the knowledge that what he says will influence whether he is appointed a judge." 830

Zander's concerns were well illustrated in his remarks on the benefits to be obtained from fusion of the two branches of the legal profession. A unified profession would widen the base from which the judiciary was taken

> "The judges are drawn exclusively from the Bar. There are about 150 senior appointments, plus a great many others in the range of Recorders, Chairmen and Deputy Chairmen of Quarter Sessions, totalling perhaps another 100 or so. The Bar has a strength of a little over 2,000; the solicitors' side of the profession has over 22,000 members. About one

> twelfth of the legal profession therefore provides the entire judiciary. This is bad for at least two reasons. First, it limits the ambit of choice and excludes many who, in a unified legal profession, might be suitable for appointments to the Bench." 831

By maintaining a Bar monopoly in a situation where there was a relatively small Bar one was at the mercy of Barristers - "mediocre or worse". It was a question of the talent one was denying the country as judges

> "It seems probably that there are a reasonable number of solicitors who would make perfectly good judges." 832

In addition to benefiting the community from having a potentially higher calibre judiciary, Zander also felt that being denied the possibility of qualifying for the highest office was unfair to the solicitors' branch.

> "This is not merely unjust to those amongst them who would be suitable for appointment to the Bench, it is also an injury to the dignity, self-respect, and pride of the whole solicitors' side of the profession that none of its members can reach the highest positions open to lawyers." 833

Apart from the "freezing out" of solicitors from judicial appointments there would be benefits for others not solicitors

> "There is nothing to be lost and something to be gained by broadening the area of choice from the judiciary - not least because a broader area of choice would reduce the present tendency for judges to be drawn from the same narrow social class with the same rather narrow range of attitudes derived from practice conducted in the sheltered conditions of the Bar at present organised." 834

As indicated Zander's general work is very specifically oriented to reforming goals of a quite precise nature. His work situated within an "achievable goals matrix" rather than one of theoretical analysis.

In 1974 in his introductory text for "students training for social work, teaching and a wide variety of other professions", Michael Freeman while eschewing such topics as "power, order (and) class" 835 described some of the standard features of the context of judicial work. He stressed the unreliability of court work as a guide to social conflict

> "Under 5 per cent of writs issued come to trial, and the majority of potential court actions do not even reach the writ stage." 836

Freeman ably demonstrated that judges indeed did make law within specific limits indicated by legislation and, to an extent, precedent

> "... the judge does not have carte blanche, but must innovate within the interstices of established rules, fashioning them in accordance with the principles and policies at the basis of those rules." 837

He suggested further, enigmatically

> "A judge is expected to develop the law in the directions required by social needs ..." 838

He did address himself to the practical 'difficulties' of reconciling an unelected judiciary which made important decisions on social policy with notions of democratic accountability.

Aside from the technical advantages of statute as a method of legal change, Freeman addressed the problems of judicial unsuitability as determiners of social policy and looked at the common social background and socialisation process of the judiciary. He seemed to suggest that role perception would compound the conservative bias of the judiciary as then constituted. This led to social isolation which was deemed to be of significance

> "... one still wonders whether the Bench can really understand and communicate with the working classes: whether it can, for example, understand the problems of poverty or the different tensions, expectations or social values to be found in classes of society other than their own." 839

The problem of communication, though, Freeman suggested might not lead to any other different kinds of decisions. Instead it was urged that judges should receive education

> "... so as to enable them to get a better understanding of those who appear before them and to become more socially tolerant." 840

This was urged along with selection from a wider social base, to include solicitors but all subject to the caveat that

> "Judges recruited from a different background would anyway take on the characteristics of the body they were joining." 841

Insofar as textbooks on the English Legal System deal with the judiciary and their decisionmaking, this has tended to be at the purely descriptive level. Walker and Walker in their "The English Legal System" devote a chapter to the judiciary and a chapter to "Law Reports and Precedents". The question of the creative possibilities of the judiciary role was raised

> "It is fair to say that certain judges deem it to be within their function to create new principles of law while others believe that any far-reaching change should be left to Parliament, which has the greater facilities for testing the possible repercussions of law reform." 842

However, the authors went no further than suggesting that such a dichotomy appeared to exist between active and passive judges except, probably in crime where

> "... it is universally accepted that judges have no power to create new criminal offences." [843]

Professor Jackson in his "Machinery of Justice in England" described the process of judicial work and appointment and dealt with the question of criteria for decisionmaking. Although admitting the difficulties of analysing the measure of uniformity which was produced by the judicial career path in England he suggested that the way in which success at the Bar and elevation to the Bench depend very much on individual effort and personal exertions could well mean that

> "Successful barristers, and hence the judges, are not likely to be very critical of the legal order. The existing system has brought them large incomes and position and has produced a disposition to resent change." [844]

When considering the matter of judicial prejudice or bias Jackson felt that this was a highly significant issue

> "It is sometimes argued that the whole matter is one of social class, for there are few barristers of working class origin ... The class factor cannot be ignored, but in its simple format is not a complete explanation." [845]

This Jackson attributed to the legal caste of mind.

Lawyers tend to see issues between individuals structured by notions like fault. They were unable to see the wider social canvas. Accordingly, the judiciary's record had not been impressive in all their areas of work,he suggested,particularly where organised labour was involved

> "Social legislation can rarely be comprehended by seeing its effects solely an issue between two individuals but the isolated issue is the centre of the common law technique." 846

As far as industrial relations failure was concerned, Jackson attributed this to lack of intimate involvement in industrial relations at the practical level. No amount of training of lawyers would produce a solution.

Jackson's statement of the nature of the main problems as he perceived them taken along with his analysis of the Baker v. Board of Education, Gideon v. Wainwright and Miranda decisions as they might have been dealt with in Britain give a fair indication of the limited reformist analysis which is deemed appropriate. This might be simply short-term "hard-headed" practicality since Jackson did imply that the judicial problem might require a far reaching solution. 847

Baker, Gideon and Miranda would have been impossible in Britain because of the existence of statutory

schemes for education, legal aid and quasi - official Judges Rules.

> "It is difficult to see how an English court could have done anything about racial segregation in schools because our educational system is statutory, and little could have been done about racial discrimination without upsetting some of the basic concepts of the law of contract and property." 848

Shimon Shetreet in his exhaustive examination of the processes for appointment and removal of the judiciary dealt incidentally with the specific problems of the criteria available to the judiciary and adopted by them when making social policy.[849] Dr. Shetreet amassed a vast amount of data, stories, anecdotes and general information about the process of the formal and informal pressures exerted upon the judiciary by the press, politicians, fellow professionals and so on. The level of debate about the criteria and guidelines which the judiciary follow tends to be rather limited to exchanges of polemical abuse and strenuously expressed veneration. We are able to glean from Shetreet's comprehensive work that the judiciary as a subject of debate is cloaked in mystery, awe and symbolism. He repeated with acknowledgement the Justice Report[850] without comment and also Alan Paterson's doubts about speed of appeal in Heaton.[851] Such things as when judges can criticise legislation; what they can lecture and write on; what they can say in the

House of Lords and what folk variously think of their appointment to special enquiries - these were the staple fare of "Judges on Trial".

Critical Evaluations

Although Fred Morrison[852] and Dr. Kellas[853] were correct in their suggestions that political scientists and analysts when examining Britain have tended to omit the whole area of judicial decisionmaking, latterly some attention has been paid to these issues particularly in the work of socialist theorists.

In "The State in Capitalist Society", Ralph Miliband examined the role of the judiciary in his Chapter, Servants of the State. He posited the judiciary alongside other decisionmakers like the Civil Service whom he saw as likely to adopt a reinforcing conservative role in the councils of the state which has a conservative governing body and to serve as an inhibiting element in regard to more radically orientated governments. When he addressed himself specifically to the judicial role in "Western-type political systems", Miliband challenged the notion of judicial independence. He noted that this really was limited to the limited form of freedom from day to day supervision by the Executive arm of the State. Those who had been accepted into these rarified reaches of

decisionmaking, he suggested had included few liberals, and only those who were not basically hostile to the "basic economic and social institutions of capitalist society".[855] Since the judiciary were vested with considerable scope for exercising discretion in applying and, of course, making law Miliband suggested

> "... Judges cannot fail to be deeply affected by their view of the world, which in turn determines their attitude to the conflicts which occur in it."[856]

Nor did this worldview influence actually prevent the judges from recognising the possibility of "blatant partisanship". Miliband though suggested that the rigorousness with which this was sought depended on the specific problems at stake and the current social position

> "As a general rule ... success in this field (overcoming blatant partisanship) is the more likely to be achieved the less crucial to the social fabric the issues at stake appear to be, the less they affect the basic patterns of relationships between capital and labour, the less they involve what is taken to be the security of the state and the safety of the social order; and relatedly, the avoidance of outright bias is also much more likely in periods of relative social calm than in periods of acute social conflict and stress."[857]

Miliband broadly indicated the dual features of partisan possibilities from which the judiciary make their appropriate selection

> "... judges in advanced capitalist countries have generally a rather poor view of radical dissent, and the more radical the dissent, the greater has been judicial hostility to it; and judicial discretion has, in this respect, tended to be used to support rather than to curb the attempts which governments and legislatures have made at one time or another to contain, subdue or suppress dissident views and activities." 858

This seemed to consist of the trades' unions

> "... unending struggle against the courts' attempts to curb and erode the unions' ability to defend their members' interests;" 859

This was substantiated by reference to the data contained within Wedderburn's "The Worker and the Law". Miliband concluded

> "... the dominant economic interests in capitalist society can normally count on the active good-will and support of those in whose hands state power lies ..." 860

This work is echoed in that of the doughty campaigner for the National Campaign for Civil Liberties, onetime committed Tory and subsequently a Labour Party Member M.P. and Queen's Counsel, D.N. Pritt. In a four volume work under the general title "Law, class and society", 861 Pritt took a highly critical view of the law from a class position. Pritt did not pretend other than that his work was polemical rather than analytic.

Pritt was concerned to demystify traditional accounts of law which, explicitly, or more usually implicitly, denied the connection between the economic base and the content of formal social codes. He was concerned to indicate that law was at heart the one of the modes whereby the ruling class furthers its class interests and imposed its will on the mass of the people. This was not to suggest that the process of utilising and operationalising such modes of control was not without difficulties and beyond struggle as his own work testified.

Pritt's materialist perspective was by no means of a mechanistic kind

> "... the whole of a civilisation ... which is ... an immensely complex social organism - must be seen and understood as the product of all the forces at work in society. It is shaped and reshaped by the activities and strivings of the various classes." 862

Pritt's conception of the law, whilst not based on a simple mechanistic structuralism was nevertheless, essentially an instrumental one. In situating the judiciary within his class analysis Pritt was careful to explain, in non-technical terms, the nature of hegemony - the subtlety of ruling class techniques and methods of maintaining and legitimating their position.

> "The law is not therefore, the merely automatic reflection of a particular economic structure, but takes shape, develops and changes in ways determined by actual class interests and class struggles." 863

Specifically, he suggested

> "... law is determined above all by the work and the wishes of the dominant or ruling class - a body, great or small in membership, which largely determines a country's life, deciding upon its wars, making its peace treaties, imposing its taxes and, by managing the economy and so dictating how well or ill the main body of citizens shall live." 864

Pritt was talking here in general terms of all ruling classes and these confronted different problems and selected different solutions to deal with these

> "This ruling class, one must bear in mind, changes with the passage of time, like everything else. It changes in its composition, its strength, the sources of its strength, its interests, and its problems; the degrees of opposition to it vary, and it changes accordingly its views as to how it should react, and whether it should appease, oppose, bamboozle, or destroy." 865

Exactly where the law fitted into this pattern Pritt explained with reference to an implicit notion of hegemony

> "The ruling class by no means uses its power impartially for the benefit and protection equally of all classes that make up the community ... it governs in its own interests, which it professes to believe, and perhaps sometimes does believe, to be identical with the interests of the whole people." 866

The actual relationship between the ruling class and the judiciary and other State "operatives" seemed to be one of simple subordination

> "Nor are its (the ruling class) servants, including the legislators, judges and lawyers, in any sense neutral." 867

Pritt was quite explicit that the law was the product of the interests of the ruling class as modified by the influence of the working class

> "The whole body of our law should thus be regarded not as something wholly created and imposed on us from above by a ruling class, but rather as the work of many generations of English people, both of those who at the various stages of our history have had the direct power to shape it in their own interests, and of those who could not do no more than obstruct or modify this shaping in varying degrees by their organised insistence or passive resistance." 868

Pritt did not simply assert but contrived to illustrate with empirical data this analysis. Talking of notions such as the framing of legal issues and their application to the facts would contain the class outlook of the relevant individuals, including the judiciary. Discussing the defects of the case law system as experienced in England he noted

> "Almost all the judges are drawn from surroundings very different from those of most of the people over whom they exercise jurisdiction. The practical result, in relation to what we are considering here, is that when judges come to decide new points, and to apply thereto

> principles of law already established, they inevitably approach them from their own point of view, which they derive from their education, upbringing and outlook, of what is socially good or bad." 869

Thus it had been in the past and so it continued to be according to Pritt

> "... case law has for some centuries been tending to favour one side of the class war, be it the landlord, the employer, the industrialist, or more generally, the apparatus of government, against the "man in the street." 870

Writing directly on the judiciary, however, Pritt's work only operated at the anecdotal level on such issues as the appointment of Gordon Hewart and his relationship with Lloyd George's Government. 871

In a more limited way more recently John Westergaard and Henrietta Resler attempted to demonstrate that the notion of class was as potent in the mid-seventies as it ever had been. The forms had altered and the working class had obtained some significant concessions but

> "Poverty, profit and market - the key institutions of the capitalist society - retain their central place in social arrangements ... (the) impact (of consolidation of labour organisation and expansion of state activity) has been within boundaries largely fixed by the maintenance of private property, profit and market as the key institutions controlling the conduct of society's affairs." 872

Drawing on evidence as to the alienating impact of court appearances for largely unrepresented working class individuals who entered the forensic forum in minor criminal matters or on alimony related matters with a bench drawn from professionals and employers Westergaard and Resler concluded that

> "... State services shade into class control." [873]

The cause was not so much that magistrates and judges were less kindly disposed towards working class offenders and litigants but that the substance of the law was class orientated. Typically "white-collar crime" was treated much less harshly than its working class equivalent.[874] Drawing on Carson's work they suggested

> "... the agencies of the state - police, inspectorates, commissions, tribunals and courts - act with great reluctance and leniency in respect of breaches of law and 'public interest' committed by business. This contrasts strikingly with their severity in action against 'ordinary' overwhelmingly working-class, offenders;"[875]

The role of the law in industrial relations was similarly decisive. Having mentioned traditional 'anti-labour' decisions Westergaard and Resler suggested that Rookes v. Barnard's tort of conspiracy to intimidate evinced something sinister

> "The courts showed their sensitivity to the new climate of establishment hostility to labour early on, before either major party had even come near to deciding on a lone of policy." 876

The Rookes v. Barnard decision was thus, effectively a response to rank and file militancy and shop floor organisation in the early sixties which threatened to disrupt the three-cornered partnership of the mixed economy of state, labour and capital.

A similar brand of prescience was evinced by the National Industrial Relations Court set up under the Industrial Relations Act 1971. Westergaard and Resler perceived a trimming to the wind of social expediency in its decisions. In 1972 there was an order from the N.I.R.C. to the T.G.W.U. to get their members to cease picketing a storage depot which was involved in threatening dockers' jobs by taking work away from the port limits. The union duly advised the men to halt their 'blacking'. This was not complied with and the N.I.R.C. fined the union for failing to remove the stewards from office. The fine was overturned on appeal.

> "In retrospect, the Appeal Court reversal may seem the first sign of hesitation within the establishment of government, courts and business about the practical consequences, if the new legal framework were pushed as hard as possible into full confrontation with organised labour.

> That was in the spring and summer of 1972. The signs of establishment hesitation were to multiply during the following months, as a hard anti-labour course threatened industrial strife on a scale unknown since 1962. The courts again showed a nice sensitivity to the shift in climate, their inconsistencies of judgment monitoring the limited and uncertain nature of the shift itself." 877

This seemed to amount to a conspiracy theory for decisionmaking where crucial disputes were involved.

The great merit of the approach of the most recent writing on this subject of the impact from 1977 on the direction of the law's policy by the higher judiciary was that it ranged across a wide spectrum of the law's operation.[878] From the critical emergent sociology of law perspective the main area of interest tended to be within the field of criminal law and its operation. Much of the focus concentrated on the policing of working class deviance in contrast to both the differential content and application of the criminal code.[879] Whilst this might provide a vital key in understanding the ways in which the reproduction of the social relations of production have been effected within our recent era, it could only provide a very limited picture of the social control mechanisms available within Britain. It did tend to stress the raw edge of the machinery of social conformity rather than the soft machine of socialisation of which Jock Young talked.[880]

The 'Politics of the Judiciary' aimed to demonstrate that class was significant in areas of the law which were less "obvious" in reproducing that 'status quo' than the criminalisation of certain types of activity. More importantly it dealt with the operation of an apparatus of the State which was widely recognised as autonomous in some sense. Griffith documented ways in which the judiciary allegedly tended to support external innovations in social policy in only a minimal way and where possible apply statutes in as limited a way as was compatible with their implicit assumptions about certain central social values. These central values Griffith categorised broadly as

> "tenderness towards private property and ... dislike of trade unions ... strong adherence to the maintenance of law and order ... distaste for minority opinions, demonstrations and protests ... indifference to the promotion of better race relations ... support of governmental secrecy, and ... concern for the preservation of the moral and social behaviour to which (the judiciary) is accustomed." 882

This attempt to demonstrate the actual <u>impact</u> of judicial background can be seen as an important complement to work on the external common factors of the judiciary as a group of policy makers.[883] Previous discussion of the judiciary had tended to do little more than postulate a specific narrow social and educational background and either make blanket

condemnations of the judicial role per se or they make a cursory selection of a couple of contrasting contentious areas.[883] By contrast with this trend, Griffith examined the judicial record in traditional as well as some of the less well publicised areas of the political economy. He started by documenting the continuation of the scarcely veiled antipathy of the judiciary to organised labour bearing out the remark of Winston Churchill

> "It is not good for trade unions that they should be brought into contact with the courts, and it is not good for the courts." [884]

This obvious political area of operation of the law has been the subject of criticism along similar lines in the past, both in brief anecdotal form as well as more systematically by Professors Wedderburn and Kahn-Freund.[885]

Griffith, appeared to demonstrate that for all the alleged political muscle available to organised labour that they continued to get a "raw deal" in the Courts whether it was in the operation of picketing or making strikes effective.

Griffith inferred from both the judicial work in the fields of labour relations and interpersonal relations that

> "The judges define the public interest, inevitably, from the viewpoint of their own class. And those interests, by a natural, not an artificial coincidence, are the interests of others in authority, whether in Government, in the City of in the Church. Those values are the maintenance of law and order, the protection of private property, the containment of the trade union movement, and the continuance of Governments which conduct their business largely in private and on the advice of other members of what I have called the governing group." 886

Griffith dealt with the relatively well documented area of personal rights - the powers of the police, protection from racial oppression, whether it was in the form of discriminatory job practices or immigration policies, and limitations on what can be published. Griffith was not impressed by the record of the judiciary in protecting the rights of individuals from attack by the public authorities and oppressive factions. The whole trend in the area of police powers was described as "alarming".

> "It comes very close to giving the police a right to search and to seize documents which have nothing to do either with the warrant (if they have one) or with the original purpose of their investigations. It is an old tradition that general warrants to arrest unspecified persons and to search property at large are illegal and are not justifiable on the ground of the public interest. The tradition is beginning to look less strong than it did. The danger of placing so sharp a weapon in the hands of the Government and of the police is very obvious." 887

What Griffith provided was an account of the judiciary in a number of politically contentious areas well known to the public where no obvious consensus could be found anyway. The judiciary seemed to favour authoritarian solutions in such instances as state security but on the other hand were highly suspicious of executive power. This was illustrated in the more arcane subjects of recent developments on property rights. One feature of the post Second World War era had been the growth of two phenomena in the housing field. Legitimate and institutionalised, an elaborate system of planning legislation was created. One central feature of this control system was the placing in the hands of elected bodies in the community the right to determine the desirability and nature of proposed developments. The criteria which might be used in the representation of the general community interest in development of land permitted local planning bodies to examine "any material considerations" in reaching their decisions. These appeared to clearly vest power in the local planning authority who were given the discretion to approve, vary or veto proposals from applicants. Griffith suggested that where the local planning authorities attempted to use this power for securing broadly community goals - improving the road system[888] or attempting to secure some rights for a minority group[889] omitted from standard legal protection

then the Courts rejected such conditions imposed on the granting of permission. Starting at roughly the same time in the post World War Two era, Griffith noted the ways in which the judiciary at the highest levels rapidly moved to close up any apparent procedural gaps disclosed by a well organised and politically astute squatting movement.

Griffith appeared to infer a consistent rationale from all the vagaries of judicial policy making in the various selected areas. So it had been and so it will always be was his broad picture of the judicial reality although he did suggest that possibly change was on the way.

> "Nevertheless, some men and women have, since the middle 1960s, benefited from the expansion of university education, from the growth of law faculties in universities, and from the wider availability of this education and, with little private income, have been able, (largely because of the increase in publicly financed legal aid) to make a living at the bar. By the mid-1980s some of these will move into the ranks of successful barristers from whom judicial appointments are made. Only then shall we be able to assess how far the dominance of the public schools and (what is of much less significance) of Oxford and Cambridge has begun to lessen. And not until the 1990s shall we know whether (as seems most unlikely) judicial attitudes have changed as a result." 890

What Griffith seemed to present was a static world without competing fractions of labour and competing fractions of capital or competing elites.

What we had, instead, was a homogenous judiciary whose attitudes comprise a "package" which Griffith suggests is upper-middle class.

Summary

Apart from the limited volume of the work, much of what has been written about the British judiciary does not transcend the anecdotal level and is of limited value in the substantiation of a theory of judicial policymaking. Similarly as we have noted much of the work has been characterised by a highly polemical approach, utilising highly selective data and casting severe doubts on the potential of the inferences therefrom. In a slightly different vein, as we have noted, the judiciary have figured as actors of varying degrees of blameworthiness in the schemata of various legal and social reformers. This prime reform goal has sometimes led to a limited instrumental role being assigned to the judiciary rather than this being a theoretical construction in its own right. Alternatively, the judiciary have made their appearance as not the white Knights but as the villains in the social reform drama holding up "progress" through their "out of date" or "class" views.

All in all it is impossible to suggest that there are a good number of hints as to possible organising frameworks for examining judicial action from social isolation, class, limited social environment through to professional isolation. Little work has been done by way of systematic substantiation of the various hypotheses about the judicial role. In this sense the work of Griffith is a substantial advance on the previous approaches in its wide ranging empirical backup data to demonstrate and inform his thesis.

This is not to say that a good deal of valuable descriptive work has not been done on the general topic of the structure and composition of the judiciary in both England and Scotland. These provide platforms on which the judicial activity in practice can be assessed with decision data. They provide pointers as Professor Willock has noted in his work on the upper echelons of the Court of Session

> The Scottish superior court judges tend to be drawn from the prosperous professional and business classes of Scotland and predominantly from the legal profession ... In practice political attachments, which may be fairly muted in display are a powerful accelerator to advancement and may even be said to be indispensable to promotion to the highest offices. ... This study has merely collated and analysed the available information from published sources and, it may well be, has done no more than confirm existing widely held impressions. The

> questions of the desirability of political influence in judicial appointments and the investigation of whether there is any link between actual judgments and political opinions may be left to a later occasion or another pen." 891

It remains to see to what extent we can utilise any of these formulations in our assessment of the work of the Scottish judiciary in the field of housing in the nineteenth and twentieth centuries. This will be the location where we will critically examine the epistemological bases which inform the "proto-theories" of the judiciary which we have indicated as well as go on to examine to what extent any of these stand up to detailed scrutiny and examination in other fields. Although, for the purposes of this work we will be limiting ourselves to the situation of one set of social relationships within the housing field, nevertheless, as Professor Griffith has demonstrated, we must beware of making across the board inferences from a specific data base. However, given the operational choice imposed by the specific restraints of this particular work, it seems more useful to examine a specific issue in depth over a period of time so that we are able to form a hypothesis of judicial activity within the dynamics of historical change rather than in some sort of "freeze frame". This issue will be explored in more detail at that juncture.

PROBLEMS OF JUDICIARY THEORY

General

There seem to be two major difficulties in attempting to utilise the various schemata described which stem frequently from the concerns and goals of the authors. Where these goals have been broadly reformist or in some way orientated to change there has been a general tendency to construct theories on highly selective data and generalise therefrom. This practice is in itself in no way objectionable given the desire to say something rather than fall into Maxwell Atkinson's category of "nothing goes" social scientists.[892] But the rider needs to be added that the data-base from which the hypotheses are articulated may be limited either in time or range. As we shall see this is not an acknowledgement which is by any means universal in this field and it must lead us to view the conclusions with some degree of scepticism. Alternatively there is a failure to state the epistemological terms in which the issues are situated or only hint at this. We find a number of studies go "half way" in suggesting that the "problem" of the judiciary is that they are drawn from a particular social class of society. Leaving aside for the moment the whole issue of classification, this leaves us with only part of the picture. Quite what it is about this social class skewing of judicial

distribution is only suggested in the sketchiest of terms. It is assumed that "upper class" judges are somehow in the classification of Sellar and Yeatman a "bad thing".[893] The extent to which any of these hypotheses, with their "gaps" closed and their bases made explicit, can be utilised to look at the operation of the Scottish higher judiciary in the chosen era, is assessed. The limitations and subtleties of each theorist are highly distinct and require separate attention within the broad themes of these various "deficiencies".

(a) The Unproblematic Judge

Although it may seem in a sense self-defeating to look at writers who have failed to produce a theory of judicial action within their wider writings it is worth looking at some of the implicit assumptions which stem from the adoption of this stance for the success of various other theories of judicial action. That is to say the existence of a continuous and even dominant viewpoint which fails to recognise that the powers exercised by the judiciary within a democracy with no formal code and no written constitution may have important repercussions for the practice of both the actors in that scenario and for those who are thereby affected. A judiciary with self-confidence whose role is not questioned and whose political potential is ignored is likely to act

differently from one who are under a form of "monitoring" and whose position is not regarded as unproblematic. As negotiators of reality the judiciary do not operate in a professional vacuum any more than other political and social decisionmakers do.

In the Austinian and immediate post Austinian scheme the major concerns of legal academics did not include the judicial role. From Austin through the work of Markby, Sheldon,Amos and Holland the position of the judiciary was simply noted. In none of these writers was there any suggestion that the criteria which the judiciary might adopt had any difficulty attached to it. However, what did link these writers in the latter part of the nineteenth century was the recognition that the judiciary's work was concerned with relating to the moral and political constitution of the society in his decisionmaking. Only Sir John Salmond seemed to be concerned that this whole process stemmed from the need to avoid, for some reason, acknowledging the creative role of the judiciary. The declaratory theory of precedent might be a fiction but the techniques which in reality operated in place of it were not explored.Clark reflected at much the same time the same sort of recognition of the truth "that dare not speak it name" although he did articulate some sorts of criteria on which the

judiciary were alleged to found their decisions. [894]

The unproblematic approach was evident again in the work of Miller with his suggestion that the judiciary were on many subjects the best "legislators". This confidence in the decisionmaking of the judiciary and the relegation of the issue to that of a non-problem was not demonstrated with the sort of evidence one might have expected from this strongly "judicial" viewpoint. Miller provided us with the classic non-theory. He offered no general theory of the relationship between judiciary and other state institutions and no evidence on any specific issues but nevertheless concluded with a support for an "active" judiciary on unspecified matters.

By the beginning of the century this non-problematic descriptive approach to the issue had by and large been abandoned in favour of rather more informative and generally less confident approaches to the judicial enterprise. The one shining exception was Sir Frederick Pollock with his style of discussing the work of the judiciary in terms of personification. Pollock's essay was the last shaft from the nineteenth century post Austinians whose major interests were in areas like the nature of sovereignty and the formal sources of law. Formalistic analysis rather than social science in jurisprudence persisted into the beginning of the start of the twentieth century

and this is seen in its least methodologically substantiated work, "The Genius of the Common Law". Here Sir Frederick paid homage "to our lady Common Law". The policy directions which have occurred in the past are attributed to her shrewdness. The use of this device meant that Pollock's suggestions as to the dubiety of democracy and other issues were situated within a reified notion of legal rules. Apart from the judgments which the "lady common law" had come to, the judges had totally disappeared from the scene. The decisions were no longer made by anyone human but by "the common law". No criteria for her decisions were put forward so that even if one "translates" Pollock into normal terminology we find a series of assertions of the wisdom of the content of the rules of the common law based on a confidence in pragmatism. The view Pollock took was pragmatic, atheoretical and functionalist. Nowhere did he argue for any of these positions. He simply asserted that the common law was good because it distrusted explicit legislative, social or political theory. It had managed to extract the "good bits" from the past and present competing policy possibilities and finally had constructed a body of rules which were able to "fit" the world into which they existed and served the world of commerce and work alike by their very nature. All this might be

capable of support given some specific goals. The rules of the common law may at the time of writing have been given an efficient form of dispute resolution in commerce and in the factory. The process may have evolved from the early principles of the common law through a series of precedents. The process, however, was not argued for nor was the desirability of atheoretical pragmatism as encapsulating the "best possible" solution to unspecified problems ever argued. It simply was so. Thus

> "The ...Common law ... is ... quite sufficient for everyday needs ..." [895]

To paraphrase Chambliss and Mankoff "Whose needs? Whose sufficiency?" [896] It is not easy to relate these exercises in judicial confidence and faith in the common law tothe judicial performance on housing issues in Scotland. There are no criteria.

(b) The Unsocialised Judge Theory

Even within the writings of those who conceived the role of the judge as non-problematic there were hints that in reaching their decisions the judges would be involved making decisions in the context of their society's major moral and ethical currents. In applying their discretion in the areas assigned to

them this would not take place in some sort of a social isolation but would draw on the moral and social attitudes of those around them.

Apart, then from anodyne recognition that judges operated as part of society not apart from it, this notion of the judge has tended to concentrate on the problems which flow from the value choices available to the judge in one of three major ways.

