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UDAL LAW – PAST, PRESENT AND FUTURE?

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CONTENTS

	Page
Introduction	2
Chapter 1 Historical Development	4
• Norse Settlers	
• 1468 to 1611	
• Post 1611	
Chapter 2 Case Law	13
• Early Case Law	
• Smith v Lerwick Harbour Trustees	
• Lord Advocate v University of Aberdeen and Budge	
• Shetland Salmon Farmers	
Chapter 3 Survivals	21
• Udal Law in its Present Form	
(a) Udal tenure	
(b) Scat	
(c) Salmon Fishings	
(d) Foreshore	
• The Position in Norway	
Chapter 4 Future Reform	28
• Perceptions of Udal Law Today	
• Land Reform and Law of the Foreshore and Seabed	
Conclusion	35
Appendices	36
Bibliography & References	41

INTRODUCTION

Udal law is in essence an allodial system of landholding and related rights, of Norse origin, brought to Orkney and Shetland when colonised by Norwegian emigrants in the seventh century. More than a thousand years on, the purpose of this study is to examine the existence of Udal law, from its history, to its relevance in a modern context and ultimately its prospects in the 21st century.

The historical background which will be outlined in the first chapter, is long and eventful. From the incorporation of what are now the Northern Isles into Greater Scandinavia, to the impignoration of the islands to Scotland in the 15th century, the foundation of the udal system was that udal land, unlike the feudal equivalent, was owned outright, the udaller having no superior. However, scottisization and the feudal influence this brought with it is an interesting factor in the development of the udal system, and further investigation gives an insight into the current situation as it has developed.

This Scottish impact on case law will be the focus of investigation in the second chapter. Several cases involving amongst other things salmon, the foreshore and the Crown Estate forwarded arguments founded on udal principles. This led to recognition in some cases and rejection in others, but provides an interesting illustration of the judicial treatment of the subject. This will lead on to an examination of the established survivals considered in existence today, as contrasted with the former neighbouring udal system in Norway. Further to this, local views will be sought, as to the general public opinion on udal rights. Finally, the question will be asked as to whether udal law has a future in some form, in the light of impending land reform legislation.

The methodology used in the course of the study is diverse. From a historical perspective it is necessary to look at work by the Institutional writers and articles written from a variety of different academic standpoints such as geographical, sociological, and of course legal writings. Using the Westlaw computer catalogue,

and Scots Law Times internet sites facilitate access to case reports. In addition, the internet will also be used to access Government publications, and those of the Scottish Law Commission; plus library skills will be utilised to find legislation. Furthermore, academic work from overseas is analysed to include a comparative study with Norway. To get a more current angle, newspaper reports are also included in the review. In addition to this I intend to undertake primary research in order to establish modern-day views on the subject, through employing my local knowledge to conduct interviews with individuals.

It should also be pointed out that due to lack of space, research has been predominantly conducted from an Orcadian standpoint, though Shetland cases and articles have also been used. However, the principle still applies that both are subject to the same set of laws and thus an assumption can be made that rules concerning udal law have equal application in both island groups.

CHAPTER 1

HISTORICAL DEVELOPMENT

“[A] continuous tale of wrong and oppression, of unscrupulous rapacity and unheeded complaint...Regarded as aliens of no value beyond the revenue or plunder which could be extorted from them, they have been granted, revoked, annexed, regranted, confiscated, and re-annexed with wearisome monotony of torturing change.”

Balfour, 1859¹

Norse Settlers

The relationship between Orkney and Scandinavia is long and well documented. The Norse impact is clear: from the lilting accent derived from the old Orkney Norn (apparently akin to a Norwegian person talking English), to the runic graffiti on the ancient monuments, and the influence on many of the surnames and place names. With such a history, it is clear to see why still today Orcadians have a strong affiliation with their Viking roots and thus why they are reluctant to give up on their ancient rights. Therefore, for the purposes of this study it is first of all necessary to trace the origins of these rights.

The foundation of Viking rule in Orkney goes back to the seventh century, when Orkney was colonised by Norse emigrants. The first mention of udal law² is in the Orkneyinga Saga at the time of King Harald Haarfagr³ who was King of Norway from 872. At the time, *Gulathing* law set out the laws of Western Norway, with

¹ Balfour, (1859), *Oppressions of the Sixteenth Century in the Islands of Orkney and Zetland*

² or odal/odal law in Norway

³ King Harald Fairhair

Frostathing law being the equivalent in the North of the country. These showed that udal law then meant complete ownership of land, plus rights for the udal family such as: a right of pre-emption for the kinsmen of the owner if he intended to sell the land; a right of redemption by kinsmen if the ownership was transferred to another person; and a right for kinsmen to lease land from the owner. In both *Gulathing* and *Frostathing* laws udal men appear as a distinct social class. Both versions of laws are fairly complete, and there are indications that the Orkney Lawbook resembled both, but was in itself different⁴. Although the lawbook of Orkney had been relied upon before the Scottish Privy Council in the 16th Century⁵ no copies are known to have survived (it being lost or destroyed under Patrick, Earl of Orkney in the 17th century – tradition has it that it was burnt), therefore making it impossible to know their exact terms.

In order to understand the historical development, it is necessary to examine the structure of the system. At its base was the *bønder*, self-owning, and served by labourers. These landowners held an absolute right in their property, which was said to be held under no man but God alone. Regulation between *bønder* families was dealt with in the same way as the custom in Norway, by meetings called *ting*. The society functioned almost entirely founded on the spoken word⁶. A *ting* was more than a court, but a meeting place, drawing from the collective knowledge of the old minds, and moreover a place of song, dance and entertainment. The *lawman* was its president, and legal assessor.

Although the udal system was free of a service owed to an overlord, it had its own obligations. Firstly to take up arms in defence of his country if called upon to do so⁷, and second, to pay *scat* – a kind of land tax, in its origin a tribute to the state or crown, rather than a feu duty.⁸ A *lawrightman*⁹ was chosen by the islanders to keep

⁴ In 1274 Magnus Hakonsson the Law-Mender's code was accepted by the Gulathing in Bergen, and the Magnus book became the Orkney lawbook. (Firth, J, OSCA Udal Law Discussion Paper, Oct 10 2001)

⁵ Register of the Privy Council of Scotland 1545-1689 (1st series) ii, pp. 488, 489, 517, 518

⁶ Apart from the church or King, written word was virtually unknown until the end of the 12th century. Brogger, A W, (1929), Ancient Emigrants, Oxford at the Clarendon Press

⁷ Howarth, W 'A Norse Saga: The Salmon, The Crown Estate and the Udal Law' Jur. Rev. 1988 1 (Jun) 91-1116

⁸ Mackenzie, J, (1736), The General Grievances and Oppressions of the Isles of Orkney and Shetland (originally published anonymously)

the weights and measures of each parish, to advise on interpretation and to collect the taxes. The measurements themselves were quite unique – a merk of land was quite indefinite, ranging in area from less than an acre, to almost six.¹⁰ The theory for this was the inability of ancient minds to calculate by area, and instead the quality of the land was considered.¹¹

Distinctions between udal and feudal systems are illustrated by the practice of land transfer, as no written deed is required for the transfer of udal land. Agreements were concluded by handshake. The udaller held his land by right of original possession acknowledging no superior, therefore in essence the antithesis of feudal holdings. When the owner wished to transfer udal land, he had a duty to notify his kinsmen, as it could not be sold outwith the family until it had been offered to the kindred publicly before witnesses at the *ting*. The udal right could be considered a twofold concept: a social system based on the family, and the heritable lands the family members possessed. The land itself was regarded as inseparable from the kindred. Under Gulathing law a man was *arborinn* or freeborn if five of his forefathers had inherited the land, then he as the sixth would inherit it by ownership.

When an owner died, his property went to his heirs – a daughter getting half as much as a son. If there were sufficient farms to be inherited, then every brother and sister were to have one each. If a man died leaving two sons the situation was solved as follows: “If two brothers divide their udals between them, the udals shall pass into the hands of the branch which receives them by lot, in respect of both right of redemption and of occupation; they shall only be offered to the other branch if this one comes to utter poverty or the inheritance is left without a legal heir. Yet the latter does not lose its right to the udal until each of the two can marry the other’s daughter.”¹² Therefore, their respective shares were held together until which time they were united by a marriage between second cousins. An interesting feature of udalism is the fact that since one brother possessed the right to the udal, the other and his family would hold their land dependent of the owner, becoming a stem family, therefore implying that

⁹ or lawrikman

¹⁰ See Appendix 1

¹¹ Stewart, John ‘Udal Law and Government in Shetland’ in *The Viking Congress*, W Douglas Simpson (ed), Oliver & Boyd 1950

¹² *The Udal Law Myth*, Evan MacGillvray, Oslo 1983 (unpublished), Orkney County Library

the udal itself was a right separate from the actual lands themselves. ‘Full ownership’ implied a complete right of disposal of the land with regard to everything legally related. It was up to the owner himself to decide upon the manner in which he wanted to use the land.

