THE ANATOMY OF A LAW REPORT[1]

I have chosen a dull subject—the anatomy of a law report. I have not pushed my researches so far back as to embrace that department of anatomy known as embryology—the study of rudimentary forms. From such evidence as has come my way I deduce that the judgments of our remote ancestors were invariably short and to the point. The dooms of Anglo-Saxon kings were commendably terse, and if we peneetrate to biblical times we find that the one surviving judgment of King Solomon upon which his judicial reputation rests consists of sixteen words—" Give her the living child and in no wise slay it: she is the mother thereof."

I am not going back even as far as the Year Books or *Coke's Reports*. Valuable as these may be to legal historians they are of little significance in present day litigation. The doctrine of precedent operates to-day almost wholly in the context of the last hundred years. I recently counted the cases in a volume of the *Weekly Law Reports* which were indexed under the title " Cases Judicially Considered." Of the 238 cases listed 179 (or 75%) were post-1930. Only 6% came from the period 1742-1841, and there was no case earlier than 1742.

Indeed, until the middle of the eighteenth century there were no law reports as we know them to-day. In those days we have at one extreme the Year Books which contain snippets of dialogue between bench and bar intended to illustrate some pleading point, but all too often neglecting to say what gave rise to the litigation and what was its outcome: at the other extreme we have Coke who interlarded each report with what one writer has described as " outbursts of inexhaustible learning," so that at the end of the day the confused reader is often unable to distinguish what the judges decided from what Coke thinks they should have decided. Between these two extremes there was a large number of reports of quality good, bad and indifferent, but practically all sharing the fault of incompleteness. Sometimes we have judgments and nothing more; sometimes arguments and judgments but no facts; sometimes arguments but neither facts nor judgments. Often the patient researcher has to pursue a case through three or four collateral series before he can assemble all the facts and all the arguments and all the judgments.

[1] This is the text of a public lecture delivered in the Queen's University of Belfast on 4th March 1965. [Editor's note:—the author represented that this lecture with its racy style and various irreverences should have been rewritten for publication, but it is printed as actually delivered.]

It was Sir James Burrow, Master of the Crown Office, who established in 1757 the pattern of the modern law report with his series of reports known as *Burrow's Reports*. His pattern is quite simple—headnote, facts, arguments, judgments, and in that order. By following this pattern we are sure to get a good report if each of the ingredients is good in quality and well handled. As far as three of the four ingredients are concerned the reporter cannot assume full responsibility for the quality. Facts are facts and you have to take them as you find them, or rather as judge or jury has found them. Arguments may be illogical, rambling and confused; so, too, may judgments exhibit the same vices. But the headnote is something which the reporter himself controls, and since all too often the busy lawyer must content himself with reading the headnote and little more it is clear that a heavy responsibility rests on the reporter who drafts it.

I have written elsewhere[2] about the composition of headnotes and I will not add much here. They are usually despised by academic lawyers, presumably because they suppose that the idle student will assume that reading the headnotes absolves him from the trouble of reading the full report. Weighty warnings are given that to read no more than the headnote may give wrong impressions. True, but of course it depends on the headnote. " A headnote," said Lord Lindley,[3] " should contain the legal pith of a case and nothing more." If it does that no student will ever be led astray.

The real shortcoming inherent in headnotes is that they lack authority. The judge's judgment may be obscure, ambiguous or plain wrong, but it is still an authoritative judgment and takes its place in that complex mechanism which we call *stare decisis*. The headnote is merely a lesser mortal's opinion of what the judgment means.

If the headnote is the legal pith of the case then we may describe the judgment as the flesh and bones of the case, and it is with the anatomy of judgments that I am really concerned. I propose to say something about the length of judgments and then to consider their form.

Judgments may be long or they may be short. I do not know what judge claims the record for length. In the *Tichborne* case it is recorded that Cockburn L.C.J. began his summing-up on 29th January and ended on 28th February, but a summing-up is not technically a

[2] " Headnotes " (1953) 12 *N.I.L.Q.* 29.

