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何家弘／编

·高等法律院校试用教材

LEGAL ENGLISH

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说　明

《法律英语》是为高等法律院校法学专业的本科生和研究生编写的专业英语教材。编者根据自己在美国学习法律的体会和在国内讲授法律英语的经验，将专业外语教学中“用专业学外语”和“用外语学专业”这两种方法有机地结合起来，在内容设计上既照顾到外语学习的规律，又照顾到法律学科的体系，从而可以使学生收到“一石两鸟”的学习效果。

本书共设20课，包括法律制度、法律职业、法律教育、司法系统、宪法、行政法、刑法、民权法、合同法、侵权法、财产法、公司法、保险法、商法、税法、环境保护法、家庭法、民事诉讼程序、刑事诉讼程序、证据规则。每课内容包括课文、背景情况、注释、练习和补充读物五部分。课文和补充读物的选材十分广泛且形式多样，其中既有法典和判例，也有文章和讲稿。编者还对原材料进行了一定的编辑和修改，以适应本教材的需要。本书还有三个附录，即模拟练习、补充读物参考译文和词汇表。

本书最突出的特点是实用性强。每课的练习中都有专门为该课内容设计的讨论和模拟练习，以提高学生的英语表达能力和涉外法律实务能力。其中的专题讨论、案例分析、模拟谈判、法庭辩论以及案情摘要和法律备忘录等常用法律文书的写作练习都有很强的实用性。此外，该书在附录中还设计了两个综合性模拟练习：一个是根据轰动一时的辛普森案设计的整个审判过程的模拟练习；一个

是建立中外合资企业的合同谈判练习。练习后面还附有法庭常用英语、法官给陪审团的指示范例、中外合资企业合同英文参考样本和《中华人民共和国中外合资经营企业法实施条例》英译本，以便学生参考。

于钦建、王文河、任新萍、刘希明、刘昊阳、李凌波、武咏、张文进、张桂勇、曹爱莲、虞英倩等人参加了本书补充读物的翻译工作，编者在此谨表谢忱。

编　者

1997 年 5 月

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LESSON ONE

Legal System
法律制度

I Text 课文

1.

The United States is at once a very new nation and a very old nation. It is a new nation compared with many other countries, and it is new, too, in the sense that it is constantly being renewed by the addition of new elements of population and of new States. But in other senses it is old. It is the oldest of the "new" nations——the first one to be made out of an Old World colony. It has the oldest written constitution, the oldest continuous federal system, and the oldest practice of self-government of any nation.

One of the most interesting features of America's youth is that the whole of its history belongs in the period since the invention of the printing press. The whole of its history is, therefore, recorded: indeed, it is safe to say that no other major nation has so comprehensive a record of its history as has the United States, for events such as those that are lost in the legendary past of Italy or France or England are part of the printed record of the United States. And the American record is not only comprehensive; it is immense. It embraces not only the record of the colonial era and of the Nation since 1776, but of the present fifty States as well,

and the intricate network of relationships between States and Nation. Thus, to take a very elementary example, the reports of the United States Supreme Court fill some 350 volumes, and the reports of some States are almost equally voluminous: the reader who wants to trace the history of law in America is confronted with over 5,000 stout volumes of legal cases.

No one document, no handful of documents, can properly be said to reveal the character of a people or of their government. But when hundreds and thousands of documents strike a consistent note, over more than a hundred years, we have a right to say that is the keynote. When hundreds and thousand of documents address themselves in the same ways, to the same overarching problems, we have a right to read from them certain conclusions which we can call national characteristics.

2.

The American legal system, like the English, is methodologically mainly a case law system. Most fields of private law still consist primarily of case law and the extensive and steadily growing statutory law continues to be subject to binding interpretation through case law. Knowledge of the case law method as well as of the technique of working with case law therefore are of central importance for an understanding of American law and legal methodology.

The Common Law is historically the common general law —— with supremacy over local law —— which was decreed by the itinerant judges of the English royal court. The enforcement of a claim presupposed the existence of a special form of action, a writ, with the result that the original common law represented a system of "actions" similar to that of classical Roman law. If a

writ existed (in 1227) a claim could be enforced; there was no recourse for a claim without a writ, the claim did not exist. This system became inflexible when the "Provisions of Oxford" (1258) prohibited the creation of new writs, except for the flexibility which the "writ upon the case" allowed and which later led to the development of contract and tort law.

