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# PROBLEMS OF SOVEREIGNTY AND LAW IN ORKNEY AND SHETLAND

*By* GORDON DONALDSON, D.LITT., F.B.A.,
*Historiographer Royal for Scotland;*
*Professor Emeritus, University of Edinburgh*

It is among the most picturesque and therefore best remembered episodes in Scottish history that King Christian I of Denmark and Norway, unable to raise the 60,000 florins of the Rhine which he had promised as the dowry of his daughter, Margaret, on her marriage to James III, King of Scots, pledged his lands and rights in Orkney for 50,000 florins in 1468 and his lands and rights in Shetland for a further 8,000 florins in the following year.[1] But those transactions were no more than incidents in a long process whereby the islands were gradually transferred from Norwegian control and were stage by stage incorporated into the Scottish kingdom. They did not in themselves mean an abrupt substitution of Scottish rule and Scots law for Norwegian rule and Norse law.

Much had already happened before 1468-9 — in the first place in the international scene. In 1266, by the Treaty of Perth, Norway ceded to Scotland the Isle of Man, the Hebrides and all other islands on the west and south of the great 'Haff' or sea, in return for 4,000 merks in four annual instalments and 100 merks yearly in perpetuity[2] — the 'Annual of Norway' which remained a Scottish liability for two hundred years but which was seldom paid. Orkney and Shetland were at that time expressly reserved to Norway, but, only fifteen years later, a treaty arranging the marriage of Alexander III's daughter to King Erik of Norway provided that, should the Norwegians not fulfil the terms, then Orkney was to be ceded to Scotland:[3] the possibility of a cession of Orkney had thus been envisaged two hundred years before 1468. Soon after the treaties of 1266 and 1281 Scotland was preoccupied with her relations with England, and — although the Treaty of Perth was confirmed by the Treaty of Inverness in 1312[4] — relations with Norway did not figure much in Scottish history again until Scotland recovered stability after prolonged wars and periods of weak administration. But in 1426 the obligation to pay the Annual of Norway was reaffirmed.[5] Then in 1460, when the possibility of a marriage of Princess Margaret of Denmark to James III was first discussed, the Scots proposed that to make up her dowry the

[1] The best text of the Orkney treaty, with translation, is in John Mooney, *Charters and other Records of the City and Royal Burgh of Kirkwall*, 96-109. The text of the Shetland treaty is in *Norges Gamle Love*, Anden Raekke (ed. O. A. Johnsen et al., Oslo, ii, no. 116, 1934), and Barbara E. Crawford, 'The Pawning of Orkney and Shetland', *SHR*, xlviii, 52-3.
[2] *APS*, i, 420.
[3] *ibid.*, 423.
[4] *ibid.*, 461-2.
[5] *Diplomatarium Norvegicum*, xx, 764-6.

Annual of Norway should be extinguished and Orkney and Shetland should be ceded to Scotland.[6] These events should be seen in the general setting of Scoto-Norwegian relations over two centuries. With the death of Haakon the Old in 1263 it may be said that the imperialist phase of Norwegian history came to an end, even while Norway was still an independent state. Then, in the fourteenth century, when Norway passed under the Danish crown, responsibility for Norwegian dependencies passed to Denmark, which was interested not in possessions overseas to the west but in its relations with the Hanseatic League and the Baltic lands, so that Norwegian interests were neglected.

Thus, even in the international scene, the transfer of Orkney and Shetland in 1468-9 did not represent anything startlingly novel. But much had also been happening before 1468-9 within the islands, where Scottish influence had long been infiltrating. One need look only at the succession of the earls to see this. It is usually said that the Norse line of jarls ended with John in 1231, but the fact is that both John and his brother and predecessor, David, were at least three-quarters Scots, and their father, Harald Maddadson, had been Scots on the male side. Indeed, intermarriage between Orkney earls and Scottish families had started at least as far back as the end of the tenth century, when Sigurd II married a daughter of Malcolm II, and the male line of the Norse earls had not continued beyond Earl Rognvald, who died in 1158. At any rate, after 1231 the earldom passed to a series of Scottish families — the Angus line (1231-c. 1320), the Strathearn line (1321-57) and finally, in 1379, the St. Clair line. All these earls were mainly Scots or Scoto-Norman in race, their interests were primarily Scottish and some of them may never have set foot in Orkney. They had a dual allegiance, for, while they held Orkney from the kings of Norway, they also held Caithness or other property from the kings of Scots, and as Scottish magnates they played their parts in Scottish affairs: Magnus, earl of Caithness and Orkney, was one of the barons in whose names the Declaration of Arbroath was sent to the pope in 1320. Precisely what influence these earls had in Orkney may be debatable, but they assuredly can have done nothing to strengthen or even to maintain the connection with Norway. Shetland, however, did not wholly share Orkney's fortunes. In 1195 it had been detached from the earldom, and was ruled, like the Faroes, by a governor appointed in Norway. This arrangement lasted until at least 1379, when the St. Clair earls came in, but, although they certainly had interests in Shetland, whether they were actually invested in Shetland as well as Orkney remains debatable.[7]

It is true that the formal superiority of the king of Norway over the earls of Orkney, Scots though they were, was maintained. Indeed, between the last of the Strathearn earls and the first of the St. Clair line the Norwegian king took the earldom into his own hands for twenty-two years, and after the death of the second St. Clair earl, in 1420, the Norwegian king again took the earldom into his own hands, this time for fourteen years. Certainly the St. Clair earls, and presumably their predecessors also, were invested on terms designed to safeguard

[6] *Diplomatarium Christierni Primi* (ed. Hans Knudsen, Copenhagen, 1856), 128. I am indebted to Dr. Barbara Crawford for giving me a photocopy of this item.

[7] Barbara E. Crawford, 'The earldom of Orkney and lordship of Shetland', *Saga Book* (Viking Society for Northern Research), xvii, 157, 165.

the rights of the Norwegian king: they were to govern only during his pleasure, they were to be answerable to him for their administration, they were not to build castles in the islands without his consent and they were to provide men for his service.[8] If these provisions suggest that the king was apprehensive lest Orkney, under its Scottish earls, might slip from his grasp altogether, his fears seem to have been justified. The first of the St. Clair earls did build a castle in Kirkwall; the last of them, when summoned in 1460 and 1461 to give his personal allegiance to Christian I of Denmark and Norway, excused himself and there seems to be no evidence that he ever did homage to the king.[9] Besides, the earls were clearly withdrawing from active participation in Norwegian affairs. In 1389, when twenty Norwegian councillors declared that King Erik was the rightful heir to the Norwegian crown, the second name in the list was that of Henry Sinclair, Earl of Orkney.[10] By contrast, after Christian I came to the throne in 1448, there was no representative present from Orkney either when he was elected as Norwegian king, when he was proved to be the true heir, or when he was crowned at Trondheim.[11]

Just how strong Scottish influence in Orkney had become is shown by the fact that even when the Norwegian king took the earldom into his own hands Scots continued to play important parts in Orkney. Already in 1357, when the king resumed the earldom after the death of the last Strathearn earl, the people of Orkney petitioned him for protection against the activities of a Scot, Duncan Anderson, who claimed to be acting for the rightful heir of the earldom.[12] After 1420, when the king again resumed the earldom after the death of the second St. Clair earl, the administration was nonetheless carried on (though in his name) by Scots — Bishop Thomas Tulloch from 1420 to 1423 and 1426 to 1434 and David Menzies of Weem from 1423 to 1426. There is also evidence that before 1468 the king of Norway was finding it impossible to collect the revenues due to him from the islands.[13] It looks as if it was impracticable for the Norwegian king, whatever his intentions, to make his power effective in this distant dependency.

In view of the long succession of Scottish earls, a certain amount of penetration of Scottish influence in the secular field is not surprising. But it extended also to the church, and only four years after Henry Sinclair became earl of Orkney Robert Sinclair was nominated as bishop of Orkney. This is perhaps rather more surprising, because the bishopric of Orkney did not form part of the Scottish province but was subject to the Norwegian archbishop of Trondheim. That Scottish influence was paramount in the church in Orkney became evident during the time of the Great Schism (1378-1417), when rival popes competed for the allegiance of western Christendom. Norway, like England, supported the pope at Rome, and Scotland, like France, the pope at Avignon. Clearly, the will of the Roman pope should have prevailed in Orkney, and yet it seems that in practice the voice of Avignon, which meant Scotland, was not ineffective, with

[8] *REO*, 21-2, 48-9.
[9] Crawford, 'Pawning', 41-2.
[10] *Diplomatarium Norvegicum*, v, no. 484.
[11] Lecture by Mrs. Thelma Jexlev, Assistant Keeper of the Danish Archives, at Kirkwall, reported in *The Orcadian* 29 August 1968.
[12] Joseph Anderson, in Introduction to *Orkneyinga Saga* (1873), lix-lx.
[13] Crawford, 'Earldom', 162.

the appointments of Robert Sinclair, dean of Moray and later Bishop of Dunkeld, and Alexander Vaus, later Bishop of Caithness. Nominations were of course made on the Roman side as well. One of them was the realistic one of John, parson of Fetlar, presumably a native candidate, but after him came the nomination of an Englishman, a papal chaplain, who was recognised in Norway but apparently never set foot in Orkney. It seems that the Norwegian candidates, the Roman candidates, were repulsed by the Scots, with the support of the earls. The important fact is that from 1383 onwards there was a succession of Scottish bishops of Orkney, including latterly two Tullochs — the Thomas Tulloch already mentioned and then William Tulloch, who was keeper of the privy seal of Scotland and an active figure at the Scottish court.

It was perhaps even more remarkable that Scots were finding their way into the church in Shetland (which, even when detached from the earldom of Orkney, was always part of the bishopric). In the archdeaconry of Shetland there were a couple of Buchans, obviously Scots, in the 1380s, and during the Schism it seems that it was Scots, nominated by Avignon, rather than natives or Norwegians, who obtained possession. After the Schism, the archdeaconry of Shetland, like the bishopric of Orkney, fell into the hands of Tullochs — three of them in succession, Malise, David and Thomas. Thus even Shetland, though to some extent screened from Scotticisation in secular affairs, was exposed to Scottish influence through the church.

The Scots who filled the leading positions in church and state brought their kinsmen and clients in their train: one of the Orcadians' complaints against Menzies of Weem in the 1420s was that he introduced 'foreigners' (i.e. Scots) who oppressed the people,[14] and it is evident that there must have been a substantial Scottish immigration before 1468, to produce a fair number of officials and landowners.[15] There is a telling illustration in the linguistic field. The latest extant Orkney document in Norse is dated so early as 1426, and even it was composed in the official Norwegian of the day and not in the local Orcadian Norn. Ten years after that, namely in 1436, the lawman of Orkney was writing in Lowland Scots — a generation before the transaction of 1468. As we should expect, it was different in Shetland. As to Scottish immigration, it seems unlikely that more than a small number of Scots can have settled in Shetland before 1469, and even thereafter, until the second half of the sixteenth century, the process was slow. It is not surprising that the latest Norse document extant in Shetland belongs to so late as 1607, nearly two hundred years after the latest Orkney one. Clearly, Scotticisation was much slower in Shetland than in Orkney.

