全国高等院校法律英语专业统编教材
法律英语证书（LEC）全国统一考试指定用书

法律英语
精读教程

上

Legal English
Intensive Reading Course

张法连　主编

北京大学出版社
PEKING UNIVERSITY PRESS

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前　言

法律英语是法律科学与英语语言学有机结合形成的一门实践性很强的交叉学科，是ESP(English for Specific Purposes)最重要的分支之一。法律英语是以普通英语为基础，在立法和司法等活动中形成和使用的具有法律专业特点的语言，是指表述法律科学概念以及诉讼或非诉讼法律实务时所使用的英语。当今世界的发展日新月异，经济全球化进程突飞猛进，国际交流合作日益加强，涉外法务活动空前频繁。十八届四中全会提出要加强涉外法律工作，运用法律手段维护国家的发展利益。经济全球化过程中我们所面临的很多问题其实都是法律问题，而这些法律问题中的绝大多数又都属于涉外法律的工作范畴，所有这些工作都需要法律工作者通过专业外语完成。国家急需明晰国际法律规则、通晓英语语言的“精英明法”复合型人才，法律英语的重要性日益彰显，掌握专业外语已经成为法律人必备的职业素质。法律英语证书(LEC)全国统一考试的成功推出和中央政法委、教育部“卓越法律人才计划”的顺利启动无疑把法律英语的学习和研究推向了高潮。

法律英语是高校英语、法学等专业教学改革的新方向。随着高校英语专业教学改革不断深化，国内许多高校在外语院系开设了法律英语课程，有的院系设置了法律英语方向，有些高校大胆创新，开始尝试设置法律英语专业，收到了良好的社会效果。2013年高等教育出版社出版发行《法律英语专业教学大纲》，标志着法律英语专业的诞生，给高校外语院系设置法律英语专业指明了方向。本套教材正是以该大纲为重要依据编写而成。

美国法是英美法系的典型代表，其法律体系完整、内容丰富，既有传统的普通法，又有新兴的成文法；既有统一的联邦法，又有各州的法律。同时，美国法在世界范围内影响深远，学习研究美国法意义重大，这不仅表现为许多国家都在研究美国的法律规则，借鉴其成熟做法，还表现为许多国际公约也参照美国法的理念、原则、规则制定。因此，本书作为法律英语专业的精读教材，主要介绍美国法，希望学生通过学习权威、实用的美国法律知识，掌握地道、纯正的法律英语。一般的语言教材都会系统地讲授语法知识，但本书认为法律英语的学习者应当已经完成了基础阶段的普通英语学习，系统掌握了英语语法等

基础知识并具有了一定的词汇量。

本套教材共包括《法律英语精读教程》《法律英语泛读教程》《法律英语写作教程》《法律英语翻译教程》和《法律英语文化教程》，以及配套学习使用的《英美法律术语双解》。

编写本书的过程中，编者参考了大量的美国原版法学书籍，包括美国法学院教材及大量判例，力求实现教材内容的权威性和丰富性。本书引用了许多极具代表性的英文案例。英美法系是判例法系，无论是法官还是律师都特别注重对判例的研究，因此学习美国法不能绕过案例，通过研究案例更有利于掌握标准的法律英语，也更容易掌握美国法的精髓。本书选取了几十个经典案例，以期最大程度地展现美国法原貌。

本书力求内容丰富，可读性强，几乎涉及了法律英语的听、说、读、写、译的各个方面。本书在每部分或各章后面都附有相关的练习题，以期帮助学生检查自己对基础美国法知识和英美法律文化知识以及法律英语读写基本能力的掌握程度。教材在编写上遵循由总述到具体、由浅入深的原则，基本上达到《法律英语专业教学大纲》提出的目标要求。

本书共由两部分组成。第一部分是英美法律文化知识简介。语言是文化的载体，法律文化知识是法律英语学习过程中不可或缺的内容；第二部分分别对美国六个主干部门法（美国宪法、合同法、侵权法、财产法、证据法、刑法/刑事诉讼法）基本内容进行概括介绍并选取典型案例诠释有关知识点。这两部分内容浑然一体，又相互独立。学习本教材不一定要严格按前后编写顺序进行，教师完全可以根据学生的具体情况挑选合适的内容安排教学。

