

Glamorgan Custom and Tenant Right*

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I

THE problem of tenant right pierces the core of one of the most fundamental characteristics of nineteenth-century rural society, that of land tenure and the nature of agricultural tenancy. It was a vital link in the transformation of the countryside into the realm of commercial agriculture where capital is the final measure of success or failure in the farming community. The study of local customs of tenant right, or of tenant right as an issue of agrarian social and economic reform, serves to elucidate the mechanics of this process but tends to emphasize local peculiarity or the philosophy of contemporary rural politics. Glamorgan Custom cannot be discussed as a local form of rural utopia. Comparison with the widely publicized tenant right custom of Lincolnshire illustrates the association between capitalism, tenurial change, and developments in the agricultural economy. The maturation and consolidation of local custom, its operation within the legal system, and the structural capacity to adapt to movements of agricultural fashion must receive primary consideration.

The essence of tenant right, according to either the dictates of custom or statutory law, is that the agricultural tenant upon the termination of his tenancy is entitled to compensation for labour and capital expended on the farm for which he did not receive the full benefit during his term of tenure. Unexhausted improvements which would profit the incoming tenant, or if the

farm was taken in hand, the landlord, constitute the *raison d'être* of tenant right. Compensation for such additions to the capital value and productive capacity of the farm involves the payment of a capital sum by either the incoming tenant or the landlord to the outgoing tenant based on an established scale according to the type of improvement as well as a systematic mode of judicious assessment. The scale was set to calculate capital payment in terms of the period of time over which the improvement was deemed to be beneficial, taking into account the general appearance and condition of the farm. Thus, if an input was considered to benefit the farm for three years and the tenant quit the holding one year after the initial investment had been enacted, he was to be compensated for two years' value of this investment which had not been realized. This closely resembled a type of insurance policy for personally invested capital and labour. The process of evaluation and assessment of the total state of the farm was a recognition of the farmer's effort and ability.

Tenant right epitomizes the idealistic view of landlord-tenant relations in the nineteenth century. It gave form and substance to the Cairdian model of landlord and tenant being actively involved in the process of agricultural production, in which the landlord provided the fixed capital in terms of the farm and appurtenant buildings and fixtures, and the tenant was granted protection for his labour and working capital, regardless of his term of tenure. According to Caird, the farmers were not to be considered mere husbandmen but small capitalists in their own right: 'But the tenant-farmers are

* I owe thanks to Dr David Howell, University College of Swansea, for reading this paper in manuscript, and for his helpful comments.

entitled also to be reckoned as part owners of agricultural property, for, in the crops and live and dead stock, they own equal to one-third of the capital value of the land.'¹ Caird's model implied that production in an increasingly competitive market economy was a cost-sharing venture, marked by mutual responsibilities and obligations between landlord and tenant. Commercial, capital-intensive agriculture in expanding economic regions like Glamorgan, combined with the active response of the local rural community to supply and demand factors demanded tenants of capital and enterprise, skill and initiative. The fickle nature of a competitive market placed the farmer in a tenuous position with respect to his invested capital. Currents of uncertainty prevented the complete surrender to new and improved modes of husbandry, all of which required liquid funds to initiate and risk to continue in operation. The landlord appeared as an inviolate entity while the farmer, along with the less deified capital which he had invested, was at the mercy of the market and the goodwill of the landlord.

The question of tenant right emerged as a major issue in the agitation of nineteenth-century reform advocates. It has been justly concluded that tenant right was one of the most prickly thorns in the verbal battle between agrarian reformers and the landed aristocracy during the Victorian era: 'Of all the issues . . . tenant right proved to be the most durable and significant.'² The demand for tenant right legislation became the focus of politically active reformers and their parliamentary supporters. Of supreme importance for the future of rural society was that tenant right provided a concrete object for landlord-tenant discontent. It was proof of the gradual erosion of traditional deferential relationships. The entire issue ' . . . transcended the ordinary channels of agrarian dispute to facilitate and to advertise the

disintegration of the long-honored connection between landed proprietors and their farmers'.³

Many counties and localities possessed the rudimentary elements of custom relating to the date and conditions of taking or leaving a farm, but comprehensive systems of compensation to the outgoing tenant, specifically with regard to the capital value of unexhausted improvements were quite exceptional. Lincolnshire Custom appears to have become the terminus of historical investigation and praise while that of Glamorgan, unique in Wales, has been ignored. Lincolnshire Custom holds the exalted position as the 'earliest example on a broad scale', and the sole progenitor of tenant right legislation.⁴ Other customs deserve a far more equitable share of attention. George Shaw Lefevre, a nineteenth-century reform advocate and critic of tenant right legislation, stated that only in Lincolnshire, Leicestershire, and Glamorgan were customs of tenant right 'sufficient and satisfactory' to provide adequate compensation following the Act of 1875.⁵ The fact that Lincolnshire Custom was the blueprint for subsequent legislation does not necessarily reflect the superiority of that custom. In 1881 Daniel Owen, a Glamorgan farmer and spokesman for local agrarian rights, contended that Lincolnshire Custom was 'inadequate and cumbersome' when compared with that of Glamorgan.⁶ It may also be argued that the comprehensive scope of Glamorgan Custom rendered it unsuitable for the basis of acts of parliament, an unpalatable pill for the majority of landed proprietors to consume with statutory gulps.

II

The tenets of Glamorgan Custom were geared to the orderly termination of tenancy

¹James Caird, *The Landed Interest and the Supply of Food*, Intro. by G E Mingay, 5th edn, 1967, p 43.

²Julian R McQuiston, 'Tenant Right: Farmer Against Landlord in Victorian England, 1847-1883', *Ag Hist*, XLVII, 1973, p 95.

³*Ibid*, p 112.

