CAUSE OR CONSIDERATION

QUEBEC CIVIL CODE—ART. 984:—

"There are four requisites to the validity of a contract:
Parties legally capable of contracting;
Their consent legally given;
Something which forms the object of the contract;
A lawful cause or consideration."

When the Commissioners charged with the duty of drafting the Civil Code of Lower Canada reached the subject of "Contracts", they departed slightly from the model of the Code Napoleon, and introduced into the fourth requisite of the validity of a contract the word "consideration", which was a term unknown to the Roman law, and to the civil law which had been introduced into Canada.

In their report, the Commissioners have nothing to say about the use of the word "consideration", and the opinion may be hazarded that it was a concession to the common law, the exponents of which had never been able to understand what the Roman jurists meant by "cause", and had, during the course of several centuries, invented the doctrine of consideration, which appears only late in the 15th Century, and we do not know by what steps it became a settled term of law. (Pollock on Contracts p. 179, and following.)

Although entire libraries have been written in an attempt to devise an accurate definition of the word "cause", which will meet all the requirements of the metaphysical subtilities, the ordinary advocate or layman has no difficulty oin grasping the essential characteristics of the term.

The question of "motive" being eliminated, the "cause" of any contract, viewed from the standpoint of one of the parties, is merely the promise by the other. For example in the contract of sale, the cause of the purchaser's obligation to pay the price is the obligation contracted by the vendor to deliver the thing. (16 Laurent No. 109)

Laurent proceeds to point out that, since the thing promised by the buyer is the cause of the vendor's obligation, and the thing promised by the vendor the cause of the buyer's obligation, the theory of the Code is not logical because the cause is confused with the object, and he concludes:—

> Une chose est certaine, c'est que le contrat existe et est valable dès que les trois premières conditions exigées par l'article 1108 existent; le consentement la capacité et l'objet.

Should it be considered essential to distinguish "cause" from "object", it is obvious that any bilateral contract must have two causes, one of which, viewed from the standpoint of the party having recourse to the courts, that is, the plaintiff, becomes the consideration which he alleges as the basis of his action.

It is to be observed, therefore, that the two words are mutually complementary; the cause of the obligation assumed by one party is the consideration given by the other party. In other words, consideration is nothing more than the obligation assumed by the plaintiff, on which he relies as the basis for his judicial demand that the defendant be ordered to discharge the obligations assumed by him.

As defined by Halsbury (Vol. 7, No. 383,) consideration is:—

> Some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss of responsibility suffered or undertaken by the other at his request, but always viewed from the standpoint of the plaintiff.

The Oxford English Dictionary cites the following definition given in "Termes de la Ley" (1641):

> Consideration is the *material cause* of the contract without which no contract can bind the parties.

Pollock (Contracts p. 182) adds:—

> Some English canonists perhaps used the word "consideration" with the same or nearly the same meaning as their extended sense of "cause" before it was familiar to the common lawyers.

The development of the doctrine of consideration illustrates the fundamental difference between the Common Law and the Civil Law.

The civilian commentators have devoted their energies to the development of the general principles of the law, and discussed those principles in the abstract.

The common law, on the contrary, has, throughout the ages, been striving to discover particular rules for concrete cases, not with the idea of enunciating hgeneral principles of substantive law, but of identifying the particular conditions which were essential to the enforceability of an action.

Although all the English legal historians insist that there was never any reception of the Roman law in England, nevertheless the fact remains that the common law was based upon the decisions of Chancellors who were familiar with such rules of

the Roman law as had been incorporated in the canon law; the Roman law was, from the middle of the 12th century, a subject of constant study, and when Glanvil and Bracton produced their works on the law of England, they incorporated therein particular rules of the Roman law with regard to contracts.

Since the civilian commentators have been unable to agree upon the exact meaning of "cause", it is not surprising to discover that the common lawyers, even with the texts of Glanvil and Bracton, were unable to discover what were the essential elements of a contract under the Roman law. They accepted in their entirety the definitions of the four consensual contracts—sale, lease and hire, etc., but they made no attempt to analyse those definitions for the purpose of identifying the essential elements of parties, consent, object and cause. When, therefore, they were called upon to enforce, on behalf of a client, an ordinary contract, their energies were devoted to the discovery of some form of action by means of which they could prevail upon a judge or court to recognise the client's rights.

