

UDAL LAW AND CONTESTED HISTORIES OF LAND TENURE AND LANDSCAPE IN ORKNEY AND SHETLAND

Michael Jones

Department of Geography, Norwegian University of Science and Technology
NO-7491 Trondheim, Norway
michael.jones@svt.ntnu.no

Key words: *contested histories, landscape and law, land tenure, Orkney and Shetland, udal law*

After settlement by Vikings c. 800 AD, Orkney and Shetland were for nearly 700 years under Norse rule, followed after transfer of sovereignty in 1468–1469 by 540 years of rule by Scotland and then Britain. Vestiges of Norse law — known as udal law — have nonetheless survived to the present. The paper illustrates manifestations of law in the landscape of Orkney and Shetland. It examines how ideas of udal law have been maintained in modern legal texts and public perceptions. Udal law has continued to be invoked in public debates about a variety of issues up until the 21st century. A tentative exploration is made of how conceptions of udal law have been socially constructed. This is related to two contested strands in the historiography of Orkney and Shetland, one emphasizing Norse influence and the other Scots influence. Based on an analysis of legal, historical and topographical literature concerning Orkney and Shetland, this paper illustrates how different interpretations of the history of land-tenure and landscape change reflect domination, resistance and contestation between different classes and ethnicities in the construction of histories of the islands.

Introduction

I revisit here my paper presented in 1996 at the Dublin meeting of the Permanent Conference for the Study of the Rural Landscape (PECSRL) on the topic “Scots and Norse in the landscape of Orkney and Shetland — visible landscape and mental landscape” (Jones, 1996b). Orkney and Shetland are the Northern Isles of Scotland (Fig. 1). They were colonised by Norse Vikings AD c. 800. They were transferred to the Scottish Crown in 1468 (Orkney) and 1469 (Shetland). Along

with Scotland they have been under the British Crown since 1603. The isles became subject to the British Parliament after the union of the Scottish and English Parliaments in 1707. Since devolution in 1999 they are also subject to the re-established Scottish Parliament. Despite 540 years of Scottish and British rule, Norse cultural influences are still found in the isles. I have a long-standing interest in traces of Norse law in Orkney and Shetland, and how they relate to landscape. Here, I summarise my previous work on this

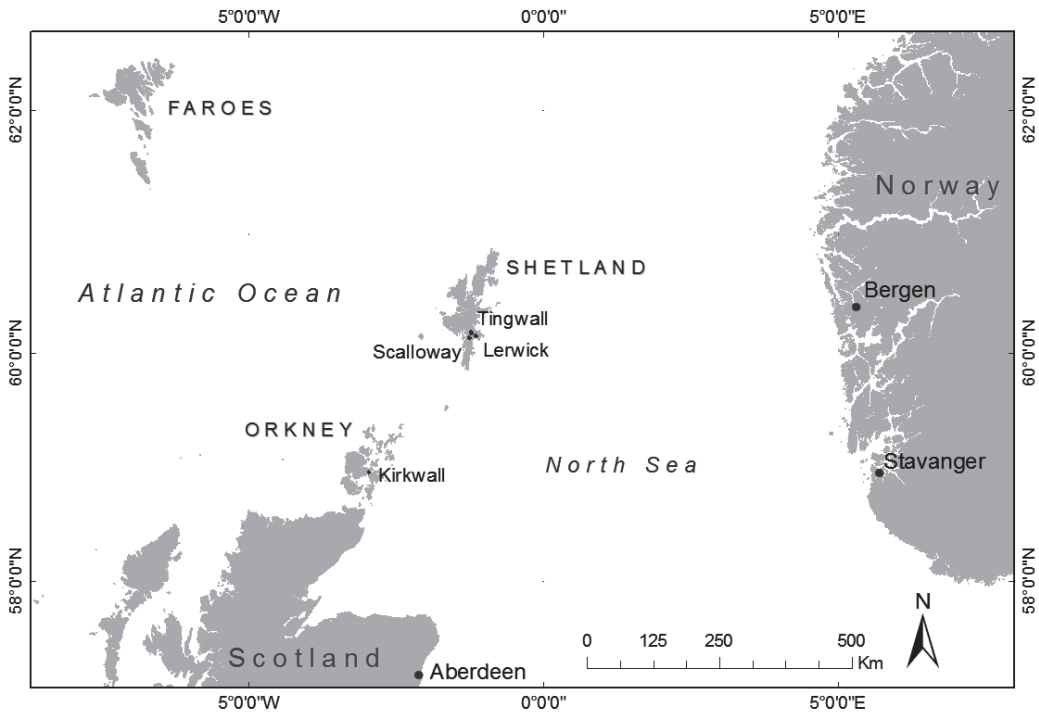


Fig. 1. The location of Orkney and Shetland between mainland Scotland and western Norway

topic and provide a view of the way forward. I am particularly interested in differing interpretations of history, and associated popular conceptions that underlie understandings of the role of law in the landscape of the isles.

The first section of the paper recapitulates in part my previous studies illustrating manifestations of law in the landscape of Orkney and Shetland, and showing the extent to which ideas of survivals of Norse law — known in the Northern Isles as “udal law” — have been maintained in modern legal texts and popular perceptions. The second section provides a tentative exploration of how conceptions of udal law have been socially constructed, and how this is related to the contested Norse and Scots roles in the historiography of Orkney and Shetland.

