

Cambridge University Press

978-1-107-12227-7 - Law and Authority in British Legal History, 1200–1900

Edited by Mark Godfrey

Frontmatter

[More information](#)

LAW AND AUTHORITY IN
BRITISH LEGAL HISTORY,
1200–1900

By presenting original research into British legal history, this volume emphasises the historical shaping of the law by ideas of authority. The essays offer perspectives upon the way that ideas of authority underpinned the conceptualisation and interpretation of legal sources over time and became embedded in legal institutions. The contributors explore the basis of the authority of particular sources of law, such as legislation or court judgments, and highlight how this was affected by shifting ideas relating to concepts of sovereignty, religion, political legitimacy, the nature of law, equity and judicial interpretation. The analysis also encompasses ideas of authority which influenced the development of courts, remedies and jurisdictions, international aspects of legal authority when questions of foreign law or jurisdiction arose in British courts, the wider authority of systems of legal ideas such as natural law, the authority of legal treatises, and the relationship between history, law and legal thought.

MARK GODFREY is Professor of Legal History at the University of Glasgow, where he teaches private law and legal history.

Cambridge University Press

978-1-107-12227-7 - Law and Authority in British Legal History, 1200–1900

Edited by Mark Godfrey

Frontmatter

[More information](#)

Cambridge University Press

978-1-107-12227-7 - Law and Authority in British Legal History, 1200–1900

Edited by Mark Godfrey

Frontmatter

[More information](#)

LAW AND AUTHORITY IN
BRITISH LEGAL HISTORY,
1200–1900

Edited by
MARK GODFREY



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press

978-1-107-12227-7 - Law and Authority in British Legal History, 1200–1900

Edited by Mark Godfrey

Frontmatter

[More information](#)

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781107122277

© Cambridge University Press 2016

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2016

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data

Law and authority in British legal history, 1200–1900 / edited by Mark Godfrey.
pages cm

Includes bibliographical references and index.

ISBN 978-1-107-12227-7 (hardback)

1. Law – Great Britain – History. 2. Authority. I. Godfrey, Mark, (Law teacher), editor.

KD606.L37 2016

349.41 – dc23 2015032899

ISBN 978-1-107-12227-7 Hardback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Cambridge University Press

978-1-107-12227-7 - Law and Authority in British Legal History, 1200–1900

Edited by Mark Godfrey

Frontmatter

[More information](#)

In Memory of
William M. Gordon
(1933–2012)
Emeritus Douglas Professor of Civil Law
University of Glasgow

Cambridge University Press

978-1-107-12227-7 - Law and Authority in British Legal History, 1200–1900

Edited by Mark Godfrey

Frontmatter

[More information](#)

CONTENTS

<i>List of contributors</i>	<i>page</i>	ix
<i>Preface</i>		xi
1 The judicial interpretation of legislation in later thirteenth- and early fourteenth-century England		1
PAUL BRAND		
2 The authority of parliament and the scope of the Statute of Uses 1536		13
N.G. JONES		
3 Developing a prerogative theory for the authority of the Chancery: the French connection		33
IAN WILLIAMS		
4 Authority and precedent		60
DAVID IBBETSON		
5 Legislation and authority in early-modern Scotland		85
ANDREW R.C. SIMPSON		
6 The sources of early Scots consistorial law: reflections on law, authority and jurisdiction during the Scottish Reformation		120
THOMAS GREEN		
7 Conciliar authority and equitable jurisdiction in early-modern Scotland		140
J.D. FORD		
8 Legal authorities as instruments of conflict management: the long endgame of Anglo-Hanseatic relations (1474–1603)		170
ALAIN WIJFFELS		

viii	CONTENTS	
9	History and the justification of governmental authority and individual rights in the age of John Locke and Samuel Pufendorf	192
	ANDREAS THIER	
10	The commissioners for claims on France and the case of the Baron de Bode, 1815–1861	212
	MICHAEL LOBBAN	
11	The authority of law in a bureaucratic framework: the nineteenth-century medicine stamp duty	250
	CHANTAL STEBBINGS	
12	The authority of treatises in English law (1800–1936)	274
	STEPHEN WADDAMS	
13	Maitland and Austin: legal history and legal thought in the late nineteenth century	293
	JOHN HUDSON	
	<i>Index</i>	329

Cambridge University Press

978-1-107-12227-7 - Law and Authority in British Legal History, 1200–1900

Edited by Mark Godfrey

Frontmatter

[More information](#)

CONTRIBUTORS

PAUL BRAND is Emeritus Fellow of All Souls College and Professor of English Legal History at the University of Oxford.

