UDAL LAW: AN INTRODUCTION

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As a lecture delivered to the Scottish Society for Northern Studies, this article represented the writer's first attempts to wrestle with the vexed question of udal law in Orkney and Shetland. A comprehensive account, together with an editorial excursus by the late Sir Thomas Smith, has since been published in The Laws of Scotland: the Stair Memorial Encyclopaedia.[1] What the revised article attempts is a synthesis of the two entries in the Stair Encyclopaedia, in so far as they address issues of historical background, without necessarily examining every aspect of the law. The article also attempts to highlight issues of general interest in the context of modern United Kingdom law.

With this in mind, it is useful to examine three distinct periods: the first being the period before the pledging or wadset of the islands in 1468-9, the second period from 1468-9 to 1611, and the third, 1611 to date.

The period up to 1468-9

The settlement of Orkney and Shetland and the establishment of udal law by Scandinavian settlers was part of the larger population movement of Scandinavian peoples throughout Europe. Earlier writers, including Snorri Sturlason, had interpreted the permanent settlement as a political response to the centralising authority of Harold Finehair, and in particular to his victory at the battle of Hafrsfjord in 872. This must be modified in light of recent research which has redated the battle to some time between the 880s and 900s. Moreover recent place-name and archaeological evidence points to settlement by colonists from the west coast of Norway at an earlier date.[2]

There is no doubt that prior to 1468-9, the islands of Orkney and Shetland administered a system of law which derived directly from the Norwegian, but the different interpretations of the impetus for the settlement have directly influenced the interpretation of the legal system which was introduced. This really requires a more detailed historiographical study but perhaps two illustrations will suffice. Bankton, whose 'Institutes' were published in 1751-3, approached the question of land tenure within an essentially feudal framework. While recognising that there is such a thing as allodial tenure, he went to elaborate lengths to

argue that udal tenure was in essence feudal:

> "The udal right may be accounted for thus; originally feus were constituted without writing. The lord only made a verbal grant of the land and gave sasine or possession of the same to the vassal before the pares curiae or con vassals, fees being then revocable at pleasure; but thereafter when they were made hereditary a deed was granted by the lord called breve testartum often mentioned in the book of the feus testifying that the grant of the feude was made and possession given to the vassal."[3]

On the other hand, a writer such as Drever saw udal law as the legal expression of an individualist political will:

> "Rather than have any form of vassalage, these hardy Norsemen abandoned their home and alods: they would not subject them and their persons to sinister feudalism. ... The tenure of the alod, if homage to transcendental idola may be called a tenure, is anyhow intensely individualistic, independent, without mediation, exclusive. The udaller was a law unto himself in the apostolic sense."[4]

The passages highlight the very different approaches taken by legal writers, and the importance of the political and intellectual climate is worth remembering in considering in particular the leading udal law cases of Bruce v Smith (the Hoswick whale case)[5] and Lord Advocate v Aberdeen University and Budge (the St. Ninian's Isle Treasure case).[6] Moreover, it is clear that the resurgence of interest in udal law owes much both to current political tensions between Scotland and Westminster, and also to the commercial activities of the Crown Estate Commissioners, whose grant of leases of the seabed proceeds upon assumptions of Crown ownership which, it is argued, are inappropriate in Orkney and Shetland. The nature of State authority is accordingly one of the fundamental issues which underlies present discussions of udal law, and gives an added dimension to what might otherwise be thought of as purely academic speculation.

Whether the original impetus for the settlement of Orkney and Shetland was political, or economic, or a mixture of both, there is no doubt that the Norwegian settlers retained close links with Norway, and it has long been recognised by historians that the law of Orkney and Shetland was based on the Law of Norway. According to Snorri Sturlason, the oldest of the Norwegian codes was the *Heidsævisthinglaw*, later called *Eidsivathinglaw*, which was current in the east. In the mid tenth century, or possibly earlier, the *Gulathing* code was developed in Bergen, and the

Frostathingcode in Trondelag. A fourth code, *Borgarthinglaw*, which prevailed in the south east, evolved in the course of the eleventh century.[7]

According to Ari Thorgilsson, the first Icelandic laws mostly "conform to that which was the *Gulathing* law, with the additions and removals and alterations recommended by Thorliv the lawyer".[8] These early Icelandic laws are known as *Grågås*. The earlier Norwegian codes were superseded by a new Lawbook or code, issued by King Magnus Hakonsson, Known as Magnus the Law-Mender (1264-80). The code was accepted by the *Gulathing* in 1274 and by the other *Lawthings* in the following year and it appears to have been this code which was introduced into the Faroes. In Iceland, *Grågås* was superseded in 1271-3 by a new lawbook *"Jarnsida"* which was again based on *Gulathing* (and *Frostathing*). In 1281 the Althing accepted yet another code thereafter known as *Jonsbok*, which was based on the *Gulathing* code but with Icelandic additions.[9]

