Concerning Judicial Method*

BY THE RIGHT HONOURABLE SIR OWEN DIXON, G.C.M.G. [1956] 29 ALJ 468

To receive the Henry E. Howland Memorial Prize is indeed an honour. It is one for which I am profoundly grateful. There are very great names in the list of those to whom the prize has been awarded in the past. No one could find his name added to the list without a feeling of pride. Many of them devoted their lives to noble pursuits. I can make no such claim. The life I have led has been forensic and judicial, interspersed with sallies into wartime administration and diplomacy. If what I have written contributes to my chosen field, the law, it must be in the pages of the law reports or perhaps some legal periodical. As for what I have done, it is not for me to speak. But I had regarded it as having no importance that did not pass with the moment. I owe, therefore, a special debt to the Corporation of Yale for finding me worthy of this honour.

My pursuit has been the law. The country whence I come and where my work, both as counsel and as judge, has been done, though British, has federal institutions. Indeed it is a federal Commonwealth indebted for its constitutional structure to the United States. The Court over which I now preside and where I have long served has in many respects been modelled on the Supreme Court of the United States, and, for Australia, bears the same responsibilities. For that reason, if for no other, it has been my fortunate duty to draw upon the resources supplied by the constitutional law and theory of this country for concepts, principles and examples that may be applied to the solution of our own Australian problems. At the same time, the courts in which I practised as counsel, and the Court in which I have sat so long as a judge, are British in structure and in procedure. The Australian law is based on the law of England as it was applicable to our conditions in 1829 and it consists of that jurisprudence altered by the legislation of the Commonwealth and the six States and developed by judicial decision. We are guided now, although not governed, by the authority of the decisions given by the courts in London. If our own conceptions of the principles of the common law or of the doctrines of equity constrain us to depart from a modern English precedent of authority, it is done with reluctance and regret. For we set a certain value on consistency of decision in the British Commonwealth and upon preserving the unity and uniformity of the common law.

The High Court of Australia, as we name the Federal Supreme Court of Judicature is not merely the ultimate court of federal jurisdiction. It occupies the additional position of a general appellate court of last resort in Australia, whether the jurisdiction appealed from be State or federal. If you work day by day in a court of this kind, where the problem presented by one case may be essentially a product of American federalism and that of the next case as typical a consequence of the application of the principles of the common law to modern life as if it arose in England, you cannot avoid, in what intervals for reflection are allowed to you, some occasional attempts to contrast and comprehend the two judicial systems. Civil liberties depend with us upon nothing more obligatory than tradition and upon nothing more inflexible than the principles of interpretation and the duty of courts to presume in favour of innocence and against the invasion of personal freedom under colour of authority. We did

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not adopt the Bill of Rights or transcribe the Fourteenth Amendment. It is, as it appears to me, a striking difference. It goes deep in legal thinking. The influence is far-reaching that has been exerted upon the judicial and juridical thought of this country by the functions which the courts must fulfil under those great constitutional guarantees. The juridical thought in this continent in its turn has affected the mind of the English-speaking legal world more than those who dwell elsewhere admit or perhaps know. It is not simply the result of the facility with which it is possible here to make ideas known to readers and to students. It is because the American legal system provides a fertile field from which ideas spring; because it forms a lively stimulus to legal thought, and because an unequalled amount of high ability is devoted to juristic study in the law schools of so many great universities.

During the forty-five years of my working life in the law I have been conscious of a revolution in the conception of law that is taught. In Maitland's introduction to the first volume of the Selden Society's Year Book Series there is a passage in which he finds in certain qualities of the common law its capacity to resist in the sixteenth century a reception of the civil law in England. It was, he says,

> "not vulgar common sense and the reflection of the laymen's unanalysed instincts : rather strict logic and high technique, rooted in the Inns of Court, rooted in the Year Books rooted in the centuries."[1]