Holdsworth (History of English Law Vol. 3, p. 319 and following) gives a comprehensive account of the ingenuity of these early practitioners in bringing the question of contracts within the scope of the actions of debt and assumpsit, the theory of *quid pro quo*, and ultimately adopting from the Court of Chancery the doctrine of consideration.

In this search for the basis of an action, the English lawyers were following in the footsteps of the Roman jurists, whose substantive law had nothing whatever to say about the "cause" of contracts, and the word was introduced in their search for the grounds upon which an action could be taken.

The theory of contracts did not originate fully developed in the brains of the jurisconsults. It was formulated little by little as need arose, and was not finally developed until the late Empire.

The jurisconsults were, above all, practical lawyers, whose preoccupation was to discover practical solutions for adapting law to the needs of commerce rather than the development of theories.

The idea of cause originates in the use of the word "causa" in a bewildering number of meanings, and it is interesting to observe that, in connection with the grounds of an action, it is a synonym for *res*. (Capitant, p. 112-113).

Since the absence of any theory of the cause of a contract in the common law is one of the principal grounds for the

contention that the common law theory of contract is entirely independent of the Roman law, it becomes necessary to consider whether, as a matter of fact, the Roman law ever had a theory of cause.

Although the Commissioners charged with the duty of preparing the Code Napoleon followed Domat by adopting the theory of cause, and by Article 1108 specified "une cause licite" as one of the four essential conditions for the validity of a contract, controversies soon arose and, as early as 1826, a Professor of the University of Liege, Ernst, published a criticism demanding the suppression of the Articles of the Code referring to the cause of a contract, which, according to him, had no real significance and were only a source of error and confusion. (Capitant p. 39).

Since that time, the controversy has continued to divide the French jurists into "causalistes" and "anti-causalistes". Henri Capitant, to whom reference has already been made as the most brilliant of the "causalistes", published his exhaustive review of the controversy in 1924, and Prof. Walton, formerly Dean of the Faculty of Law at McGill, reviewed the work the following year. (41 L.Q.R. 1926—p. 306).

After a detailed review of the different meanings of the word "causa", Dr. Walton continues:—

> It is perfectly clear, therefore, that when Domat, Pothier and the French codifiers talk about "causa" as an element of obligation, they are not using that ambiguous word in the sense of "causa-civilis obligandi". No one denies that an obligation must have a lawful subject-matter, but the question is whether this requirement is not covered by other Articles, and whether the theory of cause needs to be introduced.

He concludes (p. 323):—

> With all my admiration for the work of M. Henri Capitant, I am not convinced that the articles on cause in the French Code are necessary, and I feel strongly that they are a source of confusion. As a foreign student of the French Law, it is with great diffidence that I express my opinion, but surely the fact that so many French lawyers of eminence are anti-causalistes is enough to show that there must be something wrong with the Code.

After reviewing the citations from the Digest, on which Domat relies for his theory of "cause", Dabin says:—

(*Theorie de la Cause*) p. 34 :

> Sur cinq textes invoqués, trois parlent explicitement ou implicitement de cause; mais ils visent une hypothèse différente de celle de DONAT. Les deux premiers sont relatifs aux contrats innomés.

(Dig. 2. 14, de pactis, 7.4. Dig. 19. 5 de praeser, verbis et in factum actionibus, 5); le troisième relatif aux contrats formels, suppose une stipulation faite sine causa. (Dig. 12, 7, de cond. sine causa, 1 princ). Les deux autres textes visant la même hypothèse que DOMAT, à savoir un contrat synallagmatique, justement ne parlent pas de cause; le premier definit le contrat synallagamatique; ultro citroque obligation. (Dig. 50, 16, de verb. significatione, 19); le second explique le sens du terme credere (Dig. 12, 1. de rebus creditis, 1. 1 in fine).

A première vue, ces textes paraissent aussi étrangers les uns aux autres que chacun d'eux a la théorie de la cause. On est tenté de conclure qu'à l'erreur. DOMAT aurait ajoute la contradiction, de telle sorte que le genèse de la théorie deviendrait totalement inexplicable.