It is reasonable to assume that the original Norwegian settlers established a system of law in Orkney and Shetland, as elsewhere, which closely mirrored the system with which they had been familiar (the more so if the impetus for the westward expansion was population pressure rather than political malaise). Since this *Gulathing* code was common to all the western colonies of the Norwegian empire, it is highly unlikely that the code accepted by the Orkney and Shetland lawthings was significantly different and indeed there are clear references in the later Court records to the *Gulathing* version of the Magnus code.[10] However, although the Lawbooks of Orkney and Shetland had been relied upon before the Scottish Privy Council in the sixteenth century[11] no copies are known to have survived, and in their absence it is impossible to know the exact terms of the Orkney and Shetland codes. The proposition that the *Gulathing* edition of the Magnus code was applicable to Orkney and Shetland was, so far as one can ascertain, not judicially examined at least in the Court of Session until the 1960s in the course of the St. Ninian's Isle Treasure case.[12] Professor Knut Robberstad, expert for the respondents, the finders of the treasure, was clear that the *Gulathing* version of the Magnus code was applicable, although it has to be said that neither his opinion nor his later article[13] sufficiently demonstrate how he arrives at this view, except by way of a general summary and reference to the later Court books. However, this argument was not discussed in any detail in the judgements. Lord Hunter, the judge at first instance, had been prepared to accept that the Privy Council Act of 1611[14] did not effect a total abolition of all differences between the law of Shetland and the law of Scotland generally, but as the respondents' case at first instance was a purely negative one, he was not required to comment on any positive case. It was only on amendment that positive averments were made to the effect that the Magnus code was applicable. Before the Inner House, Lord Patrick accepted that it was

critical to the respondents to establish whether the Magnus code was still part of the law of Shetland. However, he took the view that, either as a result of the 1611 Act or as a result of gradual abandonment, "the position was long ago reached where nothing could be said with certainty to remain of that law save udal tenure of land, scat, which was the return for udal lands, scattald, which was a right of commonty, and a few weights and measures."[15]

On that basis, he was not prepared to hold that the Magnus code could now prevail. Nor did he consider that a question of udal law was appropriate for proof as foreign law, although on at least two previous occasions the court had been prepared to hear evidence as to "udal" custom[16] and it is usually open to any party to adduce evidence of foreign law before the Scottish courts, provided those courts have jurisdiction. Lord Mackintosh was of the view that since the institutional writers made no mention of any speciality in relation to treasure, and since no reference to any speciality of Norse law had been made in Bruce v Smith there was no ground for judicial recognition that the Magnus code was still the law of Shetland and therefore no relevant case for proof had been averred.[17] The weakness of this argument is that it adduces a positive principle from mere omission in writers who had frankly neither knowledge of nor interest in the specialities of udal law. The absence of any reference to specialities in Bruce v Smith is more telling, since in that case it was argued that the right to a share of the stranded whales was an aspect of land ownership rather than a right to moveables and one might have expected some reference to any similar right arising as an incident of land ownership, such as a right to treasure. Nevertheless, the impression given by the judgement is that the court was indulging in what David Sellar has described as "an exercise in legal imperialism",[18] and that a valuable opportunity for examining the real relationship between the law of Scotland and udal law was lost.

1468-9 to 1611

Accordingly it has never been judicially decided in modern times whether the Magnus code was law prior to 1468-9, and whether it remained the law thereafter, although it has been recognised that some code of udal law was in force. In the period between 1468-9 and 1611, the islands continued to adhere to a system of law which was firmly rooted in the Norwegian and enabled the inhabitants on occasion to appeal to Bergen for confirmation of decrees[19] (or alternatively appeal to the Scottish Privy Council and refer to the Orkney and Shetland Lawbooks, presumably as modern Scottish litigants may refer to specific Scottish statutes in appeals to the House of Lords). While it is clear from the surviving Court books that there had been very considerable infiltration of Scottish law and practice, Robberstad was firmly of the view that

"the fact that the Court of Shetland in 1602-3 made their decisions on the law book of King Magnus appears from the terminology, the legal conceptions applied, the rules enforced and the way of thinking – and from the fines."[20]

The Treaties of 1468-9 had not expressly preserved Norse law in the islands, but may be contrasted with the Treaty of Perth which ceded the Hebrides and provided that

"all men of the said islands ... lesser as well as greater, shall be subject to the laws and customs of the kingdom of Scotland."[21]

Donaldson sees the absence of such a clause in 1468-9 as suggesting that Orkney and Shetland were not intended to be subject to the laws of Scotland. He also point to the Act of 1503-44 which was originally drafted to read

"that all our soverane lordis liegis, bath within Orknay, Scheteland and the Ilis, be reulit be our soverane lordis aune lawis and the commoun lawis of the realme and be nain other lawis."

However this was finally amended to read "all our soverane lordis liegis beand under his obesance and in speciale the Ilis", the references to Orkney and Shetland being omitted. The changes may have been intended to reflect the ambiguity about sovereignty, but certainly Donaldson thinks it more likely that this Act indicated that Scots law was not intended to apply in the Northern Isles, but in the Western Isles only.[22]

In December 1567 a number of articles were presented to a Parliament which met in Edinburgh between 15 and 29 December. The question was asked "whether Orkney and Shetland shall be subject to the common law of this Realm or if they shall bruke (enjoy) their own laws". The answer was that they ought to be subject to their own laws.[23] There is no, conclusive evidence that the Article was the foundation for an Act or had any statutory authority, but it is an indication of general acceptance that the laws current in Orkney and Shetland were different from those on the Scottish mainland.

In 1611 an act of the Privy Council was passed which abolishes the so called foreign laws of Orkney and Shetland.[24] This has been interpreted by some to mean the abolition of udal law, but in practice it is clear that this was not the effect of the Act and indeed may not have been the intention. At the time of the passing of the Act, Patrick Stewart, Earl of Orkney, was in custody awaiting trial for treason on seven counts, including unreasonably making laws by himself "contrary and repugnant to the laws

of the Kingdom". That could simply mean that he resorted to unfamiliar laws which in the context may be Scottish, and the Act can be seen as a formal response to Patrick's eclectic approach to law enforcement, and an attempt to return to the familiar and established rule of law, which would certainly include established udal law.

A further consideration is that in 1604 Christian IV of Norway and Denmark had published a new Danish edition of Magnus the Law-Mender's Lawbook. Robberstad pointed out that one of the reasons behind the 1611 Act may have been the desire to prevent the introduction of new law from Bergen or Copenhagen.[25] The Privy Council may well have recognised the difficulties of implementing these revisions in a society undoubtedly becoming more feudalised.

