PERCEPTIONS OF UDAL LAW IN ORKNEY AND SHETLAND

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On 23rd March 1990, a headline in *The Shetland Times* proclaimed: 'Udal Law buried by Crown Estate.' The article reported a ruling of the Court of Session that the seabed around Orkney and Shetland was owned by the Crown, as elsewhere in Scotland. A 'Special Case' had been raised by the Shetland Salmon Farmers' Association (SSFA) and Lerwick Harbour Trustees to test their claim that under 'old Norwegian laws, popularly known as Udal Law' (*Shetland Times* 18.3.1988) the Crown could not be the owner of the seabed around the Northern Isles.

The dispute arose after the Crown Estate Commissioners in 1986 announced a substantial increase in the seabed rental for salmon farmers. The SSFA argued that the Crown's right to the seabed off mainland Scotland was based on the feudal system. However, as Orkney and Shetland were originally udal, the SSFA maintained that feudal theory did not apply, and questioned whether the seabed around the Northern Isles really did belong to the Crown. If not, the Crown Estate Commissioners would not have the right to charge rentals. Lerwick Harbour Trustees wanted the question of udal law to be clarified in connection with land reclamation plans for the construction of a jetty at Dales Voe.

The Court of Session found that the Crown had the right of property on the territorial seabed from the low water mark out to the 12 mile limit. Hence the consent of the Crown Estate Commissioners is necessary for permanent fixtures on or over the seabed, and they have the right to charge rentals (*Shetland Times* 23.3.1990).

The claim that udal law was buried by this decision was contested in a letter to *The Shetland Times* of 30th March 1990 by T.M.Y. Manson. While he had never heard before of the claim that udal law might apply to the seabed, he pointed out that the Court of Session's decision did not affect udal rights on land above the low water mark.

In other words, udal law was still alive and kicking. It is in itself noteworthy that Norse cultural traditions have apparently persisted more than 500 years after the islands became Scottish. Despite the disappearance of the Norn language, certain rights and customs related to land holding still survive which are in marked contrast to the Scottish tradition. Orkney and Shetland thus provide an ideal case for examining the characteristics of cultural change and continuity in the meeting of two cultures over a long period of time.

I first heard about udal law from an uncle, who worked for the Ministry of Works in Edinburgh. My interest remained latent until I moved to Norway in 1973. My research into Norwegian land tenure gave me some points of reference. I spent the academic year 1985-86 in Scotland, when I began a

study of geographical manifestations of udal tenure and undertook a month's field work in Orkney and Shetland.[1] This lecture recapitulates some of my work up until now. I will present preliminary answers to two questions:

— What are the characteristics of udal law as described in published literature on the topic?
— What are people's perceptions of the significance of udal law today?

What are the characteristics of udal law as described in the literature?

My approach is historical-geographical or cultural-historical rather then legal. As well as legal literature, I have looked at historical, geographical, topographical and popular literature.[2] As a frame of reference, I have compared the situation in Orkney and Shetland with that prevailing both in Norway and mainland Scotland.

In a broad sense, the term udal law is used to refer to the whole system of Norse law, based principally on the Magnus Code of 1274, in force when the islands were impignorated to the Scottish Crown in 1468 and 1469. In a narrow sense, udal law refers to certain survivals in the land-tenure system, sometimes referred to as udal tenure (Dobie 1936: 450, 455; Ryder 1989: 193, 196).

From the literature, I have identified ten main characteristics or aspects of udal law which still seem to have some relevance today. (The question of historical land measures and weights and measures will not be considered here.) Seven of these, relating directly to land tenure, are shown in Figure 1 in comparison with the situation in respectively Norway and mainland Scotland.

1) Absolute ownership of land (allodial tenure)

Unlike most land in Scotland, where feudal tenure dominates, udal land is allodial, i.e. the title does not emanate from the Crown and there is no feudal superior. A written title is not necessary under udal tenure, although it may be found convenient to take out one (Drever 1933: 323, 328-9; Dobie 1936: 451-3; Smith 1978: 197, 199; Ryder 1989: 201-2). This is similar to the situation in Norway, where there is no feudal superior to land. Although deeds have been registered in Norway since 1623 and a land register was established by decree of 1738, registration is not necessary for the acquisition of ownership to land (Imsen 1974: 344-5; Robberstad 1983: 59-60).

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1. The study has been supported financially by grants from the Norwegian Research Council for Science and the Humanities (1985-86) and the Research Council of Norway (1993-94). Preliminary results of the study were presented in lectures given at meetings of the Traditional Cosmology Society and of the Scottish Society for Northern Studies in Edinburgh in November 1986.

