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Udal Law

In the reported cases involving udal law, the main issues raised have related to land, or rights arising from the ownership of land.[1] In Scotland, virtually all of the land which is owned, is held on feudal tenure, by which is meant that the Sovereign is the original owner and all rights in land derive from the Sovereign. There are some exceptions to that, such as land held by the Kindly Tenants of Lochmaben,[2] whose ownership is ascertained from records kept by the Earl of Mansfield.[3] The exception with which we are concerned are the lands of Orkney and Shetland, which are held on udal and not feudal tenure, the distinction being that there is no overlordship in the Crown. It is a form of allodial property.[4] While the feudal system spread over much of Europe, it did not reach the Scandinavian countries.[5] From about the end of the 9th century until 1468, Orkney and Shetland were part of the kingdom of Norway.[6] Prior to 1468, although the islands owed allegiance to the King of Norway, there were no military or personal obligations owed to him. The islands were divided into 10 or 11 districts and each was governed by a foude, assisted by ranselmen. Each year, an assembly, the Alting, met at Tingwall and enacted the laws for the islands.[7] However, there were no military or personal obligations owed to the King as a *reddendo*,[8] a feature of the feudal system under which the obligations were due, in a sense, from the lands themselves.[9] While scat was paid to the Earls of Orkney, it was a tribute to the state, rather than a feuduty.[10] Under the udal system, ownership of the land went to the first person who enclosed lands with the intention of improving them, and there was no overlord.[11]

In 1468, James III of Scotland married Margaret, the daughter of Christian I of Norway[12] and received a dowry of 60,000 florins[13] (this sum has been calculated to be

£24,166.67[14]) of which only 10,100 was to be paid in cash. The remainder was secured over the lands of Orkney and Shetland which, in 1468 and 1469 respectively, were pledged to the Scottish Crown.[15] Shetland was pledged in 1469 because Christian was able to pay only 2,000 florins towards the cash payment,[16] because of a revolt in Sweden.[17] It appears that the pledge was never redeemed and Craig takes the view that the right to redeem had been renounced.[18] That view has been disputed and indeed, there has been a great deal of debate about precisely what was intended and about what was pledged.[19] However, there was an Act of the Scottish Parliament in 1469 dealing with prescription under which the right to redeem, which was a personal one, would have prescribed in 40 years.[20] However, at the Peace of Breda in 1667, the plenipotentiaries of Europe attested that the right of redemption was imprescriptible,[21] but it is not clear on what that view was based, since the matter would have been governed by Scots law.

It does, however, seem to be accepted that in the earliest years of the impignoration, the view was that the islands should enjoy their own laws and customs and not be subject to those of Scotland. It is equally true that from an early date, the Scottish Parliament legislated for Orkney and Shetland, and gradually much of the original law in the islands was replaced by Scots law, perhaps because it became increasingly difficult to discover what the local law was. In many countries, one of the distinctive features of the legal system is the system of landownership, but even in the islands, land become subject to the Scottish Crown. For example in 1470, William Sinclair, the last of the Earls, or yarls, exchanged the earldom lands for lands in Scotland,[22] and by an Act of the Scottish Parliament of 1471,[23] these lands were annexed to the Crown. By that time, it appears that the Islands were *de facto* subject to Scots law, except in so far as udal law was saved and remained in effect. Thus in 1472, the bishopric of the islands had been transferred from Trondheim to St. Andrews,[24] the year 1535 has been stated to be the year in which there was the first charter in feudal form,[25] in 1541, the first sheriff was appointed,[26] and in 1587, the first justice of the peace.[27]