1611 to date.

The status of udal law after 1611 is therefore debatable. On the one hand, it has been judicially acknowledged that udal law exists and continues to exist as a separate system. In the dissenting judgement of Lord Lee in Bruce v Smith, the whole system of law in Shetland is different from the common law of Scotland, excepting in so far as it has been assimilated by legislative enactment or gradual adoption.[26] In Lord Advocate v Balfour (1907) Lord Johnson was quite clear

> "The results of the inquiry sufficiently demonstrate that nothing has occurred since 1468 which amounts to a general acceptance in Orkney of the Scots feudal system, and still less of its customary incidents."[27]

On the other hand, the courts have in practice treated udal law not as a separate system of law, but as custom, existing within the framework of Scottish law. As custom, udal law is evidenced by and exists only in the form of specific survivals: the courts are not prepared to extrapolate from customs, however proved, principles of law which can be applied in different circumstances. The anomaly of such an approach is that in theory a party can pray in aid a passage in Stair, which the courts will be prepared to consider, but may not use the evidence of specific Shetland or Orkney cases, such as Bruce v Smith or Lord Advocate v Balfour, to draw parallels, however close these might appear.

However, even if the second approach is incorrect, it has to be recognised that there are difficulties in arguing that the Magnus code survived intact from 1468-9 to date. A medieval code is clearly inapplicable in a modern society and although certain provisions of the Magnus code might well be quite as acceptable as alternative Scottish

solutions in particular instances, it places an undue burden on the Scottish courts to have to determine which provisions might and which might not be acceptable. Moreover if the Magnus code were to be applied, the courts would have to determine whether the 1604, 1611 or later versions were appropriate. The Scottish courts are ordinarily reluctant to rewrite contracts, by severing otherwise unacceptable or ambiguous clauses, and *a fortiori* it is not to be expected that they would be anxious to rewrite the udal law of Orkney and Shetland by construing different versions of a medieval Norwegian law code. Nevertheless, on one view this is a purely practical problem: in terms of legal theory, it may be questioned whether the Scottish doctrine of desuetude and contrary use are applicable where the law in question was based on Statute, as the Magnus code, and Orkney and Shetland variations clearly were. Campbell v Hall (1774) [28] is authority for the proposition that the laws of a country over which another state acquires sovereignty continue in force until altered by the acquiring state but, apart from the 1611 Act, it seems there has never been an attempt to repeal the Lawbooks in whole or in part. Nevertheless, the political realities if not the superior qualities of Scots law have undoubtedly eroded any separate legal system, and it is generally accepted that the United Kingdom Parliament has the power to legislate for Orkney and Shetland, even to the extent of changing recognised specialties. Sir Thomas Smith suggested that it might now be appropriate for the Scottish Law Commission, a body with the statutory duty to keep the law under review, to consider what appears to be a genuine ambiguity as to the present status of udal law, and to what extent that law merits restatement in modern form.[29]

Sovereignty

Sir Thomas Smith has suggested that the term sovereignty can be interpreted in two different ways. On the one hand, he suggests, it can mean the powers and prerogatives of government: on the other it can mean dominium in the sense of ownership and the capacity to alienate.[30] While it is undoubtedly correct to differentiate between the exercise of the powers of government, and the concept of ownership, there is an ambiguity in the term "prerogative" in this context. In a feudal society the prerogative rights of the Crown extended not only to powers of government, but also included proprietorial rights, enjoyed by virtue of the prerogative, such as the right to the foreshore. It is unlikely that Sir Thomas Smith, in his discussions of sovereignty in relation to Orkney and Shetland, intended that prerogative be understood in this wider sense, and it may be more accurate to speak only of the powers rather than the powers and prerogatives of government. In any event, the distinction which Sir Thomas makes is not one observed by earlier writers or judges who have assumed that, at the time of the impignoration, sovereignty passed to the

Scottish Crown not only in the sense that dominium was acquired, but also that the Crown thereby acquired the powers and prerogatives – in the widest, as it were most feudal, sense of the word – which the Scottish Crown at that time enjoyed on the Scottish mainland.[31] It is therefore worth examining briefly these dimensions of sovereignty, and considering whether they have any bearing on the nature of state authority or individual rights in Orkney and Shetland.

Prior to 1468 there can be no doubt that sovereignty, in both senses, was vested in the Norwegian Crown, whether by virtue of occupation, administration or acquisitive prescription. It has never been doubted that the Norwegian Crown had the power to dispose of the islands by pledging them in security of Margaret's dowry, although the basis of that power had not been adequately examined. When Christian came to pledge the islands, it seems that he intended if not to transfer, then at least to temporarily assign his royal authority to the Scottish Crown. In 1469 he wrote to the islanders telling them to be dutiful and obedient and to pay their annual scat to the King of Scotland until the islands were redeemed, which as Barbara Crawford has pointed out, clearly implied a transfer of allegiance.[32] In modern times that temporary resignation of royal authority would also imply a temporary renunciation of the power to legislate or exercise the executive functions of government, although in practice one would expect the position to be set out in some detail. Such a renunciation is not unique: leases or pledges of territory have frequently been made by one state to another. For instance the lease of the New Territories empowered the United Kingdom to exercise all the powers of government over those territories, but certainly not to alienate them.[33] It may be questioned how closely either the mortgagor or mortgagee in this transaction had examined the judicial implications of what they were proposing and, assuming that there was no intention to transfer outright ownership, it is difficult to know what, if any, legislative powers Christian thought of himself as retaining and what powers James thought of himself as acquiring. Donaldson, as indicated earlier, believes that there was no intention to apply Scottish law at least until 1503-4. Moreover, the answer to the questions posed to the 1567 Parliament suggest the Scottish Parliament may not have thought of itself as able to initiate legislation. If this is correct, Sir Thomas Smith is perhaps too emphatic when he states that "There has never been any doubt as to the powers of the Scottish, British or United Kingdom Parliament to legislate for the Orkneys and Shetland"[34] but it is true that by 1611 when the Privy Council purported to abolish the foreign laws, the perception was unquestionably that the power to legislate for Orkney and Shetland no longer lay with the Norwegian Crown.