(i) culture lag
(ii) social class
(iii) political bias

In recent times, particularly, these categories have not been used as discrete entities but rather there has been a tendency to concentrate on a mixture of these factors. Nevertheless, there have been eras when one aspect has been stressed.

(i) Culture Lag

The quintessential exponent of cultural lag in judicial practice was A.V. Dicey in his lectures on "Law and Opinion in England". The problem, though, with this felicitous explanation of the relationship between the legislature, the judiciary and public opinion, is that it is constructed without any explicit statement as to what the vital ingredient

"public opinion" actually represented in his schemata. What Dicey appeared to do was to trace shifts and changes in legislative content and infer from that that "public opinion" has changed. This form of tautology ensured that the changes which Dicey discussed involved all aspects of his equation. This "fitting" of the facts to the theory was borne out further in his remarks on the absence of legislation. Where no legislation occurred this was attributed to the "dulness or stupidity of Englishmen" which the legislature "wisely" paid attention to during the eighteenth century. Thus if there was no change it was because there was no public opinion demanding change.

This limitation on exactly what constituted the public opinion against which to measure the achievements or otherwise of the judiciary means that the notion of the time lag of two generations for judges is no more than a barely supported assertion. This, along with the notion that judges are "for the most part persons of a conservative disposition" was of course capable of being tested with reference to some sort of specified criteria of "conservatism" and "public opinion". However, Dicey provided none for what was basically a "hunch". The lack of criteria is apparent when we look at the situation which Dicey outlined where in certain instances the judiciary

are "in advance" of public opinion and practice. Dicey indicated such areas as the revisions made to commercial law and the system of trusts by Lord Mansfield and the Courts of Equity as well as in the area of the duty of agents towards their employers. In their work in this field Dicey concluded that the "morality is higher than that of either traders (i.e. public opinion) or Parliament." The question of how it was that ideas are wrong was not dealt with by Dicey except in the merest hint to substantiate the relationship between judicial practice and public opinion. An idea was not wrong simply through being "out of date" suggested Dicey without adding further illumination.

So, as far as Dicey was concerned, it seems that his notions of a relationship between judicial decisionmaking and public opinion and between cultural lag and judge-made law require clearer criteria before we can utilise them. As they stand in Dicey's framework they appear inoperable lacking as they do any standards of measuring the constituent parts of the formula which are not either tautologous or undisclosed. Only by filling these gaps can the broad idea which one can infer from Dicey be assessed.

This is essentially what later versions of the socialised judge have concerned themselves with, namely supplying more specific factors beyond the vague

notions of Dicey. In 1906 Jethro Brown referred to the judiciary as "creatures of their time and place, animated by the time-spirit, the hopes, the fears of their day and generation ..." The problem with this elaboration of the possible meaning of the "judge in context" was that each epoch and generation are here endowed with a simple content which was presumably in itself eminently discoverable by both the judges and those observing this process. No data was given here on this specific problem and Brown must presumably be taken to be supporting an unspecified form of consensus which is accessible to all by some form of revelation. This notion that a consensus of political and social goals can be assumed within any society is not self evident. If the consensus is to form a crucial part of any argument then it is necessary to postulate what the criteria for discovery of such a consensus are to be. It may well be once criteria are established the task of establishing same may not prove insuperable but the consensus cannot be established by straight assertion. This same type of difficulty occurs with conflict and Marxist assessments of judicial practice.

Harold Laski echoed the words of Brown where he suggested even more forcefully than Brown that a judge utilising the "total push and pressure of the cosmos" will opt where, the case was clear cut, for

his own conception of what the law ought to be. This conception of right was tied by Laski into the notion of the cultural lag of generations. According to Laski the judge's assumptions about social and political policy will have formed by forty and be retained in professional life for upwards of thirty years. The advantage here was that although there was no evidence for this categorisation of judicial behaviour as conforming to this pattern the criteria were to some extent spelled out. Laski gave us a notion of the extent of the time lag.

The post Second War trend has been to opt for more precise specification of the failings of aspects of the legal system including the role and practice of the judiciary with some traces of the anecdotal and polemic style of earlier days. Those who have held high judicial office tended to adopt a broad sweep to deal with the issues of judicial policymaking as exampled by Lord Denning and Lord Radcliffe. In neither "Freedom under the Law" nor in "The Independence of the Judges" nor in Denning's most recent utterances in public do we find any actual specification of the sense in which the judiciary relate to the society in which they work.[897] Lord Radcliffe did no more than indicate an awareness of the parlous position of an unelected judiciary in a democratic system of

government where their decisions are situated within a competing value spectrum. He did not himself do more than imply the problem solution of the situation the judge finds himself in. Denning's own writings simply asserted that there was no problem or any issue in response to those who so claim.

The problem, though, is that there do not appear in this work any kind of criteria by which we can usefully measure judicial performance. They seem to occasionally get "out of step" and their "image" is tarnished by intemperate decisions which offend "public expectations". The source of these expectations and the status of the image is not specified. The overall impression is of an assessment of an unarticulated set of standards which may only be observable in breach. To any earnest "self-improving" judge they offer only the obverse of the Denning creativity coin. The most likely contender is a form of consensus discoverable from 'informed' opinion whose criteria need hardly be spelled out. In fairness, though it might be argued that later writers concentrated more on the difficulties arising from the social background of the judiciary and do at one stage posit the simple criterion of legislative intention when dealing with statutes.[898] This itself is less than helpful in that it is posited on the

false basis that Courts are dealing with simple slot machine decisions stemming from statutes. The whole point of the statutory dispute is that there is some doubt emerging from the statute as to the intention of the legislation. This is not to say that with the benefit of hindsight that some decisions can be characterised in this way but as a sole criterion of measuring judicial performance this is both limited and internally unspecific. Even at the level of interpretation the criticism made by Abel-Smith and Stevens of the judicial sermonising in criminal cases is a feature which Lords Denning and Scarman over a decade later have applauded as performing a vital and beneficial task.[897] The practice has been much favoured, with little observable adverse reaction in the media in the work of Lords Carmont and Wheatley where gratuitous moralising could be argued as being highly acceptable, depending on the issue although the actual determinant of "public reaction" seems to be rooted in media reaction to such activities.

Michael Zander's work, as we have already seen, has been widely read and apparently influential in its impact. However, it is only in the area of their narrow social background that Zander offered any specific viewpoint on the judiciary. The extent, really of his criticisms of the judiciary beyond their

social class, amounted to a form of cultural alienation from which solicitors were thought to be more immune. He did not specify exactly what form this cultural gap took.

Louis Jaffe referred to the "leadership" role of the judiciary where there were value conflicts and where populism seemed likely to be oppressive of minorities. In such situations judges could rifle through legal data to find "principles" from the past law on which to make decisions on essentially "extra-legal" considerations. The judge was required to use his common sense in the context of knowing what line will be "more or less widely accepted". This seemed to involve something, then of a contradiction in terms, unless one resorted to some form of elitist constituency for evaluation. If the judge needed to reassert himself against the overweaning majority in favour of minorities, how was it possible to ground this process in "wide acceptance". The only way it could operate is by either having an unstated reference group of "real" and "pure" opinion or alternatively the judicial leadership could be essentially ungrounded in its primary emanation but might achieve a successful proselytised majority support. We either have a judge appealing to some form of elite or the "better side" of peoples'

natures. Even where Jaffe illustrated his notion of the desirable aspect of progressive judicial work with the conception of concern for "the little man" we are left little better off. Much like the later goals of Denning it still depended on the definition chosen for assessing power where many social decisions come in terms of their impact on the "little man". Unless it was a call to crude individualism in economic and social and political fields, we have no workable criterion. The notion of the "little man" having interests served by unfettered competition, limitations on organised labour, no welfare, no discrimination is at the heart of standard political debate. Few political theories disclaim the interest of the individual but rather differ on how his safety and happiness is to be secured and what his relationship to the community is to be in times of stress. This is not to suggest that all these concerns need to be taken at face value but simply that where criteria for judicial action are stated to be concern for the "little man" this is a 'Barmecidal feast" with more appeal to the heart than the senses. The simple notion of judicial innovation itself as progressive is similarly imprecise and controverted by the vast range of alternative assessments which can be made of actions which are presented simplistically as innovatory. Thus we can look at the doctrines of

common employment and contributory negligence as innovatory measures. There is nothing intrinsically good or bad about innovation. It depends on the goals of those assessing the innovation.

A couple of enigmatic remarks on the notion of cultural lag we find in Michael Freeman's remark that a judge's role included developing law in directions "required by social needs" which were in turn left unspecified. One other approach has been through the notion of professional socialisation. Jackson talks of the "legal caste of mind" echoing the comments and analysis of Judith Shklar[900] in her work "Legalism". This notion of "lawyers' ways of thinking" has been explored in some depth in different contexts by Willock,[901] Campbell,[902] Lewis[903] and Bankowski and Mungham[904] in the debate on "legal paradigms". What the argument in the judicial context amounts to is an expression of the dichotomy between literal and liberal interpretation, between the black-letter approach and the social goal approach. It is fair to suggest that conventional legal education has tended to present the law as a complete gapless system with all answers susceptible of being produced from <u>within</u> the system. For a legal system without any broadly expressed constitutional "principles" this narrow legalist approach is easier to sustain and more difficult to displace. One problem with an activist

interventionist judiciary is exactly what sorts of social effects are supported as desirable and so advocated. From the point of view, then, of Jackson we only have the notion that lawyers tend to be more rule-orientated than those whose training has been in social policy. Apart from its undoubted truth as a general observation it provides us with little to work on since rule orientation itself involves policy choices.

(ii) Social Class Bias

A similar train of thought concerning the cause of judicial policy problems emerged from a number of writers centring on the specific social background of the judiciary. As we have seen, the only major theorist to examine the problem of the judicial background before the Great War, Dicey, only did so in terms of the senior nature of judges within the profession and the "conservative disposition" of the judiciary tied up with their advanced age. The only writer to discuss the question of class and the judiciary before the War Sir Frederick Pollock indicated that, implicitly, the judiciary (in the form of Our Lady, the Common Law) were above considerations of class in contrast to legislatures where "class grievances" dictated the pattern of issues emerging. It was precisely this form of absence of class

adherence which set the Common Law aside from other systems in Pollock's view, although he did not specify the sense in which the decisions of the common law reflect a just and merciful consensus.

It seems, then that we have to thank a judge for bringing the issue of class bias as an issue to the fore in academic judicial analysis. In his remarks to the Cambridge University Law Society on "The Work of the Commercial Courts" in 1920,[905] Scrutton L.J. made the admission that judges felt a natural sympathy with persons and organisations from within those sectors of society with which they were familiar. This clear statement of class loyalty in such matters as trade union disputes afforded little beyond the voyeuristic insight into the consciousness of one particular judge. When it came down to it Scrutton did not indicate the areas where the elements of class loyalty could affect judges beyond trade union and, to some extent, workmen's compensation cases. Nor was it clear quite what the impact of differential socialisation actually was. Did it do any more than make it difficult for the judge to be sure he was not evincing social prejudice against one party in the dispute. Was it in fact any more than a nagging doubt? As a hint it was valuable but since no criteria were suggested as to the areas of the problem or the

impact of same on actual decisionmaking we are not greatly assisted by this revelation. How does one measure it for example, against the specific data which Douglas Hay supplied us with from "Albion's Fatal Tree"[906] on the legalism of the English judiciary in their approach to the criminal law in the eighteenth century even when it involved the sacrifice on the gallows of members of their own social class. Similarly, as has been pointed out in other contexts and as we shall see in the examination of the mutual obligations of landlords and tenants in Scotland, the exact notion of class interest and class issue are themselves often less then clearcut in many instances.

In Abel-Smith and Stevens we find little actual reference to the social class of judges in their first work except insofar as they were less willing to interfere with business than with unions. However, in the second work "In Search of Justice" the significance of the social background of the judiciary as the crucial source of many problems stemming from judicial policymaking was made clear. The judges were influenced by their class, family and social contacts in their political and social views and this background tends to be homogenous. They were largely "upper middle-class" with a public school education. This then becomes the kernel of the

problem. The "solution" which Abel-Smith and Stevens advanced to meet this difficulty was in-service training to cut down on class alienation. This social distance was perceived to be the major problem flowing from the narrow social class from whom the judiciary are traditionally drawn i.e. members of the Bar. Their remarks were in the tradition of Scrutton L.J. and the alienation from the mainstream of life meant that the candidates are neither "progressive" nor "socially aware". It was not specified what the criteria for these qualities should consist of. One can infer to a limited extent that since the judiciary are criticised for their preference for business over labour that the latter is a "progressive" orientation. This tells us little about a whole range of decisions from civil liberties problems through ministerial discretion issues to welfare and housing problems. It contributed but little to a clear notion of which forms of workers' organisations are to be supported and which aspects of business are to be resisted. Are the judges to be "progressive" to follow a labourist, Stalinist, Trotskyist, Syndicalist or Anarcho-Syndicalist line. The notion that there was a simple category to make decisions on pro-labour or anti-labour disputes lines assume both an absence of detailed issues within disputes and within the various analyses which are

variously socialist, labourist and anarchist. Even if one did not wish to upbraid Abel-Smith and Stevens for failing to detail their critique in a work dealing with broader issues, it remains a difficulty for anyone who might have hopes to discover judicial policy decision hypotheses here. It behoves any writer in delineating a hypothesis of judicial behaviour to specify to some degree exactly what his data consists of and what the meaning of his categories of classification are. For our purposes the problems seem as though they may well stem from the legalcentric approach of Abel-Smith and Stevens with their concern that the legal profession was used less than comparable legal professions abroad in new areas of social decisionmaking. Whilst this may reflect doubts as to the speed and efficiency of the judiciary, it is a less than secure base from which to launch one's analysis of the judiciary. The fact that the legal approach is not the one which springs to mind first in the minds of politicians and social administrators they imply presupposes that there is some qualitative difference between legal decisionmaking and other forms of same. This may appeal to lawyers but rests on an implicit Weberian notion of technical rationality counterposed to Kadi 907 like discretion. This position has to be strenuously argued for in the light of the work of the judiciary in the past where the notion of

the rule of law as an empirical as opposed to epistemological possibility has been less than credible.[908]

The overall limitations of the reforming goal in this context meant that Michael Zander could complain in one breath of the "rather narrow social class with the same rather narrow range of attitudes derived from practice in the sheltered conditions of the Bar" and then go on to suggest that the way to solve this general problem was to give the solicitors' branch of the profession greater opportunities to become judges. Since it was not specified exactly what form and impact these allegedly narrow social attitudes were one can only infer that they were the sorts of issues on which solicitors could be expected to have a wide range of attitudes. Quite what Zander has in mind is not easy to guess. One needs to find issues on which the Bar has a strong consensus and one on which there is a wide spectrum of opinion. Possibly one might suggest neighbourhood law centres or legal education. There are possible areas but these remain undemonstrated by Zander and anyone wishing to substantiate this claim has to do more than assert that this alleged distinction must somehow exist.

Freeman reiterated the doubts about the judicial ability to comprehend the norms of other lifestyles from their own in his work and asks whether or not the tensions, expectations and social values of other classes can be truly appreciated by those from other classes.

How this difficulty can be overcome seems to depend on in-course training and periods in the deprived areas which are beyond comprehension. Presumably, though, this is not a difficulty, if truly valid, which afflicts only the working classes. Are the lower middle classes truly appreciated in forensic situations? Are the upper classes getting a fair deal from a judiciary with its social base firmly located in the professional classes. These are not facetious questions but serious doubts about the validity of the notion of "experiencing" other social classes with which the individual decision-maker is unfamiliar.[909] The essential unreality of this experience can be added to the limited notion of the classes to be investigated. Beyond, possibly, casting into doubt the notion of a clear consensus and the reality of "one nation" by visiting the country mansions, semi-detached avenues and high rise estates, it is not clear what could be gained. The notion is grounded in the conception that to view is to experience. Seeing poverty is not the same as being in it and knowing it is not going to go away

after three months.[910] It is not specifically articulated what the impact of social alienation is supposed to be on actual decisionmaking.

Freeman suggested that a wider experience field should make judges more socially tolerant of those who come up before them. The problem is that although this may be the result of such exposure what form is this to take? What are the bases of current "deficiencies". It is not clear in what sense there is social alienation except in a very general anecdotal level. Wilson in his work on the judiciary asked a series of indirect questions to check on the social alienation of the judiciary in the High Court on such matters as levels of old age pensions, the starting salary of a newly qualified teacher in London and the length of time of waiting list for a hernia operation.[911] The range of questions which might be put forward as constituting some "acceptable" level of social awareness is miriad. Quite what satisfaction of these "tests" would achieve is not specified very clearly in operational terms. Does it simply mean that judges in criminal matters would understand inter-personal violence better because of the knowledge that poor livings conditions inhibit relaxed social intercourse. Judges doing participant research into expressive communal squats with either a strong

political orientation or a hedonistic approach to life might be imagined? But all this seems to be bound up with the notion that behind all apparent conflicts there is some form of explanation which not only accounts for the activity, presumably deviant, but can permit it to be integrated into the fabric of "straight" social life. All sub-cultures then, can be characterised as lacking any countercultural elements. Insofar as sub-cultures can be integrated then the proposal may have merit but it remains no more than a device to render the dominant cultures operation more efficient. The judiciary do not become in some way more "objective" by widening their socialisation deficiencies but rather they become more skilled mediators of minor conflicts within the parameters of that system. This exercise, whilst it may be desired for some external reason of policy does not bring us closer to an understanding of those features of social policy which the judiciary choose to supply with their technical support and authority.

At a different level, the assertions of Westergaard and Resler as to the alienating impact of the whole legal process both as to rules and as to personnel in such sensitive areas as labour disputes merit criticism. They evinced a conspiracy theory of an anti-labour establishment duly given court support in such areas as Rookes v. Barnard and the Industrial Relations Act.

The Government, Courts and Business are described as conniving to confront the labour movement. It was only judicial perception of the shift in climate in the labour movement into readiness for outright confrontation that preserved the nation from a second General Strike. This may be entirely accurate as an analysis of the events of 1972 with the strange and apparently conflicting decisions of the various forensic for a on industrial relations questions. However, there are two doubts which need to be put forward at this stage. Firstly, the actual application of the conspiracy theory of judicial decisionmaking assumes that there is in fact a clear Government/Business line. In much housing and welfare areas this is not so obvious. Even in labour matters it assumes that there is such a line. The problem where there is dispute within an organised Labour Union or between different Unions is not so clear. Nor is it easy to square this crude anti-Unionism with the notions of encapsulation and incorporation of Union structures into the smooth operation of the private enterprise or State capitalist economy. The characterisation of Unions as the force for alternative economic strategies does not seem to square with the British experience of economism rather than syndicalism.[912]

Jackson dismissed the class origin of the

judiciary as failing to provide a complete explanation but as we have seen he rested his analysis rather on the notion of judicial legalism and "nearsightedness" which is interesting but hardly meets the claims that there is a strong correlation between the social class of the majority of the judiciary and the preferences of the judiciary as a whole for supporting certain specific social goals and discouraging others. He hinted at these when he suggested that some of the innovatory American decisions on equality of opportunity and access to the legal process would have been inconceivable in Britain because they would have trenched on "basic concepts of the law of contract and property". However, it is possible to recognise that the point is that it is certain rights of property and certain forms of contractual arrangements which receive the blessing of the judges rather than any blanket notion of simple indivisible rights.[913]

At one level the representation of the judiciary reflects a highly simplistic view from the left which can be found in such publications as "Up Against the Law" [914] and the Big Red Diary. [915] Whilst some work does not pretend to be anything other than a piece of polemics it does have a strong connection with academic approaches to the class background of the judiciary.[916] The assumption is made that because of their class situation the judiciary will operate in a specific way.

This would not appear as blatant partisanship but only at times of social stress when there was "acute social conflict and stress" rather than in periods of "social calm". In general "privilege, property and capital" could count on the support of the Courts in their struggles with Labour and in defence of their economic interests. In the limited coverage which Miliband gave to this arm of the State he did not specify quite what precise connections he had in mind, but we may infer that much of the analysis of John Griffith could only be taken as applicable to Miliband's brief remarks.

In Griffith we have a complex of goals not just an anti-union facet. He posited the likes and dislikes of the judiciary drawn from their work in a variety of fields over the years as

> "tenderness towards private property and ... dislike of trade unions ... strong adherence to the maintenance of law and order ... distaste for minority opinions, demonstrations and protests ... indifference to the promotion of better race relations ... support of governmental secrecy, and ... concern for the preservation of the moral and social behaviour to which (the judiciary) is accustomed."

These then comprised the social preferences of the judiciary which Griffith described as their "politics". Now this relates less directly to the social class of the judiciary. They were not guilty

> "of a conscious and deliberate intention to pursue their own interests or the interests of their class." 918

Their position is rather subtler in that they pursue their conception of public interest as broadly outlined. This viewpoint though is class related

> "The judges define the public interest, inevitably, from the viewpoint of their own class." 919

This process was seen as inevitable in view of the parasitic nature of the whole judicial role in both capitalist and non-capitalist political economies.[920] Much of Griffith's substantive criticisms in areas like race relations and police powers and ministerial power control centred around his own preferences on these matters which differed from those adopted by the judiciary.

In addition to the fairly straightforward point that much of Griffith's critique was based on a difference of opinion as to the desirable content of vague notions like "public interest" or "reasonableness" we have some sort of criteria assembled here as to source of the governing notions today of the judiciary's policy making. It seemed to consist of a pot-pourri of the Conservative Party's policies on most issues both as to law and order, economics and the role of Trades Unions as well as

the limits to political organisation. The Conservative Party stood for individualism in industry, collectivism in national and local security and the preservation of the conditions which support such notions as private capital and property accumulation. What was particularly interesting about the transformation of the social policies of the judiciary in the second half of the twentieth century has been the way in which this change has developed has occurred at a time when the overt political connections of the judiciary are less than ever before. In Scotland the Lord Advocate/Bench connection has been cut[921] and the importance of the political road to the Bench south of the border is greatly reduced in the wake of some of the more disastrous judicial/political appointments in the first decades of the century.[922]

Griffith's inferences depend on the extent to which the database is satisfactory for the claims made.

This, in turns brings up the method of data selection. It is to simply pick out specific decisions made over the past half century as Griffith does from the "outlawing" of the General Strike by Sir John Simon to the difficulties of Sir John Donaldson's N.I.R.C. and claim that this is a full and accurate picture of the judicial role in relation to modern industrial relations. Are the areas selected supposed to be representative of the whole spectrum of

decisionmaking in the industrial field - where are decisions on the recognition of new industrial injuries such as deafness? What of the rejection by the judiciary of the doctrine of volenti non fit injuria as a presumption to be rebutted in industrial cases except where it can be specifically established. These might only be exceptions attributable to specific judicial actors or a temporary aberration stemming from a fresh perception of central values or subconscious fear or some other combination of causal factors. Until we are sure then the value of the inferences from Griffith must remain under a cloud.

(c) Political Party Bias

Although this claim has a long pedigree it has fallen out of favour as the judiciary has adopted a less overtly party political line.[923] When the choice of political parties was limited the claim does not seem to have become a serious issue within legal and political circles. It was only with the rise of political representation for the working classes that the social class and also the political affiliation of the judiciary figured prominently in assessment of the judicial policymaking.

Trades Unions had good reason to wonder whether or not the judiciary was wholly sympathetic to their

difficulties, goals and interests in such matters as organising, striking and picketing.[924] None of the writers in the nineteenth century evinced any recognition of this topic of party politics in any of their writings. Dicey castigated "Parliament" as a bloc and saw no connection between the judiciary and the field of party politics. In the post Great War era there was raising of the question of party as opposed to class politics by the Socialist Ensor who specifically dealt with the appointment on party grounds of a number of judges. However, although he instanced a number of cases in the past he did opine that

> "politics now counts for much less than it did."[925]

This, he stated despite the selection of judges resting in the hands of the ruling political party and their Lord Chancellor, himself a political appointment and changing with the change of Governing party. As Paterson[926] and Willock[927] have demonstrated the road to judicial office through some form of party political activity has always been and remains a fruitful one, particularly north of the border but it has attracted little attention or controversy. Even Ensor limits himself to a few unsupported remarks of a very imprecise kind such as the claim that

> "... at different periods, a good deal of party ... propossession has been displayed

> on the English Bench ... Usually it was unconscious ..." 928

What Ensor has in mind was the anti-Union line taken in the nineteenth century which is more accurately seen in class rather than party political terms.

For the rest only Griffith really mentions the question of party politics but as we shall see his mention does not suggest any formal connection between the prevalent judicial attitudes this century and the policy of the Conservative Party. In fairness to the Conservative Party many of the aspects of the judicial policy preferences which are discussed by Griffith could be regarded as part of the Labour Party's practice.[929]

Sociological Approaches and the Judiciary in Britain

The impact of the sociological theory on the work of much British jurisprudence has not produced sustained empirical work in the field of judicial activity but rather the disregard for such data. Given the stage at which British sociology of law finds itself it is, perhaps, not surprising that the work which we have thus experienced should be at the level of 'high' theory or within areas of "political" contention.[930]

Along with the major discipline of sociology the

legal theorists interests have to a large extent been influenced by work published in the United States where sociology has exercised a more wide ranging influence on social sciences than in Britain. This has meant that what has constituted a social scientific approach to legal phenomena has often consisted in taking concepts and perspectives of American writers and applying these to specific empirical projects in Britain. At the level of theory this has involved simply borrowing the insights of the sociological "greats" and seeing how these fit into the British context, or even simply presenting them in some form of academic aspic as "the way it is". Along side these new ways of seeing the legal process we find a rather more voluminous continuation of traditional legal analysis operating in isolation and apparently unaffected by this new style of law business. This is not surprising in view of both the structure of much legal education during the twentieth century and the strong strain of "rejectionism" within some social scientific approaches to legal study. [931]

Not only do we find little by way of change in the relationship between the law Faculties and the Profession over the years but also an isolationist tendency within the new approaches. Standard legal education's goals remained and at the time of writing remain, for the most part, tied very firmly in with

the practical orientation of solicitors and pleaders. Whilst this same sort of criterion of "usefulness" has been a feature of some of the social scientific work in Britain,[932] the immediate goals of theoretical approaches have been less instrumental. The atheorectical approach of American behaviouralists and the parasitic nature of American social science all helped the adoption of a less supine set of interests.[933]

From the point of teaching, as opposed to research, the work of Roscoe Pound and the American realists has been easy enough to integrate into legal curricula since they fitted into an analytical approach to the nature of law. In fact it may be suggested that none of these writings offer a soundly based methodology within which to conduct empirical research, based, as they appear to be, on anti-theoretical approaches to the legal enterprise. The same can be said for the strongly judicially orientated work in the United States on the behaviouralist model, although there has been rather more work in the criminological field within this perspective in Britain.[934] The reception of American work into the mainstream of British academic method, then has remained a limited one.

The emergence of sociological approaches to social life can be seen in a variety of different

ways. It has been presented as an emanation of the intellectual movement which spread from the United States in the late nineteenth century in the social science field. Typical of this was the scepticism of the psychologist William James.[935] There are hints within the work of historical jurists like Maine and in Germany Von Savigny of a totally different approach to legal phenomena based on an essential anti-formalism which characterised the early sociological jurisprudence and realism in the United States. It is possible to trace a common kind of concern and explanatory goal back from Maine through Roscoe Pound and Karl Llewellyn and Jerome Frank. All were aiming to rescue the legal process from the aridity of what Julius Stone called "logical analysis and abstract speculation". The distinction between the various individuals involved in sociological jurisprudence and sociology of law centres simply on their starting point. The former commenced with the legal phenomena and attempted to move out from this to make connections and correlations in the past, with political events and with specific social situations. Sociology of law attempted rather to situate the legal enterprise within the whole complex of social relations as part of that complex. The distinction is not always easy to make in practice and seems to centre very much around the

avowed degree of legalcentricity.

Christopher Hill was generally wary of the notion of simply tracing the evolution of intellectual movements in social isolation. In the context of the sociological movement in law Alan Hunt has more recently warned us that autonomy in intellectual movements is misleading

> "Development and movements in the intellectual arena are never exclusive or self-contained. A particular intellectual trend or initiative may for a period provide a self-sustaining momentum and hence acquire a degree of autonomy. Yet intellectual activity cannot remain for ever self-generating and self-determining ..." 936

Just like any other field of intellectual activity, sociological and juristic enquiry is not 'pure' and abstracted from their historical circumstances

> "... intellectual activity cannot remain for ever self-generating and self-determining; it must stand in some relationship to social and economic conditions which with varying degrees of directness will influence, and (in) that sense determine, the developments that take place in the intellectual sphere." 937

We have attempted to suggest some reasons why the study of the judiciary in the pre-twentieth century Britain never really got off the ground. The defence of the "bloodless revolution" meant that in the pre-professional era no study took place in the direction of the juristic function at any level.

