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A GERMAN LAW SUIT

If the German empire is compared with the United States, we find it possessed of far more power over the internal concerns of the several component States. Among other things, it dictates the methods of procedure in civil actions for the whole country. They are regulated by two imperial statutes, one entitled the *Civilprozessordnung*, or *Ordering of Civil Process, i. e., Code of Civil Procedure*; and the other the *Gerichtsverfassungsgesetz*, or *Law of Court Administration, i. e., the Judiciary Act*. Each was originally enacted in 1877, and has since been amended in various points.

The practical operation of these statutes is the subject of a treatise styled a *Guide to Civil Practice Through Examples of Lawsuits*, (*Anleitung zur Prozesspraxis in Beispielen an Rechtsfällen*) which is accepted as a standard authority. The author, Dr. Herman Meyer, is a Privy Councillor, and a judge of large experience, residing in Breslau. His plan of treatment is, as the title indicates, to give practical examples of what a lawyer must do in particular cases.

By following him in the statement of one of these, a clear view can be got of an ordinary German lawsuit. There are two kinds: one formal and conducted by lawyers; the other informal and infrequent, in which lawyers take no part. Dr. Meyer first describes one of the formal kind. At each step he cites the particular sections of the statutes which present the rule of proceeding. These we omit.

Let us suppose, he says, that one Klatt, a landed proprietor in Benthe, Prussia, wishes to sue one Becker, a merchant in Wieren,

on an account of 1600 marks with interest. Wieren lies in the territory under the jurisdiction of the court of the first instance¹ of Uelzen, and of the County Court² of Lüneburg. Therefore both these courts are competent as regards territorial jurisdiction. Which of them is competent with respect to the matter in controversy depends, as a rule, subject to certain exceptions, on its value. Therefore³ the County Court of Lüneburg has jurisdiction.

In order to institute a suit in the County Court of Lüneburg, the complainant must be represented by a lawyer admitted to practice before it. He thereupon goes to a counsellor at law, Agerius, and gives him an account of the controversy. From this Agerius perceives that Klatt's claim appertains to property brought him by his wife, and so writes him that he ought to join her in the suit.

Dr. Meyer is at the pains of giving us a form for such letter, as follows:

"You are, it is true, entitled under section 1380 of the imperial code, to sue in your own name to enforce such a right as you set up. But since, under section 1375, you cannot dispose of this claim, the judgment would, under section 1380, have no force either for or against your wife. The defendant would only be adjudged to make payment to you, upon your wife's consent being proved. It is therefore best that she should join in the suit, and I send you the power of attorney, with the request that you both execute it."

An American lawyer, under like circumstances would, of course, hardly think it worth while to refer the client to the particular sections of the statute book; nor is it likely that the German lawyer does. The author is here really bent on directing the attention of a law student or practitioner to all the governing statutes.

The power of attorney having been received, Agerius prepares the writ. For this a date is not required. It is, however, customary and best to put one in.

The writ or process may be of the following form:

"Royal County Court, Lüneburg: Civil chamber No. 1.

Writ

of Adolf Klatt, landed proprietor, of Benthe, and his wife Anna (whose maiden name was Dickfass), plaintiffs,

¹ *Amstgericht.*

² *Landgericht.*

³ By a section of the statute to which he has referred.

against

Ludwig Becker, merchant, of Wieren in Uelzen, defendant,
on account of brokerage.

An exhibit is annexed.

As authorized attorney of the plaintiff, I cite the defendant to the oral trial of the action before the County Court of Lüneburg, and demand that he appoint an attorney admitted to practice in that court.

I will move for

judgment against the defendant for the payment of 1600 marks with four per cent interest from September 1, 1900.

The plaintiffs make, under section 1380, B. G. B. 4, a demand appertaining to property coming from Mrs. Klatt, the co-plaintiff. She is, as appears by the annexed certificate of inheritance, sole heir of her father, Hans Dickfass, brewer, of Hanover. On January 2, 1900, the defendant promised said Dickfass, if he would aid him to sell his house and garden in Hanover, No. 15 Bodeker street, a fee of 2400 marks (Evidence; Franz Doppelkreide, innkeeper, and Hans Pillè, M. D., of Hanover, as witnesses).

Dickfass ascertained that the master-builder Emtor of Burgdorf, might be a purchaser, and through the agency of Dickfass, Emtor, on January 19, 1900, bought house and garden for 120,000 marks (Evidence: Testimony of the restaurant-keeper Burmann of Hanover). The contract was thereupon attested on January 20, 1900, by the notary Brandis (Evidence: Affidavit.).

