

2016

Maitland, The Forms of Action at Common Law

William Hamilton Bryson

University of Richmond, hbryson@richmond.edu

Follow this and additional works at: <http://scholarship.richmond.edu/law-faculty-publications>



Part of the [Legal History Commons](#)

Recommended Citation

William Hamilton Bryson, *Maitland, The Forms of Action at Common Law*, in *The Formation and Transmission of Western Legal Culture: 150 Books that Made the Law in the Age of Printing* 431-433 (Serge Dauchy, et al., eds., Springer International Publishing 2016).

This Book Chapter is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

Studies in the History of Law and Justice 7

Series Editors: Georges Martyn · Mortimer Sellers

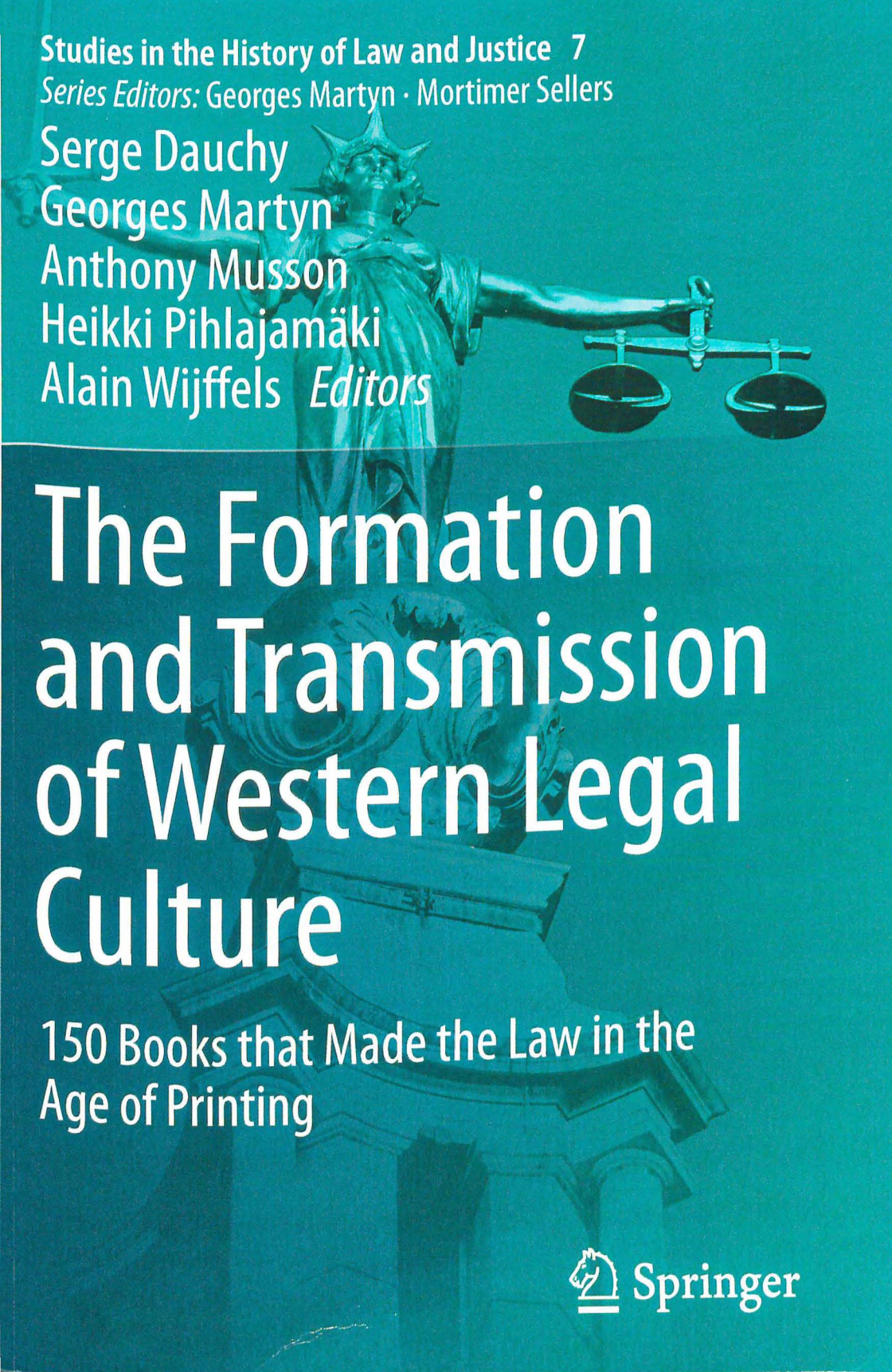
Serge Dauchy

Georges Martyn

Anthony Musson

Heikki Pihlajamäki

Alain Wijffels *Editors*



The Formation and Transmission of Western Legal Culture

150 Books that Made the Law in the
Age of Printing



Springer

The purpose of this book series is to publish high quality volumes on the history of law and justice.

Legal history can be a deeply provocative and influential field, as illustrated by the growth of the European universities and the *Ius Commune*, the French Revolution, the American Revolution, and indeed all the great movements for national liberation through law. The study of history gives scholars and reformers the models and courage to question entrenched injustices, by demonstrating the contingency of law and other social arrangements.

Yet legal history today finds itself diminished in the universities and legal academy. Too often scholarship betrays no knowledge of what went before, or why legal institutions took the shape that they did. This series seeks to remedy that deficiency.

Studies in the History of Law and Justice will be theoretical and reflective. Volumes will address the history of law and justice from a critical and comparative viewpoint. The studies in this series will be strong bold narratives of the development of law and justice. Some will be suitable for a very broad readership.

Contributions to this series will come from scholars on every continent and in every legal system. Volumes will promote international comparisons and dialogue. The purpose will be to provide the next generation of lawyers with the models and narratives needed to understand and improve the law and justice of their own era.

