法律英语读物
English Readings in Legal Studies

欧美民事诉讼程序
Civil Procedure in Europe and North America

王景琦/编

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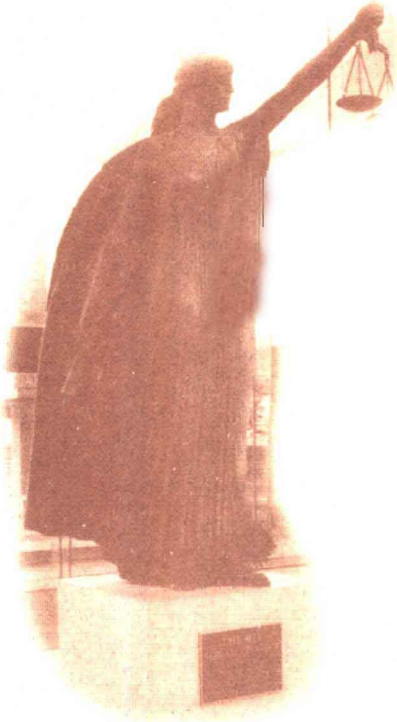

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出版者的话

1755年，在英语——作为一种文字的发展史上，是具有里程碑意义的。这一年，英国的第一部《英语大辞典》问世。她的作者便是英国著名的作家和词典编纂学家撒缪尔·约翰逊（Samuel Johnson）。他在这部大辞典的序言里写下了这样一句话：The great pest of speech is frequency of translation. ... this is the most mischievous and comprehensive innovation（语言最大的祸害就是频繁的翻译，这是一种最有害且最综合意义上的"再炮制"。）

"炮制"常常会差强人意，甚至于以讹传讹，而法学译作更在一定意义上是件"不可为而为之"的作品。英美法的一些概念、术语实难在汉语中有完美的匹配。于是我们推崇读原文。

原文闪烁着作品本身质朴而灵动的光芒，而地道的语言传送着的是英语中"法言法语"独特的个性化色彩。

少有机会读到英美法学原篇的中国学子们，将会从这套丛书中看到真正的英文法学篇章是个什么样子。这里既有严谨、典型的英美法学学术篇章，也有法庭上唇枪舌剑的审判实录，更有闻名于世的英美法"案例学习"。

这套辑录自90年代以来的"原汁原味"的法学英语读物，我们相信她带给您的会是这样的阅读体验——语言一百分，思想不打折。

1997年12月

导　言

欧美民事诉讼程序涵盖了当今世界两大民事诉讼模式，即当事人主义诉讼模式和职权主义诉讼模式。所谓诉讼模式，是一个综合性的抽象概念，是对民事诉讼体制运行特征的综合表述，是对民事诉讼的主体在民事诉讼过程中的地位、作用及其相互关系的概括。民事诉讼法律关系的性质、特点是诉讼模式最基本的组成部分，诉讼主体（原告、被告、法院）的组合方式及相互关系的处理、权限的划分是构成民事诉讼模式的基本格局。当事人主义在民事诉讼程序设计上以当事人为重心，职权主义则以法院为重心。

一般而言，以英、美为代表的普通法系的民事诉讼程序体现了当事人主义诉讼模式。这种模式从总体上有利于实现当事人程序主体权与诉讼参与权，以双方当事人充分辩论为核心，法官不主动干预，以确保法官的中立性。通过审前准备程序对证据、辩论要点的确定，可以防止当事人在法庭上受到突然袭击。其弊端则是过分强调当事人的诉讼权利，致使法官权力落空，法官的消极地位也不利于查明案件事实，形式上的平等可能会因法律以外的原因导致实质上的不平等，还可能因诉讼迟延增加当事人的经济负担，不利于降低民事诉讼的社会成本等。

以法、德为代表的大陆法系的民事诉讼程序则体现了职权主义诉讼模式。这种模式追求客观真实，既突出审判权的作用，也发挥当事人的主动性，法官能够控制诉讼的全过程。其缺陷在于容易引起法官权力的滥用，削弱当事人的主体地位和程序保障权。

总之，不能简单地认为一种模式优于另一种模式。两种模式原本都是民主政治的产物，都有其合理的内核。实际上，英、美、法、

德等国都对本国的民事诉讼程序进行了深刻的反思，认识到了两种模式的弊端，而且进行了不同程度的改革。诉讼模式随着经济发展的需要和诉讼目的变化而发生变化，彼此间可以相互吸收、渗透与借鉴。