Upon the demand of Dickfass of 2400 marks, the defendant has only paid 800 marks, and still owes 1600 marks, with interest for delay of payment since September 1, 1900, before which on August 31, 1900, Dickfass demanded payment of the defendant.

Lüneburg, October 20, 1901.

Agerius.

Exhibit attached.

Certificate of inheritance.

By the hereinafter described court of probate it is hereby certified that by will executed January 20, 1900, the wife of Adolf Klatt, landed proprietor of Benthe, Anna, whose maiden name was Dickfass, has proved herself to be the sole heir of Hans Dickfass of Hanover, who died May 14, 1901.

Hanover, September 16, 1901.

Royal Court of the First Instance, Twentieth District.

RIEDEL."

⁴ i. e. The imperial civil code, or *Bürgerliche Gesetzbuch*.

It will be observed that the German practice differs from the American in indicating at the outset the mode in which each averment is to be proved, and naming the witnesses to be produced. Otherwise the form much resembles that customary in those of our States which have abandoned common law pleading for code pleading.

The action is considered as pending only after the service of the writ. If the defendant pays up, before that, he is not liable for costs.

Agerius sends to the clerk's office the original writ and either the original exhibit or a copy of it, and also an unattested copy of these marked "for the court." The clerk lays the original promptly before the presiding judge, who sets a day for the hearing and makes an endorsement to that effect, *e. g.*:

"Time for hearing, November 10, 1901, 9 a. m. Lüneburg, October 21, 1901.

The presiding judge of the first civil chamber of the Royal County Court.

SCHWARZ."

This time must ordinarily be such as to give the defendant at least two weeks between the day when he is served and the day of the hearing, to prepare his answer.

The clerk copies the indorsement on the court copy, and Agerius can then call for the original. A copy of this with its endorsement he attests, as an attorney, and sends original and copy to the court officer for service, which may be made either personally or by mail. It is to be mailed, in order to save expense, unless he is otherwise instructed.

The officer makes his return of service in considerable detail, on the original process. The copy he leaves with the defendant or, if he cannot find him, with one of his family and household. He then returns the original to the plaintiff's attorney.

If the defendant wishes to contest the plaintiff's demand he must now employ a competent attorney. He cannot under these circumstances appear in that court, and conduct his own case. His attorney, when retained, sends his answer to Agerius, together with an office copy of it, attested by himself. It may be thus phrased:

"Royal County Court, Lüneburg.

Answer.

In the matter of Adolf Klatt, landed proprietor, and his wife Anna, whose maiden name was Dickfass, of Benthe, plaintiffs,
 against
 Ludwig Becker, merchant, of Wieren. in Uelzen, defendant,
 on account of brokerage.

Time for hearing, November 10. 290.

The defendant will move for the dismissal of the suit. The lawful right of the plaintiffs to sue will not be contested. But the fee promised was only 800 marks (Evidence: Apothecary Mueller of Burgdorf, as witness.

But that Dickfass furnished assistance to the defendant or negotiated the sale will be contested. The property also was sold for 115,000 marks, not 120,000 marks, and not January 19, but January 20, 1900, and through the efforts of Jacob Heine, broker, of Lüneburg, as this defendant will prove.

For further answer to the claim sued on, Dickfass also was active in behalf of Emtor (B. G. B., section 654). Evidence: Master-builder Emtor of Burgorf, as witness.

The demand made by the plaintiffs for payment will not be contested.

Lüneburg, November 1, 1901.

DR. NEGIDI."

Agerius endorses on the original answer, that he has received the attested copy from Negidi on a day named.

He may then file a reply thus:

"Royal County Court, Lüneburg, Civil Chamber No. 1.

Pleading of the plaintiffs

in the matter of Adolf Klatt and his wife (&c., &c.: caption, as in answer).

It is true that the purchase price was not 120,000 marks, but 115,000 marks. On January 19, 1900, the bargain was fully completed, orally.

The allegation that Dickfass was active for Emtor is unintelligible. If Dickfass was to negotiate a sale, he must treat with the buyer also.

Lüneburg, November 3, 1901.

AGERIUS."

An attested copy of this is served on the opposing counsel.

It will be observed that this replication enters into a legal argument.

Agerius also files in court a copy of his power of attorney.

Further pleadings are allowed, if deemed necessary.

The County Court is composed of a presiding judge and two side judges.

