Corrected version of
extempore decision
by
Sheriff Graeme Napier
in
PF v Hill
(17 August 2011)

I have now had the opportunity to consider overnight the voluminous submission made by Mr Hill; the points made in contradiction by Mr Mackenzie; have given both an opportunity to expand upon yesterday's submissions; and, in Mr Hill's case, to answer some queries arising out of his submission and also to respond to Mr Mackenzie's submissions yesterday.

Stuart Alan Hill is charged on Summary Complaint under the Criminal Procedure (Scotland) Act 1995 at the instance of the Procurator Fiscal, Lerwick with 9 Contraventions of sections of the (UK) Road Traffic Act 1988 and 1 of contravening Road Vehicle Lighting Regulations made under that Act; 2 contraventions of the (UK) Vehicle Excise and Registration Act 1994; and 2 contraventions of the (UK) Police (Scotland) Act 1967.

The Summary Complaint first called in Lerwick Sheriff Court on 27 July 2011. After sundry procedure the accused intimated a preliminary plea to the Competency in which he argued that the Sheriff Court at Lerwick had no competence, or jurisdiction to deal with the matter as the offences were alleged to have occurred in Shetland which is not subject to the jurisdiction of the Scottish Courts (including the Sheriff Court) not being and never having been incorporated into Shetland.

A hearing on that plea was fixed for 16 August 2011 when, after sundry procedure, I heard Mr Hill in support of his plea and the Crown, in the form of Mr Mackenzie, Senior Procurator Fiscal depute, as contradictor. In addition to his oral submissions Mr Hill provided me with a written submission in support of his plea which ran to some 71 pages with what he termed 31 heads of argument. He had not, however, as previously requested, provided me with copies of the 'authorities' which he relied on and referred to extensively in his submission. The majority of these 'authorities' are books and papers written by various academic lawyers and historians: some were familiar to me, although others were not. Having heard parties for around 2 hours I suggested that I should take the opportunity to read the submission overnight and requested that Mr Hill arrange to supply me with copies of some of the publications he made reference to with which I was not familiar. This he did handing in copies of:

1. *The Shetland Report: A constitutional study prepared for the Shetland Island Council by The Nevis Institute under the Chairmanship of Lord Kilbrandon* (1978);
2. Mc Neil, *Common Law Aboriginal Title* (1989), Clarendon Press;
3. Forte, *Black Patie and Andro Umfra* in Miscellany 5, The Stair Society (2006);
4. Howarth, *A Norse Saga: The Salmon, the Crown Estate and the Udal law* (undated with publisher unspecified); and
5. Peterkin, *Political State of Orkney and Zetland* (again undated and publisher unspecified).

Although Mr Hill told me that it was impossible to summarise his submission in a few sentences, in fact he has done of on a number of occasions in his written submission and did

so orally on 16 August. At paragraph 6.2 of his submission he suggests that there are 3 obstacles to the Scottish / British Crown's claims to Shetland. Firstly "the pawning document, which has meant it [the Crown] was unable to establish ownership"; secondly the "allodial nature of the land" which meant that Shetland could not be incorporated into the realm; and thirdly, something un-remarked by other commentators, "the inherent sovereignty of the Shetland land-owners". Not, I note, inhabitants. His argument is one which seems to revolve very much around rights in property, not what, in a modern Scotland we tend to consider a determinant of citizens rights *vis a vis* the state.

Mr Hill agreed that in essence his argument is that whatever the legal impact was of the pawning by the Danish Crown to the Scottish Crown of (or of its interest in) the Shetland Isles in 1469 it did not and therefore subsequently cannot affect the whole of Shetland or all of those with proprietorial interests in Shetland as the most the Danish Crown could pawn was the right which it had at that time; and its rights extended only to some 3% (his estimate based on Smith's suggestion that they were small) of the land in Shetland, the balance being held by what he refers to as a "third, silent party", the udallers of Shetland that is the then existing land owners whose land holding was allodial not feudal; and as these land owners never relinquished their rights, which he says "have been trampled underfoot by succeeding monarchs and their henchmen" [presumably including Sheriffs and Procurators Fiscal] it has been impossible to protest through fear and dread of consequences, Shetlanders being, in his (oral) submission, normally reluctant to challenge authority.

