THE CASE OF ANTONIO RIVERO AND
SOVEREIGNTY OVER THE FALKLAND
ISLANDS

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When, on 2 April 1982, Argentina provoked an international crisis and a war by invading the Falkland Islands, it made certain that the old argument about the right to possess the islands would be reopened and that the rival claims would be examined and discussed by legal experts and historians in many countries. Inevitably, in view of the loss of life which took place, the domestic political significance of the Falklands campaign and the continuing costs involved, that process of questioning (and, in some cases, doubting) has been most intense in Britain, where more pages have been devoted to the history of the Falkland Islands in the course of one year than in the previous two hundred.

It should be stated at the outset that any clarification which may be attempted of the events of 1833 cannot have direct bearing on the present or the future, for in addition to the argument about 'the historical facts' there is an argument about prescriptive rights based on a century and a half of peaceful rule and occupation and a yet more persuasive argument based on the right of a distinctive community, however small, to be governed in a way it finds acceptable and to enjoy civil liberties which have been sadly lacking in Argentina of late. Nevertheless, when history is so much in dispute, it can only be helpful to put the record straight as far as possible.

The purpose of the present short article is to throw a little light on an episode which has hitherto been referred to inaccurately and in doing so to demonstrate that at the time when Britain was asserting its sovereignty over the Falkland Islands against the claims of the United Provinces of the River Plate (soon to be known as Argentina) there was no clear consensus within the British government as to the grounds on which sovereignty was claimed.

After the British garrison at Port Egmont was withdrawn in 1774, British interest in the Falkland Islands lapsed for fifty-five years. A Spanish presence was maintained on East Falkland until 1811 and the colony based there seems to have regarded the whole group as its territory, with occasional visits being paid to the demolished fort at Port Egmont on Saunders Island to check that the British had not returned. In 1820 Colonel Jewett visited Port Louis on East Falkland (which, as Puerto de la Soledad, had been the seat of the Spanish colony) and formally claimed the Islands for the United Provinces of the River Plate and made his act known to the captains of those vessels which he found moored there – of which six, at least, were British, and ten American.¹ No international acknowledgement was given to this event, but

the information that Jewett had claimed the islands was available in London before long, for an official announcement of the United Provinces' act appeared in *The Times* on 3 August 1821, and one of the British captains present, the explorer James Weddell, described what had happened in his book *A voyage towards the South Pole*, published in London in 1825 and dedicated to the First Lord of the Admiralty, Lord Melville. No protest was made.

It was not until 1826, however, that any settlement of the islands got under way and it began as a commercial venture organized by one Louis Vernet, a merchant originally from Hamburg, who enjoyed the support and encouragement of the government in Buenos Aires. Vernet's activities attracted the attention of Woodbine Parish, the British consul-general in Buenos Aires, who, in 1829, alerted the Foreign Office in London to what was happening. It was Parish's belief that Vernet would positively welcome the possession of the islands by Britain. Once he had communicated this view to London in April 1829 it was understandable that the Foreign Office should not consider Vernet's activities to be strong evidence of state activity by the United Provinces.

On 10 June 1829, however, the government in Buenos Aires issued two decrees, one setting forth its claim to sovereignty over the Falkland Islands by virtue of inheritance from the Spanish viceroyalty of La Plata, on the principle of *uti possidetis*, and the other declaring Vernet to be 'Political and Military Governor' of the Islands.

This news, following Parish's representations and set against the desire of the Admiralty to obtain a South Atlantic station, sparked off a series of hurried consultations in London. On 9 July Lord Aberdeen, the foreign secretary, requested a legal opinion on the possession of the Falkland Islands from Sir Herbert Jenner, the king's advocate-general. For this purpose he provided Jenner with a brief note of the historical facts, which concluded with the remark that 'it does not appear that any settlement has since been formed upon these Islands'. Within a day or two of this the Colonial Office circulated a memorandum setting out the advantages of 'resuming possession' of the islands, with particular reference to the possible replacement of Australia as a penal colony and with the comment that Buenos Aires now has 'some thoughts of reoccupying them'.

A fortnight later the matter reached the desk of the prime minister, the duke of Wellington, via the colonial secretary, Sir George Murray, who appended to the relevant papers a note stating his opinion that 'the interval between the cessation of the power of Old Spain and the consolidation of that of the new governments in South America would be the best time for our resuming our former possession of the Falkland Islands', and that though he had not yet discussed it with Lord Melville (first lord of the Admiralty) he believed the latter to be 'very sensible of the importance, in a naval point of view, of the occupation of those islands'.