至于我国民事诉讼模式的定性，有人认为是职权主义或超职权主义。应该说，改革前的情况确是如此。1991年的民事诉讼法，则是带有某些当事人主义色彩的职权主义模式，是一种以当事人为基础、以法院为主导的诉讼格局。具体体现为，实行当事人处分与国家干预相结合的原则，以当事人举证为主、以法院查证为辅，以自愿、合法调解取代职权调解等。我国民事诉讼模式的改革与最终确定，应当立足于中国国情，以现行的职权主义模式为基础，兼采两种诉讼模式之长，构筑适度兼容的现代民事诉讼模式。这也正是我们学习和介绍欧美民事诉讼程序的目的所在。

王景琦

1997年8月

目　录

An Outline of Civil Procedure in United States

The first step in a lawsuit strictly speaking is not a matter of law, certainly not a matter of the law of civil procedure. Lawsuits do not begin themselves. Someone must first decide to sue someone else. If this decision is made intelligently, the person choosing to sue must have weighed several matters, among which at least three are basic.

A potential litigant obviously feels aggrieved or would not be thinking of a lawsuit. But he or she must further consider whether the grievance is one for which the law furnishes relief. There are a great many hurts a person may feel that the law will not redress. She is offended by the paint on her neighbor's house; he has worked for weeks to persuade a grocer to buy his brand of peas, and sees the sale go to a competitor; she has been holding a plot of ground for speculation expecting industry to move in and the area is zoned for residential use; he slips on a spot of grease in the county courthouse but the county is immune from suit. If the injury is among those not redressable by a court of law, litigation would be a fruitless and wasteful exercise.

Even if she concludes that the grievance is one for which the courts will grant relief, a potential litigant must consider the probability of winning a lawsuit. She must ask whether the person who has caused the injury can be found and brought into court; whether witnesses and documents will be available to support the

claims being sued on; whether this proof will be believed; whether the potential adversary can justify its conduct or establish any defenses to the action; and whether an accurate assessment of the law can be made ahead of time.

Then, and perhaps most important of all, a potential litigant must consider whether what is won will be worth the time, the effort, and the expense it will cost, and must weigh against this the alternatives to suit, among them settlement, arbitration, self-help, and letting matters rest. What form will the relief take?Most frequently it will be restricted to a judgment for damages. If this is true, the potential litigant must decide whether the injury is one for which a monetary payment will be satisfactory. Assuming it is, will defendant be rich enough to pay?How difficult will a judgment be to collect?How expensive?Will the recovery be enough to pay the lawyer' s fees and the other litigation expenses that undoubtedly will be incurred?Even in a context in which the court may grant specific relief-for example, an order directing the opposing party to do something or to stop doing something-will compliance by defendant be possible?Worthwhile?Sufficient?In the same vein, a potential litigant also must consider whether there are risks not directly tied to the suit; Will she acquire the reputation of a crank?Will he antagonize people whose goodwill he needs? Will the action publicize an error of judgment on her part or open her private affairs to public gaze?

Only after considerable thought has resolved these and similar questions will the prospective plaintiff be ready for the steps that follow. Let us now consider those steps in the light of a relatively uncluttered hypothetical case:

Aikings, while crossing the street in front of her private home, was struck and seriously injured by an automobile driven by

Beasley. On inquiry, Aikins found that the automobile was owned by Cecil and that Beasley apparently had been in Cecil' s employ. Beasley was predictably without substantial assets and a judgment against him for Aikins' injuries promised little material compensation. But Cecil was wealthy, and Aikins was advised that if she could establish that Beasley had indeed been working for Cecil and had been negligent, she then could recover from Cecil. Aikins decided to sue Cecil for $60,000.

1. SELECTING A PROPER COURT

Aikins initially must determine in which court to bring the action. She probably will have some choice, but it will be a limited one. This is true because the court selected must have jurisdiction over the subject matter (that is, the constitution and statutes under which the court operates must have conferred upon it power to decide this type of case)and must also have jurisdiction over the person of Cecil (that is, Cecil must be subject or amenable to suit in the state in which the court is located).