In some of these courts all the judges read the record before the day assigned for the hearing. In some none do. In some, that one is appointed to read it who is to put the judgment in form (the *Referent*) and he may be required to notify the presiding judge, before the trial, what he thinks of the case.

If, on a preliminary reading of the record, the reader is of opinion that either party has omitted some material statement or failed to lay in some material document, he may in practice call on his attorney to supply the omission; although the statute does not require this.

It is, of course, seldom that the pleadings are closed in so short a time as indicated in the foregoing form.

When the hearing is reached, the clerk reads a protocol, or brief description of what the case is. The plaintiff's lawyer then states the facts as he claims them. This must be done orally. To refer the court to a written statement for this purpose is prohibited, nor are the papers to be read, unless some question arises as to the meaning of an averment. The defendant's counsel is at liberty to interpose and correct anything that he deems a misstatement of fact. The presiding judge also, from time to time, asks any questions which he thinks may throw light on the subject. With his permission, the parties can also enter into the discussion, and supplement and correct their lawyers' statements.

If a party in this way says something which the counsel for the other side deems to bear in his favor, he can ask to have a note made of it. This done, the clerk reads it, and if the counsel assents (a nod being sufficient for the purpose), the presiding judge directs that it be added to the protocol.

Either counsel can also hand in a reference to any statute which he has not mentioned in his pleading.

The first hearing is then closed, and the court retires for consultation.

If there is nothing in the case, on the face of the record, it may come to a final judgment:

If there are points on which the court thinks evidence should be heard, it so orders.

If the witnesses live at a distance, it issues a commission to take their evidence. This may be issued to a local court of the first instance. The latter fulfils it by summoning in the witnesses. The counsel for both sides are notified and may be present. The return must state that the witnesses were duly sworn after being informed as to the nature of an oath, and give the substance of the testimony of each. Each must testify out of the hearing of the others.

We quote here again from the form given by Dr. Meyer, omitting the introductory part:

“1. Doppelkreide.

My name is Franz Doppelkreide. I am 42 years old, a Catholic, and an innkeeper here. The parties are entirely unknown to me.

As to the facts:

I only know that some two years ago in my inn two gentlemen were talking about the estate No. 15 Bödeker street. It appeared to me that one of them wanted to sell it. Then came the words: ‘If you help me to sell, I will give you 800 thalers.’⁵ I took it then to be a brokerage fee, and the large amount surprised me. I can, therefore, not think that it could have been 800 marks. But I did not listen closely.

Read over. Assented to. The witness took the witness-oath.

2. Dr. Pille.”

[Then follows Pille’s testimony, likewise summarized and certified.]

As soon as any commission thus sent out has been executed, and the return made, the clerk allows the lawyers to read it. When all are in, the presiding judge sets a day to proceed with the hearing. At this, it can order that any local witness may be examined personally. The parties can amend their pleadings in the interval, if they see cause.

The argument is now in order. The local witness, if any, can be examined by the presiding judge either before or during the argument, as he may think proper. The oath is sometimes administered before and sometimes after he testifies.

A *referendar*, (or law-student at an advanced stage of his education), who is in attendance to aid the court and keep a sum-

⁵ A thaler is of the value of three marks.

mary record of the proceedings, notes the substance of the testimony and reads it to the witness for his approval.

At the close of the hearing the court may retire for consultation, or set a future day for giving judgment.

This judgment file is a carefully prepared and lengthy document.

That in the supposed case of *Klatt v. Becker* begins as follows:

"In the name of the King!

Judgment pronounced

January 27, 1902.

Blau, clerk.

In the matter of

Adolf Klatt, landed proprietor,
and his wife Anna, whose
maiden name was Dickfass, of
Benthe, plaintiffs: Attorney
appointed, Agerius of Lüneburg
against

Ludwig Becker, merchant of
Wieren, defendant: Attorney
duly appointed, Dr. Negidi of
Lüneburg,

on account of a brokerage fee,

has the first Civil Chamber of the Royal County Court of Lüneburg, after an oral hearing on January 20, 1902, before Schwarz, presiding judge of said court, Roth, judge of said court, and Gold, a *Gerichtsassessor*.⁶

rendered this judgment:

The defendant is adjudged to pay to the plaintiffs 1,600 marks,—that is to say, sixteen hundred marks,—with 4 per cent interest from September 1, 1900.

The costs of the action must be discharged by the defendant."

Then follows a statement of the points made and the main proofs of fact in the case and, after that, the grounds of decision are also fully given, with references to the governing sections of the codes.

It is to be signed by each of the judges.

An appeal lies from the County Court to the Superior Court.