2. Only a selection of the most central references will be presented in the following.

In the court case of 1963 concerning the treasure found on St. Ninian's Isle in Shetland, the finders claimed that, as the treasure was found on udal land with no feudal superior, it should be divided according to Magnus Law (Taranger 1915: 107): one-third should go to the finder, one-third to the landowner and one-third to the Crown. The Court of Session accepted that the land was held under allodial tenure, but ruled that the right of treasure nonetheless belonged to the Crown, not as feudal superior but as part of its sovereign rights (*Lord Advocate v. Aberdeen University and Budge* 1963 SC 533; Smith 1973: 149-51; Robberstad 1983: 64-5; Ryder 1989: 212-3).

Under Scots law, treasure belongs to the Crown if the proper owner cannot be ascertained (Smith 1973: 149; Ryder 1989: 212). We can note that in Norway, since 1905, treasure and other moveable antiquities older than 1537 belong automatically to the State when the rightful owner can no longer be traced[3] (Robberstad 1983: 64; *Kulturminneloven* 1978: 12-13).

2) Rights of kin

Udal land is held with an entail on the family. Land becomes udal if held unbroken in the family for a certain length of time: according to the Magnus Code, this was 60 years or four generations, or with immediate effect if it was a gift from the king. The principle was that if udal land was offered for sale, the kin had rights of prior purchase; or if the land had already been sold, they had rights of repurchase within a certain time (Taranger 1915: 98-100; Dobie 1936: 451-2; *NOU* 1972, 22: 7-8; Robberstad 1983: 60; Ryder 1989: 204-5).

This is still the essence of udal rights (*odelsrett*) in Norway today. Although an attempt was made to abolish udal rights in 1811, they were restored and enshrined in the Norwegian Constitution of 1814. Since 1857, land has become udal after 20 years. Since 1974, the family's right to repurchase sold land remains valid for two years, the owner being required to live on the farm and operate it (*NOU* 1972, 22: 9-11; Johannessen 1974: 240-1; *Odelslova* 1974: 7, 27, 40).

Evidence from the Orkney and Shetland Records and court cases indicates that the consent of kin (*roithman* or person with the nearest right) was often obtained on land sales until at least the beginning of the 17th century (Dobie 1936: 452; Ryder 1989: 205).

3) Partible inheritance

In the case of udal property, the principle is that all the immediate heirs share the inheritance. The Magnus Code gave the eldest son the right to take over the main house. It also stipulated that daughters should receive half the shares

3. However, the State can pay a reward, to be divided equally between the finder and the landowner, and in the case of gold and silver this is to be equal to at least the metal value plus 10%.

of sons. Partible inheritance tended to produce the sub-division of holdings, but only if the younger brothers and sisters could not be compensated in other property, moveables or shares in an undivided estate (Taranger 1915: 80-1; Dobie 1936: 453; Fenton 1978: 22; Robberstad 1983: 61; Ryder 1989: 204).

Partible inheritance of land contrasts with the Scottish feudal principle of primogeniture for male heirs, which was the main rule applied to heritage until 1964[4] (Smith 1958; Gloag & Henderson 1980: 647-54, 664; Walker 1983: 134-44).

However, in Norway, a decree of 1539 allowed the senior male heir to inherit land intact if he could buy out the other heirs or if he paid rent to them. This right (*åsetesrett*) was enshrined in the Norwegian Constitution of 1814. Since 1821, junior heirs have received their shares in the form of mortgage rights. Females have received full shares since 1854 (*NOU* 1972, 22: 14-15; Johannessen 1974: 376). From 1955, the sub-division of farm holdings has been forbidden without the consent of the agricultural authorities (*Jordlova* 1955: 55). The law was changed in 1974 to remove the distinction between males and females in the order of succession (*Odelslova* 1974: 12).

The last case recorded in the literature of udal land in the Northern Isles being sub-divided upon intestacy is the case of Hawick v. Hawick from 1893. The Sheriff Court upheld the law of udal succession, ordering the land to be divided equally among the heirs (two sons and two daughters, the latter receiving full shares) (Dickinson 1954: 159-60).[5]

4) Scat

In Norwegian, the general term for tax is *skatt*. In Orkney and Shetland, scat was a tax payable by udal landholders for government purposes. It was regarded as a tribute to the Crown or State, not as a feu duty, which in Scotland implied servitude to a feudal superior. Scat was payable to the Crown directly or to the Earl in the right of the Crown (Smith 1978: 198-9; Ryder 1989: 206-7).

An Act of 1812 allowed scats and other duties of the Earldom to be sold. During the 19th and 20th centuries, many — although not all — landowners redeemed scat upon the payment of a lump sum (Heddle & Johnston 1889: 14; MacGillivray 1986). According to the Scottish Office, 315 scats were still being paid in 1972 (265 in Orkney and 50 in Shetland).

4. The principal rule applied to intestate succession. Testamentary disposition of heritage was, however, permitted from 1868, while before this a landowner could before death dispose of heritage as he would, thus legally circumventing primogeniture. The Succession (Scotland) Act 1964 removed the distinction between males and females for the heirs of those dying after the Act came into force.