As we have seen, the judiciary were largely simply there. Thus we have, with the encapsulation of such notions of the judicial role within Austin a very clear assessment of the place of the judiciary already institutionalised in print. The displacement of Austinian concerns and analysis does not yet appear to have been effected at the time of writing. The Scottish alternative Jurisprudence simply concentrated on other aspects of juristic analysis whose concerns were essentially abstracted and unconnected with concrete policy analysis. The commencement of the process of demystification of the law in general and the judicial role in particular has to then be set against this initial conception of academic Jurisprudence. Such a conception remains apparently dominant at the time of writing.[938]

What has occurred in Britain has been a continuation of concentration on both the concerns of the early legal theorists combined with an incorporation of "social scientific" approaches largely at an exegetical level. Jurisprudence has been typified by what Willock referred to as the "great men of Jurisprudence" approach.[939] This has been the way in which alternative perspectives, particularly those from the United States have been treated. Thus we find the sharpest challenge to traditional Jurisprudence from

Marxist legal thinking has been treated quite extensively in the post War era but until very recently the notion of applying the concepts in an empirical way to any legal system has been missing.[940]

Thus it is left to those outwith academic legal circles to point out these features of the legal system in operation which operated against the working classes and organised labour. However the organised labour movement in its politicised form from the 1870s onwards developed their own interpretation of the operation of the legal structures of a class state.[941] Their approach has varied in intensity but is postulated on the assumption that the conjunction between the employing class and the governing class is so close, if not identical, that any decisions from that governing class's Law Courts are unlikely to be favourable to labour. The Law system is perceived as one of repression, since its major connection with the working classes is in its criminal form. The nineteenth century was the happy hunting ground for employers in their attempts to use the Courts to prescribe the various defensive and offensive strategies of labour at the workplace. Apart from this, the notion of the rule of law and the freedom to use the legal grievance mechanisms to secure rights and their restitution of property depended on the initial

possession of such rights or property, For the majority of the working class the problem largely did not arise. Only with the increased organisation of skilled and unskilled labour do we find the working classes speaking in an articulate voice with their demands for better treatment in the workplace and in such matters as rights in housing and health and old age income support.[942] However, the context of these demands and the specific formation of political Labour organisations was not one where anything other than a very broad sweep of social and economic analysis was available. Engels made the same sort of point in the context of the implications of inevitability within the Manifesto and the crude mechanistic determinism of the Second International.[943]

From this vantage it is then possible to see examination of the judiciary as a reaction to the realisation that the overt political power of property had been broken and the institutions of the bourgeois State democratised without the accretion of rights to the working classes which they had been led to believe.[944] What had been suspected in relation to the direct confrontations between organised labour and employers and the Courts' role was found to be more pervasive in fact than the immediate reactions of the judiciary in the first Post War years of the century might have given the impression. What was

witnessed during this period was judicial abstention where the control of government departments was concerned.[945] Now this in itself might be regarded as unexceptional but for the fact that what was permitted in the inter War period was power to bodies like the Unemployment Assistance Boards' decisions against the unemployed.[946] Only when the complexion of the Executive altered after the Second World War and the judiciary became reactivated did the political aspects of the judiciary again become matter for any political comment. From the academe the voices were few and far between until we reach[947] the sixties. As we shall see the goals and interests of those who featured in judicial critiques at this time concerned themselves largely with very specific short-term limited goals. Their objectives were structured by a Fabian conception of the absence of justice in the legal format through the absence of formal equality at the level of representation.[948]

The continued absence of any sustained academic perspectives on the judiciary can be seen in terms of their general conformity to the political status quo and its various component institutions as well as the relationship between the academic legal establishments and the profession. What we seem to have within law

teaching is a paradox. Whilst it can be suggested that anti-formalism produced by either the rapidity of social change resulting in legal "lag" or western legal systems in crisis this new social orientation of the legal system as a whole does not seem to have penetrated very far where judicial studies are concerned. Apart from the notion of academic inertia providing a block to innovation in such areas as jurisprudence teaching we need to bear in mind that unlike some research 'subjects' the judiciary are always in the position to rework their self-presentation in a most profound manner. The judicial process provides opportunities for judges to adhere to the "fashionable" in their public utterances and to replace "outdated" concepts with new "socially relevant" ones. Whilst the words of Scrutton may be regarded as indiscreet the judiciary have access to the public media either within or outwith their case work to disown a particular approach.[949]

The legalcentric approach has had a profound impact on limiting the possibilities for sociological jurisprudence since it presumes, by its very nature that the legal process is significant. One way of combatting this limitation has come from the sociology of law which has attempted to place law and legal rule systems within the wider society. This has

attempted to obviate the problem of simply selecting techniques from the shelves of social science or applying concepts from social science to legal phenomena. The difficulty of avoiding something similar in sociology of law on a wider scale does not yet appear to have been totally solved.[950] The temptation here is simply to adopt an extant body of sociological thought wholesale and 'fit' law into it with greater specification than in the wider theory.

In fact in Britain there has been little systematic theory and the limited concerns of the first sociologists of law have studiously avoided the decisionmaking aspects of the judicial process. This is itself a healthy sign boding well for the displacement of legalcentricity and undue legalism within the sociology of law but it does mean that much valuable data is in danger of being rejected for the wrong reasons.[951] At the moment there is no "grand theory" in native sociology of law but a burgeoning literature centring around criminology and the sociology of deviance as well as the process of the Courts. Inspired by labelling and social reaction theory, there has been a fresh interest in criminology which had become this century allegedly increasingly reformist and positivistic.[952] Whilst this led to a concentration on the source of legal norms and a

decline in crass reification of such products as the common law and its component parts, it has not got far at the time of writing in building its own alternative theory.[953]

As regards 'borrowing' from other perspectives, the major source appears to have been the United States and American realist. This represents no more than a handy piece of shorthand to denote a variety of strains of anti-formalism. In its thrust against the declaratory notions of judicial decisionmaking, the scepticism of the realists was couched in strong polemical and convincing tones rescuing the politics of the courts from the abstraction of reified "rules" of pre-existing decisionmakers. The overall orientation though of the theorists broadly termed "realist" was encapsulated in Oliver Wendell Holmes notion that what was meant by law was

> "the prophecies of what the courts will do in fact, and nothing more pretentious ..." 954

This orientation reflected by W. W. Cook where he explained in the thirties the goals of realism

> "... we are interested in knowing how certain officials of society ... have behaved in the past in order that we may make a prediction of their probable behaviour in the future." 955

Although this positivist approach foreshadows the behaviouralist approach it may be possible to separate the goals of realism from its methods. The most concerted attempt to relate judicial decisionmaking to some sort of theoretical orientation we find in Llewellyn's "Common Law Tradition".[956] Here Llewellyn attempted to answer some of the pressing perceived problems of the trial lawyers of his day centred around the alleged unpredictability of the American Appellate Court system. Whilst Llewellyn accepted that the declaratory theory was successfully laid to rest

> "You never can tell on what peg an appellate court will hang its hat ... What has become of the doctrine of precedent?" [957]

In response to these difficulties Llewellyn describes how it was that in fact the appellate court structure was predictable or as he expresses it "reasonably reckonable" with empirical support. This he ties in with an adoption of the "Grand style" of judicial decisionmaking. This was the approach to legal decisions which he counterposed to the "Formal style". They differed in that Grand style was strongly akin to the mischief interpretation where statutes are involved and policy rationale elsewhere whilst the formal style was more likely to adopt the literal rule for statutes and rely on the language of prior

precedents rather than their goals. The problem though with much of what Llewellyn so entertainingly described was that its exact source was never quite clear. His whole notion of "steadying factors" which militated against unpredictability were derived apparently from "common sense" notions. Thus he listed a sequence of "relatively stable and strongly stabilising factors" such as "responsibility for justice" and "judicial security and honesty" as well as "the General Period-Style and its promise". The criteria are not argued for in The Common Law Tradition and the work was a fascinating exercise in intuition and what Llewellyn himself termed "horse sense". The method of examining the judicial exercise in these terms then requires further elucidation of criteria if they are to be part of any analysis in relation to Britain. Behind the elaboration what the Common Law Tradition seemed to purport is that at different epochs judges adopt a different way of "packaging" their decisions. What the impact on decision criteria is is less clear. The notion is described by Twining as being of potential value

> "The Common Law Tradition contains the seeds of a potentially fruitful approach to the comparative analysis of judicial opinions and of courts as working institutions." 958

The "scientific" study of the judicial process which began in the United States stemmed from cognate work being done in the other policy areas of social science by behaviouralists. In the area of American political science this has been the dominant trend for the past forty years.[959] This fitted in with the surrogate role of American social science and has been the cause for major discussion in the area of sociology. There have been a number of critiques of the positivism and system orientation of the consensus based and equilibrium dependent varieties of sociology and political science that have dominated the American teaching and thinking this century.[960] In the field of judicial politics there has been a strong consistent series of studies both in the United States and in other legal systems adopting a specific "scientistic" methodology. Britain has been exempt from such studies except in one interesting area where the techniques are prima facie least problematic to utilise.[961]

Behaviouralists built on these insights that behind the formal description of rule application favoured by judges and by most traditional jurists there were undisclosed factors in decisionmaking which, if they could be discovered, would provide the key to future prediction. The realists had been

involved in an attempt to discredit the notion of a purely formal account of lawmaking but had not provided any sustained systematic data to support these criticisms. The behaviouralists sought to right this deficiency and let a breath of fresh air into the "closed room of jurisprudence". They were confident that their impact would be devastating and that if jurisprudence did not redirect itself towards "jurimetrics"

> "it will deserve and ultimately get assignment to the same limbo that holds the alchemists and necromancers and other practitioners of man's forgotten superstitions." 962

The interconnected approaches of computer applications to legal research problems found their best expression in the practical and instantly verifiable field of judicial behaviour. The approach adopted in the United States has been, briefly, to construct a set of variables against which to test each judge and thereafter to extract a line of decision based on the results. This allows future "prediction" where the same kind of problem comes up before a Court with the same range of variables in its membership. The most immediately accessible work in this field has been in the area of prediction centred around the economic orientations of judges where labour or related problems are concerned. The notion is that

having worked out who is an "economic liberal" and who is an "economic conservative" it will be possible to work out on any given court what sort of decision the Court will reach on such an instance as the constitutionality of say a restriction on union activity or on labour conditions.

This method seems, however, to depend for its "success" on two a priori requirements. The sorts of disputes require to be situated within a limited set of accepted parameters of consensual economic and political practice. That is to say, provided the parties are only involved in minor adjustments of position within the accepted norms of private property then this method may be to some extent viable. Where the system is not characterised by an immediately clear agreement as to goals, then the value of the categories becomes more questionable. This a priori requirement has been expressed also as a feature of the culture-bound nature of the categories. Now this does not seem to be an insuperable objection provided that the behaviouralist does not attempt to make any kinds of universalist inference from his culture-bound data. By using specific vocabulary like 'liberal' and 'conservative' a misleading notion of universality may be implied which would not be justified outwith that particular area. The categories from the United States are the creation

and have their meaning within the political and intellectual world of the United States rather than in any other political economy not sharing its central features.[903] This brings one to the second aspect of ethnocentricity involved in the behaviouralist categories. The notion of being able to categorise disputes before the Courts as having implications of a specific kind seems to be easier to understand in the context of a system, like the American one, where there is judicial review on legislation measured against a set of Constitutional rules. Since these provide given goals against which economic arrangements, amongst other matters, can be gauged, then it becomes a less methodologically difficult problem to arrange the data to meet the category boundaries. In a system without such constitutional features the situation is less clear. Judges are in effect pre-warned to apply their values within the American system. In Britain the implications of decisions on disputes, relying on more indirect rules, may be involved in a much less precise operation.

Some of these difficulties have meant that, apart from simple methodological scepticism, there have been few attempts to examine the judicial process in this way. As we shall see, once the interest in the judicial process had been taken on board by the

various social sciences the interests have tended in other directions. The only major study of the judiciary on the behaviouralist type of model appears to have been that of Bob Wilson which attempted to combine a behaviouralist examination of High Court decisions on economic matters over a two year period with follow-up work on the judiciary.[964] Wilson in his examination posited three areas for attitude testing - social, economic and political. These he analysed into conservative or liberal attitudes on these matters producing different approaches to equalitarianism, political liberalism and economic individualism. From these he produced a fourfold classification of judges.

		POLITICAL ATTITUDES	
		CONSERVATIVE	LIBERAL
ECONOMIC ATTITUDES	CONSERVATIVE	Conservative	Individualist
	LIBERAL	Authoritarian	Liberal

This approach could certainly be utilised within Griffith's work to explain how it is possible to categorise some of the members of the judiciary who fail to fit into the role of the economically individualist and politically restrictive. However, Wilson, provided the key in his own work when he described the difficulty he had in gaining access to the judiciary for carrying out his attitude testing. Wilson's goal was frustrated by the inaccessibility of the judiciary. His aim had been to see what the attitudinal factors were which could account for decision differences rather than similarities from a relatively homogenous social group.

> "The influences that are of interest to us here, however, are of a much more subtle kind - namely the influence of a judge's background on the content of the decision he is asked to make. In trying to establish this 'influence' and its impact on judicial decisionmaking there are three main problems. Firstly, what is the content of upper middle class perspectives or ideologies; Second, what effect does this content have on particular decisions; and third, by far the most important methodologically, given the fact that there is such a high level of similarity in the judges' background, how do we explain differences in their decisions."[965]

This approach sought to transcend the mechanistic "cause-effect" view taken by some of the American behaviouralists on social and cultural background as simple determinant and the popularised versions of such work in Britain where it was often implied

that background simply produced decisions in some reflexive automatic way. But it also runs the risk of purely personalising decisionmaking and removing it from its social context and its historical conjuncture. If one is positing the judge as a socialised individual then there is more in his work than simply social background and role perception. One needs to relate this to the overall specific political and economic problem perception as mediated through the other organs of dominant problem isolation.[966]

The limitations of the approach of "total" case analysis with follow-up interviews are also practical. It cannot be used to deal with historical developments. Even for current research the throughput of cases means that either severe time or subject selectivity has to be adopted. This has been a feature of some of the more limited recent work, though these have tended to utilise a legislative intent frame of reference. This work has not claimed to go beyond comments on the specific issue in hand and is within the older traditions of analysis of judicial doctrine rather than sociology of law theory.[967]

JUDICIAL HYPOTHESES AND THE OBLIGATIONS OF LANDLORD AND TENANT

The various writers evince a variety of suggestions as to judicial policy motivation. Little fully documented theory actually emerges although polemic or anecdote are high profile. In addition many hints at theories are given but never followed through or are *precis* versions of wider studies. The sheer difficulty of accumulating sufficient expertise across a wide range of distinct legal interests may have inhibited judicial analysis. Many writers have failed to give the judiciary a great deal of attention since their major targets have been, for example, legal restrictive practices or the reform of other aspects of the system like legal education and legal aid. For those limited to a single field of endeavour there has been a marked reluctance to theorise from a limited set of case data and the work of Jennings in the thirties and more recent welfare assessments by Reynolds[969] is unusual. However, both Jennings and Reynolds set themselves limited criteria with which to assess the judicial record. Jennings attempted to answer the dispute about whether or not judges are going for a 'literal' or 'liberal' interpretation in their treatment of the Housing Acts in the inter-War period. We have noted the basic

limitations of this mode of classification basing itself on an analysis of judicial activity which assumes the external form of the action is significant rather than the specific content of the approach. Reynolds operates in another traditional vein measuring the judicial record against what the apparent intentions of the legislators may be deemed to be.

From the point of view of this work what it is proposed to do is see whether any specific hypothesis appears to be helpful in examining the Scottish housing situation in the late nineteenth and early twentieth century. The notion of culture lag figures prominently in judicial writing but tends to lack specific criteria in most formulations. Whilst we have attempted to set the activities of the judges in the debates which were taking place within vocal sectors of public opinion such as the Glasgow Philosophical Society, the Glasgow Landlords Association and a number of assorted Medical and Sanitary Officers and local government officials it is not clear to what extent and in what sense we can use such data in the testing of Dicey's or Freeman's formulations as to what constitutes "public opinion" or "social needs". Other sorts of problems emerge from Laski's notion of the 30 year gap between the judge's assumptions as to social and political policy.

Quite how these data are to be acquired is not clear and for historical studies it becomes even more of a problem.

Similarly the difficulties of assessing the data on social class alienation may be soluble where dealing with practicing judges but are incapable of much by way of measurement in any historically based study. We might note that the notion of alienation applies less to civil disputes, presumably, than where criminal issues are involved. Where the civil situation comes into play the question of alienation is related rather to questions of approaching the legal means of securing rights rather than their mediation in court. Here much of the discussion centres on technical legal issues of "relevance" rather than on issues of credibility where the process of cultural conflict might be brought into play. As we have seen the actual arrival of tenants cases at the Courts seems to indicate that this initial aspect of the alienation quotient was at least overcome. However, as with Steven Lukes' "third" model of power, the existence of alienation can only be assessed by the absence of tenants in formal disputes with landlords. The testing of such a hypothesis is clearly impossible except by way of informed inference based on little more than intuition.[970]

On social class alienation there are problems which emerge from the initial lack of any alternative clearly articulated approach to insanitary housing.

It is not easy to measure judicial decisionmaking against clearly specified policy possibilities on the question of the extent of mutual obligations of landlords and tenants where one side of the equation is missing. The non-socialist parties evinced no policies on this question and when they come into formal existence nor did the socialist political organisations.[971] The alternative is to assume that the bodies like the Royal Philosophical Society of Glasgow with their continued interest in housing were representative of a class view. Certainly the prominence of such as Smart, Honeyman and Mann in their papers and debates on housing does suggest that they do represent a specific, actively investing section of the Glasgow bourgeoisie.[972] However, the relationship between them and for example the approach of the Glasgow Kyrle Society and the Edinburgh and Dundee Social Unions at the same time would suggest that the notion of a dominant explanation of the housing problems of tenants and the means whereby these could be solved was perhaps a little less than totally homogeneous.[973]

However, it is possible that the most frequent kind of analysis which <u>appears</u> in the records is the

moral one overlaid with aspects of physical causation. In their work the judiciary operate not so much along these lines but along lines which might be said to be implicit within this debate, namely that of the personal responsibility of the individual to look after himself in the contractual world of renting property. No opinion formers really discuss this aspect of the freedom of contract which permit tenants to move as they choose except for a few remarks which make it clear that the social control function of the Factors and their "lines" was decisive on "getting on" in rented property. In much the same way as the modern bad debt "blacklisting" the lack of the Factors' recommendation or references restricted the kind of property where the tenant could expect to get accommodation. The absence of this sort of consideration from much of the frameworks of analysis of the judiciary indicates that whatever world the judiciary inhabited it was somewhat removed from the specific reality of the tenant with a problem of an insanitary dwelling. The attitude of the sanitary authorities indicates too, that the operationalisation of the formal systems of tenant protection were mediated by factors of a local and 'practical' nature so far as securing sanitary improvements were concerned. Looking, then, at the specific actors and forensic dramas may provide some help.

Out of the Wood and into the Trees

Introduction

It is proposed to examine whether the reported cases throw up any recurrent features which might give a clue to the source of the change in the legal position of tenants and landlords. Was this, for example, all the result of a 'push' by urban landlords in the West of Scotland or was it rather a product of friction in the rural Scots borders? Similarly, amongst the internal features which will be examined are the class situation of the tenants and landlords and whether or not the same judges had the moulding of the mutual obligations in their own hands. Rather like the examination of the development of the doctrines of '*volenti*' and 'notice' where it was essentially misleading to regard the changes and movements of the legal position as being attributed to pro-landlordism by the Courts, this study of surface features should enable any kind of simple causal pattern to be either established *prima facie* or discounted. The features of the cases which will be tested out cover both geographical location, as well as type of property and occupation of parties, amount involved as well as the lawyers and judges involved as well as the notion of technically based complaints as opposed to those based on a 'commonsense' conception of habitability.

Lawyers

One feature of the capitalist political economy which Max Weber suggested was crucial to the development of the system was the increase not only in technical rational methods of decisionmaking[974] but also implicitly the professionalisation of the advisers of the various fractions of the owning class. This feature which can be discerned in the work of landlords in the seventies in England with them using specialist lawyers, both firms of solicitors and barristers, suggests a clear conception of a strategy in respect of their interests so far as the Rent Acts are concerned. An examination of the lawyers involved is, thus, part of the process whereby it is possible to infer that the developments and changes in the Rent Acts over the past decade since the introduction of 'fair rents' in the Rent Act 1965 are to an extent the product of a goal orientated movement by a particular group.[975]

So far as the modern residential landlords are concerned, the changes in law are no product of mere chance but of a carefully orchestrated campaign both through the Courts and to a lesser extent, the political channels.

So far as the use of landlords' lawyers is concerned, it might also be possible to infer that a tenants'

movement existed on similar lines such as has occurred from time to time using the medium of the Courts, albeit to a lesser extent. Ron Bailey described the uses to which the squatters' movement of the sixties in Britain put the legal process systematically in their attempts to draw attention to the plight of the homeless. However, the Courts, off their own back, altered the procedural rules which had enabled squatting to operate effectively.[976]

Solicitors

There are a number of different methods of reaching the Court of Session. Since 1868 any action being brought on a civil matter in Scotland can be brought in the Sheriff Court or if the value is above a certain figure directly before a Lord Ordinary in the Court of Session. An appeal lies from the Sheriff Court either to the Sheriff Principal of the Sheriffdom and thence to the Court of Session Inner House or missing out the Sheriff Principal and appealing direct to the Inner House. Similarly appeal from the Lord Ordinary lies to the Inner House. This Inner House is split into two Divisions and they receive appeals on a random basis i.e. there is no significance in a case being heard by either Division and there is no specialisation or "division of labour" by case type.[977] Appeal lies from the Inner House of the Court

of Session to the House of Lords in these civil matters and no leave of appeal has to be obtained although in practice where legal aid or assistance is involved the legal aid will only be given where there is at least one dissenting voice in the Court of Session.

In the 56 cases examined, some 81 firms appear in only one case either for pursuer or defender. The other 27 "gaps" figure some 11 firms in more than one case. Of these, three firms appear more than twice. The breakdown is as follows:-

81 firms	-	1 case
8 firms	-	2 cases
2 firms	-	3 cases
1 firm	-	5 cases

It is immediately evident that the notion of any form of specialisation is less than obvious from such data. When we look at the firms which have made more than one appearance this is confirmed.

Two appearance firms

The time gaps for a number of these firms is sufficient to dispel any notion of specialisation varying as it does between 1 year and 50 years with an average of 16 years

firm	1	7 years
	2	50 years
	3	32 years
	4	22 years
	5	12 years
	6	7 years
	7	1 year
	8	10 years

So far as the cases themselves are concerned, we can see that there is no apparent "campaign" by tenants through the cases with any specialist lawyers being retained to defend tenants' interests from the junior branch of the legal profession. Also the information on the party for whom two appearance firms were representing suggests no campaign

	Case 1	Case 2
firm 1	Landlord	Landlord
2	Tenant	Landlord
3	Landlord	Tenant
4	Landlord	Tenant
5	Landlord	Landlord
6	Landlord	Tenant
7	Landlord	Landlord
8	Landlord	Landlord

On the landlord's side there is a connection between the cases of some of the four firms who appeared only for landlords. It is clear that half the firms who represented both landlords and tenants cannot be said to be part of any movement to clarify the landlord position through specialisation which we encounter in the current decade.[978]

It seems clear that we can only talk of very marginal possible connections in the area under consideration for the large majority of the cases. In the remaining instances there is a possibility of something less tenuous.

Multiple appearance firms

As indicated two firms appeared in three cases apiece. The cases are distributed in the case of firm A 1874-1883-1885 which suggests at least some

possible support for a notion of continuity necessary to the notion of professionalisation. There is no clear theme in the actions and they in no direct way concern the tenants at the lower end of the residential market with whom the statutory incursions were concerned. They concern, rather, tenants who are in sectors of the market where bargaining power approached equality. There is no element of consistency in the class of firm B which comprised two tenant and one landlord representation. These were distributed 1895-1901-1910 and again give a possible hint as to a theme. However, they include such items as acting for a landlord in an agricultural set off dispute and then for the landlord in a post Webster volenti case and finally for the tenant in an agricultural dispute about the sufficiency of field drains.

When we look at the cases which firm C were involved in, the search for some possible thread from either side does appear to be more rewarding at first sight. Certainly the cases in which firm C are concerned include some of the most notable of the cases from the point of pushing the boundaries of the doctrines in specific directions. These include acting for the tenant in Webster on when the doctrine of volenti first made its appearance in Scots landlord

and tenant law as well as for the landlords in the volenti case of Caldwell v. McCallum and in the "obvious defect at commencement" case Mechan v. Watson and in the same year a stair fall case where the tenant succeeded Grant v. McLafferty and finally in the commercial lease of motor garage premises with a leaky roof at the outbreak of the First World War. It is evident from this brief look at the cases of firm C that a possible landlord move could be inferred but set off against the significant 'master decision' of Webster which, along with the commercial lease cannot be included as relevant to any possible pattern which might exist here.

Little concrete seems to emerge from this examination of the solicitors involved in these cases except a few possible lines of inquiry which other extrinsic evidence may support but which does not appear to look significant

Advocates

There are, of course, a number of difficulties in examining the members of the Scottish Bar involved in disputes to determine whether there appears to be any strands of consistency which might indicate the possible existence of some sort of tenant or landlord campaign which might bear further investigation. The sheer lack of size of the Bar in Scotland could mean

that selection of a particular advocate owed more to availability than judgment. The position today, however, is not radically different from the period under study both as regards practising advocates and litigation volume and there is little evidence of solicitors adopting the practice of "wishing and hoping" when it comes to counsel selection. Given the lack of internal organisation in the Scottish Bar there is little reason to suppose that supply and demand is not able to operate effectively in counsel selection.

The incidence of multiple appearances by advocates is, overall, not marked. As the Appendix indicates there are only 15 advocates who appear more than twice in these landlord and tenant cases. Six of this band appear three times. Of course, the only pattern which seems at all hopeful is the presence of Crabb Watt for the tenants in three major cases in the urban residential field.[979] He appeared in the washhouse floor case, McManus v. Armour in 1901 and five years later in the stair death case, Mechan v. Watson. Both times he appeared unsuccessfully for the tenant but was retained in 1911 in a similar sort of case, Dickie v. Amicable Property Investment Building Society where a complained of defective stair rail resulted in a tenant suffering injury. Of the other advocates in this section, as can be seen, there are

combinations of acting for landlord and tenant as well as a mixture of commercial, agricultural and residential cases. Typically, although R. V. Campbell appears in his three cases for landlords, they cover all three types of property with no apparent connection. Five advocates appear in four cases and a similar lack of theme is evident from the cases in which they were involved. One of the group, Murray, made all his appearances for landlords all of which three were in agricultural tenancies. No consistent common issues were involved here, however.

When we move into the more frequent appearances only one advocate appears in five cases, Balfour. Again four of these appearances were in commercial cases with no apparent theme. He represented landlords twice and tenants three times over this twenty year period.

Two advocates made six appearances, Salvesen and Campbell. Salvesen's cases were agricultural (4) and commercial (2). Campbell, in his cases appeared in four residential cases of which all these were for the landlord. Four of these residential cases were of great interest in that they dealt with two drainage cases - Smith v. Maryculter School Board and McKimmie's Trustees v. Armour and a ceiling and a stair case - McKinlay v. McClymont and Cameron v. Young. The early success though of Smith did not

pursue Campbell in the later cases and of the six cases involving landlord and tenant disputes he lost five.

Finally, the most appearances made were by George Watt who was called on some seven times in this context.[980] There is a striking consistency in his cases, however. All of these cases were for the tenant and four of them were in residential property. The two commercial cases were also the two marginal cases where living accommodation was involved too - Hall v. Hubner and Baikie v. Wordie's Trustees. Accordingly we have Watt involved in three drains cases and two stair cases and one ceiling case. In all these cases individually, including the commercial cases there was injury or illness to tenants.

There does appear to be an element here which suggests that although there might not be any specialist tenant solicitors, Watt was regarded as something of a choice for litigating tenants. The notion that this ties in with tenants' organisations concerned with the habitability of housing does not seem to be borne out.

The Personnel in the Courts

We have already seen how the developments in the rights and obligations of landlords and tenants cannot be easily ascribed to any notion of doctrinal

"necessity". Put simply the decisions could just as easily have been decided in favour of the unsuccessful party more easily than in most two-sided competitions in that the specific bone of contention in almost all these cases - the standard of habitability or repair of subjects let - is clearly by its very nature highly relativistic. As long as leases expressly or implicitly use the general terminology of "good" or "satisfactory repair" this will subsist rather like the recently recognised question of the non-disappearing "slums".
Amongst the various possible hypotheses, then, to try to explain how the position could change over the period in question, apart from other internal case variables, one factor which can be perceived in other areas of case law is worth examining, namely the specific judges involved in crucial decisions.

In the housing field subsequent to the period in question, we can see the great personal impact on the interpretation of the Rent Acts of a string of Lords Chief Justice in England - from Lord Goddard on through Lord Parker up until the current tenure by Lord Widgery we find the development of the case law dominated by these individuals in their own particular eras.[981] A similar sort of situation can be noted in other fields such as the position in the late sixties and early seventies with Lord Denning and squatting

and there are other areas where the same process has occurred.[982] The point, though, is not simply that particular judges have appeared in certain sorts of cases but that they have been concerned to pursue a particular central purpose throughout a series of cases - thus we can see in the recent epoch Lord Widgery 'pushing the line' of the independence and virtual non-accountability of Rent Assessment Committees[983] and the Denning cases limiting the possible uses of socially motivated squatting.[984]

The extent to which we can perceive such possibilities within thelandlord and tenant field in the 1850-1915 period must be seen within the context of the Scottish random distribution of caseloads.

So far as the urban residential cases are involved, we find that there are six judges who make more than a couple of appearances in these cases and who might be able to make something of a "personal impact" over a period of time on the development of the mutual rights. However, when we look at the spread of these decisions as between findings for landlords or tenants there is no consistent anti-tenant or anti-landlord judge.[985] Although he appears in seven cases and speaks in all but one, the Lord Justice Clerk J.H.A. Macdonald[986] opts for the tenant three times and the landlord the remaining four times in

similar significant cases like Webster v. Brown and Caldwell v. McCallum. The nearest one can come to any possible trend might be in the decisions and appearances of Lords Young and Trayner. In Young's six appearances he opts for landlords four times in conjunction with Lord Trayner on three occasions. In fact his record is a little more anti-landlord than these figures suggest in that he dissented in one pro-tenant case whilst he similarly dissented from a pro-landlord case on a misconception of the evidence. Although the data is less than conclusive, it is worth examining the role of Lord Young and his partner Lord Trayner in more detail.[987]

All in all then this particular line as the Appendix confirms yields little by way of "Senator with a mission" in the field of mutual obligations although we will be examining the Young Trayner conjunction further.

