Conference track «44.5 Current issues in English and US law»

Origins and history of consideration doctrine

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The origins of the consideration doctrine can be traced back to thirteenth-century English law. At that time, the English courts did not yet recognize concept of breach of contract. They did, however, enforce legal rights that were similar to those arising under contracts today. The English courts allowed two contractual causes of action: covenant and debt.

The covenant action was available only to enforce a promise in writing and under seal. Such documents were seldom employed in day-to-day business affairs, so the action of covenant had limited utility.

The debt action had more practical importance, because it was available to enforce both formal promises and informal ones. The debt action was not available unless the plaintiff claimed that the defendant owed him a definite sum of money. Action of debt could be used to enforce informal promises, so long as the plaintiff could claim a definite sum and could establish that the defendant had received a quid pro quo for the debt.

Neither covenant nor debt provided a remedy for the improper performance of an informal promise. In addition, the debt action suffered from two other limitations. First, it was not available if the debtor had died. More importantly, the defendant in a debt action could have the benefit of a "wager of law." Under this procedure, the defendant could appear in court with "oathhelpers", each of whom would swear that the defendant was not indebted. If the defendant performed this ceremony, he won his case.

Because of that, covenant and debt were replaced by a new form of action, called "assumpsit." Assumpsit eventually became the general remedy for breach of promise. In the fourteenth century, the English courts recognized the action for damages from a wrongful act. This action, known as "trespass," originally applied to public wrongs. Later it was extended to apply to private wrongs as well. Thus, an action would lie for the nonperformance of an obligation voluntarily undertaken. The action in such cases came to be known as assumpsit.

By the year 1400, it was established that an action of assumpsit could be used to recover damages for improper performance of a voluntary obligation. The English courts distinguished between "misfeasance" and "nonfeasance". Assumpsit was only available to remedy the former. For nonfeasance, the plaintiff was remitted to an action of covenant, where he could recover only if he could produce a specialty. By the sixteenth century, the plaintiff was permitted to recover for either misfeasance or nonfeasance without producing a sealed document. Assumpsit had completely superseded covenant.

The use of assumpsit instead of debt had attraction for the creditor, because of the procedural advantage enjoyed by the defendant in a debt action. Defendants' attorneys therefore objected when plaintiffs attempted to bring an assumpsit in any case where an action of debt would be available. This dispute was resolved in Slade's Case. It held that a plaintiff might elect between assumpsit and debt. The consequence was that assumpsit replaced debt.