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3 Parish to Lord Aberdeen, 25 April 1829, Colonial Office Papers, Public Record Office CO 78.2, fo. 160 v.
5 Unsigned memorandum, 10 July 1829, Colonial Office Papers, Public Record Office CO 88.2, fo. 138.
Wellington took only a day or two to peruse the papers and reach his conclusion: 'It is not clear to me that we have ever possessed the sovereignty of all these islands. The Convention [of 1771] certainly goes no further than to restore to us Port Egmont, which we abandoned nearly sixty years ago.' He went on to say that even if Britain's claim had been undisputed he would have been reluctant to attract 'the attention and jealousy of other Powers by extending our possessions'. In this case, since the claim to more than Port Egmont was both disputed and doubtful, 'it is very desirable to avoid such acts'. At the same time the duke appreciated that it would be well to prevent the French and the Americans from settling the islands and to this end he suggested a discreet but firm approach to the government in Buenos Aires telling it that Britain would not allow any settlement 'which shall be inconsistent with the King's acknowledged right of sovereignty'.

Three days after this Sir Herbert Jenner came up with his legal opinion of the case. The essence of it was that the Spanish claim, from which the claim of the United Provinces derived, had never been acknowledged by Britain and that therefore the United Provinces' claim could only be sustained if it were believed that the British evacuation of Port Egmont in 1774 amounted to an abandonment of the right acquired 'by original discovery and subsequent occupation'. However, in Jenner's opinion, 'the symbols of property and possession which were left upon the Islands sufficiently denote the intention of the British Government to retain those rights which they had previously acquired'.

The outcome of these deliberations was that Wellington's idea of a discreet warning to Buenos Aires was combined with Jenner's argumentation to produce the protest note which Woodbine Parish delivered to the Buenos Aires foreign ministry on 19 November 1829. This stated that in issuing its decree of 10 June the Buenos Aires government was assuming an authority incompatible with British rights of sovereignty over the Falklands.

There the matter rested until 1831 when Vernet's settlement was sacked by the U.S. Lexington in reprisal for his attempts to protect his fishing monopoly against American vessels. The resulting dispute between the U.S.A. and the United Provinces continued through 1832 and was still unresolved at the end of that year, when the Clio, commanded by Captain Onslow, called first at Port Egmont and then, on 2 January 1833, at Port Louis, to assert British sovereignty. According to Goebel, the American envoy, sent to Buenos Aires in connexion with the Lexington incident, had, before leaving in September 1832, dropped clear hints to the British minister that the U.S.A. might welcome British action.

The incident with which we are principally concerned occurred in August 1833 after Onslow had departed, leaving Vernet's agents and other assorted traders once more in sole possession of the islands. On 26 August 1833 a series of bloody murders took place at Port Louis. The victims were an Englishman named Matthew Brisbane (Vernet's superintendent), an Irishman named William Dickson (Vernet's storekeeper, entrusted by Onslow with the custody of the British flag), Juan Simon (one of Vernet's farm managers, of South American, or possibly French origin), an elderly German trader named Wagner and one Don Ventura Pasos. The murderers were three of Vernet's gauchos and five convicts, apparently South American.
Indians. The ringleader was one of the gauchos, Antonio Rivero, a 26-year-old from Buenos Aires who had been on the island since about 1831 and whose name had been included on a list drawn up by Onslow the previous January.  

The innocent survivors of this incident fled into what is now known as the Camp, and it was not until the arrival of H.M.S. Challenger in January 1834 that order was restored and the culprits rounded up. For a year, from March 1834 to March 1835, the prisoners were held at Rio de Janeiro awaiting a suitable occasion for them to be shipped to England, along with a number of witnesses who had also been detained. The problem of what to do with them exercised, among others, the new colonial secretary, Mr Spring Rice, who believed that 'as the Falkland Islands are an undoubted possession of Great Britain there can be no question as to the right which His Majesty possesses of ordering the Murderers to be sent home and to be submitted to the ordinary course of the law in this country'. However, he felt that this course of action was not ideal and that the Admiral on the South America station (i.e. at Rio) should find an alternative means of seeing justice done. Spring Rice was also of the opinion that it was not necessary to keep Lieutenant Smith of H.M.S. Challenger permanently on the Falklands, because the maintenance of a garrison ashore 'is not necessary' for the preservation of sovereignty rights.