Was dominium in the sense of ownership and the capacity to

permanently alienate transferred at the same time as the legislative initiative was transferred to the Scottish Crown, whether temporarily or by later acquisitive prescription? There seems little justification for the assumption that the pledge itself operated as a transfer of dominium, if that was not the intention of the parties. However, it seems to be generally accepted that the right of redemption has now been lost and that Orkney and Shetland now form part of the United Kingdom by operation of the process of prescription. Gordon Donaldson's review of the problems of law and sovereignty concludes that it was not intended to transfer sovereignty and that frequent attempts, or at least assertions of the right to redeem were made up to the Treaty of Breda in 1667. However, he concludes that by acquisitive prescription, the British Crown has probably acquired sovereignty of the islands (although it remains an open question whether that sovereignty had been acquired by the Scottish Crown prior to the Union) Donaldson does not examine what he means by the concept of sovereignty, but it seems that he assumes the term includes both dominium in the sense of ownership, and the powers of government.[35]

The legal argument is summarised by John Grant thus:

> "Territory not formerly subject to the sovereignty of a State (*terra nullis*) can be acquired by the process of occupation (*occupatio*); territory formerly subject to the sovereignty of a State can be acquired by another State through the process of prescription. In practice it is far from easy to draw a clear distinction between *occupatio* and acquisitive prescription ... the conditions that satisfy effective occupation of territory are markedly similar to those for acquisitive prescription. Stated in broad terms, these are that there must be peaceful, open, continuous and effective exercise of sovereignty over the territories coupled with the clear and unequivocal intention (*animus*) to act as sovereign. The appreciation of whether those conditions are satisfied in relation to a particular piece of territory is difficult, especially where there are competing claimants: it is made no easier by the requirements that claims are to be judged according to the law contemporaneous with the acts of sovereignty (so-called inter-temporal law)."[36]

Grant concludes that

> "There is no clearer way to demonstrate the completeness of United Kingdom sovereignty over Shetland than to pose the question: what sovereign powers are exercised in Scandinavia in respect of the islands?"[37]

If the absence of any powers now demonstrates the transfer of sovereignty,

then it must follow that the exercise of any sovereign powers in the period following 1468-9 demonstrates a retention of some sovereign rights by the Norwegian Crown until these were displaced by prescription, and this is clearly an area which deserves further consideration.

However, the most interesting question, which has not been considered in any detail, is what was the nature of those sovereign rights which the Scottish Crown would undoubtedly now appear to have acquired. Without express statutory authority can the Scottish Crown and Parliament exercise greater rights than those previously enjoyed by the Norwegian Crown? The rights of the Norwegian Crown may have included legislative, defensive and political powers, but this by no means necessarily includes the whole regalia majora and regalia minora implied in the feudal concept of sovereignty. As noted earlier, the traditional view of the Norse settlement as an aristocratic revolt against the centralising authority of Harald Finehair has been moderated, so that the settlement is no longer seen as a conscious attempt to preserve the independence of the udaller: nevertheless there is no doubt that the characteristic feature of Orkney and Shetland udal law is recognised to be the allodial nature of land ownership. There is no concept of land held in return for service, although there was originally an obligation to render naval service in particular, as is shown in some detail in *Gulathing*.[38] There was no feudal hierarchy, a fact which has been judicially recognised in a number of cases, most persuasively in Lord Advocate v Balfour in which Lord Johnston concluded that

> "the examination shows that the Crown derived its rights in Orkney in a definite and historic manner, which precludes the idea or fiction that the Crown is the fountain of all land rights and the paramount superior".[39]

Yet the Crown was clearly more than just *primus inter pares*. In general, it is assumed that laws were promulgated in the king's name and enforceable by the Earl of Orkney or the sysselman in Shetland as his agent. Although it has been assumed that scat was paid to the Earl, there is evidence that it belonged to the king,[40] which would be consistent with the notion of scat as a tax imposed for the benefit of the country's defence. Payment on this basis certainly points to some overriding authority vested in the Crown. Moreover it is evident from *Gulathing* that the King not only owned estates in his own right, but had in some sense title to land not otherwise in private ownership. Thus while every man had use of wood and water in the common (*almenningr*) and "such rights ... as he had of old", farms cleared in the common "shall belong to the king."[41] According to *Frostathing* the king was entitled to lease the common, which could include the foreshore, otherwise an individual proprietary right.[42]

The king's relationship with the Earls of Orkney is also instructive. It is clear that by the twelfth century the title of earl was in some way granted by the king, who also had the right to withhold the title. There seems no doubt that in 1195 Earl Harald Maddadsson forfeited both estates and title in Shetland for supporting a rebellion against King Sverre. In 1267 fresh conditions were imposed upon the Earl, and in 1379 in his installation document, the Earl acknowledged that he and his heirs had no prescriptive right to the earldom and that he would forfeit the grant on non-fulfilment of any conditions.[43] By this stage, whether or not the nature of individual land tenure remained truly allodial, it seems clear that the Earl's formal relationship with the King of Norway closely resembled that of feudal superior and vassal.