Quantifying the cases

Our primary interest in examining the paradoxical position of legislative and judicial rights is with urban residential leases. As we shall see these cases tend to share common geographical and social features as well as on point of dispute. Again, although as I stress doctrinally of significance, the field of commercial leases tends to involve a

different class of party as well as issue. The nature of the problems which emerge from commercial disputes is of a different quality. This produces different types of issue. In addition they are between parties of rough equality. More significantly the problem is the temporary interruption of the productive process rather than the prevention of normal social life.[988]

Of the cases under consideration, slightly less than half were concerned directly with the provision of housing accommodation. There are in addition to the 24 urban residential cases a couple of cases where classification is not hard and fast. In two of the cases which have been classified as commercial, the leases involved shop lets with living accommodation included. In neither of these, however, was it suggested that the living accommodation was the defective item. In one the condition of the shop was allegedly harmful through defective drains and there was loss of livestock from a bird-dealer business[989] and in the other a stairway down to a cellar which gave way causing the shopkeeper's wife injury from her consequent fall.[990]

(a) Action raising

In the twenty four cases involved here we have tenants raising the actions in all but three of

the disputes. This is hardly surprising since there is an allegation of either death or illness, or injury involved in all the cases. What is perhaps surprising is that three of the cases were in fact instigated by landlords. In these cases the landlords were suing for rent due as a result of abandonment of premises by tenants. The fact that 95% of the urban residential cases were raised by tenants is, perhaps not surprising in view of the seriousness of the issues involved.

(b) Case winning

The nature of tenants' complaints were almost standard. As a result of a defect in the premises let the tenant or a member of his household was injured in some way and hence a claim arose. The defects varied from ceilings which fell, stairs which were alleged unsafe as well as unhealthy drains. Both sides had a statistical breakeven of half. Landlords were successful in 50% of the cases and tenants in 50%. When they were raising actions, tenants had a 47% success rate. In the three cases where they raised the actions, only one landlord was successful.

(c) Sums involved

Although as indicated all these cases involved either death or injury or illness in the tenant's family, the sum claimed was highly variable ranging from

£20 up to £1,000. Where the sum claimed was in three figures, the tenant success rate was 33% and when four figures was the extent of the claim, the success rate was nil. It may be possible to suggest that tenants were more likely to be successful where they were putting in a modest claim. In similar wise it may be possible to see this as a corollary of the suggestion in the earlier section that tenants were able to win specific battles but that the war was won by the landlords' restriction of the extent of their mutual obligations on habitability. Thus, it might be possible to perceive not a crude anti-tenant line in the courts but a rather subtler, possibly subconscious support for the owner of the property rather than his tenant. At this juncture this is only one way which the data might be read and without further support it remains little more than a possibility with limited data.

(d) Nature of claims

In order to give more depth to this consideration of the variables in the cases, the actual nature of the claims needs to be examined. The extent to which the cases turn on technical expertise may provide some kind of guidance to the other factors which appear to weigh with the tribunals. The claims themselves, as indicated, where urban residential leases were

involved were relatively unproblematic in that they involved 95% of damages claims against landlords.

The actual issues in detail break down as follows

stair defects	9 cases
drains or water problems	9 cases
ceiling faults	3 cases
dampness	2 cases
deficient flooring	1 case

In over half these cases there was some evidence in the pre-trial process of consultation by either landlord and tenant with technical expertise varying from the medical profession to builders and plumbers and various 'men of skill'. Where there was consultation of technical expertise by tenants, their success rate in the subsequent cases was 72%. The figure for landlords where they utilised some expertise other than their own judgement was nil.

(e) Nature of the property involved

Not all the gains and losses in the shifting parameters of mutual obligations took place in this sector of the market. Of the 2 4 cases, not all the

cases concern this bottom sector. Tenants include a doctor, a schoolmaster, a commercial traveller and from the rentals and areas of the houses involved, some 36% of the cases involve middle class tenants and properties and some 40% are working class. Again what we can glean from this is that there is no obvious movement of working class defence.[991]

There is no overwhelming evidence of any class orientation in the cases at first glance but it may be that the "crucial" feature may be that where a working class property was involved the chances of success varied from more prosperous tenants. The relevant 'success' rates by social class were for the former 55% and for the latter 50%.[992]

Geographically the cases are spread, between the larger urban areas, although with no contributions from Dundee or Aberdeen. 45% of the cases come from Glasgow and a further 23% from the Edinburgh area. This reflects the distribution of population although one would not expect something as exceptional as a case coming the full length of the Court of Session in Edinburgh to be reflected in a straight statistical distribution given the variables involved in deciding to take legal action and subsequently to press one's case.

Alternative strategies

Although not directly involved in the problems of the working class tenant through this period of legislation, innovation and judicial change, the impact of the commercial cases was such that it served to close off a number of possible avenues to the tenant of uninhabitable residential property, only in many instances by implication. Although in this study we have made a distinction between urban residential, commercial and agricultural leases the common law of Scotland only recognised one kind of distinction, namely between urban and rural property. This runs through the whole of the common law of landlord and tenant from notice and fixtures through to the question which concerns us, the implied obligations to provide satisfactory property fit for the purpose for which it was let.

The question of class orientation in broad terms did not enter into the area of commercial leases which were broadly concerned with parties from the same social class although there is evidence of Gwyn Williams' 'penny capitalists'[993] in at least three of the cases.[994] The majority of the disputes, though concern 'businessmen' rather than 'shopkeepers' with similar sorts of commercial landlords. The relevant success rates, if one pursues this distinction reveals similar success rates for 'businessmen' and 'merchants'.

Judicial theory and the Scottish Context

The moves over the period in question do not resolve into straightforward anti-tenant prejudices or even anti-working class feeling. However, since there did not appear to be any doctrinal reasons for the erratic movements of the boundaries of mutual obligations over this period, we will see whether or not an element of personal causation might provide some assistance. It may be that as we have seen, the judiciary as a whole cannot be characterised as being a party to a dominant landlordist ideology but within the specific decisions we may find key figures in key cases which the bald statistics "pro-landlord three times pro-tenant three times" fail to reveal. As we have seen, one of the problems with a commodity like case law is that the decisions are not "pure" entities which can be weighed against exactly equal fellows. Finding for a landlord in one particular action may be in terms of the future development of a policy more or less significant than a tenant decision. The battery of "approved judicial techniques" ranging from "distinguishing" to "per incuriam" ensure that the notion of the judicial decision as an integral totally significant entity is misleading. The real "winners" only appear often many years after the original decision.

Thus, it was with the field under discussion here. Whilst we have seen the uncertain status of a doctrine of limitation like 'volenti', the subsequent law on the topic makes it clear that the doctrine has not been consigned to the scrap heap of outdated and inapplicable doctrines.[995]

Focussing on the specific Court membership

There was no compelling doctrinal reason why the mutual obligations about residential habitability developed as they did over this period, nor can we perceive any strong pervasive current of property tenderness pervading all judicial decisions on this point. Chronologically, there is a "break point" in 1888 when the Courts seem unwilling to accept a simple causal connection between death or injury to a tenant and a breach of obligation by the landlord. It is instructive to examine the personnel of the Courts at this time and look in some detail at the judges involved in a number of cases. The strength of personalities and specific orientations of individual judges provide some important perspectives in the development of this specialised area of social power.

Of the twenty five judges involved in these decisions, over the years seven were given the opportunity to imprint their conception of the obligations' parameters in a series of cases

These individuals provide an interesting cross section of the Scottish senior judiciary during this period. They range in their politics and in their involvement in public life and debate. What united them and continued to unite the senior Scottish judiciary was their social and educational background.[996] The impact of this, though, does not appear to provide a satisfactory explanation in the variation of decisions which we find over this period.

The minimal impact which was made by Lords Adam and Pearson appeared to be in line with their overall low public profile. Lord Adam figured in one case which provided an alternative to volenti non fit injuria[997] and one which modified the application of that doctrine as well as a case where the landlord was attempting to require a tenant to return to a house where the drains had been noisome. No clues as to the sources for these apparently conflicting decisions from one judge appears even though the cases were separated only by a three year span.[998] The same sort of difficulties attend the decisions involving Lord Pearson. He again was involved in upholding the "defect obvious at the commencement of the tenancy" defence as well as silently concurring with his colleagues in the following year in awarding a tenant on whom his ceiling fell. Although Pearson's spell in the First Division was much shorter than that

of Lord Adam, there is little from his political or private life to indicate any particular reason for this uncertain train of decisionmaking. Prior to his elevation to the Bench, he had been briefly a Conservative M.P. for the Universities of St. Andrews and Edinburgh. He was also a Counsel for the Church of Scotland to which he devoted some of his spare time[999] but none of these factors provide much by way of clues as to his varying decisionmaking.

This feeling of perlexity is relieved a little with Lord Trayner whose decisions were in the major cases resisting tenant's claims arising from insanitary or unsafe property. He was involved in the Second Division's elaboration of the defences to actions for breach of the landlord's obligations as to habitability. However, in addition to these causes, Lord Trayner was also one of the Bench which provided a restriction on the defence in 1901 where the landlord had given assurances as to the safety of the ceiling. The connection between the work of Lord Trayner and Lord Young though is worth examining

Lord Trayner was a Liberal although he never actually contested a seat for the party.[1000] As an advocate, he had been highly successful and was described on his death as having been the most prominent member of the Second Division of his day

until his retiral in 1904[1001]

Another prominent Liberal judge involved in the work of the First Division in this field Lord McLaren had a rather different kind of background. Unsuccessful at the Bar, partly due to his chronic poor health, Lord McLaren does not appear to have been so highly thought of in the sense that

> "he sometimes exhibited a tendency to make sweeping legal propositions which were unnecessary for the disposal of the case in hand."[1002]

It has also been suggested that Lord McLaren, possibly in view of his eminence in the field of wills and succession,[1003] was no Divisional "yes man"

> "Once he had formed an opinion it was difficult to induce him to change it ... other things being equal, he preferred to decide a case on the law rather than on "special circumstances."[1004]

This consistency was shown in his dual support for two "defect obvious at the commencement" cases,[1005] although he also found for tenants in the other two cases in which he was involved, rejecting the technical landlord "contract" defences.[1006] This is confirmed by the general absence of consideration of material. We find him in Cameron v. Young explaining how the various cases are not really inconsistent but merely demonstrate

> "the different impressions made on the mind of the Court as to the relevancy of the averments."

This need to reconcile and package divergent views of principle as if there was none can help us understand to some extent how, specifically, the various divergencies of direction could take place within Divisions of the Court of Session and with the same Court personnel involved.

The relative consistency of personnel over the crucial fifteen year period helped to prevent alternative lines appearing. It is interesting to note that the final decision before the Great War involved a new set of judges who had not been involved in the previous developments.[1008] This applied through both Divisions and as we can see, the notion of wrangle between Divisions does not seem to be borne out by the data.[1009]

The only non-political judge involved in these matters was Lord Kinnear.[1010] Alexander Kinnear sat in the First Division from 1890 till he resigned in 1913 and was present in all the vital decisions which were heard in that Division. Like Lord McLaren, his Bar practice was very slow to build up and it was not until he had been at the Bar almost a quarter of a century that he achieved some success. Neither political nor involved in public affairs to any

extent, Lord Kinnear was interested in more esoteric subjects. His interests in Greek translation[1011] persisted over the years and expressed the hope that "somebody would found a Chair or Lectureship in Modern Greek" in 1890.[1012] With his social and education background in line with those of his colleagues at this time Lord Kinnear's decisions in all the important cases were somewhat lessened by his habit of silent concurrence. This means that the major source of apparent inconsistency never actually revealed why it was that he found for the various successful parties in the conflicting causes. The distinction which he appears to make is between defects which emerge and those which are extant. The former could become the subject of a fresh contract but the latter were simply part of the terms which a tenant accepted. So far as his other vocal contribution to the debate was concerned, Lord Kinnear opted for the tenant in Cameron v. Young on the unusual ground that Smith v. Baker had invalidated the volenti defence. When seen against his support of "defect obvious at commencement"[1013] the internal consistency is not noticeable.

The dominant figures in the Second Division provide an interesting contrast in politics and reputation. Lord Young appears to be one of the few judges who are openly criticised during their lifetime[1014] and in their obituaries. Again Lord Young was

involved in the critical decisions to limit tenant's rights of recourse, Henderson, Webster and Smith as well as the decisions modifying and confirming this approach. Whilst the decisions themselves bear the strong stamp of Lord Young's impatience with precedents in their limited use of reference, his own courting of controversy[1015] led him to support the tenant's claim where the Second Division opted for the landlord and vice-versa. After his early lead this perversity, which was reflected in his other work, seems to stem from Young's job dissatisfaction.[1016] Noted for his preference for gut judgment, his powers were marred according to contemporary judgment

> "As a judge, his powers were great; but his quickness of apprehension often made him impatient both with counsel and with his colleagues. He was too fond of taking the management of the case into his own hands; and it was largely owing to this defect that he was not conspicuously successful on the bench ..."[1017]

As regards the decisions he made after directing the cause before him

> "The rapidity and boldness which characterised him as a counsel were marked features of his judicial work ... always favoured equity and common sense as against technicalities and strict legal rules ..."[1018]

This kind of approach meant that the Second Division generally and Lord Young in particular during the

latter part of the nineteenth century and first decade of the twentieth was characterised by a very high level of internal dissent. Whilst the First Division produced twenty eight dissents and the Second Division produced 150. Of these Lord Young personally was responsible for 100.[1019] In our particular field of study though, we do not find dissent occurring until after the turn of the century when Lord Young appeared to find it hard to agree with his colleagues.

The sources of this general attitude may have been seated in his relationship with the Lord Justice Clerk, John Macdonald. Both were keen political figures having been Lord Advocates for the Conservative and Liberal causes as well as Members of Parliament and one might expect in the Second Division the notion of internal friction. In the important cases at the end of the nineteenth century, both Lord Young and Lord Kingsburgh took the same line in Webster and Smith. The virulence of Kingsburgh's attacks on Liberals appears[1020] to have been abated, possibly by the Dreyfus Affair.[1021] This appeared to have a profound effect on Kingsburgh and might be said to have strengthened his commitment to the judiciary as the guardians of the State against political subversion. For his part there is little hint in the early decisions of Lord Young of the ennui which he felt in the 1880s. The Young/Kingsburgh relationship, though, was not seen as close at the

time. When Kingsburgh was made a judge in 1888, the man passed over for the Lord Justice Clerkship had been Lord Young

> "At the outset of his judicial career, it was said of him, somewhat unkindly, that "like necessity, the mother of invention, he knew no law". By the time of his accession Lord Young, through seniority, had reached the Inner House. The legal profession soon saw how injurious it was for the interests of Scottish jurisprudence to have a tribunal led in name by Kingsburgh, but dominated by the masterful mind of Young. He took no pains to conceal his estimate of his chief."[1022]

There does not appear to be a discernible 'Liberal' line from Lord Young though. Nor is there any clear signs of the fierce partisanship of Lord Kingsburgh which led him to describe Gladstone as a "magnificent hypocrite,"[1023] his Ministry as "Government by fraud"[1024] and to describe an attack on their policies in an article as "short and sweet like a flogging at school".[1025] The friction described and which one might expect between him and a close associate of Lord Rosebery's is not evident in this work.[1026]

The connection which was tentatively inferred from the decisions between Lord Young and Lord Trayner does not square with Lord Young's assessment of Trayner when making recommendations for a vacancy on the Bench in 1881. He suggested, rather that Lord the non-political Alexander Kinnear whom he described to Lord Roseberry as

> "the most intellectual and accomplished man at the Scottish Bar at the present."[1027]

Alternatively as second best, Mr. Asher was suggested and whilst Young said the name of Trayner might be mentioned, he was "not real competition". As we have noted it is not easy to discern the thinking of Lord Kinnear very clearly on this issue despite his frequent appearance in the First Divisions cases.

From the point of view then of a block of "progressive" judges coming in to modify the harsher earlier decisions on volenti or "obvious defect" then the examination of the judges most closely involved does not seem to bear this out with the almost constant judicial membership during the crucial period from 1890 onwards. Since, this kind of dichotomy is unable to be put forward to make some sense of the general drift of decisions and modifications over the years, it is necessary to locate this whole approach within an overall assessment of judicial action rather than in terms of maladjusted "out of date" "backward" judges.

SUMMARY

What this study of the late nineteenth century Scottish judicial hierarchy seems to suggest is that crude background assessments cannot be supported by the decisional variations. What seems to have been involved during this period is not a class move against a clearly discernible body of tenants in defence of property owners. Rather the judiciary seem to have applied at different moments, in different cases and in slightly different contexts, two sets of criteria which produced different class results in practice. The defence of property rights was of course a central concern of the judiciary within the extant political economy. Along with this recognition, though, went the particular mode of property accumulation at that juncture, namely freedom of contract. Whilst this may not have always been an unmitigated disaster for owners of labour power much of the early development of industrial capitalism was characterised by leonine bargains in the workplace. The protection which the early interventionist Governments had indirectly given to labour was directly confronted by both the legislation against effective organisation of labour and the approach of the Courts.

As far as the bargain concerning the renting of housing accommodation was concerned, the mutual

rights were more strongly entrenched in the common law of Scotland. This was important for the agricultural political economy and the rules of the agricultural bargain were simply translated to the urban situation with the growth of urban settlements. As one can see from the agricultural disputes at this time over outbuildings and farm drainage, the relationship between the relevant parties appeared to be akin to a genuine consensus. The same can be said for commercial property. With one set of rules governing all forms of contract, then the property owners' rights could be significantly limited. One set of rules covered all kinds of property rented out whether in towns, for living or for use as offices or factories or workshops or farm buildings or barns. By applying a single standard which would comply with the contractual obligation to provide rented property which was reasonably fit for the purpose for which it was let, the impact on the owners would have been traumatic. Property would have been severely restricted. What we see in this period is an attempt to reconcile these important property rights together with the notion of enforcing contract. A crude background view is not able to explain how it was that volenti and "defect obvious" could not resist all claims. It seems necessary to suggest some other kind of alternative explanation, of what relation the

judicial role bears to the social formation.

Insofar as the issue of insanitary housing specifically and housing generally was not perceived as an area of political confrontation or organisation the judiciary appear to have reflected this interpretation. The question of housing remained a "problem" stemming from tenants' bad habits and firmly situated within the market. The other actors in the housing situation never conceptualised housing as an issue of crucial conflict. Neither those tenants' organisations which existed in Scotland nor the programmes of political parties were concerned to challenge the fundamental tenets of the housing provision system. Those involved in the process of regulation of sanitation avoided a structural aetiology. It is in this context that the judiciary operated the rules concerning the insanitary housing in the latter part of the nineteenth century and it was in accord with the specific debate as to the causation of same that the decisions were made. Tenants of private rented housing accommodation were not restricted to the working classes as occurred in the inter-war era of private house provision and local authority housing. Given the composition of the tenantry and the context within which the judicial work operated, the notion of "class line" in these decisions is less than easy to sustain. If the

judiciary are not simply functional epiphenomena of their class, it is equally clear that they are not totally random in their work. They operate within quite narrow limits in a common law system with the range of causes before them and the principles available to them circumscribed by external influences. This limitation on the range of creation was not always so and the emergence of the defence notions of landlords during this epoch suggests that it is not closed off. Judicial confidence, though, is not a constant phenomenon and the ability to cast off dead men's thoughts does not always come easily. The role appears to be characterised at this time by a dual commitment to property as well as to legal principle.

It is necessary to note the operation of the alternative redress system for tenants of insanitary houses as well as the strong causal shift of blame onto the tenantry throughout this period to understand how the judiciary could elaborate a series of decisions requiring tenants to "stand on their own feet" unless there was a categorical assurance otherwise. The fact that they were able to pursue these lines independently of legislative backing seems to suggest that their role in the State at this time was relatively autonomous. That is to say whilst on the one hand being strongly supportive of the central

values and institutions of the political economy, this commitment sits alongside a degree of free space within which to operate against the dominant State interests. This formal and informal autonomy is encapsulated in the notion of judicial independence. Not only are the judiciary largely left on their own in their decisionmaking so that their relationship to the State is indirect but judicial ideology explicitly rejects the notion of subservience to anything other than "the law". This has been buttressed both by legal commentators and politicians in the past and more recently. There seems to be little doubt that the judiciary "believe" in their independence. The notion of the conspiracy theory seems to be untenable at either the positive or inferential level. The obvious tension between the most visible formal institution of the State, the Executive, is a product of this particular orientation. Genuine conflict between judiciary and the aims of governments stems, then, from their autonomous position. The level of unpredictability, though, is restricted both by the socialisation of the judiciary pool and the areas of work ascribed to them. This is not to suggest that this relatively harmonious mode of government is constant or sacrosanct. In certain very obvious areas like industrial struggles, the ideology of independence

is not widely adhered to within the Labour movement. Any informal institutional arrangement like this is in danger of straying beyond the discreet bounds which are unacknowledged but capable of practical inference. The judiciary are vulnerable in a representative democracy where whilst they can generally be counted on by the dominant forces within the social formation this is a possible area of sacrifice. They do share similar backgrounds. The rules are loaded in favour of property. The open textured nature of the rules which the judiciary work with, whether in statutory or common law form, mean that their support cannot be certain. No ruling group mastermind their way through history. Just as systems do not have clear goals in relation to each eventuality and development, so too, within the relatively marginal areas of disputed legal rights and obligations the most desirable decision for the present or future may not be clear. The curious ambivalence in a secular world with no obvious value consensus towards a new breed of possible Prince-philosophers has meant that the notion of entrusting difficult matters "beyond" politics to a Bill of Rights with judicial review has meant a renaissance recently in judicial eulogies and diatribes. Optimism in such ventures should be tempered on all sides in view of the judicial approach to matters or crucial social significance with limited media exposure

which we have examined.

Inevitably,. the kinds of approaches which have been traditionally taken to legal phenomena mean that either there are crude inferences of trends and perspectives which run the risk of making the judicial enterprise into some form of mechancial reflection of some external set of criteria or which alternatively fail to reveal any broad overall developments. One does not have to go so far as to deny general movements in judicial approach both of presentation and policy orientation to suggest that these more polemical approaches accounts of the judicial role run the risk of selective contradiction if their data base is as limited as it has thus far been. Provided the limited role of the judiciary within the British political economy is recognised then it is possible to make certain limited inferences from their behaviour. It is located within the issues of the day and the competing worldviews and versions of reality available and it is to some extent predictable in certain areas at certain times. However, as has been demonstrated in relation to the insanitary housing question in the period under discussion this analysis is neither clear cut nor is it necessarily crucial for the State that in this limited sphere issues require to be directed to organs of mediation other than the Courts. The findings in other detailed

examinations of the judicial practice, at different periods and on judicial issues may reveal more clear-cut lines but this is certainly not the case in this study.

JUDICIAL STUDIES IN PERSPECTIVE

The notion of what can be achieved in useful terms within judicial analysis must be carefully examined before we can be sure that the trap of legalcentrism is not being entered again. The fact that we can reach some sort of position on the relationship between dominant social groups and their outlook on the political and economic issues of the day does not mean that the legal arena itself *is per se* perceived as vital by any or all of the competing social and political groupings in any given society at any particular time. This must be stressed lest it be assumed as the earlier works seemed to do that the legal enterprise was important. The obverse position has been achieved in some of the work of the sociologists of deviance where the content of both the legal rules and the overall operation of same are assumed to be no more than class emanations and mediations and the sole interest in the process as such is in the ways in which the dramaturgy of the court room contributed to the pervasion of ruling class ideology or elite group ideology.

The difficulty, even *within* a specific legal system, apart from cross-cultural studies, is that the persistence of the significance of various aspects of the ideological apparatus of the State and civil

society is by no means constant. Thus even at the simplest level we can see in the past two decades in Britain a fall in the stock of the judiciary as part of the battery of ideological approval mechanisms in the State followed by a partial recovery and then further setbacks and finally a renaissance in the late seventies. What I have in mind is the reaction of the political parties to the judiciary over this period as reflected in the work farmed out to them in legislation and the direct attacks mounted on current judicial work. As Gavin Drewry points out, the existence of bitter pointed attacks on the judiciary was more prevalent in the nineteenth century than has been the case for most of the twentieth century.[1028] The process, though, is not one of straightforward progress towards the rehabilitation of the judiciary in the eyes of the political and social critics. Even the more severe critics of the judiciary have always been careful to stress that it is specific individuals and specific issues with which they are dissatisfied rather than the structural relationship between politicians and the judiciary. This cosy though occasionally uneasy symbiotic relationship between politicians in the mainstream Parliamentary parties has meant that within none of these parties has the judiciary or their composition ever been an <u>issue</u> in itself. The labour distrust of the judiciary in certain fields based on the experiences of the judiciary in the

nineteenth century in Trade Unions conflicts and struggles and such legislation as the Workmen's Compensation Acts had its reflection in the adoption in a number of instances of the "tribunal" solution and the "Ministerial discretion" solution. The Trade Union and Labour Relations Act of 1974 avoided the experience of the Industrial Relations Act 1971 of giving work to the judiciary as such and expanded the system of Industrial Tribunals with informal procedure and a limited legal input. The Planning innovations of the Labour Government in the 1947 Acts relied on giving the Minister the final ultimate discretion in what were perceived to be essentially political decisions rather than legal ones. The very notion of this dichotomy, though, is one which has pervaded the most consistent critics of the judiciary, the representatives of organised labour. Rather than accept a Leninist view that "Law is Politics", there has been a line of argument from the left over the years to the effect that there are two kinds of legislation and law. One consists of straight law and the other involves political law. Although this has not, for specific historical reasons achieved the status of its equivalent American political phenomenon, the Civil Disobedience movements, a number of contentious political disputes have thrown up the argument that some legislation is motivated by sectional interest and

thus in a different category from that which is normally produced by the Parliament of the United Kingdom. The most bitter examples of this in the recent past centred around the legislation of the Conservative administration in the early seventies. We find arguments used in the media as well as in the law Courts that the refusal of Labour Councillors to implement the rent rises required under the Housing Finance Act 1972 were somehow in a different category from other sorts of rule disobedience and should not attract standard criminal penalties.[1029]

However, although many of the examples of this sort of differential approach to "law" and "political law" have come from the labour movement there have been issues where "direct action" has come from groups whose adherence to the rule of law is generally more explicit in pamphlet and media pronouncements and policy declarations. Thus we find in 1976 elected local authorities taking the same sort of line as the Clay Cross councillors in respect of centrally directed policies, this time on education. Here the argument outwith the forensic forum centred on the notion of the deprivation of the right of parents to choose their children's education. The Courts were again asked to determine the appropriateness of the action taken by the local authority. Interestingly enough, they did here recognise some form of populism in judicial decisionmaking.[1030]

Thus we have the situation where the judiciary are not perceived as playing a constant role by those with whom they interact. By association with certain policies as well as by their actual specific decisions the judiciary's "image" can be tarnished or enhanced in the eyes of those examining their own relationship to the legal process. Thus in one specific area we can find an ad hominem attack on the racism of one indiscreet judge in a minor case involving a speech by a racist politician attacking the Asian community in Britain drawing great support in the media and the Parliamentary Labour Party with motions of censure whilst no criticism of any kind seems to have been made in the Press or in the political parties over the policies of the House of Lords in their interpretation of the Race Relations Act 1968. In global terms it seems at least possible to contend that the impact of the House of Lords decisions was far more extensive in practical effect than the Kingsley Read decision. Irrespective of the impact, however, one might have expected some sorts of direct reaction to the Courts during this period. They were under strong attack during this period in respect of their association with the Heath Government's policies on industrial relations both within the National Industrial Relations Court set up and in the related and consequential legal activity.

In attempting to relate the judiciary to their social context we can see that this relationship is by no means constant. Not only does the judicial role alter within the ideological configurations of social and political groups but certain groups are able to either add to the judicial workload or minimise this in specific new functions. There may be situations where the judiciary are, after much doubting, seen as the lesser of two evils in certain situations. Thus the attitude of the Labour movement to the rights of local authority tenants to security of tenure have in the past been notable for their ambivalence to the role of the courts in such a process. It is only after some sixty years that such a move has won the guarded approval of such bodies as the S.T.U.C.[1032] They have come to view the possible activities of the Courts as providing less of a threat to tenants than recalcitrant local authorities. This relates to and has its roots firmly in the strong politicisation of the housing issue in Britain since the Great War. Apart from a few eras of relative consensus between the Labour and Conservative parties since 1919 much of this period has been characterised by a very different view of municipal authority housing and its relationship to the overall State role in housing.[1033] This persistent value dissensus on municipal housing has tended not to overspill into the approaches to owner occupation

and apart from one important exception, the private rented housing market. This identification of issues as being inappropriate for the judiciary and the courts has characterised the housing legislation in all fields since the Great War. The motives of the various interested parties have been somewhat different. The early rejection of Fair Rent Courts both before and during the Great War had its explanation in the desire to deny a platform for propoganda to those who wished to stress the inequalities and housing deficiencies. By the time we had reached the second half of the century the sorts of reasons for rejecting a specific judicial input into the fair rent process as well as a technical formulation of the "fair rent" method lay in a faith in professional expertise. Richard Crossman's adviser Arnold Goodman stressed the role, not of institutions or formulae but of individuals. With an alliance of men of good will and the conciliation element of the rent fixing process under the Rent Act 1965, Crossman sought to remove this aspect of housing from the arena of political football. This process had begun with the drive of the Conservative administration of the mid-fifties to get back to the pre-Great War market situation in rented residential housingthough their Rent Act, 1957. It seems clear from the data available at the time of writing that the Labour "solution", though coloured by

a belief in technical expertise in all fields from housing through to economic and planning matters rested very much on a hastily "cobbled together" programme of electoral pledges. The Rent Act of 1965 may owe as much to Christine Keeler and Mandy Rice-Davies as to organised tenant groups demands with the revelations of the dealings of Perec Rachman stemming from the Profumo affair in 1963.[1034]

Thus very different considerations even in this limited field have been brought to bear on the form of legislative activity in relation to matters being directed towards the Courts or elsewhere.

If, then it is suggested that an isolated attempt to locate judicial action within a separate self-contained frame of reference is likely to be less than helpful we must proceed to see how the view of the judge as a social actor operates. The essence of such a position must be that any theory of the judicial role must be supported at any epoch by empirical data. This should also indicate that the roles and functions of the judiciary in any one culture may well vary over time as well as between cultures. This latter point helps to explain how it is that the very different constitutional position of both the judiciary and the written Constitutional conditions in the United States has meant a difference both of judicial approach and of course of academic study of their activities. Indeed much of the interest in the American system has been

posited on the premise not of the comparability and applicability of American decisionmaking techniques to the British scene but rather the desirability of the ends thereby achieved and hence the possibility of transplanting this whole approach. Different perceptions of the political problems revolving around the legal process over the past two decades in Britian have led to advocation of a Bill of Rights and the elevation of the judicial role to that enjoyed by the United State Supreme Court from differing political positions. At one time a wide range of judicial powers have been seen as the answer to the inbuilt conservatism of a strongly precedent orientated system whilst more recently the absence of a clearly defined consensus has led to a variety of calls for the judiciary to be called on to create such a sheet anchor for a "drifting" society. Apart from the question of the desirability of such proposals it remains clear that the forms of judicial power which we have been accustomed to in Britain in the past century have been of a much less overt form. In Britain this has partly been a matter of style and partly a matter of content. The method of decisionmaking in common law or precedent systems is rather less obvious than ones based on codes. It is only in the last decades of this century that the content of the law has altered significantly to actually concern the rights of the working masses of the nation.