Landscape, law and popular perceptions

Landscape and law

Legal geography can provide a theoretical framework for studies of the significance of law — both formal law and customary law, as well as popular perceptions of law — for the ways in which people make use of their geographical environment. My own work falls within a North European tradition of research on the relationship of landscape to law, land regulation and local customary institutions, undertaken by geographers, ethnologists, historians, and legal historians (Jones, 2005). Olwig (1996; 2002) has demonstrated the close relationship between law and the medieval notion of landscape in Scandinavia and northern Germany. Landscape referred here

to the conditions and character of a land, including its traditions and customs. The landscape referred also to the organisation of things in a land through “things” — legal assemblies and courts called *ting* in Scandinavian. The activities of these landscape polities shaped the material forms of the landscape. As a region, a landscape was a district in which the land was shaped by the regional customs and laws.

Law may be directly manifested in the physical landscape through buildings such as parliaments and law courts, through signs and decorations alluding to law, through boundary markers, and through field systems and land-tenure patterns. Manifestations of law and legal power in the landscape of Orkney and Shetland can be related to both a

Norse landscape narrative and a Scots landscape narrative.

The Norse narrative includes excavated foundations of Viking longhouses, Norse fortresses and palaces, and the 12th-century St Magnus Cathedral in Kirkwall. At Tingwall, in Shetland, is an islet named the Law Ting Holm, reputed to be the open-air meeting-place of the medieval Shetland law court. This is an example of the manifestation of the law in the landscape both materially and immaterially through the surviving place-name. Landholdings showing continuity from Norse times are still thought of as “udal” holdings (Fig. 2). Jetties with houses built on the foreshore, although dating from the 18th century, are known as *lodberries* in Lerwick, from Old Norse *hlaðberg*, meaning loading rocks



Fig. 2. Udal and crofting tenant holdings at Coppister, Yell, Shetland. The middle house, called the Auld Haa, belongs to a small udal holding that has never been part of a large estate. To the left is Lowerhouses and to the right Da Kitchen, former udal holdings that became tenanted crofts in 1882 when the land was bought by a Lerwick merchant. The holdings consist of intermixed parcels of land separated by stone walls and fences. Photo: Michael Jones, 28.05.1986

(Wonders, 1995), facilitated by the Norse concept that a landholding extends to the ebb, or low-tide mark. A Norse literary revival starting in the 19th century led to the use of Norse symbolism in decorative elements of buildings, coat-of-arms and flags. Lerwick Town Hall, from 1883, has external decorations representing the Norse past and a spectacular series of stained-glass windows with motifs of Norwegian rulers. The Shetland coat of arms incorporates the motto “Med

lögum skal landet byggja”, meaning “By law the land shall be built”, taken from *Njáls Saga* and found in medieval Scandinavian law codes (Jones, 1996b) (Fig. 3).

The Scots narrative includes the ruins of Renaissance palaces and castles. The ruins of Scalloway Castle in Shetland and the Earl’s Place in Kirkwall, built at the turn of the 16th and 17th centuries, remain as monuments to the rule and misrule of Patrick, Earl of Orkney and Lord of Shetland, accused of manipulating Norse and Scots law for his own ends. The ruined Muness Castle on Unst in Shetland similarly provides a reminder of Earl Patrick’s erstwhile ally Lawrence Bruce of Cultmalindie, also accused of misdeeds. Lairds’ and merchants’ houses built from the 17th century onwards, and the pattern of enclosures that transformed the landscape of Orkney in the 19th century, are memorials to the power of the incoming Scots who acquired estates in the islands. The “squared” fields that characterise parts of the Orkney landscape reflect the history of land reorganisation and agricultural improvement, involving enclosure and division of the commons, and replacing fragmented smallholdings (Fig. 4).

The medieval Norse law in Orkney and Shetland is thought to derive from Gulating Law, i.e. the law of the Gulating legal assembly. This was the regional “landscape law” for West Norway. Similar “landscape laws” were found in several regions of medieval Norway, Denmark and Sweden. This was a notion of landscape as a territorial unit together with its legal institutions and people. The laws included rules and rights concerning use of land and other resources and the inheritance of land and goods. They were written down in the 12th and 13th centuries, and are thought to have been based on oral customary law with added elements of canon law introduced with the establishment of Christianity. The main provisions of the Gulating Law were codified by the Norwegian king Magnus Lawmender (*lagabøte*) in 1274 (Helle,

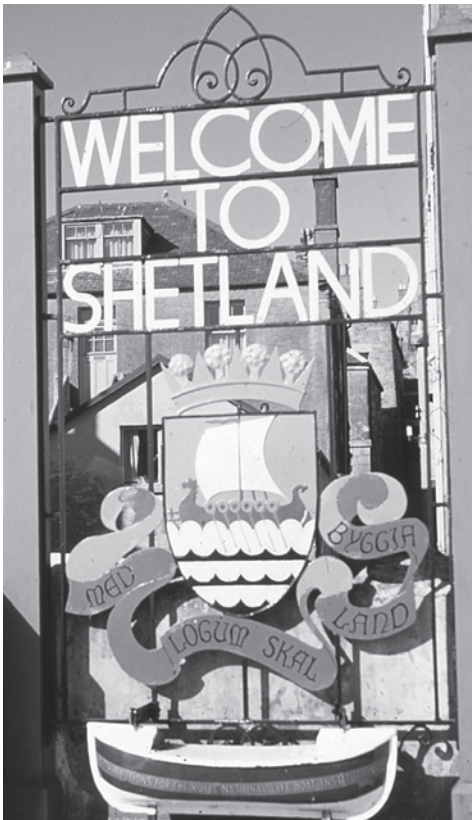


Fig. 3. Shetland’s coat of arms on a welcoming sign at Lerwick Harbour. The arms use Norse imagery, including a legal motto found in several medieval Scandinavian landscape laws. Translated this means “By law the land shall be built”. Photo: Michael Jones 04.08.1972