In old forms of udal law full ownership also included, and still includes, ownership of the foreshore. This extended to the lowest point of the ebb, and also the ground further out, or *marebakke*, which is where the foreshore becomes steep at a depth of from 2 to 5 metres at the ebb tide¹³.

The development of the udal system in the middle ages went through various stages: the growth of estates claimed by nobility, the expansion of the Western European feudal system, and the appropriation of estates by the church. The earl and bishop became the most powerful men in the isles, each acting as a kind of foreign minister dealing with Scottish and Norwegian relations. The creation of the Earldom of Orkney meant that the earl accepted the king as his feudal superior – in effect fusing feudalism with the udal system. The emergence of Christianity was also fuelled by feudalism, thus the church and feudal ideologies of the Middle Ages were compatible, whilst the tribal order of the north and its ideology of collective responsibility defied both.

The 13th Century was strongly influenced by a feeling of national unification, or the scottisization of Orkney and its norseness. Many udal lands were slowly merged into the earldom and bishopric estates, often not in an entirely honest fashion. Kindred possession of land was to be replaced by individual ownership, and kindred responsibility to be replaced by personal responsibility to community, church and state. 1349 brought the Black Death, and an epidemic bringing such fatalities that some claim it could have ended such a pattern of udal tenure¹⁴. The widespread suffering would have made such a system so founded on oral evidence, witnessing and oath taking very difficult to operate. However, because of the nature of the disease, evidence to that effect is difficult to prove.

¹³ Donald J. Withrington (ed.), (1983) *Shetland and the Outside World 1469-1969*, Oxford University Press

¹⁴ *The Udal Law Myth*, Evan MacGillvray, Oslo 1983 (unpublished), Orkney County Library

1468 to 1611

1468 is the probably most important year in the history of Orkney, essentially the turning point of the legal development of the isles. Yet it was more than that, altering the culture and national identity of successive generations.

It was in that year on the 8th September that James III of Scotland married Princess Margaret, daughter of Christian I of Denmark, Sweden and Norway.¹⁵ A dowry of 60,000 florins of the Rhine¹⁶ was to be paid, of which 10,000 were to be paid before the Bride's departure, and Orkney was to be held in pledge by the Scottish Crown for the balance, until redeemed by paying the outstanding amount. However, as Christian could only pay 2,000 florins of the down payment, Shetland was also pledged to make up the difference¹⁷.

An important factor to note is the reservation of the right of redemption. An Act of Parliament was passed in 1469 dealing with prescription, under which the right to redeem would have prescribed after 40 years. However, in 1667 at the Peace of Breda, it was attested that the right of redemption was imprescribable. Therefore, since that right of redemption has never since been formally discharged there can be a question mark drawn over the present sovereignty over the isles – though perhaps in legal theory only.

After the impignoration in 1468 the isles continued to function using a very Norse system of law, often appealing to Bergen for the confirmation of decrees.¹⁸ But the Scottish Parliament also legislated for Orkney and Shetland from an early date, which led to much of the local law being replaced by Scots law. It is likely that this was due to the fact it would have become progressively more difficult to interpret what the native law was. In 1470 the last earl, William Sinclair exchanged the earldom lands (subsequently annexed to the crown), for land in Scotland.¹⁹ 1472 saw the bishopric

¹⁵ Dobie, W J, *Udal Law*, Green's Encyclopaedia of Scots Law

¹⁶ which has been calculated to be £24,166.67. Cusine, D J, 'Udal Law' in *Northern Studies*, vol. 32, 1997

¹⁷ Howarth, W 'A Norse Saga: The Salmon, The Crown Estate and the Udal Law' *Jur. Rev.* 1988 1 (Jun) 91-1116

¹⁸ Register of the Privy Council of Scotland 1545-1689 (1st series) ii, pp 488, 489, 517, 518

¹⁹ Register of the Great Seal of Scotland, vol.ii, p.207

of the isles transferred from Trondheim to St Andrews²⁰ all the time advancing the scottisization of the island way of life.

The 15th Century brought with it a fast expanding church, and the economic development of Orkney through an increase in trade. Where before there existed a hierarchy of udal families, there arrived the feudal landowners, bringing a new social structure under the church and crown. The local laws were also adjusted, giving greater security to the buyer. The period in which udal land could be recovered was reduced from twenty to ten years, and land became udal after sixty winters instead of six generations. Additionally, a statute was passed in Bergen in 1539 whereby the eldest son would take possession of the farm and had to pay rent to his siblings for the use of their shares.

Law and administration in general are not fond of exceptions, and in Orkney and Shetland exceptions to the Scottish Legal System had been the cause of considerable trouble. A desire for uniformity was probably one of the reasons Earl Robert felt the need to evict many udallers, later reinstalling them to their land paying annual rent to him instead of the *scat* and other burdens previously demanded, but in addition being forced to accept a superior therefore losing their independence.

The first Crown Charter in feudal form was granted in 1536 to the last Orkney lawman, under feudal pressure, confirming a holding of the “nine penny udall land of sabay...from the highest of the hill to the lowest of the ebb”²¹ though continuing to divide it in a udal fashion. The first Sheriff was appointed in 1541 followed by the first Justice of the Peace in 1587.

In December 1567 the question was presented to Parliament “whether Orkney and Shetland shall be subject to the common law of this Realm or if they shall bruke their own laws.” The answer was that they should be subject to their own laws, indicating at that time a general recognition of the difference in laws. In 1611 the Scottish Privy Council prescribed that the native laws of Orkney and Shetland be abolished, and the

²⁰ Orkney and Shetland Records, Johnson (ed), Viking Society for Northern Research (1907-13), p xvii

²¹ Records of the Earldom of Orkney, Scottish Historical Society, no. CXIV in Dickinson, William Croft ‘Odal Rights and Feudal Wrongs’ in The Viking Congress, W Douglas Simpson (ed), Oliver & Boyd, 1950

Law of Scotland imposed on the isles instead²². It has been claimed by some to mean the abolition of udal law, but it is clear this was not the intention of the act. The previous Act of Parliament took precedent, and as it was not given retroactive effect, udal law continued to operate in Orkney and Shetland, retaining concepts of ownership in accordance with the Lawbook of Magnus.

Sovereignty

A discussion of udal law is not complete without commentary on the inherent problem arising from the 1468 impignoration and the questions of sovereignty that have resulted. Evidently, the standpoint taken regarding national sovereignty, affects the approach to take as regards development of the udal system.

The Treaty of 1266 which ceded the Hebrides to Scotland states unequivocally “the men of the said islands...shall be subject to the laws and customs of the realm of Scotland.’ The absence of such a clause in the 1468 transfer of Orkney and Shetland implies that Orkney and Shetland were not to be subject to the same rules.

In 1667 Denmark claimed that the islands “belonged to the Kingdom of Norway as an inseparable and inalienable dependency, and still belong to it”.²³ It is therefore reasonable to believe that the intention was never to formally transfer sovereignty. However, Scotland, and the United Kingdom have long exercised sovereign rights, and it has been many times concluded that during that time sovereignty has been transferred by acquiescence, unchallenged for many generations.

To resolve the question, it has been suggested that a treaty between Britain and Norway be drawn up, to remove any ambiguity remaining. In essence, and in my view, the relationship between Scotland, Orkney and Shetland is best summarized by the analogy used by Donaldson²⁴ in his discussion of sovereignty as a marriage of

²² Register of the Privy Council of Scotland 1545-1689 (1st series) ix pp. 181-2

²³ Donaldson, G ‘Problems of Sovereignty and Law in Orkney and Shetland’ in Miscellany Two, David Sellar (ed), The Stair Society, 1984

²⁴ *ibid*

habit and repute. However, the dispute is essentially hypothetical, as the likelihood of a claim of redemption is highly improbable.²⁵

Post- 1611

Arguments over sovereignty aside, the existence of udal law to date is still questionable. Though it has been judicially acknowledged, and continues to exist as a unique system, it has been treated more as custom. After the Privy Council Act of 1611 it seems as if both the Scots law and udal system existed in tandem. Being applied in a way that was most favourable to those concerned.

The Register of Sasines was established in 1617 but extracts from the second volume in 1623 reveal a rather confused situation: udal land, feudal land, and land not expressed as either. A charter was granted by a man stated as ‘udaller and heritable proprietor’; ‘udal land’ was held of the crown and even by feu charter; and a crown precept could be obtained for infeftment in ‘udal land’.²⁶ From this it appears that in general, some udal land was only that by name, and in fact the feudal system of tenure was exercising its influence.