[3] (1885) 1 *L.Q.R.* 143.

judgment. I think that Northern Ireland holds the record for the shortest judgment.[4] Some twenty years ago a Northern Ireland county court judge heard a very complicated right-of-way case with abundant witnesses on each side and not a little perjury here and there. The case was important not only of itself but also, so it was said, because the decision would rule a number of other cases in the same district. After several days' hearing the judge reserved his judgment and returned to Belfast. A couple of months later he let it be known that on a certain day judgment would be given, and on that day the parties and their counsel, solicitors, friends and relations and all the other interested parties gathered in the court room for the great event. At 11 o'clock precisely the judge took his seat. Unfolding the papers before him he said: "I have thought about this case. I think the plaintiff has the right end of the stick. Judgment for the plaintiff with costs." And then everyone went home.

I do not need to produce evidence that the goodness of a judgment is not to be measured directly proportional to its length. Indeed, within limits, the converse would be easier to prove. Though mere length is not synonymous with prolixity, it is generally accepted that those with acute and well-ordered minds can express themselves in a fraction of the space taken by those who are not so well mentally endowed. It is true that all judges are not equal in their mental power, while cases also range from the comparatively simple to the exceedingly complex; and it might be thought that this question of length of judgments is not worth probing into. But I have decided to probe into it because I believe that there is evidence that as the years pass our judges are becoming more verbose, and we as lawyers have two very pressing interests in seeing that they do not become too verbose. In the first place it is obvious that the range of law is increasing year by year and we do not want our "prescribed reading" to be more lengthy than it need be. Secondly, every lawyer and every law library is facing difficult problems of finding shelf-space for the law reports which pour from the presses, and they do not want their problems aggravated by garrulous judges.

At the beginning of the eighteenth century a newly appointed judge complained that when he was a law student he could carry a complete law library around in a barrow, but now he was a grown man he needed a wagon.[5] To-day a couple of U.T.A. vans would

[4] Concurring judges in appellate courts who simply say "I agree" are disqualified in this competition.

[5] Quoted in the preface to 5 Modern, p. xi.

hardly suffice. And apart from our own judges there are other brave spirits on the other side of the Atlantic where, restricting ourselves to courts of last resort and federal courts, there are 70,000,000 words of judicial utterance printed and bound each year. Indeed, A. T. Vanderbilt assured us[6] that an English practitioner wishing to be sure that no relevant citable case had escaped his notice would have to refer to 2,000 *series* of reports, some of these series running to 50, 80 or 100 volumes.

To *prove* the generalisation that present-day judgments are longer than those of a century ago would involve a considerable statistical exercise which is beyond the facilities available to me. For the purpose of this lecture I have not thought it worth while to employ programmers and buy time on a computer. Even to follow the drill of proper sampling techniques has not been possible. Instead I have contented myself with a test of my own devising, and this test is modest enough. Relying on my memory I selected four pairs of cases, the cases in each pair dealing with the same topic, and one of the cases being a modern case and the other being a case of the last century. You will have to trust me that the selection was honestly made and without knowing that my suspicions about the increasing verbosity of judges would be substantiated by an analysis of the cases I chose.

My first pair is that venerable classic *Rylands* v. *Fletcher*[7] and the most important case of modern times on the application of the rule—*Read* v. *Lyons (J.) & Co. Ltd.*[8] The judgment in the Exchequer Chamber where the rule was laid down ran to 3630 words. The judgments of the Court of Appeal—the equivalent court—in *Read* v. *Lyons (J.) & Co. Ltd.* ran to 10,392 words. Each case went to the House of Lords. The speeches in the House of Lords in *Rylands* v. *Fletcher* ran to 2156 words. In *Read* v. *Lyons (J.) & Co. Ltd.* their lordships affirmed the Court of Appeal in 9250 words. Grand total: *Rylands* v. *Fletcher*—5786 words: *Read* v. *Lyons (J.) & Co. Ltd.*—19,642 words.

As this is the first pair of cases which I examine it is worth while pausing to see if there is any obvious cause of this disparity. The first thing we notice is that whereas in the Court of Exchequer Chamber in *Rylands* v. *Fletcher* there was one judgment, that of the court, in *Read* v. *Lyons (J.) & Co. Ltd.* each of the three lords justices gave judgment. In former days—leaving aside cases where the members of a court were divided in opinion—a single judgment of the court was

[6] (1955) 78 *New York State Bar Association Reports* 152.