In the working, housing and general social lives of the mass of the population resort to the civil law would have depended on the existence of rights to be defended or asserted. These were very largely absent in the nineteenth century. The civil law is about the defence of rights flowing from property and contract and absence of these in any significant quantity diminishes the applicability of forensic dispute. We can see this most clearly in the relatively small amount of litigation during this period over the habitability of housing in Scotland. Professional observers from the medical and sanitary services as well as other moral entrepreneurs from Chadwick and Engels to Rowntree and Booth were moved by the conditions in which they saw their fellow citizens living. It is clear from the reactions of the Courts to the moves by tenants in the cases over the latter part of the nineteenth century that the rules had not been created with the industrialised city dweller in mind. The number of cases is a clear sign of the inapplicability of securing rights in this way and it is noteworthy that many of the instances in the cases that did reach the length of the Courts there were traumatic factors, in the form of either death or serious illness. Nor do these cases appear to have been merely the tip of a strong wave of lower court actions or organisation through threats of court action.[1035]

Given the data available, this inference is less than easy to test conclusively but insofar as there was by the beginning of the twentieth century organisation around the housing issue, this took the form of methods of creating new housing at a more reasonable price either municipally or otherwise rather than dealing with the state of the slums. Even in the cases which did reach the Courts, most of the tenants appear to have been middle class or from the artisan section of the working class where the housing stress was least acute. The Courts and the legal process were not the avenue of change which the working class sought to mobilise nor were such approaches favoured by cultural and social Imperialists.

The use of the Courts and the role of the judiciary in housing and related issues was echoed in the other areas of social life where the social security system relied for its dispute resolution not to the activities of the paupers but of the Poor law Unions and parishes themselves. Rather more forensic was the approach of the problems of the workplace. Again like housing conditions, part of this was a response to traumatic life loss or other frequent injury in the early industrial processes as well as simply a defence in the criminal and civil courts to suits arising from the pursuit of class goals through collective action. The position on picketing was clarified in the nineteenth

century as a result of actions brought against strikers whose activities were criminalised in this way. When organised labour did come into contact with the Courts either involuntarily or as pursuer, then the judiciary did not provide a lot of encouragement to return. However, despite the reaction of the Courts on such issues as contributory negligence and earlier on common employment to negative the possibility of the worker seeking protection from unsafe industrial processes through the common law, it would be misleading to simply assume that there was simple judicial homogeneity on working class rights from the Courts. Not only do we find divergences as between cultures as we have seen, but divergences within cultures over a span of time, and more interestingly, divergences over specific issues which broadly relate to each other as to social impact.[1037]

What we find over the period of time we are dealing with is a divergence of forensic performance between the approach to questions of housing rights and industrial rights. Thus the defences which are enshrined in the law over this period in landlord and tenant cases like volenti and its variants were refined almost out of existence in industrial disputes. Similarly the standards of proof required to sustain an action for damages to an individual brought in relation to unsafe stairs to a dwelling were somewhat different where the action was

brought under reparation and the rules of law of delict than under the contract of landlord and tenant. We find that in 1891, the year before the crucial Webster v. Brown decisions in the landlord and tenant area, a House of Lords decision on the doctrine of volenti in industrial situations. This decision Smith v. Baker meant that volenti could never be pleaded in industrial contracts except where there was evidence of clear unequivocal acceptance of the risk. This could not simply be inferred by lack of action by the injured party. The important distinction was to be between the risk which was known about and the one which was actively accepted. Thus the doctrine was split into whether an individual was merely sciens or whether he showed he was not merely sciens but volens. The case principle was incorporated into the law of Scotland very rapidly by the Court of Session. This, combined with the cases which satisfy the requirement for a delict action against a landlord but not one based on contract, seem to bely a simple analysis of the issue of unsatisfactory housing even within the specific era of change chosen for study.

Faced with these inconsistencies and paradoxes then, we might wish to conclude that Scottish judges are the conservators not of any Weberian technical rational decisionmaking techniques but are the repositories of kadi justice or even that Freirechtslehre notions had their home in the Court of Session. This would be to

ignore, though, the space afforded to the judiciary within our culture to make socio-political choices having prospective impact at the level of principles of law. This space is severely restricted in simple physical terms. As we could see from the study in the 1850-1915 period the sheer opportunities to lay down a clear line and to reinforce this is limited in a relatively small system like Scotland. Given this variable, there is also the point which is counter-legalcentric that the judiciary and courts are ignored by the labour movement and other social movements in that their effective scope is highly restricted. Not only are their powers of a limited nature in a common law system as opposed to one with a Constitutional yardstick, but that there are important cultural restrictions on their scope for action. Thus we find that not only does the curiously open-textured nature of the decisionmaking process of the common law make for difficulties of interpretation but it also means that it is difficult for a policy line to be laid down with complete confidence that the line will hold.

What the study undertaken has attempted to do is situate the approach of the Scottish judiciary to tenants and landlords rights on habitability in its social context rather than simply take the end result and attribute this to the upper class background of the Scottish judges. Just as at the time of writing, the

upper judiciary in Scotland is recruited almost equally from the two major political parties of the day, so too the background then as now is almost wholly professional. Willock's study makes it clear that this feature has been present throughout the twentieth century judicial recruitment. The notion, though, of a clear and consistent 'line' derived from parental occupational background and education does not seem to be sustainable in this field of study. Part of the contextual study has been concerned to demonstrate the tension between the personal and the environmental views of the problems of the working man at the professional, intellectual and political levels of debate. Although at a superficial level we can describe the development of the legal position of the tenant over this period of time as appearing to go contrary to the development of legislation for them as a group, the decisions are not so unequivocal and crystal clear that we can actually present the developments as emanating from some specific policy design of a particular social group. Insofar as the social background relationship writers talk in terms of judicial decisions as the products of judges of a particular social class, this implies quite clearly that there is an actual unequivocal viewpoint. This does not appear to have been the case during the period when we are talking.

These sorts of problems and difficulties in establishing what exactly constitutes a class position seem to stem from an asocial view of the inter-relationship between various aspects of the state. It is not a deficiency simply of theorists of the judiciary but pervades social scientific inquiry in Britain. The difficulty is that much academic and taught social science revolves around the notion of splitting the study of society into discrete areas. Within each area there are purported dynamics of causation. Each separate area of study has, then, its own specialised area of expertise and literature ranging from the sociology of education and the sociology of the family to the sociology of law. There has been a variety of accounts for this compartmentalisation of the social sciences which stress the structural significance of academic arrangements. There are good reasons for in depth studies, in particular, areas of interest within social scientific enquiry such as the specific areas of culture or religion. It is clear that approaches to the judiciary have been coloured by a myopic version of these forms of specialisation. The notion of extracting one facet of the legal enterprise from its social context and analysing, as it were, in aspic is likely to produce highly misleading data. If the analysis takes place on a number of variables or even as in the later American Supreme Court, work on a wide range of variables questions must remain as to both the

constancy of applicability of these variables as well as the denial of relevance to external factors on the judicial enterprise.

This study has attempted to point up some of these limitations both at the epistemological and empirical level. The major point which appears to come from all this is that the sloganising which was mentioned right at the beginning of the study is in a sense perfectly justified. It is possible to select data to support the notion that the upper judiciary in their work pursue specific class policy lines. It is also possible to choose areas which indicate that the judiciary are at best random in their partiality for specific policy lines. What this particular study seems to suggest is that the issue determines the approach. The issue in turn is socially mediated by the actors involved in its elaboration. Neither the perception of the issue nor the status of the judicial role are constants, necessarily. The perceptions in the area of labour relations and the workplace differ greatly from those involving matrimonial property rights and also from local authority powers. It may well be possible to make a series of links on crucial issues over time which receive a specific treatment from the judiciary but unless more satisfactorily documented than has been the case so far the charge of "fixing the evidence" will be hard to refute. For those who do

have doubts about the notion of "neutral" judges in the light of their past record, it should not be necessary to be tempted to simplify the judicial enterprise for easier political packaging. If it was as simple as a conspiracy or unconscious class crusade, one suspects that the judiciary would have suffered the fate which Engels implied will befall them upon emancipation of the working class

> "enmity to the proletariat is so emphatically the basis of the law that the judges ... who are bourgeois themselves ... find this meaning in the laws without further consideration." \039

APPENDIX I

Scottish Heritable was followed in the Sheriff Court in Hunter v. Wilkie where a tenant was successful in resisting the landlord's demand to return to the property in circumstances very similar to those in Scottish Heritable Property Company v. Granger where in the instant case it was contended that

> "... the drains of the house were in a bad condition and that there was an offensive odour in the rooms owing to damp. In consequence of these, it was stated, the health of the defender, her daughter, and her son was very much impaired. They became subject to headache, sickness, and general weakness, and although alterations were made upon the house, these illnesses did not disappear until defender removed to another house ..." (Scottish Property Gazette, July 1st 1892)

In dealing with the question of the right to abandon on the grounds that the house was not inhabitable, the Sheriff caught the dilemma which other judges faced in many cases where the defect complained of was by way of a relative problem whose seriousness was a matter of degree

> "... In one sense there was almost no house into which a human creature could crawl that was uninhabitable ... a house which could not be inhabited without injury or risk to health or life was an uninhabitable house ..."

In the specific circumstances he considered that the abandonment was justified and there was no rental liability by the tenant after quitting the property a quarter of the way through the term.

APPENDIX II

One defence mechanism against complaining tenants was attempted relatively unsuccessfully in 1861 involving one of the larger factors in the city of Glasgow, James Speirs. It arose from a paper given by a working man on the "Necessity of a Building Act for the houses of the Working Classes". This was reported in the North British Daily Mail on December 1st 1860 and included the description of a tenement at 45 Richmond Street, Glasgow

> "there is not a breath of air to clear the close foetid atmosphere here. The last time we felt the same feverish, close smell was in visiting the dormitories of a large asylum."

The article, like the address, was made under the auspices of the Finnieston Social Science Association and they duly received a letter from the solicitor for the owner of the property, Dr. Douglas Speirs, one William Speirs. The Doctor had complained to the factor, James Speirs, his brother, and the letter of complaint which ensued demanded

> "suitable reparation for the loss and damage sustained from ... the false and fallacious article."

Although there were negotiations centring around and demand for a payment to the Infirmary along with an apology, an action was raised for £12 sterling

> "for damages sustained and to be sustained by the pursuer in his feelings and patrimonial interests in consequence of the defenders having wickedly, wantonly and maliciously printed ... a false, fabricated and injurious report of and concerning a tenement of dwelling houses belonging to the pursuer ... in which report the defender in the most malicious and unjustifiable manner attacked the character of the said building, and set it forth to the public as a place dangerous to health and unfit for human habitation."

In fact, apart from the passage mentioned above, the article was confined to such details as the number of houses on the stair and the number of individuals inhabiting same.

An extremely detailed proof ensued over two days with some twelve witnesses. The Sheriff accepted that the pursuer had ____ a cause of action in that the Social Science Association failed to prove that the building was as described in the article. However, apart from having to pay half the costs of the landlord's action, the amount of damages which he received was assessed at one penny. He failed to prove that he would lose either in being unable to let the houses or due to the class of tenants involved nor would there be any hindrance to raising

money on the property as a result of the article.

The information on which this is based is a manuscript book kept by the Finnieston Social Science Association at the time which includes both a handwritten account of the drama but also newspaper clippings of the time. This is located in the Baillie's Library, Glasgow.

APPENDIX III

Munn was followed in a case before Sheriff Spens in Thomas v. Robertson where property in Dunoon was let for the month of August in 1892 for a holiday. Shortly after taking the house, the children of the tenant took ill. Sheriff Spens agreed that the illness might possibly have been attributed to the drains being in an insanitary state. The Sheriff followed the line in Henderson v, Munn

> "... where there is such manifestation of defective drainage, if a tenant stays on the risk is accepted as incident to the occupation; that is the latest decided case in the Supreme Court so far as I know on this point." (Sanitary Journal, 1892, 466 at 467).

The Gourlay line is not canvassed by the Sheriff although he does mention the possibility of an obligation to guarantee the drainage system as perfect even in situations where tenants are unlikely to be in a position to examine the house

> "... it is probably not a wise thing for a tenant to take a house without ... (an investigation into the drains) ... although, I daresay, 99 out of 100 coast houses are taken without any investigation being made. I am not prepared, as matter of law, to lay down that if illness does emerge through defective drainage of coast houses that the landlord is to be held liable ..." (ibid.)

The shift of emphasis in the post Munn era in the Sheriff Courts was towards the need to emphasise culpa quite specifically rather than merely point to illness or injury occurring during occupation of property. We see this in Barrow v. Morrison, 1890 6 Sh. Ct. Rep. 332 on alleged defective drainage and concurrent illness, Hogg v. Aitken 1891, 7 Sh. Ct. Rep. 192, where the defective water supply allegedly caused ill health and Stewart v. Smellie, 1891 7 Sh. Ct. Rep. 336 where despite the admitted insanitary condition of the property permitting the tenant to give up the lease, he was unable to automatically receive compensation for the death of his daughter from typhoid fever. Only where there were factual disputes simply as to the extent of the repairs necessary did tenants appear to have been successful after Munn as in Finlay v. Thomas, 1892, 8 Sh. Ct. Rep. 113 where the dispute centred around whether the landlord's operations on the drains had been adequate - and Lawless v. Glasgow Police Commissioners, 1892 8 Sh. Ct. Rep. 195, where a ceiling fell after the landlord's factor had allegedly been informed and the dispute was as to whether notice had in fact been given.

APPENDIX IV

From the membership roll of the Glasgow Landlords' Association in 1885, we examined the Register of Sasines to determine the approximate extent of the holdings of the membership. Single holdings generally denoted a tenement block of between eight to ten houses. The pattern of holdings of members of the Landlords' Association seems to bear out data available on the holding of rented property in Glasgow generally which sees shopkeepers as the most frequent investors in rented housing along with builders and trusts.

For the purposes of the survey, we looked at the holdings of one in ten of the membership of the Association. This revealed that of the 43 individuals investigated, average holdings were a little less than six - in fact the make-up of these figures consist of a few large holdings by house factors mainly and small holdings by shopkeepers, particularly spirit merchants.

The most frequent investors in houses for renting in the Association were housefactors - eight, and wine and spirit merchants - six. This latter bears out the observations of Whitehouse* as to the pattern of building whereby those providing the living space also invested in the leisure activities of their tenants. The rest of the members were shopkeepers - six and professionals - six as well as craftsmen - three and builders - three.

Baker	5
Grocer	2
Clothier	3
Builder	1
?	1
Accountant	5
Civil Engineer	3
Plasterer	4
Shipcarver and Gilder	3
Widow	1
House Factor	3
Doctor	6
Builder	8
Dairyman	2
Railway Clerk	1
Inspector to Clyde Trustees	4
?	3
Wine Merchant	1
Merchant	2
House Factor	5

House Factor	25
Builder	11
Spirit Merchants	1
Accountant	3
Wine Merchant	3
House Factor	3
Wine and Spirit Merchant	2
Accountant and House Factor	3
Manufacturer	12
House Factor	2
?	8
Architect	6
House Factor	17
Coppersmith	7
House Factor	13
Wine and Spirit Merchant	23
Ironmonger	19
Wine and Spirit Merchant	8
Slate Merchant	6
Biscuit Baker	1
Physician	7

* Working class housing in the Burgh of Maryhill 1856-91, S. Whitehouse. B.A. thesis, University of Strathclyde.

APPENDIX V

Fred Knee made a number of visits to Scotland to encourage those involved in housing reform. However, he noted that little general activity existed by tenants. There had been the West of Scotland Housing Reform Council set up at the turn of the century but this "faded away and is now practically dead" - The Housing Journal, June 1904. Even where he achieved a degree of success as in Greenock this was evanescent. Greenock Trades Council subscribed to the Housing Journal in 1900 for one year but then we find their subscription lapsing for some years before renewal following a further visit from Knee in 1909. The same sort of difficulties were involved in the subscription of Aberdeen Trades Council. As Fred Knee observed

> "my friend Councillor Burgess is left as a voice crying in the wilderness demanding better houses and more of them ..." Housing Journal, June 1904

This analysis is confirmed as far as activity on W.N.H.C. lines from an examination of the records of those bodies who joined the W.N.H.C. where throughout the period 1900 to 1915 the number of entries from Scotland can be counted on the fingers of one hand as well as exhibiting a tendency to let membership lapse. Thus we find single entries in the accounts for Paisley Trades Council, Edinburgh Trades Council and Glasgow

Trades Council in the year of the House-letting Act. This meant that in his visits to Scotland Knee tended to wear his S.D.F. hat and from his reports of his talks he would turn the meetings on socialism into ones on housing.

APPENDIX VI

Multiple appearance advocates by case type, client and success

3 appearances

MacRobert — * As junior counsel

1	1906	Mechan	v.	Watson*	resid.	tenant	lost
2	1910	Wolfson	v.	Forrester*	comm.	tenant	lost
3	1911	Early of Galloway	v.	McConnell*	agric.	landlord	lost

R. V. Campbell — * As junior counsel ** As solo counsel against solo opponent

1	1872	McMartin	v.	Hannay**	resid.	landlord	lost
2	1874	Sawers	v.	McConnell*	comm.	landlord	lost
3	1890	Govs. of Daniel Stewarts Hospital	v.	Waddell*	agric.	landlord	lost

Multiple appearance advocates by case type, client and success

3 appearances

Shaw * While Solicitor General

1	1888	Henderson	v.	Munn	resid.	tenant	lost
2	1895	Lovie	v.	Baird's Trs.*	agric.	tenant	lost
2	1899	Hampton	v.	Galloway	comm.	landlord	won

Dickson * As Dean of Faculty of Advocates

1	1893	Smith	v.	Harrison & Co.'s Trs.	agric.	tenant	lost
2	1895	Scott, Croal	v.	Moir	comm.	tenant	won
3	1910	Christie	v.	Birrell*	agric.	tenant	lost

Crabb Watt

1	1901	McManus	v.	Armour	resid.	tenant	lost
2	1906	Mechan	v.	Watson	resid.	tenant	lost
3	1911	Dickie	v.	Amicable Property Investment B.S.	resid.	tenant	won

J. A. Christie *Solo versus two opponents ** As Junior counsel

1	1905	McKinlay	v.	McClymont*	resid.	tenant	won
2	1909	MacNab	v.	Nelson**	agric.	tenant	lost
3	1910	Christie	v.	Birrell**	agric.	landlord	won

Multiple appearance advocates by case type, client and success

4 appearances

Murray * As Junior counsel

1	1883	Humphrey	v.	MacKay*	agric.	landlord	won
2	1888	Munro	v.	McGeogh	agric.	landlord	lost
3	1893	Smith	v.	Harrison & Co.'s Trustees	comm.	landlord	won
4	1910	Christie	v.	Birrells	agric.	landlord	won

Asher * While Solicitor General **While Dean of the Faculty of Advocates

1	1871	Whitelaw	v.	Fulton	comm.	tenant	lost
2	1885	Corrie Mackie	v.	Stewart*	comm.	tenant	lost
3	1890	Govs. of Daniel Stewart's Hosp.	v.	Waddell	agric.	landlord	lost
4	1900	Glebe Sugar Refining Co.	v.	Paterson**	comm.	tenant	lost

Multiple appearance advocates by case type, client and success

4 appearances

Mackintosh — *As Dean of Faculty of Advocates

1	1872	McMartin	v.	Hannay	resid.	tenant	won
2	1876	Davie	v.	Stark	comm.	tenant	won
3	1885	Corrie, Mackie	v.	Stewart	comm.	tenant	lost
4	1887	Muir	v.	McIntyre*	agric.	landlord	lost

Clyde

1	1897	Sandeman	v.	Duncan's Trs.	comm.	landlord	lost
2	1897	Shields	v.	Dalziel	resid.	landlord	lost
3	1898	Burns	v.	McNeil	resid.	landlord	won
4	1910	Wolfson	v.	Forrester	comm.	tenant	lost

Constable — *Solo v. two opponents

1	1906	Grant	v.	McLafferty*	resid.	landlord	lost
2	1909	Macnab	v.	Nelson	agric.	landlord	won
3	1911	Earl of Galloway	v.	McConnell	agric.	landlord	lost
4	1915	Haig	v.	Boswall - Preston	comm.	tenant	won

Multiple appearance advocates by case type, client and success

6 appearances

Salvesen *As Junior counsel

1	1887	Muir	v.	McIntyre*	agric.	tenant	won
2	1890	Sivright	v.	Lightbourne*	agric.	landlord	lost
3	1895	Lovie	v.	Baird's Trs.*	agric.	landlord	won
4	1897	Hall	v.	Hubner	comm.	landlord	lost
5	1900	Glebe Sugar Refining Co.	v.	Paterson	comm.	landlord	won
6	1901	McDonald	v.	Kydd	agric.	tenant	won

5 appearances

Balfour * As Lord Advocate ** As Dean of the Faculty of Advocates

1	1869	Drummond	v.	Hunter	comm.	tenant	won
2	1876	Davie	v.	Stark	comm.	landlord	lost
3	1876	Reid	v.	Baird	comm.	tenant	won
4	1885	Corrie, Mackie	v.	Stewart*	comm.	landlord	won
5	1890	Govs. of Daniel Stewart's Hosp.	v.	Waddell**	agric.	tenant	won

Multiple appearances by case type, client and success

7 appearances

Watt

1	1889	Stewart	v.	Campbell	agric.	tenant	lost
2	1897	Shields	v.	Dalziel	resid.	tenant	won
3	1897	Hall	v.	Hubner	comm.	tenant	won
4	1897	Baikie	v.	Wordie's Trs.	comm.	tenant	lost
5	1898	Smith	v.	Maryculter School Board	resid.	tenant	lost
6	1906	Grant	v.	McLafferty	resid.	tenant	won
7	1907	Souter	v.	Mulhern	resid.	tenant	lost

6 appearances

Campbell

1	1898	Smith	v.	Maryculter School Board	resid.	landlord	won
2	1899	Hampton	v.	Galloway	comm.	tenant	lost
3	1899	McKimmie's Trs.	v.	Armour	resid.	landlord	lost
4	1901	McDonald	v.	Kydd	agric.	landlord	lost
5	1905	McKinlay	v.	McClymont	resid.	landlord	lost
6	1907	Cameron	v.	Young	resid.	landlord	lost

Urban residential cases by instigator and successful party in litigation

	Year	Name	Action raised by	Action won by
1	1872	McMartin v. Hannay	TENANT	TENANT
2	1881	Scottish Heritable Security Co. v. Granger	LANDLORD	TENANT
3	1887	Gourlay v. Ferguson	TENANT	TENANT
4	1888	Henderson v. Munn	TENANT	LANDLORD
5	1889	McNee v. Brownlie's Trs.	TENANT	TENANT
6	1892	Webster v. Brown	TENANT	LANDLORD
7	1896	Maitland v. Allan	TENANT	TENANT
8	1896	Russell v. Macknight	TENANT	LANDLORD
9	1897	Shields v. Dalziel	TENANT	TENANT
10	1898	Burns v. McNeil	LANDLORD	LANDLORD
11	1898	Smith v. Maryculter School Board	TENANT	LANDLORD
12	1899	McKimmie's Trs. v. Armour	LANDLORD	TENANT
13	1900	Forbes v. Fergusson	TENANT	LANDLORD
14	1901	McManus v. Armour	TENANT	LANDLORD
15	1901	Caldwell v. McCallum	TENANT	TENANT
16	1902	Irvine v. Caledonian Railway Co.	TENANT	LANDLORD
17	1902	Hamilton v. Nimmo	TENANT	TENANT
18	1905	McKinlay v. McClymont	TENANT	TENANT
19	1906	Mechan v. Watson	TENANT	LANDLORD
20	1907	Grant v. McLafferty	TENANT	TENANT
21	1907	Cameron v. Young	TENANT	TENANT
22	1907	Souter v. Mulhern	TENANT	LANDLORD
23	1909	Davidson v. Sprengel	TENANT	LANDLORD
24	1911	Dickie v. Amicable Property Investment B.S.	TENANT	TENANT

Tenant and property

URBAN RESIDENTIAL

Case No.	Occupier	Rental	District	Issue in the dispute
1	Moulder	£80	Working	Stair*
2	Doctor	£80	Middle	Drains
3	Provision Merchant		Middle	Drains*
4	Widow		£300 value	Stair
5	Shopkeeper		Middle	Drains
6	Nurse	£50	Middle	Stairs
7	Joiner		Middle	Drains
8	Ironstone worker			Stair*
9	Storekeeper	£1-6-80 per mth.		Ceiling
10		£70	Villa-Clyde Coast	
11	Schoolmaster	free	Maryculter, Ab.	Drains and water*
12	Shipchandler	£28	Middle	Drains
13		£20	Middle	Dampness
14	Widow		Working	Hole in washhouse floor
15	Clothier		Working	Ceiling
16		£10-5/-	Working	Dampness
17				Stair
18	Labourer		Working	Ceiling
19			Working	Stair*
20			Working	Stair
21	Carter	£9-10/-	Crieff	Stair
22	Commercial traveller		Middle	Drains
23	Coachbody-maker		Working	Stair*
24		£35	Middle	Stair

* Indicates death in tenant's household related to alleged defect.