Fig. 4. The squared landscape of Shapinsay, Orkney. The grid-iron pattern of fields was laid out in the mid-19th century by estate owner David Balfour, descended from Scots incomer landowners. Balfour instituted agricultural improvement that involved enclosure and reclamation of land, which became farmed by tenants. Photo: Venke Åsheim Olsen 07.08.1972

2001). Magnus ruled the Norwegian realm at the time of its greatest extent, after Iceland and Greenland had submitted to the authority of the Norwegian king in the early 1260s, and before the loss of the Hebrides and Isle of Man to the Scottish king in 1266 (Helle, 1995). Orkney and Shetland remained part of the Norwegian realm until the mid-15th century; from the 1230s the Earls of Orkney were Scottish, recognising Norwegian suzerainty (Thomson, 2001).

Scandinavian rule ended when the king of Denmark and Norway, Christian I, pawned the islands to the Scottish king James III in lieu of a dowry for Christian's daughter Margrethe (Margaret). The treaties of 1468 and 1469 provided implicitly for the continuation in Orkney and Shetland of existing laws, and the Scottish Parliament in 1567 specifically recognized that the islands were subject to

their own laws. Nonetheless the gradual imposition of Scots law and legal practice occurred. The notorious Earls Robert and Patrick Stewart, who ruled the islands as a fief from 1565 to 1609, exploited the confusion between Norse and Scots law to suit their own ends. In 1611, an Act of the Scottish Privy Council proscribed "foreign laws" in Orkney and Shetland. Such aspects of the old laws that survived came to be regarded as customs within a corpus of Scots law (Donaldson, 1978).

Udal law

The primary meaning of "udal" (also written "odal") is inherited land held by a form of freehold tenure involving absolute ownership, not subject to a superior. It derives from Old Norse *oðal*, meaning ownership of inherited family property in which certain rights belong

to the kin. Spelt *odel* in modern Norwegian, this form of landholding still exists in Norway, securing the kin in a fixed order of succession prior rights to take over a farm holding above a certain size once it has been held in the family for a specified length of time. Similar rights in other Scandinavian and Germanic countries disappeared between the 16th and 20th centuries (Jones, in press).

The term “udal law” is used in two principal ways. In the narrow sense, it refers to certain survivals of the Norse land tenure system, sometimes referred to as udal tenure. In the broad sense, it is used to refer to the whole system of Norse law that regulated Orkney and Shetland when they were transferred to the Scottish Crown in 1468–1469. The Norwegian legal historian Knut Robberstad (1983) showed that udal law in Orkney and Shetland can be traced to the Magnus Code of 1274 and the earlier provincial laws this codified. Norwegian laws were not superseded in Orkney and Shetland by Scots law until the early seventeenth century. Nevertheless, certain aspects of the Norse laws survived in the Northern Isles until the twentieth century. Although some claim that udal law can still be regarded as a separate system of law, the prevailing opinion among Scottish lawyers is that it represents survivals of customary land tenure within the prevailing body of Scots law (Robberstad, 1983; Sellar, 1987; Ryder, 1989; Smith, T., 1989; Jones, 1996b).

Udal law merited separate chapters in 20th-century encyclopaedias of Scots law. Orkney solicitor W.P. Drever wrote a chapter on udal law for *Green's Encyclopædia of Scots Law* in 1900. Noting its Norse origins, he stated that udal law was “foreign” in relation to Scotland and coexisted with Scots feudal law as survivals of what he termed “native law”. Udal landowners, or ‘udallers’, held hereditary estates derived from “primitive occupation”, and owed no vassalage, homage or service to a superior, but had “a right of absolute property”. Drever listed a number of

features of udal law, some superseded and others surviving:

(1) The things — the “Udallers’ Law Court and Parliament” — with their lawbooks had been gradually superseded until the last vestiges were abolished in 1748.

(2) Succession to property, both land and moveables, was by partition among all the children, with a brother’s part being worth two sisters’ parts, but this had been gradually superseded by the feudal practice of primogeniture. Drever erroneously stated that the youngest son received the father’s dwelling-house.

(3) The period of prescription whereby lands became udal was, according to Drever, 30 years, but this had been superseded by the Scots law of prescription.

(4) Udal tenure was allodial, i.e. title did not emanate from the Crown and there was no feudal superior. A written title was not deemed necessary, although convenient. However, title had to derive from a lawful right; possession alone was not sufficient. Even where udal land had been granted by a feudal charter, as frequently happened in the 17th century, this was not sufficient to transform udal land into feudal land. Drever also referred to claims that the foreshore adjoining udal land belonged to the udaller rather than to the Crown.

(5) Udal landowners paid an annual tax of Norse origin, known as “scat” (Old Norse *skattr* = “tax”), which in origin was not a feudal duty, although over time tended to be conflated with feu-duties.