Moreover he argues that with his eye on a likely union of the Parliaments of Scotland and England the King (Charles II) with the counsel and advice of the Scots Parliament by the 1669 Act for Annexation of Orkney and Shetland to the Crown precluded the Scots Parliament in 1707 making any arrangements which would have the effect of dissipating the Kings personal estate and incorporating Orkney and Shetland into the united Kingdom of Great Britain. (Mr Hill's view of the implications of the 1669 Act is described, somewhat uncharitably, as a "crackpot theory" in an article concerning *When Shetland became part of Scotland* (infra) by Brian Smith of Shetland museum to which I was referred by Mr Mackenzie,

According to Mr Hill's argument, despite Scots Courts having held sway in Scotland for over 500 years, any actings of the courts have no basis in law. Indeed what he argues is that no modern law applies in Shetland and there are no courts currently in existence which have jurisdiction to enforce any remnants of old laws that still apply. Whilst the attraction of this argument for Mr Hill might be that taxation cannot be enforced (although he seems to accept that the whole benefit of Shetland to the Scots, Norwegian and Danish Crowns was as a source of revenue) equally those who rely on services or income derived from the state (such as pension and other benefit and health services) would not be entitled to these.

Mr Mackenzie for his part suggested that the position is simple and straightforward. There were 4 elements to his argument. Firstly if the issue is to be determined from a historical perspective then the answer to the question when did Shetland become part of Scotland? is on the 20 February 1472 by the passing of the Act of the Scots Parliament whereby King James III with the advice of his tree estates "annext and uniit the erledome of Orknay and the lordship of Scheteland to the croune" not to be given away in the future to any persons except one of the Kings legitimate sons only. In support he referred me to the article entitled "When did Orkney and Shetland become part of Scotland?" by Brian Smith in *New Orkney Antiquarian Journal,* Vol 5.

Mr Hill, for his part, does not accept that this annexation had the effect that on the face of it is claimed. He argues (see para. 14 of his submission) by reference to a copy of a reply from James III to the son of the Danish King that James could not have thought that he had a right to govern as he parried complaints about changing the language and laws of Shetland and replacing the inhabitants with his own subjects by saying that he would not do so. This Mr Hill argues means that he accepted that he was bound by a previous agreement at the time of the pawn to uphold these laws and this language (the implicit agreement to return the pawned goods in their same condition as when received); moreover he (the King) would not have referred to his subjects being brought in to replace the inhabitants (of Shetland) if he considered both to be his subjects. That does not seem to me to be the only meaning of the letter the real import of which can only be determined by access to both the letter and reply (and only the reply appears to exist).

Secondly, in Mr Mackenzie's submission, Mr Hill has failed to understand the significance of custom as a source of Scots Law. He referred me to the *Laws of Scotland: Stair Encyclopaedia* Vol. 22 at paragraph 529 where both Stair and Erskine are referred to as authority for the role of custom which, according to Stair (*Institutions,* I,1,16) "declareth equity and constituteth expediency". Erskine of course (*Erskine,* I,1,43) talks of custom as being that "which without any express enactment by the supreme power, derives force from its tacit consent; which consent is presumed from the inveterate or immemorial useage of the community". Although I was not referred to it by Mr Mackenzie there is a fuller treatment of custom as a source of law in chapter 3 on Custom in the Section on Sources of Law in volume 22 of the *Encyclopaedia*, rather than in chapter 5 (on Legal Literature) with some relevant comments particularly applicable to the situation in Shetland. The learned author (W David H Sellar) refers to the Shetland whaling case, *Bruce v Smith* (1890) 17 R 1000 (see paras. 385 – 388) and the comments of Erskine (I,1,46) that "there is hardly an instance of a local custom in any county, but in the udal right proper to the stewartry of Orkney and Zetland .. Certain useages practiced in particular boroughs,... but have no authority elsewhere". It is correct to note that Mr Hill, in his submission, seems to be unaware of the way in which early and local customs which continued to flourish in many parts of Scotland, not just in the Northern Isles, continued to flourish until at least the 16th century (see paragraph 361 if the *Encyclopaedia*). Over time of course their relevance diminished as the centralising power of the state increased as elsewhere in Europe.