5. Shetland archivist Brian Smith has, however, been unable to find this case in the Sheriff Court records.

Since 1974, redemption has been compulsory on the sale of a holding. Since then, scat payments have become vestigial (Ryder 1989: 207).

In Norway, various land taxes were payable from at least the 12th century. Most were abolished in 1837. The remainder could be redeemed from then, and redemption was made compulsory in 1939 (Winge 1974: 143-4, 197-8, 199-201).

5) Scattalds

In its original meaning, a scattald was a territorial unit of landownership with several owners, apparently a unit for the payment of scat. Each owner possessed both privately owned arable land and a share in the undivided hill grazings, owned in common. The term scattald is apparently only found in Shetland, but the phenomenon appears to be similar to urislands in Orkney (Fenton 1978: 35-6; Smith 1984; Ryder 1989: 208-9).

By the 18th century, the term scattald came to be synonymous with commonties in mainland Scotland, i.e. hill grazings in which tenants have rights of pasture and peat-cutting. Scattalds may be divided among landowners under a Scottish Act of 1695 providing for Division of Commonty (Adams 1971: 1, 234-53; Knox 1985: 22, 199-234). The division of scattald among landowners and the apportionment of crofters' rights remain two distinct operations.

In Norway, it is still not unusual for hill pastures to be owned in common by several landowners, who as owner-occupiers have grazing rights. Common land could, however, be divided under ancient Norse laws, and from the 19th century by the Norwegian Enclosure Acts (Borgedal 1959: 135-6, 142-5, 155-62; Grendahl & Solberg 1959; Johannessen 1974: 361).

6) Foreshore

The ownership of udal land extends from the highest stone on the hill to the lowest of the ebb. This is often confirmed in title deeds, thus including the foreshore (to the low water mark at spring tide) in the adjoining holding. Possibly the earliest mention of this in Orkney is in a deed from 1480 and in Shetland from 1528. In Norway, the foreshore belongs to the adjoining landowner, in contrast to mainland Scotland, where the foreshore belongs to the Crown, although the right to property in the foreshore is alienable to individuals with the Crown as ultimate superior (Drever 1904: 10-16; Smith 1978: 200-1; Gloag & Henderson 1980: 593-4; Robberstad 1983: 65-6; Ryder 1989: 214).

Associated with foreshore ownership are rights to sand and shingle, and certain rights to build on the foreshore. Historically, proprietary rights included bait, sealing-places, seaweed, driftwood, whales and wrecks (Ryder 1989: 213-4). The right of tenants to seaweed etc. was not protected in Scotland until the Crofters Act of 1886.

Historically, landowners in Orkney and Shetland claimed a share of pilot or caaing whales driven up on to their shores. Under Scots law, landowners have no rights to whales. In the Northern Isles, the claims of landowners derived from somewhat complicated rules in the Magnus Code. These became in time modified so that one-third went to the captors, one-third to the landowners and one-third to the Crown. The Crown eventually ceased to exercise its right, but landowners' claims were upheld in court cases of 1831 and 1838. In the Hoswick whale case of 1890, however, the Court of Session declared this to be an unreasonable custom and the landowners were overruled. The decision was reached by a majority verdict, the dissenting judgement being that Scots law concerning the foreshore did not apply to udal land in Shetland (Taranger 1915: 158-60; *Bruce v. Smith* 1890 17 R 1000; Ryder 1989: 213).

In the Sinclair's Beach case, on the other hand, the Court of Session upheld the adjoining landowner's right to build on the foreshore on the basis of a udal title. A Crown grant to Lerwick Harbour Trustees was found not to be valid (*Smith v. Lerwick Harbour Trustees* 1903 5 F 680; Drever 1904: 4-5; 1933: 330; Ryder 1989: 214). A similar case in the Sheriff Court in 1950 was won by the Harbour Trustees, when the adjoining property was found to be feudal, not udal (*Shetland News* 7.12.1950; *Lerwick Harbour Trustees v. Moar* 1951 SLT (Sh Ct) 46; Ryder 1989: 214).

7) Rights to salmon-fishing

Salmon-fishing is a udal right belonging to riparian proprietors in Orkney and Shetland. In Norway, salmon-fishing rights have always belonged to the adjoining landowner, subject to the right of the State to regulate the equipment used (Robberstad 1983: 62; *Laksefiske- og innlandsfiskeloven* 1964: 43-56). Under Scots law, salmon-fishing belongs to the Crown as feudal superior, although alienable to individuals (Neish & Blades 1929).

In the Balfour case of 1907, it was found that a riparian owner in Orkney whose lands were held on a feudal title nonetheless possessed salmon-fishing rights. The Court of Session found that salmon-fishings do not constitute a separate feudal estate in Orkney and Shetland, but are part and pertinent of landownership. The right of salmon-fishing was never claimed by the Crown of Norway, and thus never conferred on the Crown of Scotland (*Lord Advocate v. Balfour* 1907 SC 1360; Drever 1933: 330-1; Smith 1978: 201-2; Ryder 1989: 315).