The historical accuracy of Maitland's thesis can hardly be doubted. Not only can the effect of its technique be seen in the survival of the common law where elsewhere in Europe the civilians were victorious. In the ensuing centuries men trained in the common law and dominated by its conceptions carried its influence into the special jurisdictions including those of the Council, when they were at their strongest ; into Chancery itself, and indeed into widely different systems prevailing in other countries. Witness the jurisprudence of India and that of Pakistan today. But now the signs are many that the strict logic and the high technique of the common law have fallen into disfavour. Perhaps too much of the technique has been swept away by the reforms in procedure. Perhaps the minds it held in thrall were forensic and professional and since the teaching of law passed to the universities it has lacked votaries who would bring acolytes to the altar. But more probably the causes are deeper. It is not an age in which men would respond to a system of fixed concepts logical categories and prescribed principles of reasoning. In the exact sciences the faith is gone which the nineteenth century is reputed to have held in the immutability of ascertained and accepted truths. The conclusions of physical science are now held as provisional but workable hypotheses. Even more tentative are the fundamental explanations of bacteriology and virology. Philosophy appears to have foregone the search for reality and seldom speaks of the absolute. History concedes the validity of a diversity of subjective interpretations. The visual arts tend to discard form as an expression of aesthetic truth. Clearly the intellectual climate is unfavourable to the high technique of the common law, to say nothing of strict logic. It is certainly not a time when many minds can be found to respond with lively animation to an encounter with a tolled entry upon a descent cast, or with a demurrer to a plea giving express colour on the ground that, lacking a protestando, the plea confesses but does not avoid a count in

[1] Selden Society Y.B. Series Vol. 1**,** Introduction, p. xviii.

trespass ; nor even with the acceleration of a legal contingent remainder by the destruction of a prior contingent interest. We have turned in other directions. We think about the law in a way which may have an analogy in the attitude ascribed to those who pursue the exact sciences towards the more basal concepts of the knowledge their predecessors won and organized. The possession of fixed concepts is now seldom conceded to the law. Rather its principles are held to be provisional; its categories, however convenient or comforting in forensic or judicial life, are viewed as unreal. They are accommodated with a place, it is true, but only as illusory guides formerly treated with undue respect. The technique of the law cannot or should not now, so it is thought, exercise any imperative control over the minds of those whose lot it is to engage day by day in the judicial process.

Law is confined to the realm of ideas. It is concerned with human conduct but otherwise it has no relation to objective fact. There ought therefore to be no relevance in fashions of thought which prevail in organized branches of knowledge concerned with external nature. Yet there is an analogy, although a false analogy; and analogies true or false will serve to carry a contagion of ideas. Ours is a system of law which makes the utterances of judges the best evidence of the state of the law, that is provided that the utterances are delivered from the bench. Here is an aspect of our law opening a field where the minds more susceptible to currents of thought might be exercised. Why should they not regard the legal system as a branch of knowledge depending upon the subjective notions of the men, considered collectively, who occupy seats in courts of ultimate resort? There would be nothing inconsistent with the modes of thought so generally current if it wore this aspect to those who pursue the study of the law as a science. It is from the experience of judges, sharply distinguished no doubt from their logic, that the life of the law is widely held to come, at all events to come more immediately. It is, of course, a developing life and it is not necessarily incoherent. The obsession of our ancestors with certainty in the law as we inherited it at least gave some coherence to the inheritance. But in the end it is what the courts choose to say, the courts considered as an entire hierarchical system, that determines the substance of the law. That is the underlying assumption. It has become possible accordingly to describe or even to define law in terms of predictability.

All this seems peculiarly unreal and certainly unsatisfying to one who has passed much of his life attempting to administer justice according to law in a court of ultimate resort without restriction of subject matter. Predictability means nothing to a judge in that situation. His decision is final and a knowledge that what his court will say as to the rule of law is regarded by others as part of a general question of predictability does not help him to decide what to do. Such courts do in fact proceed upon the assumption that the law provides a body of doctrine which governs the decision of a given case. It is taken for granted that the decision of the court will be “ correct ” or “ incorrect,” “ right ” or “ wrong ” as it conforms with ascertained legal principles and applies them according to a standard of reasoning which is not personal to the judges themselves. It is a tacit assumption. But it is basal. The court would feel that the function it performed had lost its meaning and purpose, if there were no external standard of legal correctness. With us in Australia appeals are argued at length in open court and written briefs are not filed. The argument is dialectical and the judges engage in the discussion. At every point in