Thirdly Mr Mackenzie argues that the jurisdiction of the Sheriff Court at Lerwick is established by the Sheriff Court (Scotland) Act 1971 and the Sheriff Court Districts (Alteration of Boundaries) Order 1996 which sets out, in Schedule 1, the arrangements for the division of Scotland into Sheriffdoms and Sheriff Court Districts with the Sheriff Court District of Lerwick comprising the local authority area of Shetland Islands, which Sheriff Court District falls in the Sheriffdom of Grampian highland and Islands. As the offences charged are alleged to have occurred within Shetland then, as I understand Mr Mackenzie to argue, this court clearly has jurisdiction (the offences not in any way being excluded from my jurisdiction).

Finally Mr Mackenzie drew my attention to the absence of any competing claims for the governance of Shetland and no dispute having been dealt with at the International Court of Justice anent the issue and that despite the wealth of the fishing grounds and oil interests off the Shetland shores (although I note that there were disputes before this court in 1969 involving Denmark and Germany, reported, along with a case involving Germany and the

Netherlands as the *North Sea Continental Shelf cases,* 1969 I.C.J. 3). This point was conceded by Mr Hill who also accepted that the governments of the United Kingdom, Denmark and Norway had entered into various multilateral treaties in which the integration of Shetland as part of the United Kingdom has been accepted. For example:

1. UK / Norway Double Taxation Convention signed 12 October 200, entered into force 21 December 2000;
2. The North Sea delimitation agreements between Norway and the UK of 1965 between the UK and Denmark in 1971 (altering a point in the 1966 agreement), between the UK and the Netherlands in 1965 (amended in 1971) and between Denmark and Germany, Germany and the Netherlands and Germany and the UK which clearly shows that all of the UK including Shetland lies to the west of the boundaries between the UK , Norway and Denmark; and
3. the agreements between the UK and Norway in relation to the North Sea Frigg field;

Discussion

Eloquent and as heavily researched as his submissions may be I consider that Mr Hill is deluded by a rather romantic and unrealistic view of the way the relationship between Scotland and Shetland developed from before, around the time of and after the time of the pawning of Shetland to the Scottish Crown in 1469. To coin a phrase which Forte uses (at page 90 of his paper *Black Pattie and Andro Umfra* (supra) there is an allegorical quality about the argument and as Forte does, in relation to the *Earl of Orkney v Vinfra* case (1606) Mor 16481, we need "to peer beneath the thin patina of the narrative" to see that there is no substance to Mr Hill's contention, a position accepted by the thousands of litigants from Shetland who have accepted the jusisdiction of the Scottish Crown and Courts since the late 15th century. Even in the many cases before the Court of Session where the applicability of and implications of the udal background to Shetland land holding have been considered the jurisdiction of the Scottish courts to determine the issue has been accepted (in addition to the cases already mentioned the most notable of these cases are *The Lord Advocate v Balfour* (1907) 15 S.L.T. 7; *Shetland Salmon Farmers Association v Crown Estate Commissioners* 1991 S.L.T. 166; *Lord Advocate v University of Aberdeen and Budge* 1963 S.C. 533; and *Smith v Trustees of Harbour of Lerwick* (1903) 10 S.L.T. 742).

It seems to me that Mr Hill has seriously misguided himself as to the inferences to be drawn from the various historical events. I do not propose to discuss these in detail. Such detail is of more interest to historians than to a 21st century jurist. Suffice it to say that I am grateful to Mr Hill for providing the source of a concise summary of the historical position which sets this discussion in context. This is taken from the paper Shetland as it is in *The Shetland Report* (supra) at page 19:

"Shetland is different. This is no doubt a commonplace for Shetlanders. It is not, however, something which is necessarily recognised beyond the Islands. Such recognition is, however, an essential starting-point for an examination of Shetland as it is.

