THE ATTITUDE TOWARDS JUDICIAL PRECEDENT IN DANISH AND NORWEGIAN COURTS

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I. INTRODUCTION

1. In Danish or Norwegian legal writing there is no work in which the question of precedent has been thoroughly examined. Usually authors are content to offer rather general reflections on the subject, or else they choose to make a comparison between the Continental and the Anglo-American conception of the importance of precedent. The traditional view assumes that the decisive difference between the two systems lies in the fact that precedent is binding in the Anglo-American system, but is only a guide in the Continental system.

It has long been acknowledged, however, that the boundary line between the two systems is by no means firm. The British judge may "distinguish" the case before him from earlier cases, and may rely on unimportant differences as a pretext for deviating from an earlier decision—a procedure which is not unknown in Scandinavia. On the other hand, the Continental judge—or at any rate a Danish or Norwegian judge—will, to a larger extent than is perhaps tradionally assumed, feel bound by earlier decisions. It may even be that the Continental judge feels less responsible for the development of the law, and is therefore more apt to follow precedent.[1]

A characteristic feature of the Scandinavian courts—and especially of the Danish ones—is that the primary aim is to decide the concrete legal dispute in such a manner that the decision is felt by everybody to be fair and just. The aim of providing guidance for the future is of secondary importance. The courts do not want to commit themselves on the general question until they are on firm ground. The counsel are, of course, primarily interested in their clients. Their concern is to win the case, and it is therefore uncertain whether the case will be so presented in the courts that the judge will feel that he can make a decision that can serve as a guide for the future. It is true that often a safe result may be reached in a particular case, even though it may be very difficult to answer some of the general legal questions involved. So it is preferable to decide the case with reference to the particular circumstances. It is a general practice in Denmark for the courts

[1] Ross, *Om ret og retfærdighed,* Copenhagen 1953, p. 106.

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to enumerate some concrete established facts and then conclude by saying that "owing to the circumstances" a certain result has been reached.

One may therefore say that the tendency of Danish courts to confine the opinion rendered to the concrete case is due to intellectual restraint on the part of the judges. They prefer not to indulge in superficial reflections that subsequent similar cases may show to be untenable. Only when a number of cases have been fed to the judicial mills can it be seen how the general question must be answered. This restraint, however, sometimes develops into a reluctance to render decisions with a general effect. Perhaps the counsel even makes this "virtue" of restraint a necessity. Not daring to embark upon the general question, he takes refuge behind the concrete circumstances. In Denmark there have been quite a number of attacks by legal practitioners and theorists on this self-limiting tendency of the courts. This criticism has found its sharpest form in a statement to the effect that the courts "are steering haphazardly among the concrete facts".[2] Though much of the criticism has been appropriate, this statement is rather wide of the mark.

Instead of reasoning on the basis of general reflections and possibly of comparative studies, we may attempt a study based on Danish and Norwegian decisions that have touched on the question of precedent, for what the judges say and write about precedent is at least one significant aspect in the study of actual judicial practice.

So far as can be determined, the attitude of judge and counsel towards the question of precedent is fundamentally different. Those who are to be legal advisers will prefer to build on decisions already rendered. By comparing the case in question with earlier decisions in similar cases, they find a starting-point for the evaluation of the case before them. It is expected that a subsequent decision, presenting substantially the same or analogous facts, will follow the same lines as the previous one. As the clients are informed of this, it would be unfortunate if expectations of this kind were disappointed. Not only the counsel but also the laymen themselves take the same view.

The primary concern of the judge, on the other hand, is to arrive at a decision that is just in the particular circumstances of the case. In Scandinavia, there is a distinction in the effect of

[2] Illum in *U.f.R.* 1946, B, p. 171.

