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# THE MACHINERY OF JUSTICE

## An Introduction to Legal Structure and Process

LEWIS MAYERS

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## ABOUT THE AUTHOR

Lewis Mayers has practiced law in New York City for many years, as well as serving as counsel to several public bodies. Until 1959, he was Professor of Law at the City College, City University of New York. He has served as President of the American Business Law Association, and from 1959 to 1964 he was a consultant to the Institute of Judicial Administration. In 1967–68 he again taught at City College, City University of New York as a visiting professor of political science teaching constitutional law. Mr. Mayers is the author of, among other books, *The Law of Business Contracts, The Law of Business Corporations,* and *The American Legal System.*

## ABOUT THE BOOK

Dr. Mayers has outlined the agencies which operate the machinery of justice. He explains the relations among the various systems for administering justice, state and federal, in our complex society, including administrative and military tribunals. The author points out that study of legal rules and principles is unrealistic without an understanding of the actual way in which the power of adjudicating legal rights is organized and exercised.

# PREFACE

This book aims to present, necessarily only in outline, a picture of those agencies of government which adjudicate legal rights—whether between the state and the individual or between private parties.

It is difficult to overestimate the importance, for one seeking a knowledge of our law, of understanding the way in which the power of adjudicating legal rights is organized and exercised. The rules of law which define the rights of the individual, of the corporation, of the innumerable forms of voluntary association, and of the vast network of public agencies, federal, state, and local—these rules are expressed in formal legislative enactments and also in traditional doctrines not embodied in any single authoritative formulation, and in the recorded opinions of the courts rendered in the past in connection with particular cases. In whatever form these rules may be set forth, however, they constitute in reality a statement of what the law should be, rather than of what it is. They merely furnish directions and guidelines to the tribunals which decide particular cases. However sound and well-expressed these rules may be, they avail us nothing unless they are expeditiously, expertly, and impartially applied and enforced in the adjudication of concrete cases.

Consequently, a study of legal rules and principles merely in the abstract—divorced from the framework within which, and from the machinery by which, they are applied and indeed in large measure created—is unrealistic. Only in the light thrown by an understanding of the way in which our tribunals operate can one grasp the true significance of the legal principles which they enforce.

To speak of our tribunals, it should be noted, is not the same thing as to speak of our courts. Side by side with the courts, which comprise, under both

federal and state constitutions, a branch of government coordinate with the legislative and executive branches, there functions a vast array of tribunals forming part of the executive branch—administrative tribunals as they are commonly, but somewhat inaccurately, called. In the armed services, too, there are tribunals which administer a far-flung machinery of justice. Moreover, over large areas of business life, arbitration entered into voluntarily but with legally enforceable effect is regularly employed in lieu of court action. A faithful picture of our legal machinery, then, must include all these varieties of adjudication in addition to that administered by the courts, which indeed participate, in a supervisory role, in the work of these other types of tribunals.

In a society as complex as ours, the machinery of justice is of necessity correspondingly complex—far too complex for accurate depiction in so small a compass as this volume affords. This would be so even if our legal machinery constituted, as it does in France, for example, a single unitary system. Since, by contrast, we have fifty autonomous state systems of justice, each with its own diversities, paralleled by a nation-wide federal system, itself autonomous, but exercising a measure of control over all the state systems, the complexity of the whole is so great that even several large volumes would barely suffice for a detailed description. All that can be attempted in these pages, therefore, is to explain the relations which subsist among these varied systems and to single out the principal features common to all.

*L. M.*

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# How legal rules are made

## 1

THE LEGAL RULES WHICH GUIDE OUR courts and other tribunals in deciding the particular matters that come before them are expressed in varying forms. There are, of course, the enactments of our legislatures, federal, state, and local, and of the myriad of executive agencies authorized to promulgate regulations. Also, we have the authoritative opinion of a court, rendered by it in deciding a case before it, setting forth the precise construction to be given to a specific statutory provision. But in addition to these, there are rules, or perhaps more correctly, doctrines, which are of wide importance and yet are to be found in no express enactment and in no one judicial opinion. They are the traditional doctrines which have been developed over the years, in some cases over the centuries, as the outcome of the views expressed by the courts in disposing of particular cases. Such doctrines, rather than being set forth in definitive form in any one court opinion, are to be collected from a long succession of such opinions.