Looking over the whole field, can one doubt that much had happened before 1468 and that the Scots had come to Orkney and had come to stay? It is hard to believe that by 1468 the king of Denmark and Norway can have considered that the effective reintegration of the islands into his dominions could be practicable. The transaction of 1468 may not have been a mere recognition of a *fait accompli*, but it did not amount to the transfer to Scotland of something that was an integral part of the Norwegian kingdom. This may have been less true of

[14] *REO*, 37.
[15] Storer Clouston, *History of Orkney* (Kirkwall, 1932), 271, 281.

Shetland than of Orkney, and 1469 was perhaps a more significant date for Shetland than 1468 was for Orkney.

But what did in fact happen in 1468-9? What was the scope of the transactions and what exactly was pledged? A substantial transfer of some kind must have been made, for the king of Scots was not going to waive the bulk of the dowry in return for a mere paper concession. What was pledged must have been considered to represent a value of 58,000 florins. The treaties specified 'our lands of the islands of Orkney' and 'our lands of the islands of Shetland', with 'all and sundry rights, services and rightful pertinents belonging to us by royal right'. Whatever else may have been comprehended, crown lands clearly had first place. There were assuredly lands in Orkney which had belonged to the Norwegian crown, and when Henry St. Clair was installed as earl in 1379 there is a reference to 'the lands of our said lord the king', as well as to the king's rights, on which the new earl was not to encroach.[16] We know less about crown lands in Shetland, and if royal estates were less extensive there that would help to explain the discrepancy between the sum of 50,000 florins for Orkney and only 8000 for Shetland — bearing in mind that Shetland, though far less fertile than Orkney, has an area about 50% greater.[17] On the other hand, it may be doubted if the negotiators were thinking of a precise valuation, and perhaps King Christian could hardly have pledged a quarter or a third of Shetland.

Besides lands which may have been considered royal demesne, there were lands of which the crown was superior or landlord. It is true that udal tenure, which obtained in Norwegian territories, involved allodial holding, with no superior in the feudal sense, but clearly the king was in some way the superior of the earldom of Orkney and, besides, there must have been land which was let and from which the crown derived rents. Among crown renenues there were not only rents but profits of justice, especially fines. We know that in 1195 half the fines from Orkney were assigned to the crown, and in the 1420s David Menzies of Weem was accused of wrongfully uplifting them.[18] There were also taxes, and in 1469 King Christian commanded the people of the islands to pay their taxes to the Scottish king and obey him.[19]

A comprehensive transfer of crown rights should have included a voice in the selection of bishops, the patronage of other benefices and the enjoyment of the temporalities of bishoprics during vacancies. In 1266, when the Hebrides were ceded, the crown patronage in the bishopric of the Isles had been expressly mentioned, but there was no such clause in 1468 and some uncertainty seems to have persisted. In 1502 a nominee of the king of Denmark contested the archdeaconry of Shetland with a nominee of the king of Scots,[20] and so late as 1662 a conveyance of land in Shetland which had once belonged to the cathedral of Bergen and had fallen to the Norwegian crown was confirmed by King Frederick III.[21] On the other hand, there is ample evidence that from the very

[16] *REO*, 26; Crawford, 'Pawning', 44.
[17] Crawford, 'Earldom', 164-5: Mr. Brian Smith, Shetland Archivist, deduces from a reference c. 1500 to 'the kingis landmaill' that the crown lands in Shetland were 'very meagre indeed'.
[18] *REO*, 38.
[19] Crawford, 'Earldom', 163-4, 168.
[20] *RSS*, i, 755.
[21] Gilbert Goudie, *Celtic and Scandinavian Antiquities of Shetland* (Blackwood, 1904), 97-9.

beginning of the sixteenth century the Scottish kings regularly exercised their regalian rights in the bishopric of Orkney and also made presentations to benefices in the islands without further challenge.[22]

Crown lands, revenues and rights had the pecuniary value with which the negotiators of 1468-9 may be presumed to have been primarily concerned. It may be doubted if they thought of the more abstract concept of sovereignty, but there are positive indications that sovereignty was deliberately excluded from the impignoration. A comparison with the Treaty of Perth is again instructive. The western isles were ceded in comprehensive terms, with express exclusion of 'the islands of Orkney and Shetland, which the said king of Norway reserved to his *dominium*, with all their lordships, homages and revenues, services and all their rights and pertinents'. The marriage treaty of 1281 envisaged the possible cession of 'the whole land of Orkney'. The draft treaty of 1460, in its turn, proposed to transfer 'all right and *dominium*' which the king of Denmark and Norway had in the islands of Orkney and Shetland (*omne jus et dominium quod habet et habere pretendit in insulis Orchadie et Chasteland*).

In the terminology of 1468-9 there is no mention either of *dominium* or of the whole land of Orkney and Shetland. King Christian pledged only 'our lands of the islands of the Orkneys' and 'our lands of the islands of Shetland'. That may or may not have in itself meant less than 'the Orkney islands' or 'the islands of Shetland' would have done, but it has been argued on the strength of this phrase that the impignoration extended only to the royal estates.[23] It is more revealing that the treaty of 1468 contains a contrast between 'the islands of the Sudreys and Man' and 'our lands of the Orkney islands'. Why this qualifying phrase, '*our lands of* the Orkney islands'? It does look as if Norway was ceding less in Orkney in 1468 than she had ceded in the Sudreys in 1266 and less in Orkney in 1468 than she had reserved there in 1266. The 'something less', whatever else it may have been, surely included sovereignty. It may be objected that the Treaty of Perth was two hundred years old when the impignoration of 1468-9 took place. But, though old, it was not forgotten. It had been reissued in 1426, it had been referred to in the negotiations of 1460, when a draft treaty contained an abridgment of its terms,[24] and it was referred to in the treaty of 1468 itself, one clause of which finally extinguished (as the treaty of 1460 had proposed to do) the Annual of Norway payable in terms of the treaty of 1266. It can hardly be doubted that those who drew up the treaty of 1468, if they did not actually have the treaty of 1266 before them, were fully conversant with its terminology.

In later attempts by the Danish kings to redeem what they had pledged, it was more than once claimed that sovereignty had not been renounced, and this claim was not, apparently, disputed by the Scots. When Frederick II raised the question of the redemption of the islands in 1560 he said that the Scots must be aware that the *dominium* of the islands pertained to him. Again that word *dominium*, which in the context must mean sovereignty. His words were: 'of the Orkney islands, which your people have kept for some time, the *dominium* pertains to us and to our kingdom of Norway' (*insularum Orcadum, quas aliquo*

[22] *RSS*, i, 1031 and *passim*.
[23] *The Viking Congress* (ed. W. Douglas Simpson, Aberdeen, 1954), 81-2.
[24] *Diplomatarium Christierni Primi*, 125-6.

*jam tempore gens vestra detinet, dominium ad nos nostrumque regnum Norwagie pertinet*).[25] In 1585 Frederick again asserted that the islands 'are acknowledged indisputably to form part of our kingdom'.[26] And in 1667 the Danish case was that the islands 'belonged to the kingdom of Norway as an inseparable and inalienable dependency, and still belong to it'.[27]

It is therefore reasonable to maintain that sovereignty was never formally transferred, even in pledge, let alone by complete cession. On the other hand, in practice, Scotland, and subsequently the United Kingdom, have long and continuously exercised sovereign rights, to the exclusion of any Scandinavian authority, and it has therefore been concluded that sovereignty has in the course of time been transferred by use and wont, by tacit agreement or acquiescence and, for many generations now, without challenge. An expert in international law has written recently: 'At the present time, and indeed for some considerable time past, the United Kingdom has exercised full sovereign powers over Shetland: the islands are under the British crown, governed by the government of the U.K., bound by the statutes made at Westminster, subject to the Scottish legal system of local government and the U.K. administrative network.... The Scottish, and later U.K., title to Shetland derives from the exercise of a full range of governmental functions over a large number of years without interruption.' It is argued further that, despite the 'whensoever' (*quandocunque*) of the document pledging Shetland, which gave the Norwegian crown the right to redeem at any point in the future, yet by this time acquiescence and delay have now barred Norway from invoking the rights of redemption.[28] It has been from time to time suggested that all possible ambiguity should be removed by a brief treaty between Britain and Norway, perhaps along with Denmark for any interest that country might be thought to have, just to make it clear once and for all that sovereignty over the islands belongs to Britain,[29] but in view of the opinion just quoted this would appear to be quite superfluous. The link of Orkney and Shetland with Britain may resemble a marriage by habit and repute, but it is nonetheless a legal marriage. There remains, however, one point of ambiguity. Granted that British sovereignty now exists by prescription, no one has ventured to pronounce on the date at which such sovereignty became effective *de jure*, and it may be considered to remain uncertain whether Scotland had acquired sovereignty before 1707 or if it was acquired by the U.K. after that date: it might therefore be asked whether Orkney and Shetland, while legally parts of the U.K., are legally parts of Scotland. At the moment this question is purely academic, but in the event of Scotland becoming independent it might conceivably have to be discussed.

Examination of the question of sovereignty, and in particular of what precisely was pledged in 1468-9, must take the documents of those years as meaning what they say and as being legally impignorations. It has, however, been contended that Christian I had no intention of redeeming what he had pledged.

[25] *National MSS of Scotland*, III, xliv; translated by Goudie, *op. cit.*, 217-18 (where 'dominium' is wrongly rendered 'lordship').
[26] Goudie, *op. cit.*, 219
[27] See note 115 below.
[28] John P. Grant in *The Shetland Report* (Nevis Institute, 1978), i, 139.
[29] *Shetland Times*, 9 July 1965.

The argument is based partly on the diplomatic of the documents. In the private law of Scotland the pledging of land by a wadset, as it was called, was commonplace, and specimens of reversions, whereby the grantee undertook to return the land on payment of redemption money, are frequently found in private muniments, containing words and phrases with which the student of Scottish documents is thoroughly familiar. While it would not be true to say that there is an absolutely rigid style, or that all reversions contain precisely the same clauses, certain provisions were nonetheless normal: the place where payment was to be made was specified, payment had to be made on one day between sunrise and sunset, there had to be warning in advance (usually, though not always, forty days) of the intention to pay, the coin in which payment was to be made was stipulated, and arrangements were sometimes made for handing over the money to a third party should the person entitled to receive it not appear.