It is interesting to note that Prof. Buckland, Regius Professor of Civil Law, Caius College, Cambridge, comes to the same conclusion. He writes:

(*Roman Law and Common Law*) p. 175 :

> The mediaeval lawyers made the principle of *causa* the basis of their system of contract, and from them the principle has passed into modern continental law, not in Germany but in France and Italy and elsewhere. But the conception is unmanageable and it was long ago observed by Bonfante that it is the most discussed and most "indecipherable" problem of modern legal doctrine, the battle-ground for metaphysical elucubrations and juridical psychology. If this is so for Italy, it is certainly not less so for France. Cause is not *quid pro quo*, for intent to donate is a cause. It is not motive, for motive, in general, is indifferent. It is some times defined as the immediate aim, as opposed to ulterior motives, some times as the "objective" motive. Yet the French Civil Code deals with "cause illicite", which is much the same as the Roman "turpis causa", "ulterior motive", but groups it with "sans cause" (sine causa) and "fausse cause", as if cause were used in the same sense in all three cases. In fact, so wide is the conception of cause, if it is to be found wherever there is a binding contract, that it becomes meaningless; as has been said, no one but a lunatic could possible set out to contract an obligation without a cause in this sense. It is, however, firmly embodied in the Civil Code, sect. 1131, which rejects an obligation *sans cause*. The question of the value of the conception has been much discussed both in France and in Italy, but need not be here considered. Our only concern with the matter is to suggest that it *is not really to be based on the Roman Law, as expressed in the texts.*

Prof. Buckland's reference to Art. 1131 C.N., reflects the confusion that runs through the whole controversy, by the assumption that the *cause of a contract is* synonymous with the *cause of an obligation.*

The question is whether the medieval lawyers, in making the principle of *causa* the basis of their system of contract, were

following the Roman Law, and it seems to be utterly irrelevant to bring the question of the cause of the obligation. As Capitant says(p. 26):

> C'est également une erreur de parler, comme certains auteurs, de la cause du contrat. Il y a là une évidente méprise. *La cause d'un contrat, cela ne signifie rien. Il ne peut être question que de la cause des obligations* assumées par les contractants. Dans un contrat unilateral, il faut rechercher quel est le but que vise celui qui s'oblige; et dans un contrat synallagmatique, quel est le but que poursuit chaque contractant. Les rédacteurs du Code n'ont pas, du reste, commis la confusion signalée. L'article 1108, qui énonce les conditions essentielles pour la validité d'une convention, cite: la consentement de la partie qui s'oblige; sa capacité de contracter; un objet licite qui forme la matière de l'engagement; et enfin, une cause licite dans l'obligation. Et l'article 1131, le premier et le plus important des trois articles qui composent la section IV, consacrée à cette quatrième condition, répète à son tour;
>
> L'obligation sans cause, ou sur une fausse cause, ou sur une cause illicite ne peut avoir aucun effet. Ici encore, c'est bien de l'obligation et non du contrat qu'il est question.

This passage, it is submitted, is a complete abandonment of Capitant's entire thesis, which is an attempt to refute the arguments of the "anti-causalistes". But those authors never pretended that an obligation could exist without a cause; they confined their criticism to the provisions of the Code, which made "cause" one of the essential elements of a convention or contract.

> Aussi n'est-il pas étonnant qu'il se soit formé dans la doctrine une école 'anticausaliste' qui soutient que la cause est une création artificielle dont il faut débarrasser la technique juridique. A l'en croire, les rédacteurs du code ne seraient mépris en inscrivant cet élément parmi les conditions de la validite d'une convention. Tout contrat est parfait, complet, dit-elle, du moment que les parties sont capables, qu'elles ont échangé leurs consentements et se sont mises d'accord sur l'objet de leurs engagements. A ces éléments seuls nécessaires, la cause n'ajouterait rien de réel, elle ne serait qu'une expression vide de contenu, ou plutôt une façon nouvelle de désigner, suivant les cas, l'une des conditions précédentes.

The whole purpose of his book is to defend and support the theory of cause as it applies to contracts.