These issues were raised in the St. Ninian's treasure case, but it cannot be said that the court dealt adequately with them. All the judges were of the view that the Crown's right to treasure was one of prerogative, but they treated that prerogative as no different from the Crown's prerogative rights elsewhere in the United Kingdom. In the Outer House, Lord Hunter declared that "If the King is sovereign in Shetland, I consider the rights deriving from such sovereignty exist there as well as the mainland of Scotland":[44] He therefore analysed the rights of sovereignty in Scottish terms without explaining why identical rights should exist in Shetland. In the Inner House, although the respondents argued that by the accepted rules of international law and British constitutional law, the prerogative rights of the Crown which are concerned with property perquisites do not extend to conquered or annexed territory unless or until the acquiring state alters the law of such territory,[45] no counter arguments were advanced by the Crown and the court did not express a view on this issue. Lord Patrick proceeded upon the dubious assumption that all rights of sovereignty had belonged to the Scottish Crown since 1468-9. Lord Mackintosh relied heavily on the negative evidence of omissions in Erskine and Bell to dismiss the respondents arguments for irrelevancy. Recognising that sovereignty was relevant, he said "I do not see why any different rule should prevail in Shetland ... simply because the objects were found on udal land"[46] and also proceeded upon an assumption that the Crown's sovereign rights in Orkney and Shetland were the same as mainland Scotland, despite the wholly different foundation for the Crown's authority. None of the judges therefore addressed the questions of what were the rights of the Norwegian Crown at the time the islands were pledged, what was and is the relationship between the sovereign rights of Norway and Scotland, and by what right the British Crown extends or has extended the prerogative powers which it has acquired at best by way of prescription. Such issues may seem academic, but the legal basis for the exercise of state authority, particularly where the powers claimed by the state may conflict with the rights otherwise claimed by

individuals, is clearly one of continuing interest and concern.

Space does not permit a comprehensive examination of udal law, but there are two areas which may be of particular interest and where incidentally one can see the uneasy relationship between private rights and Crown prerogative operating in practice; namely rights of the foreshore and fishing rights.

Foreshore

The foreshore is usually defined as the shore between high and low spring tides.[47] In mainland Scotland the foreshore is part of the regalia minora, that is one of the prerogative rights of the Crown which can be alienated, although subject to an element of continuing trust for the benefit of the public for navigation and white fishing in particular.[48] In contrast the regalia majora are inalienable. However this prerogative possessory right is based on the Crown's position as feudal superior. The position is different in Orkney and Shetland, where there is judicial recognition of the fact that the Crown was never the feudal superior.[49] Most udal titles were described as extending to the highest of the hill, or the highest stone of the hill, to the lowest or lowest stone of the ebb, thus expressly including the foreshore.[50]

In the leading case of Smith v Lerwick Harbour Trustees[51] the Crown claimed a right to the foreshore *ex adverso* allodial land by virtue of the jus coronae or royal prerogative, a right arising out of its position as feudal superior, but it was successfully argued for the defender that udal title carried with it a right to the foreshore. In Lerwick Harbour Trustees v Moar [52]in contrast, it was held that no competing or preferential title arose in a feudal title as against a Crown grant, and the feudal title could not be assumed to have been a udal title carrying with it a right to the foreshore. It could of course be argued that neither the feudal title nor the Crown grant was a good title to the foreshore, unless it could be demonstrated that either the original feudal superior or the Crown had obtained an express resignation of the udal subjects, including the foreshore. Strictly, the mere fact that sasine has passed on written deeds does not of itself suffice to change tenure from udal to feudal[53] (whereupon the foreshore would presumably vest in the Crown). Lord Kincairney in Smith v Lerwick Harbour Trustees suggested that an exception to this rule would occur when sasine proceeded upon a charter from the Crown or a subject superior deriving right from the Crown,[54] but it is difficult to see the justification for this. Lord Wellwood's reasoning that an express resignation is required appears historically more correct,[55] even if the logical consequence appears to be that some proprietary rights, such as that to the foreshore, would remain with the udal proprietor while the

subjects are vested in the "feudal" proprietor. Such a dichotomy would not be unique: the right to salmon fishing is for instance a separate feudal estate in mainland Scotland (although not in Orkney and Shetland)[56] and is frequently owned by someone other than the heritable proprietor of the subjects in which the fishing rights are enjoyed. However, it must be recognised that such arguments, while logical, have an air of unreality and one would imagine that the courts would be tempted to find a pragmatic solution, for instance relying upon the operation of prescription to extinguish possible competing rights.

The right to foreshore under udal law carried with it various rights which were an important economic asset, although their extent is difficult to determine. In Norway, this included rights to whales, seals, wrecks and even the belongings of shipwrecked mariners.[57] In Iceland the owner of the foreshore had the right to everything caught between the foreshore and the *netlog* (boundary) which extended to the depth of twenty meshes of seal net. Between the *netlog* and the open sea, the owner had the right to what was driven ashore (*reki*).[58] From later Orkney and Shetland records it can be seen that the owner of the foreshore had similar proprietorial rights, including bait within the ebb,[59] and "*lattrom ok lunnendom*", which has been translated as "sealing places and appurtenances, that is hunting places of the seal" and "lots and parts."[60] In a perambulation of disputed marches in 1583-4 it was held that the owner had a just right "to the ground and all the wear that comes ashore within the foresaid marches."[61]