Curiously, perhaps, in 1567, an Act of the Scottish Parliament was passed declaring that the islands should enjoy their own law, and not be subject to the law of Scotland, but in 1611, an Act of the Privy Council sought to discharge the 'foreign laws' within the islands, i.e. the udal law.[28] The terms of the Act of the privy Council cannot be reconciled with the Act of the Scottish Parliament of 1567, and, in such circumstances, the Act of the Scottish Parliament has the greater authority.[29] While Donaldson says that it is possible to argue that sovereignty over the islands was never formally transferred from Norway to Scotland, he nevertheless goes on to say, '[I]n practice, Scotland and subsequently the United Kingdom, have long and continuously exercised sovereign rights, to the exclusion of Scandinavian authority, and it has therefore been concluded that sovereignty has in course of time been transferred by use and wont, by tacit agreement or acquiescence and, for many generations now, without challenge.'[30]

Although sovereignty has been exercised for a long time, udal law prevailed and still prevails unless it has been replaced with Scots law. What that law was and is a matter of some doubt. There is no doubt that the law in the islands in the 9th century was based on the law of Norway, which had been promulgated in several codes. These were later superseded by the Code or Lawbook of Magnus (1264-1280).[31] At the time of the impignoration, the law in force in the islands would have been that Code of Magnus, with whatever variations had been added to meet the needs of the various districts within the islands. There are several references to this Code in the court books and decrees of the court.[32] There was a Lawbook for both islands, but each has disappeared, and as Sellar states:

> When a code of written law disappears, its rules in practice tend to survive only as fragmentary and partially remembered customs. When laws cease to be readily verifiable, they can well be exploited arbitrarily by those who control the administration of justice. This stage of degeneration may have begun in the Islands by 1611 and continued during the seventeenth and eighteenth

centuries.[33]

The aspects of udal law which we know about which were distinct were (i) the laws on succession and kinship, which were linked with (ii) the system of landownership, the payment of scat, the origin of which may have been to do with naval service, but later became a land tax, (iii) scattalds which were the lands in respect of which the tax was paid,[34] and (iv) land measures and weights. Over many years, many of these features of udal law have been superseded by the law of Scotland, principally when udal holdings were replaced with feudal holdings, which, in turn, would impose the Scots law on succession, and Scots land measures.

What remains?[35]

As has been said, many of the reported cases deal with land, or rights related to land, such as salmon fishings, and treasure trove.

(i) Landownership

The distinctive feature of udal land holdings from the lawyer's point of view is that the land is not held of the Crown, as it is in a feudal system, and so there are no superiors, and no feuduties. Furthermore, there is no need for a written title and the entitlement to the land is provable by witnesses.[36] When the owner died, there was no need for the heir to establish his entitlement in a court process (service of heirs), but again, this could be proved by any form of competent evidence.[37] If land is held on udal tenure, no amount of possession can convert it into feudal tenure,[38] and not even the fact that there is a written title on which sasine (an essential of the feudal system) has followed will suffice,[39] since the distinctive feature of the latter is a title which can be traced to the Crown.[40]

Two cases on this issue are worth noting. The first is *Bruce v. Smith*[41] in which there was a claim by a landowner that there was a custom, based on udal law, that he was entitled to

a share of some 300-400 'caaing whales' which were driven into Hoswisk Bay from the sea. Whale oil is mentioned as a product of Shetland in the 16th century,[42] and the custom of sharing the catch can be traced back to the practice of the admiral who divided the catch into three parts, one for himself, one for those who drove the whales ashore, and the last part for the owner of the lands on which the whales beached. This custom was, however, frequently challenged, because it was a condition imposed by some landowners that the tenants engaged in fishing, and this may have been responsible for some emigration from the Islands.[43] In 1784, the Court of Session held that a catch of 23 whales at Sellavoe in Sandsting should go to the salvors, and a similar decision was reached in the Uyea whale case in 1805.[44] Despite the resistance, there were two earlier cases in which the claims to a division had been successful,[45] but in *Bruce v. Smith*, the court refused to recognise the landowner's claim on the basis that it was neither just nor reasonable. The case caused quite a stir at the time, and in order to support the fishermen in the appeal to the Court of Session, a fund was set up to which many people outside Shetland, including some abroad contributed.[46] Today, there is a display of a considerable amount of material about this case in the local tearoom/museum in Hoswick.