an argument the existence is assumed of a body of ascertained principles or doctrine which both counsel and judges know or ought to know and there is a constant appeal to this body of knowledge. In the course of an argument there is usually a resort to case law, for one purpose or another. It may be for an illustration. It may be because there is a decided case to which the court will ascribe an imperative authority, if the court has established by its practice a distinction between persuasive and imperative authority. But for the most part it is for the purpose of persuasion; persuasion as to the true principle or doctrine or the true application of principle or doctrine to the whole or part of the legal complex which is under discussion. Textbooks and other works of authority are used. Indeed there is nothing strange in a reference from the bar or the bench to the Harvard Law Review, to the Law Quarterly Review or to other learned journals from either side of the Atlantic. The pre-supposition is that there exists a definite system of accepted knowledge or thought and that judgments and other legal writings are evidence of its content. In matters affecting the Constitution the United states Supreme Court Reports are much in our hands. But in matters of private law the law reports of this country are by no means entirely neglected. Accessibility places one serious limitation upon their use. But enough are contained in various libraries to make it possible to discover what is the course of authority in this country. Whenever we meet anything in the nature of a crux, there is always an examination of American case law. Of course the Restatement is freely used. Scant and inadequate as our knowledge of American case law may appear to be, it is enough to make it quite clear that the basal conceptions of judicial reasoning which American courts pursue are those which we share. But while this is true of American jurisprudence considered as a whole, we are conscious of a distinct change of atmosphere when we find ourselves involved in the constitutional doctrine which has grown up under the Fourteenth Amendment and the Bill of Rights. It is the fate of the High Court of Australia often to be engaged in the discussion of the validity of statutes, State and federal. But almost always the question depends on the effect of some positive constitutional power. In any such question counsel and the court pray in aid any relevant contribution which the Supreme Court of the United States has made to the subject that may be in hand. But there are few modern cases in the United States reports which are concerned solely with the demarcation of affirmative powers. More often than not due process accompanies the question, particularly if the constitutional power in question is that of the States. Our Court is therefore often engaged in disentangling questions of due process or questions arising, for example, under the Fifth Amendment from definitions of power. We must do this before we can profit by what the Supreme Court has said with reference to the problem of demarcation. An exercise of this kind constantly repeated gives a vivid impression of the difference between, on the one hand, the judicial process necessarily involved in applying these great precepts of constitutional liberty, and, on the other hand, the judicial method employed in the administration of the common law. The sense of contrast is perhaps the greater because we are also conscious that the same principles govern our thinking, but only as a matter of convention and tradition and as the source of canons of interpretation. The very purpose as well as the nature of constitutional checks and guarantees makes it inevitable that they will not be capable of the objective treatment characteristic of the administration by courts of private law. The standards of what is correct or incorrect cannot be so exact, they cannot be so external. So much is a commonplace. The importance of studying judicial

method in constitutional cases is undeniable. But is it a permissable view that its study has dominated speculative thought upon the nature of the judicial process and perhaps upon the reality of the content of the law? There have been other influences no doubt which have tendencies towards the same philosophy. The rise in the early nineteenth century of Benthamite principles spread the opinion that the function of evolving the law ought not to be conceded to the judiciary. If the judiciary, whether consciously or unconsciously, developed legal principles or even if the judges extended the application of law inductively without taking the next step of producing new principles deductively from the extensions, this was judicial usurpation. It was for the legislature alone to bring about any legal change. The inherited system must be given a rigidity and statute must become the only source of law. The natural reaction from such false doctrine has perhaps carried the attack upon orthodox conceptions of judicial method so far in the contrary direction that it has overshot the truth. In reality Benthamite views did not retard the development of the law under judicial hands. It is enough to look at the English law reports from the end of the Napoleonic Wars until the later years of the nineteenth century. The future will probably regard that as the classical period of English law. It was a period of legal rationalisation. The search for principle was a marked characteristic of many judges. Principles were not only used, they were developed. There was a steady, if intuitive, attempt to develop the law as a science. But this was done not by an abandonment of the high technique and strict logic of the common law. It was done by an apt and felicitous use of that very technique and, under the name of reasoning, of that strict logic which it seems fashionable now to expel from the system. The courts did not arrogate to themselves a freedom of choice. It is no doubt unsafe to generalise about judicial process. For after all it is a generalisation about the work of individual men. In no field of special knowledge does one man pursue its technique or exercise its art precisely in the same way as another. Certainly the differences are marked between judicial minds at work. There is no place where the inequalities and variations of men can be seen more clearly than when the men are upon a bench. Not only is the working of the judicial mind more exposed to view, it is more exposed also to expert analysis and criticism. But it is a safe generalisation that courts proceed upon the basis that the conclusion of the judge should not be subjective or personal to him but should be the consequence of his best endeavour to apply an external standard. The standard is found in a body of positive knowledge which he regards himself as having acquired, more or less imperfectly no doubt, but still as having acquired. It is open to the realist, if he is so minded, to attack the validity of such an assumption. But he cannot deny its existence. To do so is in fact unreal. It is open to him to condemn it, if he chooses, as a concept juggling survival, as a judicial method which responds insufficiently or perhaps not at all to the actual or supposed demands of an ever- changing social order. It still remains true that it is the way in which the administration of justice proceeds. Nor can the truth be avoided that it has always been so in the long history of Anglo- American law. To call it now a high technique would not be a just use of the epithet. And logic is not pursued so very strictly. But there has been no violent break with traditional conceptions and methods of reasoning. The changes have been gradual and evolutionary. No doubt courts are much more conscious than of old of the formative process to which their judgments may contribute. They have listened, perhaps with profit, to the teachings concerning the social ends to which legal development is or ought to be directed. But in our Australian High Court