Perhaps one of the most interesting parallels is that of the corresponding Norwegian system, and its development. Examination of 20th Century Norwegian laws show that not only does udal law exist, but it is written in the statute books, and has been developed and adjusted over the centuries to reflect social change and development. For example, it is the first born, regardless of gender who inherits udal property, instead of the system of primogeniture previously prevalent.²⁷

The udal system is by no means perfect, and there have been many criticisms over the years. Tudor, in ‘The Orkneys and Shetland’ said of udal rights: “A more perfect

²⁵ However, recently a group in Norway called “Vinjammer’s Friends” have written to the Norwegian Minister for Foreign Affairs calling for a return of their former territories. The Orcadian, February 7 2002, “Norwegians attempt to move borders and reclaim islands”

²⁶ Orkney and Shetland Records, Viking Club, ii (no.s 1,10,11,12,42,83) in Donaldson, G ‘Problems of Sovereignty and Law in Orkney and Shetland’ in Miscellany Two, David Sellar (ed), The Stair Society, 1984

²⁷ For further discussion see Chapter 3

system of land tenure for retarding the development of country could hardly have been devised”.²⁸ It undeniably has its share of defects: Brøgger in ‘Ancient Emigrants’ points out how it divides the land into too many parts, “sterilizing” some of the vitality of the community, giving little advantage to anyone.²⁹ Celebrated Orcadian historian Hugh Marwick also blamed inherent faults in the udal system for the fact there was no determined leadership in Orkney in the 13th and 14th Centuries, leaving the isles vulnerable to “wild Scots”³⁰. Merits, on the other hand, include the protection of property rights as against the interests of its individual owners, and how it is conducive to enterprise for the dependent kindred, keeping alive initiative.

One difficulty in ascertaining the existence of udal rights arises with the disappearance of the Lawbook, as Sellar states: ‘When a code of written law disappears, its rules in practice tend to survive only as fragmentary and partially remembered customs. When laws cease to be readily verifiable, they can be exploited arbitrarily by those who control the administration of justice. This stage of degeneration may have begun in the islands by 1611 and continued during the seventeenth and eighteenth centuries.’³¹ So we arrive at udal rights in their present day form. As would be expected, the old udallers had a tough battle against change, and the wonder is not that the udal system survived the destruction of its infrastructure, but that it survived at all.

²⁸ Tudor, *The Orkneys and Shetland*, Landen, 1883

²⁹ Brogger, A W, (1929) *Ancient Emigrants*, Oxford at the Clarendon Press

³⁰ *The Udal Law Myth*, Evan MacGillivray, Oslo 1983 (unpublished), Orkney County Library

³¹ Donaldson, G ‘Problems of Sovereignty and Law in Orkney and Shetland’ in *Miscellany Two*, David Sellar (ed), The Stair Society, 1984

CHAPTER 2

CASE LAW

“The whole system of law in Shetland is different from the common law of Scotland except in so far as it has been assimilated by legislative enactment or gradual adoption.”

*Lord Lee, 1890*³²

“As a practical matter, it is probably more accurate to say that the ordinary statute and municipal law of Scotland operates, except in so far as there is some specialty still extant in Orkney and Shetland which modifies it.”

*Lord Hunter, 1963*³³

Early Case Law

Having established how such a system and situation unique to the Northern isles came to pass, it is next fundamental to examine how these distinct laws were dealt with in practice. Charting the development of case law on the subject enables us to follow the judicial development of udal law. As demonstrated in the previous chapter, very little documentary evidence remains of udal rights, primarily due to the oral nature of the system. Drever, in his writing on udal law³⁴ claimed the survivals to be in tenure, foreshore, salmon fishings, scat, scattald or commonty and land measures and weights. It was therefore for the Scottish Court system to establish exactly to what extent these Norse laws applied when such disputes arose – leading to some interesting and sometimes controversial cases.

³² *Bruce v Smith* 1890 17 R 1000 at 1014

³³ *Lord Advocate v University of Aberdeen* 1963 SC 533 at p.540

³⁴ Drever, W P, *Udal Law in the Orkneys and Zetland* (reprinted from Green’s “Encyclopaedia of the Law of Scotland”), William Green and Sons, 1900.

The duality of the Scots feudal and old udal system was destined to cause legal problems regarding tenure, with the allodial character of udal property vesting in the heir by survivance without the obligation of service. If the heir completes a written title, it is transferred and can be burdened by deeds in usual feudal form. However, with regard to udal property, service is not necessary, nor writing, as the right can be proved *prout de jure* as established in the case of *Irvine v Davidson*.³⁵ However, the cases *Sinclair v Hawick*³⁶ and *Rendall v Robertson*³⁷ held that there needs to be some lawful right and title. The case of the *King's Advocate v Earl of Morton*³⁸ resulted in the reduction of a charter granted in 1661 to the Earl of Morton, and laid open to challenge many of the charters flowing from that – therefore not feudalising lands which were originally udal. Further in *Beaton v Gaudie*³⁹ feudal charters not from or derived from the Crown, are not sufficient to feudalise one time udal lands, nor for them to lose their udal character and rights. Thus a written title registered in the Sasine Register will not suffice. This principle was reaffirmed some years later in *Spence v Union Bank of Scotland*⁴⁰ in which Lord Wellwood while referring to prescription said that no length of time could by itself convert udal to feudal tenure.

As mentioned in the previous chapter, lands in the Northern Isles were not divided by area, but divided according to quality. A piece of good land would be smaller in area than poorer land. Divisions were first called uncelsands and pennylands, then later subdivided into mark lands, eyrislands or urislands.⁴¹ In the fertile lands of Orkney it was necessary to subdivide yet further so the Jarl divided each Norse urisland into the Scottish measurement of 18 Pennylands, and each pennyland into 4 Farthings or Merks or sometimes into 6 Uriscops or Maeliscops and lastly to aid the sometimes complex succession of udal lands, 10 Yowsworths.⁴²

³⁵ Drever, W P, Udal Law in the Orkneys and Zetland (reprinted from Green's "Encyclopaedia of the Law of Scotland"), William Green and Sons, 1900, 22nd December 1866, unrecorded

³⁶ 1694, Mor. 16393

³⁷ 1837 15 S 1145

³⁸ 1669 Mor. 7857

³⁹ 1832 10 S 286

⁴⁰ 1894 31 SLR

⁴¹ *ibid*

⁴² Balfour, David (1859) *Oppressions of the Sixteenth Century in the islands of Orkney and Shetland*, Maitland Club, Edinburgh.

The weights and measures were also of Norse origin, weight being measured by pundlar and bysmar, capacity in can or barrel, and extent by way of cuttel and pack.⁴³ In the case of *Udallers and Heritors of Orkney v Earl of Morton*⁴⁴ (“The Pundlar Case”) it was claimed that there had been an illegal increase in the weights and measures, that they should be standardised, and scats and duties should be paid to the Earl according to that standard. After lengthy discussion on Norse origins and local custom and proof of the increase in weights and measures, the case ended with the Earl of Morton being assoilzied on the plea of prescription. However, in 1826 a jury found that no measures of extent and capacity were peculiar to Orkney, and a table of calculations was set out with regard to weights, by which duties were determined.

Scattald in Shetland or commonty in Orkney was a pasture ground, for which scat in the form of butter, fish ,oil or coarse cloth called wadmill was paid annually. The name of the scattald was written in the old rentals, and the scat is marked in lispunds and marks of butter, shillings and cuttels of wadmill, and butts and cans of oil.⁴⁵ The scat itself was not a feudal burden⁴⁶ due to the allodial nature of the system. Matters were further complicated with the introduction of cess or land tax in 1667, when in *Earl of Galloway v Earl of Morton*⁴⁷ it was claimed this double taxation was unjust. However on the principle of prescription the Earl was held to be entitled to the scat duties considering both had been paid in preceding years. Feudalisation became general around 1640 and with that, the scat and teinds paid according to use and wont were mostly converted into a feu duty⁴⁸ – specified in a charter or Bishop Law’s Rental.⁴⁹

In the case *Bruce v Smith*⁵⁰ (The Hoswick whale case) whales were driven into Hoswick Bay from the sea. There was a custom under Udal Law of sharing the catch into three parts, one for the admiral, one for those who drove the whales ashore and

⁴³ See Appendix 1

⁴⁴ 1750, n.r.