⁴*Ibid*, p 95.

⁵George Shaw Lefevre, 'The Agricultural Holdings Act, 1883', *Nineteenth Century*, XIV, No LXXX, 1883, p 676.

⁶Daniel Owen, *Tenant Right*, Cardiff, 1881, p 17.

following a notice to quit by either the landlord or the sitting tenant. A comprehensive scope of compensation for unexhausted improvements did not, however, suddenly emerge as an established custom without some pre-existing base, a tradition of accepted norms which governed the departure from an agricultural holding. Many of these basic customary elements were deep-seated long before the maturation of Glamorgan Custom as a sophisticated system of tenant right towards the middle of the century. For example, the tenant was entitled to either give or receive six months' notice to quit the holding prior to the traditional final date of occupancy, the second day of February. The outgoing tenant was free to retain, without charge, the farm house and the pasture field nearest the homestead until the end of his tenancy to the first day of May.⁷ In 1828 Grainger and Kennedy described a rather simplified version of Glamorgan Custom, apparently before it had developed into a fully-fledged system of tenant right. A tenant could usually remove hay and straw from the premises and either convey them elsewhere or be paid for their manorial value upon quitting the farm. In 'some few cases' the tenant was compelled to feed the hay and straw upon the land, leaving the manure for the future tenant. It was customary for the outgoing tenant to sow the wheat crop, and be paid for the same by the incoming tenant following a valuation by two or three neighbouring farmers. He was also compensated for the sowing of clover or grass seeds, according to a similar valuation based upon the cost of seeds and labour. The incoming tenant had the option to plough for his own fallows and spring crop, but he could not enter for that purpose before Ladyday (the time of his official and undisputed possession of the farm) without permission from the outgoing tenant.⁸

⁷Lascelles Carr, 'Convey, the Wise it Call', *Red Dragon*, I, 1882, p. 69.

⁸T B Grainger and L Kennedy, *The Present State of the Tenancy of Land in Great Britain*, 1828, p. 212.

Glamorgan Custom, in its most advanced and sophisticated form, was essentially a Vale phenomenon, colloquially entitled the custom of east and central Glamorgan, or that of south and east Glamorgan. The custom was limited to those sectors of the county east of the river Afan and dedicated to arable husbandry, especially the cultivation of wheat. Towards the western borders of the Vale of Glamorgan only the barest elements were visible and the scope, in addition to the scale of compensation, gradually contracted. For example, lime, the traditional manure of Welsh agriculture, was the basis of compensation in the western Vale. Compensation for lime was paid in full only the first year of application, and one-half the initial value for the second year.⁹ The *Report of the Welsh Land Commission* of 1896 stated that tenant right in the west related solely to lime, various other manures, seeds, and labour connected with these operations.¹⁰

There can be little doubt that Glamorgan Custom was sufficiently flexible to adapt to the peculiarities of each locality under its accepted sphere of jurisdiction and to accommodate changes in agricultural fashion. Deeper penetration into the Vale proper and the large arable farms customarily associated with the 'garden of Wales' reveals that the personality of tenant right assumes an increasing degree of complexity. Legal advice given to an estate agent relating to tenant right for a large arable farm near the most favoured area of the western Vale shows that the outgoing tenant was to receive payment for a wide variety of farm inputs: lime in full; ploughing, harrowing, dragging, rolling, and couching at a stipulated amount per acre; dung, but only if paid for by the outgoing tenant at his initial occupation of the farm; a rent allowance for land in fallow; an allowance for a lime kiln 'if lately built, and now in good repair'; carrying dung to the fallows, and

⁹Owen, *op cit*, pp. 19-20, 26.

¹⁰BPP 1896, XXXIV, p. 483.

spreading.¹¹ In another letter of legal advice relating to the same sector of the Vale, the outgoing tenant was to be compensated for the following: '... work and labour tillage corn and grass seeds and Lime & other manures done performed sown used and expended upon the said premises. ...'¹² However, the idea of compensation for unexhausted improvements, albeit in a highly simplified form, appears to have permeated far beyond the favoured climes of the Vale of Glamorgan. In the region of Pontypridd drainage improvements and dry stone walls fell within the realm of tenant right. The dry stone walls had to be at least five feet in height, but were not to exceed six feet. Both walling and drainage were eligible for compensation for a period of fourteen years.¹³ It is interesting to note that the dry stone wall was perhaps one of the most ancient improvements associated with Welsh agriculture; it had been employed for boundary fences and the keeping of mountain stock for centuries. This represents the geographical limit to which the Custom of Glamorgan could reasonably diffuse, touching the most elementary innovations in the highland region just to the north of the Vale. In fact, in many northern districts of the country, these were the only improvements which could be readily executed.

Towards the end of the century Glamorgan Custom had developed into a comprehensive system of tenant right, taking into account every aspect of county farming. The payment of compensation had extended far beyond the restricted confines described by Grainger and Kennedy in 1828. Time-lapse and set rates of compensation illustrate the important difference between the more simple customs of taking and leaving an agricultural holding and the more advanced concept of protection for invested labour and capital.