编写本书过程中，我们参考了大量国内外有关资料，在此谨对原作者表示谢忱。参加本书编写工作的还有北京外国语大学郑小军教授、中国石油大学徐文斌副教授、甘肃政法学院唐丽玲教授、河南工业大学杜巧阁副教授、聊城大学胡朝丽副教授等。感谢法律英语证书（LEC）全国统一考试指导委员会将该套教材指定为复习应考 LEC 的参考用书。

各位教师或同学在使用本书的过程中有什么问题，欢迎及时与编者联系：zhangbook16@yahoo.com。

编者

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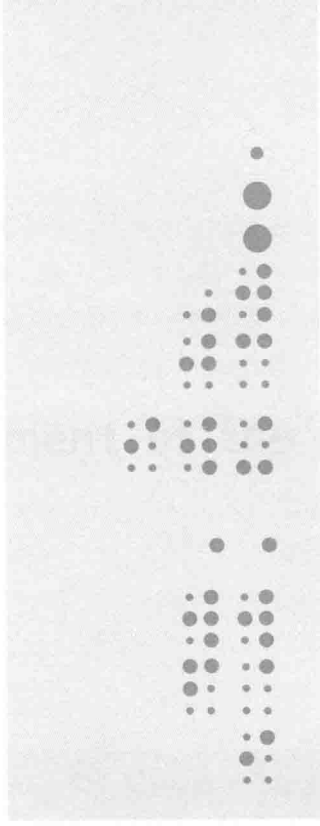

Part One

Anglo–American Legal Culture

Chapter 1

Historical Development of the Common Law

导读

"普通法"亦称"不成文法"或"案例法",对于大陆法系的法律工作者而言这是一个怪诞的概念:它既不是"普通"的法,又不是"普遍通用"的法(除英语国家外);它虽称"不成文",可又有永远读不完的案例。

当诺曼底人以武力征服英格兰时,他们得到的仅仅是王位和朝廷,在乡下,人们处理实际纠纷时所依据的还是传统的标准,由于交通和信息交流的不便,各地法庭所采取的标准由于历史沿革、民族传统和生活习惯的不同而有很大差别,导致了相同的问题往往会因不同的判断标准产生不同的判决结果。当上诉到"国王的法庭"时,便逐渐产生通过文字记录法官的思考过程以确立统一标准的制度。

其"普通"的意义在于:法是独立于个人感情和情感意识之外的客观标准、不能人为创造而只能发现、不受时间和地域限制而普遍适用的行为准则。

所谓"不成文"是指这些客观原则并非以法条的文字形式公之于众,而是在法官确立原则的推理过程中记录于"法庭意见"。其可取之处在于这些原则可以在不断变换的客观环境中实时得到完善、错误的判决可以通过上诉得到纠正、经过时间检验的标准可以上升为立法,从而避免了成文法体系中的"法律滞后"问题。

本章还介绍了英美法体系中独特的"衡平"制度对于法律制度的完善和补充作用。

The common law system came into being, historically, in England largely as the result of the activity of the royal courts of justice after the Norman Conquest. In England, first, there were Germanic laws during the Anglo-Saxon period. Though England was ruled by a single monarch, the law in force was still made up of strictly local customs. With the Norman Conquest, the period of tribal rule was finished and feudalism installed. Gradually, through the **institutionalization**[①] of the royal courts and the extension of their **jurisdiction**[②], a body of laws called the common law applied to the whole country came into being. There is also a dissenting view that common law is also royal law; the basic characteristics of much of the common law can be traced back to royal legislation.

There are four distinct periods:

First, The Anglo-Saxon Period (Preceding the Norman Conquest of 1066)

This is the period when different tribes of Germanic origins (Saxons, Jutes, Danes and Angles) divided up England. These tribes applied local customs for dispute resolution.

Second, Formation of the Common Law (1066—1485): From Writs to Actions on the Case

The Norman Conquest brought about a strong and centralized administrative organization. With it, the period of tribal rules was finished and feudalism installed. The highly organized character of English feudalism prepared the way for the development of the common law. The following are some of the most important developments.