we have had as yet no deliberate innovators bent on express change of acknowledged doctrine. It is one thing for a court to seek to extend the application of accepted principles to new cases or to reason from the more fundamental of settled legal principles to new conclusions or to decide that a category is not closed against unforseen instances which in reason might be subsumed thereunder. It is an entirely different thing for a judge, who is discontented with a result held to flow from a long accepted legal principle, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience. The former accords with the technique of the common law and amounts to no more than an enlightened application of modes of reasoning traditionally respected in the courts. It is a process by the repeated use of which the law is developed, is adapted to new conditions, and is improved in content. The latter means an abrupt and almost arbitrary change. The objection is not that it violates Aristotle's precept…"that the effort to be wiser than the laws is what is prohibited by the codes that are extolled."[2] The objection is that in truth the judge wrests the law to his authority. No doubt he supposes that it is to do a great right. And he may not acknowledge that for the purpose he must do more than a little wrong. Indeed there is a fundamental contradiction when such a course is taken. The purpose of the court which does it is to establish as law a better rule or doctrine. For this the court looks to the binding effect of its decisions as precedents. Treating itself as possessed of a paramount authority over the law in virtue of the doctrine of judicial precedent, it sets at nought every relevant judicial precedent of the past. It is for this reason that it has been said that the conscious judicial innovator is bound under the doctrine of precedents by no authority except the error he committed yesterday. The great James Parke, whose judicial achievement legal history seems now so strangely to misrepresent, described the course to be pursued by courts in words which, although chosen more than a century ago, do not need much extension if they are to serve as a statement of what I have witnessed during my service in the courts as judge and counsel. What he wrote was this :

> "Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents; and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them, and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised."[3]

But if the doctrine that is taught, the gospel that is preached, is the contrary of this, it is evident that the disciples, or at least some of them, when they come to the bench, will not feel the obligatory force of the corpus juris which has come into their keeping. In fact there are those who say that the phenomenon has already appeared. Its occurrence must as yet be sporadic in the Anglo-American system and where it has appeared or will appear the emotions of joy which it will arouse and has aroused in some will be counterpoised, we may be sure, by the despondent displeasure of others. If law be a philosophy, like history it works by examples. The two judicial methods should accordingly be seen working by example. It is only thus that the acute contrast between them comes fully to be felt. What is needed is an example to which may be applied, on the one hand, the method which, so far as

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[2] Aristotle Rhetoric I : 15 (¶1375 b 23)

[3] 3 Mirehouse v. Rennell (1833) 1 C1. & F. 527, at p. 546 ; 6 E.R. 1015 at p. 1023

my means of knowledge extends, seems actually to prevail in courts of final resort and, on the other hand, the judicial method which the conscious innovator will be apt to adopt. If an example be sought the illustration comes readily to hand, even if it is not taken entirely from actual judicial life. It may involve a little discussion of technical conceptions that, to say the least of them, do not stir the deeper emotions of man's nature, however much credit they may do to his logical processes. But this lawyers may endure and it will serve the turn. It is a modern story; fiction founded on fact.