The evolution of the farmer as an entrepreneur increasingly reflected the ultimate domination of the farm unit by considerations of costs and prices. Glamorgan Custom mirrored this process. As the century drew to a close, rents, tithes, and taxes came to assume a far greater role in moulding the character of local custom. The outgoing tenant received a proportion of these capital payments with respect to fallows, as his successor would enjoy the benefit of tax exemption as well as that of the recuperated land.¹⁴ The same was also received for stubble from the autumn ploughing to the second day of February, and for land on which young seeds were growing that had not been fed off after the corn had been cut.¹⁵

The amount of compensation paid depended heavily upon the state of the farm at the time of valuation. This could reach a full two-years' rent for a well-kept mixed Vale farm of arable and pasture. As much as £5 to £6 per acre would be paid for turnips, but only £2 to £3 if they were to be sold off the farm. Farmyard manure was compensated for a period of three years: 2s 6d to 3s 6d for the first year, declining by two-thirds for the second year, and warranting only one-third the initial value for the final year. If the outgoing tenant should lay or trim hedges, compensation was permitted for up to one year for trimming, but was extended to three years for labour and the value of planting; the scale was one-third of the total value per annum for the latter.¹⁶

Glamorgan Custom appears to have been fundamentally supported by the twin props of wheat and turnips. The dominant mode of intensive agriculture during the mid-century was the Norfolk System, but this can only be considered a general guide as the Norfolk System was almost never found in its pure state. A wide variety of local mutations was characteristic of the county. Tenant right

¹¹ NLW (National Library of Wales), Penrice Margam, 9290.

¹² NLW, Penrice Margam, 9313.

¹³ BPP 1896, XXXIV, p 484.

¹⁴ Carr, *op cit*, p 69.

¹⁵ Owen, *op cit*, p 28.

¹⁶ *Ibid*, pp 27-8.

compensation was therefore geared towards facilitating a system of mixed husbandry. Drainage represented a fairly long-term investment, but a necessary pre-requisite to improve the impermeable clay soils of much of the Vale and put them in good heart for corn production. Manuring, fallowing, seeding, and crops were short-term investments according to any measure, but of absolute necessity in the prevailing trend of local agricultural production. Corn was the common denominator of the entire framework. In fact, farm valuation to assess the capital value of tenant right was based upon wheat, a crop which seems to have held an almost mystical fascination for contemporaries. Each party, whether it be the outgoing tenant, the incoming tenant, or, if the farm was taken in hand, the landlord, had the right to select an independent valuer of his own choice. The valuation was made according to the value of the wheat crop upon the land. In the event of a dispute, an umpire was selected to enact a judgement, a decision which was deemed to be final and binding for the parties concerned. The method of valuation and recourse to an umpire was perhaps the most superb example of what contemporary critics viewed as the ideal partnership of landlord and tenant. It made tenant right a viable, realistic mechanism when legislation was non-existent. Without this mode of judgement and arbitration, Glamorgan Custom would have sunk to the status of a flouted law, an absurdity popularly evaded and often scorned.

The bill for tenant right could be fairly extensive, and often ranged from 20s to as high as 60s per acre. Scale rates were flexible enough to accommodate various states of farm quality. For turnips £5 to £6 per acre could be paid if two-thirds of the crop was consumed and tillage done and manure laid; £2 to £3 if turnips and swedes were sold off the land but the manorial value retained through artificial or other fertilizers; £2 to £3 if the turnips were retained upon the land; 10s

to £1 per acre if the turnips were carried away, plus the price for seeds sown and labour done for sowing, harrowing, and rolling. Farm manure applied to grassland warranted compensation for the full value during the first year according to the cart load, taking into consideration the quality of manure and distance of haulage. On arable land manure was compensated for a three-year lapse period. If two straw crops were taken from a manured field no compensation was paid. Nothing at all was paid for the construction, enlargement, or repair of farm buildings. No machinery could be removed from the farm, whatever the circumstance. The laying down of arable land to grass, considered by many to be the most valuable improvement towards the end of the century, did not fall within the scope of Glamorgan Custom and nothing was granted for its execution.¹⁷ Arable agriculture was definitely the environment in which the Custom matured and flourished.

Lincolnshire Custom was in many respects similar to that of Glamorgan, but there were fundamental contrasts which reflected variations in local modes of agriculture, and a different pattern of development. Basic structural characteristics such as the farm valuation, appeal to an umpire in the event of a dispute, the sliding scale and a period of time to denote the productive capacity of the improvement in question, and local peculiarities within county borders, were common features of both customs. Lincolnshire Custom was largely based on underdraining, feeds such as oilcake, and fertilizers in the nature of guano, bones, lime, and claying.¹⁸ One basic difference was that in Lincolnshire permanent additions to the farm like farm buildings warranted compensation for a period of up to twenty years if constructed by the tenant's labour and capital. In Glamorgan, as in the rest of Wales,

¹⁷ BPP 1896, XXXIV, pp 483-4; David Grigg, *The Agricultural Revolution in South Lincolnshire*, Cambridge, 1966, p 134.

¹⁸ McQuiston, *op cit*, p 95; R J Olney, *Lincolnshire Politics, 1832-1885*, 1973, pp 41, 224.

it was standard practice for landlords to supply the material and skilled labour for the construction of farm buildings, and the tenant the haulage and unskilled labour. The tenant, however, was almost universally bound by contract to execute all repairs on buildings to the satisfaction of both the landlord and the incoming tenant. In this instance it was the landlord's capital expenditure which was receiving the benefit of protection, while the tenant's contribution of haulage and labour was more in the nature of a service, a burden without compensation or return.

Lincolnshire Custom appears to have been primarily suited to high farming. For example, storage of cattle feed was paid up to a maximum of two years. In the 1840s allowances were beginning to be made for oilcake fed to cattle in the yard. It was not until 1879–80, however, that compensation was adopted for liming, marling, and claying on the principle of a seven-year maximum period of exhaustion. Allowances for underdraining ran from seven to fourteen years. In light of these improvements it is justifiable to state that Lincolnshire Custom matured in the 1840s when high farming was reaching a state of entrenchment: '... its origin was connected with the spread of high farming'. But long-term investment of a more enduring nature was also evident, tending towards the promotion of land reclamation by individual farmers. A tenant who took an upland farm in a barren state would pay a very low rent for the first few years of his tenancy. Rent was increased when the land was in good heart, and began to yield substantial crops.¹⁹ It may be contended that there was an almost natural thirst for agricultural improvement, a drive to review a state of affairs and seek a remedial course of action. Perhaps in both the 'garden of Wales' and Lincolnshire the tradition of adaptation to natural problems of soils and climate instilled a psychological freedom to experiment, a catalyst for change

and innovation. What is certain is that the desire to improve, the challenge of market demands, and the existence of at least significant amounts of capital were necessary pre-requisites for the establishment of tenant right as a local custom.