8) Ownership of the seabed

Udal rights to the seabed were not declared in the past until they were invoked in 1986 by salmon-farmers and others protesting against the decision

of the Crown Estate Commissioners to raise rentals (*The Orcadian* 21.8.1986; 4.9.1986).[6]

In Scotland, the Crown regards itself as owner of the seabed. In Norway, private ownership rights extend as far out as the *marbakken*, i.e. where the coastal shallows end in a steep slope to deeper water. Where there is no clearly defined *marbakke*, private ownership rights extend to a depth of 2 m from the low water mark. Implicit in the Magnus Code, this was upheld by the Supreme Court in the 19th and 20th centuries. Within this boundary, the agreement of the shore-owner is necessary before a fish farm can be established (although subject to government rights of compulsory purchase). In 1985, the Supreme Court established that the rights of riparian owners — known as *strandrett* — extend even beyond this limit with regard to the taking of seaweed, sand and shingle, rights of infilling, building of piers and breakwaters, and the right of objecting to third-party use on aesthetic grounds. However, anyone can establish a fish farm beyond the private boundary. There is no question of paying a rental to the State (Austenå 1984: 4-21; Neergaard 1984: 317-9, 321-4; Belsheim 1987; Reiten 1987; Rogstad 1987; Ryder 1989: 218).[7]

In Shetland, the SSFA wanted to establish that the Crown had no property rights to the seabed. The SSFA was not, however, concerned with establishing competing ownership. Shetland Islands Council was worried that the defeat of the Crown Estate Commisioners would result in a multitude of proprietary claims from adjoining landowners (*Shetland Times* 11.3.1988). Counsel for the SSFA argued that there was a case for the seabed being seen as having some relationship to the land in general — which was udal in character — but without it belonging to particular holdings. There was no evidence that the Crown had rights to the seabed initially.[8]

Knut Robberstad (1983: 65-6) suggested that Norse law implying private ownership as far as to the *marbakke* may have become modified in Orkney and Shetland in the 15th and 16th centuries with the concept of ownership extending to the lowest of the ebb. It was argued by William Howarth (1988) that udal tenure ceases at the lowest water mark.

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6. Thanks are due to William P. L. Thomson for drawing my attention to the discussion in the pages of *The Orcadian* in September 1986. In personal communications from James Moncrieff, Chief Executive of the SSFA in Lerwick, in October and November 1987, I was asked to assist in obtaining information regarding the status of the seabed in Norway and other Scandinavian countries in connection with the dispute between the SSFA and the Crown.

7. Information on the status of the seabed in Norway was obtained for the entry on 'Udal Law' in *The Laws of Scotland. Stair Memorial Encyclopaedia* (Ryder 1989) by the present author.

8. This argument was contained in a *Supplementary note for Shetland Salmon Farmers Association*, dated 9th June 1987, from Anderson & Goodlad, solicitors, Edinburgh. Thanks are due to James Moncrieff for making this document available to me.

The decision of the Court of Session in 1990 in favour of the Crown referred to the seabed within the limits of the territorial sea. As in the St. Ninian's Isle treasure case, the seabed was found to belong to the Crown as part of its sovereign rights, not its rights as feudal superior (*Shetland Salmon Farmers Association v. Crown Estate Commissioners* 1990 SCLR 483). The Crown might well have lost the latter argument in court.

9) Udaller class

The term udaller referred originally to any person possessing land under udal tenure. However, it is often used in the literature to refer to an intermediate class of small landowners holding udal property, and by implication descended from the original Norse landowners. It is not infrequently a romanticized concept: Walter Scott referred to 'the Norse inhabitants, the true Udallers of Zetland' ([1831] 1904: 9), while to David Balfour (1859: xxx, xxxv) the udaller was a 'peasant noble.'

In Norway, a udaller (*odelsbonde*) is a freehold farmer holding land with udal rights; 98% of Norwegian farms are owner-occupied, the majority small farms held under udal tenure.

10) Udal law as a symbol of Orkney and Shetland identity

Udal law was taken up by Orkney writers in the later 19th century, a period when the Norse connection experienced a cultural revival (Renwanz 1980: 9-10, 89-91; Cohen 1983: 316-91). David Balfour, in *Odal rights and feudal wrongs* (1860), associated udal rights with the opposition of landowners to the impositions of the Earls. Alfred Johnston idealized the Norwegian peasant democracy, and in 1886 founded the Udal League to campaign for Home Rule. The Udal League advocated land reform and the conversion of tenants to owner-occupiers, who would have their udal rights confirmed as protection against the feudal estate owners (Thomson 1985).