A more important case, from a legal standpoint, is *Smith v. Lerwick Harbour Trs.*[47] Smith was the proprietor of a dwellinghouse on the foreshore at Lerwick. He founded his title not on any grant from the Crown, but on a deed from a private individual dated 1819 which conveyed the ground from Commercial Street 'downwards to the lowest low-water mark'. He argued that that included the foreshore which is the strip of ground between the mean low and high spring tides. The Harbour Trustees claimed the foreshore as being included in a grant from the Crown of 1878. The court held that the land was udal land, and as there was a practice in udal titles to convey ground down to the lowest water mark, the land was owned by the pursuer and not the Harbour Trustees. Lord Kinnear said, 'I do not think it possible to doubt that the land law of Shetland is allodial and not feudal...But if the

land right is allodial, it is certain that in that system the fundamental doctrine of the feudal system as to the Crown right of property has no place. In the feudal system the King is the original lord of the land, and every right of property in land issues mediately or immediately from him. That is the theoretical basis of our whole system of land rights in Scotland. But the King or overlord has no such radical right of property of property in allodial land.'[48] The opinion of the court was that unless the land had been feudalised by a charter from the Crown, it remained udal. Seller doubts whether even then the holding could become feudal, if the Crown had never been the feudal superior, but it is possible to justify the conversion because of the assumption of sovereignty by the Crown, which has not been challenged. My understanding is that even when titles are feudalised in the islands, it is still common to provide that the boundary is the low water mark. Although udal law did govern the foreshore, it appears not to have dealt with the sea bed around the islands, which belongs to the Crown.[49]

(ii) Salmon fishing.[50]

Under the feudal system, the right to salmon fishings is part of the *regalia minora*. In *Lord Advocate v. Balfour*,[51] the Crown sought to establish rights to salmon fishings in the lochs and burn of Kirbister in Orkney on the same basis as the rest of Scotland. Balfour was a descendant of the author of *Oppressions of the Sixteenth Century in the Islands of Orkney and Zetland* published in 1859 and also in 1860 under the title *Odal Rights and Feudal Wrongs*, and the Crown's argument was that since Balfour's title to his lands was feudal, i.e. held of the Crown, and he had no express title to the salmon fishings, it followed that they belonged to the Crown. Balfour's response was that some of the lands included in his title were udal, and in particular those abutting on the burn were udal. The case went no further than the Outer House of the Court of Session in which Lord Johnston held that (i) the right of salmon fishing in Orkney did not form part of the *regalia* and (ii) the feudal law did not apply, and so Balfour succeeded. Lord Johnston said:

> It certainly cannot be maintained that the partial adoption of the feudal system in matters of tenure has so affected the whole of the Orkneys as to bring those parts which have not yet been feudalised under the Scots law of salmon fishing rights. Can it then apply to all estates now held on feudal tenure, while it does not apply to those still held as udal...I do not think that is a necessary consequence of such feudalism as has taken place in Orkney.[52]

Nicolson in his book *Shetland*[53] points out that the foreshore is still used for salmon and sea trout fishings.

(iii) Treasure Trove

In July 1958 a team of archaeologists from the University of Aberdeen were engaged in excavations on St. Ninian's Isle, in the Parish of Drumrossness, Shetland. In the course of that, they discovered a number of objects (29) which became known as the 'St. Ninian's Isle treasure'. Among the objects were brooches and bowls made of silver alloy, with a gilt overlay. These were found in the remains of a wooden box under a small stone slab, and they became the subject of litigation between the Crown and the University.[54] The defenders, who were represented by the then Professor of Scots Law, the late Sir Thomas Smith, founded upon udal law, and in particular provisions in the *Gulathing*, a code developed in the area around Bergen, with later amendments which they claimed had applied to Shetland. The Code provided that a person on whose ground treasure was found was entitled to it, even although someone else found it.[55] The person on whose land the treasure was found was James Budge and the University had clearly come to some arrangement with him in relation to the conduct and outcome of the litigation. In the Outer House, Lord Hunter covered the history of the islands, and while he recognised that udal law had applied at one time, he also accepted that the aspects which survived were land tenure, scat, scattald, and certain weights and measures. Only land tenure was relevant to the treasure. He referred to the various cases which have been mentioned above, and then addressed himself to the argument put forward by the University. This