III

The acceptance of a custom of tenant right is parallel to changes in the prevailing matrix of land tenure, as well as the availability of technology and developments in agricultural acumen. It has been quite accurately stated that tenant right '... developed of its own accord out of the circumstances created by the year-to-year tenancy'. Compensation was therefore a substitute for security of tenure, a welcome alternative, for 'It did not hang the weight of a long lease about the neck of the tenant. . . .' Lincolnshire Custom, in fact, became embedded in that county when agricultural profits had diminished and farm expenditures were reduced by landlords and tenants alike following the disaster of the post-Napoleonic War period. The emergence of yearly tenancy not merely gave the landlord a greater degree of control over his own property, but provided the tenant with a short-term escape from distress when markets and prices crashed about him. Depression and prosperity set the parameters within which tenant right could function. In Lincolnshire, custom was employed as a guideline during periods of depression, testing the tenant's ability to retain his holding, and helping to make the landlord's decision as to whether or not the financially troubled tenant would be permitted to hold the farm in future.²⁰ Around Loughborough in Leicestershire farms were generally let on twenty-one-year leases, but tenant right clauses were generally included in the lease to provide additional security for the farmer's capital. A contemporary advo-

¹⁹ Olney, *op cit*, p 41.

²⁰ Joan Thirsk, *English Peasant Farming*, 1967, p 266; J A Perkins, 'Tenure, Tenant Right and Agricultural Progress in Lindsey, 1780–1850', *Ag Hist Rev*, 23, 1, 1975, p 315.

cate of tenant right, Charles Stokes, believed that on small farms which did not require a great deal of capital, tenant right was vastly superior to long leases. But on the Bute estate in Glamorgan tenants of small capital disliked the payment of tenant right anterior to entry, a bill which was invariably less than a full two years' rent. In 1829 the second Marquis of Bute compensated the outgoing tenant of Rhydpennau on the basis of an understanding that the new tenant would make no claim upon his departure.²¹

Glamorgan Custom followed the general pattern of tenurial development. The drive towards corn production during the war period, often characterized by the breaking up of valuable pastures, the growing of successive crops of corn which exhausted the soil, and the uncontrolled lust to grasp higher prices, left much of the 'garden of Wales' in a desolate state. An 1816 survey of the Dinas Powis estate, located in a favoured sector of the eastern Vale of Glamorgan, serves to elucidate the extent of this dilapidation. Much of the land was 'Poor and wet Starved by the Stagnated water no discharge for the same'. Meadow grass had deteriorated, and what little manure was applied was almost useless owing to the lack of proper drainage facilities:

... there is not an acre of it properly Cultivated and treated the Ditches and watercourses full of mud ... the fences out of repair together with all the Buildings not a Gate or Bars on the Estate. In short every thing Seems in ruin.²²

Contemporaries insisted that long leases, encouraging a farmer to exhaust the soil for the term of his tenure, receiving the highest level of profit with little or no input costs, were the ultimate cause of farm deterioration. A concerted policy to let leases fall in was widely adopted by county proprietors. Yearly agreements, many of them verbal, became the dominant mode of tenure in lowland Glamorgan by the middle of the

century. Indeed, long-term investment in underdraining may have been conducive to the granting of long leases when both farmers and capital were equally scarce. On the other hand, allowances for short-term investments like seeding and manuring, especially in order to attain substantial turnip and wheat crops, alleviated the air of uncertainty associated with yearly tenancy. Farmers were striving for greater levels of production, receiving lower prices in spite of expensive inputs, but maintaining a profit margin by increased sales of produce. Only a high and constant demand could justify this measure. Tenant right was virtually a necessity in this fragile economic milieu.

IV

Real property law and the actual operation and legality of tenant right as a local custom before the era of statutory legislation are fundamental problems which have not been fully investigated. It is essential to advance a definition of custom and define its true legal status. Without a strong legal basis customs of tenant right would not have been the darlings of agricultural commentators and reformers. It is clearly absurd to consider security for capital when undisputed security of custom has not been established.

The concept of tenant right was not merely a heady idea of land reform advocates or the mysterious consequence of ancient practice. It had legal precedent and a solid base upon which to theoretically expand into more general usage. Within the confines of the common law a tenant was guaranteed certain compensatory rights, under specific conditions entitled emblements. If a tenancy was unexpectedly ended owing to some totally unforeseen circumstance, during a period in which the occupier's crops were growing, the tenant possessed the right to enter on the land and harvest the crops, irrespective of the termination of his tenancy.²³ The law concerning emblements

²¹ Charles Stokes, 'On Securing to the Outgoing Tenant a claim to Unexhausted Improvements', *JRASE*, 6, 1845, p 47; David W Howell, *Land and People in Nineteenth-Century Wales*, 1977, p 88.

²² NLW, Dinas Powis, 412.