(6) In Shetland the commonly grazed pastures are called “scattalds”, which Drever thought was the unit on which “scat” was payable.

(7) Regarding the Norse weights and measures peculiar to Orkney and Shetland, Drever found the land measures, based on value rather than area, to be “vague” and “confusing”, although perpetuated in descriptions of land titles. “Native” standards and in-

struments, such as weighing-beams or steel-yards of Norse origin known as “bismars” and “pundlars”, were replaced by imperial avoirdupois weights in 1826.

In the 1914 and 1933 editions of Green’s encyclopaedia, Drever added a paragraph on the right of riparian owners to salmon-fishings, which Scotland’s supreme court, the Court of Session, had found in 1907 did not belong to the Crown but to the adjacent landowner on the basis of udal law.

In 1936, Edinburgh solicitor Wm. Jardine Dobie wrote a chapter on udal law in the Stair Society’s *Survey of the Sources and Literature of Scots Law*. Like Drever, he noted that a udal holding was allodial, and the “udaller held of no man and owed no service to any superior”. He paid “skat”, which in origin was “a tribute to the state or Crown, rather than a feu-duty”. The udal system involved “an entail on the family”, and a udaller who wished to sell his land had to offer it first to his kinsmen. The kin had the right to redeem land sold to a stranger without their consent. Dobie also referred to the practice of “uppgestry”, whereby an owner could make over his land to another in return for upkeep for the remainder of his life. Again, it was noted that writing was not essential to transfer the title of udal holdings. Udal inheritance was divided among the children, with daughters’ shares being one-half those of sons, and the latter being entitled to acquire their sisters’ portions by purchase if they wished. The eldest son (not the youngest, as stated by Drever) was entitled to the mansion or manor-house and had first choice of lots available. Dobie referred to the chief court, or law-thing, presided over by the lawman, until replaced by Scottish sheriffs. He referred also to local weights and measures. While udal law had largely disappeared from the islands, udal tenure had survived in the form of foreshore and fishing-rights.

Udal law was discussed in the Stair Memorial Encyclopaedia on *The Laws of*

Scotland by Edinburgh solicitor Jane Ryder in 1989. Udal landownership involved a system of inheritance and kinship rights in which land was allodial rather than feudal, not emanating from the Crown as feudal superior. Title to udal property could be transferred without writ or conveyance if the legal right could be proven by witnesses. A written deed or charter was not sufficient in itself to convert a udal to a feudal holding if the Crown had never been feudal superior. Ryder described succession through partible inheritance as well as the rights of kin, the land being held “in trust for the family”. Partible inheritance on intestacy was upheld in the Shetland sheriff court as late as 1893. She further described scat as an incident of udal landownership. Scattalds were in origin the unit for which scat was paid and included not only common grazings but also arable land and foreshore rights. Udal landowners owned the adjoining foreshore between high and low spring tides. Udal holdings were frequently described as extending from the highest stone of the hill to the lowest of the ebb. Ryder also described the historical weights and measures, including land measures.

Between 1890 and 1990, the Court of Session judged five cases involving udal law. In 1890, the case concerned a landowner’s claim under udal law to one-third share of pilot whales driven on to his shore, which was contested by the captors. Although such claims had been recognised in earlier court decisions, it was rejected in 1890 on the grounds that it was an unreasonable custom. In 1903, a merchant’s claim to foreshore adjoining his udal land in Lerwick was upheld, allowing him build out on to the foreshore. In 1907, a landowner’s claim to salmon-fishing rights on the basis of udal law was upheld. In 1963, a claim was rejected that treasure trove found on udal land should be divided according the Magnus Code: one-third to the finders, one-third to the landowner, and one-third to the Crown. Finally, in 1990,

the Shetland Salmon Farmers' Association contested Crown ownership of the seabed under udal law but lost the case. Thus udal tenure was upheld in two of these cases, but rejected in three cases, once on the grounds that it was an unreasonable custom and twice (in the treasure and seabed cases) that they concerned the Crown's sovereign rights (Ryder, 1989; Smith, T., 1989; Jones, 1996a; 1996b).

Udal law differed from Scots law in several ways. Allodial tenure contrasted with feudal tenure, which prevailed legally in Scotland until it was formally abolished in 2000, with effect from 2004. Partible inheritance and rights of kin differed from Scots law, where primogeniture prevailed for intestate succession until 1964. Norse weights and measures were effectively done away with in 1826. Scat payments in Orkney and Shetland were finally extinguished in 2004. The foreshore and salmon-fishings in mainland Scotland belong to the Crown estate except where alienated. Especially after the reform of Scottish land tenure since devolution in 1999, little remains legally to distinguish udal law from Scots law. Foreshore and salmon-fishing rights remain, but their practice is subject to other legislation such as planning laws and fishing regulations (Jones, 1996a; in press).