⁴⁵ W P Drever, (1900) *Udal Law in the Orkneys and Zetland* (reprinted from Green’s “Encyclopaedia of the Law of Scotland”), William Green and Sons

⁴⁶ *Dundas v Heritors of Orkney and Shetland*, 1777 5 Bro. Supp. 609

⁴⁷ 1st July 1752, F.C.; Mor. 16393

⁴⁸ *Dundas v Heritors of Orkney and Shetland*, 1777 5 Bro. Supp. 609

⁴⁹ W P Drever, (1900) *Udal Law in the Orkneys and Zetland* (reprinted from Green’s “Encyclopaedia of the Law of Scotland”), William Green and Sons

⁵⁰ (1890) 17 R 1000

the last share for the owner of the lands on which the whales beached. Previous cases had held that the catch should go to those who salvaged the animals, but in *Bruce* the court refused to recognise the claim of the landowner, saying it was neither just nor reasonable. However the case was treated as one of land ownership rather than moveables, which meant a valuable opportunity for examining the real relationship between the law of Scotland and udal law was lost.⁵¹ The claim to one third of the proceeds of the whale-drive was discussed as a custom, when it could have derived from a udal rule of law. Sellar commented on the case saying: “it is doubtful if the majority of the judges had any notion that they were engaged in an exercise in legal imperialism as well as the elucidation of custom as a source of law.”⁵²

Smith v Lerwick Harbour Trustees

In the landmark Shetland case of *Smith v Lerwick Harbour Trustees*⁵³ a udaller argued that the Crown had no right to the foreshore as he, by way of udal tenure, was owner. Lerwick Harbour Trustees, the defenders, founded their case on a crown grant claiming the foreshore could only be derived from the Crown as ultimate superior. In a note to his interlocutor ordering proof, the Lord Ordinary (Kincairney) did not assent to the argument for the Harbour Trustees that a right to the foreshore could only be acquired by crown grant – as on the mainland of Scotland. He considered the shore in Orkney and Shetland to be a part of the islands, and therefore able to be acquired in the same manner as other land in the islands, which is not feudalised. Udal tenure and its peculiarities prevailed over all Orkney and Shetland, except where altered by the Crown. As it was practice to convey udal titles down to the lowest watermark, the foreshore was owned by the pursuer.

Therefore the idiosyncratic two tenures are not only distinct in origin and history, but also in legal and practical effect. If feudal, the foreshore is the patrimonial property, *inter regalia*, of the Crown; if udal, it is the property of the udaller. As Drever

⁵¹ Ryder, J, Udal Law, in Northern Studies, vol 32, 1997 at p.4

⁵² Sellar, D, “Custom as a Source of Law” in Stair Memorial Encyclopaedia vol 22 para 388

⁵³ 1897, 5, S.L.T. 175

somewhat haughtily puts it: “The Norse odal overcomes the Scottish feudum: the individual withstands the state”.⁵⁴

The Orkney case of *Lord Advocate v Balfour*⁵⁵ followed the reasoning in *Smith*⁵⁶ in the instance of salmon fishing. Under Norse law, the right to salmon fishings in the sea, or rivers belonged not to the crown of Norway, but to the owners of the land adjacent. The Crown sought to claim rights to salmon fishing in Orkney since the defender held a feudal title to his lands, with no express title for salmon fishing. However, some of the lands included in his title were udal, in particular those adjacent to the burn. Therefore no rights of this kind could have been transferred by impignoration of the Isles, so it followed that it was a matter of udal law, and feudal law did not apply.

Lord Advocate v University of Aberdeen and Budge⁵⁷ (St Ninians Isle Treasure Case)

In 1958 a number of objects were excavated by Aberdeen University on St Ninians Isle in Shetland. Under udal law, and in particular the Magnus code, a third would go to the finder, a third to the udal landowner and a third to the crown. In an Outer House judgement, Lord Hunter recognised that udal law had applied at one time, and that the survivals were land tenure, scat, scattald, and certain weights and measures; but only land tenure was relevant in this case. The university argued that treasure was part of the *regalia minora* and as such was a feudal concept having no bearing in a udal system. However, Lord Hunter was of the opinion that the *regalia* were a feature of sovereignty, and therefore it was Scots Law which applied to the treasure, reason being that the Crown’s prerogative powers are the same in the isles as the rest of the

⁵⁴ Drever, W. P. (1904) *Udal Law and the Foreshore* (Reprinted from *The Juridical Review*, June 1904), William Green & Sons, Edinburgh. W P Drever was a partner in the Kirkwall law firm of Drever and Heddle, and advised on many cases involving udal law. His law firm is still one of the largest in Orkney.

⁵⁵ (O.H.), 1907 S.C. 1360

⁵⁶ *Smith v Lerwick Harbour Trustees*, 1897, 5, S.L.T. 175

⁵⁷ (1963) SC 533

country. They however omitted to explain by what right the British Crown has extended the prerogative powers over Shetland.⁵⁸

On appeal the Inner House of the Court of Session held that since no case had been cited to the court in which the Magnus code had been used to deal with treasure, and the institutional writers were silent on this point, they were not entitled to prove udal law applied. Yet it seems somewhat questionable that such reasoning was given to the effect that in the absence of a previous case on the matter, udal law could not apply when in cases involving salmon fishings and foreshore rights, in the same position, it did apply. Professor Sir Thomas Smith who represented the defenders said “ the St Ninians Isle Treasure case has discouraged expectations of wider recognition of Norse Law”.⁵⁹ One must wonder though, if the case had been approached in a different manner such as affirming udal rights, whether the prosecution could have proven the contrary; and thus whether the outcome may have been somewhat different.

Shetland Salmon Farmers Association and Trustees of the Port and Harbour of Lerwick v Crown Estate Commissioners⁶⁰

This most recent case involving udal law has been the subject of some discussion. The Shetland Salmon Farmers were first aggrieved in 1986 when the Crown Estate Commissioners substantially increased their seabed rental. The pursuers, who used floating cages permanently moored to the seabed, therefore raised a case arguing that the Crown’s right to the seabed off mainland Scotland was based on the feudal system, and as Orkney and Shetland were originally udal, this supposition did not apply. The Harbour Trustees also questioned the Crown’s real title to the seabed, calling for the question of udal law to be clarified in connection with land reclamation plans.

⁵⁸ Ryder, J, Udal Law, in Northern Studies, vol 32, 1997 at p.11

⁵⁹ as quoted in Cusine, D. J. “Udal Law” in Northern Studies, vol 32, 1997

⁶⁰ 1991 S.L.T. 166

In a Special Case stated to the Second Division of the Court of Session, it was held that the Crown had the right of ownership over the territorial seabed, from the low water mark out to the twelve-mile limit. Though both parties agreed that the Crown held sovereignty over Shetland, and the seabed in question, the pursuers argued that it was the Crown's status as feudal landlord which provided the ownership of seabed elsewhere. However in contrast, in the Northern isles, the foreshore was claimed to have the same legal status as the adjacent seabed (based on *Smith v Lerwick Harbour Trustees*⁶¹) therefore subject to udal law, excluding the Crown from being feudal landlord of the seabed. The court found that the basis of the Crown's right was prerogative, and not its ultimate superiority under the feudal system – in effect following the decision in the “St Ninians Isle Treasure” case.⁶² The fatal flaw in the argument was perhaps the fact both parties conceded that the udal title itself, based on possession, could not apply below the foreshore.⁶³

Nevertheless, many were disappointed that this case was not taken to the House of Lords, as aside from the fact there is an interesting argument concerning the legal status of the territorial sea,⁶⁴ Professor Gordon in his commentary on the case claims it would not have been impossible to hold that the seabed acceded to the shore, even without express authority on the point, there being a reference to the application of such a rule in Norway.⁶⁵ He adds:

“Can one just detect a sigh of relief from the court that counsel were unable to find express authority for applying udal law to the seabed as well as the foreshore.”⁶⁶

Indeed, it was probably advantageous to the legal system that once again udal law had been suppressed in favour of the Crown Estate. The decision certainly brought to an end any further extension of udal rights on a similar basis. In fact, many at the time claimed it impeded any possible claims to udal rights whatsoever.⁶⁷ However,

⁶¹ 1897 5 S.L.T. 175

⁶² 1963 SC 533

⁶³ Marston, G, *The Crown's Seabed Estate – A valuable Prerogative*, [1991] CLR 384

⁶⁴ *ibid* at p.386, the belt of territorial waters is not “in” but “adjacent to” Scotland, or England or Great Britain.

⁶⁵ Gordon, Professor W. M., “Commentary: Shetland Salmon Farmers” SCLR 1990 512

⁶⁶ *ibid*

⁶⁷ “Udal Law Buried by Crown Estate”, *The Shetland Times*, 23rd March 1990

whatever restrictions are inferred from the failure of the Shetland Salmon Farmers, the fact remains that the Court of Session decision did not affect udal rights on land above the low water mark.

CHAPTER 3

SURVIVALS

“There is much to be said for abolishing the separate legal category of udal land. Abolition is attractive in theory without, probably being troublesome in practice. It would have the advantage that all land in Scotland would come to be held on a uniform basis... In the end, however, we have concluded that abolition ought not to be included... There may be difficulties which we are unable to foresee... udal law affects more than just land.”

Report on Abolition of the Feudal System⁶⁸

It is clear from the preceding chapters that udal rights have been recognised in some forms, rejected in others, reshaped, ignored, been fought over; and have all the while evolved, to be restricted into the present form. The historical journey through Norse times in the Northern Isles led us to the examination of the application of the udal tradition through common law, and now how all these factors, combined with statutory provisions, help us shape the current legal standpoint. By looking at the older land reform acts and more recently the Abolition of Feudal Tenure Etc (Scotland) Act, it can be seen how the Parliamentary draftsmen have dealt with the survivals. In addition, looking at the existing position in Norway gives an interesting comparative perspective on the legal development of the udal system.