Some titles include "wrak wraith war" which has been held to mean wreck as well as seaweed.[62] In terms of the Merchant Shipping Act 1894, the Crown has the right to unclaimed wreck except where the right has been granted to another.[63] However "the owner" may obtain delivery on payment of salvage, fees and expenses.[64] "Owner" is not defined in the Act and it may therefore be open to a udal proprietor to claim as owner. One udal proprietor at least lodged a claim with the Commissioner of Wrecks during the 1939-45, but the claim does not seem to have been pursued.[65]

The Lord President in Smith v Lerwick Harbour Trustees was of the view that the udallers private right to the foreshore might be subject to certain public uses such as navigation and passage.[66] Lord Kinnear applied that concept on the basis that nobody had suggested, as regards these public uses, that the Crown right was not the same in Shetland as other parts of the sea coast of Scotland.[67] However the concept of the Crown as trustee, operating to override individual rights, appears to be an exercise of prerogative which again is an inappropriate analysis for Orkney and Shetland. It may be noted that in Modern Norway there are public rights of navigation and fishing,[68] and it is therefore probably more accurate to seek justification for public use by tracing the development of these Norwegian

rights than by following Lord Kinnear's reasoning.

The territorial sea and fishings

It seems clear that the English, prior to the accession of James VI and I, had no developed notion of territorial fishing. So far from claiming an exclusive right to the fishing on the English coast, the rulers of England entered into a series of treaties by which freedom of fishing was mutually recognised and guaranteed.[69] In Scotland, on the other hand "restricted measures" were enforced from a very early date. At the beginning of the seventeenth century, when the question of unrestricted fishing was raised in an acute form, there was "a remarkable unanimity of opinion" in Scotland that the ancient and established custom was that foreigners were not allowed to carry on their operation within a land-kenning of the coast. "Land-kenning" means those waters within sight of land, and while it can mean simply the extent of the territorial sea,[70] the expression most frequently occurs in the context of reservation of fishing rights. In 1540 James V had complained to the magistrates of Bremen that their subjects came each year to fish around Orkney, Shetland and northern Scotland, and were coming "nearer the land".[71] In 1594, when the Dutch asked for and obtained permission to fish in Scottish waters, it was agreed that they should not come "within the sight of the shoar, nor into any of the loughs, nor in the seas betwixt islands".[72] James VI and I strongly urged that this point should be argued against the Dutch: he wrote on 14 May 1618 to Sir Dudley Carleton:

> "For the other part, which the ancient custom alleadge by all subjects that they [the Dutch] should not fish within kenning of land, of which they make show to be ignorant, and would not understand what is meant by it; you may say that all subjects do conceave that custom to be that no stranger should fish either within the creeks of all land or within a kenning of the land as seamen do take a kenning."[73]

The anonymous "Arguments for collecting the assyze herring from all strangers fishing in the North seas of Scotland, and answers to some objections proponet be Sir Noel Carron" (c 1610) alleges that the Hollanders were in ancient times "appointed to fish no nearer the land than they could see the shore from their main tops".[74]

Both Fulton and O'Connell are clear that James's policy of claiming sovereignty over the British seas was determined by this Scottish notion of "land-kenning".[75] The phrase itself may be of Norse origin. While the word "ken" is Scots, the word "kenning" seems to appear mainly in a Scandinavian context, for example the branding of Shetland and Faroese sheep,[76] and as applied to Icelandic skaldic poetry.

The notion of territorial fishings, and land-kenning, was certainly familiar in other Scandinavian countries. According to *Grågås*, there was a free right to fishing outwith the *netlog*,[77] but within this boundary fishing rights belonged to the owner. Until about 1400, only the Icelanders fished off the coast of Iceland, but the English began to arrive shortly afterwards. As early as 1415 King Erik of Denmark and Norway complained to King Henry V of England against the infringement of native fishing rights, and Henry V accordingly prohibited his subjects from going to Iceland or any other islands belonging to Norway or Denmark.[78] There were repeated further complaints, and in 1418 and 1527 the English were forbidden to overwinter in Iceland. In 1532 King Frederick was complaining again to Henry VIII that the English "clayme to have a fyshinge place whiche of tyme oute of mynde out people of Iselande have occupied in the See and challenged onlie unto theymselffe". The Icelanders never relinquished their claim that the fishing in the territorial sea belong to Icelanders alone.[78]

Not surprisingly, similar complaints were made by the king of Denmark on behalf of his other territories: in 1618 he complained to the Scots Privy Council that Scottish fishermen were fishing within the waters of the Faroes. The Scottish fishermen's reply was that they were forced to do so because of Dutch encroachment in Orkney and Shetland. The Privy Council upheld the Danish claim and issued a proclamation forbidding Scottish fishermen "to fische within sight of the land of the Ile of Fara", but to reserve the fishing there to the inhabitants of the said isle and to other subjects of the king of Denmark. At the same time the Privy Council wrote to the king regarding complaints against the Dutch, suggesting he should demand instant prohibition "that thay fishe not within sight of his Majesteis land, bot reserve these boundis to his Majesteis subjectis, conforme to the law of nationis".[79] The terms of the correspondence between James and Sir Dudley Carleton suggest that the Dutch were not familiar with the notion of the "land-kenning", although this ignorance may have been more politic than real.