The series includes monographs focusing on a specific topic, as well as collections of articles covering a theme or collections of article by one author.

More information about this series at <http://www.springer.com/series/11794>

Serge Dauchy · Georges Martyn · Anthony Musson
Heikki Pihlajamäki · Alain Wijffels
Editors

The Formation and Transmission of Western Legal Culture

150 Books that Made the Law
in the Age of Printing

In collaboration with Naoko Seriu

 Springer

University of Richmond

APR 21 2017

Law Library

Editors

Serge Dauchy
CNRS – University of Lille
Lille
France

Georges Martyn
Ghent University
Gent
Belgium

Anthony Musson
School of Law
University of Exeter
Exeter
UK

Heikki Pihlajamäki
Faculty of Law
University of Helsinki
Helsinki
Finland

Alain Wijffels
Faculteit Rechtsgeleerdheid, Afdeling
Historische ontwikkeling
Leiden University
Leiden
The Netherlands

ISSN 2198-9842

ISSN 2198-9850 (electronic)

Studies in the History of Law and Justice

ISBN 978-3-319-45566-2

ISBN 978-3-319-45567-9 (eBook)

DOI 10.1007/978-3-319-45567-9

Library of Congress Control Number: 2016950743

© Springer International Publishing Switzerland 2016

This work is subject to copyright. All rights are reserved by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

The publisher, the authors and the editors are safe to assume that the advice and information in this book are believed to be true and accurate at the date of publication. Neither the publisher nor the authors or the editors give a warranty, express or implied, with respect to the material contained herein or for any errors or omissions that may have been made.

Printed on acid-free paper

This Springer imprint is published by Springer Nature

The registered company is Springer International Publishing AG

The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

Duguit's doctrine as a practico-legal basis for the socialist revolution (Duguit, however, opposed this adoption).

Le droit social, le droit individuel et la transformation de l'État is not the most elaborate publication of Duguit, but it gives a good insight in his reasoning and it contains the highlights of his important dual volume on the State from 1901-1903. It also has importance because it was translated in a number of languages, this way helping to distribute Duguit's ideas.