[7] (1866) L.R. 1 Ex. 265 (Exchequer Chamber); (1868) L.R. 3 H.L. 330 (House of Lords).

[8] [1945] K.B. 216 (Court of Appeal); [1947] A.C. 156 (House of Lords).

common: indeed, it would seem that there was a preference for a single judgment unless there were special reasons to the contrary. To-day it seems to be assumed that there should be individual judgments unless there are special reasons to the contrary. And I hardly need to point out that it is in cases where there are multiple judgments that the ratio decidendi of the cases lies buried the deepest.

The second thing to notice is that the judges of the last century did not consider it incumbent on them to set out the facts at length. In *Rylands* v. *Fletcher* in the Exchequer Chamber we notice that Blackburn J. found that he could adequately deal with the facts in 264 words —about 1/15 of his judgment. As a matter of fact *Read* v. *Lyons (J.) & Co. Ltd.* does not compare too unfavourably in this respect, but in modern judgments more often than not the facts are painstakingly set out by each judge in turn even where their is no dispute as to the facts or as to the inferences to be drawn from these facts. Thus in the recent case of *Building and Civil Holidays Scheme Management Ltd.* v. *Post Office*[9] the facts were that the plaintiffs ran a holidays-with-pay scheme by which employers in the industry bought stamps from the plaintiffs, stuck these stamps on the workman's card, and when holiday time came round the workman collected the aggregate face value of the stamps as pay for his holiday. The plaintiffs sent stamps through the post and they were lost by the admitted negligence of the Post Office. The only question was whether the market value of the stamps was the face value of the stamps (£27) or their value as pieces of paper (1/-). Roskill J.'s judgment ran to 5445 words of which 2475 words were directed to setting out the scheme in all its details.

Another good example of the waste of effort and paper in setting out facts is to be found in *Noon* v. *Smith.*[10] This was a case—probably not worth reporting at all, anyway—which holds that larceny can be established by evidence directly proving the theft or by evidence from which any reasonable person could draw the inference that a theft had taken place. In reporting this case the evidence is set out three times. In the judgment it took 302 words. In the statement of facts which precedes the judgment the reporter took 312 words. The disparity is accounted for by the fact that whereas the judge spoke of " constable " the reporter thought that " police constable " would be more accurate. Otherwise the two statements are identical. In the

[9] [1964] 2 W.L.R. 967, [1964] 2 Q.B. 430, [1964] 2 All E.R. 25. This case was later in the Court of Appeal: [1965] 2 W.L.R. 72, [1965] 1 All E.R. 163.

[10] [1964] 1 W.L.R. 1450.

headnote the facts are set out a third time, but with a little condensation, such as making " police constable " revert to " constable," and omitting the irrelevant facts that these events took place on a piece of waste ground, it was possible to reduce the facts to 210 words.

Apart from those exceptional cases where the judge has to assess the value of the evidence and make a finding on the facts in his judgment there seems to be no reason why the judge need refer to the detailed facts at all. The judges of the last century very often did not. They knew what the facts were, they knew that the parties and counsel knew them, and they knew that if the case were reported the report could be relied on to include any necessary statement of the facts in the report. Look at the great case of *Asher* v. *Whitlock*.[11] Cockburn C.J. and Mellor J. both gave judgment in that case but neither referred to the facts. Many hard things have been said about *Asher* v. *Whitlock* but I have never heard it suggested that we suffer because of a scarcity of facts. Indeed, I venture to think that most lawyers would have to think very hard before they could recollect a case where they felt that they had been handicapped by reason of the shortness of the statement of facts.