The narrow limits of the forms of action and the limited recourse they provided led to the development of equity law and equity case law. "Equity", in its general meaning of doing "equity", deciding *ex aequo et bono*, was first granted by the King, and later by his Chancellor as "keeper of the King's conscience", to afford relief in hardship cases. In the fifteenth century, however, equity law and equity case law developed into an independent legal system and judiciary (Court of Chancery) which competed with the ordinary common law courts. Its rules and maxims became fixed and, to a degree, inflexible as in any legal system. Special characteristics of equity law include: relief in the form of specific performance (in contrast to the common law award of compensatory damages), the injunction (a temporary or final order to do or not to do a specific act), the development of so-called maxims of equity law which permeated the entire legal system and in many cases explain the origin of modern legal concepts. However, equitable relief regularly will lie only when the common law relief is inadequate. For instance, specific performance for the purchase of real property will be granted because common law damages are deemed to be inadequate since they cannot compensate the buyer in view of the uniqueness attributed to real property.

As the common law, equity law became part of American law either through judicial acceptance or through express statuto-

ry provision. Today, both legal systems have been merged in many American jurisdictions (beginning with New York in 1848), with the result that there is only one form of civil suit in these jurisdictions as well as in federal practice. Only few States continue to maintain a separate chancery court. Nevertheless, the reference to the historical development is important because, on the one hand, it explains the origin and significance of many contemporary legal concepts (for instance the division of title in the law of property) and, on the other hand, it is still relevant for the decision of such questions whether, for instance, there is a right to a trial by jury (only in the case of common law suits, in other cases only before the judge). In addition, the differentiation will determine whether the "ordinary" common law relief of damages applies or whether the "extraordinary" equity remedy of specific performance is available.

"Case law" describes the entire body of judge-made law and today includes common law and equity precedents. In imprecise and confusing usage the terms "common law" and "case law" are often used synonymously, with the term "common law" in this usage connoting judge-made law in general as contrasted with statutory law. "Case law" always connotes judge-made law, while "common law" in contrast——depending on the meaning intended——describes either the judge-made law in common law subject matters or, more extensively, all judge-made law.

Ⅱ Background 背景情况

自从哥伦布(Christopher Columbus)于1492年航行至美洲之后,大批欧洲人便开始拥向这片"新大陆"。不过,人们通常把第一批英国定居者(the first English settlers)于1607年到达弗吉尼亚(Virginia)的詹姆斯顿(Jamestown)视为美国法律制度历史的起点。

美国法制史可以大体上分为两个时期，即英属殖民地时期(the Period of the English Colonies)和美利坚合众国时期(the Period of the United States)。虽然美国的法律制度是在英国法律传统的基础上形成和发展起来的，但是在近四百年的历史进程中，美国的法律制度也形成了一些不同于英国法律制度的特点，如公诉制度(public prosecution)等。

美国属于普通法系(Common Law Legal System)国家，其法律制度有两个基本特点：其一是以分散制(decentralization)为原则；其二是以判例法(case law)为主体。美国除联邦政府外，还有州政府、县政府、市政府、镇政府等等，而且这些政府都是相互独立的，各自在其管辖范围内享有一定的立法权和执法权。因此，有人说美国是“一个有许多政府的国家”(a country of many governments)；而美国的法律体系则是一个“零散的无系统”(fragmental no-system)。诚然，美国现在也有很多成文法(written law)或制定法(statutory law)，但是其法律制度仍是以判例法为主体的。换言之，“遵从前例”(*stare decisis*)仍然是美国司法活动中最重要的原则之一。以上两点对于理解美国的法律制度具有重要意义。

Ⅲ Notes 注释

1. Legal system：法律制度或法律体系或法系

2. …at once… 同时；既……也(又)……如：The book is at once interesting and instructive. 该书即有趣又有教益。

3. …and it is new, too, in the sense that it is constantly being renewed by the addition of new elements of population and of new States. ……同时，它(美国)因新人口成分和新州的加入而持续更新，在此意义上，它也是新国家。

