

Alan J. Berger
108 Roosevelt Ave.
Wauconda, Ill. 60084
USA

LAW IN NJÁLS SAGA

I

Date of Composition

Many of the Old Icelandic family sagas describe legal problems and procedures in detail, and the foremost of those sagas is Njals saga, the "jurist's saga." ¹ Because the legal history of old Iceland is so well known, the law in Njals saga is good evidence of its date of composition.

That Njals saga is no older than the late thirteenth century was established by the legal historian Karl Lehmann, working under the tutelage of Konrad Maurer, in his Die Njalssage insbesondere in ihren juristischen Bestandteilen Ein kritischer Beitrag zur altnordischen Rechts und Literaturgeschichte (Berlin 1883). His argument was simple: the author of Njals saga was familiar with the Norwegianized Icelandic law of the post-1262 period, but misunderstood the native Icelandic law of the prior period. Lehmann also argued that the extensive citations from the law of the Icelandic republic showed a use of law books, not actual experience.

Einar Olafur Sveinsson placed the date of composition "shortly before 1280," arguing that Njals saga shows an awareness of Jarnsida, the Norwegianized law book introduced in 1262, but not of Jonsbok, the law book ² introduced in the year 1281. The argument is improbable.

Njals saga contains more than a bit of law from Jonsbok, and may be considerably younger.

In 1281, Jonsbok introduced a controversial law that dispossessed owners of surplus fodder in times of shortage in favor of those with no fodder.

If men on their farms need to buy hay, the man who needs hay should go to the ombudsman with two men as witnesses and ask him to summon a thing and appoint reasonable men to search all the farms as far as necessary, and where an excess of hay is found, the hay should be measured so that the farmer's horses can be stall-fed until summer, the sheep and goats until moving days, and the cows until thing time. Whatever is then left over should be sold at the usual price, rather to the men of the same district than to others, but only to those who are able to give full warranty for payment. If a man refuses to sell, he is fined a half-mark, two ounces to the ombudsman and two to the man who was refused the sale, and the hay shall be had nevertheless without payment, and it shall be divided among those in need . . . If anyone defends his hay with weapons, he shall be uncompensated if he is wounded or suffers other injuries . . . Jonsbok, ed. Olafur Halldorsson (Moeller; Copenhagen, 1904), pp. 139-140.

The hostile Icelandic response to the new provision was recorded in the saga of the life of Bishop Arni (Arna saga biskups), and was dramatized in Hoensa-Thoris saga, a saga generally considered older than Njals saga. In 1281, as the Norwegian king's men offered Jonsbok to the Icelanders for approval, the bishop and the farmers made written objections to the fodder law, stating that "each man wishes to rule his own hay and other property," and "all men in this country are free to rule their own property."³

The objections seem to be on principle. As far as we know, no one argued that the law was unnecessary, and the

Norwegian king Magnus made no argument for its necessity. We do not know whether the new law was addressed to a recurrent problem, or arose in response to a particular incident, or whether it simply seemed like a good idea. Were there farmers who refused to sell surplus to those in need? Were there farmers who were injured defending their hay? We have no recorded instance of its enforcement, nor of any incident that might have inspired such a law. However, several sagas deal with the issue. The issue is theft.

Hoensa-Thoris saga tells of a shortage of hay one summer shortly before Iceland's official conversion to Christianity. Blund-Ketill advises his tenants to slaughter more than the usual number of stock in order to extend the supply of hay over the winter. His tenants disregard his orders, and in January and February come begging to him for hay. Blund-Ketill slaughters forty horses and gives the fodder intended for them to his tenants. In March, things are worse. Blund-Ketill can do no more for the importunate tenants than accede to their request to act as their surety in purchasing hay from Hen-Thorir, but Hen-Thorir refuses to sell his hay, in spite of Blund-Ketill's generous offers. Blund-Ketill then goes to Hen-Thorir's haystacks, "and calculated that even if all Thorir's stock were stall-fed until the time of the All-thing, there would be five stacks left over." He takes the hay and leaves payment behind. For this, he is later called to his door and summoned to

answer a charge of theft, a very grave charge.

Since the saga episode and the law of 1281 concerning the purchase of surplus hay in a time of need are so similar, one must be the source of the other. Blund-Ketill calculates that even if all of Hen-Thorir's stock is stall-fed until Althing time, there will still be a surplus, and that calculation is clearly related to the lawbook's mandate that "the horses must be stall-fed until summer, the sheep and goats until moving days, and the cows until thing time." Which came first?