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pleadings in the judicial decision-making process: facts not invoked by the litigants may not be considered, while legal issues not raised may nevertheless be examined. This is a questionable distinction because it presumes that the judges are familiar with all the domains of the law, and that the ordinary citizen may with equanimity leave all the legal reasoning to the court. This assumption, of course, is based on a fiction. The judges cannot possibly master the law to such perfection. The counsel for the parties must instruct the court not only on the facts of the case, but also on the legal grounds. Then it is the court's business to cut through the diverging views taken by the parties, and to arrive at a proper understanding of the legal problems. Although the court is not denied the right to decide the case on the basis of legal views that have not even been maintained by either of the parties, there is hardly any doubt that in this respect it ought to exercise the greatest caution. At all events it is advisable that it should submit the question to the litigants and request their views. Only in this manner can the case be thoroughly pleaded and elucidated from both sides. Experience indicates that the critical examination by the parties is a valuable safeguard against unfortunate results.[3]

It seems that Danish counsel rely too heavily on earlier decisions. There is a widespread belief that a sufficiently large muster of precedent can win a case even if none of the decisions exactly covers the case in question. Sometimes this manner of tackling the problem may well reflect intellectual modesty—or perhaps only intellectual fatigue. It is easier to shelter behind decisions made in similar cases than to build up the necessary arguments for a correct decision. The search for more enlightened rules of law would be better served if counsel were to pay more attention to the argumentation behind a given precedent and less to the outcome of the litigation. The fact that certain considerations have been acknowledged by the courts may well indicate that they are valid, but this in itself ought not to prevent other and still more decisive considerations from being applied in a new case.

Courts are justified in adopting a highly critical attitude when faced with attempts by counsel to establish that a given legal problem is settled by precedent. More often than not a judicial decision is susceptible of several interpretations. The earlier decision will appear to stand for narrower as well as broader proposi-

[3] Prytz in *U.f.R.* 1952, B, pp. 60 f., mentions an instance in which the court *ex officio* put forward a view which one party had not believed could be stated. The view proved to be untenable.

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tions of law, but in extracting the precedent value of the earlier decision the judge should look to the narrower proposition—to the least far-reaching, rather than to the most far-reaching solution. This must be so, even if the decision is so worded that it gives the impression that it is in favour of the more far-reaching solution.

The problem is illustrated by the decision, quoted in 1937 U.f.R. 91, on the question of the procedure to be followed when one spouse has given a creditor security in a life insurance policy effected for the benefit of the other spouse. When the first spouse dies, the creditor tries to obtain satisfaction in the policy amount to the detriment of the surviving spouse. Is it then possible for the latter to have recourse against the estate of the deceased spouse? This was answered in the negative, even though an older decision (*Anna Kristine Jørgensen* v. *Trustee of N. P. Jørgensen's estate,* 1904 U.f.R. 266) answered it in the affirmative. The note of 1937 U.f.R. 91 points out that the two cases differed in several respects. In the earlier case it was a question of pledging both the policy and other assets as well, whereas in the later case only the policy was pledged. But the *ratio decidendi* of the older judgment, which granted the recourse, did not imply that this factor had been considered relevant. On the contrary, the grounds are so comprehensive that they cover the later case also.

Thus it is seldom safe to assume that a certain result has been established by a decision. The *ratio decidendi* may have been couched in such a manner as to cover more than it was actually intended to decide. Another possibility is that a problem has not been sufficiently elucidated in court, so that the way is still open to a changed evaluation.

II. SOME GENERAL ARGUMENTS ON THE ADVANTAGES AND DRAWBACKS OF EMPLOYING PRECEDENT

2. Sometimes one meets the view that a precedent should be adhered to only if the grounds underlying it are compelling. There is no wisdom, in other words, in uncritical loyalty to precedent as such. The members of the Norwegian Supreme Court in a joint opinion in the case of *Hunsfos Fabriker* v. *Corporation of Kristiansand,* 1902 N.Rt. 684, take this view. This view is also

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expressed by a Swedish parliamentary committee *(Riksdagens lagutskott)* in a report of 1947. The *Justitieombudsmannen* (The Special Parliamentary Commissioner for the Judiciary and the Civil Administration)[4] had criticized a judge of a lower court for not following a Supreme Court precedent: the Committee objected to this criticism, holding that "only the strength of the grounds laid down by the Supreme Court in delivering the judgment should be decisive for the influence of the Supreme Court on the administration of justice by the lower courts".[5]

This is quite evidently too narrow a view, and it would imply, with special reference to the Danish decisions, that if they were meagre with their *ratio decidendi* they would have little or no influence on the development of the law. An important argument that is sometimes overlooked is that people adjust themselves to decisions of the Supreme Court. For most individuals the authority of the highest court and the factual patterns and results reached are compelling enough reasons for them to conform to a given decision. Their conformity does not depend upon the persuasiveness of the *ratio decidendi*. Moreover, it seems to be true that it is a self-delusion to rely on the precedents to act only through their factual strength. Due weight should also be given to the view that a judicial result is often arrived at by independent reasoning, the *ratio decidendi* serving only as a convenient rationalization.