Popular perceptions of udal law

On the basis of some 70 qualitative interviews, undertaken mostly in 1986, I investigated modern perceptions of udal law. I found that the meanings and functions attributed to udal law varied among different social groups. Townspeople in Orkney and Shetland generally had anecdotal knowledge of udal law. Some mentioned disputes over building on the foreshore. Some saw it in a somewhat romantic light as part of local history or contributing to their identity — sometimes as part of the Viking heritage used to promote tourism — but for most it had little practical significance. The legal profession, represent-

ed by local solicitors, mostly regarded udal law as having eroded over time and existing as a few survivals within the framework of Scots law, principally private ownership of the foreshore and salmon-fishing rights. Their training was in Scots law, but some were willing to defend udal law if they thought it could be legally upheld (as in the unsuccessful seabed case). Estate owners and crofters mentioned especially economic aspects connected to foreshore and salmon-fishing rights. Finally, I found a few small landowners — the “last udallers” — who told of the practice of partible inheritance and rights of kin in living memory. This is the essence of udal law, although the poorest documented in modern times. This might be regarded as vestiges of family customary land rights, or it might be interpreted as revealing ethnic memories (Jones, 1996a).

In another study, I showed how udal law became a focus of attention in the 19th and early 20th centuries as part of a Norse cultural renaissance. Local historians emphasised and often romanticised the Norse period in their works, frequently contrasting it with the perceived oppressions of Scottish rule. The Udal League, founded in 1886, campaigned for home rule, land-tenure reform and the conversion of farm tenants to owner-occupiers. Udal law was an early topic of interest for the Viking Club, founded in London in 1892, becoming in 1912 the Viking Society for Northern Research. Similarly, udal law was a theme taken up by the First Viking Congress held in Lerwick in 1950. During the second half of the 20th century, udal law was invoked in public debates on matters of concern for Orcadians and Shetlanders. In the 1960s, the concern was local government reform. In the 1970s, when constitutional reform for Scotland was debated, the Shetland and Orkney Movements were established to agitate for local autonomy and referred to udal law as part of the islands' distinctiveness. In the 1980s, udal law was

invoked by opponents to such diverse issues as uranium mining, Sites of Special Scientific Interest, and Crown estate seabed rentals for salmon-farming (Jones, 1996b).

More recently, I have examined demands that arose during the Scottish Parliamentary elections in 2003 for local control of the sea and seabed, important for fishing and offshore oil, and for local autonomy and the recognition of udal law as Shetland's "native Norse law". The Shetland and Orkney Udal Law group (SOUL) set up a website with links to legal decisions in favour of aboriginal land titles in Australia and Canada, and claimed that udal law was an "indigenous legal system". I concluded that it was doubtful whether indigenous status for Orcadians and Shetlanders could be sustained (Jones, 2010). In a further study, I have discussed in relation to the idea of the "right to landscape" the territorial dimension of human rights as a basis for analysing claims made for udal law. I argued that contested rights to land and sea resources are frequently bound up with contested interpretations of history. My conclusion was that, although land ownership and rights shape landscape to a significant degree, the right to landscape as a shared resource extends beyond legal questions of property ownership and legal rights of resource use (Jones, 2011).

Social construction of the past and contested interpretations of history

The social construction of udal law

Extensive evidence of the practice of udal law during the Norse and early Scottish periods to 1611 is found in collections of historical documents from Orkney and Shetland, mostly not published until the 20th century (Clouston, 1914; Donaldson, 1954; Ballantyne and Smith, 1994; 1999). However, ideas of the significance of udal law as part of Orkney and Shetland identity are strongly in-

fluenced by legal, topographical and historical literature as well as fiction. This literature can be said to have contributed to the "social construction" of udal law through the meanings and values conferred on it in descriptions. Ideas about udal law have been part of the social construction of the Viking past in the Victorian era (Wawn, 2000) and the related social construction of the Norse past in Shetland (Renwanz, 1980; Cohen, 1983) and Orkney (Seibert, 2008).

The earliest literature on Orkney and Shetland is in the Icelandic sagas from the early 13th century. *The Orkneyinga Saga* tells the history of the Norse earls of Orkney from the islands' capture by the Norwegian king Harald Fairhair in the 9th century to the forfeiture of Shetland with its "scats and dues" to the Norwegian king Sverre at the end of the 12th century. It mentions the calling of the things, but otherwise law is little discussed. At one meeting of the thing, Earl Rognvald allowed landowners to repurchase their previously confiscated "odal possessions", which enabled him to finance the building of St Magnus Cathedral. The saga is as much fiction as historical documentation. First published in Copenhagen in Latin translation in 1780, it did not appear in English until 1873 (Anderson, 1981). Like the English translations of the other sagas, it strongly influenced the Victorian imagination of the Viking period.

Not counting references in court records and Acts of Parliament, one of the earliest legal texts to mention Norse law in the Northern Isles was Thomas Craig's *De Unione Regnorum Britanniae Tractatus*, written in 1605 although not published before 1909. Craig, one of the most influential legal writers of his time, was one of the Scottish commissioners who drafted Articles for the proposed political union of Scotland and England. His tract provided the only detailed argument for union from the Scottish side. He gave the example of Norwegian law in Orkney as an argument

that a union was possible even if the laws differed.

The earliest topographical description of Orkney and Shetland to refer to Norwegian law was by Robert Monteith in 1633, published by the Geographer Royal of Scotland, Robert Sibbald, in 1711. Monteith was responsible for the misapprehension that the youngest was to have the dwelling-house on the division of inheritance, repeated by later writers. An Orkney money-lender and landowner, he had come into conflict with Earl Patrick, who plundered his estates. He may have described the udallers' "immemorial possession" of their lands in justification of the restoration of his rights.