If the saga used the law of 1281 as material for the episode, then the saga is posterior to Jonsbok. However, the prevailing opinion, that the saga is prior, has held since Sigurdur Nordal suggested more than seventy years ago that the Norwegian king must have heard the saga, and decided that there ought to be a law. Nordal's suggestion that the surplus fodder episode in Hoensa-Thoris saga is older than Jonsbok is not convincing. Since Njals saga also makes use of the surplus fodder law- and probably also of Hoensa-Thoris saga it is also younger than Jonsbok.

Njals saga begins with the issue of theft. In the opening chapter, we are introduced to a young girl named Hallgerdr. Her father Hoskuldr is hosting a gathering of relatives, and Hallgerdr is playing on the floor with other girls.

She was of good appearance and well grown. Her hair was as beautiful as silk and so long that it reached below her belt. Hoskuldr called to her: "Come here to me," he said. She went over to him.

He put his hand beside her cheek and kissed her. Then she went back. Then Hoskuldr spoke to his brother Hrutr, "What do you think of this girl? Don't you think she's beautiful?" Hrutr said nothing. Hoskuldr repeated the question. Then Hrutr answered: "The girl is quite beautiful, and many will suffer because of it, but what I don't understand is how thief's eyes have come into our family." Hoskuldr became angry, and for some time the brothers were cool toward each other. P. 7.

The theft issue lies dormant for many years, until Hallgerdr is grown and married to Gunnarr of Hlidarendi.

At that time there came a great famine over all the districts, and both hay and food were in short supply. Gunnarr shared his hay and food with many, and all who went to him got some while it lasted, but eventually Gunnarr ran out of hay and food. Gunnarr and some companions then went to Kirkjubaer and called Otkell out. He welcomed them; Gunnarr responded in kind. "It is this way," says Gunnarr, "that I have come to buy hay and food from you, if you have any." "I have both," says Otkell, "but I will sell you neither." "Will you give me some then," says Gunnarr, "and leave it to me to repay you somehow?" "I do not want that," says Otkell Thrainn, Gunnarr's companion, spoke up: "It would be fair if we took the food and hay and left the price behind" "I will have nothing to do with theft," says Gunnarr. P. 121.

Hallgerdr later steals butter and cheese from the miser. When Gunnarr discovers the food, he slaps her, declaring that he cannot be an accomplice in theft. Hallgerdr says she will remember the slap, and she does. Years later, when Gunnarr is besieged in his house, she whose hair in the first chapter of the saga was as beautiful as silk and reached to her waist refuses to give Gunnarr some strands of it for a bowstring that would save his life. Gunnarr does not take the hair he needs to save his life, and dies.

The long hair and thief's eyes of the opening chapter

are the saga's adaptations of the fodder law to a domestic romance. The saga is probably younger than Jonsbok and perhaps considerably younger.

II

Hrutr and Unnr

If the author of Njals saga composed his saga "shortly before 1280," as Einarr Olafur Sveinsson thought, he may have had direct and personal experience of the old law of the republic before the Norwegianized Jarnsida replaced it in 1262. His audience may also have shared his understanding of the old law. If he was composing somewhat after 1280, he and his audience were less likely to have that common understanding, and, as Lehmann suggested, he is more likely to have used law books for his material. The story of Hrutr and Unnr may show how a law book was used in composing the saga.

The author of Njals saga may have learned from Laxdaela saga, ch. 19, that Hrutr and Unnr married, she left him, and conflict between their families arose.

Hrutr kvangadisk ok fekk konu thestrar, er Unnr het, dottir Mardar gigju; Unnr gekk fra honum; thar af hefjask deilur theira Laxdoela ok Fljotshlidinga.

In Njals saga, the story is much fuller. We are told of the negotiations preceding marriage in more detail than in any other saga, and in particular, that Unnr will bring sixty hundreds worth of property as her heimanfylgja and Hrutr will assign her thirty hundreds worth as the mundr.

We are told much more than in any other saga of the grounds for parting: they are unable to have normal sexual intercourse because of Hrutr's "impotence." As to the bad feelings that arose between their families, they did not result from the divorce itself but from a dispute over the division of the marital property: Hrutr refused to give back any of her property, neither the heimanfylgja, which in any divorce should be returned to her, nor the mundr that Unnr's father claimed for her even though in most divorces the mundr remained with the husband. (The mundr is a kind of dowry from husband to wife, a peculiar custom noted by Tacitus, Germania, 18, centuries before).