This is heard on the record of the court below, including the summarized testimony of each witness, and on any new evidence

⁶ One who has entered on judicial life in an inferior judicial position, from which he will, in the natural course of things, be soon advanced.

that the parties may offer and the court admit. New witnesses may then be summoned in, and their testimony be summarized and recorded in a manner similar to that pursued for the original order.

If it appears that some material fact is peculiarly within the knowledge of one party, the other can call upon him to declare under oath what is the fact. If the court thinks this proper, it may order him to make the declaration (or suffer defeat) even after the submission of the cause, pending a motion to that effect. In the instance given by Dr. Meyer, the event of the appeal is made to turn upon it. The final judgment includes the following:

“The defendant has to take this oath:

‘I swear by God the Almighty and Omniscient, that in promising the brewer Dickfass on January 2, 1900, a reward, if he would help me to sell my estate, I said I would pay him 800 marks, not thalers. So help me God.’

If the defendant so swears, the plaintiffs will be dismissed and the costs of suit charged against them.

If he does not so swear, the defendant will be adjudged to pay the plaintiffs 1,600 marks with 4 per cent interest from September 1, 1900, and the costs of suit.”

If no appeal is taken, and the prescribed oath is not taken by a time set, a supplementary judgment is entered confirming the provisions of the former one, made to operate in that contingency.

An appeal lies from this judgment to the Imperial Supreme Court at Leipsic, which hears it on the record of the Superior Court.

Each of these three courts has its own bar, and the attorneys in the lower ones cannot conduct the cause in the higher.

The informal suit conducted without lawyers can be instituted only in the court of first instance.

The plaintiff tells his story to the clerk, who reduces it to a short statement and embodies it in a minute or protocol. This he hands to the judge, who sets a day for the appearance of the defendant, of which the latter is then notified. A written complaint may be filed, if the court thinks proper. On the day set, the parties state their claims orally to the judge, and if they do not agree on the facts, he adjourns the cause to a future day, when witnesses are produced and he examines them, the testimony of each being summarized in the protocol.

The right of appeal to the Imperial Supreme Court at Leipsic is not dependent on the nature of the subject of controversy, or any differences of citizenship between the parties. It is a natural incident of a centralized imperial government. As the empire has a general power of legislation as to all matters not purely of local concern, and has exercised it by prescribing rules for administering both civil and criminal justice in all the component States, it was necessary to give an appeal to an Imperial Court of last resort, in order to insure the uniform construction of the statutes enacted.

There are no local national courts, of original jurisdiction, as with us. Each of the several States appoints commissions, and pays its judges; and all judicial business is conducted in these State courts, subject only to review by the Supreme Imperial Court. These judges, for all the States, number many thousand. In Prussia alone there are from five to six thousand. Juries are only in use in criminal causes, and in them only when a serious offence is charged. Generally the County Court has three judges: the Superior Court five. The Imperial Court has some sixty or seventy, and sits in sections.

The absence of a jury makes it needless to prescribe many rules of evidence for excluding collateral matters or otherwise limiting the discretion of the court as to admitting proofs. The code of civil procedure (*Civilprozessordnung*) makes a very few provisions as to interested witnesses, and as to questions calling for answers damaging to the person giving them or those whom he may represent. One summoned to testify, who wishes to be excused for any such causes, must make his objections known before the day set for his appearance. Some witnesses, who could be excused for interest, but do not wish to be, are examined without being sworn. The judge puts the questions which he deems necessary. A preliminary hearing has first apprised him of what the real matters of difference are, and on what particular points witnesses should be heard. Under his superintendence, the parties or their attorneys can also put pertinent questions to them.

The testimony being officially summarized, and the summary assented to by the witness, it is easy to record it, and have it ready for use in case of an appeal. Here is a vital difference between our procedure and that of the Germans. They pick out what they deem the gist of what a witness has said, and after he has assented to their statement of it as correct, dismiss his

other testimony from their recollection. There are no reams of stenographic notes.

From this injustice may sometimes result. Matters that appear irrelevant or inconsequential when a witness is on the stand sometimes assumes a new importance on a subsequent review of the whole case. It is, however, always in the power of the court to reopen the case and call him again before them, or on an appeal he can be heard *de novo*. Expense and delay also are certainly diminished.

Another important difference from the general American practice on appeal is that the finding of facts, which every judgment must contain, is not conclusive in the higher court. Not only can it be shown to be erroneous by producing new proofs, but in certain things it can be attacked as unwarranted by the contents of the protocol.

Simeon E. Baldwin.