A hint of interest in udal law as a symbol of island identity is found in the Shetland Movement (Cohen 1983: 483) and, more markedly, in the Orkney Movement (*The Orcadian* 13.12.1979).

In Norway, udal rights were revived along with other Norwegian institutions after the split from Denmark in 1814. This was related to the power of agrarian interests and a developing Norwegian national consciousness (Tveite 1959: 112; *NOU* 1972, 22: 10-11; Østerud 1978: 79, 81, 240; MacGillivray 1986).

What are people's perceptions of the significance of udal law today?

My source material consists of interviews obtained through a network of contacts. During the spring of 1986, I talked to some 70 people about udal law — mostly in Orkney and Shetland, a few in Edinburgh. I asked them to

tell me what they understood by udal law and then to elaborate on particular aspects. The collected material varies from taped interviews (undertaken for the School of Scottish Studies) to notebook interviews as well as shorter chats and telephone conversations. I did not make a systematic sample survey. My informants were not representative in the statistical sense. My intention was to make an exploratory investigation to gain a general impression of present-day perceptions. The interview material allowed me to make a broad categorization into five groups according to the type of significance my informants attached to udal law. Besides interviews, I have undertaken supplementary archive investigations in the Shetland Archives and the Scottish Record Office.

1) The legal profession — solicitors

Solicitors practising in Lerwick, Kirkwall and Stromness (of whom I interviewed eight) are periodically confronted with questions concerning udal law. Their training is based on Scots law. Most lawyers regarded udal law as having little practical significance today. Udal law has been eroded, and exists only as survivals within Scots law.

The most important survivals are private ownership of the foreshore and of salmon-fishing rights, upheld in court cases this century. In practice, the foreshore is often a pertinent to both udal and feudal properties. Title deeds mention the lowest ebb or the tang ebbs. Landowners would also be able to claim ownership of the foreshore under the Scots law of prescription. In cases involving the Crown Estate Commissioners, the onus has been on the landowner to prove his title on the assumption that otherwise the foreshore belongs to the Crown. Commercial use of the foreshore (for example for sand and shingle extraction) is the right of the landowner. Crofters' rights to seaweed and driftwood from the foreshore are regulated by the Crofters Act.

An unclear area was whether crofters' traditional rights to fish for salmon and trout with fixed gill-nets was subject to prohibition under the Fisheries Act of 1951. Crofters prosecuted for poaching felt their udal rights were being infringed, but there has been no test case to clarify this. In Orkney, angling for salmon and trout is free for all, but legal opinion was that this is a local custom, unconnected with udal law.

Most udal properties have title deeds, but these are often defective. Feudal conveyancing is applied to udal properties, but titles in Orkney and Shetland differ somewhat from feudal titles elsewhere in Scotland.

Rights of kin and partible inheritance were regarded by most lawyers as historical curiosities they had not come across in practice.

Scat has largely been redeemed, but was still in 1986 — and in 1993 — being paid by some. I saw the scat ledger at one firm of solicitors in Lerwick.

As far as the seabed was concerned, most lawyers regarded this as belonging to the Crown, although some were in 1986 looking forward to a test case.

2) Townspeople — urban Shetlanders and Orcadians

I talked to about 30 townspeople in Lerwick, Kirkwall, Stromness and Scalloway. The majority appeared to regard udal law as largely unimportant. Many said they knew little about it. What they did know was largely anecdotal, referring for example to newspaper articles. Most knew it had something to do with the foreshore or with fishing-rights as a bone of contention.

Some had personal knowledge of disputes over foreshore ownership. In Stromness, the adjoining landowner's title had been accepted in one case but not in another in conflicts with the Harbour Authority, which claimed a title from the Crown. There has been no legal test case in Orkney, equivalent to the Sinclair's Beach case in Shetland.

Several mentioned that the seabed belonged to the Crown, but I heard two anecdotes suggesting traditions of private rights to adjoining water: in one case, they were said to extend as far out as one could wade, in the other as far as one could ride out on horseback until the sea touched the rider's scabbard.

Several of those with an academic education, including local historians, suggested that udal law was not properly understood by those making claims. As an example of a misconception, an Orkney Tourist Office brochure advertizing free angling for trout was cited, stating: 'no permits are required, thanks to ancient Norse law and Udal tradition.'

Some saw references to udal law as a hankering after a golden past, or as romanticism, while others saw it as a part of Norse tradition important for a feeling of Orkney or Shetland identity.

3) Landowners in the Scottish tradition

I had ten interviews with estate owners (lairds), proprietors of substantial areas of land and of owner-occupied farms, largely tracing their descent from Scots incomers, and with little or no tradition of udal practices.

Most felt that udal tenure had little significance other than that the foreshore belongs to the adjoining proprietor. For some, this was important for commercial sand and shingle operations. Historically, foreshore ownership had some significance for the kelp industry and for rights to a share in whales driven onto the beach. Several landowners referred to disagreements with the Crown Estate Commissioners over rights to piers on the foreshore; usually, but not invariably, these were accepted as belonging to the proprietor.