Of all those characteristic phrases, which would seem to have been of the essence of a true reversion, not one appears in the documents of 1468-9, with the single exception that the Shetland treaty specified the place for repayment — the cathedral of St. Magnus in Kirkwall. It is not impossible that this is an indication — taken along with the *quandocunque* already mentioned — that the pledging of Shetland was a shade more realistic than that of Orkney: Christian may have reflected that, while he had little hope of raising 50,000 florins to redeem Orkney, he might raise 8000 to redeem the much less Scotticised Shetland. It is true that it would have been in order for those characteristic phrases to appear not in the grant by King Christian to King James but in a separate document in which James undertook to restore what had been pledged when the money was paid over. But, while the treaty of 1468 itself has survived in both the Danish and the Scottish archives, there is no trace in either of such a reciprocal undertaking;[30] the treaty of 1468 is itself so full, reciting for instance the procuratories of the Scottish ambassadors, that it would have been expected to recite such a document had one existed; and, as the treaty of 1469 mentions the place for repayment, other provisions would surely have been inserted there as well had they been in mind.

Comparison may also be made between the Orkney and Shetland impignorations and several other documents issued by Chirstian I, who pledged many parts of his dominions, ranging from the duchies of Holstein and Slesvig to a castle or a few parishes. The other impignorations are in German or Danish and not in Latin, and they have no standard phraseology, so an argument from simple diplomatic is not possible. Yet the differences are significant. An examination of over half a dozen of Christian's impignorations, haphazardly selected, shows that although the clauses usual in Scottish reversions are not to be found regularly in them, yet similar phraseology does sometimes occur. 'In general it is stated how long notice must be given when redemption was wanted, and very often it was also mentioned that notice could be given only at certain times of the year. Furthermore there was often a clause indicating in which sort of currency the payment was to be made, and there was almost always an indication

[30] Storer Clouston, *op. cit.*, 258, states that James III formally promised to give back the islands to the king of Norway on redemption of the wadset, but the source he cites turns out to be nothing other than the document pledging Shetland.

of the place in which it was to be handed over.'[31] The inclusion of such provisions in Christian's other impignorations makes their omission from the 1468-9 documents the more striking. It is true that most, probably all, of the other areas pledged by Christian were sooner or later redeemed. None of them, however, were either outlying and detached territories already deeply infiltrated by a foreign power, or territories the outright cession of which had already been discussed, and to that extent they were in a different case from Orkney and Shetland. It would therefore be unsound to argue that Christian meant to redeem Orkney and Shetland also.

It is not a novel suggestion that Christian had no intention of redeeming Orkney and Shetland, for half a century ago a Norwegian historian wrote: 'It is not probable that the Danish king Christian I ever seriously contemplated the redemption of the islands'.[32] The question is, did Christian use an ostensible reversion to cover up his real intention of complete alienation? The negotiations of 1460 had been for a straightforward surrender of all Christian's rights and *dominium* in Orkney and Shetland: the treaties of 1468 and 1469 were impignorations of 'our lands of the islands of' Orkney and Shetland. Are we to believe that the Scottish government had climbed down and decided to settle for so much less than it had wanted eight years before? The explanation is surely to be found on the Danish side. Christian was obliged, by conditions laid down at his accession, not to decide any matter touching the Norwegian crown without the consent of his council, and he was not to alienate or even pledge any honours, fiefs or revenues of the realm. Whether Christian obtained Norwegian consent to the transactions of 1468-9 remains debatable: it has been pointed out that he did visit Norway in 1468 and it has been suggested that he obtained consent to the Orkney transaction of 1468 but not to the Shetland transaction of 1469.[33] If consent was given it was much more likely to be given to an impignoration than to a cession; and if it was not given, then Christian may have thought that a pledge was a more venial breach of his obligations than outright cession would have been and also that by giving up lands and rights, but not sovereignty, he was surrendering the substance but retaining the formal title. However regarded, the impignoration was an exercise in face-saving. It does not affect this argument that the 1468 document provided that, should James die before Margaret, and she chose to leave Scotland, she was to have 120,000 florins for her terce from Scotland, less the 50,000 florins unpaid of the dowry, and the lands of the islands of the Orkneys were to revert to Norway. At the time, in 1468, Christian's habit of pledging territory was the setting for his ingenious device which avoided

[31] Information from Th. Lyby Christensen of the University of Aarhus, in a letter of 10 February 1976. He prefaced the sentence quoted with the following: 'It is quite true that Christiern I made some sort of sport out of pledging parts of his dominions, and quite a lot of mortgage deeds are still extant. I looked through the two classical collections of documents from his times, viz. the *Diplomatarium Christierni Primi*, ed. Hans Knudsen (Copenhagen, 1856) and the 'Registrum König Christian des Ersten', ed. Georg Hille (Kiel, 1875), which is vol. iv of the *Urkundensammlung der Gesellschaft für Schleswig-Holstein-Lauenburgische Geschichte* and contains material pertaining to the Duchies. Both of them abound with impignorations, but although I went over them both, I have not been able to find any other examples of impignorations in Latin than those already known to you'.

[32] A. W. Brøgger, *Ancient Emigrants* (Oxford, 1929), 196-7.

[33] Scheel (see note prefixed to Appendix), 385.

difficulties with his Norwegian subjects and saved his pocket to the tune of 50,000 florins by parting with islands in which he had ceased to have much more than a nominal interest.

Events which happened within a very few years of 1468-9 seem to confirm the view that redemption of the islands was not regarded as likely. The 'lands of the islands of Orkney' and of Shetland pledged in 1468-9 had not, of course, included the lands of the earldom. They were not the king's to dispose of, but belonged to William St. Clair. In 1470, however, Earl William resigned to the king of Scots his rights in the earldom of Orkney and lordship of Shetland.[34] That transaction, whereby the Scottish king acquired permanent ownership of the earldom, was actually more important than the transactions of 1468-9 — if, that is, those were, as they purported to be, only redeemable pledges and constituted only a temporary title. This meant that had the pledge been redeemed after 1470 the king of Scots would have continued to hold the earldom and lordship and would have held them as a vassal of the king of Denmark and Norway. This would not have been an impossible or unparalleled situation, but it tends to increase doubts about the genuineness of the supposed pledge in 1468-9. It may be that from the outset the Scottish king had his eyes on the earldom property, and the 1468-9 treaties were steps towards his acquisition of it. In February 1471/2 the Scottish parliament 'annext and uniit the erledome of Orkney and lordschip of Scheteland to the croune, nocht to be gevin away in tyme to cum ... except alanerly til ane of the kingis sonnis gott of lachfull bed'.[35] This is of course related to the earl's private property and had no direct bearing on either sovereignty or the international status of the islands. In the very next year, 1472, when the archbishopric of St. Andrews was created, the bishopric of Orkney was included in the Scottish province — which would have been a strange proceeding if the islands had been regarded as genuinely in pledge and likely at any time to be redeemed. There is an air of inevitability about the sequence of events year by year: 1468 — impignoration of Orkney; 1469 — impignoration of Shetland; 1470 — resignation of earldom; 1471/2 — annexation of earldom to Scottish crown; 1472 — incorporation of Orkney into Scottish province. Already in 1469 the bishop of Orkney had attended the Scottish parliament and had been appointed to a committee,[36] but the determining factor in a bishop's eligibility for parliament was the territorial and not the ecclesiastical affiliation of his see. Thus two bishops had long appeared in Scottish parliaments because their dioceses were politically parts of Scotland although not parts of the Scottish ecclesiastical province — Galloway, which had been in the province of York, and The Isles, which, though politically part of the Scottish kingdom from 1266, had remained ecclesiastically subject, like Orkney, to Trondheim. The presence of the bishop of Orkney in the Scottish parliament in 1469 might therefore be taken to suggest that the 1468 treaty was understood to imply something more than the transfer, in pledge, of the lands and rights of the Norwegian crown in the islands. All in all,

[34] *RMS*, ii, 997-1002. It should be kept in mind that the entries in the Register are meagre abridgements of documents not themselves extant, and too much should not be read into their apparent brevity.
[35] *APS*, ii, 102.
[36] *ibid.*, ii, 93.

it hardly looks as if contemporaries thought that the arrangements regarding the islands were makeshift or temporary.

Curious language was used by the Scottish council in 1540 when it ordered the restitution of ships which had been seized 'out of the sey besyde the north ilis callit the Fyre Ile' in Shetland and 'out of the se beside our soverane lordis north ile callit the Fire Ile', one of those vessels being 'at the fischeing in our said soverane lordis north seis'.[37] The terminology may not have been calculated, but it does seem to imply not only the Scottish crown's property in Fair Isle but also its sovereignty over the surrounding waters (though to what limit is not defined).

Yet, whatever the meaning of the contracting parties in 1468-9, or the meaning of the language of 1540, the position about sovereignty remained ambiguous. In so far as the integration of the islands into the Scottish administrative system was significant as some kind of token of the extension of Scottish sovereignty, the process can be followed in the records of parliament and privy council. The first act which seems to put it beyond any doubt that the islands were regarded as fully within the Scottish administrative system is in September 1566, when the council, concerned over the inefficiency of the system of 'serchcouris' whose responsibility it was to look for goods which had avoided the payment of customs dues, discharged 'all generall lettres of serchcorie owir all the haill realme, and in particular within the boundis of Orknay, Zeitland and Caithnes'.[38] Eight years later, when parliament passed an act for the reorganisation of 'wapin-schawingis' or musters for military training throughout the realm, it made provision for Orkney and Shetland exactly as for other sheriffdoms.[39] In the later 1580s we come on a series of acts which point to the further integration of the islands into Scottish administration. In July 1587 parliament, in an act for the reorganisation of criminal justice which foreshadowed the system of justices of the peace, ordained that in Orkney and Shetland fourteen landed men were to act in this novel capacity. One wonders where men 'experimentit in the lovable lawes and custumes of the realme, actuall indwelleris in the same schires' would have been found in the islands, but — and it is no surprise — no names are given and we do not even know if this proposal ever got beyond paper.[40] In October of the same year, the council, making a fresh attempt to organise or reorganise a High Court of Justiciary for the trial of crime throughout the realm, made provision for Orkney and Shetland as for other shires.[41] In July of the following year, 1588, when the council drew up a list of commissioners who were to take action against various delinquents, it proceeded to name individuals, sheriffdom by sheriffdom, until it reached Orkney and Shetland, where alone no names are given.[42] Only in March 1590, when similar commissioners were appointed, was a commissioner named for Orkney and Shetland, and the name was that of Robert Stewart, the Earl, which hardly suggests a strengthening of central control.[43] Presumably the remoteness of the

[37] *Acts of the Lords of Council in Public Affairs*, 496-7.
[38] *RPC*, i, 481.
[39] *APS*, iii, 91.
[40] *ibid.*, 459.
[41] *RPC*, iii, 217-18.
[42] *ibid.*, 301.
[43] *ibid.*, 463-5.

islands, as well perhaps as hesitation about the propriety of extending Scottish administration to them, explains the apparent difficulty about applying all the intentions of the central government in the north, but the council itself, in 1598, offered a different explanation, in the shape of a flattering testimonial: because 'the boundis of the cuntrayis of Orkney and Zetland is ane civile cuntrey, and the ... inhabitantis thairof ar and evir hes bene maist obedient to his hienes and lawis of this realme', the islands were exempted from provisions intended for the Highlands and Borders, where people were 'daylie subject to commoun reiffis, spuilyeis, heirschippis, slauchteris and depredationis'.[44] However, twelve years later, when there came a full nomination of justices of the peace for all the sheriffdoms of Scotland, named justices were, for the first time, appointed for Orkney and Shetland.[45] Meantime, in 1599, when machinery was set up to operate a register of sasines, it was provided that a register for Orkney and Shetland should be kept at Kirkwall, and the same arrangement was repeated when the register was re-established in 1617.[46] The first act of council designed to deal specifically with a problem peculiar to the islands was the well-known one in 1619 forbidding the 'rooing' of sheep,[47] but the application of that whole series of acts to the islands is conclusive about their incorporation into the Scottish administrative system, at least in intention.