It should be said that this difference is first one of perception. Shetlanders see themselves as different, as a unique contained historic community. This perception is supported by geography and history. Shetland is remote. It is about 700 miles from London, 300 from Edinburgh, 200 from Bergen in Norway, 180 from Aberdeen and 55 from Orkney. Historically the Shetland and Orkney islands were the last part of the kingdom of Scotland to be incorporated. The nature and extend of this incorporation, when in 1468-9 the lands and

rights of the Norwegian Crown in the Islands were pledged to the Scottish Crown, has been the subject of much argument (see Appendix 1). What seems clear is that the original Norse stock of the Islands had already been diluted by Scottish incomers; the earldom and Bishopric of Orkney had been regularly in Scots hands since the fourteenth century, and the Archdeaconry of Shetland was in Scots hands as early as the 1380s, so that even Shetland though screened from Scottish influence in secular affairs, was exposed to that influence through the Church; that nevertheless the Norse Law continued to operate in the Islands side by side with Scots Law until the Privy Council Act of 1611, having been reaffirmed in its validity in 1504 and 1567; that the Udal system of land-holding and succession of the title survived considerably longer, being upheld in law as late as 1893; but that whatever vestigial claims the Norwegian connection has, Shetland has been effectively an integral part of first the Scottish and then the United Kingdom State since at least the early seventeenth century.

This may appear to contradict the Shetlanders' sense of difference. It certainly makes it clear that the present Shetland constitutional position is not analogous to that of the Channel Islands or the Isle of Man. In face, however, since the sense of difference does not rest on constitutional bases, it does no more than mitigate it."

As a 'soothmouther' myself I am happy to recognise the differences in Shetland. However I, like others, recognise that it cannot be the case that as Mr Hill argues no courts have jurisdiction, no modern laws apply and only land-holders have substantial (or sovereign) rights.

At an early stage in proceedings Mr hill attempted to argue that once he had raised the question of jurisdiction it was for the Crown either in the form of the prosecutor or the Court to 'prove' jurisdiction. His authorities for this proposition are a number of American cases referred to at paragraph 1.8 of his submission. He was unable to provide me with copies of these cases but I was able to recover a copy of *Melo v the United States* 505 F2d 1026. This case related to proceedings against the US postal services by an employee involved in an accident with a postal vehicle. There was a rule that an employee such as the plaintiff had to exhaust administrative remedies before resorting to the courts. The dispute was primarily about whether that had been done. The quote Mr Hill incorporates in his submission is more fully stated in this extract from the decision of Senior Circuit Judge Van Oosterhout: "The trial court, by reason of the plaintiff's failure to exhaust her administrative remedies acquired no jurisdiction over the plaintiff's claim. When it clearly appears that the court lacks jurisdiction, the court has no authority to reach the merits. In such a situation the action should be dismissed for want of jurisdiction". Clearly that decision is of not of general application as contended by Mr Hill and is of no relevance to the question of jurisdiction of courts in Scotland. Interestingly, in searching for copies of the cases, I came across a website listing all of those (referred to by Mr Hill as being authorities on jurisdiction) on the website of someone by the name of Schiff who seems to be active in the US anti-taxation lobby. Mr hill accepted that it was likely that this is where he found these references.

As far as I can see, and as acknowledged by Mr Hill, there has been no active pursuit by any nation, other than Scotland of the right of governance over Shetland since the Treaty of Breda in 1667 (in which the English representatives of the King of Scotland and England agreed to a clause being inserted leaving open in all time a Danish claim to the Northern Isles). Both Norway and Denmark have had opportunity to do so both before and after separation of their Crowns. They have not done so and indeed have entered into treaties on the basis of UK

jurisdiction over these islands. It would be safe to say that the matter seems settled in International law. It also seems clear to me that the population of Shetland has accepted the jurisdiction of the Scottish Courts and Crown since 1469. And not simply in an a quiescent way for when the inhabitants of Shetland had complaint about Lord Robert Stewart and Laurence Bruce co-partner in the alleged oppression of the people it was to the Scottish crown that they turned for redress in 1575 in an action which hardly justifies the description of a cowed population (see Balfour, *Oppressions of the Sixteenth Century in the Islands of Orkney and Zetland from Original Documents,* Maitland Club, 1859).

Mr Hill was reluctant to accept that the implication of his argument is that only udal landowners (such as himself) in Shetland would have right to determine the future of Shetland but that does seem to me to be one of the implications of his argument. I am satisfied therefore that whatever the theoretical rights and wrongs of actions of Kings Queens and their representatives 500 years ago the population of Shetland (and not just the land owners) has accepted that it is to the Scottish courts that they look to assert their rights and for the enforcement of the criminal law.

I accordingly repel the preliminary plea.