There is relatively little contemporary evidence as to the precise extent of the claim to the fisheries. The Scottish writer Wellwood (d 1622) states that before his time, after the bloody quarrel between the Scottish and the Dutch, it was arranged that the Dutch keep at least 80 miles from the coast,[80] but such an extensive claim does not appear elsewhere. By 1604 the limit appears to have been recognised as 14 miles. This was the figure embodied in the draft Treaty of Union with England in 1604, as well as that proposed to the States General of the Netherlands as a provisional limit in 1619, and declared by Parliament and the Privy Council to be the bounds of "reserved waters" belonging to Scotland.[81] This was also the limit requested by the Scottish Commissioners for the establishment of the

Fishing Association promoted by Charles I.[82]

There has been much recent debate in public international law circles on the topic of territorial sea and claims thereto.[83] So far as the United Kingdom is concerned, the Territorial Sea Act 1987 now provides that the breadth of the territorial sea adjacent to the United Kingdom is 12 nautical miles.[84] This claim is consistent with the as yet unratified United Nations Convention on the Law of the Sea of 1982[85] and with modern customary law.[86]

It seems that in udal law the right to restrict fishings was not simply a right to exclude non-nationals, but was in the nature of a possessory right enjoyed by the owner of the foreshore. In *Gulathing* law there are references both to sealing grounds and fishing grounds which appear to recognise them as exclusive possessions.[87] *Frostathing* law is even more explicit: "Every man shall possess the water course and the fishing grounds that front his land, unless they have been alienated in legal manner".[88] In relation to sealing grounds, there was a closed season from three weeks before St John's day (24 June) to six weeks before Christmas during which no man was entitled to enter the sealing grounds of another without permission. If a man was found to have taken seals on another's grounds within the closed season,

> "he shall be guilty of theft as much as if he were caught stealing in another man's storehouse. At other times let men secure their sealing grounds as they secure their possessions on land, namely by using the law billet.[89] Anyone who enters after that shall owe the robber-fine and the fine for trespass valued in burning silver and he must surrender all the seals that he took on those grounds".[90]

The Icelandic evidence makes it clear that the right of fishing close to land was a possessory right. As noticed above, according to *Grågås* there was a free right of fishing outwith the *netlog*, but within this boundary fishing rights belonged to the owner. Between the *netlog* and the open sea, the owner had, as noted,[92] the right to goods driven ashore, including dead whales. The boundary of the open sea was defined as the point at which drying cod could be seen on land – the cod being on racks or lines, usually some five or six feet above the ground.[92] This is clearly related to, if not identical with, the notion of "land-kenning".

The concept of fishing as a possessory right was certainly a view shared by the inhabitants of Orkney and Shetland, who in 1618 complained about the "Hollanders and Hamburgers who within these few years are the persociate to the Hollanders in the fishing who within His Majesty's seas in Scotland". Their complaints include the fact that the Dutch were fishing

"hard by gentlemen's doors" where fishing was "appropriate to the owners of the land nearest adjacent for their own fishing in times of storms when they could not go to sea for the entertainment of their houses", although it is fair to say that this was only one of a number of complaints including theft, damage to crops and killing of sheep.[93] It is difficult to know, without further research, how seriously these complaints were taken and to what extent they were founded in law (or custom).

Conclusion

It may well be that Lord Patrick was correct that there are only a limited number of areas where udal law can "with certainty" be said to remain. However, it seems to the author that, on a proper historical analysis, it can be argued that udal law has a greater relevance than Lord Patrick was prepared to allow. It remains to be seen whether the Scottish courts will in future adopt the narrow interpretation of the law, demonstrated by all the judges in the St. Ninian's Isle Treasure case, or whether they will be prepared to re-examine the status of udal law as an integral part of modern Scots law.

Footnotes.

1. *The Laws of Scotland: Stair Memorial Encyclopaedia* (1989).
2. B.E. Crawford *Scandinavian Scotland* (1987).
3. Bankton *Institute* II iii 18.
4. W.P. Drever "Udal Law and the Foreshore", in *Judicial Review* 1904, 193.
5. Bruce v Smith (1890) 17 R 1000.
6. Lord Advocate v Aberdeen University and Budge 1963 SC 533, 1963 SLT 361.
7. L.M. Larson *The Earliest Norwegian Laws* (1935) pp. 6-11.
8. *Inslendingabok* (ed. Finnur Jonson (1930) pp. 14, 15.
9. K. Robberstad: opinion on behalf of the University of Aberdeen 8 May 1963.
10. See e.g. *Register of the Privy Council of Scotland 1545-1689* (1st series) ii pp. 488, 489, 517, 518.
11. *ibid.*
12. Lord Advocate v Aberdeen University and Budge 1963 SC 533, 1963 SLT 361.
13. K. Robberstad "Udal Law" in *Shetland and the Outside World* (ed. D.J. Withrington 1983).
14. *Register of the Privy Council of Scotland 1545-1689* (1st series) ix pp. 181, 182.
15. 1963 Sc 533 at 5656, 1963 SLT 361 at 364.
16. Bruce v Smith (1890) 17 R 1000; Earl of Galloway and others v Earl of

Morton (the famous "Pundlar case") (unreported) Session Papers 25:21; 44:9; 50:39. See Peterkin Notes on Orkney and Zetland (1822) Appendix p. 117.