If the proceedings of parliament and council illustrate the tendency to integrate Orkney and Shetland into administration under the Scottish crown, the Register of the Privy Seal illustrates the extension of the crown's authority in other ways. The crown, for instance, had power to legitimate bastards, and as early as 1497 there is an example in the case of a cousin of the bishop of Orkney.[48] In the event of a bastard dying intestate and without heirs of his body his movable goods went to the crown, and this practice likewise was soon applied to Orkney, with an example in 1529.[49] Under the privy seal the crown could issue various privileges and licences: in 1530 there was a protection to the vicar of Northmavine,[50] but it was perhaps more remarkable that as early as 1509 the crown licensed the bishop of Orkney to 'win and fyne' (that is, quarry and refine) lead in the islands for the re-roofing of the cathedral.[51] Such gifts by the crown indicate a considerable measure of Scottish sovereignty.

The question of sovereignty has to be related not only to administrative integration and the powers of the crown, but also to the law which obtained in the islands. It is wrong to believe that sovereignty has a necessary connection with law to the extent that sovereignty involves uniformity of law. There are plenty of examples to the contrary. The United Kingdom as at present constituted is one example of a political unit without uniformity of law and even without right of appeal in criminal cases from one judicial system (the Scottish) to any British court. Equally, Britain took over French Canada without abrogating French

[44] *ibid.*, v, 436.
[45] *ibid.*, ix, 79-80.
[46] *APS*, iv, 184, 237, 546.
[47] *RPC*, xi, 510, xii, 111-12.
[48] *RSS*, i, 135.
[49] *ibid.*, ii, 216.
[50] *ibid.*, ii, 554.
[51] *ibid.*, i, 1856.

law, and took over the Cape of Good Hope with abrogating Dutch law. On the other hand, appeals can lie to a court in a land which does not possess sovereignty over the territory where the appeal originated: the judicial Committee of the Privy Council is an example of this. Yet a connection between sovereignty and law has been assumed. When the Inner House of the Court of Session gave judgment in the Case of the St. Ninian's Isle Treasure, both Lord Patrick and Lord Mackintosh based their opinions in favour of the crown partly on their belief that 'since 1468 the right of sovereignty over the islands has belonged to the kings of Scotland and afterwards of Great Britain'.[52] Professor T. B. (now Sir Thomas) Smith, who presented an argument in the case, accepted that Christian I impignorated the sovereignty of the islands.[53] Although none of those lawyers explained their grounds for believing that sovereignty had been transferred, yet the fact that their arguments were based partly on the issue of sovereignty demonstrates that discussion of the question is not merely an academic one.

The development in both law and government since 1468-9 must be viewed in a wider context. For centuries before that point there had been something like a northern commonwealth of nations or a North Atlantic community, stretching from the Baltic to the Greenland settlements, through Sweden, Norway, Denmark, Shetland, Orkney, the Faroes and Iceland, and from the Isle of Man to the North Cape. Essentially one race, one language, one culture, one set of political and legal institutions extended over that wide area, and Orkney and Shetland were not on its periphery, but at its centre. In the course of the centuries that unity has been disrupted. The political link was the first to go. There are now six or seven distinct political units, and Orkney and Shetland, almost alone of the parts of the old community, have for five hundred years been attached politically to a state itself outside that northern commonwealth. Other aspects of the old unity vanished less perceptibly. The Norse tongue ceased to be spoken in Orkney and Shetland in the eighteenth century. Unity of race was disrupted by the immigration of a considerable number of Scots into the islands: even in Shetland by the late sixteenth century such immigration had become something of a flood, and by 1600 something like a quarter of the inhabitants had names pointing to a partially Scottish ancestry.

It is against this background that the erosion of Scandinavian legal institutions must be viewed. In Orkney Norse law had been under threat even before 1468. When Bishop Thomas Tulloch was put in charge of the islands by King Erik in 1420 he promised to 'keep law and justice according as the Norse lawbook mentions',[54] and perhaps it is significant that such a promise had to be exacted. Whether the bishop kept his word does not appear, but David Menzies of Weem, who succeeded him as administrator, was accused by the people of Orkney in 1424 of imprisoning the lawman and depriving him of his seal and of the lawbook, and they petitioned that their judges and governors should be bound to observe the ancient laws approved by King Olaf.[55] It would appear, however, that there must have been at least a partial restoration of Norse law and

[52] Court of Session Cases, 2 August 1963, pp. 556, 561.
[53] A. Small, C. Thomas and D. M. Wilson, *St Ninian's Isle and its Treasure* (London, 1973), i, 151.
[54] *REO*, 31-2.
[55] *ibid.*, 36-48.

practice after that, even in Orkney, and it is unlikely that in Shetland Norse law was under any threat until some time after 1469. It has often been said that the treaties of 1468 and 1469 expressly preserved Norse law in the islands. But there was no such provision. However, the very silence of the treaties on the subject may be revealing. Once again there is a contrast with the treaty of 1266 which ceded the Hebrides and which states that 'the men of the said islands, as well lesser as greater, shall be subject to the laws and customs of the realm of Scotland'. The absence of any such clause in 1468-9 suggests that the men of Orkney and Shetland were not intended to be subject to the laws of Scotland.

An admission by the Scottish government that Scots law did not apply, or might not apply, in the islands is clear from the records of parliament in 1503/4. An act was originally drafted to read: 'That all our soverane lordis liegis, bath within Orknay, Scheteland and the Ilis, be reulit be our soverane lordis aune lawis and the commoun lawis of the realme and be nain other lawis'. This draft was next strengthened by the insertion of 'and other placis' after 'Orknay, Scheteland and the Ilis'. Then there were second thoughts, and the objection perhaps raised that the law of Scotland could not be applied to Orkney and Shetland, at least specifically. The mention of those islands by name was therefore cut out, and the act amended to read: 'All our soverane lordis liegis beand under his obesance and in speciale all the Ilis'. Finally 'all' was deleted before 'the Ilis'.[56] These changes may have been intended to leave it open to doubt whether the people of Orkney and Shetland were indeed under the obedience of the king of Scots, in other words whether the sovereignty of the islands pertained to him. The phrase 'the Ilis', especially with the omission of 'all', may have been designed to introduce a certain ambiguity, and at a later date it was argued that the act did apply to Orkney and Shetland.[57] However, the deletion of the names of those islands, the fact that in normal usage 'the Isles' meant the Western Isles, and the fact that in the first draft Orkney and Shetland had been distinguished from 'the Ilis' all make it more likely that the act indicated that Scots law was not intended to apply in the northern isles. The batch of acts which includes this item contains another, relating to a proposal for additional justices and sheriffs, in which 'The Ilis' clearly meant the Western Isles and no more.

Some sixty years later, in 1567, the question was once again discussed in the Scottish parliament. It was asked 'Quhidder Orknay and Yetland sal be subject to the commone law of this realme or if thai sall bruke [*i.e.*, enjoy] thair aune lawis', and the answer was: 'Findis thai aucht to be subject to thair aune lawis'. This, however, was only an 'article', with a comment, and there is no conclusive evidence that it was the foundation for an act or had any statutory authority.[58]

[56] *APS*, ii, 244, 252 and facsimile facing p. 241.

[57] Shetland Islands Authority Archives, SC 12/65/3: Information for James Sinclair of Scalloway. (I am indebted to Mr. Brian Smith for giving me a photocopy of a transcript of this document.) The statement also contended, with less credibility, that the matter had been settled by an act of James I (d. 1437) 'that all the kingis liegis live and be governit under the kingis lawis and statutis of the realme allenarly'. Mr. Smith has also drawn my attention to the remarks in the Report of the Napier Commission on the question of a separate law.

[58] *APS*, iii, 41. The MS. is contained in a portfolio titled 'Acta Parliamentorum 20 December 1567–28 August 1571', but the title is relatively modern, probably early nineteenth century, and does not in itself mean more than that the contents of the portfolio are parliamentary papers. The item relating to Orkney and Shetland is an integral part of a long series of articles, numbered consecutively,

Apart from parliamentary record, there is other evidence of the recognition of a distinct legal system. In 1525/6, when Margaret, Lady Sinclair, agreed to appoint her son, William, Lord Sinclair, as justice-depute of Orkney, he received authority to administer 'according to the commoune law and apprevit consuetude of Orknay'.[59] But when Oliver Sinclair was appointed sheriff in 1541, his commission was in standard Scottish form, with no allusion to special laws or procedure, and from that point the lawman of Orkney disappears from the scene while the sheriff is found acting on every occasion when the lawman had formerly acted.[60] In Shetland, however, the change came later. When Lord Robert Stewart received his feu charter of the islands in 1565, the Scottish crown granted him the 'foudrie' or office of foud of Shetland,[61] and much of the old system survived for another generation or more.