4. …the first one to be made out of an Old World colony. ……第一个从旧大陆殖民地脱胎而出的国家。Old World 指与美洲新大陆(New World) 相对而言的东半球旧大陆，尤指欧洲。

5. America's youth：美国的年青性，美国建国初期。

6. …for events such as those that are lost in the legendary past of Italy or France or England are part of the printed record of the United States. ……因为象在意大利、法国或英国过去的传说中湮没的那种事件则是美国有文字记载之历史的一部分。

7. …the intricate network of relationships between States and Nation. ……各州与联邦之间错综复杂的关系。

8. the reports of the United States Supreme Court：联邦最高法院判例汇编。

9. stout volumes：巨册；厚册。

10. …strike a consistent note：敲击出始终如一的音调。

11. binding interpretation：有约束力的(法律)解释。

12. itinerant judges of the English royal court：英国皇家法院的巡回法官。

13. writ：(以君主名义发出并加盖政府印章的)令状；法院令状。

14. The enforcement of a claim presupposed the existence of a special form of action, a writ, with the result that the original common law represented a system of "actions" similar to that of classical Roman law. 某项诉讼请求的强制执行是以法院令状这种特殊诉讼行为形式之存在为前提的，而这就使最初的普通法表现为由类似于古罗马法的"诉讼行为"所构成的体系。

15. …there was no recourse for a claim without a writ, the claim did not exist. ……没有法院令状(为前提)的诉讼请求就没有追索权，因而该诉讼请求也不存在。

16. Provisions of Oxford："牛津条例"，从贵族议会中推选出的24人委员会为限制亨利三世的权力而在1258年制定的一部带有宪法性质的法律。

17. writ upon the case：本案令状，即法院就具体案件所颁布的令状。

18. *ex aequo et bono*：(拉丁语)公平且善良。

19. …Chancellor as "keeper of the king's conscience",……作为"国王良知守护人"的大法官(即上议院议长)。

20. …relief in the form of specific performance,……特定履行(或实际履行)方式之救济。

21. division of title in the law of property: 财产法上的所有权分割。

22. …while "common Law" in contrast——depending on the meaning intended——describes either the judge-made law in common law subject matters or, more extensively, all judge-made law.……而"普通法"相对来说则可以指普通法问题上法官制定的法律,也可以在更广范围内指所有法官制定的法律——取决于使用者的用意。

Ⅳ Exercises 练习

1. Questions about the text:

① Why is the United States a very new nation?

② Why is the United States an old nation as well?

③ The record of American history is more comprehensive than those of other major nations in the world, isn't it?

④ The American record does not include the records of the present fifty states, does it?

⑤ What are the reports of the United States Supreme Court?

⑥ What are the important factors, according to the writer's opinion, for understanding American law and legal methodology? And Why?

⑦ When did the English common law system become inflexible?

⑧ What are the special characteristics of equity law?

⑨ How did the common law become part of American law?

⑩ There is not any separate chancery court in the federal ju-

risdiction in the United States, is there?

2. Dictation

There are many different legal systems in the world. In fact, every nation's legal system has its own characteristics. However, the degree of difference varies, with some systems bearing more resemblance to others. As a result, the world can be divided into several legal families. Without doubt, the Common Law Legal Family and the Roman Law Legal Family are the most important legal families in the world. The former is also called the English Law Legal Family or the English-American Law Legal Family, while the latter is also called the Civil Law Legal Family or the Continental Law Legal Family.

3. Discussion

① Topic: What is the best way to study legal English?

② Questions:

A. Is legal English a knowledge or a skill?

B. Which skill among understanding (listening), speaking, reading and writing is the most important one for studying legal English?

③ Reference arguments:

A1. Legal English is a knowledge because it includes a lot of special information and many technical terms, and it needs understanding and comprehension.

A2. Legal English is a skill because it is an ability and a tool of communication, and it needs training and practice.

B1. Understanding is the most important skill for studying legal English, because legal English is a knowledge and understanding (listening) is the basis of other skills.

B2. Speaking is the most important skill for studying legal English, because legal English is a skill and speaking is the most