Online version (Paris 1908) in the *Internet Archive*.

Blanquer, Jean-Michel & Milet, Marc. 2015. *L'invention de l'État. Léon Duguit, Maurice Hauriou et la naissance du droit public moderne*. Paris: Odile Jacob; Bonnard, Roger. 1928-1929. Léon Duguit, 1859-1928. *Revue internationale de la théorie du droit* 3: 58-70; Melleray, Fabrice. 2011. *Autour de Léon Duguit*. Brussels: Bruylant; Pinon, Stéphane. 2010. Léon Duguit face à la doctrine constitutionnelle naissante. *Revue du droit public* 2010: 523-548; Pinon, Stéphane. 2011. Le positivisme sociologique dans l'œuvre de Léon Duguit, *Revue interdisciplinaire d'Etudes juridiques* 67: 69-93.

Bruno DEBAENST

- 135 -

The Forms of Action at Common Law

1909 (1936)

Frederic William MAITLAND (1850-1906)

Frederic William Maitland was born at London, England, on 28 May 1850. Maitland's family were educated gentry with several academic connections, one of which was his grandfather, the Rev. Samuel Roffey Maitland (1792-1866), a noted historian in his time. Frederic Maitland was educated at Eton College and Trinity College, Cambridge, receiving his B.A. in 1872. Afterwards, he was called to the bar at Lincoln's Inn in 1876 and had a successful practice as an equity and a conveyancing lawyer. However, he sought a more scholarly life, and, in 1884, he was appointed a reader in English law at Cambridge University and, in 1888, Downing Professor of the Laws of England. His professional career was spent as a law teacher and writer and a fellow of Downing College. He did not seek fame and fortune; he was a modest man, who was completely dedicated to his profession, the law and the history thereof. However, his excellence was recognised in his short lifetime, and he was awarded honorary degrees from the universities of Cambridge, Oxford, Glasgow, Moscow, and Cracow, and he was elected a corresponding member of the Royal Prussian Academy and of the Royal Bavarian Academy. He was one of the original fellows of the British Academy and the founder of the Selden Society. Maitland died on 20 December 1906 at Las Palmas, Grand Canary, where he had gone for health reasons. He was 56 years old.

Maitland was a prolific scholar in the field of English legal history. All of his publications were seminal and profound because he was genuinely interested in describing what actually happened rather than what he wished had happened. In

other words, he was a scholar not a polemicist attempting to use history to vindicate pre-existing political positions. He wrote sound history on the origins of Parliament, municipal corporations, and canon law in medieval England, but, perhaps, his most significant general work was *The History of English Law before the Time of Edward I* (1895). Even though there was a titular co-author, Sir Frederick Pollock (1845-1937), Maitland was the creator of this magisterial book. In addition to his expository works, he spent much of his professional life editing the documents that are the sources of English legal history. In particular, the medieval yearbooks, the reports of the law cases heard by the courts are to be noted. His was as great a legal mind as was that of the author of the book called *Bracton*, Sir Thomas Littleton (1407-1481), Sir Edward Coke (1552-1634), and Sir Matthew Hale (1609-1676).

The Forms of Action at Common Law was first published separately in Cambridge, at the University Press, 1936, [i-vii], viii-xi, [xii], 1-92, [93].

The 1936 edition of *The Forms of Action at Common Law* as transcribed by Alfred Henry Chaytor (1869-1931) and William Joseph Whittaker (1868-1931) begins with a 'Publishers' Note', which is a short bibliographical explanation of the history of the book. Then follows a table of contents, which appears to be Maitland's outline of each lecture. There are seven lectures and an appendix of 'Select Writs'. This work was originally published in 1909 together with Maitland's lectures on equity, and there were seven subsequent editions. In 1936, it was decided to provide a new edition of the lectures on equity with substantial annotations but to reprint the lectures on the forms of action unchanged and unannotated exactly as penned by Maitland himself.