A few instances of continued reference from Shetland to Norway have often been cited. In 1485 the lawman of Bergen and the lawman of Shetland, along with the councillors of Bergen and the lawrightman of Shetland, gave a decision relating to land in Shetland. In 1538 a decree of the king's court at Bergen confirmed a decree of a court held in Yell, Shetland. And a deed of sale of land in Shetland, executed at Bergen in 1536, was ratified by the lawman of Bergen in 1544.[62] Other documents of sixteenth-century date illustrate the survival in Shetland of Norse land tenure and methods of conveyancing.[63] Several of them are in Norse, but even when they are in Scots they contain phraseology and clauses foreign to the practice of Scotland. Property extended from the highest stone in the hill to the lowest stone in the ebb, contrary to the Scottish understanding that private property stopped at high-water mark and that the shore belonged to the crown; property was divided among heirs (a daughter's share being half a son's), instead of passing to the first-born (who had, however, the right to the 'heid buile' or chief place); the consent of the family had to be obtained before land was sold. Besides, Norse terms, sometimes in corrupt form, are preserved: for example, the apparently enigmatic phrase 'all aing owthill ryt roith samaing and reversion' incorporated the words *eign*, meaning possession; the recognisable *odal* or *udal*; *roith* or *raedi*, meaning rule or control; and *sameign*, joint possession. There is an even more cryptic amalgam of Norse and Scottish jargon in 'all eing and outhwell, ryt and roith, eis and intres, hous and harbry, toftis, thowns, moillis, inpastor and outpastor'. Some of those

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presented to the parliament of December 1567. These articles had been prepared by a gathering of commissioners of barons and burgesses, with some ministers, which first met on 15 December, the day of the opening of the parliament. Each article bears a marginal annotation, often merely 'Apprevit', and the annotations which are dated bear dates from 22 to 28 December. As the last recorded act of this parliament was dated 29 December, it is hard to avoid the conclusion that the annotations represent decisions of the parliament, yet these decisions were not, so far as we know, embodied in formal acts. The possibility that they were so embodied cannot be excluded, for in the parliament of 1560 (admittedly an unusual parliament) at least one act was passed which does not appear in the parliamentary record.

[59] *Acts of the Lords of Council in Public Affairs*, 240.

[60] *REO*, 61-3.

[61] *RSS*, v, 2078.

[62] *REO*, 72-3, 96-9; cf. Goudie, *op. cit.*, 87-91.

[63] Many are reproduced or summarised in Goudie, *op. cit.*, and there are more examples among the Symbister Papers, now in the Shetland Archives (GD 144, especially 21/10 and 262/8).

documents show that inheritance of property was still arranged by Norse procedure (rendered 'sheunds', 'schuynds' or 'schounds' and 'airffis'), which enabled an udaller to assign his land as well as his movables by testament and which provided machinery for division of heritage among children.

But alongside these survivals of Norse usages there is plenty of evidence of the infiltration of Scottish practice. A very important agency in this process, and one which was effective at least in Orkney long before 1468, was the presence in the islands of many clergy of Scottish origin. These men were the most literate in the community and to them the natives perforce had to go when they wanted transactions committed to writing, which the clerics were likely to do in the Scots tongue and in phraseology which would at least be influenced by Scottish legal terminology. Not only so, but among those many clergy were a number of notaries, trained in Scottish legal styles and obviously more apt to draft deeds in the terminology of Scotland than in that of Norway. Notarial instruments by Scottish notaries are to be found in Orkney from the 1530s, as examples printed in *Records of the Earldom of Orkney* show. The survival of such material is fortuitous, and there is more consistent proof of the extension of Scottish practice in the records kept by the central government. Orkney and Shetland naturally figure in the records of crown grants of land from an early date, because, whatever else the Scottish kings may have had in the islands, they did possess certain properties, even if held only in pledge, and they could clearly make grants of these properties.[64] There is at first nothing to show that such grants were necessarily at variance with traditional tenures, but in 1535 the crown granted a feu charter to James Sinclair of Sanday and his wife of the islands of Sanday and Stronsay, to be held without division among heirs — a clear innovation.[65] Ten years later there appears a confirmation of a conveyance of lands in the islands, which seems to represent a crucial stage in the introduction of a feudal system: it was one thing for the crown, in its capacity as a proprietor, to make grants of lands which were its property; it was quite another for the crown, in its capacity as a superior, to confirm charters by private proprietors, who were thus put into the position of feudal vassals, and the concept of the crown as the ultimate owner of all land was acknowledged or implied. The first of many such confirmations, dated 30 April 1545, is of a charter dated the previous 23 January by the sons of Andrew Halcro of that ilk to their cousin Hugh, of the lands of Halcro, Holland and others, entailing the subjects on Hugh and his heirs. It is in the normal feudal form, and while it does not expressly forbid partition among heirs such a prohibition is certainly implied.[66] Such confirmations, because of their acceptance of the crown's superiority and because of their prohibition of partition among heirs, represented in simple terms the introduction of feudal law. It would appear that some years passed before confirmations were extended to property in Shetland. In March 1575/6, in a somewhat unusual style, the crown confirmed two dispositions of land in Shetland, pronouncing that the lands were to be held by the disponee 'nochwithstanding ony ... constitutionis of the said cuntre of Yetland ... that may be objectit or allegit, ... dispensand thairwith be

[64] c.g., *RMS*, ii, 1974, 2232, 2414.
[65] *ibid.*, iii, 1479.
[66] *ibid.*, 3101.

thir presentis'.[67] This may indicate that the crown was still feeling its way in Shetland, but within the next two or three years a decisive tone crept into the confirmations there too. Early in 1577 the crown confirmed a charter by Andrew Mowat of Hugoland to John, his son, of lands in Shetland, to be held without division.[68] Two years later there was a particularly interesting example. In this case the proprietor, Oliver Sinclair of Brow, had divided his heritable estate among his three sons, according to 'the custom of the country of Yetland', but a charter was then granted by the crown to one of them, conferring on him his third and specifying that it was in future to be held by him and his heirs according to the usual procedure of succession in Scotland.[69]

Possibly even more than land tenure, civil justice raised the question of the way in which the northern isles were brought within the Scottish judicial system, and it would be desirable to define the date at which cases arising in the islands were heard by the Lords of Council and their successors, the Court of Session, and the stages by which Scottish law was applied in Orkney and Shetland. This is a subject difficult to handle, because although for the sixteenth century there are in all some 220 volumes of Acta Dominorum and Acts and Decreets, there is a dearth of guides, no indexes and little in print. A case was indeed heard by the Lords of Council as early as 1485, concerning 150 merks due to Thomas Simson, sheriff of Fife, when he was comptroller of the king's rents from the lands of Orkney, money which Henry Sinclair had appropriated.[70] That can hardly be regarded as meaningful, since it was a dispute about crown property, and that the Scottish crown had had property in the islands since 1468 is not open to debate. That is the only case relating in any way to the islands in the first printed volume of the *Acta Dominorum*, covering 1478-96, and the second volume, for 1496-1501, has no Orkney or Shetland entries at all. Thereafter we are on largely uncharted seas so far as the judicial proceedings of the central civil court are concerned. There are Stair Society volumes, one for 1501-3 and one for 1532-3, in which we again draw a blank. The only thing resembling a guide to the voluminous proceedings of those days is Sir James Balfour's *Practicks*, compiled in the 1570s. That work contains no reference to cases concerning Orkney and Shetland or their inhabitants. This absence may not mean very much, partly because Balfour's work is such a small selection from a vast archive and partly because Orkney and Shetland could not have yielded him much material unless he had wanted to enter on a discussion of their peculiar usages. This he had no intention of doing, and indeed he gives no indication of being aware of, for example, the existence of any rule of succession other than by primogeniture among male heirs, a preference for males over females, and partition only among heiresses, or of the existence of any tenure other than feudal tenure with its accompaniments of the casualties of ward, marriage, relief and nonentry. Balfour does have a section on the laws of the Borders, but none on the laws of

[67] *RSS*, vii, 502. Only ten years earlier, a precept had ordered an enquiry into the ownership of land in Shetland 'according to the auld ordour observit in thai partis' (SRO, GD 164/50/404/7).

[68] *RMS*, iv, 2672.

[69] *ibid.*, 2850. A disposition of Shetland lands in 1589 stated expressly that the subjects were to be held 'but [i.e., without] divisione, efter the forme in successione usit to landis in Scotland' (Shetland Archives, GD 144/27/1).

[70] *ADC*, i, *112.

the northern isles. There is another invaluable and wide-ranging guide to the Acts and Decreets in general in Morison's *Dictionary of Decisions*, a digest of significant cases from the early sixteenth century onwards. But it is a dictionary of subjects, designed for the use of practising lawyers, with an alphabetical index of the names of parties. A search for material relating to Orkney and Shetland could be complete only if one read through all Morison's twenty volumes, but a certain amount of sampling under headings which seemed especially promising yielded no result.

Since there is no continuous and consistent guide to the judicial proceedings of the central civil court, we are thrown back on stray items gleaned from various sources. There is, for instance, a complaint to the king and council by William, Lord Sinclair, as justice of Orkney, against James and Edward Sinclair for assaulting his servants and compelling him to surrender the 'Kingis hous' at Kirkwall, and it relates that in May 1529 Lord Sinclair had obtained the king's letters against them in the first, second, third and fourth forms — the familiar procedure of 'letters in the four forms'.[71] In the hope of finding this case in the court records I searched the *Acta Dominorum* from the beginning of May 1529 to 25 March of the following year, without finding any reference to the action, though I noticed that on 31 May 1529 Lord Sinclair's procurator entered a protest before the Lords in a case between him and the Bishop of Orkney.[72] A few years later a letter dated 12 May 1535 was sent by the Scottish crown to English authorities in connection with a case before the council in which Thomas Millar, an English merchant, pursued James Sinclair of Kirkwall for the spoliation of goods in North Ronaldsay from a ship called the *Andrew*.[73] Next comes a testimonial, dated 18 September 1566, by the bailies of Kirkwall to the 'cunsall of the realme of Scotland' relating to the theft of a ship.[74] This case I thought would probably have constituted Privy Council, rather than Court of Session, business, but when I found that the printed *Register of the Privy Council* had no mention of the affair I went through the three volumes of Acts and Decreets covering the period from September 1566 to the end of the year, again with no success. There is yet another instance of casual evidence about the Court of Session: William Bruce of Simbister obtained a decreet from the Court of Session in an action of spuilzie relating to lands in Shetland in 1609.[75] What can reasonably be deduced from these stray pieces of information is that the central civil court was acting from time to time in Orkney or Shetland business from a fairly early date. But it is to be observed that none of the proceedings thus traced related to any peculiar northern law or indicated Scottish intervention in such law.