As a starting-point for the evaluation of the weight to be accorded to a precedent, one might suggest the thesis that both the advantages and the legal inequalities ensuing from a change must be weighed in the judicial scales.

3. Arguments of a general character are sometimes adduced in favour of the standpoint that judicial decisions should, as precedents, be binding for the future. Foremost among these may be placed respect for the Bench, and the wish to limit the number of future lawsuits.

These two arguments can be summarized as follows: The legal system is interested in making all citizens comply loyally with the decisions made, so that the judges are not burdened with cases concerning virtually the same problem. Legal institutions could not cope with a situation where the courts were overwhelmed by a multiplicity of suits. A constant unrest in legal life would also

[4] An official with similar functions exists in Finland. Since 1955 Denmark also has had such an official, but he is not empowered to criticize the proceedings in the courts.

[5] Cf. *infra* p. 83.

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result if it could not be taken for granted, as a main rule, that a practice is normally unalterable. The value of precedents, first and foremost, lies in the fact that because of them many a lawsuit may be avoided. All advice in the field of law would be unduly hindered if normally legal decisions were not unalterable. Besides, the authority of the law must be considered. There is a general confidence in the firmness of the legal system which will be weakened if the same question is decided quite differently in other similar or analogous concrete cases. It must be supposed that one solution only is correct in a given set of circumstances. This is particularly true if it is the same court that decides the different cases, and especially if this court is the Supreme Court.

Generally the importance of these factors is overestimated. It may have an even more disagreeable effect if those who have made an erroneous decision adhere to it.[6] The consequences of failing to rectify an erroneous decision may have injurious effects in weakening public confidence in the judiciary. It is not necessarily incorrect that the same question is decided differently in related cases. The public realizes that the courts may take different views of the same questions, and as the cases travel through the courts it is clearly disclosed that different judges may evaluate the same problem quite differently. Especially in Supreme Court decisions, the fact that there is a "grey" area and that the law is in ferment does not of itself diminish the authority of the judicial process. In the field of criminal law, the rules of retrial in criminal cases are a recognition that the case on retrial may be adjudicated differently by different judges, although the decision in the first trial was considered final. It cannot be stated that these rules of retrial have had adverse repercussions on judicial authority. Even if ample opportunities are acknowledged for overruling precedents, this will never lead to legal chaos and to lack of confidence in the legal system. By and large, courts will arrive at the same result in a new case, since the arguments that were able to convince the first group of judges will normally have the same convincing effect on a new group of judges; indeed, the latter may to some extent be swayed by the fact that other judges have been convinced by the arguments. Even if precedents are not regarded as binding they will none the less for these reasons always carry considerable weight, and there is no reason to believe that the legal authority will be alarmingly weakened.

[6] Cf. Arnholm in *T.f.R.* 1933, p. 173.

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In the Norwegian case, reported in 1924 N.Rt. 1141, one of the judges of the Supreme Court states in the records that it would lead to an undesirable state of affairs if it developed into a phenomenon of frequent occurrence that the Supreme Court delivered different opinions on the same legal problem. This in itself is true. But it is merely tilting at windmills. There is no danger that the practice referred to would develop into a "phenomenon of frequent occurrence".

This judicial viewpoint assumes that decisions on fundamental questions of law will serve to reduce the number of lawsuits, but the fact is that citizens with a litigious disposition will always have a try at their own lawsuit. Admittedly there will be a somewhat greater number of lawsuits about the same problem if earlier decisions are not considered to be binding for the future. Counselling will also be less certain if the doctrine of *stare decisis* is relaxed. It is equally true, however, that the doctrine of *stare decisis* does not always assure legal certainty. Any legal advice contains an element of uncertainty if the problem in question has not actually been decided by the clear words of a statute. Counsel may build his result on considerations underlying legislation, on legal writing and on earlier decisions, fully realizing that the opinion of writers on legal theory does not possess any special authority and that legislative material is not conclusive.