The source for the material to amplify the bare bones account may well been an old law book. "Mundr" had gone out of use in favor of "tilgjof" after the Norwegianized codes were introduced, and the inability to have sexual intercourse is not suggested as a grounds for divorce in any of the newer codes. An old law book is the likely source for this much of Njals_saga, and indeed, the chapters on divorce in Stadarholsbok may very well have been the particular source.

Ch. 136 Ef karl madr hvilir eigi isama saeing kono sinni vi missere fyrir orokdar sakir tha eigo fraendr fiar heimtingar hennar oc sva retta far hennar enda a hon sialf fe sit at vardveita.

(If the man does not lie with his wife in the same bed for six seasons because he cannot maintain marital relations, then her kin may lay claim to her property)

Ch. 137 Ef karl madr velldr scilnadinom tha a hon heimting til mundar sina oc helman fylgio.

(If the man causes the divorce then she may claim the mundr as well as her heimanfylgja.)

No other surviving Gragas text juxtaposes the "impotence" and "fault" passages, and there is little or nothing in Jarnsida or Jonsbok nearly so much on point as this small portion of Stadarholzbok, which provides grounds for divorce- impotence- as well as the suggestion that impotence is fault affecting the division of the marital property. Thus the bare bones story in Laxdoela saga of marriage, separation and conflict between their families could have been fleshed out in Njals saga with that particular law book.

The juxtaposition of the "impotence" and "cause" passages in Stadarholzbok highlights the legal issue: is impotence a cause, like severe physical abuse (II, 168), that warrants a forfeiture of the mundr? The law book does not explicitly say so, nor does the saga go into the question, but why else would Unnr's father think she had a claim when no passage in any law book explicitly allows such a claim? Only severe physical abuse would warrant forfeiture of the mundr, and Hrutr certainly does not deserve to be called an abuser. The author's reading of Stadarholzbok may be the source of the claim on the mundr.

However, even if impotence were found as a matter of law to be fault warranting forfeiture of the mundr, Hrutr's lawyer might argue that Hrutr is not in fact or law impotent, in spite of what KHLNM, "impotens," thinks. If

Unnr were to testify in court as she testified to her father, could she establish "impotence?"

"I want to divorce Hrutr, and I'll tell you the grounds I have. He cannot have marital relations with me that will please me, but he is in all respects otherwise as vigorous as any man."

"How can this be," asks her father. "Speak more clearly."

"When he comes to me, his member is so large that he cannot perform the act with me. We have tried every which way to enjoy each other, but it can't be done. Yet before we part, he proves that he is by nature a man like other men." P. 24.

Unnr's complaint is no common one. It may not be a case of "impotence," though that is its effect on her. Looked at another way, it is the opposite of impotence, and a lawyer could argue not only that Unnr has no grounds for divorce, but that she cannot prove them even if she thinks she has. She is faced with difficult problems of proof. At trial, if Hrutr refuses to testify, what can Unnr prove? Can she force Hrutr to disclose the evidence she wishes to use against him, or to demonstrate her claim? The court would be left only with her word that Hrutr is too big, but is she competent to testify? How does she know what is too big and what is not, and how does she know that she is without fault when alleging matters of size? What standard is she using? There are no statutory guidelines

available here. The causal element- is Hrutr the cause of the divorce- is hard to prove, but even if he is the cause there may not be legal cause- impotence- warranting forfeiture of the mundr.

Hrutr does not need to rely on difficulties of proof in resisting the claim for the mundr. Hrutr's lawyer could argue from Unnr's testimony that they were never married, nor was the marriage consummated, and therefore Unnr has no claim on the mundr, even though it was contracted for as part of the marriage deal, or kaup.

The law says,

The marriage is legally perfected when the bride has been properly betrothed, and when there are no fewer than six people at the wedding, and the groom goes in plain view (lit. "in the light") with the bride into the same bed. II, 204.

When the couple go together in one bed, then the woman comes into possession of the mundr. II, 199.

The law seems to say that if the marriage is not consummated, there is no marriage and there is no transfer of the mundr.

Nevertheless, her lawyer might say, Hrutr and Unnr were often "in one bed," and therefore they have satisfied the law, at least. Unnr's lawyer could argue that the phrases, "go to bed," like the phrase for separation and divorce, "part their bed," and "in the light," as well as the vague terms of "impotence," are not figures of speech but the

literal and univocal terms of well written statutes that deliberately obviate closer inquiry and difficult questions of proof. In any case, if Hrutr argued that Unnr has no claim on the mundr because they were never married, how then can Hrutr hang on to the heimanfylgja?