However, apart from the records of the Court of Session, in their uncharted state, we have the *Register of the Privy Council* and, as the council continued to act judicially despite the differentiation between it and the Court of Session, this record helps us to determine at what point the central civil judicature of Scotland began to operate regularly in the islands. It is not easy to know what precise

[71] *REO*, 57-60.
[72] *ADC*, xl, 48v.
[73] *RSS*, ii, 1665.
[74] *REO*, 375-7.
[75] *Archeologia Scotica*, iv (1857), 385. I am indebted to Mr. Brian Smith for this reference.

significance to attach to the well-known 'Complaints' of the people of Orkney and Shetland against the oppressions of Lord Robert Stewart and Laurence Bruce of Cultmalindie which came before the council in 1575,[76] except in so far as they seem to demonstrate an acceptance of the sovereignty of the Scottish government; it does not seem to have occurred to anyone that complaints against oppression should now, as in the case of Menzies of Weem in 1425, go to the Norwegian government. The first clear indication of the strictly judicial functions of the council in relation to the islands seems to occur in February 1575/6. A complaint was made by Nicol Oliverson, son and heir of the deceased Oliver Randveill, heritor of udal land in Gairsay in Orkney. The complainer had been in Norway for forty years and had returned three or four years ago because, as he explained in a pretty compliment to the Regent Morton, he had heard that justice was 'ministrat the better within Orknay sen my lord Regentis grace regiment than afoir'. He had obtained a decreet in his favour from Lord Robert, as sheriff, but Lord Robert subsequently intruded one Isobel Brown into his heritage. For Lord Robert it was alleged that the lands pertained to him 'be the law and practik' observed in Orkney. The pursuer's procurator was ordered to produce 'the bukis of the said law'. He duly did so and on 4 April the council ordered Lord Robert to enter the complainer in his heritage and keep him there.[77] Thus the council was giving judgment in a dispute over udal property and taking Orcadian law into account — showing that uniformity of law and unity of jurisdiction did not necessarily go together. Thirteen years passed before another case from the islands came before the privy council, and this time it was a less significant one. On 2 July 1589 James Pitcairn, minister of Northmavine, appeared before the council. He had been summoned by letters dated 22 January 1589 at the instance of his parishioners to compear to answer their complaints. However, although Pitcairn turned up the pursuers did not.[78]

There is yet another key, besides the *Acta Dominorum*, the Acts and Decreets and the Privy Council Register, to the relationship of the islands with the Court of Session, and that is the Register of Deeds or Books of Council and Session, of which there is a brief Calendar, with an index, from its beginning in 1554 down to 1595. This shows that the Register does contain deeds to which people in the islands were parties and which were drawn up in the islands and duly recorded in the Books of Council and Session. There is one example in 1563 of a contract between a party in Shetland and a party in Orkney.[79] The mere fact of registration, taking into account the formula used, implied recognition of the jurisdiction of the Court of Session, so that this Register is further proof that long before the end of the sixteenth century the court was the acceptable judicatory in the islands for civil justice at the highest level. There is a large number of entries in the Acts and Decreets and the Register of Deeds which *relate* in one way or another to the islands; many are cited in Peter D. Anderson, *Robert Stewart, Earl of Orkney* (1982), and in my article on 'Bishop Adam Bothwell and the

[76] David Balfour (ed.), *Oppressions of the sixteenth century in Orkney and Zetland* (Abbotsford and Maitland Clubs).
[77] *RPC*, ii, 488-9, 517-18.
[78] *ibid.*, iii, 400-1.
[79] Register of Deeds, vi, 338b.

Reformation in Orkney' in *Records of the Scottish Church History Society*, xiii. But the more significant items are surely transactions to which at least one of the parties was a native of the islands.

Criminal law deserves as much study as civil law. Here our main source is the records of the High Court of Justiciary, material from which was printed by Pitcairn in his *Criminal Trials*, but supplementary information comes from the *Register of the Privy Seal*, which records respites and remissions for offences and also escheats of the goods of persons convicted of crimes. It is evident that from an early date Scottish rights were held to include responsibility for the maintenance of order in the islands, so that in 1539, for example, we find the respite to Edward Sinclair and thirty others in Orkney for their conflict with the Earl of Caithness at Summerdale ten years earlier.[80] In 1544 Oliver Sinclair of Havera, foud of Shetland, had a respite for the slaughter of certain Lewismen who had invaded the islands in the previous year; he had another respite later and finally a remission in 1564.[81] Persons guilty of an affray in Kirkwall were tried in the High Court of Justiciary in 1562 and the case then remitted to the justice ayre of Orkney.[82] A particularly explicit Shetland case arose in 1581: Thomas Boyn was summoned to the High Court in Edinburgh for the murder of Patrick Winram and, on his failure to compear, was put to the horn.[83] In 1596, when Henry Colville, parson of Orphir in Orkney, was murdered at Nesting in Shetland, the persons accused were all tried in the High Court of Justiciary.[84] It would seem, therefore, that in criminal as in civil cases the central court in Edinburgh was accepted as the appropriate judicature for Orkney and Shetland some time before the act of 1611 abolishing Norse law in the islands.

Yet, although courts in Edinburgh might from time to time exercise jurisdiction in the islands, local justice, at least in Shetland, still reflected the survival of Norse law and practice, as the *Court Book of Shetland, 1602-4*, amply shows. It is at once evident that it represents much of the old Norwegian laws as they were printed by Laurence Larson,[85] and Professor Robberstad identified the law operating in Shetland specifically as the law found in the lawbook of Magnus the Lawmender (1263-80).[86] The language of the Court Book is Scots, but there are many survivals of Norse terminology and procedure. A man accused of a crime could clear or 'quit' himself with the aid of compurgators or oath-helpers, two, six or twelve in number, the number apparently depending partly on the nature of the crime and partly on the accused's past record. As in the Norwegian code of law, various degrees of assault and injuries were defined: penalties were more severe when wounds were 'beneath the end', as the Court Book has it, that is, beneath the breath. It made a difference, too, as in the Norwegian laws, where the assault was committed: attacks in a trading or market-place — 'ane frie coupsta' — or in a boat, for instance, were more severely punished. The Court Book also shows that the Lawbook of Shetland was still consulted and it

[80] *RSS*, ii, 3151.
[81] *ibid.*, iii, 980, 1542, v, 1794.
[82] Pitcairn, *Criminal Trials* (Bannatyne and Maitland Clubs), I, i, *413.
[83] *RSS*, viii, 37, 40.
[84] Pitcairn, *op. cit.*, I, iii, 386-97.
[85] Laurence M. Larson, *The Earliest Norwegian Laws* (New York, 1935).
[86] *Historisk Tidsskrift*, xli (1961-2), 65-9.

confirms that udal practice was still at least partly observed. Anyone looking in the Court Book for Norse survivals will find them there in plenty. But what it reveals is an amalgam of Scottish and Norse terminology and procedure and it represents much the same kind of duality as we have already seen in isolated documents. Two systems had clearly been to some extent merged, presumably over a considerable period. The very structure of the judicature, or at any rate its designations, reveals the duality. The local headman in a district was still called the foud; but the judge in whose name the central court was held was styled justice general and sheriff principal. By a curious reversal of usage, the local courts were called courts, not *things*, but the central court was officially styled 'the Lating'. Similarly, in the local or parochial organisations, the lawrightman and the ranselman had Norse titles, but there was also an 'officer'. And for the jury in each court, whether central or local, there seems to have been no other term than 'assize', a word the Scots had taken over as part of their borrowing from English or Anglo-Norman procedure. Some of the terminology which looks Norse is also, however, Scottish, and does not necessarily represent Norse survivals. Thus 'bluidwyt' is identifiable with the Norwegian *blodvite*; but it was also regularly used in Scottish charters and had been adopted at an early date from England. Equally, 'skayth', meaning damage or harm, can be equated with the Norse *skade*; but it was a term in constant use in Scots law and indeed is still standard English, if a shade archaic, in the form 'scathe'. And there is the term 'fang', in the phrase 'taken with the fang' used of a thief apprehended with stolen goods in his possession; again the term is both Norse and English, and 'infangthief' and 'outfangthief' were standard terms in Scottish charters from the earliest times. Neither Norwegians on one side nor Scots on the other need jump hastily to the conclusion that many terms used in the Court Book are definitely or exclusively Norse or Scottish. It is also noticeable that the Court Book contains several allusions to the Court of Session: persons in Shetland were at one stage forbidden to raise actions there except in default of justice within the islands, but at least one action had been raised in Edinburgh before that act was made; several deeds are recorded in the Court Book which contain the usual clause giving consent to registration in the Books of Council and Session; and the volume contains a copy of letters under the signet which demonstrate the normal operation, within Shetland, of the proceedings of the Court of Session.[87]

When one reviews the duality or coexistence which the evidence discloses, it becomes plain that it would be totally wrong to believe that the Norse system survived until it was abolished at a stroke in 1611. There was clearly some truth in the Privy Council act which did in that year finally abolish the Norse law when it stated that the rulers of Orkney and Shetland had for some years past 'taken upon them ... to judge the inhabitants of the said countries by foreign laws, making choice sometimes of foreign laws and sometimes of the proper laws of this kingdom'.[88] But it was wrong to allege that the rulers — the Stewart earls — had necessarily made an arbitrary choice between the two systems. One reason, probably the main reason, for the act of 1611 was the policy of James VI,

[87] *Court Book of Shetland, 1602-4*, ed. G. Donaldson (Scottish Record Soc.), 48, 40, 137-8, 138-9, 142-3, 148, 152.

[88] *RPC*, ix, 181-2.

determined as he was to make the whole of Scotland a unified country, obedient to him and to a uniform law. But Professor Robberstad did point out that in 1604 there had appeared in Norway a revised code of law, the revision of Christian IV, and it would have been difficult for Orkney and Shetland either to adhere to the now superseded older code or to accept a new code at the hands of someone now regarded as a foreign king.[89]

It has sometimes been suggested that the act of 1611 was beyond the competence of the Privy Council,[90] especially if the Norse law in the islands had previously been safeguarded by acts of the Scottish parliament. But, even if they had been so safeguarded, the competence of the privy council in legislation was in practice so extensive that it would be hard to challenge any of its acts as *ultra vires*, and the fact remains that this act seems never to have been so challenged in a court of law.

The act of 1611, perhaps in conjunction with other events, had an immediate effect in ending the duality or coexistence of two judicial systems. When next we have a Shetland Court Book, in 1615, its procedure approximates much more closely to that of a Scottish sheriff court and it bears little resemblance to the book of 1602-4. Certain unusual administrative and judicial practices long survived at parish level — the appointment of ranselmen, for example, until the nineteenth century[91] — and there were 'Country Acts' with something of the character of bye-laws, but any distinction in substantive law had disappeared.