⁶⁸ Scottish Law Commission, Report on Abolition of the Feudal System, www.scotlawcom.gov.uk

Udal Law in Its Present Form

It is perhaps useful at this stage to give a brief summation of the udal rights that have been recognised as enforceable in present day Orkney and Shetland.

(a) Udal tenure

Udal tenure can be held in two different ways. Firstly, where title is based on possession: for example in a purely udal landholding where no writing is necessary for the transfer of title, as possession is the attestation of ownership. Alternatively, udal land can be held by a standard conveyancing writ,⁶⁹ given that use of feudal type writs does not convert udal to feudal landholdings, irrespective of time held.⁷⁰

The Abolition of Feudal Tenure (Scotland) Act 2000 did not abolish udal tenure,⁷¹ since is by nature allodial and thus does not form part of the feudal system. Indeed, one view of feudal abolition is that it merely assimilates feudal land with the land that is already owned outright, as after abolition all land became allodial.⁷² Nonetheless, udal land does have its own distinctive rules of transfer, without writing and registration, unaffected by the 2000 Act; but this saving is only temporary.

Under the Land Registration (Scotland) Act 1979, a new system of land registration was introduced – a register of interests in land and not of deeds. As such, it is not the conveyance itself which is registered, but the real right of ownership. Once the system becomes operational in the Northern Isles⁷³ all titles to udal land will have to be registered where land changes ownership,⁷⁴ but the registered title will still be a

⁶⁹ See *Smith v Lerwick Harbour Trustees* (1903) 5 F 680 at p.685 per Lord Ordinary (Kincairney)

⁷⁰ *Beaton v Gaudie* (1832) 10 S 286, *Rendall v Robertson's representatives* (1836) 15 S 265; and *Spence v Union Bank of Scotland* (1894) 31 SLR

⁷¹ Schedule 11 of the 2000 Act repeals the Udal Tenure Act 1690 in its entirety, but as a tidying up measure, as most of the Act was repealed by the Statute Law Revision (Scotland) Act 1906.

⁷² Scottish Law Commission, Report on Abolition of the Feudal System, para 7.19, www.scotlawcom.gov.uk

⁷³ 1st April 2003

⁷⁴ Land Registration (Scotland) Act 1979 section 3(3) (b)

udal title.⁷⁵ This may well bring to light any uncertainties as to whether a title is udal or not, which could potentially be a time consuming issue to determine.

(b) Scat

In 1972 following Scottish Office research, it was believed that there were only 315 scats being paid.⁷⁶ Subsequently, in the Land Tenure Reform (Scotland) Act 1974, scat is treated in the same way as a feuduty for the purposes of redemption.⁷⁷ The 1974 Act forbade the imposition of new feuduties and introduced a scheme for the buying out of all feuduties then in existence. Feuduty, and consequentially scat, was to be redeemed on the first occasion on which property was sold after the coming into force of the legislation,⁷⁸ or at other times on a voluntary basis.⁷⁹ Since the introduction of the land reform provisions, most feuduties have been extinguished, and it is claimed that less than 10% of properties remain subject to such feuduties.⁸⁰ Even though scat is of an allodial nature, with the introduction of the Abolition of Feudal Tenure (Scotland) Act 2000, it is abolished,⁸¹ being assimilated to other feudal burdens.

(c) Salmon fishings

In the feudal system the right to fish for salmon is a legally separate tenement, which can be transferred independently from land. It does not arise in udal tenure, but even with partial feudalisation in the form of a grant from the crown, or through using a feudal deed to transfer udal land, the right to salmon fishings never vested in the crown.⁸² Therefore, the right to fish for salmon is not capable of being severed from

⁷⁵ Udal law answers from Jim Wallace MSP for Orkney, in letter to author. See Appendix 2

⁷⁶ Stair Memorial Encyclopaedia Vol 24, para 308 at footnote 22. See Appendix 3 for an example of a scat payment form from an Orkney Law Firm.

⁷⁷ Land Tenure Reform (Scotland) Act sections 4(7), 5(12)

⁷⁸ *ibid* section 5

⁷⁹ *ibid* section 4

⁸⁰ Scottish Law Commission, Report on Abolition of the Feudal System, para 3.7, www.scotlawcom.gov.uk

⁸¹ Abolition of Feudal Tenure (Scotland) Act 2000 section 56

⁸² *Lord Advocate v Balfour* 1907 SC 1360, per Lord Johnson at p.1369

the land of the neighbouring riparian proprietor, and it is even thought that the right to fish for salmon extends to those who also own the shore.⁸³ The right to gather mussels and oysters was treated the same way as salmon fishings, thus impliedly reserved from crown grants, but Reid⁸⁴ considered it to be unclear as to whether these incorporeal separate tenements are indeed similarly held.

(d) Foreshore

The foreshore is the part of the shore which is wholly covered at spring high tide, and wholly uncovered at spring low tide.⁸⁵ In Scotland it is owned by the Crown, but in Orkney and Shetland, the foreshore was never vested in the Crown, as it is allodial land and therefore owned by the adjacent landowner with a udal title. Thus, a feu grant by the crown conveying the foreshore was prevailed over by an adjacent udal proprietor who had title over the foreshore.⁸⁶

(e) Remaining Rights

In conclusion, with the extinction of scat, it would seem udal law retains only two distinctive features. Firstly, the Crown has no residual claim to the foreshore, it being privately owned, usually by the proprietor of the adjoining land.⁸⁷ It has also been suggested that public rights over the udal foreshore may be distinctive.⁸⁸ Secondly, udal law does not recognise incorporeal tenements, so ownership of a udal river includes salmon fishing rights. However, the opening quote in this chapter illustrates how, in the light of Parliaments need for standardisation, it is perhaps fortunate that even these rights were guarded.

⁸³ *Lord Advocate v Balfour* 1907 SC 1360, per Lord Johnson at p.1369, no distinction was made between the right to fish in rivers and from the seashore.

⁸⁴ Reid, Property at para 331

⁸⁵ *ibid* at para 313, as in *Bowier v Marquis of Ailsa* (1887) 14 R 660

⁸⁶ *Smith v Lerwick Harbour Trustees* (1903) 5 F 680

⁸⁷ *ibid*

⁸⁸ Stair Memorial Encyclopaedia, vol 24, para 314

The earlier portrayal of the Scottish feudal system being fused onto the ancient Norse system seems to have now almost consumed it entirely, save the rights mentioned above. But what of that original system - is there a general consensus behind the deterioration of udal rights, or has that earlier system survived more strongly in other parts? Examining the present situation in Norway, may indicate the inherent strengths or weaknesses of the udal system in practice.

The Position in Norway

Kindred rights of prior purchase and repurchase are still prevalent 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. After 1857 land became udal following 20 years of possession and since 1974, the family's right to repurchase sold land remains valid for two years, with the owner being required to live on and operate the property.⁸⁹ Furthermore, regarding partible inheritance, a decree of 1539 allowed the senior male heir to inherit land undivided if he could buy out the other heirs, or if he paid rent to them; again this right was enshrined in the Norwegian Constitution. On an egalitarian note, females have received full shares since 1854 and the law was altered in 1974 to remove the distinction between males and females in order of succession. In addition, after 1955, the sub-division of farm holdings was forbidden without the consent of the agricultural authorities. At present 98% of Norwegian farms are owner-occupied, the majority being small farms held under udal tenure.

In Norwegian, *scatt* is the general term for tax, and various forms of land taxes were paid from the twelfth century. However, most were abolished in 1837, with the remainder being redeemable from then on; after which redemption became compulsory in 1939,⁹⁰ even before in Scotland. As for scattalds – the udal equivalent of commonties, some hill pastures are still owned in common by several different landowners who have grazing rights.⁹¹

⁸⁹ Jones, Michael R H, 1996, "Perceptions of Udal Law in Orkney and Shetland" in Doreen Waugh and Brian Smith (eds.), *Shetland's Northern Links*, Scottish Society for Northern Studies

⁹⁰ *ibid* at p.4

⁹¹ *ibid* at p.5

With regard to treasure trove, and in comparison with the St Ninian's Isle Treasure case,⁹² it is interesting to note that in Norway, since 1905, treasure and other moveables older than 1537 belong automatically to the state when the rightful owner can no longer be traced; but the state can pay a reward, to be divided equally between the finder and the landowner.⁹³ It therefore seems as if the state has taken control of such valuable finds, yet is trying to echo the traditional divisive udal procedure with split compensation.

In Norway the foreshore belongs to the adjoining landowner, in contrast to the Crown right over the shoreline in mainland Scotland. Similarly, salmon-fishing rights have always belonged to the adjoining landowner, subject to the right of the State to regulate the equipment used.⁹⁴ Moreover, land ownership in Norway extends as far out as the *marbakken*, where the coastal shallows end in a steep slope to the deeper water. Where there is no definite *marbakke*, ownership rights extend to a depth of two metres from the low water mark. This principle was implicitly included in the Magnus code, and upheld by the Norwegian Supreme Court in the 19th and 20th centuries.