Eventually the prisoners were transferred to the sloop Snake, which set sail for Spithead, arriving there on approximately 10 May 1835, and then proceeding to Sheerness. One of the prisoners had died while at Rio and another had turned king's evidence, leaving six men to stand trial. Responsibility for the men now passed to the Home Office and a legal problem arose. Could the men be tried in Britain for murders committed abroad? The answer was 'yes', under an act of 1828 (9 Geo. 4 c31, section 7), provided that it could be demonstrated that they were His Majesty's subjects.

With this in mind the Home Office applied to the law-officers on 16 May 1835 for answers to three questions: 'Whether these Prisoners are liable to be prosecuted under the provisions of the Act 9 Geo. 4 c31, s.7 or by any other means for the murder of all or any and which of the individuals above stated?'; 'Whether the Evidence will be sufficient to lead to their conviction?'; and 'Whether under the circumstances, and with reference to whether it might be fit to execute judgement upon them in case of a Conviction they would recommend a prosecution?'.

The law-officers whose opinion was sought were the king's advocate-general Sir John Dodson, the attorney-general Sir John Campbell and the solicitor-general Sir Robert Rolfe. It seems likely that the first of these contributed most to the solution of the problem since his role was that of 'standing adviser to the Crown upon questions of international, maritime and ecclesiastical law'. Dodson had succeeded...
Jenner in this non-political office in 1834. Campbell and Rolfe had no specialized knowledge of international law, had been in their posts for barely a fortnight, having come in with the new administration of Viscount Melbourne and, in Campbell’s case at least, were heavily involved in other matters. 

An Opinion was delivered on 2 June 1835. It was to the effect that (a) the prisoners could be prosecuted under 9 Geo. 4, c31, that (b) ‘the Evidence would be sufficient to lead to their conviction’, but that (c) ‘under all the circumstances it appears to us that in case of a conviction the sentence could not justly be carried into execution and therefore we cannot recommend a prosecution’. 

Though the text of the Opinion covers twenty-three large sheets, there is no detailed argumentation: most of the space is taken up with verbatim transcriptions of documents such as the exchange of notes of 1771, the instructions given to Captain Onslow, the written testimony of the witnesses and the record of the interrogation of the suspects. 

The only explanation of the conclusions comes in the section immediately preceding them:

…it is submitted that after the possession taken by Commodore Onslow the Settlement in Berkeley Sound became a part of and within the Dominions of His Majesty and thus these individuals (altho’ Foreigners and originally settled there under a Foreign Dominion) being resident within the King’s Dominion and therefore entitled to the King’s protection and owing allegiance to him became subjects of His Majesty within the meaning of the Statute.

The justification for not prosecuting would seem to be the point made in parentheses. The law-officers seem to be arguing that the prisoners are technically British subjects, but they were not so when they settled on the islands. It may also have been in their minds that, although British subjects, none of those present on the islands when the murders were committed in August 1833 was actually in receipt of ‘the King’s protection’ because there was no British authority or representative there at all. Whatever the reason for not recommending prosecution, however, the main interest of the passage from the Opinion quoted lies in something else.

It is said in the Opinion that the Falkland Islands became ‘a part of and within the Dominions of His Majesty’ when Captain Onslow took possession of them in 1833 and that previously they had been under ‘a Foreign Dominion’. This can only refer to the United Provinces for no other state had made claim to the islands since the Spanish departed in 1811. The law-officers knew about the plaque left at Port Egmont in 1774, but they must have concluded (like the duke of Wellington, but unlike Sir Herbert Jenner) that this was not sufficient to sustain a claim to the whole group. It is notable that they refer not to the Falkland Islands, but to the ‘Settlement on Berkeley Sound’ (i.e. Port Louis on East Falkland) having becoming part of His Majesty’s Dominions in 1833.

A further hint of scepticism about the continuity of British sovereignty assured by the plaque is contained in the sentence which, earlier in the Opinion, links the documents relating to 1771 to those of 1832–3:

From this period it would seem that the attention of the British Government was altogether withdrawn from these islands until about the year 1829.

Nowhere in the Opinion is there any indication that the writers of it were aware that their reference to ‘foreign dominion’ over Port Louis before 1833 was 

19 Ibid. p. 22.
20 Ibid. p. 3.
inconsistent with the official British claim to sovereignty over the islands, nor do they cast any doubt upon the validity of the decision to assert possession in 1833.