²³ Gibson's *Conveyancing*, 5th edn, 1938, p 398.

was particularly relevant to those tenants who held an interest in the land which was terminated by the whims of fortune, and not in the normal course of contractual release. It did not apply to non-agricultural tenancies. If a tenancy ended prior to the actual harvest the tenant was entitled to enter and reap the growing crops when they had ripened. This right only extended to 'artificial' crops annually produced by the labour of the tenant. Crops like wheat (*blé* being corn, the French or law-French origin of the word *emblemment*) and turnips were therefore protected, but perennial crops like fruit were not afforded the benefits of the right to enter and reap.²⁴

The law of *emblemments* closely followed the pattern of land law legislation during the course of the nineteenth century. According to the Landlord and Tenant Act of 1851 a tenant for years at a rack rent, whose lease had expired owing to the failure of the lessor's estate could, in lieu of *emblemments*, remain in occupation until the end of the current year of tenancy.²⁵ The common law with respect to *emblemments* and agricultural tenancies at a fixed rent was superseded by later acts pertaining to tenant right. Tenants for life, however, farming what was in reality their own land, were not covered by the provisions of tenant right legislation, and continue to enjoy, in equity, a right to *emblemments*.²⁶

The example of *emblemments* provided a legal as well as an intellectual justification for nineteenth-century land reform advocates of enforced tenant right. In 1883 George Shaw Lefevre employed the precedent of *emblemments* to depict the ultimate logic of compensation for agricultural tenants. He gloried in the fact that neither party could contract out of the tenets of the common law. Lefevre emphasized that this doctrine should be extended to improvements in addition to

growing crops, a modification which he believed would illustrate the real nature of cost-sharing in agricultural production between landlord and tenant.²⁷ Ironically, the common law itself was more ancient than custom with regard to tenant right on a wide scale.

The actual legality of custom *qua* custom may at first sight appear to taint the validity of tenant right with a hue of uncertainty, relegating it to the status of an extra-legal, non-legislative phenomenon with no solid foundation or effectual means of enforcement. On the other hand, it must be realized that until the revolutionary legislation of the 1920s customary law did have a tremendous bearing on the entire edifice of the law of real property. Of Lincolnshire Custom it has been stated that agreements with respect of tenant right were sometimes included in the lease agreement, but tenants strongly preferred the actual custom '... which grew to have almost the force of law'.²⁸ The concept of acceptance rather than legality remains the standard interpretation concerning Lincolnshire Custom: 'By the 1840s the custom was well established, although it had no legal basis and remained simply an accepted understanding between landlords and tenants throughout the century.'²⁹ This is precisely what had happened in Glamorgan, at least in terms of general acceptance and, adherence to the principles of tenant right. But whether mere custom or not, what was according to the custom of the country was also the law of the land where that custom prevailed. Suits at common law over the interpretation or even implementation of Glamorgan Custom were not unknown. In fact, it was clearly stated in the *Report* of the Welsh Land Commission of 1896 that if documents prepared by the valuers went unheeded by either the landlord or the incoming tenant, the outgoing tenant had the right of recourse to a suit at common

²⁴ G C Cheshire, *The Modern Law of Real Property*, 5th edn, 1944, p 166.

²⁵ *Ibid*, p 166.

²⁶ G R Y Radcliffe, *Real Property Law*, 2nd edn, Oxford, 1938, pp 31-2.

²⁷ Lefevre, *op cit*, p 682.

²⁸ Olney, *op cit*, p 41.

²⁹ Grigg, *op cit*, p 134.

law.³⁰ Obviously, the apparent laxity of custom as a term of reference mattered little with regard to legal validity.

The strict legal definition of custom is of particular importance to the present analysis of tenant right: 'Custom is an unwritten rule of law which has applied from time immemorial in a particular locality and which displaces the common law in so far as that particular locality is concerned.'³¹ The displacement of the common law is what gives any custom its peculiar local flavour, and distinguishes it from a mode of behaviour; at that point it becomes an institution enforced by the hand of authority. But laws and institutions by their very nature must be formal and specific. A custom must possess five essential criteria before it bears legal weight: it must be certain, reasonable, have existed from time immemorial, have continued without interruption, and be applicable to a particular locality. Restriction to a specific locality and the existence from time immemorial must be satisfied before the remaining criteria formalize the custom. The problem of immemorial time may be satisfied by either unopposed acceptance or the recognition of a modern phenomenon which has become established owing to a prior, but recent grant, from some undefined source: the mists of the past, perhaps excused on the basis of the doctrine of emblements or the existence of customs of taking and leaving an agricultural holding, would provide adequate proof. Custom is not, however, to be confused with prescription, a right vested in an individual, an estate, or a title. In order for a person to fall under the jurisdiction of custom, an attachment of the right to a specific locality must first be ascertained, followed by a proven connection with that locality of the individual concerned.³²

An epidemic of legal action concerning Glamorgan Custom on the Margam estate

during the 1840s serves to illustrate the ultimate legality of custom. Both custom and lease agreement appear to have been carefully weighed in the legal technicalities following a dispute. For example, in one instance landlord and tenant were both held responsible for reciprocal compensation, the landlord according to the custom of the country, and the tenant by contractual agreement.³³ Very often, it appears, compromises were made in order to evade the expense and inconvenience of legal procedure. An attorney's letter elucidates this form of tactful evasion:

... he has laid out considerable sums for improving these farms — amounting to £156 - 14 - 0 ½ ... I believe he is willing to accede to every thing that is just and according to the Custom of the Country ... P.S. I think if you allow him the half years Rent due 25th. inst. and pay him the balance of £125. 19. - 0 ½ ...³⁴

In one case of dispute it was ruled by the court that further procedure be deferred to arbitration based on the value of the wheat crop. The court made custom itself the basis of justice, providing that the outgoing and the incoming tenants, suitors in the dispute, made written submissions to the assessors and the umpire.³⁵

It is quite clear that Glamorgan Custom was intended to promote the compensation of conscientious farmers genuinely interested in improvement, not slovenly men oblivious to committing acts of waste to the farm and eager to receive payment for dilapidation and poor husbandry. This idea extended to farming techniques in addition to general appearance. For example, in Lincolnshire a tenant was not permitted to break up grass land without permission, or to sell any hay, straw or manure off the farm. The tenant was also to keep fences, ditches and buildings in good repair.³⁶ There were similar safeguards in Glamorgan, and these

³⁰ BPP 1896, XXXIV, p 483.