Aikins probably will bring suit in a state court, for as we shall shortly see the subject-matter jurisdiction of the federal courts is severely limited. If the court organization of Aikins' state is typical, there will be courts of original jurisdiction in which cases are brought and tried, and one court of appellate jurisdiction that sits, with rare exceptions, only to review the decisions of lower courts. (In most states there will also be a group of intermediate courts of appellate jurisdiction.)The courts of original jurisdiction probably consist of one set of courts of general jurisdiction and several sets of courts of inferior jurisdiction. The courts of general jurisdiction are organized into districts comprising for the most part several counties, although the largest or most populous counties each may constitute single districts. These district

courts hear cases of many kinds and are competent to grant every kind of relief, but in order to bring a case in one of them plaintiff must have a claim for more than a specific amount, perhaps two or three thousand dollars. The courts of inferior jurisdiction will include municipal courts, whose jurisdiction resembles that of the district courts except that the claims they hear are of less importance; justice-of-the-peace courts, which hear very minor matters; and specialized tribunals such as the traffic courts. Since Aikins' injuries are quite serious and her claim correspondingly large, she will, if she sues in a state court, bring the action in one of the district courts.

The federal government of course also operates a system of courts. The principal federal courts are the United States District Courts, courts of original jurisdiction of which there is at least one in every state; the thirteen United States Courts of Appeals, each of which reviews the decisions of federal district courts in the several states within its circuit (with the exception of the Courts of Appeals for the District of Columbia Circuit and the Federal Circuit); and the Supreme Court of the United States, which not only reviews the decisions of federal courts but also reviews decisions of state courts that turn on an issue of federal law.

The jurisdiction over the subject-matter of the United States District Courts extends to many, but by no means all, cases involving federal law, and also to many cases, similar to Aikins', that do not involve federal law; the latter are cases in which there is diversity of citizenship (the parties are citizens of different states or one of them is a citizen of a foreign country) and the required amount in controversy (more than $50,000) is at stake. Diversity jurisdiction, in common with nost of the federal courts' jurisdiction, is not exclusive; the state courts also are competent to hear these cases. But if Cecil is not a citizen of Aikins' state, Aikins

may bring an action for $60,000 in a federal court. Indeed, in these circumstances, if Aikins sued Cecil in a state court in Aikins' home state Cecil could remove the action from the state court in which it was commenced to the federal district court in that state.

It is not enough that the court selected by Aikins has jurisdiction over the subject-matter, however. That court, whether state or federal, must be one in which Cecil can be required to appear. This generally means that Cecil must reside or be found in the state in which the court sits. But the restrictions on a court's jurisdiction over the person have expanded in recent decades, and if Cecil is not present in Aikins' state but he directed Beasley to drive there, Aikins probably will be able to bring the action in that state. (Even in the event that these facts cannot be established, and Cecil cannot be found in Aikins' state, it may be possible to sue him there, if he owns property in that state, but the judgment will be limited to the value of that property.)

Not every court that has jurisdiction over the subject-matter and jurisdiction over the person of defendant will hear a case. It also is necessary that an action be brought in a court having proper venue. Thus, although every court in Aikins' state could assert personal jurisdiction over Cecil if he was within its boundaries, that state's statutes typically will provide that the case should be brought in a court whose district includes the county in which either Aikins or Cecil lives. Similarly, if Aikins decides to sue in federal court based on diversity of citizenship, she must bring suit in a district in which Cecil resides, or in a district where a substantial part of the events giving rise to the claim occurred, or in a district where Cecil is subject to personal jurisdiction, if there is no district in which the action otherwise may be brought.

Jurisdiction over the subject-matter is jealously guarded, and

cannot be waived. If Aikins and Cecil are both citizens of the same state, a federal court will refuse to hear the action even though both are anxious that it do so. Jurisdiction over the person and venue, on the other hand, essentially are protections for defendant, who may waive them if he wishes.

2. COMMENCING THE ACTION

After the court has been selected, Aikins must give notice to Cecil by service of process. The process typically consists of a summons, which directs defendant to appear and defend under penalty of default; that is, unless defendant answers the summons, a judgment will be entered against him. Service of process generally is achieved by personal service; the summons is physically delivered to the defendant or is left at his home, sometimes by the plaintiff or her attorney, sometimes by a public official such as a sheriff or a United States marshal. If Cecil lives in another state, but the circumstances are such that a court in Aikins' state may assert jurisdiction over Cecil, the summons may be personally delivered to him, or some form of substituted service, such as sending the papers by registered mail or delivering the summons to his agent within Aikins' state, may be employed. Even if Cecil cannot be located, service in yet another form, usually by publication in a newspaper for a certain length of time, may be allowed, although the validity of this kind of service in the type of case Aikins is bringing against Cecil is unlikely to be upheld. The United States Supreme Court repeatedly has emphasized that service must be of a kind reasonably calculated to bring the action to defendant's notice, and from this perspective service by publication is rarely sufficient.