J.D. FORD is Professor of Civil Law at the University of Aberdeen.

THOMAS GREEN is an Honorary Research Fellow in the School of Law, University of Glasgow. From 2011 to 2014 he was a British Academy Postdoctoral Fellow in the School of Law, University of Edinburgh.

JOHN HUDSON is Professor of Legal History at the University of St Andrews.

DAVID IBBETSON is Regius Professor of Civil Law at the University of Cambridge and President of Clare Hall.

NEIL JONES is Reader in English Legal History at the University of Cambridge, and a Fellow of Magdalene College, Cambridge.

MICHAEL LOBBAN is Professor of Legal History at the London School of Economics.

ANDREW SIMPSON is Lecturer in the School of Law, University of Aberdeen.

CHANTAL STEBBINGS is Professor of Law and Legal History at the University of Exeter.

ANDREAS THIER is Professor of Legal History, Ecclesiastical Law, Legal Theory and Private Law at the University of Zurich.

Cambridge University Press

978-1-107-12227-7 - Law and Authority in British Legal History, 1200–1900

Edited by Mark Godfrey

Frontmatter

[More information](#)

X

LIST OF CONTRIBUTORS

ALAIN WIJFFELS is a Senior Research Fellow of the French Centre National de la Recherche Scientifique at the University of Lille-2 and teaches legal history and comparative law at the universities of Leiden, Leuven and Louvain-la-Neuve.

IAN WILLIAMS is Lecturer in the Faculty of Laws, University College, London.

Cambridge University Press

978-1-107-12227-7 - Law and Authority in British Legal History, 1200–1900

Edited by Mark Godfrey

Frontmatter

[More information](#)

PREFACE

The papers in this book represent a selection of those given at the Twenty-First British Legal History Conference, held at the University of Glasgow between 10 and 13 July 2013 on the theme Law and Authority. The timing was significant for Glasgow, because 2013 marked the tercentenary of the foundation of the Regius Chair of Law at the University of Glasgow, celebrated with a programme of public lectures and other events, which included hosting the Twenty-First British Legal History Conference.

This was the second meeting of the conference in Glasgow. Indeed, a distinctive feature of the conference since its first meeting in Aberystwyth in 1972 has been an emphasis on legal history in all parts of the British Isles, and it has been held variously at venues in England, Ireland, Scotland and Wales. Its first Scottish meeting was in Edinburgh in 1977, organised by Professor Alan Harding (whom the conference was delighted to welcome back to Glasgow in 2013), but was held in Glasgow for the first time in 1989, organised by the late Professor William M. Gordon and Dr David Fergus. And as their successor in the role, I would like to record my gratitude to both Bill Gordon and David Fergus for their advice and support in the planning of the 2013 conference.

It is to the memory of Bill Gordon that this book is dedicated with both affection and esteem. He was an early supporter of the British Legal History Conference from its beginnings in the 1970s. He had planned to attend the 2013 conference, but after a short illness died on 1 September 2012, aged seventy-nine.¹ Bill was Douglas Professor of Civil Law at the University of Glasgow from 1969 to 1999, having begun his career at the University of Aberdeen, where perhaps uniquely he was a pupil of both

¹ See the memorial page at www.iuscivile.com/people/gordon/ which includes links to tributes from Dr Douglas Osler, Professor David Carey Miller and Professor Hector MacQueen, and a full bibliography.

Cambridge University Press

978-1-107-12227-7 - Law and Authority in British Legal History, 1200–1900

Edited by Mark Godfrey

Frontmatter

[More information](#)

David Daube and Peter Stein.² He occupied the chair with distinction and in retirement remained active as a scholar, the range of his interests being well represented by his last two books – *Roman Law, Scots Law and Legal History. Selected Essays* (Edinburgh, 2007), and the third edition of *Scottish Land Law* (Edinburgh, 2009).³

Aptly enough, the theme of Law and Authority around which the 2013 conference was based is one which Bill Gordon had himself addressed very suggestively at the Edinburgh conference in 1977 in a paper on ‘Stair’s Use of Roman Law’.⁴ This paper analysed the approach to the authority of Roman law in Scots law taken by the most famous Scottish jurist of the early-modern period, James Dalrymple, Viscount Stair, in *Institutions of the Law of Scotland* (Edinburgh, 1681). Bill’s argument was that ‘insufficient stress has been laid on the role of natural law and equity in the Institutions, in mediating Roman law . . .’⁵ This theme has been explored and developed considerably in scholarship of the last thirty years on the history of early-modern Scots law. In particular, John Ford’s *Law and Opinion in Scotland during the Seventeenth Century* (Oxford, 2007) has opened up new perspectives in a remarkable way.⁶ This corpus of recent work on Scottish legal history seemed fertile ground from which to generalise a theme for the 2013 conference in Glasgow, especially given that Bill Gordon was a Glasgow professor, John Ford is a Glasgow graduate, and Stair himself was both.⁷