My next pair of cases deal with the nature of a licence: they are *Wood* v. *Leadbitter*[12] and *Winter Garden Theatre (London) Ltd.* v. *Millenium Productions Ltd.*[13] *Wood* v. *Leadbitter* was argued before the Court of Exchequer. Three judges sat and the judgment of the court was delivered by Alderson B. His judgment was 3850 words of which 232 were taken up by the facts. The *Millenium* case was argued before the Court of Appeal and on appeal in the House of Lords. In the Court of Appeal Lord Greene M.R. took 4620 words to deliver judgment and Cohen L.J. took 742 words. Somervell L.J.'s contribution was to say in 14 words that he did not wish to say anything. Grand total: 5376 words, of which 1008 words were used in detailing the facts. In the House of Lords four law lords gave utterance, amounting in total to 10,724 words, of which 2144 were devoted to the facts. Yet the *Millenium* case was one where there was no dispute as to the facts.

My next pair of cases is in the sphere of defamation. They are the cases of *Capital & Counties Bank* v. *Henty*[14] in 1882 and the recent case of *Lewis* v. *Daily Telegraph*[15]. Each case was argued in

[11] (1865) L.R. 1 Q.B. 1.
[12] (1845) 13 M. & W. 838, 153 E.R. 351.
[13] [1946] 1 All E.R. 678, [1948] A.C. 173.
[14] (1882) 5 C.P.D. 514, (1882) 7 App. Cas. 741.
[15] [1963] 1 Q.B. 340, [1964] A.C. 234.

the Court of Appeal and in the House of Lords. In *Henty's* case three judges gave judgment in the Court of Appeal, their contributions being 1867, 1332 and 1972—a total of 5171. Batting against this total the House of Lords ran up 22,038 for the loss of five law lords. The highest scorer was Lord Penzance whose speech ran to 8828 words. I am entirely unable to account for this verbosity from a judge whose training was in the fields of matrimonial litigation and had never sat as a common law judge, especially as his appearance in *Henty's* case was ten years after he had retired from the judicial bench on account of ill health.

One might have thought that the grand total of 27,209 in *Henty's* case would not easily have been beaten in a similar case. However, in *Lewis* v. *Daily Telegraph* the Court of Appeal contributed 26,203 words, mainly due to a patient 13,365 by Pearce L.J. As the House of Lords produced another 15,116 words the grand total of 41,319 words leaves *Henty's* case far behind.

Two things are worth observing here. The first is that Pearce L.J.'s monumental judgment was greatly assisted by his being able to incorporate 3718 words devoted to setting out the facts—slightly more than was needed to dispose of the whole case in the Exchequer Chamber in *Rylands* v. *Fletcher*. The other—in case anyone cannot easily comprehend what 41,319 words looks like—is that 41,319 words is about half the length of a modern novel. In other words, anyone who thought that they might have missed something in *Lewis* v. *Daily Telegraph* on the first reading and who went back and read it over again might just as well have settled down to read "*From Russia With Love*," which is slightly shorter but much more thrilling.

The last pair of cases is *Le Lievre* v. *Gould*[16] and the *Hedley Byrne* case[17] which overruled it.

Le Lievre v. *Gould* was a decision of the Court of Appeal in 1893. Three judges, Lord Esher M.R., Bowen L.J. and A. L. Smith L.J. disposed of the case in 2893 words.

In the *Hedley Byrne* case the Court of Appeal could do no better than 5390 words. Even so an increase over *Le Lievre* v. *Gould* of 89% is not to be belittled. I think the reason why the Court of Appeal failed to put up a better show in *Hedley Byrne* is that it was evident that the case was going to the House of Lords, so they put up only one

[16] [1893] 1 Q.B. 491.
[17] *Hedley Byrne & Co. Ltd.* v. *Heller and Partners Ltd.* [1962] 1 Q.B. 396, [1964] A.C. 645.

lord justice to give judgment. After all, a few years previously—in *Candler* v. *Crane, Christmas & Co.*[18]—the Court of Appeal showed what it was capable of in a case on this branch of the law: there three lords justices chalked up 15,358 words. However, in *Hedley Byrne* the House of Lords made up for any shortcomings on the part of the Court of Appeal: five law lords put together 25,974 words.