Some proprietors were aware that they owned salmon-fishing rights, but the main talking-point was the crofters' claims to traditional rights of netting salmon for their own use.

Some proprietors had title deeds indicating they owned a mixture of udal and feudal land. The land was invariably inherited by the Scottish law of

succession, although some made reference to land sub-division as a historical occurrence.

Relations with tenants are governed by the Crofters Act, which regulated crofters' rights to grazing and peat-cutting in the scattald, and to seaweed, shingle etc. for their own use from the foreshore. The right to cut peats commercially in the scattald belonged apparently to the landowner.

4) Crofters — tenants and owner-occupiers of recent date

Twenty crofters were interviewed. These were tenants or had been until relatively recently before purchasing their crofts.

On many of the smaller islands of Orkney, where the large estates had been broken up and crofters became owner-occupiers in the 1920s or later, I got the impression that there was little or no udal tradition, although it was accepted that landowners have rights to the foreshore.

An active member of the Orkney Movement claimed that udal law in its original sense was still valid, and that owner-occupied crofts could claim udal status after the requisite number of generations had passed. This would have implications for rights of kin and inheritance. It was claimed that udal landholders owe no allegiance to the Crown apart from the obligation to pay scat, and the government could not do away with udal law. Udal law was seen as a part of Orkney identity.

In Shetland, there appeared to be fairly strong awareness of udal law among several of the crofters I interviewed. Private ownership of the foreshore was generally mentioned. Several gave a wide interpretation of udal rights as including tenant crofters' traditional rights to take seaweed, sand and shingle from the foreshore, although this was less clearly expressed in the case of grazing and peat-cutting rights on the scattald.

The biggest source of contention was the claim that crofters have traditional rights to set salmon-nets off their own shores. I attended a meeting of the committee of the Shetland Crofters Fishing Rights Protection Society, formed in 1970 after a crofter was prosecuted for illegal fishing (Tirval 1986). The society aims to uphold crofters' traditional fishing rights, including the right to set standing nets, which was said to be handed down in the old udal laws. The use of gill nets is not allowed under Scots law. The local branch of the Crofters Union supported the right of crofters to set nets provided they used traditional methods, and the nets were set off their own shores (*Shetland Times* 11.7.86). According to the society, traditional methods meant the nets were not allowed to be attached to the shore, nor to block completely the mouth of a voe — the fish must be given a 'sporting chance.' The local interpretation was that crofters are allowed to set nets to catch 'one for the pot,' but not for commercial fishing.

The feeling was also expressed that crofters need to guard their foreshore rights against encroachment by Shetland Islands Council when the latter built roads and sewers.

The claim of the Crown Estate Commissioners for a rental from the seabed was seen as an anomaly, not in accordance with udal law.

Generally, udal law was regarded in a positive light, historically protecting the small farmer against the Crown and lairds. The Hoswick whale case of 1890 was seen not only as a victory for tenant rights, but also for udal rights: paradoxically, the lairds were seen as trying to stamp out udal law when demanding their right to a share of the whales!

5) The 'last udallers'

The term 'last udallers' might be applied to small udal proprietors whose land has apparently been inherited through the generations without becoming subservient to the lairds. Present owners may not always have a great deal of knowledge about udal law as such, but could tell of practices existing within living memory or recent generations which are clearly udal, such as partible inheritance and rights of kin. In some instances, however, the owners had made a special study of udal law, so that it was difficult to tell whether they were presenting book knowledge or oral tradition.

In Orkney, active udal traditions are to be found in Harray and Firth. People spoke of the 'Harray lairds.' Reference was made to property that could be traced back in the same family as far as the 16th century. It was observed that many do not have proper titles to their land when it has not been sold out of the family. Udal rights were held to include foreshore rights and rights to salmon-fishing as far as the horizon. It was said that genuine udallers only come to light when put under pressure. As an example was mentioned protests against the establishment of a Site of Special Scientific Interest (SSSI), which affected a large number of small udallers who regarded this as an infringement of their absolute rights of ownership.

Unclear ownership — farmers without title deeds — posed problems for the declaration of the SSSI. The dispute is documented in the pages of the local newspaper. Complexities of land tenure delayed the final notification of the West Mainland SSSI, first announced in 1983, until 1987. In all, 95 owners or occupiers had to be consulted. The Harray Commonty was divided into 166 strips (*The Orcadian* 19.2.1987). A group known as the Orkney Hill Users Association and Conservation Group objected to the SSSI on the grounds of 'ancient rights under Udal Law of Orkney' (*The Orcadian* 11.6.1987). There were incidents of heath-burning that were seen as a protest against the SSSI (*The Orcadian* 21.4.1988).

