

*THE COMMON LAW THEORY OF CONTRACT.*

The deeper one goes into the literature of the subject the stronger becomes the conviction that nowhere does the philosophy of the early Common Law shew itself so tenuous as in the province of Contract. Doubtless it was the recognition of this fact that impelled such writers as Sir Frederick Pollock and Sir William Anson to attempt to ingraft the consensual theory of the Continental jurists upon the English system, and to argue that in the Common Law as well as in the Civil Law the conception of contractual obligation is derived from Agreement—*Conventio vincit legem*. That the courts of our own day are disposed to countenance this heresy is patent to every student of case-law, but that the English system of Contract has been developed along this line has no support in history. Strange as it may seem, the Common Law evolved no general conception of contractual obligation until comparatively recent times.

Reference to the ancient books discloses a singular poverty of ideas in respect of this great branch of jurisprudence. Bracton (*a*), finding the native law *tabula vacua* in this province, was bold enough to borrow somewhat from Azo and more from the Institutes, and to set down the pilfered matter as the indigenous product of English soil. The conspicuous lack of success which Bracton experienced in this venture is admitted by Professor Maitland, who may be regarded generally as an apologist for the medieval writer (*b*), and Professor Salmond, in a monograph entitled "The History of Contract" (*c*) speaks of it as follows: "In Bracton and Fleta, indeed, we find an attempt to employ the general principles of the Roman Law as a setting for English contracts, but the chief significance of this attempt lies in its failure. Perhaps in no other part of the law have Roman principles been so prominently introduced only to be so completely rejected."

It is quite true that the 'lex mercatoria' was recognized in England at a very early date, and in that body of law the

(*a*) *De Leg. Angl.* 99, 100. Both Britton and Fleta take their cues from Bracton in respect of furtive enterprises upon the Civil Law.

(*b*) See Publications of Selden Society, vol. ii (*The Fair of St. Ives*), p. 32. Also Pollock & Maitland's *History Eng. Law* (2nd ed.) vol. ii, p. 104.

(*c*) 3 *Law Quart. Review*, p. 166.