On the whole it seems that more confidence is placed in precedent. This is probably due to some extent to the fact that the pronouncements originate from the same agency that is going to consider the problem. The assumption is built on the fiction that the courts represent a unity, whereas in fact they are, like other agencies, composed of persons with different views and opinions.

It is perhaps realistic to regard a Supreme Court decision which has not been overruled as an authoritative guide for the present, while understanding that it is subject to revision in the light of future experience.

It is sometimes argued that particular care should be taken not to occupy the Supreme Court's time unneccessarily. The highest court in the country should not have to waste its energy by dealing with the same problem several times over. However, the fear of misuse of the right to appeal is probably quite unfounded. So long as the task of the party is to convince a group of judges, who have already once made up their minds about the problem, that they should change their view, counsel will hardly encourage his

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client to bring a case of a similar kind before the Supreme Court. Also, the Court has the power, by means of fines for vexatious suits, to check this development, if the tendency to bring closely related cases before the Supreme Court should become so pronounced as to cause inconvenience to the Court.

4. Against those considerations, which are arguments in favour of attaching great importance to precedent, there are, in the Scandinavian conception of law, weighty counter-considerations of a general character. Just as society is in flux, so also must the law be, if it is to be a living body responsive to changes in society. Each decision is indeed a conglomerate of the factual and legal conditions prevailing at the time of the judgment. In evaluating the practical consequences of an earlier decision it is necessary to consider the social conditions as they were at the time it was rendered, and as they were expected to develop.

But the law is constantly changing. New statutes in other fields may have the effect of throwing new light upon the legal system. A decision which earlier fitted harmoniously into the legal system will in the future appear discordant. Jurists with keener thoughts and vision may discover new relevant legal viewpoints, which ought to have an opportunity to influence the development of the law. But new viewpoints ought not to function just because they are new, any more than the old ones ought to function because they are old. They ought to function solely by virtue of their own factual merit.

Social conditions, of course, are also constantly changing. Predictions once made concerning the future development of society may have been wrong. It is difficult to see why a prediction which proves to be wrong should be able to withstand the objective demonstration, in a later age, of the actual state of affairs. There should be an unbiased examination when the issue of precedent arises, whether the earlier decisions ought to function as precedents and, if so, how much importance should be attached to them.

Norwegian legal practice provides a characteristic example of the change in social relations which had outdistanced earlier decisions. In the case *Iver Flatmo et al.* v. *the Ministry of Public Works,* 1922 N.Rt. 747, it was decided that a man whose wife had been killed in a railway accident could not be compensated for the loss of support, since the deceased, as a housewife, had had no income of her own. In a later case, *A/S/Oslo Sporveier* v. *Birger*

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Lerdal, 1951 N.Rt. 687, the opposite result was arrived at. Reference was made to the fact that the previous result did not agree with the prevailing opinion of the value of the work contributed by a housewife, an opinion which had developed gradually, and which had found expression in modern legislation on the financial status of married persons.