We are now in a position to compose a balance sheet. For this purpose we must, of course, balance like against like. So in comparing *Le Lievre* v. *Gould* and *Hedley Byrne* we must ignore the House of Lords decision in the latter case, and do the same in the *Millenium* case. Here is the balance sheet—

Old Cases		*Recent Cases*	
Rylands v. *Fletcher*	5786	*Read* v. *Lyons (J.) & Co. Ltd.*	19642
Wood v. *Leadbitter*	3850	*Millenium* case	4620
Henty's case	27209	*Lewis* v. *Daily Telegraph*	41319
Le Lievre v. *Gould*	2893	*Hedley Byrne* case	5390
Total	39,738	Total	70,971

It will be seen that the four later cases show a 78.9% increase over the earlier cases.

Are there evident reasons for this expansive attitude on the part of the judiciary which has developed in recent times ? There must be. It is idle to suppose that from some obscure genetic cause a race of much-speaking judges has been bred in the present generation. I suggest the following as possible reasons:—

(i) The advent of mechanical aids. One can understand why Lord Abinger's judgments were short if you think of him writing them with his own hand by the light of a guttering candle and using a quill pen which needed frequent re-sharpening. The stenographer and the typewriter have put paid to all that.

(ii) A decline in the feeling of " corporate spirit " in the courts. In the early and mid nineteenth century when the majority of reported decisions on the common law side were of a court sitting in banc, one finds that week after week the court was composed of the same four or five judges, and they acted as a court rather than as a collection of individual judges. In consequence we find so often that it is the " judgment of the court," and even when there are separate judgments those

[18] [1952] 1 K.B. 264.

judges who follow the first do not feel it necessary to traverse all the ground again: they are content to emphasise one point or to indicate a fresh point. The same can be noticed, though not in the same degree, in the modern Court of Appeal from the time of the Judicature Act to the 1930s. In that period the Court of Appeal sat in two divisions, each division maintaining the same composition for long periods. To-day it is a different tale. Judges seem to have lost the sense of attachment to a court. They tend to act as a collection of individuals, and each individual has to mark his individuality by giving an individual performance.

(iii) Though this is by no means peculiar to Her Majesty's judges, it would seem that the power of succinct expression has largely been lost. Since using words does not involve great physical effort, let us spread ourselves ! Churchill's reiterated orders to his subordinates to compress their views to one side of a piece of notepaper is witness to this. Perhaps this trend is due to the decay of classical scholarship, for the Greeks and the Latins were able to compress a wealth of thought into very small compass.

* * *

I now come to consider more generally the form of judgments. Any lawyer—academic or professional—whose work involves extensive reading in the law reports soon finds that the form in which the judges frame their judgments are diverse, but that some forms predominate, and that individual judges have often a preference for a particular form. For instance, leaving aside grammatical construction and style of language, no one could confuse a judgment of Lord Denning with a judgment of Lord Hewart.

The most usual form—in fact it might be called the " common form " pattern of judgment—is as follows. Basically it can be described as " Find the facts—Find the law—Fit the facts to the law." But this basic model is capable of refinements and there are " optional extras," and the full specification is this:—

(i) statement of and finding of facts;
(ii) analysis of cases relevant to the point in issue;
(iii) extraction of the principles of law derived from the cases:
(iv) (first optional extra) account of the history of these principles;
(v) resolution of any conflicting principles of law;

(vi) subsumption of facts to the principles of law selected;

(vii) (second optional extra) assertion that the conclusion accords with justice, commonsense, equity or any other virtue that stands high in the estimation of the particular judge;

(viii) (alternative second optional extra) assertion that the conclusion is unjust, ridiculous, inequitable or the like; and that it is high time that someone (e.g. legislature, House of Lords, government) did something about it.

Two classes of judges tend to favour the " common form " type of judgment. One is, to speak frankly, the not very good judge, whose mind is not all that flexible and who plods a rather pedestrian way towards a result. The other is the Chancery judge, for it is rare in a Chancery case for any compelling interest of justice to arise, and therefore Chancery judges can treat the case as an entertaining logical exercise and throw everything overboard except the power of logical reasoning. Consequently Chancery judges rarely indulge in " optional extras."