³¹ Cheshire, *op cit*, p 291.

³² *Ibid*, pp 292-4.

³³ NLW, Penrice Margam, 9290.

³⁴ *Ibid*.

³⁵ NLW, Penrice Margam, 9319.

³⁶ G M Williams, 'On the Tenants Right to unexhausted Improvements according to the Custom of North Lincolnshire', *JRASE*, 6, 1845, pp 44-6.

were widely accepted as part of the initial contract between landlord and tenant. In one instance a tenant was given notice to quit by his landlord for non-payment of rent, obviously following a period of severe disagreement over a variety of matters. The landlord chose to ignore tenant right while the tenant apparently wished to remove the farm from the very face of the earth on his departure. Compensation was owing to the tenant for any improvement made by the employment of his own labour and capital, but the court was also bound to honour the terms of agreement with his landlord in addition to local practices of good husbandry. The tenant was compelled to leave all dung on the farm, not less than twenty tons of good straw, all other hay or fodder belonging to the farm, and 120 acres in either naked fallow or root crops. All fences, buildings, and other farm structures were to be left in good repair, and the outgoing tenant was not to sublet the cottage, grass or turnips during the final year of his tenancy. Both landlord and tenant were ruled to share the cost of court proceedings. The cash settlement was based on the arrears of rent owing by the tenant. An abatement of £510, however, was made by the landlord out of an investment in buildings begun by the tenant but not completed. The remaining arrears were to be remitted, and only the abatement was raised for any additional improvement.³⁷ In effect, the formal contractual agreement and Glamorgan Custom were part of the same package of legal protection.

In Lincolnshire there were a few cases where landlords refused to pay the outgoing tenant compensation for certain improvements. A 'Special Jury' ruled in one instance that the tenant was entitled to compensation for rent and taxes only on summer fallowed land, and 'for fold-yard fences and buildings five or six inches only in the ground'; other claims were rejected. In another case the court refused to grant a tenant compensation

for bone manure and marl laid upon the land the year prior to his quitting the farm. The court ruled that the landlord was not liable as tenant right was a matter to be settled between the outgoing and the incoming tenant.³⁸ This does not imply that tenant right was not considered legally binding but that both custom and the law agreed in that the matter was solely related to tenants, and not to the owners of the soil. In Glamorgan it appears that although at least one landlord was attempting to establish his independence from liability, custom was more comprehensive and deeply rooted.

V

The Agricultural Holdings Acts of 1875 and 1883 provided an acid test for Glamorgan Custom. Although the statute of 1875 contained the essence of the idea of tenant right, it bound neither landlord nor tenant. The private contract remained supreme, so much so that the landed proprietors unfavourable to the granting of compensatory allowances simply contracted out of the Act. The legislation of 1883 was more universal in scope, and represented what may be truly dubbed a revolutionary stage in the development of the law of real property. Contract was placed in a subservient position with respect to parliamentary legislation governing the termination of agricultural tenancies. By the provisions of the Act it was made impossible to waive tenant right by contractual agreement. Compensation for unexhausted improvements according to their capital value became the letter of the law.

The Glamorgan response to the Act of 1875 was quite simple: '... negative replies were given for the whole of Glamorgan-shire. . . .'³⁹ If tenant right was to be enshrined as a legal institution by the Act of 1883, the legislators also realized that local customs were not inferior to statutory reform. This Act was based on the much-

³⁸ Perkins, *op cit*, pp 20-2.

³⁹ BPP 1896, XXXIV, pp 496-7.

³⁷ NLW, Penrice Margam, 8661.

vaunted Lincolnshire Custom, but the statute declared that where local custom was preferred by the inhabitants, landlords and tenants could reach an agreement of their own accord before the Act came into effect. Customary tenant right regulations then came to possess the force of a statute pertaining to that locality.⁴⁰ Statutory legislation, undoubtedly a boon to the farmers of less fortunate climes, was not enthusiastically received by the farmers of Glamorgan and Lincolnshire. Compensation for liming, boning and feeding stuffs could have little effect where traditional modes of tenant right had been long rooted in the fabric of agricultural production. The Lincolnshire Chamber of Agriculture proposed that local custom should remain the foundation of payments with respect to temporary improvements rather than the procedure set forth by the Act. Both the Chamber and the local valuers were to reach an agreement regarding the exact clauses of Lincolnshire Custom.⁴¹ In Glamorgan, however, 'landlords and tenants alike' strongly preferred the letter of local custom, and a general lack of interest appears to have been the rule: '... over the greater part of the county of Glamorgan... this Act is confessedly a dead letter. Nobody attempts to contract out of it; for the plain fact is that nobody takes the slightest notice of it.'⁴²

Evidence given before the Royal Commission on Agriculture, 1882, bears out the fact that local farmers had little interest in tenant right legislation. Out of nineteen testimonies presented by Glamorgan farmers, only one stated that Glamorgan Custom did not apply to his farm: all others made specific mention of tenant right being the norm, in one instance being rather proudly referred to as 'our country custom'. One farmer considered Glamorgan Custom 'if not abused' to be 'far superior to the Agricultural Holdings Act'. Another tes-

tified that, although he held his farm by agreement, he was still covered by the custom of the country. There were absolutely no criticisms of Glamorgan Custom. General satisfaction was the dominant chord.⁴³ Local farmers however, did react more strongly to the legislation of 1883. Glamorgan farmers essentially scoffed at the Act. They were repelled by the appeal to a court of law, if necessary, when the award exceeded £100 to the outgoing tenant. The choice of local valuers and arbitrators, as well as the binding decision of the umpire in the event of a dispute, were universally preferred.