In 1681, James Dalrymple (later Viscount of Stair) published his *Institutions of the Law of Scotland*. Two short paragraphs described "udal rights" as "peculiar customs of the isles of Orkney and Zetland" (Stair, 1826–1827, II, 222, IV, 683). Statements by Monteith and Dalrymple that written titles were not necessary were repeated in other early topographical accounts (Wallace, 1693; Martin, 1703; Brand, 1883).

A much fuller account of udal law is found in Thomas Gifford's *Historical Description of the Shetland Islands in 1733*, published in 1786. He was a landowner and the Earl's chamberlain, responsible for collecting dues and rents as well as scat, and hence had an interest in making a thorough historical reconstruction of these as well as ways of transmitting property. He claimed that the udallers had been oppressed by the Fowd, the Norwegian governor who had collected the scat historically. He also criticised the oppressions of the Stewart earls. Nonetheless, he regretted the replacement of the simple Norse system of transmitting land by Scots conveyancing as it impoverished the udallers while making money for lawyers.

In 1750, James Mackenzie, a Kirkwall lawyer, published anonymously *The General Grievances and Oppressions of the Isles of*

Orkney and Shetland. He was a legal agent for one of the Orkney lairds involved in a 26-year long legal dispute known as the Pundlar Process, in which the Earl was accused of manipulating the old weights and measures to increase the dues payable to the Earldom. Mackenzie produced a historical account supporting the claims of the lairds. He argued that the weights and measures should revert to their original values under Norwegian rule, and that scat should be abolished since the landowners also paid Scottish land tax. In 1759, however, the Court of Session found in favour of the Earl.

Among those arguing against Mackenzie was Andrew McDouall (later Lord Bankton) in his *Institute of the Laws of Scotland*. On udal law he argued that the lack of written titles was antiquated, that udal rights were an ancient feudal form of possession, and that scat was not a land tax but a feudal due. He claimed that the rights of kin and partible inheritance were in disuse, or if still practised were so inconvenient that udal rights should be discontinued (McDouall, 1751, 542–545).

These examples from the 17th and 18th centuries show that interpretations of udal law varied according to personal circumstances, political views, and position in the landowning hierarchy. Despite differences, a picture was built up of the Norse heritage of the isles in which udal law became an established part. Interpretations as well as misinterpretations of history were passed down from one writer to another and became widely accepted as "historical facts". The number of accounts referring to udal law multiplied in the 19th and 20th centuries. A detailed analysis of these is a task for later (although I have provided a brief account (Jones, in press b)). They have helped sustain up until the 21st century debates over the relevance of the Norse historical past for the present despite 540 years of Scottish dominating influence.

Contested historiography

In 2004, the relevance of udal law was the subject of a public debate in Kirkwall on whether udal law was living history or modern fantasy. The first view contended that udal law was part of Orkney and Shetland identity and hence a continuing part of modern life. The opponents argued that it was a remnant of a system of private law concerning land inheritance, and not relevant for ordinary people in the street. The jury (including a solicitor, local historian, librarian and ex-councillor) voted seven to five against the motion that udal law was still relevant, whereas the audience voted by 43 votes to 11 that it continued to be relevant (Jones, 2011; in press). The status of udal rights is linked to differing interpretations of the islands' history. In detail this requires further research, but a tentative sketch can be given (Jones, 2011).

Øien (2005) identifies two main strands in the historiography of Orkney and Shetland, one emphasizing Norse influence and the other Scots influence. One debate has been between the 'war school', who maintain that Viking settlement was accompanied by genocide of the pre-existing population, and 'the peace school', who emphasize continuity with assimilation of the former Pictish inhabitants (Bäcklund, 2001; Smith, B., 2001; 2003b; Fellows-Jensen, 2005). Another debate has concerned whether the medieval system of administration and taxation was solely of Norse origin or showed Celtic-Pictish influences (Øien, 2005). On the transfer of sovereignty to Scotland, some maintain that there still exists a residual Norwegian or Danish right of redemption of the mortgage by which sovereignty was transferred in 1468–1469, while others argue that sovereignty has been permanently transferred to Scotland by acquiescence (Donaldson, 1984). The Stewart earls' administration of 1565–1609 has been regarded in some quarters as the worst example of Scottish misrule and in oth-

ers as a treacherous exploitation in their own interest of Scots feudal or Norse udal laws according to expediency (Smith, B., 1999). "Udallers" have been variously described as Norse smallholders struggling against the power of expanding Scottish estate-owners or as large medieval landowners with tenants whose estates were eventually acquired through marriage or purchase by incoming Scots. Fragmentation of udal (allodial) estates has been explained by the introduction of feudal conveyancing without recognizing the rights of kin or as the result of partible inheritance under Norse udal law (Shaw, 1980). The claim to a share of pilot whales driven onshore has been presented as an ancient udal right of landowners or as an unjust custom introduced by Scottish estate-owners in the eighteenth century (Smith, B., 2003a). Udal law has been presented as a separate system of law eroded by the political ascendancy of Scotland and the "legal imperialism" of encroaching Scots law or as accepted local customary rights within the prevailing system of Scots law (Sellar, 1987; Jones, 1996b). In the most recent debates, it has been evoked as a basis for claims to local control over maritime and seabed resources or dismissed as vestigial land rights unrelated to the regional and offshore economy.