17. Lord Advocate v Aberdeen University and Budge 1963 SC 533 at 563, 1963 SLT 361 at 368.
18. D. Sellar "Custom as a Source of Law" in *Stair Memorial Encyclopaedia* Vol. 22, para 388.
19. *Register of the Privy Council of Scotland 1545-1689* (1st series) ii, pp. 488, 489, 517, 518.
20. Robberstad "Udal Law" p. 58.
21. APS i, 420.
22. G. Donaldson "Problems of Sovereignty and Law in Orkney and Shetland" in *Miscellany II* (Stair Society vol. 35, 1984, ed. Sellar) pp. 18, 26; APS ii 244, 252 and facsimile facing p. 241.
23. APS iii 41.
24. *Register of the Privy Council of Scotland 1545-1689* (1st series) ix, pp. 181-2.
25. Robberstad "Udal Law" p. 58.
26. Bruce v Smith (1890) 17 R 1000 at 1014.
27. Lord Advocate v Balfour 1907 SC 1360 at 1368, 15 SLT 7 at 11 OH.
28. R.B. Ferguson "Legislation" in *Stair Memorial Encyclopaedia* Vol. 22, paras 129-133.
29. T.B. Smith "Udal Law" in *Stair Memorial Encyclopaedia* vol. 24, para 325.
30. *ibid.* para 328.
31. Lord Advocate v Aberdeen University and Budge 1963 SC 533 at 547.
32. B.E. Crawford "The Pawning of Orkney and Shetland" in *XLVIII S.H.R.* (1969) p. 163, 164.
33. For a fuller discussion of the international law see "Udal Law" Smith paras 326-328.
34. Smith "Udal Law" para 325.
35. G. Donaldson. Problems of sovereignty and law in Orkney and Shetland.
36. Smith "Udal Law" paras 326-328.
37. Smith "Udal Law" para 328.
38. L.M. Larson p. 188 *et seq.* See also *Stair Memorial Encyclopaedia* para 309.
39. Lord Advocate v Balfour 1907 SC 1360 at 1368, 15 SLT 7 at 11 OH.
40. B.E. Crawford "The Pawning of Orkney and Shetland in *XLVIII S.H.R.* (1969) p. 163.
41. L.M. Larson p. 124, 125.
42. *ibid.* p. 127, 395, 396.
43. Crawford pp. 160, 161.
44. Lord Advocate v Aberdeen University and Budge 1963 SC 533 at 547.

45. See No. 28.
46. Lord Advocate v Aberdeen University and Budge 1963 SC 533.
47. However, the Protection of Wrecks Act 1973 (c. 33)s.3, appears to defined the foreshore as part of the seabed.
48. Smith v Lerwick Harbour Trustees (1903) 5 F 680, 10 SLT 742.
49. Lord Advocate v Balfour 1907 SC 1360, 15 SLT 7.
50. *Records of the Earldom of Orkney* (ed. J. Storer Clouston, 1914) Nos 101, 108, 120, 123; *Orkney and Shetland Records* (ed. A.W. and A. Johnston 1907-13) no. 57.
51. Smith v Lerwick Harbour Trustees (1903) 5 F 680, 10 SLT 742.
52. Lerwick Harbour Trustees v Moar 1951 SLT (Sh Ct) 46.
53. Spence v Union Bank of Scotland (1894) 31 SLR 904.
54. Smith v Lerwick Harbour Trustees (1903) 5 F 680, 10 SLT 742.
55. Spence v Union Bank of Scotland (1894) 31 SCR 904.
56. Lord Advocate v Balfour 1907 SC 1360, 15 SLT 7.
57. K. Robberstad "Strandrett" in *Norsk Leksikon (Kulturhistorisk Leksikon for Norsk Middelalder)* (1956-78) p. 296.
58. M.M. Larusson "Reki" in *Norsk Leksikon* pp. 34,35.
59. G. Donaldson *Shetland Life under Earl Patrick* (1958) p. 49.
60. *Records of the Earldom of Orkney No. 23.* There had already been three earlier litigations involving the subjects: decrees in two survive, nos 37 and 41.
62. Lord Advocate v Hebden (1868) 6 M 489 at 496, per Lord Ardmillan.
63. Merchant Shipping Act 1894 (c. 60) s. 523. See also Customs Comrs v Lord Dundas 8 December 1812 FC.
64. Merchant Shipping Act 1894 s. 521.
65. Information supplied by Sir Thomas Smith.
66. Smith v Lerwick Harbour Trustees (1903) 5 F. 680 at 689, 10 SLT 742 at 745.
67. 5 F 680 at 682, 10 SLT 742 at 747.
68. M. Reiten "Arealkonflicter i Akvakulturnaeringa" in *Kart og Plan* 6-87.
69. T.W. Fulton *Sovereignty of the Sea* (1911) p. 75.
70. Stair *Institutions* II, 1.5.
71. G. Donaldson *Shetland Life under Earl Patrick* (1958) p. 53.
72. J.R. Elder *The Royal Fishery Companies of the 17th Century* (1912) p. 9.
73. Fulton, pp. 176, 177.
74. Fulton, p. 154.
75. Fulton, pp. 83, 84; D.P. O'Connell *International Law of the Sea* i (1983) p. 3.
76. G. Donaldson, *Shetland Life under Earl Patrick* (1958) p. 19. Sir Thomas Smith points out that in Scots law formerly there could be a "kenning" of a widow to her terce. See also *Concise Scots Dictionary* (ed. M. Robinson, 1985).

77. As to the *netlog*, see No. 58.
78. B. Thornsteinsson "Fiskeret" in *Norsk Leksikon*, p.334.
79. *Register of the Privy Council of Scotland 1545-1689* (1st series) xi, pp. 328, 330.
80. Fulton, p. 83.
81. Fulton, pp. 84, 192, 223.
82. APS v pp. 234 ff.
83. O'Connell, i pp. 50, 51, 745.
84. Territorial Sea Act 1987 (c 49), s1(1)(a).
85. United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; Misc 11 (1983); Cmnd 8941).
86. R. Churchill and A.V. Lowe *The Law of the Sea* (2nd edn., 1988).
87. L.M. Larson *The Earliest Norwegian Laws* (1935) pp. 76, 77, 103, 104.
88. Larson, p. 381. It can be argued, however, that these rights are merely riparian.
89. The law billet placed a formal bar upon and about the grounds: Larson, p. 397.
90. Larson, p. 397.
91. See No. 58.
92. M.M. Larusson "Reki" in *Norsk Leksikon* pp. 34, 35.
93. National Library of Scotland, Advocates Mss 31.2.16.