### *Legal rules and "law"*

The body of our legal rules is, of course, usually referred to as "the law." This term, in contrast to the term "legal rules" (or "rules of law") is, however, sometimes used in a wider sense. The term "legal rules" unequivocally describes merely a collection of man-made regulations, at a given time recognized by the public power as binding, and enforced by it, while the term "law" has been used by

some thinkers to connote a body of eternal principles, having an existence independent of transient man-made regulations. To distinguish this latter concept, the term "natural law" has been employed, while the body of rules enforced by the state, in contradistinction, is termed "positive law." Needless to say, our concern in these pages is solely with positive law.

The operation of rules of law is, of course, twofold. They guide and control the agencies of government, executive as well as judicial; and they guide and control the individual, to the extent that he is familiar with them, in his dealings and behavior. The actions of individuals are of course guided and controlled also by innumerable rules and standards of conduct which are not enforceable by any agency of government; but such rules and standards, particularly if they relate to property or business transactions, or to family obligations, from mere custom tend to become rules of law, recognized and enforced by the tribunals of the state. A large part of our rules of law had its origin in such community custom, rather than in any deliberate act of legislative creation.

### *The formulation of the law: cases and statutes*

When the judge or lawyer must ascertain the legal rule governing a given state of facts, he of course turns in many cases to the statutes enacted by Congress, or by the state legislatures. In a host of situations, however, there is no applicable statute—not because the question is a new one, but, more likely, because it is an old one, and the rule applicable to it has long been well-settled and well-understood, so that no need has been felt for a legislative declaration.

Initially our law, as carried over from England, was chiefly traditional rather than statutory: that is to say, it had been formulated not through enactments by Parliament but through the pronouncements of the courts over the two or three centuries preceding, as new questions arose in the cases brought before them. Today, by contrast, over very large areas of our law, the starting point is a statute enacted by the legislature, in conjunction, perhaps, with a regulation promulgated by an executive agency pursuant to statutory authorization.

Nevertheless, the statement, so common in our elementary textbooks on American government, that today the legislature makes the law and the courts merely interpret it, greatly oversimplifies the situation. It fails to take into account the fact that a case before a court may, and in fact often does, present a situation in which there exists no established rule of law by which the court may be guided. Where this occurs, the courts do not hesitate, in a proper case, to create a new rule of law. A rule so created governs the particular case in which it is announced, and may be followed in subsequent cases presenting the same question. It is, of course, always open to the legislature to change the rule as to future cases, or to reaffirm it by enacting it in statutory form. But if it does neither, and the rule is accepted by the highest state court (or, if a

question of federal law is involved, by the United States Supreme Court), it may be said to be as fully a part of the law as any legislative enactment; and a very considerable part of our substantive law, and a measurable but smaller part of our procedural law, are of this judge-made character.

The extent to which our statutes have created new rules of law, rather than merely restating antecedent, traditional legal doctrine, varies greatly from one legal area to another. At one extreme is found a statute (e.g., the federal labor relations statute) which created entirely novel rights and liabilities, previously unknown to our law. At the other extreme is a statute (e.g., the Uniform Negotiable Instruments Law) which, for the most part, merely sets forth in systematic fashion doctrines long-accepted by the courts everywhere (and on a few points enacts a rule which some courts had adopted and others had rejected).

Despite the considerable area of the traditional law which has thus been converted into statute, a surprisingly large body of our basic legal doctrine still remains purely traditional; that is to say, there exists no legislative formulation (or indeed any other systematic formulation having official sanction) to which the inquirer can resort. The doctrine in such cases is not expressed in any single formulation; its purport can be gleaned only from the writings of judges and commentators (the writings of the judges being the "opinions" written by them, ordinarily only in the appellate courts, in explanation of their decisions in particular cases). Though this may seem, abstractly, an irrational arrangement for the formulation and communication of legal doctrine, in practice it works at least well enough to discourage any proposal for massive or comprehensive codification of those areas of our law which still remain chiefly traditional, particularly since codification itself, however skilfully done, carries with it the seeds of new uncertainties of meaning.

The adjudication of the legal rights of individuals is not by any means carried on exclusively by the courts; a vast array of administrative tribunals, so-called, also adjudicate legal rights, often in matters of great importance. Like the courts, these tribunals amplify and elaborate the statutes which they enforce. Their holdings are in all cases subject to revision by the courts on appeal; but since, in many cases, the parties before them do not seek a review by the courts, their decisions in a number of instances come to be accepted as authoritative. Hence, it is correct to say that our legal rules are made by our administrative tribunals as well as by the courts and the legislatures.

### *English ancestry of American law*

The traditional rules of law which, whether or not now formulated in statutory garb, comprise so important a part of our law, both substantive and procedural, are, as already indicated, largely of English rather than American origin. Many of them formed part of the legal tradition which the English settlers carried with them to these shores; and becoming in turn a part of the legal tradition of

the Atlantic seaboard, they eventually extended their sway over the entire country, including those parts of it which had earlier been governed by Spanish or French legal doctrine.