A good instance of a " common form " judgment is that of Wilberforce J. (as he then was) in *Re Stonham.*[19] The case raised the construction of a home-made will containing a bequest of " cash in Lloyd's Bank " in circumstances where the deceased had two accounts at Lloyd's Bank—a deposit account and a current account. The stages of the judgment are:—

(i) Wilberforce J. states the facts—at unnecessary length as it would seem;

(ii) Wilberforce J. considers nine cases on " cash ", " ready money " and " money ";

(iii) Wilberforce J. concludes that these cases establish certain rules;

(iv) Wilberforce J. fits the facts of the will to these rules;

(v) (Optional extra) Wilberforce J. adds the observation that the result arrived at seems reasonable since otherwise one would have to assume that a testatrix who had specifically bequeathed other substantial items had omitted to deal with one very substantial item of a bank account.

[19] [1963] 1 W.L.R. 238.

It will be noted that this judgment goes against what I have said above, in that although it is the judgment of a Chancery judge it none the less contains an " optional extra." But I think we can account for this. As you will have noticed Wilberforce J. regarded the result arrived at as reasonable. This is so unusual an event in the Chancery Division on a construction summons arising out of a home-made will that, I think, the learned judge did right to call public attention to it.

This traditional " common form " pattern of judgment always suggests to my mind two things, which perhaps are probably more often true than not. The first is that the judge's conclusion, usually to be discovered in the last paragraph or two of the judgment, reads as if it were as much a surprise to the judge as to anyone else. The judge has managed to convey the impression that he has been engaging in an operation like a jig-saw puzzle, and what has hitherto been a meaningless mass of colour develops into a coherent picture only as the last one or two pieces fall into place. Holmes once described this sort of approach as " adding up ones sums correctly." At other times this approach makes it seem that the judgment is a sort of exercise in exegetical apologetics. A case has been set down for trial, a result is going to be announced, and the judge justifies the result by showing the public how the wheels, cogs and pistons in the judicial machine are operating to produce the result.

The main objection that can be levelled against the " common form " judgment is, not that it uses the machinery of logic (let us hope that all judgments do that), but that it tends to make everything subservient to the machinery. A map is a very useful piece of equipment, but though it may keep you on the right road a map does not tell you where to start from nor where to go to. Hence those not infrequent cases in the law reports where we read that the Court of Appeal affirmed the judgment of Binks J. on different grounds. Binks J. followed his map faithfully but he started from the wrong point or took the wrong road and it is only by sheer luck that he managed to arrive at the right destination.

The next type of judgment is what I call the " crying shame " type. I am sure you will recognise it. It occurs in a case where the judge has decided at a pretty early stage in the proceedings that judgment ought to go for (say) the plaintiff. On the other hand the judge has been considerably pressed with very cogent arguments backed by apposite decisions which suggest that the judgment should go for the defendant. The resulting judgment is framed from the standpoint:

" In this case it will be a crying shame if the plaintiff does not get judgment. I will do the best that I can to see that he does get judgment, and I am not going to let a lot of stuffy precedents stand in the way if I can help it."

It is generally believed that this type of judgment has made its appearance only in modern times. In its most blatant form this is true, but throughout the history of our courts there has been a succession of judges who formed at an early stage—not Judge Hutchinson's famous " hunch "—but a deep conviction that justice demanded a decision contrary to that which the precedents appeared to suggest. Bereford C.J. in the thirteenth century was such a character. In the eighteenth century we have Holt and Mansfield. These judges were discreet without being less effective. They knew that no authority exists which cannot in some way or other be distinguished if the desire and the expertise is there, and that there is no statute which cannot be glossed if sufficient cunning is employed. They could, therefore, often achieve the desired result without appearing too iconoclastic.

It is left to rough fellows like MacKinnon L.J. in the twentieth century to be thoroughly blatant about the process. Said MacKinnon L.J. in *Heap* v. *Ind, Coope & Alsopp Ltd.*:[20] So far as I am concerned, I freely avow that, inasmuch as in common-sense and all decency, Mr. Heap ought to be able to recover against somebody, and in the circumstances of this case .... in all common-sense and decency he is able to recover against the defendants if the law allows it, my only concern is to see whether, on the cases, the law does allow him so to recover." He then proceeded to examine the cases and, as one might expect from the standpoint he had adopted, his approach was not entirely destitute of some bias.

