简明法学案例丛书(影印版)

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证据法简明案例

(第二版)

(Second Edition)

爱德华·菲利普斯
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本书导读

客观真实和法律真实存在着明显的差异，这一点现在应该是没有争议的了。但这个基本的常识性问题在中国理论和实务界却长期不被人理解。我们的教科书和各种宣传性材料都强调在法律的运用过程中必须以事实为根据，以法律为准绳，这里的事实就是客观事实。我们一般认为，通过发挥伟大理论武器的作用，发挥人的主观能动性，我们能够完全认识到案件的客观真实，从而最终实现正义。这实际上误解了法律真实与客观真实的内涵，也是对法律的基本模式和正义品格的最大误读。实际上，由于诉讼是回溯性的，是对发生的争议事实的法律确认。因此，尽管我们运用各种努力，我们都无法达致真正的客观事实。客观事实作为一种事实是客观存在的，不依我们的意志为转移，也不因我们能否认识到而消长。但作为法律事实的事实，必须是证据证明的事实，只有经过证据证明的事实才能进入法学的视野，接受法律规范的选择与评价。而且，根据证据法的规定，即使是被证据证明的事实，如果由于不符合法律规定和取得的方式不当，也会否定其为法律事实的资格。因此，客观事实和法律事实是内含不同的两个概念，蕴涵着不同的价值取向。正如日本著名的法学家团藤重光所说："真正绝对的真实，只有在神的世界才能存在"，"审判中事实的认定，要求尽可能接近神所看到的真实(实体真实)"，"设想了只有神才知道的真的'事实'，在诉讼中尽可能接近它，这是实体真实主义，而这可以说只不过是观念性的设想而已"。正是由于客观事实和法律事实的差异，世界上不存在绝对的正义，所谓的正义也只有在相对的范围内才能存在。由于正义的相对性，加之正义之于人的重要价值以及人对正义的期望，西方国家在实践正义的过程中不断强调程序正当的重要性，主张在正当程序的过程中实现正义的最大化。

我国素来就有重实体轻程序的传统，表现在司法实践中，就是强调程序的工具性，程序自身不具有内在价值。程序的有用性在于为实体权利、义务的实现而服务，为了实体性权利、义务的实现，即使牺牲程序也不足惜。体现在刑事诉讼法中，就是主张口供是无冕之王，强调通过刑讯逼供以及其他非法手段取得证据来实现犯罪的追究。这种观念在我国现代民主文明的法治国家里得以部分纠正，但其遗毒影响却是深远的，某些做法甚至还被我国现阶段某些司法人员奉为圭臬。当然，这种情况正在改善，我国证据法的制

定工作已经提上日程，学者们对于证据法的制定已经提出了各种主张。我们认为，对于西方先进的证据法研究成果仔细体会其技巧、消化其原理，对提升我国证据法的学术质量与实践品格是大有作为的。

摆在读者面前的就是这样一本好书。它深入浅出、寓例于教，通过典型的案例，详细勾画了英国关于证据分析和确认的高超技巧，对证据法的重大问题（如证据的可采性、非法证据的排除、证人证言、自认、相同事实证据规则、证人品格以及补强证据等）进行了系统而具体的解读，是一部适合初学者了解英美法系证据法的快速入门的实用教材。

本书目录、案例和索引由武汉大学法学院赵慧博士翻译，由于译者水平有限，错误在所难免，请方家不吝指教。

译　者

2004 年 5 月

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