URBAN RESIDENTIAL

	Sum involved	Technical expertise?
1	£20	NO
2	£40	YES
3	£200	YES
4	£1000	NO
5	£200	NO
6	£1000	NO
7	£40	YES
8	£1000	NO
9	£300	YES
10	£70	YES
11	£1000	YES
12	£21	YES
13	£150	YES
14	£50	NO
15	£25	YES
16	£100	NO
17	£	NO
18	£	YES
19	£250	NO
20	£400	YES
21	£15	YES
22	£250	YES
23	£750	NO
24	£750	NO

f the claims involved

COMMERCIAL

	Sum involved		Technical expertise?
1	£12		NO
2	Plenishing		NO
3	£130		YES
4	£250		YES
5	£222-10/-		YES
6	£50		NO
7			NO
8	£30		YES
9	£175		NO
10			YES
11	£500		YES
12	£300		NO
13	£35		YES
14			NO
15			YES
16	£53		NO
17			YES
18	£	inc. 6 dead horses to be replaced	NO

Geographical Locati

1	Urban
2	Glasgow
3	Glasgow
4	Rothesay
5	Glasgow
6	Glasgow
7	Edinburgh
8	South Queensferry
9	
10	Wemyss Bay, Renfrewshire
11	Maryculter, Aberdeenshire
12	Glasgow
13	Glasgow
14	Glasgow
15	Glasgow
16	Edinburgh
17	
18	Glasgow
19	Glasgow
20	Glasgow
21	Crieff
22	Edinburgh
23	Edinburgh
24	Edinburgh

on

Commercial cases by instigator and successful party in litigation

	Year	Name	Action raised by	Action won by
1	1869	Drummond v. Hunter	LANDLORD	TENANT
2	1871	Whitelaw v. Fulton	LANDLORD	LANDLORD
3	1872	Kilmarnock Gas Light Co. v. Smith	LANDLORD	TENANT
4	1874	Sawers v. McConnell	LANDLORD	TENANT
5	1874	Drybrough v. Drybrough	LANDLORD	LANDLORD
6	1876	Davie v. Stark	LANDLORD	TENANT
7	1876	Reid v. Baird	TENANT	TENANT
8	1885	Corrie, Mackie & Co. v. Stewart	LANDLORD	LANDLORD
9	1893	Smith v. Harrison & Co.'s Trs.	LANDLORD	LANDLORD
10	1895	Scott, Croally, Moir	TENANT	TENANT
11	1897	Sandeman v. Duncan's Trs.	TENANT	TENANT
12	1897	Hall v. Hubner	TENANT	TENANT
13	1897	Baikie v. Wordie's Trs.	TENANT	LANDLORD
14	1899	Hampton v. Galloway & Sykes	TENANT	LANDLORD
15	1900	Turner's Trs. v. Steel	LANDLORD	LANDLORD
16	1900	Glebe Sugar Refining Co. v. Paterson	TENANT	LANDLORD
17	1910	Wolfson v. Forrester	TENANT	LANDLORD
18	1951	Haig v. Boswall-Preston	LANDLORD	TENANT

Case No.	Business of Tenant
1	Paperrulers
2	Pawnbrokers
3	Tar manufacturers
4	Bleachworkers
5	Brewers
6	Clothier
7	Clothier
8	Jute and flax merchants
9	Fishcurers
10	Depository
11	Warehousemen
12	Shopkeeper
13	Bird-dealer and grocer
14	Carver and gilder
15	Lodging house keeper
16	Sugar refiners
17	Picture framemakers
18	Motor engineers

Rental	Issue in the dispute
£12	Fire - tenant abandoned
£24	Damp - tenant resiled
£130	Lease of by-products - diminution of supply
£300	Rent abatement for disputed payment by tenant
£222-10/-	Building in bad repair
£100	Landlord opened up in competition next door
	Roof not snowproof
£90 for 9m	Floor collapsed
	Ranking of landlord in tenant's bankruptcy
	Wall collapse
	Flooding
	Stair collapse
£16-10/-	Drains
	Flooding
£95	Roof
	Floors collapse
	Flooding
£40	Roof

Judges in urban residential cases by multiple appearance

JHA Macdonald	7	Webster v. Brown	Smith v. Maryculter	McManus v. Armour	Caldwell v. McCallum X	McKinlay v. McClymont X	Souter v. Mulhern	Dickie v. Amic. D X
Kinnear	7	C Russell v. Macknight	C Shields v. Dalziel X	McKimmies Trs. v. Armour X	Mechan v. Watson	C Grant v. McLafferty X	Cameron v. Young X	C Davidson v. Sprengel
Young	7	Scott. Herit Sec. v. Granger X	Henderson v. Munn	McNee v. Brownlies' Trs.	C Webster v. Brown	Smith v. Maryculter	D McManus v. Armour	D Caldwell v. McCallum X
McLaren	4	Russell v. Macknight	McKimmies Trs. v. Armour	Mechan v. Watson X	Cameron v. Young X			
Trayner	4	Webster v. Brown	Smith v. Maryculter	McManus v. Armour	Caldwell c. McCallum X			
Adam	4	C McNee v. Brownlies' Trs.	Russell v. Macknight	C Shields v. Dalziel X	McKimmies Trs. v. Armour X			
Pearson	3	Mechan v. Watson	C Grant v. McLafferty X	Cameron v. Young X				

D dissent

C silent concurrence

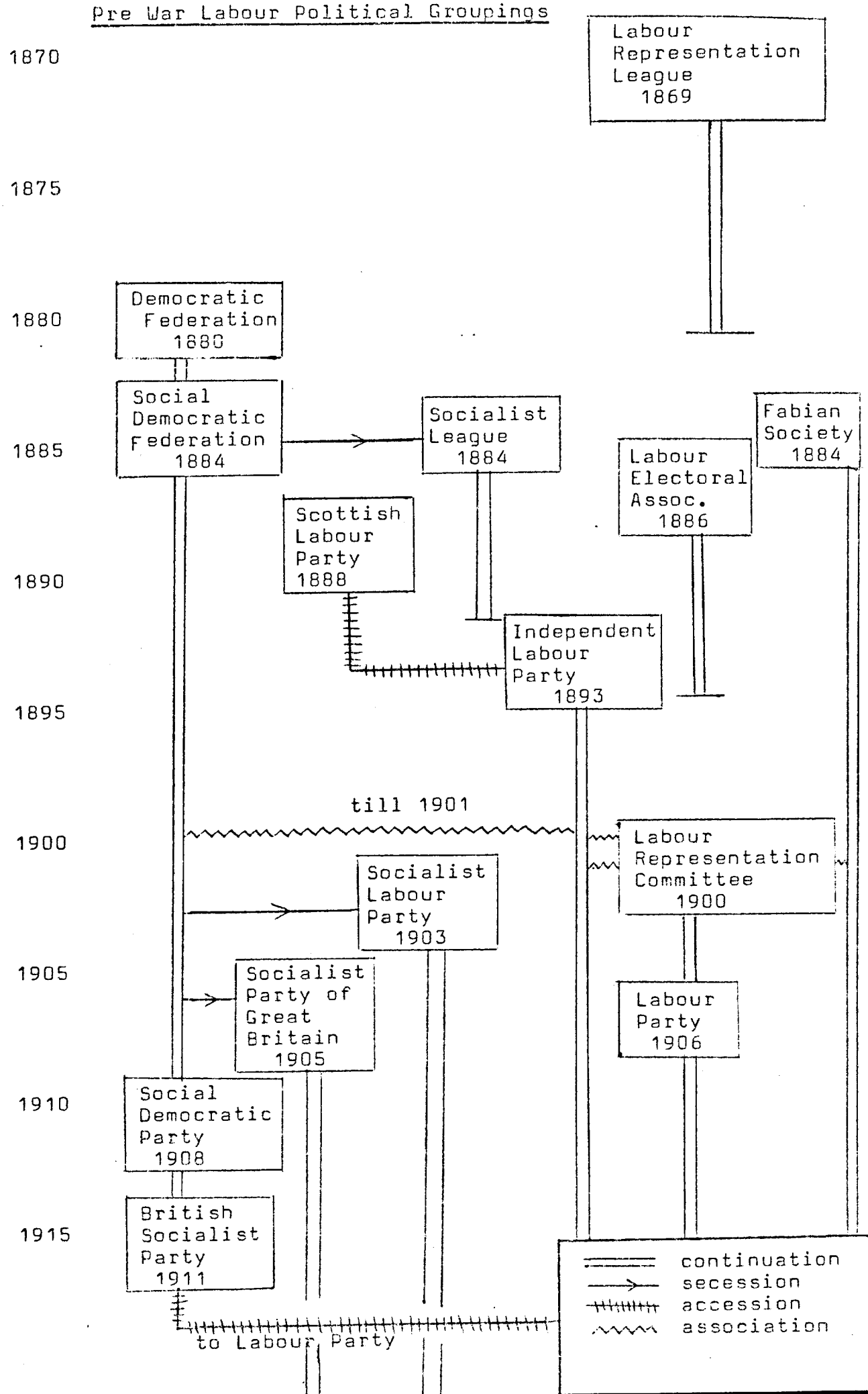
X tenant wins

Macdonald	1836 1859 1919	W.S.	Edinburgh Acad.
Young	1819 1840 1907	Procurator Fiscal	Dumfries Acad.
Kinnear	1833 1856 1917	Merchant	
Trayner	1834 1858 1929	Non-lawyer	
Adam	1824 1849 1914	S.S.C.	Edinburgh Acad.
Pearson	1843 1870 1910	C.A.	Edinburgh Acad.
McLaren	1831 1856 1910	M.P.	Private education

Basle Edin.	Con.	Military; scientific journalist; author Church of Scotland
Edin.	Liberal	Good practice; Lord Advocate; Church of Scotland
Glas. Acad.	No part	Moderate practice; feudal lawyer 1882 C of S; 1890 First Division
Glas. Edin.	Liberal	1885 Court of Session ; 1890 to Second Division good practice;
Edin.	Con.	1876 Judge; 1885 First Division; Retired 1905.
St. Ands. Oxford	Con.	Sol Gen 1890; M.P. for Universities of St. Andrews & Edinburgh; L.A. 1891; 1892 Dean of Faculty; Judge 1896-1909; Church of Scotland adv. and activist; only 3 years in First Division
Edin.	Liberal	1880 Lord Advocate; 1881 M.P.; 1881 Court of Session; writer and editor

Appendix VII

Pre War Labour Political Groupings



REFERENCES AND FOOTNOTES

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2. Herrington v. British Railways Board 1972 A.C. 877 per Lord Pearson at 929

3. Cassell v. Broome 1972 A.C. 1027 per Viscount Dilhorne at 1107

4. "Law as an integrative mechanism" in 'Law and Sociology' ed. W. Evan 1962

5. "Introduction" to "The Institutions of Private Law and their Social Functions" Otto Kahn-Freund 1949 at 37 ff; "English History 1914-1945 A.J.P. Taylor; Law and Opinion in England in the twentieth century, ed.M. Ginsberg 1959; "Renner Revisited" Peter Robson in "Perspectives in Jurisprudence" ed. E. Attwooll 1977; "The State in Capitalist Society" Ralph Miliband 1969.

6. "The State and the Rule of Law in a Mixed Economy" Wolfgang Friedmann 1972

7. "A History of the Criminal Law of England" 1883 Sir James Stephen, Volume II at 205.

8. Representation of the People (Equal Franchise) Act 1928

9. Representation of the People Act 1948

10. Law and Politics in Jacobean England, L.A. Knafla 1977 vii

11. "The Inns of Court" 1590 - 1640 W.R. Prest, 1972; "Doctors' Commons" G.D. Squibb 1977; "The Civil Lawyer in England" 1603 - 1641 B.P. Levack 1973; "Law and Politics in Jacobean England" L.A. Knafla supra

12. See particularly "The Coming Crisis of Western Sociology" Alvin Gouldner 1971, "The Professional Organisation of Sociology : a View from Below" Martin Nicolaus 1972 in "Ideology in Social Science" ed. Robin Blackburn; "Crimes of the Powerful" Frank Pearce 1976.

13. Borlase Manuscript 3/29/28 cited in Judson at 27

14. Archeion, William Lambard at 77

15. "Proceedings and Debates in the House of Commons in 1620 and 1621", Edward Nicholas, 1766 at 109

16. Parliamentary Debates in 1610 at 23

17. "The Letters and Life of Francis Bacon", James Spedding, Vol. VI at 18

18. Commons Debates for 1629 at 11

19. N.R.S. iii 156 - Notestein, Relf and Simpson, Commons Debates for 1621

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21. Blackstone's Commentaries, Section 3 at 73

22. Hill supra at 257.

23. Exchequer Chamber (1602).

24. "The Agitation for Law Reform"1640 - 1660 S.E. Prall 1966; "The Popular Movement for Law Reform" 1640 - 1660, D. Veall 1970.

25. "The Triumph of the Lawyers", M. Landon 1970.

26. "Convention Resolution of 28th January 1689"; see also "The Lawyer, the Historian and the Glorious Revolution", L. Glassey in Perspectives in Jurisprudence supra at 5.

27. "Law and Politics in the Middle Ages", W. Ullmann 1975.

28. Hill supra at 3.

29. Nicolaus supra at 56.

30. Blackstone's Commentaries, Section 1

31. Prest supra particularly chapters VI and VII.

32. Knafla supra particularly chapter II.

33. Blackstone's Commentaries, Section 1

34. Political Power, ed. R. Bell, D. Edwards and R. Wagner, 1969.

35. Lawyers and the Courts, B. Abel-Smith and R. Stevens, at 16

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38. 'Prohibitions del Roy', 1607, 12 Coke'sReports at 166

39. Lawson supra at 3.

40. Oxford University Commission 1852 at 77.

41. Select Committee into the State of Legal Education B.P.P. 10 (1846).

42. Select Committee supra at

43. Oxford University Commission supra at 67 see also the Appendices in Lawson which give the flavour of the Oxford approach in the post Reform era.

44. See infra at 66

45. "Lawyers and the Courts", B. Abel-Smith and R. Stevens 1967 chapters III and VII.

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47. "Honours Examinations in Law at Cambridge", H.A. Hollond, J.S.P.T.L. 1924 at 38.

48. Law Moderations W.S. Holdsworth J.S.P.T.L. 1930 at 39.

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50. The Province of Jurisprudence Redetermined, Modern Law Review, 1943, at 99.

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53. Curricula, J.S.P.T.L. 1927 at 7.

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55. "English Legal Education", Edward Jenks, Law Quarterly Review 1935 162 at 169.

56. Op. cit. at 179; "Studies in the History of a University" 1874 - 1974, ed. P.H.J.H. Gosden and A.J. Taylor 1975 - Leeds University; "The Story of a Modern University", A.W. Chapman 1955 - Liverpool University; The University of Southampton, A. Temple Patterson 1962.

57. During the inter war years the works which seem to feature prominently in the recommended reading of Jurisprudence courses at Bristol, Birmingham, Liverpool, Sheffield, Durham, Leeds and the Victoria University of Manchester were Salmond and Hollond. The other works range from Eastwood and Keeton's introduction to Austinian theory of law to Maine. The actual numbers of staff involved, as indicated seems to hover around half a dozen in these provincial Universities and in many of them individuals were charged with teaching up to four full subjects each - Hartley Shawcross during his time at Liverpool as a law teacher taught Jurisprudence, Constitutional Law and History, Private International Law and Roman Law as did his successor, W. Geddes - Liverpool University Calendars 1926 - 1937; see for this period the inter war University Calendars of the relevant institutions.

58. "Law Teaching and Law Practice", A.E.W. Hazel, Law Quarterly Review 1931, 502 at 509.

59. "Law in the Universities", W.T. Stallybrass, J.S.P.T.L. 1948, 157 at 164.

60. "The Teaching of Jurisprudence in England and Wales", R.H. Graveson, Journal of Legal Education, Vol. 4 at 127, 1951 - 2.

61. Op. cit. at 131 - Liverpool.

62. "Reflections on the Teaching of Jurisprudence", Denis Browne, J.S.P.T.L. 1953, 79 at 83.

63. Op. cit. at 87. Those who spoke approvingly included Professors A.H. Campbell, Graveson, Jolowicz, Wortley and Derham and Messrs. Dowrick and Dias.

64. Lord Cooper exhibited a disinclination to creativity in a variety of instances in a question involving the question of survivorship presumptions in a common calamity Cooper suggested that if the question had arisen in the seventeenth century, the Scottish Courts might have accepted the Roman solution but not any more as "such a step would ... partake of judicial legislation" - Drummond's J.F. v. H.M.A. 1944 S.C. 298. Similarly in Mackay v. Scottish Airways 1947 S.C. 254 where an airline limited their liability as carriers in a leonine commercial contract, Cooper regretted the position but did not strike the contract down.

65. Beith's Trustees v. Beith 1950 SC 66

66. British Justice : The Scottish Contribution, T.B. Smith, 1962; The Scottish Legal System, D.M. Walker, 1959; Lord Clyde in Criminal Statutes; Lord Young on Precedent and Lord Cooper generally

67. Are we forever to be behind Scotland? C.B. Burns, Law Teacher 1978

68. Legal Education, Journal of Jurisprudence, Vol 1 1857 at 138

69. In the late 1880s and 1890s Bell and Bradfute list some 33 publications ranging from succession through conveyancing and land law to procedure and legal styles. Green's at the same time listed some 35 covering a similar range but including the lectures of Professor Lorimer and W.G. Miller's Law of Nature and Nations in Scotland, both covering international law.

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72. The Scottish Legal Heritage Revisited, I.D. Willock in Devolution and Independence, ed. J. Grant, 1976

73. Smith supra; Cooper supra; Walker supra

74. Minutes of Evidence, Royal Commission on Scottish Universities 1831

75. Report 1839 supra at 253.

76. Minutes of Evidence - King's College, Aberdeen University at 45.

77. Report 1839 supra at 310.

78. Op. cit. at 53

79. Op. cit. at 55

80. ibid.

81. Legal Education, Journal of Jurisprudence, Vol. 1, 1857 at 139.

82. The Development and the Teaching of Law in the University of Edinburgh Journal of Jurisprudence, Vol. 28, 1884 at 561.

83. Op. cit. at 565.

84. An "alternative production system of "pirated" lecture notes was given the seal of approval by the Court of Session where fee payers attempted to publish notes from courses which they had attended. Although the Court of Session did not favour restriction, the House of Lords came to the rescue of the Universities prohibiting such practices. In the 18 month gap between the Second Division decision and the Lords decision, no actual editions were brought out although manuscripts were widely available. Caird v. Sime 1887 Scottish Law Review Vol. II at 196.

85. The Law Faculty in Glasgow University, Scottish Law Review Vol. 6 1890, 143 at 145.

86. Report of the Scottish Universities Commission 1863 at xxxvi.

87. "The Universities and Scottish Legal Education", A.R. Brownlie, Juridicial Review, Vol. 67 1955 26 at 55 per Table Three.

88. "The Story of Edinburgh University", A. Grant, 1884 Vol. II at 129.

89. "Letter on the Edinburgh University Law Degree", A. Wood Renton, Journal of Jurisprudence, Vol. 27, 1883 at 553.

90. "Letter on Legal Education in Scotland", W.G. Black, Journal of Jurisprudence, Vol. 28, 1884 at 207.

91. The Education of Scotch Lawyers, Journal of Jurisprudence, Vol. 13, 1869 at 124.

92. Ibid.

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94. Op. cit. at 128.

95. "Legal Education and the Scottish Universities", Aeneas Mackay, Journal of Jurisprudence, Vol. 24, 1880, 626 at 634.

96. Legal Education in Scotland, Journal of Jurisprudence, Vol. 8, 1864, 491 at 495.

97. Op. cit. at 493.

98. Typically in 1877 the Degree examination questions in Public Law dealt with definitions of natural law, the meaning of positive law, the origin of Rights and Duties, the distinction between Perfect and Imperfect Obligations, Analytic and Synthetic Justice and the Historical School of Law - Calendar of Edinburgh University 1878 - 79 at 295.

99. The questions asked in the following two decades demonstrate similar concerns. The questions asked include such matter as "How do we discover natural law?" - 1887 Calendar for 1888-9 at 286 and "Give some account of the Negative School of Jurisprudence" - 1898 Calendar 1898-99 at 768.

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101. On Legal Education in a University and the Proper Relations of the Faculty of Laws to the Professional Corporations, James Lorimer, Journal of Jurisprudence, Vol. 28, 1884 at 598.

102. The Education of Scotch Lawyers supra at 128.

103. Calendars for the University of Glasgow 1865 - 1885

104 A short account of the University of Glasgow, James Coutts, 1901 and 1909.

105 Legal Education and the Scottish Universities supra at 635; General Report of the Commissioners under the Universities (Scotland) Act 1889 Cd. 276 1900 at 177

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107. Coutts supra at 452 - 1909 edition.

108. Calendar of the University of Glasgow 1878-79

109. Op. cit. including "What are the theories of property founded on Occupatio, labour and law alone" as well as "What is the best classification of obligations" at 228.

110. Calendar of Glasgow University 1888-89 at 330.

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113. Legal Education, Scottish Law Review, Vol. V, 1889, 125 at 127.

114. Ibid.

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116. "Reform in the Scottish Law School", A. Dewar Gibb, Juridicial Review, 1943, Vol. 55 at 159.

117. The Education of Scotch Lawyers supra at 129.

118. The Universities and Scottish Legal Education, supra at 28.

119. Op. cit. at 54.

120. The Education of Scotch Lawyers supra at 131.

121. Op. cit. at 177.

122. Op. cit. at 179.

123. Op. cit. at 182.

124. Minutes of Evidence of Royal Commission 1876 - C 1935, Vol. III at 363.

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129. "The Scottish Legal Tradition", T.M. Cooper, 1949 Willock supra

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132. See particularly the Legal Action Group Bulletin and the Scottish Legal Action Group Bulletin as well as the Haldane Society Bulletin.

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134. "Law and Public Opinion in England during the Nineteenth Century", A.V. Dicey, 1905 (1st ed.), 1914 (2nd ed.)

135. Op. cit. - 2nd ed. at 369.

136. Political Power and Social Classes 1973 and Classes in Contemporary Capitalism 1975, N. Poulantzas

137. "A Reply to Pessimism", Howard Levenson, Haldane Society Bulletin, 7 November 1977, 33.

138. The debate on the extension of legal services to certain sectors of the community includes within it an implicit critique of the arcane nature of the judicial/public interface but relegates this qualitative defect below the agenda to the quantitative one of legal resources. See, for example, the Small Claims Courts experiments - "Justice Out of Reach", Consumer Council 1970.

139. "Class in a Capitalist Society", John Westergaard and Henrietta Resler, 1975 is primarily concerned with demonstrating the falsity of notions of classlessness in Britain in the 1970s but does deal with the ideological form of the courtroom drama.

140. "The Politics of the Judiciary", John Griffith, 1977

141. "Judicial Decisionmaking", R.J. Wilson, Ph.D. Thesis 1970.

142. For example, Judicial Decision-Making 1963; The Judicial Mind Revisited 1974; Human Jurisprudence 1975; Political Attitudes and Ideologies 1977.

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144. "Psychoanalytic Jurisprudence", Albert A. Ehrenzweig, 1971 at 83.

145. "The Province of Jurisprudence Determined", John Austin, 1832 (1859 edition) at 191.

146. Op. cit. at 190

147. John Austin's Political Pamphlets 1824 - 1859, Eira Rubin in Perspectives in Jurisprudence supra

148. "Elements of Law", William Markby, 1871. From the reading lists on courses in Jurisprudence at English Universities this work seems to have been widely used in its various editions. See University Calendars supra

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151. "Science of Jurisprudence", Sheldon Amos, 1872, at 1

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153. Ibid.

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162. The Province of Jurisprudence Determined (3rd edition) at 655

163. Practical Jurisprudence, supra at 229

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168. Op. cit. at 178

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170. Op. cit. at 179

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174. "The Institutes of Law", James Lorimer, 1872 at 5.

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176. Op. cit. at 217.

177. Op. cit. at 423.

178. "The Philosophy of Law", W.G. Miller, 1884 at 4.

179. Op. cit. at 59.

180. Op. cit. at 63.

181. Op. cit. at 66.

182. "Jurisprudence or the Principles of Political Right", W. Herkless, 1901 at 58.

183. "The Data of Jurisprudence", W.G. Miller, 1903 at 3.

184. Law and Public Opinion in England supra at LXV.

185. Ibid.

186. Op. cit. at XXXV. The Old Age Pension Act, 1908 section 3 had disqualified both those who had been in prison or who was in receipt of poor relief and where a person "has habitually failed to work according to his ability, opportunity and need".

187. Op. cit. at 11.

188. Op. cit. at 364.

189. Op. cit. at 367.

190. Op. cit. at 368.

191. Ibid.

192. Op. cit. at 151

193. Op. cit. at 369.

194. Ibid.

195. Ibid.

196. "The Austinian Theory of Law", Jethro Brown, 1906, at 288.

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198. "First Book of Jurisprudence", F. Pollock, 1896.

199. "The Genius of the Common Law", F. Pollock, 1912 at 2.

200. Op. cit. at 3.

201. Op. cit. at 46.

202. Op. cit. at 47.

203. Ibid.

204. Op. cit. at 48.

205. Ibid.

206. Ibid.

207. Op. cit. at 54.

208. Ibid.

209. Op. cit. at 87.

210. Op. cit. at 109.

211. "The Elementary Principles of Jurisprudence", G.W. Keeton, 1930.

212. Op. cit. at 187.

213. Op. cit. at 67.

214. Ibid.

215. Op. cit. at 68.

216. Op. cit. at 69.

217. "The New Jurisprudence", E. Jenks, 1933.

218. Op. cit. at 224.

219. "The Quest of Justice", Harold Potter, 1951.

220. Op. cit. at 9.

221. Ibid.

222. Op. cit. at 30.

223. Op. cit. at 81.

224. "Freedom under the Law", Alfred T. Denning, 1949, at 126.

225. Op. cit. at 31. Lord Denning has repeated this view in a variety of forensic and non-forensic situations over the past twenty five years finally culminating in a long version of this particular reading of the past judicial record on social and political disputes in the Discipline of Law, 1979. This is the subject of an extensive critical evaluation by a variety of writers in Law and State - the Denning issue, 1979.

226. See infra at 369ff.

227. "Grammar of Politics", Harold Laski, 1925, at 86.

228. Op. cit. at 300.

229. Op. cit. at 544.

230. ibid.

231. Op. cit. at 545

232. Op. cit. at 550

233. "Democracy in Crisis", Harold Laski, 1933, at 136.

234. Although it is in a sense a tautlogous observation given the goals of the rules of the legal system and the judicial role in connection with these. See infra at

235. "Parliamentary Government in England", Harold Laski, 1938.

236. The Work of the Commercial Courts supra at 8.

237. ibid.

238. Op. cit. at 7

239. Op. cit. at 18

240. "Justice and Administrative Law", W.A. Robson, 1928

241. Op. cit. at XIV

242. "The New Despotism", Gordon Hewart, 1929

243. Justice and Administrative Law supra at 237

244. Op. cit. at 88

245. Op. cit. at 36

246. Board of Education v. Rice (1911) A.C. 179 on the comprehensive and exclusive judicial functions of the Board of Education with which the Courts would not interfere.

247. Local Government Board v. Arlidge (1915) A.C. 120 on the right of a government department to exercise their judicial functions in ways that appeared fair and convenient to the department.

248. Justice and Administrative Law supra at 147

249. Ensor, the author of a Fabian/Independent Labour Party pamphlet in 1912, on housing entitled "Healthy Homes for All", was a journalist, lecturer and lifelong socialist.

250. "Courts and Judges in France, Germany and England" - R.C.K. Ensor, 1933.

251. Op. cit. at IV.

252. Op. cit. at 11

253. Ibid.

254. Op. cit. at 12.

255. Op. cit. at 82

256. Ibid.

257. Ibid. Note 1

258. See infra at 296

259. "A Treatise on the Law of Landlord and Tenant", Robert Hunter 1860 (3rd edition).

260. Op. cit. at 424, Vol. II.

261. The Institutions of the Law of Scotland, Viscount Stair, (4th edition by John More) 1832; Institutions of the Law of Scotland, Sir James Mackenzie, (ed. Bayne) 1730; Institute of the Law of Scotland, Andrew Macdouall (Bankton), 1751-3; An Institute of the Law of Scotland, John Erskine, 1785; Principles of Equity, Henry, Lord Kames, 1760, 1767, 1778, 1800.

262. Landlord and Tenant supra at 425, Vol. II.

263. These include Sinclair v. Hutchison 1751 where there was an action for damages and rent by a landlord against his tenants, the congregation of an Episcopal non-juring chapel which was demolished by the King's Army in the 1745 Rebellion. The ground for damage was culpa praecederat casum - not praying for the King. The landlord's action was successful at 427, Vol. II.

264. Op. cit. at 428, Vol. II.

265. Kippen v. Oppenheim 1847 10 D. 242.

266. Landlord and Tenant supra at 429.

267. Hunter cited More's Notes to Stair on Location and Conduction in Stair supra at xcv where the authorities appear to be agricultural although urban subjects are deemed to be covered by implication - op. cit. at xcvi. Hunter at 430

268. Landlord and Tenant supra at 507, Vol. II.

269. Op. cit. at 211.

270. "The Law of Leases in Scotland", John Rankine, 1887 at V.

271. Op. cit. at 219

272. "The Law of Leases in Scotland", John Rankine, 3rd edition, 1916, at 241

273. McMartin v. Hannay 1872 10 M. 411.

274. Mangan v. Atterton 1866 L.R. (Exch.) 239 (misspelt in the Court of Session Reports as Maugan v. Atterton).

275. McMartin ibid.

276. McMartin per Lord Neaves at 413.

277. Mangan ibid.

278. Scottish Heritable Security Company (Limited) v. Granger 1881 8 R. 459.

279. Scottish Heritable at 466 per Lord Justice-Clerk Moncrieff.

280. Scottish Heritable at 464 per Lord Young.

281. Scottish Heritable at 466 per Lord Craighill, see Appendix I.

282. Webster v. Brown 1892 19 R. 765.

283. Webster at 767 per Lord Justice-Clerk Kingsburgh (Macdonald).

284. Webster at 768 per Lord Trayner.

285. Shields v. Dalziel 1897 24 R. 849.

286. Shields at 850 per Lord President JPB Robertson

287. Hall v. Hubner 1897 24 R. 875.

288. Hall at 877 per Lord Justice-Clerk Kingsburgh (Macdonald).

289. Smith v. School Board of Maryculter 1898 1 F. 5

290. Smith at 14 per Lord Justice-Clerk Kingsburgh (Macdonald).

291. McManus v. Armour 1901 3 F. 1078.

292. McManus at 1081 per Lord Moncrieff.

293. McManus at 1080 per Lord Justice-Clerk Kingsburgh (Macdonald).

294. Caldwell v. McCallum 1901 4 F. 371.

295. Russell v. Macknight 1896 24 R. 118 discussed infra at reference 323.

296. Caldwell at 372 per Lord Justice-Clerk Kingsburgh (Macdonald).

297. Caldwell at 374 per Lord Moncrieff.

298. McManus at 1080 per Lord Young.

299. Caldwell at 373 per Lord Young.

300. Shields at 849.

301. Hamilton v. Nimmo 1902 10 S.L.T. 394.

302. Hamilton at 395 per Lord Kincairney.

303. McKinlay v. McClymont 1905 43 Scottish Law Reporter 9.

304. McKinlay at 10 per Sheriff Guthrie.

305. McKimmie's Trustees v. Armour 1899 2 F. 156 discussed infra at 179.

306. McKinlay at 11 per Lord Justice-Clerk Kingsburgh (Macdonald).

307. McKinlay ibid. per Lord Kyllachy.

308. Grant v. McClafferty 1907 S.C. 201.

309. Grant at 203 per Lord President Dunedin.

301. Cameron v. Young 1907 S.C. 475.

311. Cameron at 480 per Lord McLaren.

312. Cameron ibid. per Lord McLaren.

313. Smith v. Baker (1891) A.C. 325.

314. Cameron at 482 per Lord Kinnear

315. Soutar v. Mulhern 1907 S.C. 723 which the Second Division also considered on technicalities of pleading.

316. Soutar at 725 per Lord Mackenzie.

317. Dickie v. The Amicable Property Investment Building Society 1911 S.C. 1079.

318. Dickie at 1083 per Lord Salvesen.

319. Mullen v. Dunbartonshire County Council 1933 S.C. 380 in which the defence was rejected and Proctor v. Cowlairs Co-operative Society Ltd. 1961 S.L.T. 434 where it was applied despite being described by Lord Kilbrandon as "socially unrealistic" 435.

320. Writing shortly after Proctor was decided, T.B. Smith doubted whether or not the Courts would apply the doctrine due to such factors as the acute shortage of housing - A short commentary on the law of Scotland, 1962 at 523.

321. See reference 273.

322. Mangan at 239.

323. Russell v. Macknight 1896 24 R. 118

324. Russell at 119 per Lord President JPB Robertson

325. Russell at 120 per Lord Adam.

326. Robbins v. Jones 1863, 15 C.B. (N.S.) 211

327. Russell at 120 per Lord McLaren

328. Mechan v. Watson 1907 S.C. 27

329. The judgments do not reveal the age of the child nor the width between the railings.

330. Mechan at 28 per Lord McLaren

331. Mechan ibid. per Lord McLaren

332. Mechan at 30 per Lord Pearson

333. Davidson v. Sprengel 1909 S.C. 566

334. Edinburgh Municipal and Police Act 1891

335. Davidson at 570 per Lord President

336. See reference 265 supra

337. Kippen at 244 per Lord Ivory

338. Kippen at 243

339. Kippen at 244 per Lord Moncrieff.

340. Kippen ibid. per Lord Cockburn.

341. Kippen at 245 per Lord Medwyn; see Appendix II.

342. Reid v. Baird 1876 4 M. 234.

343. Reid at 235 per Lord Justice-Clerk Moncrieff although the question of agreement of the parties as to defective construction is not borne out in the pleadings.

344. Gourlay v. Ferguson 1887, unreported decision. The Sheriff Court stage is to be found in Scottish Law Review III 1887 sub. nom. Ferguson v. Gourlay at 255.

345. Ferguson at 256 per Sheriff Lees.

346. Henderson v. Munn 1888 15 R. 859.

347. Henderson at 861 per Lord Justice-Clerk Moncrieff

348. Henderson ibid. per Lord Young; See Appendix III

349. McNee v. Brownlie's Trustees 1889 Scottish Law Reporter Vol. 26, 590.

350. McNee at 591 per Lord Young.

351. McNee at 592 per Lord Young.

352. McNee ibid. per Lord Young; the practical impact of these decisions was to halt the various Sheriff Court litigations that had taken place hitherto; see Appendix IV.