Lord Denning is a believer in a " crying shame " form of judgment, though his approach is slightly different from the usual. Most " crying shamers " start from the point that the law has got on to the wrong track and that it is their task to shunt it back on to the right track. Lord Denning is usually not disposed to admit that the *law* has got on to the wrong track. The *law* is all right: the trouble is that a few judges may have erred or have been misunderstood, and a few text-book

[20] [1940] 2 K.B. 746.

writers have failed to understand the cases, with the result that the opinion has got abroad that the law is something different from what it is. Prophet Denning will now expound the scriptures and set everyone right again !

The famous *High Trees* case[21] is an example of Lord Denning's approach. Having expressed his view of what the result of the case ought to be, and having stated the position both at common law and in equity as previously understood, he does not assert that the *law* has gone wrong or that the *law* has failed to develop. His thesis is that the *law* is all right: it has developed, but that this fact has not been generally noticed. Naturally he must give evidence of this development so he produces four cases spread over half a century. Only one of these cases ever rose to the exalted level of the Incorporated Council's series of reports. One had to be rescued from the 1917 volume of the *Times Law Reports*, one from an early volume of the *All England Law Reports* and one from the obscurity of the *Weekly Notes*. It is not surprising that Cheshire and Fifoot described this catena of authority as " slim."

There are other cases where Lord Denning, either as Lord Denning or Denning L.J. or Denning J., has employed this method. It is to be seen in *Cassidy* v. *Ministry of Health*[22] which raised the question of the liability of hospital authorities for the acts of their staff when about their professional duties. There was not so much here about something being done for the unfortunate plaintiff who now had a paralysed hand whereas he formerly had merely a stiff finger, but rather an insistence that there was a perfectly clear principle of law applicable which had in some way become obscured for the previous fifty years—so clear, as Lord Denning says " that one wonders why there should ever have been any doubt about it." One should indeed wonder how such a clear principle should have eluded not only the profession at large but also such eminent text-book writers as Pollock, Salmond and Winfield who plodded through edition after edition in complete ignorance of what the law really was.

[21] *Central London Property Trust Ltd.* v. *High Trees House Ltd.* [1947] K.B. 130.
[22] [1951] 2 K.B. 343.

The last type of judgment with which I shall deal[23] is what I will call the "judgment of principle." A judgment must, of course, be given in every case even if the issue is no more than a question of fact whether the defendant's dog bit the plaintiff (as the plaintiff alleges) or whether (as the defendant alleges) the plaintiff carelessly brushed against the dog who happened to have his mouth open at the time. The better judges know that the only judgments worth profound preparation and worth reporting are those in which conflicting principles contend for supremacy. The better judges know, too, that a dreary rehearsal of the facts and judgments in previous cases is not always necessary for the extraction of the principles on which those cases were decided. There is nothing novel in this. It has long been recognised that one of the occupational diseases of lawyers which should be fought against is the tendency to become mesmerised by the minutiae of the law. As long ago as the seventeenth century Heneage Finch wrote:[24] "He that will take the whole body of the law before him, and go really and judicially to work, must not lay the foundation of his building in Estates, Tenures, and the gist of Writs, and such like, but in those current and sound principles which our books are full of."

From a line of precedents—sometimes from a single case—there can be generated a principle, and once this principle has taken root the case or cases which gave it birth are really of little account and can almost be written off, just as a butterfly when once it spreads its wings writes off its chrysalis.

The judge who delivers what I have called a "judgment of principle" cites few cases and those he does cite are mentioned but briefly and then to make some significant point. The reason for this is clear. The cases have been cited, quoted from in extenso and distinguished

[23] There are several other types of judgment which can be discerned in the reports, some of which could more appropriately be dealt with in a lecture on "The Pathology of a Law Report." There is, for example, the "spurious legal history" type. Occasionally a judge will go back beyond the precedents and try to find the first cause of it all, and soon we are among the Year Books and the origin of writs and In Consimili Casu and stuff of that sort. Unfortunately judges are thirty or more years from a law school and are ill equipped for this sort of thing. Still, "*Omne ignotum pro magnifico*" and no doubt the barristers and solicitors in court are impressed. Yet another type is the "too clear for argument" type. As soon as the arguments are over the judge sails into a short extempore judgment, prefacing the judgment with the statement that the law is clear, or too clear for argument, or that it is obvious that the rule in *Puffington* v. *Ditchwater* applies, and so he quickly disposes of the matter—so quickly that he misses the real point and produces a result which may mystify for years to come.