(1) County and Local Courts

The hundred local or country courts that applied local custom were gradually replaced by new feudal courts that still applied the same local customary law. But how could the highly organized character of the feudal

① 制度化
② 管辖权

system of government and the establishment of feudal courts help the development of the common law since the new feudal courts applied also local customary law? What was done is that in either case, the applicable law or rule was extended to all the people in the jurisdiction.

(2) Jurisdiction of Royal Courts—Restricted Reach

The creation of the commune ley, an English law truly common to the whole of England, was to be the exclusive work of the royal courts of justice.

At first, the King only exercised "high justice." The Curia Regis, from which the King dispensed justice assisted by his closest officials and highest ranking persons, was a court for only the important personalities and disputes.

Feudal barons resisted the jurisdiction of royal courts. Certain parts of the Curia Regis gradually became autonomous bodies and established their seats at Westminster.

Royal courts had jurisdiction only over Royal finance, ownership and possession of land, and serious crimes.

(3) Extension of Royal Jurisdiction

Reasons for extension included: more cases meant more fees for the kingdom, people viewed the royal courts superior to feudal courts, only royal courts had the means to summon witnesses and to enforce judgments, and only the King, apart from the church, could require the swearing of an oath. Royal courts followed modern procedures and availed of the verdict of a jury.

(4) Writs

Until 1875, the royal courts remained special courts to which the citizen had no automatic access. The person who pressed a claim had first of all to address his request to an important royal official, the Chancellor, asking him to deliver a writ. A writ is simply another term for a court order. The effect of a writ was to enable the royal courts to be seized of the matter upon the payment of fees. It was not automatic that a writ would be issued. The judges had to be convinced to take up the matter complained. Each instance had to be individually examined. The list of established situations where writs were granted automatically was slow to grow.

Nonetheless, the list grew and increased over times. Neither should the

extension of royal jurisdiction be measured by such increase nor was caused by the passage of the Statute of Westminster II of 1285. That statute authorized the Chancellor to deliver writs in *consimilicasu* (in instances having great similarity to others for which the delivery of the writ was already established). The reasonable explanation for the extension over times is to accommodate increasing social needs.

(5) Actions on the Case

What is significant and decisive is the appreciation by the royal courts of the significance of the declaration made by the plaintiff explaining the details of the facts of the cases. And this led to the admission by the royal courts of their jurisdiction over new factual situations or instances because of the compelling nature of the moral and justice issues. In time, these admissible actions multiplied and were given special titles in the light of the facts which justified them—actions of **assumpsit**[①], deceit, **trover**[②], negligence, and so on. These actions may be generally classified under three headings: trespass to land, trespass to goods, and trespass to the person. Trover is defined as a common law action to recover the value of personal property illegally converted by another to his or her own use. In old French, trover means find.

Third: Growth of Equity (1485—1832)

(1) Emergence of Equity

The strict compliance with formalist procedure exposed the common law to two dangers: that of not developing with sufficient freedom to meet the needs of the period and that the dangers of becoming paralyzed because of the conservatism of the legal world of the time.

Unfortunately, these shortcomings of the royal courts could not be rectified or corrected by other courts that had general jurisdiction, for these courts were themselves in decline and gradually disappeared from the scene.

The situation led to the eventuality that in a number of cases, no just solution could be found. In seeking another way of obtaining redress, a direct

① 约定,允诺;口头合同;违约诉讼
② 追索侵占物诉讼

appeal to the King, the fountain of all justice and favor, was the logical and natural option.

In cases of no solution or shocking solution, people addressed the King asking him to intervene as an act of royal grace to satisfy conscience and as a work of brotherly love. As the King's confessor, the Chancellor had the responsibility of guiding the King's conscience and would, if he thought it appropriate, transmit the request to the King for judgment in his council.

In other countries, the judges themselves could supply the required remedy by prohibiting the abuse of a right or fraud, or by applying the principle of public order and good morals; such remedies were possible on the European continent within the very framework of the legal principles. In England, however, the royal courts did not have the same freedom of action because they had never had the same general jurisdiction and were bound to observe rigid procedures.

This recourse to the royal prerogative, perfectly justifiable and unopposed so long as it remained exceptional, could not fail to give rise to a conflict when it became institutionalized and developed into a system of legal rules set up in opposed to the common law.