353. Maitland v. Allan 1896 4 S.L.T. 121

354. Maitland at 121 per Lord Kyllachy.

355. Robb v. Edinburgh Railway Access and Property Co. Ltd. 1896 Sanitary Journal 640.

356. Robb at 356 per Lord Kincairney.

357. Robb ibid. per Lord Kincairney.

358. Baikie v. Wordie's Trustees 1897 24 R. 1098

359. Baikie at 1101 per Lord Young.

360. Baikie ibid. per Lord Young.

361. Baikie ibid. per Lord Young.

362. Burns v. McNeil 1898 5 S.L.T. 289.

363. Burns at 290 per Lord Stormonth Darling.

364. Burns at 289 per Lord Stormonth Darling.

365. Forbes v. Fergusson 1900 7 S.L.T. 293.

366. Forbes at 294 per Lord Kincairney.

367. Irvine v. Caledonian Railway Co. 1902 10 S.L.T. 363 as well as in a commercial lease dispute about blocked downpipes in Hampton v. Galloway 1899 1 F. 501 supported this tight approach to causal linkage.

368. Irvine at 363 per Lord Kincairney. Since he was involved in both Forbes v. Fergusson and Irvine it is to be expected that these display a certain consistency of approach.

369. Irvine ibid. per Lord Kincairney. This feature of working class lifestyle was commented on by the Royal Commission on the Housing of the Working Classes particularly in respect of Edinburgh. In the Eternal Slum, Wohl explains the link between much casual work and the need to be as close to the sources of such employment as possible - Chapter 11. It was a factor also mentioned in the recommendations of the Edinburgh Working Men's Report on housing infra. Other moral entrepreneurs tended to ascribe this desire to live in certain areas to deviant social cultural factors - Peter Fyfe floats this idea in connection with "backland" dwellers - infra at reference 486

370. Wolfson v. Forrester 1910 S.C. 675.

371. Wolfson at 680 per Lord President Dunedin.

372. Wolfson at 681 per Lord Johnston.

373. See infra at 285

374. Sivright v. Lightbourne 1890 17 R. 917.

375. Sivright at 919 per Lord Shand.

376. Haig v. Boswall - Preston 1915 S.C. 339.

377. Haig at 344 per Lord Justice-Clerk Kingsburgh (Macdonald).

378. Haig at 347 per Lord Guthrie.

379. Supra at reference 265.

380. Graham v. Gordon 1841 5 D 1207

381. Graham at 1211 per Lord Mackenzie

382. Davie v. Stark 1878 3 R. 1114

383. Davie at 1119 per Lord Justice-Clerk Moncrieff.

384. McKimmie's Trustees v. Armour 1899 2 F. 156

385. McKimmie at 161 per Lord Adam.

386. McKimmie at 162 per Lord McLaren.

387. McKimmie ibid. per Lord Kinnear.

388. Corrie, Mackie & Co. v. Stewart 1885 22 Scottish Law Reporter 350.

389. Robbins v. Jones 15 C.B. (N.S.) 211.

390. Robbins at 240 per Erle C.J.

391. Smith v. Baker (1891) A.C. 325.

392. Wallace v. Culter Paper Mills Co. Ltd. 1892 19 R. 915.

393. Rankine supra at reference 270 (1st edition) at 219.

394. Increase of Rent and Mortgage Interest (War Restrictions) Act 1915; The Politics of Legislation, M.J. Barnett, 1969.

395. "Sanitary control" and "sanitary problems" are used in the context of this thesis to cover the wider problems of uninhabitable or unsatisfactory dwellings ranging from drainage and overcrowding to unsafe stairs although the former type of difficulty dominated in practice.

396. The Royal was added in 1902

397. "The Legislation of Morality", T. Duster 1970

398. See infra at Appendix VII

399. "The Housing Problem", Sanitary Journal, 1902 Vol. IX (N.S.) at 631

400. See infra at 268

401. "Working Class Housing in Glasgow 1862-1902". Henry Bull, supra

402. See infra at 214. Municipalisation was an issue by 1912 only - Citizens' Union Handbook 1898-1914.

403. "The Clyde Rent Strike", John McHugh, Scottish Labour History Journal, 1978; "The Emergence of Urban Rent Control", Paul Watchman, Law and State, 5, 1979

404. "Homes of the London Poor", Octavia Hill, 1875

405. The Poor Law Report of 1834, ed. S.G. and E.O.A. Checkland, at 107.

406. ibid.

407. "Wine Alley : The Sociology of a "Problem" Housing Estate", Sean Damer, M.Sc. Thesis 1973, University of Strathclyde; more recently the author's own field work in another "problem" scheme in Glasgow confirms this reputation displacement.

408. The Architect John Honeyman was an active member of the Philosophical Society as well as a Director of the Glasgow Landlords' Association; The Medical Officers of Health and Sanitary Officers in Glasgow like William Gairdner and Peter Fyfe were both members of the Philosophical Society and made a good many contributions to housing debates - Membership rolls of the Philosophical Society in the Proceedings of the Society and the membership roll of the Association included with the Annual Reports.

409. Reports of the Edinburgh Society for this period do not disclose any social scientific input or papers. Proceedings of the Royal Society of Edinburgh.

410. Early history of the Society 1857 - Proceedings of the Philosophical Society Vol. 4 at 101.

411. The Proceedings of Society reveal a fluctuating growth curve -

1850	259
1860	305
1870	357
1880	703
1890	683
1900	967
1910	883
1914	929

412. "Defects of House Construction in Glasgow", William Gairdner, 1870-1 Vol. VII at 245.

413. Op. cit. at 247.

414. Op. cit. at 249.

415. Ibid.

416. Op. cit. at 250.

417. "The Condition of the Working Class in England", F. Engels. 1845 (first edition 1892); 1969 Panther edition at 109.

418. Report of the C.O.S. Dwellings Committee at 9 in a letter to a member of the Committee,1873

419. Some important points in the Sanitary Work of a Great City, Peter Fyfe, Proc. Phil. Soc. Glasgow 1887, Vol. xix, 257 at 271.

420. "Ticketed Houses in Glasgow", J.B. Russell, Proc. Phil. Soc. Glasgow, 1888 Vol. XX 2 at 11.

421. The process of limiting the number of individuals who could inhabit dwellings of limited size was introduced in Glasgow in 1862 and is also found in Edinburgh and Paisley. See infra at 340.

422. Op. cit. at 16.

423. Ibid.

424. Ibid.

425. Op. cit. at 23.

426. "Sanitary and Social Problems", John Honeyman, Proc. Phil Soc. Glasgow 1888, Vol. XX, 25 at 33.

427. Op. cit. at 29.

428. Op. cit. at 35.

429. Ibid.

430. Op. cit. at 36.

431. Op. cit. at 37.

432. "Poverty and Social Security in Britain", J.C. Kincaid, 1973 at 89.

433. Sanitary and Social Problems supra at 33.

434. "Improved Dwellings for the Poorer Classes", D.G. Hoey, 1890 at 12.

435. Op. cit. at 20.

436. Ibid.

437. "The Dwellings of the Poor", James Sellars, Sanitary Journal, 1885 Vol. IX at 125.

438. Ibid.

439. Op. cit. at 126.

440. Modern arguments and causal connections parallel these Victorian precursors of "coal in the bath" approaches to the unrespectable poor. Sean Damer in"Wine Alley", supra, traces the crucial connection in Local Authority social control practice in their early post War housing developments under slum clearance legislation.

441. Dwellings of the Poor at 126.

442. Editorial, Sanitary Journal, Vol. IX, 1885 at 105.

443. "Some Sociological Aspects of Sanitation", J.B. Russell, 1887 Proc. Phil. Soc. Glasgow Vol. XIX at 20.

444. "Sanitary Work of a Great City", Peter Fyfe, Proc. Phil. Soc. Glasgow, Vol. XX, 1888 at 271.

445. "Better Houses for the Poor - will they pay?", John Mann Junior, 1898, Proc. Phil. Soc. Glasgow, Vol. XXX 83 at 84.

446. Op. cit. at 85

447. Op. cit. at 104

448. Op. cit. at 108

449. Op. cit. at 109

450. Op. cit. at 112

451. Op. cit. at 118

452. The Parallel with the suggested role of local authority housing particularly after the introduction of the Housing (Homeless Persons) Act 1977 is striking.

453. Glasgow Municipal Commission on the Housing of the Poor 1904

454. Property Vol. 1 No. 7 May 1902

455. Discussion on "Housing Problems" 1901-02

456. Op. cit. at 147

457. Op. cit. at 150

458. ibid.

459. ibid.

460. "The Housing Problem and the Municipality", W. Smart. Lecture delivered on 9th December 1901 and published in 1902 at 8.

461. Described by Smart as housing where a person rents a flat of rooms, puts in a few boxes for seats, a bed, but, as a rule no grate - and charges two people 10d. a night asking no questions i.e. no references required as needed for much working class housing.

462. See infra at 229

463. Op. cit. at 9.

464. Op. cit. at 12.

465. This moral consensus on the treatment of the irreclaimable class was also shared by the Independent Labour Party Secretary, Shaw-Maxwell at 12 in reference 455 supra

466. Sanitation of the Dwelling, Property, 1902 at 149.

467. "Fluctuations of the Building Trade, and Glasgow's House Accommodation", W. Fraser. Proc. Roy. Phil. Soc. Glasgow 1908 Vol. XXXIX 21 at 39.

468. Ibid.

469. Ibid.

470. Glasgow Herald, March 4th, 11th and 18th, 1909

471. Sanitary Journal 1891 Vol. XV at 185.

472. Sanitary Journal 1887 Vol. XI at 247.

473. The editor for the first two decades of the Sanitary Journal and its driving force was Dr. Christie, a Medical Officer of Health. When he died the Journal flagged and passed into the hands of commercial publishers, although the title was initially retained. It became the rather less specialist Municipal Record and Sanitary Journal in 1902 and in 1903 the County and Municipal Record

474. Sanitary Journal, 1891, Vol. XV at 188.

475. Congress of September 1904, County and Municipal Record, Vol. 2 1904 at 493.

476. Op. cit. at 495.

477. See infra **at 339**

478. County and Municipal Record Vol. 2 1904 at 497.

479. County and Municipal Record 1903 Vol. 1 at 301.

480. Op. cit. at 302

481. County and Municipal Record, 1913 at 103 per Judge John Macpherson to the 1913 Annual Congress of the Sanitary Association of Scotland.

482. County and Municipal Record 1910 at 494 at the Annual Meeting of the Sanitary Association of Scotland. This took place some 2 years after the founding of the Eugenics Society in 1908 - see Ruth Hall's study of Marie Stopes 1978 at 176.

483. "The Housing Problem, A. Fraser, County and Municipal Record, 1912 at 502.

484. Ibid. Report on Labour Colonies, J. Mavor, 1892 Glas. Assoc. for Improving the Conditions of the People There was only one institution in Scotland on farm colony lines which owed its inception to Glasgow Social Union to solve the unemployed problem. It was situated in Mid-Locharwoods in Dumfriesshire - Habitual Offenders of the Dissipated and Dissolute Classes - County and Municipal Record 1905 at 38.

485. See infra at 329

486. "Back Lands and their Inhabitants", Peter Fyfe, 1901 at 3.

487. Op. cit. at 16.

488. Pictures of these are available in Fyfe's pamphlet as well as in Sir Alexander Macgregor's"Public Health in Glasgow" 1905-1946 and in most Victorian Glasgow photo collections. One remaining instance of the backland exists at the time of writing and is undergoing refurbishing at Patriothall, Stockbridge, Edinburgh, where St. Cuthbert's Co-operative Society infilled their backgreen with a Peabody style building.

489. Fyfe - Backlands at 14

490. Op. cit. at 29

491. Op. cit at 31

492. "Sidelights on the Housing Problem", Peter Fyfe, Municipal Record, 1902, 341 at 351.

493. ibid.

494. Municipal Commission Report at 8.

495. As Directors of the Glasgow Workmen's Dwellings Company Limited and see infra

496. The Administration of the Housing Provisions of the Housing, Town Planning Act, 1909 at the Annual Meeting of the Sanitary Association of Scotland, Thomas Bishop, County and Municipal Record 1912 at 42

497. pace Dr. Edward Norman's Reith Lectures in 1978 when he urged the Churches to return to concern with questions of spiritual welfare. The Listener, 1978 at 564, 602, 632, 668, 699 and 746.

498. Dr. Begg was a complex individual in his concern for the improvement of working men's housing along with decided rights views on the rights of property and his passionate "heart hatred of poverty". His interests in social questions sprang from his concerns about religious defects in the populace. His earliest interest in housing resulted from his concern to reduce poor rates which he saw as largely caused by the withdrawal of the wage-earner from work from illness. His interest in working men's dwellings began in 1849 according to his biographer, Dr. Smith, although the death of 28 in the Edinburgh tenement disaster of 1861 proved a catalyst to the securing of a favourable reception to the Report - "Memoirs of James Begg", Thomas Smith, 1885.

499. Proceedings of the General Assembly of the Free Church of Scotland 1858 at 53.

500. Report of the Committee on Houses for the Working Classes in connection with Social Morality at 5 May 1862

501. James Begg was involved in this work in an advisory and proselytising capacity and after their early work in Stockbridge, the Company honoured Begg by naming one of the buildings in Abbeyhill, Edinburgh after him - Memoirs at 520.

502. Report at 19.

503. Op. cit. at 21.

504. He brought out a pamphlet in 1866 entitled "Happy Homes for Working Men and How to Get Them". Two copies were sent to all Lords Provost in Scotland. He described the topic of workmen's houses as his "favourite subject" and gave papers to learned bodies and groups of improving artisans on it - Memoirs at 263 and 520.

505. The concern about the immorality of the Bothy system was noted in McVail's M.D. Thesis. On "Seasonal Workers"- Glasgow 1915 and the Report of the Royal Commission on Housing in Scotland 1918 Cd. 8731 at 179. Despite the doubts expressed by all parties as to this it persisted at least until the 1930's in Angus - author's field notes from Forfar area.

506. Principal Acts of the General Assembly of the Church of Scotland 1888 at 7.

507. Op. cit. at 8.

508. "The Cotter's Saturday Night", Robert Burns, 1785.

509. Principal Acts 1888 at 66.

510. Yearbook of the Church of Scotland 1889 at 10.

511. Report of the Commission on the Housing of the Poor in relation to their social condition, Presbytery of Glasgow 1891 at 4.

512. Principal Acts of the General Assembly of the Church of Scotland 1891 at 58.

513. Principal Acts of the General Assembly of the Church of Scotland 1892 at 53.

514. Minutes of Evidence of the Guthrie Committee 1908 Cd. 3792

515. Greenock Housing Problems, February 1913, County and Municipal Record, 1913 at 425.

516. "The Societies of Glasgow", M. Gemmell, 1906 The Kyrle Society took their name from Alexander Pope's "Man of Ross", John Kyrle, who beautified his environs at low cost.

517. The Housing of the Edinburgh Poor - Report of the 22nd Annual Meeting of the Edinburgh Social Union, County and Municipal Record 1907, 182.

518. Report of the Dundee Social Union 1905.

519. Minutes of the Annual Meeting of the Glasgow Landlords' Association January 1883. These Minutes are the major source for the ensuing description of their activities.

520. Factors in the urban context in Scotland refer to those who managed the property for the owners. They arranged repairs and obtained and gave references - Factors' lines - and it was against the Factors rather than the landlords that agitation in 1915 took place. This direction of animus against factors extends up until the time of writing. The writer in advising on housing rights in the East End of Glasgow has had explained the "hard" Factors and "very hard" ones, and the lone "good one". This oral history was based mainly on the inter War experience in Bridgeton

where the impetus to offer a better service was absent under the conditions of acute housing scarcity.

521. Rules of Constitution 1.

522. Minutes of 1886 Annual General Meeting.

523. Minutes of 1882 Annual General Meeting.

524. Minutes of 1889 Annual General Meeting.

525. Minutes of Evidence to the Guthrie Committee at 128.

526. Miscellaneous Papers and Documents 81/111 - Paisley local collection Circular dated 20th January 1891.

527. Ibid.

528. Minutes of Evidence to the Guthrie Committee at 148.

529. Op. cit. at 33.

530. The Liberty and Property Defence League was "opposed to State Socialism and interference with individual freedom and freedom of contract and the rights of property" although they claimed they were not an organisation of landlords and that landlords formed an insignificant proportion of their membership. Since the 500 strong Glasgow Landlords' Association might be counted as one member, this claim may be regarded with some scepticism. They obviously felt the need to dispel the bad landlord image and advertised their aims and objectives in the compendium of socialist organisations and personalities the Labour Annual - 1895 at 70.

531. Minutes of the Annual General Meeting 1889.

532. A geographical aberration that persisted until the 1960s and 1970s.

533. Minutes of Annual General Meeting 1886.

534. Minutes of the Annual General Meeting 1887.

535. See infra at reference 683.

536. Minutes of Annual General Meeting 1885.

537. Letter of 6th April reproduced in the Report.

538. Ibid.

539. Ibid.

540. Ibid.

541. Ibid.

542. Ibid.

543 Ibid. - this notion is now embodied in the 17 "re-establishment centres" available at the time of writing in Britain.

544. Minutes of the Annual General Meeting 1885

545. Ibid.

546. Ibid.

547. Minutes of Annual General Meeting 1888

548. Ibid.

549. See supra at 285

550. Based on a random sample survey of the Association's membership in 1885 and of the holdings of the members - R. Geary, P. Robson and P. Watchman. See Appendix

551. Minutes of Annual General Meeting 1887

552. Ibid.

553. Ibid. and see supra at ref. 529 on action in Partick.

554. Minutes of Annual General Meeting 1888

555. Ibid.

556. Ibid.

557. See supra at 238

558. The Association incorporated itself in January 1897 for administrative reasons as it made petitions and letters easier.

559. Report of the Annual General Meeting 1901 - Glasgow Herald January 17th 1901.

560. Report of Annual General Meeting 1903 Glasgow Herald January 22nd 1903.

561. Glasgow Herald October 19th 1907

562. Ibid.

563. Report of Annual General Meeting 1908 - Glasgow Herald January 24th, 1908.

564. The limited tradition of organisation did not appear to inhibit the Tenants' organisations in Great War - see supra at 285

565. The Institutions of Private Law supra at 115.

566. Even within the non Marxist wing of the Labour movement of Britain there was no doubt that the inevitability of the Second International was shared. The means of achieving these ends was the crucial area of dispute - "The Rise and Decline of Socialism in Great Britain", 1884-1924, J. Clayton; "A History of British Socialism", M. Beer

567. Tenants groups emerged around specific legislative incursions like the Housing (Financial Provisions) (Scotland) Act 1972 but are limited to campaigns rather than permanent organisation. The Scottish Council on Tenants operated from April 1973 - February 1974 with their journal "Scottish Tenant".

568. Claimants Unions are a prime example of this approach.

569. Much welfare rights work at the time of writing shares this feature in that there is an argument that the 'enemy' should not be made aware of the strategies to be employed against them.

570. Report of a Committee of the Working Classes of Edinburgh 1860 - Dr. Begg is thanked in the Introduction for his help too.

571. Coach painter; engineer; blacksmith; warehouseman; coach builder; wheelwright; joiner; clerk G.P.O.; teacher; printer

572. Report at 5

573. Report - Introduction

574. Report at 9

575. ibid.

576. Report at 14

577. See Gauldie at 204 for the outcome of this initiative

578. Report at 40

579. ibid.

580. The calculations made by Dr. Begg in his "Happy Homes for Working Men" required for their implementation a high steady artisan wage and involve a deposit equivalent to over a year's rent of a standard room and kitchen - Begg at 33

581. See Appendix VII

582. Minutes of Evidence of Guthrie Committee at 91

583. "Rights and Responsibilities of Property in relation to Sanitary Administration", W. Kelso, County and Municipal Record, 1904 at 363.

584. Apart from the structural problems for tenants and their own working lives, Kelso pointed out that in Paisley the existence of one single flitting day was chaotic. Tradesmen had no time to carry out remedial work where about one tenant in nine moved at removing day - Rights and Responsibilities ibid.

585. Minutes of Evidence of Guthrie Committee at 13.

586. Minutes of Evidence of Guthrie Committee at 85 - Baillie was incidentally a Director of the Cowlairs Co-operative Society which achieved notoriety half a century later in the most recent 'volenti' case - reference 319 supra.

587. Minutes at 13

588. Minutes at 210

589. Minutes of Paisley United Trades Council, June 13th 1911.

590. Paisley United Trades Council amalgamated with Paisley Labour Representation Committee in July 1911 with joint assets of £7-4-10d - Minutes of Paisley Trades and Labour Council July 26th 1911.

591. Minutes September 6th 1911

592. Minutes January 24th and 31st 1912

593. Minutes February 14th 1912; for more on Fred Knee see infra at reference 610 and Appendix V

594. Minutes January 24th 1912.

595. Minutes February 28th 1912

596. Minutes March 7th 1912

597. Minutes April 3rd 1912

598. Minutes April 24th 1912; reactions to this varied though and the tenants in South Govan, nearby, went on rent strike over the rate of the Factors' commission - Govan Press, November 1912.

599. Minutes October 9th 1912

600. Annual Report of Glasgow Trades Council 1892/3 at 12

601. Annual Report 1893/4 at 11

602. Annual Reports 1894/5 at 11; 1895/6 at 17; 1986/7 at 12 - this latter Report also mentions the related problem of employers using tied housing repossession as a weapon in industrial disputes. This was a familiar tactic in the coalfields.

603. Annual Report 1899/1900 at 15

604. Annual Report 1901/2 at 18

605. Annual Report 1902/3 at 20; 1905/6/7 at 16; 1907/8 at 26; 1908/9 at 24; 1911/12 at 17; Unemployment and Politics 1886-1914, Jose Harris; Labour and Unemployment 1900 - 1914, K.D. Brown; One astute company sensed the wind of change and tied it into one of the slogans of the day with their advertisement in the 1911/12 Trades Council Annual Report headed "How the MISSIVE can be ABOLISHED" urging workmen to buy their own homes.

606. Indeed in the Municipal Elections in Glasgow of 1912 one of the major planks of the Labour Party platform was the municipal housing on the lines of John Wheatley's "£8 cottages" pamphlet - The Govan Press, November 1912.

607. "The Labourer and his Cottage", Fred Knee and Robert Williams, 1905.

608. Op. cit. at 88

609. ibid.

610. The Housing of the People, The Workmen's National Housing Council 1902 lists all its areas of activity and Scotland is not included although as has been seen the Secretary, Fred Knee, was prepared to cross the Border to spread the word and his visit to Greenock led to their setting up a Housing Council in February 1912 - Housing Journal, March 1912. See Appendix

611. "The Eternal Slum", A.S. Wohl, at 325 ff

612. "The Workmen's National Housing Council 1898-1914", D. Englander M.A. Thesis 1973

613. Glasgow Corporation Minutes 2216 13th August 1914; 2362 and 2365 27th August 1914.

614. County and Municipal Record 1913 at 451; even though South Govan experienced a rent strike the kinds of demands were related very specifically to the Commission question arising from the 1911 Act rather than challenge to the market system of rental fixing and contract

615. Single Tax. George, A. Birnie, 1939

616. "The Dwellings of the People", October 1889

617. "The Black Spots of Glasgow", March 1890 which indicates the reticence of the Glasgow Sanitary Department noted infra at

618. May 1892

619. ibid.

620. Partick actually became part of Glasgow in 1912

621. March 1892

622. Typically the Torrens and Cross Acts of 1868 and 1875

623. Royal Commission of 1885, Glasgow Presbytery Commission 1891 and Glasgow Municipal Commission 1904

624."The Origins of the Liberal Welfare Reforms", J.R. Hay, 1975 deals with this notion in a slightly different context.

625. "Early Victorian Government", O. MacDonagh, 1977; "Before the Welfare State", U. Henriques, 1979

626. See "Cruel Habitations", E. Gauldie at 262

627. Op. cit. at 293

628. Early Victorian Government supra

629. See Annual Reports of the Board of Supervision and the Local Government Board

630. See for the early years "Observations on the Early Public Health Movement in Scotland", J.H.F. Brotherston, 1952, Section III.

631. "Sanitation in Paisley", W.W. Kelso, 1922 at 31.

632. Although this was only a part-time appointment until 1872 - Brotherston op. cit. at 105 - when Dr. Russell took over full-time.

633. "Source book of Administrative Law", M. McLarty ed. 1956 at 133.

634. "Working Class Housing in Glasgow 1862-1902". Henry Bull, M. Litt. Thesis, 1973.

635. Kelso op. cit. at 56

636. "Glasgow, its municipal organisation and administration", James Bell and James Paton.

637. Annual Report of Local Government Board 1907 Cd. 3470 at 201.

638. Annual Report of Local Government Board 1908 Cd. 4142 at 124.

639. Councillor James Steele addressing the Sanitary Inspectors" Associations of Edinburgh and Glasgow in Glasgow, July 1st 1909.

640. Annual Report of the Board of Supervision 1890 c. 6121 at 34 covering such items as drainage, nuisances, the character of the house accommodation of the labouring classes and lodging-houses as well as more health related issues like the conditions of dairies, burial grounds, isolation of infectious diseases and the means of disposing of privies and cesspools.

641. Annual Report of the Board of Supervision 1889-90 C. 6121 at 216.

642. Annual Report of the Board of Supervision 1889-90 supra at 38.

643. Op. cit. at 40

644. Annual Reports of Board of Supervision and Local Government Board generally from 1871-1915.

645. 1889 - 4; 1890 - 3; 1891 - 2; 1892 - 5; 1898 - 5. - Annual Reports of Board of Supervision.

646. Annual Report of Board of Supervision 1892 c. 6725 at xix.

647. The plague came to Scotland in the early twentieth century - Annual Reports of Local Government Board 1901 Cd. 701 at xxxiv and 1902 Cd. 1051 at xxxv.

648. This can be inferred from both salary levels - £739 approved to pay for 10 sanitary inspectors in 1902 and £30 for a Medical Officer of Health - 1903 Cd. 1521 - as well as professional complaints infra; the level of Sanitary Officer and Medical Officer of Health pay in Arbroath, for example, was £60 per annum in the first decade of the twentieth century - Minutes of Arbroath Town Council 1909 - 1914 and Council Accounts.

649. Local Government Board Circular dated 10th February 1903.

650. Annual Report of Local Government Board 1906 Cd. 2989 at 1 iv

651. Op. cit. at 1 v

652. Consumption or T.B. as it was later called

653. Annual Report of the Board of Supervision 1894 c.7078 at 96.

654. Op. cit. at 96.

655. Op. cit. at 97.

656. Op. cit. at 98.

657. ibid.

658. Op. cit. at 99.

659. Annual Report of the Board of Supervision 1895 C.7515 at 38 - this approach was reaffirmed by the same Inspector at the turn of the century - 1900 Cd. at 35 Annual Report of Local Government Board.

660. Annual Report 1895 C.7515 at 39

661. Section 30

662. Annual Report Local Government Board 1896 C7786 at 98.

663. Op. cit. at 99.

664. Annual Report Local Government Board 1898 C.8575 at 43.

665. Op. cit. at 133.

666. Op. cit. at 137.

667. Annual Report Local Government Board 1912 Cd. 6192.

668. Annual Report Local Government Board 1909 Cd. 4679 at 167.

669. Annual Report Local Government Board 1910 Cd. 5228 at 135.

670. Op. cit. at 130.

671. This account draws on both Kelso's Sanitary Reports as well as their popularised form in his "Sanitation in Paisley" supra.

672. "Sanitation in Paisley" at 33

673. Op. cit. at 45

674. Inspired by the discovery that whilst death rates in other Scottish cities and towns had improved, Paisley had a higher death rate than anywhere including Glasgow.

675. Sanitation at 63

676. Op. cit. at 76

677. Op. cit. at 77

678. Op. cit. at 79

679. Op. cit. at 88

680. Op. cit. at 118

681. Op. cit. at 226

682. Statistical information extracted from the annual Reports of the Sanitary Department; see also infra for more on Kelso's view of the operation of closure specifically.

683. 1887 Strathclyde Regional Archives Miscellaneous Papers 17/891.

684. MP 17/896

685. MP 17/897

686. MP 17/898

687. Minutes of Sub-Committee on Health, March 1st 1886.

688. In a letter to the School Board Vice-Chairman, who had begun the correspondence at MP 17/903 - 10th February 1888.

689. "Scotch Urban and Rural Sanitary Areas", W.C. Spens, Sanitary Journal, 1881 at 321.

690. "The Administration of the Health Laws in Scotland", Dr. Simpson, Sanitary Journal 1884 at 193.

691. Op. cit. at 194

692. ibid.

693. Op. cit. at 195

694. "County Councils and Sanitary Inspectors", John Shaw, Sanitary Journal, 1890 at 302.

695. "Annual Report on the Health and Sanitary Condition of the County of Renfrewshire", A. Campbell Munro, 1891 at 68

696. Op. cit. at 29.

697. Some Neglected Powers of the Public Health (Scotland) Act 1867 at 140.

698. Sanitation in Paisley supra at 70; in 1887 Aberdeen could only boast a Medical Officer, Sanitary Officer Inspector and one Assistant - Sanitation in Aberdeen, K. Cameron, Sanitary Journal 1887 at 257.

699. Scottish Property Gazette, August 26th 1892.

700. ibid.

701. "Administrative Sanitary Reforms", W.C. Spens, Sanitary Journal, 1893,224 at 226.

702. "Hindrances to Sanitary Improvements", J. Frew, Sanitary Journal, 1895 at 227.

703. Sanitary Journal, 1887 at 270.

704. Op. cit. at 271.

705. Annual Reports of the Local Government Board for this period.

706."Local Government in Scotland" Mabel Atkinson at 376.

707. County and Municipal Record 1908 at 461.

708. Closing and Demolition of Insanitary Houses, 1895, Sanitary Journal at 105.

709. Introduced after 1900 in Paisley and Dundee

710. Annual Report of the Operation of the Sanitary Department of the City of Glasgow for 1897 at 8

711. Housing of the Labouring Classes, 1899, Sanitary Journal, 57 at 59.

712. Backlands : their relation to the Housing Problem, County and Municipal Record, 1906, 184

713. County and Municipal Record, 1903 at 132

714. ibid.