Within this area, subject to government rights of compulsory purchase, it is necessary to gain the permission of the landowner before establishing a fish farm. In 1985 it was held that the rights of riparian owners extend even further beyond this boundary 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 usage on aesthetic grounds.⁹⁵ The idea of the *marbakke* is the most interesting dissimilarity with the situation in the Northern Isles. Should the Shetland Salmon Farmers case⁹⁶ have been decided a different way, the influence of these Norwegian laws applied in Orkney or Shetland could have caused sizeable complications, especially in the field of fisheries.

⁹² *Lord Advocate v University of Aberdeen and Budge* 1963 SC 533

⁹³ Robberstad, Knut, 1983: "Udal law" in Donald J. Withrington (ed), *Shetland and the Outside World*, Aberdeen University Studies Series No. 157, Oxford University Press, Oxford at p.64

⁹⁴ *ibid* at p.62

⁹⁵ Jones, Michael R H, 1996, "Perceptions of Udal Law in Orkney and Shetland" in Doreen Waugh and Brian Smith (eds.), *Shetland's Northern Links*, Scottish Society for Northern Studies. Professor Jones is a lecturer at the University of Trondheim, and assisted in obtaining information on behalf of the Shetland Salmon Farmers Association, regarding the status of the seabed in Norway and other Scandinavian countries in relation to the dispute between SSFA and the Crown (see chapter 2).

⁹⁶ *Shetland Salmon Farmers v Crown Estate Commissioners* 1990 SCLR 483

As a result of statutory clarification on many contentious points, coupled with the common law basis of udal rights, it seems that udal law has been controlled and constrained, in favour of uniformity with the rest of Scotland, and ease of application. Yet in comparison with the Norwegian landholders, it is clear that deterioration was inevitable. The extent to which the udal system in Scotland has been restricted is considerable, but, in a small place such as an island like Orkney or Shetland, due to the principle of relativity, the minor is often of great consequence and accordingly, there is still much interest amongst those who champion udal rights. However, from another, wider perspective it could be considered ironic in that by introducing the Abolition of Feudal Tenure (Scotland) Act, it is Scotland who has returned to the roots of those early udallers, turning from the superiority based feudal system to one of an allodial nature.

CHAPTER 4

FUTURE REFORM

“I was recently asked by a very perspicacious person – ‘exactly what relevance does udal law have for the modern islander?’ At first sight the answer might appear to be very little – perhaps someone with udal title to the low-water mark might want to take from there seaweed to put on his or her tatties... On reflection, however, I feel that udal law might have a wider relevance to the islands.”

Richard N. M. Anderson⁹⁷

Up to this point there has been a journey through more than a thousand years of the history of udal law, guiding us to the existence of rights in their present form, along with the statutory limitations. Now, it is appropriate to see what consequences flow from the function of these existing rights. Through interviews previously conducted with the public and professionals, and more recently undertaken in the course of this study, it is possible to gain a general impression of present-day perceptions. This is also made easier by the fact there has been much discussion in the media of late, with reference to the proposed Land Reform (Scotland) Bill, and the study undertaken by the Scottish Law Commission in their Discussion Paper on the Law of the Foreshore and Seabed. Looking forward, it is hoped such investigation will indicate what, if any, future there is for udal law.

⁹⁷ The Orcadian, Thursday, 19th July, 2001: “What is the future for udal law?” Mr Anderson is a law graduate of Aberdeen University with a thesis on udal law.

Perceptions of Udal Law Today

In recent times, there have been periodic discussions on the subject of udal law in the media, and it was this which led me to investigate the general feeling toward the subject. Source material consists of interviews undertaken mainly on the basis of local knowledge; it is not systematic, and not statistically representative. The aim was an investigative poll of general opinion, informed views and (as expected in a story-telling culture) anecdotal evidence. Further to this, an earlier, more comprehensive study was undertaken by Professor Jones,⁹⁸ which provides a helpful basis for discussion of a brief nature.

The most obvious starting point is with the legal profession itself. Solicitors are trained on the basis of Scots law, and will always apply its concepts and rules, so it not surprising to find a number of feudalised udal titles. Jones found that most lawyers regarded udal law as having little practical significance. A solicitor in Kirkwall whom I interviewed said problems with udal tenure crop up intermittently, but when disputes do arise, they are usually of quite a serious nature. The most important survival is considered to be foreshore rights, but 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. He also added that in fact solicitors enjoy the possibility of self-regulation, and irritating the Crown Estate. In Orkney, angling for salmon and trout is free, but legal opinion on this was that it is a local custom, and not connected to udal law. Another solicitor said there may be situations where udal law should have applied, but no-one thought to apply it, giving examples of cases demonstrating the reluctance to apply udal law.⁹⁹

⁹⁸ Professor Michael Jones is a lecturer from the University of Trondheim. In 1986 he talked to around 70 people about udal law, in Orkney, Shetland and Edinburgh. The material he collected varies from taped interviews (undertaken for the School of Scottish Studies) to notebook interviews as well as shorter chats and telephone conversations. He also undertook supplementary archive investigations in the Shetland Archives and the Scottish Record Office. His findings were presented at the Scottish Society for Northern Studies, 21st Annual Conference in 1993 and in Jones, Michael R H, 1996, "Perceptions of Udal Law in Orkney and Shetland" in Doreen Waugh and Brian Smith (eds.), *Shetland's Northern Links*, Scottish Society for Northern Studies.

⁹⁹ A landowner gifted land to another party, and that party built housing on it, neglecting to obtain a title. The benevolent landowner died, and the new rapacious landowner demanded payment of full value of the site and houses. The first party said that since it was udal land they needed no written title, and having possessed it openly and peaceably and without judicial interruption for twenty years in terms of the Prescription and Limitation (Scotland) Act 1973, it was rightfully theirs; but the landowner refused to accept this, so the party conceded, paying in full.

Jones also questioned townspeople in Orkney and Shetland, the majority of which appeared to regard udal law as insignificant. Most knew a little on the subject though this was generally anecdotal or from newspaper articles, yet simultaneously saw it as part of a Norse tradition and thus local identity. The lairds or large estate owners interviewed by Jones were from a Scottish tradition and therefore felt udal tenure unimportant, though in some cases proprietors held title deeds indicating they owned a mixture of udal and feudal land.

Farmers and crofters were the strongest advocates of the udal tradition. In Jones' study several gave a wide interpretation of udal rights, including rights to take seaweed, sand and shingle from the foreshore, although this was less clear in the case of grazing and peat-cutting rights. Several Orcadians told of how there was a custom between the inland and coastal parishes, whereby the coastal inhabitants could cut peat from an inland scattald, and those living inland could in return gather seaweed and driftwood from their shoreline. However, it is suspected this is community custom, albeit an effective system of trade.

On an anecdotal note, there are several instances, often triumphantly repeated, where udal rights have severely impeded progress. The most well known example is from the mid-1970s, when the Occidental Oil Company was building its pipeline to Flotta. The company negotiated with the Crown Estate for rights to cross a foreshore, paying the Crown Commissioners for a privilege that they had no authority to dispense, until the landowner realised his rights had been infringed.¹⁰⁰ Similarly on the island of Flotta itself, the peninsula where the oil terminal was to be built was subject to peat cutting rights, and Occidental had to pay for electricity to be installed into every house on the island in order to overcome the obstruction.

Jones also spoke to small udal proprietors whose land had apparently been inherited through the generations, who he termed the "last udallers." In Orkney udal traditions are to be found in Harray and Firth, but genuine udallers only come to light when put under pressure. The example used by Jones, was the protestation against the establishment of a Site of Special Scientific Interest (SSSI). Complexities of land

¹⁰⁰ Tait, Charles, "Udal Law" from The Orkney Guide Book, http://w8.demon.co.uk/www.charles-tait.com/guide/udal_law.html

tenure and unclear ownership (farmers without title deeds) delayed the final notification of the SSSI for four years following the consultation of 95 owners and occupiers¹⁰¹.

There is also the case of the Corrigal Farm Museum¹⁰² where an area of land was purchased by the Orkney County Council in 1971, but the owner (who lived in South Africa) would not sell until consent had been obtained from all grandchildren of the previous owner – a recent example of the practice of rights of kin.¹⁰³ One local councillor also pointed out how the building of a footbridge in the parish of Firth was delayed, as on one side of the bridge all land was udal and they therefore needed the consent of all landowners. Jones also adds to this evidence of landholdings with active udal traditions in different parts of Shetland.¹⁰⁴

These remnants of udal inheritance represent how even the least documented aspects of udal tradition, being repressed for more than 500 years, can survive in a modern context. However, the latest development, or at least topic for discussion regarding udal rights, is the introduction of new legislation concerning land tenure, and a related investigation on the subject of foreshore and seabed ownership.