> Cependant la majorité de la Doctrine croit encore a la realité de la cause, au moins pour les *contrats* à titre onereux, et continue d'enseigner . . . . qu'elle est un *element essentiel a la validite de ces contrats.* (p. 8).

Since M. Capitant himself declares that: "La cause d'un contrat ne signifie rien", it is difficult to appreciate the reasons

which induced him to present to the profession a treatise of five hundred pages devoted to the defence of a doctrine that is devoid of any meaning.

Even Capitant, who defends the theory of cause so vigorously, admits that it was the invention of the medieval commentators. He says (p. 127):—

> On peut affirmir, croyons-nous, que la théorie de la cause d'était insensiblement formée au cours des siècles, et qu'elle flottait depuis longtemps dans l'atmosphere juridique. Domat ne l'a pas inventée, il l'a simplement exposé pour la première fois en termes clairs et precis.

Professor Holdsworth, in support of his assertion that Glanvil's introduction into his account of English Law the Roman contracts by their Roman names, was "a mere borrowing without assimilation", says that "the essence of the Roman contract system—the presence of distinct *causae*—is wanting". (Vol. II, p. 162).

Modern scholars now tell us that the "theory of cause" was an invention of the medieval commentators, and was unknown to the Roman law. The absence, then, of any "theory of cause" from the English law of contract, does not differentiate it from the Roman law, and when the action of assumpsit ultimately placed the whole emphasis upon the "mutual promises", the Common law in effect adopted the Roman law of consensual contract.

The Common Law

In the search for the starting point of the history of contract in the Common law, it is useless to go beyond the year 500 A.D.

Francis Haverfield, the great authority on the early history of Great Britain, asserts that :—

> Few laws or institutions; few social and economic customs can be pointed out which unquestionably existed in known and determinate form in the year 500 A.D., by which time the Saxons had made themselves masters of the greater part of the Island.
>
> (*Roman Occupation of Britain*, p. 262).

Pollock and Maitland (History of English Law p. 25) point out that the manners, dress and dialect of our ancestors before the Norman Conquest are better known to us than their laws.

So far as we can see that there was any judicial system in Anglo-Saxon law, it was of a highly archaic type. Insofar as we can trust the written laws, the only topics of general importance were man-slaying, wounding and cattle-stealing.

It may be asserted, therefore, that the Anglo-Saxons had no theory of contract.

There is certainly nothing to suggest that there was any sign of such a theory before the Council of Whitby in 664 A.D., when the Roman missionaries were successful in establishing their predominance over the British missionaries, who first converted the Northern Saxons.

Following that Council, Theodore of Tarsus was sent by Pope Vitalianus to organize the Saxon Church, and from that time throughout the rest of the Saxon period, it was the Roman ecclesiastics who administered justcie throughout the Realm.

There were men trained in the canon law, and many of whom were also well-posted on the civil law as well.

It is impossible to believe that such men could have bothered with the crude and barbarous customs of the ignorant Saxons, and they evidently drew on their knowledge of the principles of the Roman law to introduce form and order into the administration of law during their day.

With the Norman Conquest the intercourse with the Continent and Rome became still more intimate, and it is worthy of note that Lanfranc, William's Chancellor, was a Pavian lawyer, well versed in the civil law.

Lord Justice Scrutton, in his York Prize Essay (Roman Law in England—1884), seems to suggest that there was, at that time, little knowledge of the civil law.

> The legal compilations of Justinian did not come into existence until A.D. 565, but this body of laws appears to have had no force in Western Europe, and, indeed, with the exception of a partial and temporary application in Italy, to have been almost unknown until the revival of its study by the Bolognese Law School about the year 1150.

But the law was widely known when the Digest was promulgated, and the authors therein referred to were the jurists who had been developing the Roman law for five hundred years, and it is impossible to believe that the barbarian inroads can have exterminated all memory of the Roman law that had flourished throughout Italy and the Empire for nearly a thousand years.

Lord Bryce (Holy Roman Empire p. 16 et s.) has given us a picture of the barbarian invasions which confirms the opinion that the records of the Roman law were by no means obliterated.