My attention was brought to the case of the Corrigall Farm Museum (also mentioned in MacGillivray 1986). An area of 0.26 acre was purchased in 1971 by Orkney County Council. The owner, who lived in South Africa, would not sell until the consent had been obtained of ten relatives — siblings and cousins, all grandchildren of the former owner, eight of them living in southern Africa. All signed the deed, apparently providing a recent example

of the practice of rights of kin. An extract from the plan accompanying the deed, with the signatures, is shown in Figure 2.

A check in the Index of Sasines indicated that other branches of the Corrigall family appeared to be practising udal inheritance customs and rights of kin until the early 20th century. Property was inherited by all children equally, and later some brothers purchased the shares of others, including an instance where an elder brother bought back a share sold by a younger brother to someone in South Africa.

In Shetland, holdings with active or recent udal traditions and practices are found spread in different parts of the islands, including Yell and Mainland. At Clothan, West Yell, a will of 1842 divided a property equally among three sons, after smaller outlying parts had been set aside for three daughters. It was specified that if any brother wanted to sell, the first offer was to be made to the nearest brother, 'the brothers to have a preference to all others on equal terms.' Family members, who later got into debt, emigrated to Australia or otherwise left Clothan, sold or handed over their shares to remaining family members. The property is now reunited in the hands of one owner. A curious sasine from 1892 concerns the Free Church of West Yell at Clothan, where the trustees of the congregation disponed the church to themselves as 'udal proprietors ... without a written title.'[9]

At Fladdabister, in Cunningsburgh, is to be found a group of small proprietors known as 'peerie lairds' (see also Renwanz 1980: 128-33). They referred to their lands as free lands rather than udal lands. One related in detail how the original property, mentioned in a 17th century record, had been successively divided and now consisted of six holdings. Rights of family members who emigrated appear to have been taken over by those who remained. A check in the Sasine Register confirmed the sub-divisions. In several cases, one as late as 1928, daughters received half as much as sons. At the first sub-division in 1780 and again at a later one in 1880, it was stipulated that the property was not to be sold out of the family without being offered first to the other heirs. In 1972, one of the holdings was disponed equally to two sons, one of whom bought out the share of his brother in 1979. This example suggests that partible inheritance and rights of kin have been continuously practised until the present time.

Conclusion

Udal law survives in Orkney and Shetland today as certain peculiarities of land tenure in a dominating Scots context. The Scottish Court of Session has upheld the rights of landowners to foreshore and salmon-fishing, but not to rights of a share of whales nor of treasure, while the claim of salmon-farmers

9. Thanks are due to John Ballantyne for drawing my attention to the sasines in the Scottish Record Office and to other documents concerning Clothan among the papers of L.H. Mathewson (Shetland Archives D.13.47).

to a rental-free seabed was rejected. Scat exists as perhaps a thousand-year old survival of Norse administration[10], but is rapidly disappearing. Remnants of rights of kin and udal inheritance, paradoxically the poorest documented aspects of udal tenure in the present-day context, represent survivals of the essence of udal tenure, despite the forces ranged against them for 500 years.

The meaning and function of these udal survivals vary among different social groups. For landowners and crofters, where it has any significance at all, udal law has primarily an economic function related to the exploitation of the foreshore or fishing — either commercially or, still for crofters, within a household economy. In the seabed dispute, udal law was also of potential economic significance for salmon-farmers.

For townspeople, udal law is primarily a curiosity with little significance for everyday life. For some, it is part of a Viking heritage which can be used to promote tourism. Lawyers form a special sub-group with a professional interest, by and large, in the maintenance of the Scots law of their training, although some make a point of defending udal tenure where there is a chance that it can be legally upheld. For some politically active groups, heirs of the Norse revival of the late 19th century, udal law has a symbolic function as an element in a perceived local collective identity.

For the last udallers, or at least some of them, udal law may have an idealistic function, governing their conduct regarding perceived family land rights in matters of inheritance and sale. Perhaps we have here the vestiges of a collective memory with subconscious ethnic undertones.

Tradition and change in the context of Orkney and Shetland can be seen against the background of a cultural cross-pressure from Norse and Scots influences. In order to study how the significance of udal law has altered over time, it is necessary to place recent observations and present-day perceptions in historical perspective. Udal law is not a static phenomenon. Its significance has changed through time depending on the historical context. This requires further study.[11] As tradition, udal law is part of a collective memory of Norse origins, renewed through revived Norwegian contacts and the dissemination of written knowledge in the 19th and 20th centuries. As a cultural feature subject to change, udal law has undergone alterations under the pressures of Scots feudalism and later economic and social forces. Udal law has been continually reinterpreted within different historical contexts through time, and continues to be redefined within different social groups at the present time.

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10. The payment of skatt or taxes from the Northern Islands to the Kings of Norway was mentioned in the sagas, although the connection between these payments and later scats may be somewhat tenuous (see Thomson 1987: 12, 37, 118-123).