Accordingly, with a suitably broad interpretation of the theme, a total of eighty-seven papers at the conference addressed the ways law has been shaped historically by different forms and ideas of authority, and explored how sources of law and frameworks for their application had developed

² Omitted in Peter Birks’ listing of Daube’s pupils in ‘Roman Law in Twentieth-Century Britain’, in Jack Beatson & Reinhard Zimmermann, eds., *Jurists Uprooted. German-Speaking Émigré Lawyers in Twentieth-Century Britain* (Oxford, 2004), 250–251. For a first-hand account see William M Gordon, ‘David’s Teaching in Aberdeen’, in Ernest Metzger, ed., *David Daube. A Centenary Celebration* (Glasgow, 2010), 88–100.

³ Volume 1 of *Scottish Land Law* appeared in 2009, co-authored with Scott Wortley; Volume 2 awaits publication. Bill’s last publication to date appeared posthumously in 2013: William M Gordon, ‘*Communis error facit ius*’, in Andrew Burrows, David Johnston & Reinhard Zimmermann, eds., *Judge and Jurist. Essays in Memory of Lord Rodger of Earlsferry* (Oxford, 2013), 447–454.

⁴ William M. Gordon, ‘Stair’s Use of Roman Law’, in Alan Harding, ed., *Law Making and Law Makers in British Legal History* (London, 1980), 120–126.

⁵ Gordon, ‘Stair’s Use of Roman Law’, 121–122.

⁶ Reviewed by the writer in *Journal of Legal History* 29, 3 (2008), 369–372.

⁷ Stair did not hold a chair as such but was a regent at the university in the 1640s, having been a student there in the 1630s.

Cambridge University Press

978-1-107-12227-7 - Law and Authority in British Legal History, 1200–1900

Edited by Mark Godfrey

Frontmatter

[More information](#)

PREFACE

xiii

over time in relation to concepts of authority, or to the authority of other institutions, processes or actors within the legal order. Something like 180 delegates attended the conference, which was arranged in three parallel sessions over the four days of the meeting. The papers collected in this volume demonstrate the diversity of approaches in how the conference theme was explored, though in the interests of limiting the size of the volume as well as promoting thematic coherence the content was restricted to topics within the scope of British legal history. I am particularly sorry that the limit on the scope of the volume meant that papers by the many continental colleagues who attended the Glasgow conference are mostly not represented, though delighted that those of Andreas Thier and Alain Wijffels are included. The conference opened with John Ford's paper given as a keynote lecture in the first of three plenary sessions, the other two such lectures being given by Alain Wijffels and John Hudson. Sir John Baker also addressed the final plenary session on 'Dafydd Jenkins and the British Legal History Conference', though this is published elsewhere.⁸ I am indebted to the four speakers in question for delivering these more extended contributions.

I am grateful to the School of Law at Glasgow for its significant sponsorship of the conference and practical support. I would also particularly like to acknowledge the help of my colleague Professor Ernest Metzger, and the generous advice and support of Dr Neil Jones of Magdalene College, Cambridge, in relation to how the previous conference had been organised in Cambridge in 2011. Cambridge University Press has been extremely patient and helpful too, and I am very grateful to Finola O'Sullivan for her help, advice and encouragement. Finally, the generosity of the other sponsors is also gratefully acknowledged – Glasgow University Court, Glasgow City Council, The Journal of Legal History, The Irish Legal History Society, The Selden Society, The Stair Society, The Welsh Legal History Society, Brill, Cambridge University Press, Duncker und Humblot, Edinburgh University Press, Hart Publishing, Oxford University Press, Routledge, University of Wales Press, The Faculty of Advocates and The Law Society of Scotland.

⁸ Sir John Baker, 'Dafydd Jenkins and the British Legal History Conference', in Noel Cox & Thomas Glyn Watkin, eds., *Canmlwyddiant, Cyfraith a Chymreictod, A Celebration of the Life of Dafydd Jenkins 1911–2012* (The Welsh Legal History Society, Vol. XI, 2013).