Perhaps the problems of proof make Hrutr secure in refusing to turn over the mundr, but what would make a man who is otherwise generous and fair refuse to return Unnr's sixty hundreds of heimanfylgja? Nowhere in any law book does the woman forfeit her heimanfylgja (except temporarily in Jonsbok in the case of an unrepentant and unregenerate adultress; her property is seen as more properly her kin's property). No adultery is alleged or even suspected of Unnr, so that cannot be the basis of Hrutr's refusal. Hrutr may well be secure in his refusal to return the heimanfylgja because he is secure in his belief that Unnr has no grounds for divorce, and that therefore she is still married to him. Hrutr never speaks in defense of himself, never countering that he is not unmanly or even that he is too manly. His response is a demurrer, as if no real charge had been made and no answer is required.

The mundr-heimanfylgja issue seems upon analysis to be superfluous. The author needed only to mention a dispute over property in order to satisfy the history of a conflict arising between Hrutr's and Unnr's kin, or he might simply have drawn a dispute over the mundr or the heimanfylgja alone, but bringing both into the saga seems

to be a reflex of his readings in the law books, mere realistic detail with only atmospheric function, unless we can imagine that the author or the audience was better able than we to see the legal implications operating in the story. Did the author or the audience ponder Hrutr's problem and note the irony in Unnr's charge of "impotence?" Did the author or the audience see that Unnr's claim on the mundr was based on the notion that Hrutr's problem was a cause of divorce, like severe physical abuse, that deserved a forfeiture of property? The author could hardly have written the story without considering these matters, it seems, but a reader would not need the law to understand the story.

Stadarholsbok could have provided an author in the fifteenth or sixteenth century with authentic old material about marriage, divorce and property, but it could not have provided the author of Njals saga with Hrutr's particular problem. Perhaps this is where historical tradition comes in. Could an old oral tradition have preserved the grounds for his separation from Unnr, a tradition that grew and grew until it reached mythic proportions? A tradition that was preserved not alongside the legal traditions but within them? The author of Njals saga was a legal historian, and he skillfully presents, without answering, lively legal questions.

III

Is Hrutr's refusal to return Unnr's heimanfylqja a

deliberate or accidental irony when Hrutr is the one who blanched at Hallgerdr's "thief's eyes?" Is Gunnarr to be seen as so unenlightened that he cannot recognize the defense of necessity the Christian missionary Thangbrandr had when he took another's food in order to survive? Is Gunnarr obtuse or principled when he does not take from Hallgerdr the few strands of hair that will save his life? Does Unnr have a problem or does Hrutr?

When Unnr goes to her kinsman Gunnarr in chapter 21 to ask him to get her heimanfylgja back from Hrutr, Gunnarr at first declines. "Ek kann litt til laga," he says. "I don't know much law." He is not the only saga hero who does not know the law, and no one blames the man who says, "Ekki kann ek login vel." I do not know the law well.

FOOTNOTES

1

Karl Lehmann, "Jurisprudensen i Njala," Tidsskrift for Retsvidenskap 1905, 183-194, 187 (Oslo).

2

Brennu-Njals saga, ed. Einarr Olafur Sveinsson, Hid Islenszka Fornritafelag (Reykjavik, 1954), Islensk Fornrit XII, lxxxiv.

3

Arna saga Biskups, ed. Thorleifur Hauksson, Stofnun Arna Magnussonar, Rit 2 (Reykjavik, 1972), p. 78.

4

Alan Berger, "Old Law, New Law and Hoensa-Thoris saga," Scripta Islandica 27 (1976), 3-12, gives more information.

5

Gragas efter det Arnarnagnaeanske Handskrift Nr. 334 fol., Stadarholzbok (1879), ed. Vilhjalmur Finsen. This volume is usually cited as II, distinguishing it from Finsen's 1852 edition of the Royal Library's (Copenhagen) Gragas manuscript, whose two parts are cited as Ia and Ib. In 1883, a third volume, cited as III, containing other manuscripts of the old laws was published. The method of fashioning stories from articles of law is described in my "Lawyers in the Old Icelandic Family Sagas: Heroes, Villains and Authors," Saga-Book of the Viking Society for Northern Research, vol. 20, pts. 1-2 (1978-79), 70-79.