"Thus, in many ways, was the old antagonism broken down . . . . .Rome admitting barbarians to rank and office; barbarians

catching something of the manners and culture of their neighbors. Thus when the final movement came, and the Teutonic tribes slowly established themselves throughout the provinces, they entered not as savage strangers but as colonists, knowing something of the system into which they came, and not unwilling to be considered its members; despising the degenerate provincials, who struck no blow for their own defence, but were full of respect for the majestic power which had for so many centuries confronted and instructed them.

"The wish of each leader is to maintain the existing order; to spare lives, to respect every work of skill and labor; above all to perpetuate the methods of Roman administration, and the rule of the people as deputy or successor of their Emperor. (p. 17. . . . . .)

"Historians have remarked how valuable must have been the skill of Roman officials to Princes, who, from leaders of tribes were to become rulers of wide lands. . . . . For it is hardly too much to say that the thought of antagonism to the Empire, and the wish to extinguish it, never crossed the mind of the barbarians." (p. 20 . . . . . .)

"To those who lived at the time, this year (476 A.D.) was no such epoch, as it has since become, nor was any impression made on men's minds commensurate with the real significance of the event. Theodoric, the Ostrogoth, brought up as a hostage in the Court of Byzantium, learned to know the condition of an orderly and cultured society, and the principles by which it must be maintained. . . . and he strove only to preserve and strengthen the ancient popularity of Rome, to breathe into her decaying institutions the spirit of a fresh life. *Jurisprudence and administration remained in native hands;* with peace and plenty men's minds took hope, and the study of letters revived. The last gleam of classical literature gilds the reign of the barbarian." (p. 29).

After Theodoric, Italy was conquered by Justinian. Civilization did not wane or fade. It might have perished altogether, but for the two enduring witnesses Rome had left, "her Church and her Law."

The barbarian invaders retained the customs of their ancestors, ... the characteristics of a rude people. But the subject population and the clergy continued to be governed by the elaborate system, which the genius and labor of many generations had raised to be the most lasting monument to Roman greatness.

"We have trustworthy evidence in a letter adressed by St. Aldelm to the Venerable Bede in the seventh century," says Twiss (Bracton Vol. II—Introduction p. 79) "that the marrow of the Roman Law was still being drawn out of them by earnest students, and that the study of Roman jurisprudence was at that time still maintained in the school of York."

Gibbon notes that "the Pandects are quoted by Ivo of Chartres (who died in 1117), by Theobold, Archbishop of Canterbury, and by Vacarius, our first professor of Roman Law, in the year 1140". (Decline and Fall—Vol. 4, p. 336 f.n.)

The legand that Justinian was unknown and forgotten before the discovery of a copy of the Pandects at Amalfi in 1135, is no longer accepted.

"Savigny had proved the baselessness of this tale." (Holdsworth Vol. III p. 135).

It must be concluded, therefore, that Lord Justice Scrutton exaggerated the extent to which the Roman law had been forgotten and neglected.

The Norman Conquest brought about in England a still more intimate acquaintance with the Roman law.

William the Conqueror's righthand man, Lafranc, the Pavian lawyer, was a jurist of world-wide fame, and a most accpomlished pleader. He is remembered as one of the discoverers of the Roman law which was then being studied in Italy. (Pollock and Maitland p. 78). A century later, Bishop Theobald (about 1140 A.D.) imported from Italy, Vacarius, who taught Roman law in England, and Henry the Second's greatest and most lasting triumph in the legal field was that he made the prelates of the Church his Justices.

Now, there was no doctrine of contract in the Anglo-Saxon law (Holdsworth, Vol. 2, p. 72), but 600 years later, after Roman prelates had developed the law from their acquaintance with the canon law and the Roman law, Glanvil (1198) and Bracton (1257) undertook the task of writing treatises on the English law. Glanvil sets out, as part of the English law, the Roman contracts in their Roman names, and Bracton textually reproduces entire paragraphs from Justinien's Institutes, describing contracts of sale, lease and hire, loan and mandate.

These rules were declared by men who were certainly in a position to know, to be the rules of English law as it had been administered for 600 years.