The Act of 1875 was irrelevant to those areas of Glamorgan governed by customary tenant right. In those regions of the county where custom was either severely diluted or non-existent, the Act had the effect of prompting landlords to grant contractual agreements which were not only superior to the Act itself, but as definitive as the custom then prevailing in the Vale. A lease of 1877 from the Aberpergwm estate, situated in the Vale of Neath, a locality where it had long been known that Glamorgan Custom had no validity, serves to prove this hypothesis. The agreement clearly stated that both custom and parliamentary legislation were in no way related to the contract: 'Neither the AGRICULTURAL HOLDINGS (ENGLAND) ACT, 1875, nor any custom of the Country, shall apply to these presents, or the tenancy hereby created.'⁴⁴ The agreement then outlined a contracted form of tenant right. Drainage was considered to be of paramount importance. If the landlord supplied the tiles and the tenant the labour, the labour was compensated on a declining scale of four years, but if the tenant supplied both material costs and labour the compensation was extended to eight years. All drainage operations had to be executed according to a plan agreed upon by the landlord and his agent. Manure also warranted compensation. If

⁴⁰ Lefevre, *op cit*, pp 682-3.

⁴¹ Olney, *op cit*, p 225.

⁴² J E Vincent, *The Land Question in South Wales*, 1897, p 87.

⁴³ BPP 1882, XV, p 23.

⁴⁴ NLW, Aberpergwm, 2216.

only one crop had been taken following the use of artificial manure and the land was clean, the tenant was to be paid one-half the original cost, proof of the quantity employed in addition to the initial cost being presented. The cost of dilapidation and any evidence of sloth in the repair of farm structures was laid solely upon the tenant. Arbitration measures were also included as part of the agreement. One referee was to be chosen by the landlord and another by the tenant, but an umpire, regardless of whether or not a dispute was in the offing, was to be chosen by the valuers 'before they begin to act'.⁴⁵ It appears that this lease tended towards a far stricter definition of Glamorgan Custom, limiting the scope of compensation, but stressing the mutual involvement of landlord and tenant in the preservation of farm quality and the propensities for increased agricultural production. This was not really contracting out of the Act of 1875; the lease more closely resembles a contracting into a modified version of Glamorgan Custom. From the landlord's point of view, this measure was designed to reiterate and emphasize the almost celestial aura of contract, whereas the tenant reaped the benefit of land reform agitation without the trouble of actual involvement. It was a skilful compromise, but advertised the fact that the landlord was in control of estate affairs. On the larger estates coffers were overflowing with the royalties and rents accruing from coal and mineral operations, and the proprietors could easily afford to subsidize needy tenants during periods of economic distress. On those estates where landed incomes were entirely dependent upon agricultural rents, especially during this age of difficulty, such help was not forthcoming.⁴⁶

Glamorgan Custom, especially near the twilight of the nineteenth century, was not without its critics, despite the commonly-held belief that '... everything good in the

farming of this division of the county (Vale of Glamorgan) owes its position' to the protection offered by tenant right. Complaints were frequently made concerning heavier than usual bills being presented to incoming tenants 'in the hands of unscrupulous men'. The incoming tenant was compelled to expend a substantial sum at the beginning of his tenancy, an amount which would remain frozen, and could be regained only by his departure from the holding. Thus, a temptation was provided for those 'unscrupulous men' to realize a little hidden interest on their original investment by raising the tenant right bill, or even to make a racket out of frequent taking and leaving farm holdings.⁴⁷ Complaints were often voiced pertaining to the allowable periods of time under which compensation for drainage improvements were made. Many witnesses testifying before the Welsh Land Commission of 1896 believed that the usual fourteen years should extend to twenty, or even as high as thirty years, especially if drains were constructed of stone instead of the less durable tiles. The amount of time for which dry stone walls were compensated met with the same criticism.⁴⁸ Glamorgan farmers were even exhibiting a tendency to prefer one aspect of legislated tenant right contained in the Act of 1883, that related to compensation for the laying down of arable land to grass.⁴⁹ This spelled the first complete rift in the local faith in Glamorgan Custom as the saviour of farmers and the prime mover of agricultural improvement. With the decline in arable agriculture owing to the 'Great Depression' the laying down of arable land to pasture was the major weapon in the battle to maintain the vitality of the local farm economy.

⁴⁵ Ibid.

⁴⁶ See A W Jones, *Agriculture and the Rural Community of Glamorgan, circa 1830-1896*, Swansea, unpubl. PhD thesis, 1980, ch IV and VI.

⁴⁷ W Little, 'The Agriculture of Glamorganshire', *JRASE*, 2nd ser., XXI, 1885, p 181.

⁴⁸ BPP 1896, XXXIV, pp 714, 720.

⁴⁹ Little, *op cit*, pp 181-2.

VI

The origin of tenant right is marked by a distinctive air of uncertainty, even mystery. Many contemporaries believed that Glamorgan Custom had emerged at an extremely early date, shrouded in the mists of Norman times. It was put forth by the Welsh Land Commissioners of 1896 that Glamorgan Custom had emerged only in the first quarter of the nineteenth century, and had reached its age of maturity towards the early 1840s. They held, quite logically, that the emphasis on drainage and the cultivation of turnips in order to increase corn yields provided sufficient proof that Glamorgan Custom could have come into being only when agriculture had reached a fairly advanced state, and not before.⁵⁰ But this assertion relates most strongly to tenant right, and not the real essence of custom *per se*. It is perhaps most reasonable to assume that the drive towards highly advanced styles of husbandry effected a revolution in the more traditional customs associated with the orderly taking and leaving of a holding. The local importance of the corn crop and the large-scale drainage operations necessary to initiate modes of intensive agriculture clothed the bare bones of ancient custom with the more tangible garb of tenant right. Shortage of capital and the unwillingness of entrepreneurs to invest in agriculture, despite the brisk demand for foodstuffs engendered by the demographic explosion of the South Wales Coalfield, was a serious hindrance to the implementation of innovative farming techniques. Intensive agriculture, if a viable means of maintaining a profit margin by increased production and sales of produce during an era of low returns, necessitated a vehicle for the guarantee of capital investment in an economic milieu so prone to price fluctuations and the vagaries of nature. This is precisely why tenant right emerged when it did, greatly expanding the parameters of local pre-existing customs into a comprehensive mechanism to promote investment

from the only source of willing entrepreneurs, the tenant farmers.