In common law jurisdictions where statute, or providence in some other form, has not intervened it has long been clear law that payment of a smaller sum accepted in satisfaction of a larger is not a good discharge of a debt. It is a rule that is well known. Indeed it could hardly be other- wise, so often has it drawn the derisive attack of those who see in logic an enemy to justice. The rule allows you to satisfy the debt by anything but a smaller sum of money. For money was the very thing you had bound yourself to pay and you had bound yourself to pay the larger sum, which included the smaller. Payment of the smaller sum could therefore be no consideration for the discharge. Note the serenity with which Anson, writing in 1879, was able to dismiss criticism of the rule.

> ''The application of this rule,'' he wrote, " as described has been said to involve ' an absurd paradox,' but it seems in truth to be a necessary result of the doctrine of consideration."[4]

Six or seven decades later a defence of the rule on the ground that it was a logical consequence of the doctrine of consideration makes little appeal to reformers, who in any case have been animated by a desire to expel consideration from the law of contract.

Let it be supposed that it becomes necessary to consider the application of the rule to a very simple transaction which I shall proceed to describe. We take two persons who are already the parties to an instrument by which one (let us call him proleptically the creditor) will become entitled to receive from the other (prospectively the debtor) at periodical intervals payments of sums certain. The payments which are recurrently to accrue extend over a period of years. After a little time has passed the parties agree that the future periodical sums shall be reduced in amount. They agree that he whom we have called the debtor shall be discharged, if he pays on each occasion a reduced sum in satisfaction of the larger recurring amount. And this in due course he did. On the faith of the agreement the debtor who makes the payments proceeds in the conduct of his affairs on the basis that each payment completely discharges the liability accruing. But the creditor at the end of the period claims the difference. What might a modern court of last resort say to the claim? What might reforming zeal do if coupled with boldness of innovation ? It could hardly go as far as denying that consideration is necessary to the formation of every simple contract. In some jurisdictions a sufficiency of reforming zeal might perhaps be found which without compunction would simply reject the ancient conclusion that the discharge of a debt cannot be effected by the payment of a smaller in agreed satisfaction of the larger amount of indebtedness. But in jurisdictions which acknowledge, as we in Australia have so far done, decisions of the House of Lords as final and imperative authority that could not be done. For in 1884 that tribunal

[4] Principles of the English Law of Contract, 1st Ed., by Sir William Anson.

pronounced the doctrine to be part of the law of England[5]. However that does not exhaust the possibilities. Equity once began to develop a doctrine of making representations good, but it was afterwards condemned as an attempt to find a promissory obligation where there was no contract.[6] Might an innovating court discover in the constituents of this discarded doctrine a means of holding the creditor precluded from the assertion of his claim? Or would it be enough to appeal to the injustice conceived to result, and so, without doctrine or other rationale, pronounce against the claim? A court prepared to act merely on its conception of justice or social convenience might adopt any of these experiments. But suppose the court is not of this temper. Judges of this temper are not common and I do not come from a country that knows one. Suppose that, though enlightened, the court adheres to the traditional conceptions of the judicial method. What course might it legitimately take? The assumption is that it shares the feeling that there is something wrong with the conclusion that the creditor's claim must be enforced. There is much that a court animated by this feeling might do and yet depart not at all from the traditional method of judicial reasoning which has actually developed the law. There would be no such departure if the court proceeded to re-examine the essentials of the formation of simple contract at common law and the elements necessarily inherent in the theory of estoppel. It would be in complete accord with orthodox judicial method if the court took such a course with a view of ascertaining whether in truth, upon a correct analysis of the situation giving rise to the creditor's claim, the objectionable conclusion did inevitably flow from a logical application of principle truly understood.

An analysis of the situation between the parties would at once suggest one point of possible distinction that might affect the application of the ancient rule. It is that the agreement to accept a smaller sum in discharge of the larger had not been made after the debt in the larger sum had accrued. Certainly it had been made after the obligation had been entered into by the man who is now a debtor. But the agreement to take the reduced amounts was made before the events had occurred and the time had elapsed which, under the tenor of the obligation, meant the accrual of a debt. The distinction might prove significant. Noting this it may be supposed that the court would turn from the analysis of the actual situation to a re-examination of the formation of simple contract. That would bring into immediate consideration three commonplace factors, First there is the theory of offer and acceptance. Then there is the doctrine of consideration, and thirdly there is the conception that it is no detriment to do what you are legally bound to do, a conception which means that neither by performing, nor by promising to perform, an existing obligation can you provide a consideration sufficient to support a promise of the party to whom the obligation is owed. These three things are habitually regarded as separate elements.