Land Reform (Scotland) Bill and Law of the Foreshore and Seabed

The Scottish Law Commission has produced a Discussion Paper entitled “Law of the Foreshore and Seabed”¹⁰⁵ following a reference from the Scottish Executive, as part of its wider programme of land reform. Its purpose is to consider the existing law, and advise on possible reforms, with a view to improving “clarity and consistency.”¹⁰⁶ The paper examines the legal nature of the definition of the foreshore and seabed, the

¹⁰¹ The dispute is documented in *The Orcadian*, 19 February 1987: “West Mainland SSSI notified but there is still opposition”, 21 April 1987: “Conservation grudge behind two heath fires?”, 11 June 1987: “O.I.C asks for rethink on SSSI”

¹⁰² Also mentioned in: *The Udal Law Myth*, Evan MacGillvray, Oslo 1983 (unpublished), Orkney County Library

¹⁰³ Appendix 4 shows an extract from the plan accompanying the deed, with the signatures.

¹⁰⁴ Jones, Michael R H, 1996, “Perceptions of Udal Law in Orkney and Shetland” in Doreen Waugh and Brian Smith (eds.), *Shetland’s Northern Links*, Scottish Society for Northern Studies.

¹⁰⁵ Scottish Law Commission, Discussion Paper on Law of the Foreshore and Seabed (no. 113), published 19 April 2001. Available at www.scotlawcom.gov.uk, final report due December 2002

¹⁰⁶ *ibid* at p.44

nature of the Crown's interest, and the extent and protection of public rights exercisable on the foreshore. It also identifies areas of concern, one of which is udal law.

The main proposal for reform is based on the analysis of the Scottish Executive's proposal to create statutory "access rights" over land in the Land Reform (Scotland) Bill. The Commission, in the discussion paper, invites views on their proposals that the statutory scheme be extended in relation to the foreshore, so as to cover activities presently included within the common law rights, which they also propose to abolish, removing the Crown's role as protector of the public rights. Three particular aspects of udal law are considered by the commission: ownership of the foreshore, the recognition of separate ancillary pertinent rights and ownership with respect to the seabed.

The first point raised by the Commission in their paper concerns ownership of the foreshore. Previous case law has made clear that a prior udal title will defeat a subsequent Crown grant.¹⁰⁷ The Commission suggest that legislation clarify that a pre-existing udal title to the foreshore in Orkney and Shetland would defeat a subsequent grant of the property by the Crown. Such legislation would indeed be favourable, preventing possible future disputes between a udal proprietor and the Crown Estate and would also go some way to reach the sought after improvement in clarity and consistency. Furthermore, through examination of the General Register of Sasines and other relevant registers, which may take place when Orkney and Shetland become operational areas in terms of the Land Register,¹⁰⁸ much of the foreshore will have identifiable owners.¹⁰⁹

¹⁰⁷ *Smith v Lerwick Harbour Trustees* 1897, 5, S.L.T. 175

¹⁰⁸ Land Registration (Scotland) Act 1979

¹⁰⁹ In response to the Commission paper, the Orkney Islands Council produced a reply by their Chief Legal Officer, who describes how, on a number of occasions, he has encountered title deeds *ex adverso* the foreshore which include the foreshore as part of the subjects "insofar as I have right thereto," and owners could be identified through the operation of similar phrases. He also submits that many udal titles which were converted to feudal titles did transfer ownership of the foreshore, and as such a subsequent Crown grant would not be valid. Thompson, David, Chief Legal Officer of the Orkney Islands Council, Letter in response to Scottish Law Commission Discussion Paper on Law of the Foreshore and Seabed, 24 August 2001

Another question for consideration is that of the existence of ancillary rights with a udal title to the foreshore. The ownership of the foreshore carried with it various rights which were an important economic asset in the past, although their scope is difficult to ascertain. In Norway this included rights to whales, seals, wreck and even the belongings of shipwrecked mariners.¹¹⁰ The view of the Commission is that, with the impending application of the Land Registration Act,¹¹¹ and in the absence of modern authority for the survival of a different system of pertinent rights, separate ancillary pertinent rights should not be recognised under udal law. However, it is widely acknowledged locally that like udal law itself, these rights do in fact still exist. Further research to determine the extent and function of these rights should be undertaken, as whilst these rights might *per se* be considered archaic, they may have some future value which is difficult to foresee.

Moreover, any statutory abolition of these rights may conflict with the European Convention on Human Rights.¹¹² Article 1 of Protocol 1 guarantees a right to peaceful enjoyment of possessions and protection of property, thus property rights cannot be deprived from an individual without compensation and must be justifiable in the public or general interest. The European Court of Human Rights has given a wide definition of “property” in this field, but still the number of times a violation has been found under Article 1 remains relatively small. Another reason for the difficulty of application is that the Strasbourg organs have devised a complex formula for assessing any complaint under the article.¹¹³ However, any consideration of such complaints would depend on any action taken to repress udal rights at the outset.

The final aspect of udal law to be considered is ownership of the seabed. The Commission recognise the controversy of the decision in the Shetland Salmon Farmers Case,¹¹⁴ but maintain had the case been decided differently acknowledging udal titles to the seabed exist, it is doubtful whether it would be of significant practical

¹¹⁰ Ryder, J, “Udal Law: An Introduction”, in Northern Studies, vol 25, 1988, p.13

¹¹¹ Land Registration (Scotland) Act 1979 (discussed in the previous chapter)

¹¹² Thompson, David, Chief Legal Officer of the Orkney Islands Council, Letter in response to Scottish Law Commission Discussion Paper on Law of the Foreshore and Seabed, 24 August 2001

¹¹³ Whale, Stephen, “Pawnbrokers and Parishes: the Protection of Property under the Human Rights Act” EHRLR 2002 1 67-79

¹¹⁴ *Shetland Salmon Farmers Association and Trustees of the Port and Harbour of Lerwick v Crown Estate Commissioners* [1991] S.L.T. 166

importance since it is unlikely that any such titles could be produced. However, there is another perspective upon the matter in need of consideration – that of the economic importance of aquaculture. There is already considerable discussion taking place as to the future control and development of aquaculture in Orkney and Shetland, so the local authorities advise that no legislative changes be made until the future of the industry is clearer.¹¹⁵

The final report of the Law Commission is due to be published December 2002, after they have consulted the responses of many different bodies and organisations. The fact the investigation was undertaken is to be commended, though whether it will have positive results in the field of udal law is questionable. A legislative move to clarify foreshore ownership would certainly be advantageous, but the proposal that separate ancillary pertinent rights should not be recognised could have unexpected repercussions if brought into practice. As demonstrated by the people surveyed, there is more to udal law than the publicised cases, and ancient rights are still to some extent customary in the isles. Ignoring this fact could be hazardous in the future.

However, it is difficult to see a realistic future for udal law. In the current climate of globalisation, uniformity is very much the trend, and it is doubtful how long one little corner of Scotland, or even Scotland itself, can stand against the tide. One unfortunate fact, is that many people I spoke to said their father or grandfather could have told me all about the system, yet now even the older generation struggle to know exactly what udal law is. But on the other hand, even under hundreds of years of Scots pressure and threats of abolition¹¹⁶ it is still here, indicating that like its Viking founders, it is resilient indeed.

¹¹⁵ Thompson, David, Chief Legal Officer of the Orkney Islands Council, Letter in response to Scottish Law Commission Discussion Paper on Law of the Foreshore and Seabed, 24 August 2001

¹¹⁶ “These, and similar minor forms of landholding and of burdens on land are interesting historical survivals, but they make conveyancing more complicated than it need be, and less exact than it ought to be. The government propose therefore that these forms of tenure and of burdens on land should be brought to an end at the same time as the feudal system, thus enabling a uniform system of land tenure to be introduced.” Scottish Home and Health Department, *Land Tenure Reform in Scotland*, Edinburgh, HMSO, 1972.

CONCLUSION

The Norse settlers who chose Orkney and Shetland in which to make their homes founded a system that led to a remarkable chapter in the history of the Northern Isles. However, there are two main restrictions upon discovering the full story: the missing lawbook, and the oral tradition of the system. Nevertheless, these intriguing udal rights have been the subject of judicial, parliamentary and public discussion for many years, yet have been predominantly used according to what would most benefit the parties involved.

The case law has largely established the survivals to be foreshore and fishing rights, though legal commentators have questioned other decisions including preventing seabed rights from also being recognised. This indicates an uncertainty as to the real standing of the law. Although some investigation has been undertaken by the Scottish Law Commission, it is difficult not to feel as if such projects are merely skimming the surface of what is a very complex subject.

Local people in Orkney and Shetland seem to have a romanticised view of the udal system being an inherent part of the island culture, without necessarily feeling they are entitled to any udal rights, which are generally regarded as tradition. It is probably fair to say that udal law only exists in so far as the Scots Courts have recognised it and practitioners have applied it. That may not be a romantic view, but possibly the only pragmatic one. As to the future, it is difficult to see udal land survive in light of the modern desire for standardisation and uniformity; yet it has come this far, so is clearly an enduring system.