3. PLEADING AND PARTIES

With the summons, Aikins usually will serve on Cecil the first of the pleadings, commonly called the complaint. This is a written statement that will contain Aikins' claim against Cecil. What should be required of such a statement? Obviously it may vary from a simple assertion that Cecil owes her $60,000, to a second-by-second narration of the accident, closely describing the scene and the conduct of each party, followed by a gruesome recital of Aikins' medical treatment and her prognosis for recovery. No procedural system insists upon either of these extremes, but systems do vary greatly in the detail required in the pleadings. The degree of detail required largely reflects the purposes that the pleadings are expected to serve. These purposes are many, but three objectives are particularly relevant and to the extent that a procedural system regards one rather than another as crucial, we may expect to find differing amounts of detail required.

First, the system may desire the pleadings to furnish a basis for identifying and separating the legal and factual contentions involved so that the legal issues-and hopefully through them the entire case-may be disposed of at an early stage. Thus, suppose that Cecil's liability for Beasley's driving depends upon the degree of independence with which Beasley was working at the time of the acccident. A dispute on this issue might exist on either or both of two elements. The parties might disagree as to what Beasley's duties were, and they might disagree as to whether those duties put Beasley so much under the control of Cecil that the law will impose liability on Cecil for Beasley's actions. The first disagreement would be a question of fact, and there would be no alternative to trving the suit and letting the finder of fact (usually the jury) decide the truth. But if there was agreement on that first element, a question of law would be presented by the second issue, which could be determined by the judge without a trial. The objec-

tive of which we are speaking would be fully served in such a case only if the pleadings set forth exactly what Beasley's job required him to do. It would be very inadequately served if the complaint stated only that "Beasley was driving the car on Cecil's business."

Second, the pleadings may be intended to establish in advance what a party proposes to prove at trial so that his opponent will know what contentions he must prepare to meet. If this objective is regarded as very important it will not be enough for the complaint to state that Beasley was negligent, or that Aikins suffered serious bodily injuries. It must say that Beasley was speeding, or was not keeping a proper look-out, or had inadequate brakes, or describe some other act of negligence and say that Aikins suffered a concussion, or a broken neck, or fractures of three ribs; or other injuries.

Third, the pleadings may be intended to give each party only a general notice of his opponent's contentions, in which event the system would rely upon subsequent stages of the lawsuit to identify the legal and factual contentions of the parties and to enable each to prepare to meet the opponent's case. In such a case a complaint similar to that in Form 9 of the Federal Rules would be sufficient.

Obviously each of the first two objectives is desirable. It is a waste of everybody's time to try lawsuits when the underlying legal claim is inadequate to support a judgment, and it is only fair that a person called upon to defend a judicial proceeding should know what he is alleged to have done. But to achieve the first objective fully may require pleading after pleading in order to expose and sharpen the issues; if detail is insisted upon, a long time may be consumed in producing it. Moreover, a single pleading oversight may eliminate a contention necessary to one party's case that easi-

ly could have been proven, but which will be held to have been waived. To achieve the second objective through the pleadings will mean that the parties must take rigid positions as to their factual contentions at the very beginning when they do not know what they will learn about their cases by the time trial begins. Either the first or second objective, if fully pursued, requires that the parties adhere to the positions taken in the pleadings. They could not be permitted to introduce evidence in conflict with the pleadings or to change them. For to the extent that variances between pleading and proof or amendments to the pleadings are permitted, the objectives will be lost. The court frequently will find itself forced either to depart from these objectives or to tolerate cases turning on the skill of the lawyers rather than on the merits of the controversy.

The third objective, insofar as it allows the parties to use the later stages of the lawsuit to identify and flesh out the issues in the case. avoids the delays and potential injustices created by trying to decide the case based simply on the pleadings. However, simple notice pleading may be used to harass defendant when plaintiff has no real claim. More often, though, plaintiff will use notice pleading to subject defendant to pretrial discovery (discussed more fully below), and in the process to reveal information so that plaintiff can determine whether a bona fide claim actually exists. Lawyers often refer to such use of the pleadings as a "fishing expedition," or alternatively as a "springboard into litigation." One way that courts have dealt with these problems is to sanction parties and lawyers who bring baseless claims.

4. THE RESPONSE

Following the service of Aikins' scomplaint, Cecil must respond. He may challenge the complaint by a motion to dismiss.