was that treasure was part of the *regalia minora* and that the notion of *regalia* applied only to the feudal system, and hence had no application in a system of udal tenure. However, Lord Hunter's opinion was that the *regalia* were a feature of sovereignty[56] and so the law of Scotland applied to the treasure, unless it could be demonstrated that there was a surviving rule of udal law which was to the contrary effect. The reasoning clearly was that the Crown's prerogative powers are the same in the Islands as they are in the rest of Scotland. In order to qualify as treasure, the objects must have been hidden in the ground, they must be precious, and there must not be any proof of previous ownership, or a reasonable presumption about previous ownership.[57]

It was not accepted by the University that some of the objects were hidden and so the Lord Ordinary was prepared to allow a proof on that limited point, but this was of little significance, because, in his opinion, if they were not treasure, they were items which had been either lost or abandoned, and accordingly still belonged to the Crown.

The University was not happy with the outcome and appealed to the Inner House of the Court of Session. Four judges heard the case, but only two issued opinions. The stance taken by Lords Patrick and Mackintosh was, because no case had been cited to the court in which the Code of Magnus, a development of the *Gulathing*, had been used to deal with treasure, and there was nothing in the Institutional Writers on Scots law which mentioned any exceptions in relation to treasure found in either Orkney or Shetland, the University were not entitled to prove their proposition that udal law applied. It does not follow that, because there had not been any previous case on the matter, udal law could not apply. That was the position in relation to salmon fishings and the foreshore, and in these instances udal law did apply. While one might not agree with the opinion delivered by Lord Hunter in relation to sovereignty, it is the sounder approach. Writing on this case in the *Stair Memorial Encyclopaedia*, the late Sir Thomas Smith said, '[T]he St. Ninian's Isle Treasure case has discouraged expectations of wider recognition' of Norse law.[58]

A recent development

The writer understands that there has been some recent prospecting for gold on the island of Yell in Shetland. Gold and silver mines are reserved from Crown grants by virtue of the Royal Mines Act 1424.[59] This could also raise a question if the gold is on udal land, but following the St. Ninian's case, a court is unlikely to come to any view other than that the gold belongs to the Crown, on Lord Hunter's argument, because of sovereignty.

The Future

There is no doubt that udal lands still exist in Orkney and Shetland, and certainly in Shetland there are buildings called lodberries, which are stores built on the foreshore which is still, in many instances, not feudalised. Reference is also made in titles to udal land measures, even although the title themselves may have been feudalised. Many lawyers would be cautious about changing a description even if it is incomprehensible, for example, 'All and Whole those Lands extending to twelve oxgate of land...with the multures thereof, sucken, sequels and knaveship of the same...' However, in 1979, a new system of land registration was introduced. The Register of Sasines, which was introduced in 1617, is a register of deed, whereas the Land Register is a register of title, and unlike deeds recorded in the Register of Sasines, those recorded in the Land Register carry a state guarantee unless that is expressly excluded or qualified. While these ancient descriptions are interesting, it will be necessary under land registration to produce an Ordnance Survey map to show exactly where the property to be registered is, and a Land Certificate will not be issued, without indemnity, unless the Keeper of the Registers of Scotland is satisfied about the location and extent of the property to be registered.

As we noted earlier, land which is udal does not have to be held on a written title, but when the system of Land Registration reaches the Islands (current estimated date is

April 2003), udal holdings will require to be registered before a person will obtain a real right. Thus, for example, any holding which remains unwritten will require to be registered in the Land Register on the first sale. Gradually, therefore, all udal holdings will take the form of a Land Certificate, and while udal holdings will not disappear, one of its distinctive features will. On the other hand, there may be moves to convert the remaining udal holdings into feudal ones, in order to make life easier prior to Land Registration.