In 1882, Lascelles Carr, a local spokesman for the landed proprietors, stated that the custom of the country was '... gradually built up by the mutual good sense of landlord and tenants recognising in a spirit of equity the necessities of the case'.⁵¹ If Lincolnshire Custom had emerged with the diffusion of high farming, then it was the domination of the county's agriculture by various mutations of the Norfolk System in the period following the Napoleonic Wars, and the subsequent attention given to high feeding, which established the economic basis of Glamorgan Custom.⁵²

Towards the end of the century, and with the 'Great Depression', Glamorgan Custom was failing to hold its reputation as the saving factor for local tenant farmers. It became a constituent issue in what has been termed the 'Land Question'. The depression, much like the previous turmoil in the wake of the Napoleonic Wars, provided the opposite end of the spectrum; it brought the question of tenant right into the limelight. Shortage of capital within the agricultural community, the failure of some farmers, and the difficulty of finding fresh tenants financially capable or even willing to take a farm, changed Glamorgan Custom into a matter between landlord and tenant rather than an amicable settlement between the outgoing and the incoming tenant. The role of cushion was replaced by a bed of thorns in the side of landlord-tenant relations.

John Howells, a local tenant farmer who wrote in 1882 to defend his beleaguered class, presented an incisive analysis of Glamorgan Custom with respect to its origin and subsequent development:

Until about 1840 it was an unwritten custom, handed down for generations from father to son, constantly advancing and adapting itself to the necessities and growth of the agriculture of the district, and an

⁵⁰ BPP 1896, XXXIV, p 489.

⁵¹ Carr, *op cit*, p 69.

⁵² Jones, *op cit*, ch III.

excellent incentive to the adoption of every new method and improvement in farming.⁵³

The chain of natural adaptation to changing circumstances was broken at a time when Glamorgan Custom had reached its age of maturity, and had encompassed most of the improvements associated with intensive arable agriculture. Farmers would not willingly sink funds to convert to permanent grass in this tenuous economic era without a sound guarantee that it was not a bottomless pit of no return.

Glamorgan Custom, just when it had reached an advanced stage of maturity, suffered the straight-jacket of stringent definition. About the year 1840 the principal landlords and tenant farmers of Glamorgan and Monmouthshire held a series of meetings in Cardiff, and '... with the best possible intentions, formulated it into a system'.⁵⁴ At these meetings the tenets of custom were established, and the parameters set forth in which it would operate and function. Scales were set, and improvements stilted in the prevailing tendency towards intensive agriculture. No doubt the landlords were anxious to check and define a phenomenon which would give the tenants an advantage in adverse economic circumstances, especially if farms were to be taken in hand and the owners were faced with heavy bills for tenant right. The tenants, however, appear to have been willing or at least acquiescent partners in this definition of local custom. They saw their prized 'custom of the country' sanctified as an accepted institution and their capital freed from uncertainty. But this act was contrary to the very idea of custom. It was as if a group of men, unaware of future developments in the agricultural economy, and short-sighted enough to believe that the prevailing agricultural fashion would survive into eternity, were meeting to plan when, where, and how a custom was to occur. At first sight, this

agreement might appear as laying the legal basis of custom in Glamorgan, but the progress, or even regress of agriculture, would of itself force occasional modification. Consensus served to codify a system of widely accepted norms and values, eliminating the aura of freedom, and replacing it with that of conformity and coercion.

A form of bureaucracy was introduced into the mechanical workings of Lincolnshire Custom, but it was intended to permit periodic revision. From 1873 the Tenant Right Valuer's Association met annually to adopt a flexible scale of compensation designed to alter with changes in farming practices.⁵⁵ In Glamorgan, however, further development appears to have been effectively discouraged, and measures to alleviate agricultural distress towards the end of the century by the conversion of arable land to grass, could not be accommodated except by statutory enactment. Glamorgan Custom could not function as Glamorgan System, but had become stunted, rooted in momentary consensus. Such inflexible systems are not as beneficial in a changing economic environment, and lack the capacity of custom to bend and weave according to the whims of agricultural fashion:

This act of theirs, which assumed the custom to be full grown, had quite unintentionally the effect of checking its natural development; and it has become quite doubtful whether at the present, taking into consideration the changes and progress in agriculture which have recently grown so rapidly, whether the custom has kept pace with the advance in farming or even advanced at all.⁵⁶

The conformity and systemization of Glamorgan Custom had stripped it of the 'necessary amount of elasticity and powers of adaptation' and the inherent ability to change according to the personality of the market or the advance of technology.⁵⁷ A custom it was, and a custom it should have remained.

⁵³ John Howells, 'The Land Question from a Tenant Farmer's Point of View', *Red Dragon*, II, 1882, p 81.

⁵⁴ *Ibid.*, p 81.

⁵⁵ Olney, *op cit.*, p 224.

⁵⁶ Howells, *op cit.*, pp 81-2.

⁵⁷ *Ibid.*, pp 81-2.