In Denmark there is a statutory provision requiring an administrative permit for the holding of lotteries. The aim of this has been to curb people's passion for gambling, and protection has been provided for the special lottery institutions run by the State. The Statute has not established, however, what is to be understood by lotteries. In theory and practice it is a fundamental condition that a "stake" can be said to have been contributed. In the older practice very little was required to call what was contributed a "stake". Even if commodities are bought at normal prices, and coupons are given along with the commodities, without any special payment, and on the basis of these coupons the buyer takes part in a lottery, it has been assumed that the buyer has contributed a stake (*the Public Prosecutor* v. *Niels Peter Brynoldt,* 1908 U.f.R. 318, *the Public Prosecutor* v. *Frederik Froberg,* 1912 U.f.R. 176). Nevertheless, a later decision, *the Public Prosecutor* v. *Kristen Volmer Lind,* 1954 U.f.R. 57, adopted the opposite view in a case where the audience at an entertainment took part in a lottery simply by purchasing admission tickets at 25 øre each. The Supreme Court did not find that any stake had been paid, since the cost of admission was the same on "prize evenings" as on other evenings, and the price of the ticket was a reasonable payment for the seat. There is no doubt that the last decision was based on a new way of regarding advertisements and lotteries. The prohibition in Danish legislation of prize lotteries had been made partly illusory because it has become a matter of routine to grant permission to arrange lotteries in various kinds of clubs, ("duck-lotteries", i.e. "Bingo" with ducks for prizes), with the State leading the way by organizing the *Tipstjeneste* (football pools). It is now acknowledged that people must be allowed to gamble for money, even in large sums, and this is facilitated in many ways. The ruling in the *Kristen* case, while it did not expressly overrule the previous decision, was nevertheless an effort to bring the law into closer harmony with the changed social situation.

In Danish practice, new legislation has sometimes invalidated a doctrine of law established by precedent. The legislature in 1926, for example, introduced new regulations concerning the retention of ownership of fixtures in houses, and the effect of this was a judicial reversal in the doctrine of ownership of fixtures in ships. Cf. Knud Illum, *Dansk Tingsret,* 1952, Vol. 2, p. 19.

Similarly, the same legislation which offered new, sharply defined

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rules as to the importance to be attached to the registration of rights, contributed to a changed practice in quite a different field, namely in criminal cases. See *the Public Prosecutor* v. *Johannes Emanuel Andersen,* 1939 U.f.R. 809, cf. Mr Justice Frost in *T.f.R.* 1950, p. 421, with criticism of it by Stephan Hurwitz, *Den danske Kriminalret,* Copenhagen 1955, pp. 431 f.

Sometimes a decision has been subjected to such severe criticism that it would be felt to be most unsatisfactory if the decision were upheld. There are many examples both in Denmark and Norway where the pressure of criticism has resulted in reversals by the Supreme Court of its own earlier decisions.

If a change actually achieves closer harmony with accepted legal principles, it would be a miscarriage of justice to adhere to the precedent.

This is illustrated by the Norwegian Supreme Court decision in 1916 N.Rt. 695, where, contrary to the decision of 1916 N.Rt. 545, it was established that condemnation of property belonging to a third person in a criminal case presupposed that this person, as the owner, had been summoned in the case against the offender. Here it was a question of an important legal principle: that no one is to be found guilty without having been called on to safeguard his interests. In accordance with this the first-voting judge states, "But especially when a principle of such importance as the present one is at stake, and the earlier judgment is as fresh as it is on this occasion, one should not consider it binding."

The advantage of changing a precedent is especially evident in criminal cases. If an earlier decision resulting in punishment is based upon a misconceived or erroneous proposition of law, the judge's hands should not be tied. He should be free to overturn the earlier decision and to rule the act non-punishable. The criminal-law field furnishes a weighty argument against a system of precedent to the extent that the precedent operates to create a second wrong as the price of legal uniformity.

Nevertheless, in the Norwegian Supreme Court there has been an instance of an accused No. 2 having been found guilty because there was a precedent for it, 1899 N.Rt. 762. But this decision belongs to a period when the courts were still rather reluctant to deviate from precedent.

5. The question of the weight to be attached to precedent will present itself in a special light when the courts are dealing with flexible rules of law. They might be flexible because they have

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been framed as general legal standards, or because the statutory terms do not refer to concrete phenomena capable of precise definition, or because the field is one where only guiding tenets have been developed—these being based on typical situations.

Examples of such flexible legal rules might include the following: (1) the general principle of liability for damages inflicted on others through negligence; (2) the Danish doctrine of common employment; (3) the principle of liability for damages in relations between neighbours when the inconveniences caused are of such a nature that they exceed what might have been expected in that particular neighbourhood; and (4) the provisions in the Danish Insurance Contract Act which state that the court may modify the liability for damages when the injured party is insured.