Maitland's work is a series of lectures on the substantive common law of England delivered to his students in Cambridge. They are as good as anything that he published in his lifetime. These concise lectures for law students are a succinct and lucid summary of the old common law of England, and they have been the introduction to the subject for many generations of law students and lawyers throughout the common law world.

The forms of action are the medieval English categories of the substantive law. Thus, rights were described as dower, ejectment, trespass, assumpsit, covenant, detinue, trover, etc. (In the 18th century, the English jurists following the continental scholars began to redefine the common law of England in terms of property, contract, and tort.) The forms of action were put into operation by writs. Thus, the forms of action were substantive law, and the writs, or the writ system, were the procedural law. In 1873, with the first Judiciary Act, the common law writ system was abolished and replaced by a modernised English bill procedure modeled on the old procedure of the courts of equity. The writs were taken away, but the forms of action were not and thus subsist today. It was a clever turn of phrase by Maitland to say that 'the forms of action we have buried, but they still rule us from their graves' [p. 2]. However, this is not strictly accurate; the difference between a cause of action and an action is not observed. Note, for example, that, in actions sounding in assumpsit, the ordinary remedy is money damages, not specific performance, because of the origin of this branch of the law is in tort law (trespass) not contract.

This short, posthumous book articulates the essential legal scholarship of Frederic William Maitland's academic career. Here is *multum in parvo*.

Online version (Cambridge 1929) in *Hein Online*.

Bell, Henry Esmond. 1965. *Maitland: A Critical Examination and Assessment*. Cambridge (MA): Harvard University Press; Cameron, James R. *Frederick William Maitland and the History of English Law*. Norman (OK): University of Oklahoma Press; Elton, Geoffrey Rudolph. 1985. *F.W. Maitland*. London: Weidenfeld and Nicolson; Fifoot, Cecil Herbert Stuart. 1971. *Frederic William Maitland: A Life*. Cambridge (MA): Harvard University Press; Fisher, Herbert Albert Laurens. 1910 (repr. 1984). *Frederick William Maitland, Downing Professor of the Laws of England: A Biographical Sketch*. Cambridge: Cambridge University Press, repr. Buffalo (NY): William S. Hein.

W. Hamilton BRYSON

- 136 -

Principes de droit public
(*Principles of Public Law*)

1910

Maurice HAURIUO (1856-1929)

Maurice Hauriou was born in Ladiville (Charente, France) on 17 August 1856 and died in Toulouse (Haute-Garonne, France) on 12 March 1929. He studied law and defended his doctoral thesis in Bordeaux (1879). He passed the *Agrégation* in 1882 and spent his whole career as professor of law at the law faculty in Toulouse, of which he became Dean in 1906. His career spanned the Third French Republic, more precisely from the fall of Napoleon III to the threshold of the 1930s crisis, a period marked by the Franco-German opposition and by the establishment of the modern republican regime (national sovereignty, legislative primacy, secularism, public education etc.). In the field of public law, through the development of the case law of the Council of State, a true revolution of administrative law occurred, as well as a transition from a 'night-watchman' State to a welfare State. The place and role of the State in society changed completely. A Catholic, Conservative but Liberal, Hauriou educated himself in legal history and in sociology (1870-1880). He was, with Léon Duguit (1859-1928) and Raymond Carré de Malberg (1861-1935), one of the founding fathers of French contemporary public law. The controversy between Hauriou and Duguit, between public authority (Toulouse) and public utility (Bordeaux), remains alive even today, but cannot summarise Hauriou's work and thought, which goes much further and contributes to the theory of institutionalism.

Hauriou wrote some 350 articles but very few books. Some of these contributions are the result (sometimes unwillingly) of the lectures he gave at the University of Toulouse: *De la formation du Droit administratif français depuis l'an VIII (On the creation of French Administrative Law since the year VIII)*, Paris, 1893), *Précis de droit administratif (Handbook of Administrative Law)*, Paris, 1892), *Principes du*