This paper was first delivered at the Conference of the Scottish Society for Northern Studies on 15 February 1997. I benefited from comments made there and have taken these into account in the final version.

Notes

1. The earliest case is *Sinclair v. Hawick* (1624) M. 16393; the most recent is *Shetland Salmon Fishers Assoc. v. Crown Estates Commissioners* 1991 SLT 166.
2. J. Carmont, 'The King's Kindlie Tenants of Lochmaben' (1909-10) JR. 323; J. Romanes, 'The Kindlie Tenants of the Abbey of Melrose' (1939) 51 JR. 201.
3. As Crown Steward.
4. The term is German in origin. Craig, *Jus Feudale* 1,ix,24.
5. There is a detailed coverage of the feudal system in Susan Reynolds, *Fiefs and Vassals* (1994).
6. Its origins are narrated in the *Orkneyinga Saga*. Evidence of that remains in the many Norse names on the islands. W. F. H. Nicolaisen, 'Norse Settlement in the Northern and Western Isles' (1969) 48 SHR 6.
7. James R. Nicolson, *Traditional Life in Shetland* (1978), p. 19.
8. *Lord Advocate v. Balfour* 1907 SC 1360 per Lord Johnston at 1368-69.
9. M. Bell, *Lectures on Conveyancing* (3rd. ed. 1882), pp. 562-564.
10. David Balfour, *Oppressions of the Sixteenth Century in*

the Islands of Orkney and Zetland (Maitland and Abbotsford Clubs, 1859), p. xxxii.

11. Gilbert Goudie, *The Celtic and Scandinavian Antiquities of Scotland* (1904), p. 134; J. Clouston, *Records of the Earldom of Orkney 1299-1614* (Scottish History Society Second Series, 1914), Vol. vii.
12. For details of the marriage treaty see W. P. L. Thomson, *History of Orkney* (1987), ch. 12. The contract is in *Records of the Earldom of Orkney 1299-1614*, ed. J. Storer Clouston (Scottish History Society Second Series, 1914), Vol. vii, pp. 55-57.
13. A. Peterkin, *Rentals of the Ancient Earldom and Bishopric of Orkney* (1820), App., p. 7; Act of the Scottish Parliament 1471, c. 4. Prof. Gordon Donaldson mentions 58,000 ('Sovereignty and Law in Orkney and Shetland', in *Miscellany III*, Stair Society, Vol. 35, pp. 13-40 at 17).
14. D. Barbour, *Oppressions of the Sixteenth Century in the Islands of Orkney and Zetland* (Mailtand and Abbotsford Clubs, 1859), published separately without documents in 1860 as *Odal Rights and Feudal Wrongs*.
15. Barbara E. Crawford, 'The Pawning of Orkney and Shetland – a reconsideration of the events of 1460-9' (1969) 48 SHR 35; K. Horby, 'Christian I and the pawning of Orkney: some reflections on Scandinavian foreign policy 1460-8' (1969) 48 SHR 54.
16. Act 1471 c. 4; APS II p. 207.
17. Crawford, op. cit., p. 51.
18. *Jus Feudale* 1,xv, 14. That view is not shared by others, e.g. Hill Burton, *History of Scotland* III, 162 et seq.; Dobie, 'Udal Law', in *Sources and Literature of Scots Law*, Stair Society, Vol. 1, pp. 443-460, p. 448.
19. Crawford, op. cit., pp. 38-39, p. 46; Donaldson, op. cit., pp. 18-23 and Appendix, and authorities cited by both authors; Dobie, op. cit., p. 448.
20. Act 1469 c. 28; The Act 1469 c. 27 gave the debtor a right to redeem a wadset, i.e. a security over lands in the form of an outright conveyance.
21. Hill Burton, *History of Scotland*, Vol. III, 162 et. seq.; Goudie, op. cit., p. 229.