Conclusion

Landscape and law are intimately bound up with one another in multiple ways. The example of udal law in Orkney and Shetland shows that ideas of landscape are not only based on the landscape's physical appearance but are supported by stories and histories told about it. When one system of law replaces another, vestiges of the old system may endure over many centuries and contribute to feelings of cultural identity. Interpretations of the history of land tenure and landscape change reflect domination, resistance and contestation between different classes and ethnicities in the construction of histories

of the islands. This is seen in a continuing tension between academic histories and popular histories.

References

- Anderson, J. (Ed.) (1981 [1873]). *The Orkneyinga Saga*. Edinburgh: James Thin, Mercat Press. civ+227 pp.
- Bäcklund, J. (2001). War or peace? The relations between the Picts and the Norse in Orkney. *Northern Studies*, 36, 33–47.
- Ballantyne, J., Smith, B. (eds.) (1994). *Shetland Documents 1580–1611*. Lerwick: Shetland Islands Council & The Shetland Times Ltd. xxii+329 pp.
- Ballantyne, J., Smith, B. (eds.) (1999). *Shetland Documents 1195–1579*. Lerwick: Shetland Islands Council & The Shetland Times Ltd. xxii+359 pp.
- Brand, J. (1883 [1701]). *A Brief Description of Orkney, Zetland, Pightland-Firth & Caithness*. Edinburgh: William Brown. 247 pp.
- Clouston, J.S. (Ed.) (1914). *Records of the Earldom of Orkney 1299–1614* (Publications of the Scottish History Society, Second Series, vol. VII). Edinburgh: Scottish History Society & University Press. xcix+515+8 pp.
- Cohen, B.J. (1983). Norse imagery in Shetland: An historical study of intellectuals and their use of the past in the construction of Shetland's identity, with particular reference to the period 1800–1914. PhD thesis, University of Manchester. 535 pp.
- Craig, T. (1909 [1605]). *De Unione Regnorum Britanniae Tractatus*. Ed. and transl. by Terry, C.S. Edinburgh: Scottish History Society & University Press. 497 pp.
- Dobie, W.J. (1936). Udal law. In: *The Stair Society: An Introductory Survey of the Sources and Literature of Scots Law*, Vol. 1 (pp. 445–460). Edinburgh: Stair Society.
- Donaldson, G. (Ed.) (1954). *The Court Book of Shetland 1602–1604*. Edinburgh: Scottish Record Society. xii+176 pp.
- Donaldson, G. (1978). Norse and Scottish law in Shetland: The background. In: *The Shetland Report: A Constitutional Study Prepared for the Shetland Islands Council by the Nevis Institute under the Chairmanship of Lord Kilbrandon* (pp. 179–195). Edinburgh: Nevis Institute.
- Donaldsen, G. (1984). Problems of sovereignty and law in Orkney and Shetland. In: Sellar, D. (Ed.). *The Stair Society: Miscellany Two* (Publications of the Stair Society, vol. 35) (pp. 13–40). Edinburgh: The Stair Society.
- Drever, W.P. (1900). Udal law. In: Chisholm, J. (Ed.). *Green's Encyclopædia of the Law of Scotland*, vol. XIII (pp. 28–38). Edinburgh: William Green & Sons.
- Drever, W.P. (1933 [1914]). Udal law. In: Dunedin, Viscount, Wark, J.L., Black, A.C. (eds.). *Encyclopædia of the Laws of Scotland*, vol. XV (pp. 321–336). Edinburgh: W. Green & Son.
- Fellows-Jensen, G. (2005). Extermination or economic exploitation? In: Gammeltuft, P., Hough, C., Waugh, D. (eds.). *Cultural Contacts in the North Atlantic Region: The Evidence of Names* (pp. 100–118). Lerwick: NORNA, Scottish Place-Name Society and Society for Name Studies in Britain and Ireland.
- Gifford, T. (1976 [1786]). *An Historical Description of the Zetland Islands in the Year 1733*. Sandwick, Shetland: Thuleprint Ltd. xviii+104 pp.
- Helle, K. (1995). *Aschehougs Norges-historie*, vol. 3: *Under kirke og kongemakt 1130–1350* [Aschehoug's History of Norway, vol. 3: Under the Power of Church and King]. Oslo: Aschehoug. 239 pp.
- Helle, K. (2001). *Gulatinget og Gulatingslova* [The Gula Assembly and the Gulathing Law]. Leikanger: Skald. 240 pp.
- Jones, M. (1996a). Perceptions of udal law in Orkney and Shetland. In: Waugh, D. (Ed.). *Shetland's Northern Links: Language and History* (pp. 186–204). Edinburgh: Scottish Society for Northern Studies.

Jones, M. (1996b [2001]). Scots and Norse in the landscape of Orkney and Shetland: Visible landscape and mental landscape. In: Aalen, F.H.A., Hennessy, M. (eds.). *Proceedings of the Permanent European Conference for the Study of the Rural Landscape: Papers from the 17th Session, Trinity College Dublin, 1996* (pp. 4–10). Dublin: Department of Geography, Trinity College, University of Dublin.

Jones, M. (2005). Law and landscape — some historical-geographical studies from northern Europe. In: Peil, T., Jones, M. (eds.). *Landscape, Law and Justice: Proceedings of a Conference Organised by the Centre for Advanced Study at the Norwegian Academy of Science and Letters, Oslo 15–19 June 2003* (Instituttet for sammenlignende kulturforskning, Serie B: Skrifter, vol CXVIII) (pp. 95–109). Oslo: Novus forlag.