The law and procedure of seventeenth century England, which the English settlers had thus transported across the Atlantic, had been a growth of some five centuries, with diverse roots. The Roman occupation of England, though it endured for a period about a third as long as has since ensued, apparently left little permanent impress on the legal institutions of the country. Nor, during the six centuries that followed, did any of the dynasties of Norse invaders who managed to establish a precarious dominion over the country succeed in setting up a centrally controlled system of justice; local custom governed law and procedure, and local magnates, whether lay or ecclesiastical, administered justice. It was the Norman conquerors of the eleventh century who for the first time extended a strong central control over the whole territory of England, and subsequently over Wales as well; but only gradually did a centrally controlled system of justice—central courts and a central supervision over local courts—take shape. By the beginning of the fifteenth century, the process had been substantially completed. The law which was now developed by the central courts, and was applied also by the itinerant justices regularly sent out from London, became a national or "common" law.

The law of seventeenth century England was in part statutory; but far the greater part of it reposed not in statutes but in the accumulated decisions of the courts—case law, as it is called. England's case law had not, however, been shaped by a single tribunal. There was at this time no single high tribunal with jurisdiction over the entire field of English law. Instead, there were, in addition to the regular courts dealing with civil and criminal cases, various special courts. Thus there were (not to mention several other independent courts that had no influence on the subsequent development of English law) a special set of courts for dealing with maritime cases, a set of church courts for dealing with matrimonial cases and with the estates of deceased persons, and the Court of Chancery.

Space does not permit an account of the development, in the chief ports, of the special courts to deal with maritime cases—courts which, because their supervision was entrusted to the admiral of the fleet, came to be known as admiralty courts; nor of the reasons why the church courts, long after they had lost the rest of the extensive civil jurisdiction over laymen they had once possessed, continued to exercise jurisdiction over matrimonial cases and decedents' estates. Some account of the development of the Chancery Court is, however, essential.

### *Development of special doctrines and procedure "in equity"*

The Chancery Court had its beginning in the closing years of the thirteenth century. There had been a growing volume

of petitions for redress addressed to the crown by subjects who alleged that they had been unable to obtain justice in the courts; and these had now become so numerous as to require the Chancellor, the chief administrative officer of the crown, to whom such petitions were referred, to develop a regular procedure for their disposition. The resulting eventual conversion of the Chancery, originally merely an administrative agency, into the most powerful court in the kingdom, with the Chancellor as its highest judicial officer, was completed in the sixteenth century. With this development there emerged also forms of redress granted by the Chancery Court which were not available in the regular courts, and new legal doctrines uncongenial to the narrowly legalistic tradition of those courts.

The distinctive character of the forms of redress developed by the Chancery Court was the result of the inability of the regular courts, in a variety of situations, to afford an effective remedy. Those courts had, initially, enjoyed great freedom in shaping the form of redress they gave to the petitioner. For reasons and in a manner not entirely clear, it had come about by the fourteenth century that their power to grant effective redress had become severely restricted, being limited to a rigidly circumscribed set of remedies. Thus if, for example, in a contract to sell land, the seller wrongfully refused to deliver the required deed to the buyer, these courts could award damages to the buyer, but they could not order the seller to give him the deed. If a guardian had betrayed the interests of his ward, whether by embezzlement, self-dealing, or corrupt bargains, the regular courts could give redress for any particular act of wrongdoing proved against him, but could not require him to submit to a comprehensive inquiry into all his transactions. The Lord Chancellor, as the immediate deputy of the all-powerful crown, was bound by no such limitations. He would order the recalcitrant seller to deliver the deed, on pain of fine and imprisonment unless he complied; he could order the faithless guardian to make a complete accounting or disclosure of all his transactions and, if found delinquent, to make the ward's estate whole or suffer indefinite imprisonment. The injunction, the mandate, and the supervision of fiduciaries thus became the exclusive prerogative of the Court of Chancery.