22. *Register of the Great Seal of Scotland*, Vol. II, p. 207. (RGS).
23. *Acts of the Parliament of Scotland*, Vol. II, p. 102 (APS).
24. *Orkney & Shetland Records*, ed. Johnson Viking Society for Northern Research (1907-13), p. xvii.
25. *Orkney & Shetland Records*, p. 109. However, there are records of earlier grants in Vols. II and III of RGS, commencing in Orkney with grants in 1490. (See also Peterkin, *Rentals*, App., p. 14.)
26. Clouston, op. cit., p. 61.
27. APS Vol. III. 459.
28. *Register of the Privy Council*, Vol. ix, 181.
29. A. Peterkin, *Notes on Orkney and Zetland* (1822), pp. 132-133, a view accepted by Lord Lee in *Bruce v. Smith* (1890) 17 R. 1000 at 1014.
30. op. cit., p. 19.
31. W. D. H. Sellar, 'Udal Law', in 24 *Stair Memorial Encyclopaedia*, para. 303.
32. G. Donaldson, *The Court Book of Shetland 1602-1604* (Scottish Record Society, 1954); R. S. Barclay, *The Court Books of Orkney and Shetland 1612-1613, 1614-1615* (Scottish History Society, 1962, 1967).
33. Sellar, 'Udal Law', para. 303.
34. Susan A. Knox, *The Making of the Shetland Landscape* (1895), pp. 22-28, 180-183; A. Fenton, *The Northern Isles: Orkney and Shetland* (1978), pp. 33-39, 72-78, 477-479.
35. W. J. Dobie, 'Udal and Feudal' (1931) 43 JR. 115.
36. Stair II,iii,11; Erskine II,iii,18.
37. *Beatton v. Gaudie.* (1832) 10 S. 286; W. P. Drever, 'Udal Law', in *Encyclopaedia of the Laws of Scotland*, Vol.XV., para. 702.
38. *Rendall v. Robertson's Reps.* (1836) 15 S. 265; *Spence v. Union Bank of Scotland* (1894) 1 SLT 648.
39. *Smith v. Lerwick Harbour Trs.* (1903) 5 F. 680 per Lord Kincairney at 604.
40. *Beatton v. Gaudie*, above.
41. supra.
42. P. Hume Brown, *Scotland before 1700 from Contemporary Documents* (1893), p. 159.

43. J. R. Nicolson, *Traditional Life in Shetland*, pp. 22-24.
44. Fenton, op cit., pp. 546-547.
45. *Stove v. Colvin* (1831) 9 S. 633; *Scott v. Reid* (1838) unreported, but mentioned in 18 *Stair Memorial Encyclopaedia*, para. 543, fn. 6.
46. *Shetland Times*, 31 August 1889; J. R. Nicolson, *Traditional Life in Shetland*, p. 168
47. (1903) 5 F. 680; see also Drever, 'Udal Law and the Foreshore' (1904) 16 JR 189.
48. at 692.
49. *Shetland Salmon Farmers v. Crown Estate Commissioners* 1991 SLT 166. In the opinion of Lord McCluskey, it seemed unlikely that udal law would apply to the sea bed, given that it put store on possession (at 183E) .
50. W. Howarth, 'A Norse Saga: The Salmon, the Crown Estate and the Udal Law', 1988 JR. 91-116.
51. 1907 SC 1360.
52. at 1368-1369.
53. 1972.
54. *Lord Advocate v. University of Aberdeen* 1963 SC 533.
55. I. M. Larson, *The Earliest Norwegian Laws* (1915), p. 124.
56. Stair II,i,5, III,iii,27; Bank. I,iii,14-19, I,viii,9, II,i,8; Ersk. II,i,11-12, II,vi,13; Craig I,xvi,1.
57. 1963 SC at 548.
58. Vol. 24, para. 325.
59. The Act contains conditions with which the silver must comply before it is reserved to the Crown.