715. Paisley used the Glasgow formula of 400 cubic feet of air per adult and applying to houses not exceeding 3 apartments with an overall cubic capacity of less than 2,400 feet.

716."Sanitation in Paisley" supra at 257

717. Minutes of Paisley Town Council 29th October 1903 at 319.

718. Annual Report of Sanitary Officer, Paisley, 1909 at 11.

719. Annual Report of Sanitary Officer, Paisley, 1911 at 9.

720. Annual Report 1912 at 7; Annual Report for 1913 at 8; Annual Report 1914 at 11.

721. Annual Report of Local Government Board 1915 Cd. 8041 at lxv and lxvi

722. Op. cit. at lxvii

723. Atkinson op. cit. at 172

724. ibid.

725. ibid.

726. Bull op. cit.

727. "Five per cent Philanthropy", 1973, J.N. Tarn at 64

728. Report of Edinburgh Working Men 1860 supra at reference 570 at 5

729. The Housing of the Working Classes, Scottish Local Government Gazette, 1904 at 299.

730. ibid.

731. ibid.

732. Charity Organisation Society Report supra at 19

733. Homes for the People, 1874, address to the Social Science Congress at Glasgow at 24

734. A higher standard obtained under the later legislation

735. Minutes of the Sub-Committee of the Lord Provost's Committee 20th June 1894

736. Public Health Progress in Edinburgh, Sanitary Journal, 1897 at 617.

737. Op. cit. at 618

738. Report of the Burgh Engineer for Edinburgh for 1899, Scottish Local Government Gazette July 1900 at 282.

739. ibid.

740. County and Municipal Record, 1903 at 64

741. Op. cit. at 65

742. Scottish Law Review 1913 at 131

743. "The Housing Problem as affected by the Town Planning Act", Judge Macpherson, County and Municipal Record, 1911 at 5

744. supra at 231

745. The Housing Problem at 6; Aberdeen was one of the few areas to share Edinburgh's power to close without appeal but they lacked the power to also demolish under their local legislation - County and Municipal Record, 1911 at 22 per Convener of the Public Health Committee, John Scott.

746. What are the best means of providing houses in a Burgh for those dispossessed under the Housing Acts, County and Municipal Record 1913 at 64.

747. "A Historical Sketch of the Sanitary Condition of Greenock", James Wallace, Sanitary Journal, 1895 , 446 at 451.

748. Op. cit. at 452.

749. Op. cit. at 460.

750. The Operations of the Greenock Improvement Trust, Sanitary Journal 1881 277 at 279 - there had been fevers and cholera in Greenock in 1832, 1844, 1847, 1849 and 1857.

751. Report of the Housing of the Working Classes in Greenock, County and Municipal Record, 1911 at 274.

752. County and Municipal Record, 1914 at 100.

753. i.e. until the boom conditions from the influx of workmen to the torpedo works had ended after the war.

754. "The Housing of the Working Classes", Gordon Beveridge, Sanitary Journal, 1897 at 302 addressing the Sanitary Inspectors' Association.

755. ibid.

756. Op. cit. at 313

757. Figures in W.N.H.C. pamphlet at reference 610, supra

758. "The Housing of the Working Classes", G. Beveridge supra at 313.

759. "The Corporation of Glasgow as Owner of Shops, Tenements and Warehouses", Arthur Kay, 1901 at 7.

760. County and Municipal Record 1905 at 283.

761. John Butt in "The History of Working Class Housing" ed. S. Chapman at 55. Writing slightly after the War, W. Renny Watson revealed that whilst in the first two decades of the century, 3,484 houses were built by local authorities, 11,556 houses were built by the coal-owners. In view of the cessation of building in 1914, this deals with the pre-war period - The Coal Owners of Scotland. Provision of housing by employers figured heavily in other basic industries on Clydeside - J. Melling, 1978 Employers, Labour and the Housing Market on Clydeside 1880-1920 at 5 ff. This varied depending on the nature of the industry and was not deemed desirable by the jute mill owners of Dundee, Cruel Habitations, Enid Gauldie, 1973 at 190

762. "Psychoanalytic Jurisprudence", Albert Ehrenzweig, paragraph 59 at 83.

763. "Is your textbook really necessary?", William Twining, J.S.P.T.L. 1970, 81.

764. John Austin's Political Pamphlets supra at reference 147.

765. Marie Stopes, Ruth Hall, 1978

766. "The Morality of Law", Lon Fuller, 1964, revised edition 1969.

767. "Taking Rights Seriously", Ronald Dworkin, 1977.

768. Summa Theologica, St. Thomas Aquinas, Part II 56

769. "Civil Disobedience: theory and practice", Hugo Bedau, 1969; "On Violence", Hannah Arendt, 1970; "Civil Disobedience and Violence", ed. Jeffrie Murphy, 1971 and see also Bibliography cited in Murphy.

770. "Reaching Judgement at Nuremberg" (sic) Bradley F. Smith, 1977.

771. "The Law of Scotland Regarding the Poor", A. Dunlop, 1854

772. "Ancient Law", Henry Maine, 1861 in Britain as well as von Savigny in Germany and Emile Durkheim in France.

773. Ancient Law, at 11

774. Ancient Law at 182

775. "The Division of Labour in Society", E. Durkheim, 1893

776. "Law and Politics in the Middle Ages" supra; "A History of Political Theory", G. Sabine, 3rd ed. 1963.

777. The Supreme Court, B. Schwartz, 1957; Government by Judiciary, R. Berger, 1977

778. "Survey of Legal Education in the United Kingdom", J.P. Wilson, J.S.P.T.L. 1966 at 1 - the exceptions in the 19 University courses offered were Cambridge and Exeter.

779. "A Second Survey of Legal Education in the United Kingdom", J.P. Wilson and S.B. Marsh, J.S.P.T.L. 1975 at 239.

780. This process has certainly occurred at the Universities of Dundee and Strathclyde

781. The Teaching of Jurisprudence in British Universities, R. Cotterrell, 13 J.S.P.L. (1974) at 75

782. "The New Despotism", Gordon Hewart 1929; "Justice and Administrative Law", W.A. Robson 1928

783. "The Law and its Compass", Viscount Radcliffe, 1961

784. Op. cit. at 47

785. Op. cit. at 79

786. Magor and St. Mellons R.D.C. v. Newport Borough Council 1952 A.C. 189

787. "English and American Judges as Lawmakers", Louis Jaffe, 1969

788. Op. cit. at 33

789. ibid.

790. Op. cit. at 34

791. Op. cit. at 37

792. Op. cit. at 38

793. ibid.

794. Op. cit. at 39

795. Op. cit. at 15

796. "Lawyers and the Courts", Brian Abel-Smith and Robert Stevens, at v

797. "Bomb Culture", Jeff Nuttall; 1968; "The Neophiliacs", C. Booker, 1969.

798. "Pageantry of the Law", James Derriman, 1955, at 9.

799. "Anatomy of Britain", Anthony Sampson at 146

800. Op. cit. at 154

801. Lawyers and the Courts supra at viii

802. ibid.

803. Mogul Steamship at 626 quoted at 113 in "Lawyers and the Courts".

804. Op. cit. at 114

805. Report of the Committee on Tribunals and Inquiries (1957) Cmnd. 218

806. "Unemployment Assistance Tribunals in the 1930s", Tony Lynes, in "Justice, Discretion and Poverty", M. Adler and A. Bradley, 1977

807. "British Social Policy 1914-1939", Bentley B. Gilbert, 1970

808. A class analysis can be transferred to a group of patently unworldly elitists from a profession which does not have a place in the heart of popular culture.

809. Lawyers and the Courts supra at 125.

810. Op. cit. at 302

811. Op. cit. at 306

812. Op. cit. at 310.

813. Op. cit. at 304

814. Mau-mauing the flakcatchers, Tom Wolfe in Radical Chic and Mau-mauing the Flakcatchers 1970, here used in the context of the bureaucrats operating the Welfare system in San Francisco in the troublesome days of the 1960s.

815. Lawyers and the Courts, supra at 313

816. Op. cit. at 464

817. "In Search of Justice", Brian Abel-Smith and Robert Stevens at 7, 1968

818. Op. cit. at 166

819. Op. cit. at 173

820. Op. cit. at 179

821. Op. cit. at 180

822. Op. cit. at 181

823. More recently a letter in the Guardian has suggested that the judiciary are a "small group of shortsighted and conceited old men". The comment comes from a Lecturer in Law - Guardian May 6th 1978.

824. Lawyers and the Courts, supra at 184

825. Op. cit. at 190

826. ibid.

827. The Unused Rent Acts, 12.9.68, New Society, and particularly in the Guardian as he is their Legal Correspondent.

828. "Lawyers and the Public Interest", M. Zander, at vii, 1968.

829. Op. cit. at viii

830. Op. cit. at 266

831. Op. cit. at 323

832. Op. cit. at 324

833. ibid.

834. ibid.

835. "The Legal Structure", Michael Freeman, 1974 at ix

836. Op. cit. at 120

837. Op. cit. at 123

838. Op. cit. at 125

839. Op. cit. at 130

840. ibid.

841. ibid.

842. "The English Legal System", R.J. Walker and M.G. Walker, 1976, 4th ed. at 20.

843. ibid.

844. "Machinery of Justice in England", R.M. Jackson, 1977, 7th ed. at 472.

845. Op. cit. at 47

846. Op. cit. at 474

847. Op. cit. at 480 where amongst other things a 'complaints procedure' against judges was canvassed on a formal basis as well as a career judiciary.

848. Op. cit. at 478.

849. "Judges on Trial", S. Shetreet, 1976.

850. The Judiciary, Report of a Justice Sub-Committee, 1972

851. "Judges : a political elite", Alan Paterson, British Journal of Law and Society, 1974, 118 at 126.

852. "Courts and the Political Process in England", Fred Morrison, 1973

853. Political Science Conference, Edzell, in September 1978 (in discussion).

854. "The State in Capitalist Society", Ralph Miliband, 1969.

855. Op. cit. at 125

856. ibid.

857. Op. cit. at 127

858. Op. cit. at 128

859. ibid.

860. Op. cit. at 130

861. Law Class and Society, Volume 1 Employers, Worker and Trade Unions, 1970; The Apparatus of the Law, 1971; Law and Politics, Law in the Colonies, 1971; The Substance of the Law,1972; D.N. Pritt.

862. Volume 2 at 7

863. Op. cit. at 8

864. ibid.

865. ibid.

866. ibid.

867. ibid.

868. Op. cit. at 10

869. Op. cit. at 29

870. ibid.

871. Op. cit. at 48

872. "Class in a Capitalist Society", John Westergaard and Henrietta Resler, 1975 at 17

873. Op. cit. at 191

874. Some sociological aspects of strict liability and the enforcement of Factory legislation. 33 M.L.R. (1970) at 396, W.G. Carson

875. Class in a Capitalist Society, supra at 219

876. Op. cit at 227

877. Op. cit at 231

878. "The Politics of the Judiciary", John Griffith, 1977.

879. "Critical Criminology", Ian Taylor, Paul Walton and Jock Young, 1975; "Deviance, Reality and Society", Steven Box, 1971.

880. "Working Class Criminology", Jock Young in Critical Criminology

881. The Politics of the Judiciary supra at 205

882. "Judges on Trial" supra; "Scottish Judges Scrutinised", Ian Willock, Juridical Review, 1969, 193

883. pace Scottish Judges Scrutinised which wisely suggests that any inferences which can be made from the background and career path of the judiciary require to be specifically documented.

884. Quoted in "Taft - Hartley Comes to Great Britain", W. Gould (1972), 81 Yale Law Journal, 1421

885. "The Worker and the Law", K.W. Wedderburn, 1965; "Labour and the Law", Otto Kahn-Freund, 1977 and "Trade Unions, the Law and Society", 1970 M.L.R. 33, at 241.

886. The Politics of the Judiciary, supra at 214

887. Op. cit. at 87

888. Hall and Co. v. Shoreham-by-sea 1964 1 All E.R.1

889. Mixnam's Properties v. Chertsey U.D.C. (1965) A.C. 735

890. The Politics of the Judiciary, supra at 29

891. Scottish Judges Scrutinised, supra at 204

892. Max Atkinson in "Doing Sociological Research", ed. Colin Bell and Howard Newby, 1978 at 31

893. 1066 and All That, W. Sellar and R. Yeatman, 1930

894. Practical Jurisprudence, supra at 259

895. The Genius of the Common Law, supra at 87

896. "Whose Law? What Order", William Chambliss and Milton Mankoff, 1975

897. They are simply part of it and since society is itself unproblematic by shopping in the village shop and by speaking to other members of this undifferentiated society judges, by this account are beyond criticism on the score of cultural lag - see particularly the Radio 3 broadcast of March 3rd 1976 with a discussion by Lords Denning and Scarman where this is elaborated. From author's transcription.

898. Courts and Administrative Law - The Experience of English Housing Legislation, W.I. Jennings, 49 Harvard Law Review (1936), 426; Statutory Covenants of Fitness and Repair; Social Legislation and the Judges; J.I. Reynolds, 37 M.L.R. (1974), 377

899. Radio 3 broadcast supra

900. "Legalism", Judith N. Shklar, 1964

901. "Getting on with Sociologists", Ian Willock, B.J.L.S. 1974 at 3

902. "Legal thought and juristic values", Colin Campbell, B.J.L.S. 1974 at 13

903. "Unmet Legal Needs", Philip Lewis, in Social Needs and Legal Action, 1973.

904. "Images of Law", Zenon Bankowski and Geoff Mungham, 1976 at chapter 1

905. The Work of the Commercial Courts, supra

906. Property and Authority and the criminal law supra

907. Economy and Society , Max Weber ed. Max Rheinstein, Vol 2 at 976

908. The Politics of the Judiciary supra at Part Two

909. "The Lawyer and his Societies", Ray Geary, Law and State 1 at 29

910. This is one of the unseemly voyeuristic features of Kay Carmichael's sojourn in Lilybank, Glasgow in order to experience life on social security, B.B.C. 1, 1978, March 2nd.

911. "Judicial Decision-Making",R.J. Wilson, 1970

912. "A History of British Trade Unionism", Henry Pelling, 1976, 3rd ed.

913. "State, Class and Courts", Tony Bunyan, The Leveller, November 1977 makes this point in relation to personal property protection as the institutional cover for protection of capital at 9.

914. Up Against the Law, 1972 - 1975, passim (dates approximate as early issues are not dated).

915. Particularly the 1977 edition "Law and Disorder" and the 1974 edition on major events in socialist history.

916. See, for example, "Why you should be a Socialist", Paul Foot, 1977 and the Miliband analysis in "The State in Capitalist Society" supra

917. The Politics of the Judiciary supra at 205

918. Op. cit. at 202

919. Op. cit. at 214

920. It is not clear to what extent Griffith regards the "direction" of judicial policy stems from their own preconceptions of desired ends and to what extent from the rules of the statutes of the State, whether legislative or constitutional.

921. This was done in the tenure of Norman Wylie as Lord Advocate who stated that he would not elevate himself to the Bench when the Tories were defeated. His Labour successor obliged, however, and after this had been written as promoted himself to the Court of Session. The position is not entirely clear at the time of writing.

922. Judges : a political elite supra

923. pace Scotland following the 1979 General Election and Ronald King-Murray's road to the Bench. Without such a mechanism he would have a less than odds-on choice for the Bench in view of his record as Lord Advocate, although this is no more than an informed 'hunch'.

924. "A History of British Trade Unionism", Henry Pelling, supra

925. Courts and Judges supra at 12

926. Judges : a political elite supra

927. Scottish Judges Scrutinised supra

928. Courts and Judges supra at 82

929. "The Labour Party and the Struggle for Socialism", David Coates, 1975

930. See generally the contents of the British Journal of Law and Society for this general pattern. In this latter category we find the debates on 'law for the poor' - see Bankowski and Mungham, B.J.L.S. 1974, 179 and Maureen Cain B.J.L.S. 1975 at 61.

931. Particularly in some of the ethnomethodological approaches to the legal process and some work which can be seen broadly within this stream - Magistrates' Justice, Pat Carlen, 1976.

932. "Law and Society", Adam Podgerecki, 1974 and "Knowledge and Opinion about Law", A. Podgorecki, 1973 as well as much of the 'law for the poor' work - LAG Bulletin passim.

933. "The Professional Organisation of Sociology", Martin Nicolaus, 1972 in "Ideology in Social Science", ed. Robin Blackburn.

934. Sentencing in a Magistrates' Court, Rodger Hood 1962 ; "An Evaluation of the Significant Factors in the Sentencing of Adults", E. Gavin, 1969

935. "The Will to Believe", William James, 1897

936. "The Sociological Movement in Law : Sociological Jurisprudence and the Sociology of Law", A.J. Hunt, 1974 at 4

937. ibid.

938. The Teaching of Jurisprudence supra

939. Getting on with Sociologists supra at 11.

940. See reference 953 infra

941. Justice in England, a barrister, 1938

942. Unemployment and Politics 1886 - 1914 supra

943. Letter to Block, 21-22 September, 1890 printed in Engels : Selected Writings, ed. W. Henderson, 1967

944. Exemplified by Gramsci's call for a far subtler analysis of the precise ways in which the ruling class operated hegemony - Prison Notebooks, Antonio Gramsci, 1971 edition.

945. Except where 'Poplarism' was concerned - Roberts v. Hopwood 1925 A.C. 578.

946. Unemployment Assistance Tribunals supra

947. "Justice and Administrative Law", W.A. Robson, 2nd ed. 1947

948. Abel-Smith and Stevens' work and the later concerns of the 'law for the poor' writings in LAG and SCOLAG have this as their rationale

949. Denning is able to add to the 'literal', 'mischief' and 'golden' rules with his own 'purposive approach' -"The Purposive Approach in Labour Law", K. Miller, S.L.T. 1979

950. At the time of writing the absence of theory within the area of sociology of law has been remarked on copiously - see typically David Farrier's paper "False Perspectives - Labels and Battle-cries", 1974, Socio-legal Group paper, delivered September 1974.

951. Magistrates Justice supra; "Pre-trial Procedures and Construction of Conviction", Doreen McBarnett, 1976 in "The Sociology of Law", ed. Pat Carlen.

952. Criminology and the Sociology of Deviance in Britain, Stan Cohen, 1974 in "Deviance and Social Control" ed. P. Rock and M. McIntosh.

953. Alan Hunt has suggested that so far the critical work in sociology of law from a Marxist perspective has only responded to the rhetoric of those like Sir Frederick Pollock suggesting that the Courts and their process are skewed by class affilitation and at a later date that the lawmaking itself rather than its application is essentially class based. The most recent phase beyond this trading off of rhetoric is the stage of detailed analysis of specific epochs and eras of legal policy. Hunt suggests that a start has been made by E.P. Thompson with his Whigs and Hunters in 1975 - and more recently with the work on mugging from Stuart Hall and his colleagues at the Centre for Contemporary Cultural Studies in Policing the Crisis, 1978 - Conference on Sociological Theory in Legal Studies, October 1978 at Oxford University under the auspices of the S.S.R.C.

954. "The Path of Law", O.W. Holmes, 1897 at 173

955. W.W. Cook, 1924, 33 Yale Law Journal at 475

956. "The Common Law Tradition", K. Llewellyn, 1960

957. Op. cit. at 15

958. Karl Llewellyn and the Realist Movement, W. Twining, 1973 at 212.

959. Rather than political theory which has tended to dominate most Politics Departments in Britain until recently - University Calendars.

960. The Coming Crisis of Western Sociology supra

961. Sentencing policy has been the one major area where the epistemological problems of behaviouralism are most easily discounted. The problem of variables selection is less acute in this area where a good deal of the personal information about the offender, as well as the deviant action and its proscribed treatment under the legal regime is available.

962. Lee J. Loevinger, 1949 Minnesota Law Review at 493.

963. See particularly the work of Glendon Schubert supra

964. Judicial Decision-Making supra

965. Op. cit. at 193

966. To the extent that Wilson's detailed empirical work dealt with only a two year period around 1968 then it can only provide an image at one moment rather than over a span of time.

967. "Statutory Covenants" J.I. Reynolds supra

968. "Courts and Administrative Law", W.I. Jennings supra

969. Statutory Covenants supra

970. The existence of these unaided litigants during the period of study suggest that this was not an insurmountable barrier at this time amongst some sections of those renting dwellinghouse property. However, the absence of any organisation around specific forensic issues relating to habitability suggest that the most appropriate means of grievance solution was not forensic or even housing-based but rather broadly political.

971. In addition to the work of the various Trades Councils indicated already an organisation like the Forfarshire I.L.P. during the years 1908 to 1914 spent its time organising its local branches on very general lines having little time to deal with anything like housing. Apart from keeping branches going in rather unlikely agricultural soil, the only mention we get of housing is in March 1914 when the Dundee branch agitated in favour of free school meals and a housing scheme - Minutes of the Forfarshire I.L.P. Federation 1908 - 1915. The same sort of difficulties concerning the financing general propaganda characterised the work of the local Labour Representation Committee in the area although they did suffer more traumatically in 1913 when the whole of the Forfar branch went "B.S.P." - Montrose Burghs Labour Representation Committee, Arbroath Branch, Minute Book 1910 - 1914.

972. The Glasgow Workmen's Dwelling Company in which Smart and Mann played such an active part had begun their operations in 1890 with strong support from amongst local non-socialist politicians like William Bilsland and James Bell. Their notice calling for subscribers mentioned, not only that the intial Directors had put up some £15,000 but that the impetus to invest in this sort of quasi-philanthropy resulted from the combination of such things as "the impressive pamphlets of the Medical Officer of Health, the appointment by the Presbytery of Glasgow of a Commission to collect evidence, the formation of the Social Union; and the work of Kyrle Society" - The Bailie, 16th April 1890.

973. Thus, although there are mentions of the work of the Glasgow Social Union and although E. Moberley Bell in the biography of Octavia Hill suggests that her work came to Glasgow in the form of a Social Union, this body appears to have disappeared from the scene so far as leaving any records goes. One might have expected them to have featured in Evidence to the Presbytery Commission or the Municipal Commission but they did not.

974. Economy and Society supra at 976

975. One can perceive in the work of landlords like Guppy's and the various companies of the ill-fated William Stern, Metropolitan Properties and Freshwater, a series of specific moves to clarify the extent to which the Courts would direct Rent Assessment Committees. This work continues. A letter to the writer from Guppy's in January 1979 confirms that the process of redirecting fair rents is being debated again in 1979. Conversely the Small Landlords Association perceive in the pursuit of their goals of freedom from the "persecution and exploitation of the Rent Act" - 9th January 1979 Newsletter 1/79 of the Association - that many of their problems come from "prejudiced Law Centres" - ibid.

976. "The Squatters", Ron Bailey, 1973

977. This has not always been the case, although cases were in the nineteenth century simply shifted from the popular courts to those with less business to keep the judges employed - Scottish Law Review Vol. XII, 1896 at 201

978. Although this is not in itself conclusive of any 'campaign' but merely preliminary data that such might be taking place.

979. Crabb Watt had strong unionist connections and had a busy successful practice - S.L.T. 1900 at 41; 1915 at 78;

980. As an individual he had "practically no 'backing" with no known connections with any tenants' groupings. His subsequent Shrieval tenure was not marked by any tenant affection and it seems from contemporary reports that George Watt was retained for his forensic skill by a wide variety of lawfirms rather than as part of any pattern of tenant campaign. Scots Law Times, 1898, 205

981. "Fair Rents and the Judicial Control of Administrative Discretion", Paul Watchman, Conveyancer and Property Lawyer, May/June 1979

982. The Politics of the Judiciary supra at 116 - 120

983. "The Determination of Fair Rents", Peter Robson and Paul Watchman, New Law Journal, December 1978

984. Denning has also moulded the limited rights of licensees in the wake of the Rent Acts in the past thirty years - "The Hidden Wealth of Licences", Peter Robson and Paul Watchman, Conveyancer and Property Lawyer, 1979.

985. See Appendix VI

986. Lord Kingsburgh was the judicial title of J.H.A. Macdonald but he is better known as the author of Macdonald's Criminal Law of Scotland.

987. See infra at 502

988. See Appendix VI

989. Baikie v. Wordie's Trustees supra

990. Hall v. Hubner supra

991. See also at 268 which bears out this notion of no obvious tenant campaign.

992. It is notable, though, that of all the tenants and properties which were involved from working class property were almost all occupationally artisans or occupying property above the crucial £6 per year dividing line between slums and working class housing of the 'middling' sort - Peter Fyfe supra reference.

993. "The Merthyr Rising", Gwyn Williams, 1978

994. Hall v. Hubner supra; Baikie v. Wordie's Trustees supra and Turner's Trustees v. Steel supra

995. The reaction of Lord Kilbrandon and Professor Smith to the doctrine of Volenti indicates the difficulty of forecasting such matters

996. See Appendix VI

997. Defect obvious at time of commencement of tenancy

998. No other information through biographical notes or private papers appears to be accessible which might throw any light on Lord Adams decisionmaking here.

999. Church of Scotland, Church Secretary's Correspondence Ms. 7550, 7542, 7538, 7537, 7535, 7533

1000. Scots Law Times, 1893 1 at 311

1001. Scots Law Times 1929 at 21

1002. Scots Law Times, 1910, News at 38

1003. He was the author of "Trusts and Trust Settlements" (1863) which he produced during his early "lean" years at the Bar and was until the current decade the standard work on the subject thereafter along with his "Wills and Succession" (1868) in combined form.

1004. Lord McLaren, Juridicial Review, Vol. XXII, 182 at 190.

1005. Russell supra; Mechan supra

1006. McKimmie supra; Cameron supra

1007. Cameron 1907 S.C. at 481

1008. Apart from the silent concurrence of the Lord Justice Clerk, J.H.A. Macdonald in Dickie supra

1009. The Decadence of the Second Division, XII, Scottish Law Review, 1896 at 201.

1010. Scots Law Times, 1893, 1 at 311, 1913 at 125; 1918 at 1

1011. Letter to Professor Blackie, May 18th 1866 Blackie Papers Ms. 2627 f.20.

1012. Letter to Professor Blackie, November 19th 1890, Blackie Papers, Ms. 2683 f.173

1013. Russell supra; Mechan supra

1014. Petition in 1884 for his removal on the grounds that "His Lordship appeared as if inebriated towards the end of the trial, so much so he entirely forgot to tell the Jury that the accused were entitled to the benefit of the doubt". (N.L.S. Misc.)

1015. Lord Young, XXI, Scottish Law Review 1905, 149 passim

1016. Lord Young's correspondence with Lord Rosebery in 1881 and 1882 reveals Lord Young's desire to become Lord of Appeal down in London. Rosebery's advice and help is sought to offset the prejudice which he feels is held against Scottish appointments. His ennui with the Court of Session was marked. "I have done time. I have been a judge" - December 20th 1882. Young was prepared, though, "to take disappointment like a man" - January 1st 1882. From the tone of his letters over this period the desire to escape the confines of the Court of Session are clearly stated and he describes how his "heart ... is set on this thing ..." - April 14th 1882. Despite further repetitive obsessional letters, Young was disappointed, though he was given fresh hope in 1886 when he wrote about the rumour that Lord Blackburn is going to retire and how necessary a Scottish appointment would be - March 3rd 1886. The nearest to a happy end which Lord Young gets from Rosebery is the help which he secures for his sons on the setting up of a law firm in 1894 when he asks for a sinecure for them - December 3rd 1894. The tone of this later letter is much less bouyant and the assertive Young is reduced to abject begging - Rosebery Papers Ms. 10077; 10078; 10085; 10100.

1017. Dictionary of National Biography, 2nd Supp. Vol. 3 at 721.

1018. Scots Law Times, 1905, Vol. XIII, 1 at 2

1019. Scots Law Times, 1905 at 31.

1020. His correspondence with William Blackwood concerning his anonymous writings in the 1870s and 1880s are full of invective against the Liberals in general and Gladstone in particular. His attitude to legal scholarship seems to have been less important than political polemics. Referring to a new Manual on the Criminal Law Procedure Act in 1887, Macdonald explains that "my son and I will cobble one up before the Act comes into operation" - August 12th 1887 - Blackwood Papers 4409; 4435; 4447; 4460; 4504;

1021. The tone of the correspondence with Blackwood over the Dreyfus Affair is much less jolly and Macdonald appears shaken by the whole matter. His original article takes over 8 months to complete - Blackwood Papers Ms. 4691.

1022. The Scottish Judiciary, Juridical Review 1922, 73 at 75

1023. Letter of September 6th 1883, Blackwood Papers, 4447

1024. ibid.

1025. Letter of 6th February 1884, Blackwood Papers, Ms. 4460.

1026. Although one would not expect strong criticism there are no veiled allusions to Lord Young in Macdonald's autobiographical reminiscences - "Life Jottings of an Old Edinburgh Citizen", J.H.A. Macdonald, 1915

1027. Letter of January 15th 1881, Rosebery Papers, Ms. 10077 f.31

1028. Law, Justice and Politics, Gavin Drewry, 1975 at 68

1029. Asher v. Secretary of State for the Environment 1974 2 W.L.R. 466

1030. Secretary of State for Education v. Tameside Metropolitan Borough Council 1976 3 W.L.R. 641.

1031. Judge Mackinnon and the Kingsley Read case in January 1978

1032. See submission of S.T.U.C. on proposals to extend security of tenure to local authority tenants - March 1979

1033. The Politics of Housing in Britain and France, R.Duclaud-Williams, 1978

1034. The Crossman Diaries, Richard Crossman, 1975

1035. Sheriff Court actions as reported in the newspapers and journals of the time, as well as the Law Reports themselves do not appear to have been extensive.

1036. Graham on the Poor Law, 1922

1037. We find, for example, after the Taff Vale decision had been rebuffed in the Trade Disputes Act 1906 the judiciary in Scotland continue to operate the restrictice doctrine of "defect obvious at the commencement", thereby casting doubt on a simple notion of judicial "labour sensitivity."

1038. Marxism versus Sociology, Martin Shaw, 1974.

1039. The Condition of the Working Class in England, supra at 306

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