In doctrine, too, the Court of Chancery made new departures. The Chancellor refused to honor, in certain situations, the extreme technicality to which the regular courts, with a rigidity which sometimes thwarted justice, had come to adhere. Instead, he made what he considered an equitable disposition of the case before him. Thus the Chancery Court came to be known as a court of equity, in contradistinction to the regular courts. The latter came in time to be known as the courts of law—an unhappy terminology since the church courts, the Chancery Court, and the admiralty courts were of course also, in the everyday sense of the term, courts of law. The use of "court of equity" to apply only to the Chancery Court was equally unhappy, since basically the doctrines of the courts of law, as well as of the other courts, were also intended to produce equitable results. But happy or not, the terms "equity" and

"law," with the former applied to the doctrines and procedures of the Court of Chancery and the latter to those of the regular courts (other than the church and admiralty courts), became part of the vocabulary of our law, and remain so to this day (long after the separate chancery court has, except in a few states, ceased to exist), as do also the corresponding adjectives "equitable" and "legal."

### *Survivals of doctrines and procedures of formerly independent courts*

Since the courts of law, the church courts, the admiralty courts, and the Court of Chancery had developed independently, each had, over the centuries, as already suggested, built its own systems of substantive doctrine and of procedure; and in seventeenth century England these four independent systems of doctrine and procedure still flourished. The courts of law had developed their body of legal rules (to a great extent concentrated on questions concerning landholding tenures) as well as their procedure largely as an original system, without much reference to systems existing on the Continent. The admiralty courts had, by contrast, modeled their rules and procedures on those of the venerable maritime courts of the Mediterranean ports, and on those of the less venerable, but well-established, maritime courts of the Hanseatic ports of the North Sea. The church courts had, of course, an ancient and well-developed system of procedure in ecclesiastical adjudications, and this they applied also in their civil jurisdiction. The Chancery Court, though wholly a lay court, also followed, so far as applicable, the procedures and doctrines developed by the church courts, merely because in the early days of the court the Chancellor, the general administrative officer of the crown, invariably was a churchman.

Despite the virtually complete disappearance from our court system of this ancient fragmentation of jurisdiction between autonomous court structures, the divergencies of doctrine and procedure which developed during this period of many centuries have tended to persist; they have by no means been eradicated. Perhaps the most striking illustration of this persistence is to be found in our federal courts, where the district judge may sit in the forenoon in a case arising out of an automobile accident (in which the parties are citizens or corporations of different states), and in the afternoon in a case involving the collision of two small vessels. In the one, the parties are entitled to trial by jury, and one or the other party will almost always demand it; in the other, there is no jury. In the automobile case, the doctrine of contributory negligence is enforced: if both parties were negligent, neither one can recover anything from the other, regardless of far greater negligence on one side and far greater damage on the other. In the maritime case, the damages are apportioned between the parties. Manifestly, these differences are not rational, but merely historical, in character.

### *Lack of uniformity in state law*

During the Colonial period, though each of the thirteen colonies had its own legislature and judicial system, a measure of central control over the development of legal doctrine was maintained by London—in part by the occasional veto by the crown of colonial legislation, in part by the enactment by Parliament of statutes applicable to all the colonies, and in part by the right of appeal from the highest court in each colony to the British Privy Council. In 1775, with the Revolution, all these forms of central control disappeared at once. The resulting absence of all central control in the ensuing decade and a half was not materially altered by the institution of the new government under the Constitution in 1789. Though the new federal government was given limited legislative power, in most areas of the law the power of the state legislatures and courts to shape doctrine and procedure remained unimpaired.

In the century and three quarters that have ensued, no new form of central control has emerged. However, as the number of states has grown from thirteen to fifty, the divergencies, already present in the law and procedure of the colonies on the eve of the Revolution, have not widened to nearly so great an extent as might have been anticipated. The judges in each state, when confronted with a novel doctrinal or procedural problem, commonly have sought guidance from the solutions reached by their judicial brethren in other states. The legislatures also have freely borrowed from one another. In the field of commercial transactions, uniformity has been greatly furthered by the adoption by a number of states of some or all of the statutes proposed to them by the National Conference of Commissioners of Uniform State Laws, a wholly extra-constitutional body in existence since 1890, the members of which, several from each state, are appointed by the state governors pursuant to statutory authority. In addition, an authoritative "restatement" of the received legal doctrines developed in several fields of private law, sponsored by the American Law Institute, an association of distinguished lawyers and jurists, has been a further influence for uniformity in the development of legal doctrine, particularly in the cases that present questions which the courts of a state have not yet had occasion to decide—a situation found very frequently in the courts of the less populous states.

Despite all these forces making for uniformity, in the foreseeable future there will continue to be numerous divergencies in both the statutory and the traditional law of the several states. But these divergencies cause less difficulty than might be supposed. So far as they relate to substantive rights, they create difficulties only in matters in which property transactions or domestic relationships may relate to more than one state; and here it frequently is complexity, with its attendant expense, rather than real difficulty, that results. American business finds no serious difficulty