Prof. Holdsworth (Vol. 2, p. 162) states that, in Glanvil, the essence of the Roman contract system—the presence of distinct *causae*—is wanting; "indeed," he adds, "the admission which Glanvil makes more than once that the King's Court does not usually interfere to enforce such *private conventiones*, shows us that the King's Court knows as yet no law of contract".

As has already been noted, no one knows what was the exact meaning of the Roman "causa", and since controversy still rages upon the question whether "causa", as distinct from an object, was an essential element of the Roman Law of contract, it is not surprising to discover that the early English lawyers, interpreting the texts which were presented to them as English Law, should have found difficulty in applying the Roman rules.

Although the texts themselves, of both Glanvil and Bracton, declare that the consensual contracts were a part of the English law, the King's Court refused to recognize that a contract could be concluded by consent alone, and insisted that, before a right of action should be allowed, there must have been some, at least partial, execution.

In this respect, Glanvil and Bracton followed the Roman rule with regard to the innominate contracts (Digest—19—5; "De prescriptio verbis")

> Here we have a perfectly general kind of contract, with no formalities, but with the important limitation that the action is available only where one has performed; it is essentially a contract on executed consideration. Apart from that, it is not unlike our Assumpsit.
>
> (*Buckland*, p. 237).

Prof. Guterbock (Bracton and his relations to the Roman Law p. 57 et s.) has effectively rebutted the argument that Bracton's references to Roman law were mere illustrations introduced for the sake of elegance. He says:—

> The external historical evidence as well as the internal evidence of Bracton's work itself, demonstrate that no inconsiderable part of the Roman Law must have been practically applied in England in Bracton's day. The same evidence also shows that Bracton has in general given a place to, and reproduced, only those Roman elements which he found were in England actually valid laws. (*i.e.* such as were actually received).
>
> Bracton, himself a judge and writer, scrupulously cautious of giving his assent to doubtful propositions, was not the man to have left his reader in doubt as to what he considered *law*, and what *mere ornament*. His work bears throughout the stamp of the author's fidelity to truth, but a great part of it would belie such a character,

> and he would himself be subjected to the charge of having falsified the law, if it be true that he has laid down Roman as English law for whole pages without reserve.

After Bracton's time, the English common law lost much of its interest in the Roman law, and proceeded to develop the law of contracts from the materials already available. But as they had failed to grasp the clear implications of the Roman consensual contracts, they still insisted that, at least a partial performance must be established to justify the courts in declaring a contract enforceable.

> The view prevailed, while the law of contract was being developed under the jurisprudence of the three personal actions of account, covenant and debt, that the plaintiff could not succeed unless he could prove that he had so far performed his part of the contract that he could allege that the defendant owed him a debt.
>
> (*Holdsworth* III, p. 320).

But these rigid rules made it impossible to enforce any simple executory contract.

> That a remedy which would enforce such contracts was demanded can be seen (1) from the fact that the ecclesiastical courts were able to maintain an effective rivalry all through the period; and (2) from the fact that the Chancellor was prepared to supply a remedy.

Throughout the chapter, Prof. Holdsworth continually refers to the "constantly expanding jurisdiction of the Chancery", which was an ever increasing stimulus to the judges as the sixteenth century drew to a close.

It is very difficult, therefore, for a civilian to accept the conclusion that "the common lawyers" devised the new remedy for the enforcement of executory contracts which, in course of time, created, *upon quite original lines*, our present conception of contract.

It was the Court of Chancery, "Roman to the backbone" (Scrutton p. 2) which directed the attention of the common lawyers to the real principle of the consensual contract, and lead to the idea of assumpsit, in which "it is clear that the attention will be paid rather to the *mutual promises* of the parties which constitute that agreement than to the performance of one of them".

Was that not a categorical adoption of the Roman theory "L'engagement de l'un est le fondement la cause, de celui de l'autre"?

"The most characteristic rule in our law of consideration, and the most important for the business of life, is that the *mutual promises* are sufficient consideration for ane another." (Pollock on Contracts p. 193).

After three centuries of ignorant blundering, the common lawyers came back to what had been clearly stated to be the English law of consensual contract by Bracton, and it was through the action of assumpsit that the idea of enforcing an agreement as such came into the common law.

As a result of these developments, the breach of any agreement, on the face of which the plaintiff altered his position to his detriment, became actionable.