Later in the nineteenth century there seems to have formed a definite consensus among international lawyers that sovereignty could not be asserted or maintained solely by the erection of a plaque. One of Sir John Dodson's successors as (queen's) advocate-general, Sir Robert Phillimore, was to write in 1854:

... writers on international law agree that Use and Settlement, or, in other words, continuous use, are indispensable elements of occupation properly so called. The mere erection of crosses, landmarks and inscriptions is ineffectual for acquiring or maintaining an exclusive title to a country of which no real use is made.21

A few pages further on the same writer notes that:

... A different opinion appears, indeed, to have been entertained by the officers of Great Britain in 1774, at the period of her temporary abandonment of the Falkland Islands.22

He might have added that a different opinion seems to have also been held by his predecessor in office, Jenner, in 1829, though not, perhaps by Dodson in 1835.

The last man to hold the office of queen's advocate-general before it lapsed in 1872 (to be replaced in large measure by the modern post of Legal Adviser to the Foreign Office) was Sir Travers Twiss, who agreed on this point with Phillimore. 'Unless', he writes, 'discovery has been followed within a reasonable time by some sort of settlement, the presumption arising out of notification is rebutted by non user, and lapse of time gives rise to the opposite presumption of Abandonment.'23

Twiss does not refer in his work to the example of the Falkland Islands, but in support of his view he quotes a statement made in 1826 by the British commissioners to a British–U.S. conference on questions of international law. The quotation sets out a hierarchy of acts leading to the acquisition of sovereign title, beginning with 'mere accidental discovery', then exploration, formal taking of possession, occupation, and 'settlement more or less permanent'. 'It is only', the commissioners state, 'in proportion as first discovery is followed by any or all of these acts that such title is strengthened and confirmed.'24

This formula produces no clear answer applied to the Falkland Islands in 1833 because it does not tell us how to view a situation where rival claimants can both point to certain, but not all of the acts in the hierarchy. However, it is doubtful that ten years of settlement limited to the surroundings of Port Egmont, followed by fifty-five years of neglect could qualify as 'more or less permanent' settlement.

When we recall that Jenner, in 1829, was confident that the plaque left in 1774 was sufficient to sustain British claims and that Spring Rice in 1834 thought it quite unnecessary to keep a garrison on the islands in order to preserve title, we are bound to conclude that the question was at that time an open one and was only later clarified in the minds of such advisers to the Foreign Office as Phillimore and Twiss. Dodson, we surmise, would have tended to agree with the latter.

The British admiral on the South America station, however, would have agreed with Jenner and Spring Rice had he known what their view was, for when, in September 1835, he had the job of supervising the repatriation of the surviving prisoners (now reduced to four) he referred, in a note to the British chargé d'affaires

22 Ibid. p. 349.
at Buenos Aires, to some of them having been sent as convicts to the Falklands, ‘to which, being a British possession, the Government had clearly no right to send them’.  

The prisoners had been repatriated because, if they were not to be put on trial in Britain, there was nothing else to do with them. Once the law-officers’ opinion had been digested in the Home Office, the Admiralty was asked, on 16 June 1835, to return them to South America, ‘of which they appear to be natives’.  

Rivero was released in Montevideo. Only much later when the loss of the ‘Malvinas’ became a national obsession under Peron and his successors did the name become famous in Argentina. Rivero was hailed then as a patriotic rebel against the usurping British and became the object of a minor cult. In the 1960s his most enthusiastic admirers formed a ‘Commission Pro Monumento a Antonio Rivero’. Then in 1972 there appeared a debunking history by J. L. Almeida which set the record straight and established beyond doubt that Rivero did not act with patriotic motives and could not have rebelled against the British because, at the time of the murders, there was no British presence on the islands against which to rebel.

Despite Almeida’s efforts Rivero had his moment of posthumous glory in April 1982 when for a few days only, Port Stanley was renamed in his honour Puerto Rivcro, a possibility of which he can scarcely have dreamt when he entered Vernet’s service as a gaucho in 1831, or when in the early summer of 1835 he languished in a guardship off faraway Sheerness.

26 Note added on 16 June 1835 to letter from Phillipps to Hay, 4 June 1835, Colonial Office Papers, Public Record Office CO 78.2, fo. 90.
27 J. L. Almeida, Que hizo el gaucho Rivero en las Malvinas (Buenos Aires, 1972).