[24] It looks as if Heneage Finch was having a dig at Coke when he penned these words.

and counter-distinguished in the course of argument. When the judge comes to deliver his judgment he need not refer expressly to that of which everyone in the court is already aware. As for those who come to read the judgment later in the law reports, the obliging reporter will have given the facts and given the arguments, so the judgment is clearly understandable.

There are many examples of "judgments of principle" to be found in the reports. Some of them are famous, such as those of Lord Watson in *Allen* v. *Flood*,[25] Lord Macnaghten in *Quinn* v. *Leathem*,[26] and Blackburn J. in *Rylands* v. *Fletcher*.[27] Very occasionally a complete set of "judgments of principle" may be found in one case: *Fender* v. *Mildmay*[28] is an example where five law lords contributed a straight flush of "judgments of principle"—if "straight" is the correct word in a case where the court was split 3:2.

I would not like it to be thought that a judge who gives a "judgment of principle" thinks that, unlike lesser judges, he is untrammelled by the doctrine of precedent. It is very much the reverse. It is simply that he knows that a principle is immanent in a line of precedents and not something which has to be extracted from each precedent in turn by cracking it open as if with a nut-cracker to extract the kernel. And it is by going for the immanent principle that we are saved from that dreary rehearsal of judgments in earlier cases, some going one way and some the other, so that at times it looks as if the judge were conducting a sort of Gallup Poll of his predecessors.

Perhaps I may be permitted to draw on personal experience. Whenever I come across a part of the law which is messy and obscure I feel an urge to trace the matter to its source to see where the obscurity crept in. Sometimes I have been so pleased with my detective work that I have published the results of the investigation. I did it in the case of the Voidable Marriage Mystery in the *Modern Law Review* in 1945.[29] I unravelled the Case of the Religious Charitable Trust in the *Law Quarterly Review* in 1946.[30] I gave an account of the Negligence-

[25] [1898] A.C. 1.
[26] [1901] A.C. 495.
[27] (1866) L.R. 1 Ex. 265.
[28] [1938] A.C. 1.
[29] 8 *M.L.R.* 203.
[30] 62 *L.Q.R.* 234.

Nuisance Mystery in the *Law Quarterly Review* in 1949.[31] And in 1955 in the *Law Quarterly Review*[32] I brought to book those who had turned the conception of dependent relative revocation inside out.

Each of these enquiries involved tracing a conception from the time it first appeared in a judgment, through a multitude of cases, up to the present day. In each instance as the enquiry progressed one found the small extension here, the small restriction there, the exception in this case, the modification in that case, plenty of distinguishing, plenty of argument by analogy. But never—or rarely ever—did I come across a case where a judge had sought to penetrate beneath the crust of ad hoc ratios and random obiters which had accumulated around the origin in order to extract something which could be called a living principle.

And I think it is generally true that wherever one comes across a branch of law which is in a particularly messy state it will be found on investigation that what has happened is that what was once a clear principle has been " roughed up " with exceptions and qualifications and ad hoc extensions and every sort of odd distinguishing which seemed to suit the case in hand, and that not for many, many years has there happened to pass that way a Blackburn or a Willes or an Atkin who was capable of seeing that what was wanted was, not the discarding of exceptions, qualifications and so on, and the resurrecting of the old principle—that would mean there was never to be progress—but who could see that what was wanted was to extract for this mess of overlaid principle a new principle which would shine forth in elegant simplicity for the future—that is to say it would shine forth until the next generation of judges began to mess it up again.

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[31] 65 *L.Q.R.* 480.

[32] 71 *L.Q.R.* 374.

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