11. A tentative sketch of the development of udal law through time was presented in the lecture, but this was omitted from the published version owing to lack of space.

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	NORWAY	ORKNEY & SHETLAND	SCOTLAND
Type of landownership	Allodial	Allodial & Feudal	Feudal
Rights of kin	*Odelsrett*	Udal survivals	None
System of land inheritance	Partible inheritance + *åsetesrett*	Primogeniture to 1964 + survivals of partible inheritance	Primogeniture to 1964
Land taxes and duties	Diverse land taxes to 1939	Scat + feu duty to 1974[1]	Feu duty to 1974[1]
Foreshore	Owned by adjoining landowner	Owned by adjoining landowner[2]	Owned by Crown
Rights to salmon fishing	Owned by adjoining landowner	Owned by adjoining landowner	Owned by Crown
Seabed	Owned by adjoining landowner to *marbakken*	Owned by Crown	Owned by Crown

Fig. 1. Seven aspects of land tenure in Norway, Orkney and Shetland, and mainland Scotland.

Notes:

1. Scat and feu duty were not entirely abolished in 1974: the Land Tenure Reform (Scotland) Act 1974 prohibited the creation of new feu duties or similar payments from land, and provided for their voluntary redemption, while making redemption compulsory upon the sale of land.

2. Court decisions have upheld ownership of the adjoining foreshore by landowners in the case of a udal title, but not necessarily in the case of a feudal title.

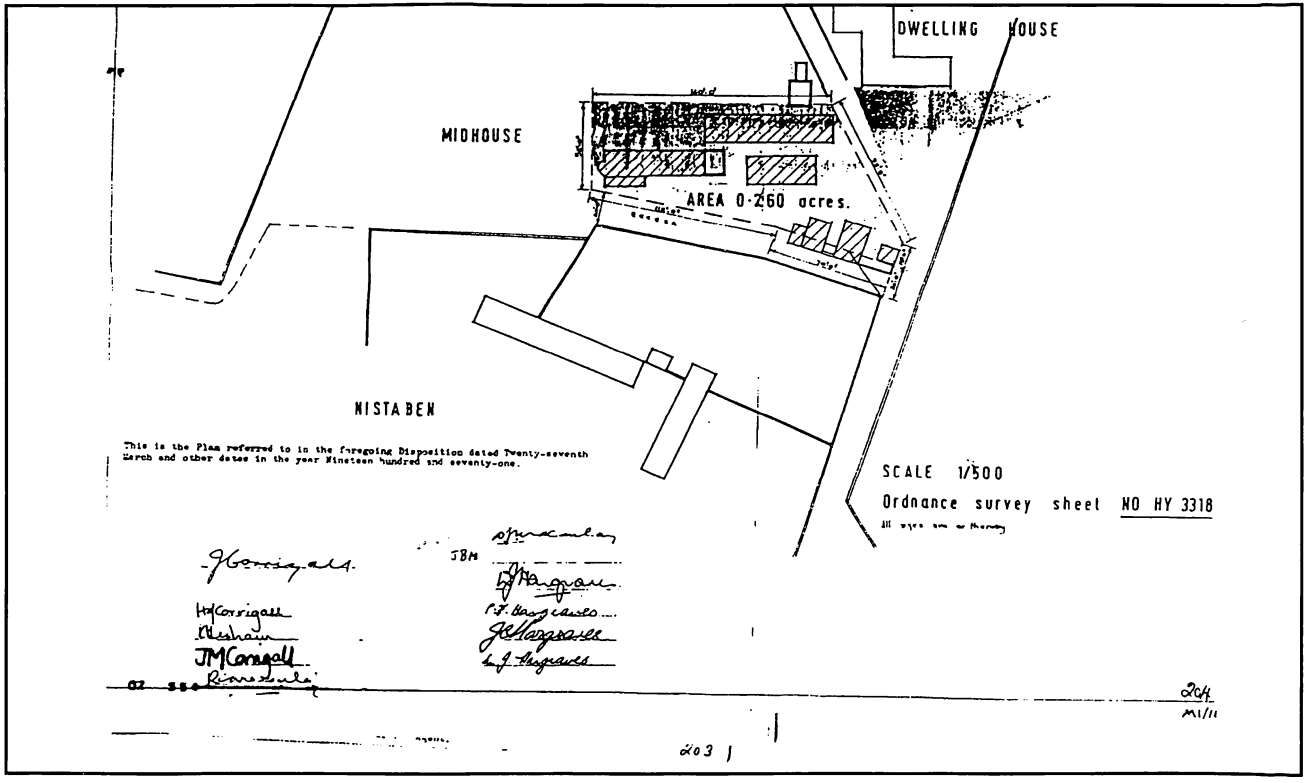

Fig. 2. Extract from the plan attached to the disposition of Corrigall Farm Museum to Orkney County Council in 1971, with signatures of kin giving consent to the sale.