There is a received analysis of offer and acceptance in simple contract which is as commonplace as the conception itself. The analysis shows that offer and acceptance must consist either in the offer of a promise in exchange for an act, or the offer of an act in exchange for a promise or the offer of a

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[5] Foakes v. Beer, (1884) L.R. 9 App. Cas. 605.

[6] Pollock, Contract, Appendix, Note I.

promise in exchange for a promise. It is a purely logical analysis but experience seems to confirm the sufficiency of the three cases to comprise all that can occur. Now I think that reflection upon these three cases will show that each of them implicitly involves the giving of consideration for the promise. It has long seemed so to me and I do not see why I should not impute such a deduction to the Court I ask you to suppose to be in search of a true basal principle. Take the case of the offer of a promise for a promise. When the offer is accepted that means the giving of mutual promises. Each promisor is also a promisee and his promise involves an act or forbearance on the part of each to the other. Next there is the case where a promise is offered in exchange for an act. There the doing of the act is the acceptance. By doing the act the promisee incurs a detriment. Last is the case where an act is offered in exchange for a promise. The giving of the promise is the acceptance. Again the doing of the act is the detriment to the promisee. It is therefore possible to push the analysis of the theory of the formation of simple contract to the point of finding no more in offer and acceptance and in the doctrine of consideration than two aspects of the same thing. I speak of the doctrine of consideration as it applies to simple contract. But the analysis may be pushed even further. Let us turn to the rule that a consideration is unreal if it consists of an act or forbearance on the part of the promisee, or where the promises are mutual, of the promise of one, if the promisee has already incurred an obligation to the promisor to do or forbear from doing that very thing. It is only a special application of a larger rule. The larger rule is that the law cannot treat it as a detriment for a man to do as the law requires him. Conversely what the law does not allow a man to do the law cannot recognize as something he can do or promise as a consideration. An illegal consideration is therefore no consideration. Consequently it may be said simply that to form a simple contract supported by consideration the act or forbearance that must be offered or promised must be legally open for the offeror or promisor to do or forbear from doing.

It is but a step further to describe the basis of simple contract as the voluntary restriction upon the existing area of action or inaction legally open to the contracting parties and to say that simple contract is formed by the exchange of such a restriction *de praesenti* or of the promise *de futuro* of such a restriction on one side for a promise of a corresponding restriction on the other. It is quite unlike courts to push analysis to any such extent and some astonishment would be felt if it were done. But to pursue the path a little distance, a distance that might suffice to expose the underlying principle which will determine the matter, to do that would involve no departure from the judicial method which has at once developed the common law and preserved its continuity. Let it be supposed that such an inquiry is made. Would not the case which has been imagined for the purpose of illustrating the thesis wear as a result a very different aspect? It is true that a conclusion altogether satisfactory to the reformer may not be produced. But he could not fairly complain that a position is left of unrelieved or unqualified injustice. The first step must be to go back to the distinction which, it was suggested, might prove significant. The significant point is that at the time when the prospective creditor agreed with the prospective debtor to accept the lesser sum in satisfaction of the larger, the obligation to pay was executory. The debts would arise only as and when the periodical payments should accrue. What was agreed upon was the variation of an executory obligation. If there was legally open to the future debtor any course of action which, whether

tacitly or expressly, he promised to forgo, then a simple contract by way of variation was formed, and that would suffice to answer the creditor's claim. But only an examination of the circumstances of the given case would show whether it was so. If, for example, the obligation had been one susceptible of avoidance or reduction in amount, an implied engagement by the debtor to refrain from invoking the means of doing it would be enough. If the position of the creditor could be rendered less beneficial or satisfactory or his remedies less expeditious or convenient by any course open to the prospective debtor any engagement to refrain from adopting it might similarly be implied. It is thus that the situation of the parties might be dealt with under a theory of contract.