APPENDIX 1

Weights and Measures

Adapted from Drever, W. P. (1900) *Udal Law in the Orkneys and Zetland* (Reprinted from Green's "Encyclopaedia of the Law of Scotland") William Green & Sons, Edinburgh

(a) Land Measures

Theoretical Scotch Acreage	Orkney	Theoretical Scotch Acreage	Shetland
104	1 oz. land = 18 d. lands	104	1 oz. land = 4 lasts
$5 \frac{7}{9}$	1 d. land = 4 average marks	26	1 last = 18 marklands
$1 \frac{4}{9}$	1 mark = 8 oz.	$1 \frac{4}{9}$	1 markland = 8 oz.

(b) Weights and Measures

At Drever's time of writing duties were calculated as follows:

	Imperial Avoirdupois.		
	lbs.	oz.	dr.
The meil of malt on the malt pundlar	177	12	
The meil of oatmeal	177	12	
The meil upon the bear pundlar	116	7	
One merk upon the bysmar	1	3	12.5
The lispund (24 merks)	29	10	12
The barrel of butter	217	6.377	

APPENDIX 2

UDAL LAW ANSWERS FROM JIM WALLACE MSP

1. Will the Land Reform (Scotland) Bill affect Udal Rights?

Only insofar as land held under Udal tenure can be subject to community purchase or purchase by a crofting community, but the title which transfers to the new owners will be a Udal title. The right of reasonable access will apply to all land subject to very limited exceptions (eg Ministry of Defence). This will not alter the fundamental basis of Udal tenure any more than the application of planning law to all land.

2. How will the Land Register of Scotland (once it comes into force in the Northern Isles) affect Udal Rights?

It will not effect Udal Rights, titles will have to be registered where land changes ownership, but the registered title will still be a Udal title. The need to register a title may well bring to a head any uncertainties on whether a particular title is Udal or not, and this may take some time to sort out, but the issue will have to be sorted out. Because of uncertainty and conflicting titles, Udal titles have probably been eroded over many years and the need to register them when they change hand will halt this.

3. In your opinion, do Udal rights still exist?

Yes. Even the Crown Estate recognises that in much of Orkney and in Shetland, they have no claim to the foreshore because of Udal tenure. (see Smith –v- Lerwick Harbour Trustees (1903) SF 680)

4. If so, what rights do you consider are still pertinent?

The principal right is that the owner owns the land outright, and the Crown enjoys no superior feudal rights. As I observed when introducing the Abolition of Feudal Tenure (Scotland) Bill, (15th December 1999), the effect of the abolition of the feudal system will be to bring the rest of Scotland into line with Orkney and Shetland. In addition, Udal land ownership includes the foreshore. Other pertinent rights are less clear, although the Scottish Law Commission has invited views on this, in particular in relation to practical experience.

5. Will the Scottish Parliament and you as MSP for Orkney protect these rights, or continue to phase them out?

Neither I or the Scottish Parliament have done anything to phase out Udal Rights, or plan so to do. Indeed, the current interest in Udal law is more likely to strengthen it, than erode it. Over the centuries passive neglect has led to an erosion and that has been reflected in judicial pronouncements in cases over the last 100 years. Any system of law requires to be refreshed to take account of changing circumstances. By instructing the Scottish Law Commission to investigate the Law of the Foreshore and Seabed, which inevitably led to their inclusion of Udal Law in their discussion paper, I ensured that Udal Law was not forgotten and died out as a result of neglect. The

Commission invited comments on the problem where Udal and feudal titles conflicted.

6. Should the surviving Udal rights (e.g. foreshore) be statutory as in Norway? Or is there a need for a register of Udal landowners?

I believe that all land titles, Udal and otherwise, should be registered, as indeed they are to be. The Scottish Law Commission will report on its consultation on the Law of the Foreshore and Seabed, and that, in turn, could lead to legislation, which may provide an opportunity to clarify Udal tenure.

7. Is there the need for a Parliament-backed comprehensive study of the subject, presently so shrouded in uncertainties?

The Scottish Law Commission is already looking at the key foreshore and seabed issues. Given the many existing demands on the Parliament, I could not justify a wider study at this time. However, if there is ultimately to be legislation coming from the SLC's current inquiry, that could well provide an opportunity for more detailed Parliamentary attention.

8. In your opinion, how do you foresee the future of Udal law?

I want to see the status of Udal Law secured.

APPENDIX 3

Account of Superior Duties Payable to the Marquis of Zetland
 by
 for his Lands in the Parish of

CHARGE

BUTTER..... Barrels..... Lispunds..... Merks
 OIL..... Barrels..... Lispunds..... Merks
 BEAR..... Meils..... Settings..... Merks
 MALT..... Meils..... Settings..... Merks
 MEAL..... Meils..... Settings..... Merks
 MONEY—SCOTS, £ : :
 POULTRY

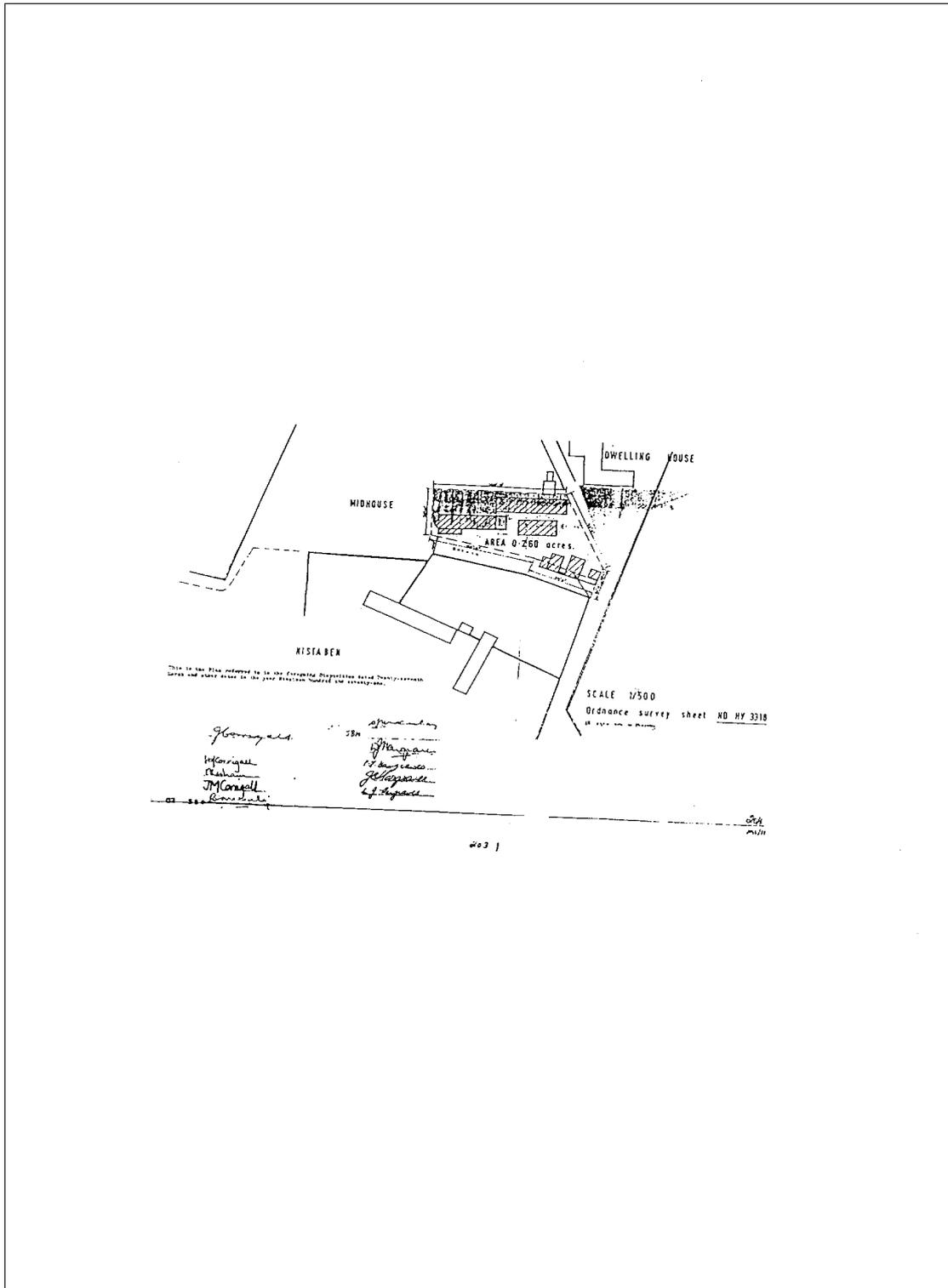
CROP..... The above Duties, converted, as follows :—

Butter, @	℥ Lispund	}
Oil, @	℥ Barrel	
Bear, @	℥ Meil	
Malt, @	℥ Meil	
Meal, @	℥ Meil	
Poultry, @	℥ Head	
Swine, @	℥ Head	
Peats, @	℥ Fathom	

£

DREVER & HEDDLE,
 SOLICITORS,
 31 ALBERT STREET,
 KIRKWALL.

APPENDIX 4



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