

SCOTTISH NATIONALITY LAW

INTRODUCTION

Two points are made in this submission,

(1) Scotland had its own nationality law at the *Act of Union*, and

(2) elements of this nationality law have remained in effect,

which bear on the current devolution process.

NATIONALITY LAW IN 1707

Under common and statutory law, Scottish subjects were either 'natural born'

(a) by birth in Scotland

(b) by birth in Nova Scotia

(c) by birth abroad, the father being born in Scotland

(d) by marriage

or were deemed 'natural born'

(e) under the Franco-Scottish alliance

(f) under the Bank of Scotland charter

(g) by Act of Naturalisation

THE ACT OF UNION

According to Manningham-Buller (perhaps following Plowden):

- article IV of the *Act of Union* assumes Scottish subjects are to be subjects of the United Kingdom;

- 'the *Act of Union* must not be treated as repealing all the statutory provisions in England and Scotland providing for either English or Scottish nationality';

- unless pre-Union English (and Scottish) nationality law applied after the Union, 'so as to govern British nationality, there was no British nationality at all in existence when the Act of Union took effect';

- pre-Union nationality law was 'regarded as still in force after the Union';

- those who became English (or Scottish) before or after the Union, 'automatically became citizens of the United Kingdom by virtue of the Act of Union';

- subsequent common or case law did not necessarily cease Scottish subject status.

It may be added that article XVIII implies preservation of public and private rights.

NATIONALITY LAW FROM 1707

Several rights under the Nova Scotia charter were preserved, regardless of constitutional change and desuetude, into the 19th century; by analogy, it is possible birth in Nova Scotia could still confer Scottish subject status until 1867 or later.

According to Dr Talbott's research, France appears to have recognised Scottish nationality until at least 1907, and in a limited sense still does.

The Bank of Scotland charter was confirmed by Parliament on several occasions in the 18th century, and in 1802. The last clause was held to make certain investors Scottish, and hence British, subjects up to 1820.

Parliament, on occasion, distinguished between Scottish and other British subjects.

Two *Acts of Naturalisation* were passed on 25 March 1707 for the benefit of named foreign Protestants. At least one *Act* is of unlimited extent, making Jean Henri Huguetan (1667-1749), 'and the children of his body, and all persons lineally descending from him, born or hereafter to be born' Scottish subjects. The *Act*, unlike the similar *Sophia Naturalisation Act 1705* (repealed 1948, and the basis of the Hanover nationality case), may still be valid.

There appears to be no legislation ceasing or limiting the status of Scottish subject.

SCOTTISH SUBJECT STATUS 1854-1964

The most important recent legal recognition of Scottish nationality is the *Registration of Births, Deaths and Marriages Act (Scotland) 1854*, and subsequently amended, possibly up to 1964, which may be taken to replace or modify the common law.

Section X implies that Scottish subject status was acquired by birth in Scotland.

It also provided for the registration with the Scottish authorities of 'foreign births', where a parent was a Scottish subject, through the British consular network. Registration presumably conferred Scottish subject status.

The status of a child of a Scottish subject, born outside Scotland but elsewhere in the United Kingdom and colonies, dependencies, or dominions (at least before the *Statute of Westminster* or local citizenship legislation came into effect), is not clear.

Some such births were registered in the Foreign Births Register; but none of the territories were 'foreign'; and, therefore, some British and Commonwealth citizens, born outside Scotland but of Scottish descent, may be Scottish subjects 'by birth'.

The reference in the *Act* to Scottish subject status was apparently accepted, without comment, within the United Kingdom and what is now the Commonwealth.

CONCLUSIONS

Elements of Scottish nationality law have existed after 1707, and may still do so.

Some Commonwealth citizens, not otherwise entitled under the *British Nationality Acts* of 1948 and 1981, may, on the basis of Scottish descent, and the inter-action between these *Acts* and the *Act of Union*, the *Statute of Westminster*, and the *Immigration Act* 1971, have a claim to some form of British citizenship, with or without the right of abode. Some foreign nationals may also have a claim to British citizenship.

It is not clear whether the Scottish government, or the government of the United Kingdom, or both, now have authority to define Scottish subject status.

There may be comparable issues with regard to other 'reserved matters'.

Ian Martlew

26 February 2015

REFERENCES

According to some authorities, there was neither Scottish nor English nationality law before 1707 (e.g. *Scotland analysis: Borders and Citizenship*, HM Government, January 2014), nor is there legal recognition of Scottish nationality (e.g. Atwood, *The Tapestry of the Law: Scotland, Legal Culture and Legal Theory* (Springer, 1997, 25). On the other hand, e.g. Parry remarks that Calvin's case does not imply English recognition of Scottish nationality law in 1608 ('The Duty to Recognise Foreign Nationality Laws', *Zeitschrift fur ausländisches öffentliches Recht und Völkerrecht*, 1958, at www.zaoerv.de). Such recognition seems implicit in the *Act of Union*.

On natural born Scottish subjects, see J M Ross (formerly Head of the Nationality Division of the Home Office), 'British Nationality Law: *Soli* or *Sanguinis*?' in C H Alexandrowicz (ed.), *Grotian Society Papers: Studies in the history of the law of nations* (Nijhoff, 1972), 1-22, citing *Leslie v Grant*, 'a Scottish case decided in the House of Lords in 1763 (2 Paton 68)'. I have relied on the accounts in Paton, *Reports of Cases decided in the House of Lords upon appeal from Scotland from 1753 to 1813* (Edinburgh, 1849, 68-78).

For the remarks of Manningham-Buller, then Attorney-General, in argument during the *Hanover* nationality case, HL [1957] AC 436, especially 443-444; Plowden, *An investigation into the native rights of British subjects* (London, 1784, 123).

Under the charter, all subjects who settled in Nova Scotia "and all their children and posterity who shall chance to be born there, and all others adventuring thither, shall have and possess all liberties, immunities and privileges, of free and natural subjects of our kingdom of Scotland, or of our other dominions, as if they had been born there." On the legal history of the Scottish colony of Nova Scotia, and the persistence of Scottish private rights under e.g. article XVIII of the *Act of Union*, 'Scottish agricultural resources, and their neglect, in the western hemisphere', in *Journal of Agriculture*, 1851, 1-21.

On Dr Talbot's research, 'Franco-Scottish alliance against England one of the longest in history', 12 August 2011, at www.manchester.ac.uk/discover/news/article/?id=7313.

On the Bank of Scotland charter, see M S Beerbuhl, 'British Nationality Policy During the Napoleonic Wars', in Fahrmeir *et al.* (edd.), *Migration Control in the North Atlantic World: The Evolution of State Practices in Europe and the United States from the French Revolution to the Inter-War Period* (Berghahn, 2005), 55-72, and *ib.* *The Forgotten Majority: German Merchants in London*,

Naturalization and Global Trade 1660-1815 (Berghahn, 2014); and e.g. the parliamentary debate on the *Alien Bill* of 1 June 1818.

The *Bank of Scotland Charter* of 17 July 1695 and *Naturalisation Acts* of 25 March 1707 are available at www.rps.ac.uk. I assume that 'John Henry Huguetan' is identical with the banker.

The Sophia/Hanover case still features in the United Kingdom's *Nationality Instructions*.

The *Statute of Westminster* came into effect at different dates for the various dominions: for Australia, it came into effect with regard to the Commonwealth of Australia in 1939, but for the states in 1987. One state voted in a referendum in the 1930s to leave the Commonwealth of Australia; this may be a complicating factor.