Jones, M. (2010). Playing the indigenous card? The Shetland and Orkney Udal Law group and indigenous rights. *GeoJournal*, 11 pp. DOI 10.1007/s10708-010-9380-8.

Jones, M. (2011). Contested rights, contested histories: Landscape and legal rights in Orkney and Shetland. In: Egoz, S, Makhzouni, J, Pungetti, G. (eds.). *The Right to Landscape: Contesting Landscape and Human Rights* (pp. 71–83). Aldershot: Ashgate.

Jones, M. (in press). Udal law. In: Mulhern, M. (Ed.). *Scottish Life and Society: A Compendium of Scottish Ethnology*, vol. 13: *Institutions of Scotland — The Law* (pp. 389–417). Edinburgh: European Ethnological Research Centre & Birlinn.

McDouall, A. (1751). *An Institute of the Laws of Scotland in Civil Rights: With Observations on the Agreement or Diversity Between Them and the Laws of England. In Four Books: After the General Method of the Viscount of Stair's Institutions*, vol. I. Edinburgh: A. Kincaid & A. Donaldson. 708 pp.

Mackenzie, J. (1836 [1750]). *The General Grievances and Oppression of the Isles*

of Orkney and Shetland. Edinburgh: Laing and Forbes. xxxix+111+vi pp.

Martin, M. (1999 [1703]). *A Description of the Western Isles of Scotland*. Edinburgh: Andrew Bell. 392 pp.

Monteith, R. (1711). *The Description of the Islands of Orkney and Zetland*. Edinburgh: S.R.S. & Andrew Sympson. 4+42 pp.

Øien, T. (2005) The Northern Isles — between two nations. *Northern Studies*, 39, 80–104.

Olwig, K.R. (1996). Recovering the substantive nature of landscape. *Annals of the Association of American Geographers*, 86, 630–653.

Olwig, K.R. (2002). *Landscape, Nature and the Body Politic — From Britain's Renaissance to America's New World*. Madison, Wisconsin: University of Wisconsin Press. 299 pp.

Renwanz, M.E. (1980). From crofters to Shetlanders: The social history of a Shetland island community's self image, 1872–1978. PhD thesis, Stanford University. 349 pp.

Robberstad, K. (1983). Udal law. In: Withrington, D.J. (Ed.). *Shetland and the Outside World 1469–1969* (Aberdeen University Studies Series, no. 157) (pp. 49–68). Oxford: Oxford University Press.

Ryder, J. (1989). Udal law (Ed. Sellar, W.D.H.). In: Smith, T., Black, R., Thomson, J.M. (eds.). *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol. 24 (pp. 193–219). Edinburgh: Law Society of Scotland & Butterworths.

Sellar, W.D.H. (1987). Custom as a source of law. In: Smith, T., Black, R., Thomson, J.M. (eds.), *The Laws of Scotland: Stair Memorial Encyclopaedia*, vol. 22 (pp. 176–198). Edinburgh: Law Society of Scotland & Butterworths.

Siebert, S. (2008). *Reception and Construction of the Norse Past in Orkney* (Imaginatio Borealis, Bilder des Norden, vol 16). Frankfurt am Main: Peter Lang. 341 pp.

Shaw, F.J. (1980). *The Northern and*

Western Islands of Scotland: Their Economy and Society in the Seventeenth Century. Edinburgh: John Donald.

Smith, B. (1999). Earl Robert and Earl Patrick in Shetland: Good, bad or indifferent? *New Orkney Antiquarian Journal*, 1, 6–16.

Smith, B. (2001). The Picts and the martyrs or did Vikings kill the native population of Orkney and Shetland? *Northern Studies*, 36, 7–32.

Smith, B. (2003a). Pilot whales, udal law and custom in Shetland: Legal red herrings, *Northern Scotland*, 23, 85–97.

Smith, B. (2003b). Not welcome at all: Vikings and the native population in Orkney and Shetland. In: Downes, J., Ritchie, A. (eds.). *Sea Change: Orkney and Northern Europe in the Later Iron Age AD 300–800* (pp. 145–150). Balgavies: Pinkfoot Press.

Smith, T. (1989). Udal law: Editorial excursus by the late Sir Thomas Smith (Ed. Sellar, W.D. H.). In: Smith, T., Black, R., Thomson, J.M. (eds.). *The Laws of Scotland:*

Stair Memorial Encyclopaedia, vol. 24 (pp. 219–230). Edinburgh: Law Society of Scotland & Butterworths.

Stair, J, Viscount of. (1826–1827 [1681]). *The Institutions of the Law of Scotland Deduced from its Originals, and Collated with the Civil and Feudal Laws and with the Customs of Neighbouring Nations in Four Books*, 4th edn. by Brodie, G., vols. I–IV. Edinburgh: Thomas Clark. 1101 pp.

Thomson, W. L. (2001). *The New History of Orkney*. Edinburgh: Mercat Press. 529 pp.

Wallace, J. (1693). *A Description of the Isles of Orkney*. Edinburgh: John Reid. 94 pp.

Wawn, A. (2000). *The Vikings and the Victorians: Inventing the Old North in Nineteenth-century Britain*. Cambridge: D.S. Brewer. 434 pp.

Wonders, W. C. (1995) The lodberries of Lerwick. *Scottish Geographical Magazine*, 111, 88–97.