Gradually request for intervention by the Chancellor became more frequent; the practice became institutionalized. At the time of the Wars of the Roses (1453—1485), the Chancellor became a more and more autonomous judge deciding alone in the name of King and his council. Decisions were made on the basis of "the equity of the case." Equitable doctrines grew out of the chancellor's decisions. These worked to add to and correct the legal principles applied by the royal courts.

After 1529, the Chancellor no longer served as confessor to the sovereign and was not an **ecclesiastic**[①] but examined the petitions addressed to him as a real judge and observed a written procedure inspired by Canon law. The substantive principles he applied were also largely taken from Roman law and Canon law rather than the very often archaic and outmoded common law rules.

A number of legal institutions (the principal one being the trust) and

① 神职人员,牧师

concepts such as misrepresentation, undue influence, specific performance, and subrogation were developed in the Chancellor's equitable jurisdiction.

In all of these matters, the intervention of the Chancellor is discretionary. He only intervened if it was considered that the conduct of the defendant was contrary to conscience, and if the plaintiff had no cause for reproaching himself; he, on his side, had to have "clean hands" and must have acted without undue delay in asserting his right.

The English sovereigns favored the chancellors' jurisdiction due to their concern for justice and good administration. The procedure of Chancery was private, written and inquisitorial in nature and also preferred by a monarch of authoritarian disposition.

As the chancellor applied Roman law, this worked to reduce the law to a simple private law and lawyer's work. And all these features helped give a greater scope to royal absolutism and executive discretion.

The risk is that the success of the Chancellor's equitable jurisdiction and the decay of the common law carried potentially the seed of a danger that disputing parties would eventually abandon the common law court.

(2) Conflict and Compromise Between Common Law and Equity

The royal courts and the common law lawyers resisted the encroachment by the Chancellor on their jurisdiction and the Chancery's continuing expansion.

To defend their position and work, and to support them against royal absolution, the Common law courts also found an ally in Parliament. The organization of Chancery, its congestion and venality (that is, association with corruption or bribery) were also used as effective weapons.

A compromise was finally reached and pronounced by James I. The common law courts and the courts of Chancellor worked side by side in a kind of equilibrium of power.

Specifically, no new **encroachments**[①] at the expense of the common law courts by the Chancery were allowed. The Chancellor would continue to adjudicate according to its precedents, not morality alone and arbitrary. The king also agreed he would no longer use his prerogative to create new courts

① 侵入,侵占,侵害

independent of the established common law courts. The Chancellor, as a legal or political figure, was no longer seen as judging on the basis of morality alone and tended to act more and more as a true judge. Further, after 1621, the control of the House of Lords over the decision of the Court of Chancery was admitted.

Over the centuries, the rules of Equity became as strict and as legal as the rules of the common law. Today, the body of rules developed in Equity is an integral part of English law. The reasons formerly justifying the intervention of the Chancellor no longer exist; if English law is in need of remedial measures, there is Parliament. The security of legal relations and the supremacy of the law would be threatened if judges were allured to bring the rules of established law back into question under the pretext of equity.

Yet, key distinctions between law and equity remain important today. Among the distinctive features of a suit in equity as opposed to an action at law were:

- The absence of jury—the judge instead of a jury is the exclusive decision-maker in equity;
- Court of equity follows a more flexible procedure;
- It enjoys a wider scope of review on appeal;
- While the law courts were generally restricted to the award of money damages as a relief, equity operated on the person of the defendant (equity acts in personam). The court of equity could, for example, issue an injunction, forbidding a particular breach of promise of an obligation, or it could decree specific performance of obligation. A defendant who disobeyed could be punished by fine or by imprisonment for contempt of court until compliance;
- In the beginning at least, the Chancery was not considered a court, it did not appear to be deciding "in law";
- Even the terminology adopted by the Chancery's court bears witness to the distinction. The procedure before the court is a "suit," not an "action"; one invokes "interests," not "rights"; the Chancery grants a "decree" not a "judgment"; he may award "compensation," not "damages."

Fourth: The Modern Period

(1) Duality Versus Unity in Action: Fusion or Merger of the Common Law and Equity

Before 1873—1875, in any one dispute, it might have been necessary to