The act of 1611 had said nothing specifically about land law, and there is no evidence that it was thought of as necessarily bringing udal tenure to an end. But only six years later, in 1617, there was finally established the Register of Sasines, in which all transactions relating to heritable property had to be recorded, and this may have had a strong influence in bringing about uniformity in the procedure for the conveyance of land. The Register certainly enables us to examine land tenure in Shetland in the seventeenth century in a systematic manner not possible for earlier periods. The first volume of the Register of Sasines for Shetland is not extant, and the second begins in 1623. Abstracts of a series of sasines from this volume were printed by the Viking Society for Northern Research, and they reveal a somewhat confused situation. There is land called 'udal land', land called 'feudal land' and land not designated as either. One sasine expressly limited property to the flood mark, so that it did not include the foreshore in the udal manner. There is an instance of the inheritance of udal land by two brothers, but on the other hand 'udal land' was disponed by the 'eldest son and heir' as if he had inherited by primogeniture. A charter was granted by a man designed as 'udaller and heritable proprietor'; 'udal land' was held of the crown and even held by a feu charter; and a crown precept could be obtained for infeftment in 'udal land'.[92] On the whole, therefore, it appears that already some 'udal land' was udal only in name and that the substance of the feudal system of conveyancing and tenure was prevailing. It fits in with this erosion of true udal tenure that in 1624 the Court of Session decided that udal

[89] *The Orcadian*, 22 August 1968.
[90] A. Small et al., *op. cit.*, 155.
[91] Goudie, *op. cit.*, 241-6.
[92] *Orkney and Shetland Records* (Viking Club), ii, nos. 1, 10, 11, 12, 42, 83, 121, 167, 174.

lands 'behoved to be bruiked by some lawful title and that naked kindness and possession were not sufficient to possess them'.[93] The situation was complicated, and confusion increased, by the fact that there was evidently a good deal of opportunism: some contended that udal land had been wholly abolished, while others — including some quite recent comers to the islands — claimed to be udallers when they saw any advantage in doing so.[94]

The Register of Sasines was examined in detail, for three sample periods in the seventeenth century, by Dr. Frances Shaw in her Ph.D. thesis.[95] She observed, as others had done, the absence of large compact estates in Shetland in the early seventeenth century and the vast numbers of small proprietors; this was almost certainly the consequence of the udal system of division among heirs, and a sharp reduction in the number of small proprietors was likewise the result of its supersession by feudalism. At the beginning of the century there are allusions to the sharing of property among heirs, to an udaller obtaining the consent of his kinsmen to the sale of land and to the transmission of land without charters.[96] However, changes came rapidly. In 1633 there was a petition to parliament by the 'udallers' craving that none be interposed between them and the crown, but that they should be vassals of the crown until the king should adjust their rights in conformity with the law of Scotland:[97] this amounted to an acceptance by the udallers of the feudal principle of the crown's ultimate superiority over all lands. In 1664, on the ground that 'udal right' was 'merely a possession and no kind of fundamental right or title by charter or sasine', the Earl of Morton, who then held the crown lands, was authorised to grant feu charters to the 'udallers', many of whom took feu charters at that time.[98] It is true that in 1690 an act of parliament gave a limited measure of protection to a certain class of udal lands, and then only where the value did not exceed £20 Scots,[99] but — apart from the fact that this was a very limited measure — the damage had by that time been done. Dr. Shaw's analysis shows that by the end of the century conveyances by udallers made up only 4% of Shetland sasines.[100] So late as 1716 it was said that three quarters of the land in Shetland was 'udal',[101] but most land in Shetland had long ceased to be udal in the full sense, for it was held by feudal and not by allodial tenure; most 'udallers' were so in name only, and Shetland was nearly as completely feudalised as the rest of Scotland. The practice of partition among heirs ceased in general to apply — though it was upheld by law as late as 1893[102] — and the only significant vestiges of udal law which remained effective related not to the terms on which the proprietors held their lands but merely to certain rights which the holders of 'udal land' continued to claim within their own properties.

[93] *Sinclair* v. *Hawick* (1624), Mor. 16393.
[94] Shetland Islands Authority Archives, *loc. cit.*; cf. Goudie, *op. cit.*, 135.
[95] Her findings have now been published in Frances J. Shaw, *The Northern and Western Islands of Scotland: Their Economy and Society in the Seventeenth Century* (Edinburgh, 1980).
[96] *ibid.*, 36-7.
[97] *ibid.*, 39.
[98] *ibid.*
[99] *APS*, ix, 200.
[100] Frances Shaw, *op. cit.*, 41.
[101] A. Small et al., *op. cit.*, 158.
[102] *The Viking Congress*, 159 — the Sheriff Court case of *Hawick* v. *Hawick*.

The Scottish machinery for succession to heritable property held of the crown — and, with modifications, to other heritable property as well — was by way of a precept which instructed a jury to ascertain the rights of the heir and report their findings in a document called a 'retour' — strictly an *inquisitio retornata* — which constituted the 'service' of the heir. Our earliest records of retours have not survived, but we do have information from the middle of the sixteenth century and that is early enough for our purposes in relation to Orkney and Shetland. Actually the confirmation under the great seal in 1579 of a third of the estate of Sinclair of Brow, referred to earlier, states explicitly that the heirs were in future to enter 'by brieves of inquest of the royal chancery and according to the rule of succession of the realm of Scotland'.[103] The extant records of retours show that the system was in operation in the islands by 1605 and that it continued thereafter.[104] Moreover, the Sheriff Court Book of Shetland for 1615-28 contains some thirty services in favour of sole heirs, though in a few cases protests were entered on behalf of those who claimed that they should be acknowledged as heirs portioners according to Norse practice.[105]

So far as the moveables of persons deceased were concerned, in 1549 the general council of the Scottish Church laid down that the law and practice of Scotland should be extended to the diocese of Orkney.[106] It is quite clear, however, that there was no immediate and sweeping change, for the machinery for the division of property according to Norse practice proved tenacious and seems to have been in regular use for another two generations. A commissary (who would normally have dealt with such matters in other parts of Scotland) was operating in Shetland by 1590,[107] but his scope must have been limited by the persistence of 'sheunds and airffs'. It was remarked in 1611 that the office of commissary in Orkney and Shetland had been 'thir mony yeiris bigane verie far obscuirit, pairtlie be the iniquitie of the tyme and be the usurpatioun whilk utheris judgeis and magistratis within the saidis boundis took upoun thame of a grite many of the actionis and causis proper and competent to the commissariat jurisdictioun'.[108] The alleged 'usurpation' may in truth have been the survival of Norse practice. It was not until 1611, when Norse laws were in general abrogated, that a Record of Testaments, barely distinguishable in character from those elsewhere in Scotland, existed for Orkney and Shetland.[109] That it was a real innovation is indicated by its inclusion of testaments of persons who had died many years before — one as far back as 1573. From that point the practice was to apply the rules for the division of moveables operating in Scotland: if the deceased was survived by a widow and children then the relict and the offspring (collectively) were each entitled to one third, leaving a third for disposition by will, and if only a widow or children survived then a half was available for bequest.

[103] *RMS*, iv, 2850.
[104] *Inquisitionum Retornatarum Abbreviatio*, ed. T. Thomson (1811-16), i, Orkney and Shetland section.
[105] A calendar of those services is inserted in the copy of the 'Retours' in the Historical Search Room, H.M. General Register House.
[106] Patrick, *Statutes of the Scottish Church* (Scot. Hist. Soc.), 115-16, 137-8.
[107] *RPC*, iv, 546-7; cf. *Court Book*, vi.
[108] *RPC*, ix, 182.
[109] Robert S. Barclay, *Orkney Testaments and Inventories* (Scottish Record Soc.).

It remains true, as was remarked earlier, that there is no necessary connection between sovereignty and uniformity of law, in the sense that sovereignty does not necessarily imply uniformity of law and uniformity of law does not necessarily imply sovereignty. Yet, in the circumstances of Orkney and Shetland in the sixteenth and seventeenth century, it is hard to see how the consistent acceptance of Scottish law, and more particularly the acceptance of the jurisdiction of Scottish courts, can have meant anything else than the existence of Scottish sovereignty, certainly *de facto* and probably even *de jure*. It is impossible to be conclusive, but there is certainly a strong case for believing that Scottish sovereignty by prescription was effective before 1707.

The one thing that remains to be looked at, among the developments since 1468-9, is the series of attempts by Denmark to redeem the islands. Much has been written about them in detail, and it is unnecessary to do more here than offer some general comments. About the attempts there was sometimes, perhaps always, an air of unreality. On the Danish side, the fact that so many attempts were made does not necessarily mean that there was ever any serious hope of getting the islands back. The fact is that each Danish king from Hans in 1483 to Frederick III in 1648 was obliged by the equivalent of a coronation oath to make an attempt to reunite Orkney and Shetland to his crown. No such obligation was imposed on later monarchs, simply because the Danish monarchy became absolute in 1665. Now, Scots believed, or professed to believe, that in making attempts at redemption the Danish kings were just going through the motions in order to comply with their accession undertakings.[110] Perhaps they were right, but they may have put this view forward in order to ease their own consciences. This they had much need to do, for their attitude throughout was something less than honest. It is true that a number of Scottish writers related that the right of redemption had been surrendered by Denmark when the future James IV, son of James III and Margaret of Denmark, was born in 1473;[111] but this tale was for home consumption only and they never dared to bring such an untruth forward in answering Danish representations. When Denmark opened negotiations, or tried to, the Scots never denied that the right of redemption existed. They contented themselves with trying to shuffle out of their responsibility, they found some pretext for evading the issue, and indeed their attitude was little better than the simple one that possession was nine tenths of the law.

On more than a dozen occasions Denmark raised the question of redeeming the islands from Scotland.[112] It is perhaps less well known that in 1535, when Denmark was anxious that England should cease aiding Lübeck against her, an offer was made to Henry VIII: if he paid a sum equal to the 58,000 florins, he could have the Danish rights in Orkney and Shetland.[113] The question was raised

[110] Sir James Melville, *Memoirs* (Bannatyne Club), 343.

[111] Hector Boece, *Scotorum Historiae* (edn. 1574), fo. 389. Ferrerius, Boece's continuator, said that he heard (*audio*) that the renunciation, in writing, was preserved among the Scottish royal archives. Sir Thomas Craig, in his *Jus Feudale* (ed. J. A. Clyde, 1934), written about 1600, stated that the Danes 'gave up their reversionary rights by the treaty between ... James IV and Christian II of Denmark. This treaty was confirmed by the authority of Pope Alexander VI and recorded in the registers of the papal court.' It may be pointed out that Alexander VI died in 1503 and that Christian II did not become king until 1513, seven months before the death of James IV. Cf. Goudie, *op. cit.*, 215.

[112] See Appendix.