It may be a question whether by this solution enough of the ground of the objection to the working of the rule is covered. It might still be felt that it does not adequately meet the justice of the case. If so it would remain to submit the principles of estoppel to the same examination and then to ascertain the result of applying them. They are principles that have often been misconceived. In hard cases they are apt to be misapplied. But they repay analysis. It is by no means fanciful to regard the fundamental principle of an estoppel which comes from dealings between the parties to be simply that one of them is disentitled to depart from an assumption in the assertion of rights against the other when it would be unjust and inadmissible for him to do so. It is a necessary condition that the second should have acted, or abstained from acting, upon the footing of the state of affairs assumed, in such a way that he would suffer a detriment if the first party were afterwards allowed to set up rights against him inconsistent with the assumption. It is further necessary that it should be unjust and inadmissible for the first party to depart from the assumption for the purpose of asserting rights. The grounds upon which it would be considered unjust and inadmissible are well recognised, but they form more than one category. It may be because the first party made representations upon which the second founded the assumption; it may be because, where care was required of him, the imprudence of the first party formed a proximate cause of the second party's adopting and acting upon the faith of the assumption; or because, knowing of some mistake under which the second laboured, he refrained from correcting him when it was his duty to do so; it may be because the first exercised against the second party rights which would exist only if the assumption was correct; it may be because the assumption formed the conventional basis upon which the parties conducted contractual or other mutual relations.

It is not possible to stop to justify this analysis or restatement of the principles. In any case it may be permitted to hope that it is unnecessary to do so. Let it be enough to say that it is not new in Australia.[7] If you employ this analysis with reference to the case supposed as an example, you may reach a point at which strict logic encounters a difficulty. It may be possible, indeed it may be reasonable, to treat the parties to the transaction as having adopted a conventional assumption, but logic may demand an answer to the question what was it precisely that they assumed. In many jurisdictions the distinction between contract and estoppel is clearly maintained by insistence on the rule that a fact or state of affairs must be assumed as existing. Other jurisdictions are less strict. Unless you can say that the

[7] *Grundt v Great Boulder Gold Mines Pty Ltd*. (1937) 59 C.L.R. 641, at pp. 675-677; *Newbon v. City Mutual Life Association* (1935) 52 C.L.R. 723.

parties concurred in adopting the assumption that the lesser sum was in fact nominated in the earlier obligation, it is not easy to find a supposedly existing fact or state of affairs. But whether this difficulty prove insuperable, as it might in some jurisdictions, or it be considered that there be a sufficient common assumption, is immaterial to my purpose. For my object has been to trace the course which judicial reasoning would or might follow when applied to the case supposed. It is of the very essence of the accepted judicial method that the result is not predetermined. And on the other hand enough has been said to show how much strength the method possesses in the fulfilment of the combined purposes of developing the law, maintaining its continuity and preserving its coherence. If, however, the answer be found permissible that there is a sufficient common assumption certain steps remain. Offer and acceptance and consideration are out of the way. In order to adopt a conventional assumption it is enough that the parties concur in it. It may be done with or without consideration writing or a seal. Once conclude that the parties concurred in an assumption that the earlier obligation sounded in the lesser sum, the further conclusion follows that the transaction proceeded on the basis of that assumption. If the debtor acted upon the assumption in such a way that to depart from the assumption would mean a detriment to him, then the creditor may not put forward his claim. He may not because to do so is inconsistent with that assumption. It would be enough that the debtor, proceeding on the supposition that the periodical payments falling due were satisfied, so arranged or conducted his affairs that by a reversal of the supposition he would incur a detriment. If however the debtor has not so acted on the assumption that he would suffer a prejudice which otherwise the mere payment of money would not have involved, then there is no substantial injustice in the creditor's demand. Perhaps some may think this possibility unsatisfactory. But is it a legitimate source of dissatisfaction that a mere hope, however justified, of relief from an obligation definitely and expressly incurred is disappointed, although no other prejudice or detriment is suffered?

The purpose of this extended and technical discussion is to show by example that it is an error, if it is believed that the technique of the common law cannot met the demands which changing conceptions of justice and convenience make. The demands made in the name of justice must not be arbitrary or fanciful. They must proceed, not from political or sociological propensities, but from deeper, more ordered, more philosophical and perhaps more enduring conceptions of justice. Impatience at the pace with which legal developments must proceed must be restrained because of graver issues. For if the alternative to the judicial administration of the law according to a received technique and by the use of the logical faculties is the abrupt change of conceptions according to personal standards or theories of justice and convenience which the judge sets up, then the Anglo-American system would seem to be placed at risk. The better judges would be set adrift with neither moorings nor chart. The courts would come to exercise an unregulated authority over the fate of men and their affairs which would leave our system undistinguishable from the systems which we least admire.