"It is," continues Prof. Holdsworth, "in the conditions under which that action can be brought that we must look for the origin, and the leading principles of the doctrine of consideration."

In all this grouping for some clear and definite rules, the common law was constantly forced from step to step by the competition of the Court of Chancery which, throughout the period, had continued, whenever a controversy was brought to their attention, to enforce the rules of the Roman law.

The common law of England was tied down by a number of wholly artificial restrictions due to the inability of the English lawyers to understand the principles of the Roman law which, according to Bracton, was the English law in 1257.

The common law courts enforced, in many legal relations, rules which the Court of Chancery pronounced to be unjust and unrighteous, and boldly set them at naught. It is apparent that the actual law of England was not administered in those matters by the common law courts, but was, in fact, determined by the rules of law in that court which had the power to pronounce the common iaw unrighteous, and which enforced that power.

The law of England was, in those respects, most emphatically not the common law. As a common instance of this description, we may take the case of one who had executed a bond, whereby he had agreed to pay a certain sum of money, and, on the day fixed for payment, the debtor, like an honest man, had paid the bond in full, and in the stress and hurry of circumstances, or perhaps out of ignorance, the debtor had failed to obtain from the creditor a release under seal. A dishonest creditor who sued on this paid obligation, obtained judgment.

The common law answered the swindled debtor who had paid, with the words that a sealed instrument could be discharged only by another sealed instrument.

But the defrauded debtor had a refuge in the Chancellor, who was considered to have in his keeping the conscience of the King. He knew something of the elevated spirit of the Roman law and its superiority to mere form, and he had none of the rigid notions of the common law judges.

The Chancellor prevented the collection of the bond, and forbade suit in the common law court.

"Is it not plain that the law of England was that payment a second time could not be enforced, and that the law unnecessarily took this expensive, awkward, devious, splay-footed method of arriving at justice?" (Zane—"The History of Law, p. 257).

Had the judges of the common law courts understood the principles of contract which Bracton declared to be the English law, there would never have been any reason for the common law to descend to such depths of ineptitude.

Thus, again, the Roman law rescued the law of England from the slough of its common law courts and approached the rule of justice.

Had the common law courts sought to extend their knowledge of the Roman Law by reference to Justinian's Digest, they would have discovered in the title "De condictione sine causa" the very point decided by the Court of Chancery in the case just referred to. (Pandectes de Justinian Op. ci. Vol. 5, p. 453):—

> Dioclétien et Maximien disent dans un autre rescrit, que 'le titre d'une obligation étiente étant inutilement retenu par le créancier, le débiteur a par conséquent le droit incontestable d'en exiger la restitution.'

"Thus," concludes Professor Holdsworth, "the theory of contract developed in the action of assumpsit became the theory of the Common Law", and "it is to the conditions under which that action can be brought that we must look for the origin of the leading principles of the doctrine of consideration." (Vol. III, p. 346-348).

In his essay "Roman Law in modern cases in English Courts", Prof. Oliver cites a recent writer who said that:—

> The whole story of the influence of the Corpus Juris upon the growth of English Law throughout its development has yet to be written.

Referring to his review of the English jurisprudence, he adds:—

> As might be expected, it is in the domain of contract that the Roman authorities are most frequently cited in modern times. The

> Roman classical jurists had succeeded in creating a body of doctrine on the subject which is of *universal application*, and little affected by the lapse of time and changes in social conditions.

If it be admitted, as Prof. Holdsworth says, that :—"The Roman contracts would not fit in with the English laws. It is difficult to understand why modern Judges make such an extended use of Roman theories."

Since it is admitted that the Anglo-Saxons had no theory of contract, since the Roman law was practised and studied in England for six hundred years before the emergence of the common law; since Glanvil and Bracton deliberately copied extensive passages from Justinian, and declared that the principles therein enunciated were English law; and since in the subsequent development of the common law, the King's Courts were continuously stimulated by the competition of the Court of Chancery, from which they took the technical word "consideration", it is not extravagant to conclude with Finlayson's assertion in his preface to "Reeves' History of English Law", that: "The English Law (of contracts) mut be Roman because there is no other source from which it can have come."

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