[113] *Letters and Papers of Henry VIII*, viii, 1160.

in some sense so late as 1749, to the extent at least that the Danes then claimed the exclusive rights of fishing in Orkney and Shetland waters and asserted that they still had the right of redemption.[114] However, the last serious attempt at redemption seems to have been at the making of the treaty of Breda in 1667. The Danish representatives wanted to insert in their agreement with Charles II the following article: 'It has been sufficiently proved by documents that for many centuries the Orkney isles belonged to the kingdom of Norway as an inseparable and inalienable dependency, and still belong to it, and that they have been pledged and pawned to the king of Scotland for a certain sum of money on condition that they should be restored and returned on reimbursement and payment of the same sum, and that they would be given back and reunited to the kingdom of Norway; yet, although reimbursement of the same sum has been many times offered on the part of Denmark, nevertheless the restitution of the islands has not been made: it has therefore been agreed and accorded ... that the abovenamed islands ... be restored and returned to the king of Denmark or to any other to whom he shall give power to receive them, in the condition in which they are at present, without any retention and without delay': The English reply was predictable: they protested that they had no instructions on this matter. The Danes therefore agreed, though under protest, that the article should be erased from the draft treaty.[115]

Since then the issue has been an academic one. The question has sometimes been raised whether the right of redemption, if it still exists, would now pertain to Denmark or to Norway. The Treaty of Kiel, in 1814, seems to be conclusive on this point. There it was laid down that the territories surrendered by Denmark comprehended not only the Norwegian mainland and the islands along the coast, but also the Norwegian dependencies, except Greenland, the Faroes and Iceland. The specific exception of those three named territories from the lands ceded by Denmark clearly implies that all other overseas dependencies of Norway were surrendered. If, therefore, it was still true in 1814 that sovereignty of Orkney and Shetland pertained to the Dano-Norwegian crown, then it can be accepted that that sovereignty was transferred or reserved to Norway by the Treaty of Kiel. It has, however, been argued, perhaps over-ingeniously, that as the islands were not mentioned when Norway gained its independence from Sweden in 1905, the sovereignty and the rights of redemption really pertain now to Sweden.

The matter therefore remains where it was left at Breda in 1667. The Danes then agreed to give up their claim for the surrender of the islands, but only 'on condition that the suspension and withdrawal of the demand for the restitution of the islands should be understood not to prejudice the rights of their lord the most serene king [of Denmark] and should not derogate in any way his claims, which remain whole and entire until a more favourable occasion, whether it presents itself sooner or later, for demanding the restitution, according to such claims'.[115]

[114] *Gentleman's Magazine*, 1749, p. 428.

[115] J. Dumont, *Corps Universel Diplomatique du Droit des Gens* (Amsterdam, 1731), VII, pt. i, 56.

## APPENDIX

*References to attempts to redeem Orkney and Shetland*

[The most comprehensive accounts are given by Thormodus Torfaeus, *Orcades seu Rerum Orcadensium Historia* (Havniae, 1715), and Fredrik Scheel, 'Orknøerne og Hjaltland i Pantsaettelsestiden, 1468-1667', *Historisk Tidsskrift udgivet af Den norske historiske Forening*, series 5, i (Kristiania, 1912), 380-420. Gilbert Goudie, *Antiquities of Shetland* (Edinburgh, 1904), 216-29, reproduces information from those authorities and adds quotations from Scottish sources. The following list provides some supplementary references.]

1485 A Scottish embassy to the Pope was to seek 'a confirmacioun of the convencions, confederacions and bandis maid betuix our soveran lord and the king of Denmark that last deceissit of the donacioun and impignoracioun of the landis of Orkney and Scheteland and of perpetuale exoneracioun, reversacioun and discharge of the contribucioun of the Ilis efter the forme of the said convencions' (*APS*, ii, 171). The 'exoneracioun' is of course of the Annual of Norway, as provided in the Treaty of 1468, but is a careless reading of this phrase the origin of the tale that the right of redemption of Orkney and Shetland had been surrendered?

1549 A letter of 1585 (see below) states that Christian III (1535-59) attempted to recover the islands, and this is presumably to be identified with an initiative taken in 1549, when it appears that a special tax was levied to procure money for redemption (Scheel, 410, citing *Danske Magazin*, series 4, iv [1878], 363).

1560 In a letter to the Governors of Scotland, 23 October 1560, Frederick II claimed that the *dominium* of the islands pertained to him and went on: 'It is of the greatest importance that these islands be at length, after so many years, restored and added to our kingdom; and we to this end do not decline [to make] payment of the money due; and . . . we request Your Highnesses that together you . . . cause these said islands to be delivered up and restored to us, in return for the payment of the money due, which we offer' (*Nat. MSS. Scot*, III, xliv; cf. *Cal. State Papers Scotland*, i, 493, 516).

1564 When William Douglas of Whittinghame went on an embassy to Denmark his instructions included this: 'In cais ony thing be proponit to yow tuicheing Orkney and Zetland, twiche nawise that string, bot, as fer as ye may, flee the clos, allegeing that ye ar nawyse instructit ony thing in that heid' (*Warrender Papers* [Scot. Hist. Soc.], i, 40). The Danish council did in fact raise the question (*RPC*, xiv, 196-201, 203-5).

1568 James Hepburn, Earl of Bothwell, who had been created Duke of Orkney when he married Mary, Queen of Scots, in 1567, declared that he had intended to obtain Danish help by surrendering Orkney and Shetland (Scheel, 416, citing Frederik Schiern, *Life of Bothwell*).

1570 Scheel (p. 416) quotes a letter of 10 June 1570 from the French ambassador to Denmark, Charles de Dancays, to Catherine de Medici, from which it appears that the Danish Council will try to get the islands back as soon as possible.

1572 Accusations of Lord Robert Stewart, feuar of Orkney and Shetland, included the allegation that in 1572 he offered the 'supremacy and dominion' of the islands to the king of Denmark, and it was reported that that king gave him a confirmation and gift of them and sent Laurence Carnes as lawman (*Cal. S.P. Scot.*, v, p. 205; Peter Anderson, *Robert Stewart*, 87).

1585 A Danish embassy for the redemption of the islands is referred to in *Warrender Papers*, ii, 36, 46n, and its purpose is described in a letter from Frederick II to Queen Elizabeth of England, 4 May 1585: 'Although an attempt was made to recover the islands by Christian III and even by ourselves some years ago, nevertheless the governor and councillors of the kingdom [of Scotland] urged in excuse partly their own occupation in operations of war and partly the minority of the queen as the cause of the restitution being hitherto always deferred. Now, therefore, we, offering anew the required sum, demand, as in duty bound, that these islands, which are acknowledged indisputably to form part of our kingdom, should be restored to us. For which cause we have despatched to the kingdom of Scotland ... ambassadors ...'. (Goudie, 219-26, gives a full account of this episode, with several quotations.)

1587-9 Negotiations in connection with the marriage of James VI and Anne of Denmark. The Danes pressed hard for redemption, and 'the matter of Orkney' was prominent in the negotiations in 1587 (*Warrender Papers*, ii, 37-42). In 1589 the question was explicitly left open: 'All further claim or repetition of the foresaid isles upon whatsoever pretended right or interest alleged thereto by that crown [Denmark] shall be superseded and continued for their parts [i.e. on the parts of the two kings] unto the said elected prince's [Christian IV's] perfect age' (*APS*, iii, 566; *RPC*, iv, 824; cf. Goudie, 228).

1621 In a treaty between James VI and Christian IV it was agreed that the question should rest during their lifetimes (Scheel, 418, citing Rymer, *Foedera*, vii, pt. 2, 216).

1640 Christian IV raised the question after Charles I had capitulated to the Covenanters (Scheel, 418, citing Torfaeus, 227).

1651 From the diaries of the Danish politician Christen Skeel it appears that the question was mentioned in the Danish Council on 6 December 1651 (Scheel, 418, citing *Nye Danske Magazin*, series 3, iv, 134).

1660 Some documents concerning Orkney were sent to the Danish ambassador in London (Scheel, 419, citing evidence of a private letter of 18 August 1660, in *Danske Magazin*, series 5, iv, 180).

1667 The negotiations for the treaty of Breda, referred to above (Scheel, 419-420, cites *Historia of Verhael van Saken van Staet en Oorlogh* [The Hague, 1669], pt. 10, 409 sqq).

1749 An attempt by Frederick V (Scheel, citing *Genealogisch-Historische Nachrichten von den allerneuesten Begebenheiten* [Leipzig, 1749], cxl, 695).

# THE STATUTES OF ETTRICK FOREST, 1499

*By* JOHN M. GILBERT, M.A., PH.D.

## *Introduction*

The Statutes of Ettrick Forest were issued on Tuesday, 30 April 1499 in the tolbooth of Edinburgh in full court of the forest.[1] They were promulgated at that court by the commissioners of crown lands who had been appointed a fortnight previously.[2] These twelve statutes brought the old forest law up to date and adapted it to the particular circumstances of Ettrick Forest. They represent, therefore, an adaptation of national law.

To understand the unique nature of Ettrick Forest and to explain why new laws were required in 1499 it is necessary to know something of the history of that forest. Before presenting the text of these laws their compilation and promulgation will also be considered. After the text a detailed commentary will explain the content of the laws while a more general commentary will endeavour to elucidate their significance.

## *Brief History of Ettrick Forest*

Ettrick Forest, or Selkirk Forest as it was called in the twelfth and thirteenth centuries, is first recorded in that part of David I's foundation charter of Melrose Abbey which can be ascribed to 1136.[3] Previously, David, as earl of Huntingdon, had some sort of hunting establishment in southern Scotland perhaps based on Selkirk Castle but he does not appear to have made that area a forest till the 1130s.[4] The forest of Ettrick was adjoined by the forests of Traquair and Tima, first mentioned in 1136 and 1165 × 1169 respectively.[5] Ettrick Forest itself was split into several administrative divisions. The division of the forest north and south of the Tweed appears in 1264.[6] Since, in the twelfth and thirteenth centuries, royal forests were usually administered by sheriffs it seems likely that the sheriff of Selkirk was the chief administrator of this forest. If the sheriffdom of Selkirk did not exist in the reign of David I then it would no doubt have been the sheriff of Roxburgh who then controlled the forest. By the later thirteenth century the area north of the Tweed was certainly administered by the sheriff of Roxburgh, while Traquair Forest was perhaps supervised initially by the sheriff of Edinburgh and then by the newly created sheriff of Traquair/Peebles. The forest of Tima was alienated to Melrose Abbey in 1235/6.[7]

*Exchequer Rolls* [*ER*], xi, 394.
*ER*, xi, 396.
*Early Scottish Charters* [*ESC*], ed. A. Lawrie (Glasgow, 1905), no. cxli.
*ESC*, no. xxxv.
*ESC*, no. cxli, *Melrose Liber* [*Melr. Lib.*], no. 39.
*ER*, i, 29, 30, 35.
*Melr. Lib.*, no. 264.