Where flexible rules of law such as these are involved, to give each decision the force of precedent would be to formulate doctrines of law before sufficient experience with individual cases has been accumulated. The continual submission to the courts of legal conflicts in these fields results in decisions that serve as guidance for the citizen. The typical procedure in future conflicts will be to make a comparison between the case in question and earlier decisions, with a view to getting them all to agree. Thus several bearings are taken to enable a decision to be made on the course to be followed.

In the law of torts it is especially hoped that people will adapt themselves to decisions which have already been made, and it is precisely for this reason that it is valuable to have clearly recognized rules. Such rules have a preventative value. But this, of course, does not mean that every decision must be followed, because it is only gradually, in the light of a series of cases, that there can be obtained a general knowledge of how a doctrine will work. Consequently, in this branch of the law one must be free to overrule earlier decisions.

> It is emphasized by Henry Ussing in his textbook on the law of torts (Ussing, *Erstatningsret,* Copenhagen 1937, p. 11) that the numerous judgments concerning damages for falls on slippery flagstones, led to the type of stone in question being treated in such a way as to render it safe to walk on, and certain decisions in cases concerning the falling down of balconies and cornices are believed to have resulted in an overhaul of numerous buildings.

Sometimes it is hardly noticeable that a practice is being changed. It is not even possible to tell with certainty whether the

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Danish courts have changed their practice in the common-employment cases. Nevertheless it is remarkable that in recent years there is no case which clearly indicates whether the Supreme Court has applied the doctrine of common employment or not.[7] Most probably a change has taken place, but it is very difficult to be sure when this set in. This is also true of sentencing practices.[8]

We study the decisions rendered during a period and are well aware that immediate comparisons can rarely be made. But this does not alter the fact that it is often possible to perceive changes in the *general tendency*.

6. It may be discussed whether a practice ought to be changed, in cases where one feels quite convinced that a correct construction of the statute concerned would lead to another result and that the older decision was therefore wrong but where it does not really matter whether one rule or another is followed, so long as a consistent practice is adhered to.[9] The Swedish *Justitieombudsman*[1] supports his standpoint that the judge of a lower court ought to follow the Supreme Court precedent with the argument that it was a question "clearly concerning a matter of orderliness".[2]

> In Sweden, however, there are instances of a changed practice in cases of an entirely formal character, cf. 1896 N.J.A. 1, and 1895 N.J.A. 600 collated with 1889 N.J.A. 521, which like the decision of 1896 was a plenary decision. Here the problem was whether, in a lawsuit, a transcript of the power of attorney would suffice.

However, there is a danger in insisting on precedents in questions of orderliness. Even in formal questions, substantial advantages may be gained by changing a practice.

7. The above examination was intended to show that the Danish and Norwegian courts have a free hand to weigh the advantages

[7] *Svend Sofus Johans Larsen* v. *"Stjernen"*, 1955 U.f.R. 472; *Burmeister & Wain* v. *Johannes Peitersen*, 1951 U.f.R. 1058; *Søren Chr. Jensen* v. *A. Nørgaard*, 1949 U.f.R. 374.

[8] Cf. Andenæs in *Scandinavian Studies in Law* 1958, pp. 57 ff.

[9] Cf. Arnholm in *T.f.R.* 1933, p. 173, Mr. Justice Trolle in *Juristen* 1953, p. 127, Bentzon, *Retskilderne*, Copenhagen 1905, p. 116.

[1] See *supra*, p. 59, and *infra*, p. 83.

[2] See *Justitieombudsmannens ämbetsberättelse* 1946 (The Report of the Special Parliamentary Commissioner for the Judiciary and the Civil Administration), p. 113.

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and disadvantages of departing from precedents. The viewpoints deducible from recent decisions verify this statement. It is not improbable that conceptions in Denmark have shifted in the same manner as in Norway, and probably within the same period. In Denmark, however, there is a traditional reluctance to indicate in the *ratio decidendi* whether the decision has been made in reliance upon older decisions. It is therefore difficult to tell what the state of the law is. A superficial study of the Reports of the Danish courts might give an erroneous impression that generally the courts do not attach much importance to earlier decisions. Knowing as we do a little about the considerations which precede the composition of a judgment, we must emphasize that this impression is false. It is true that the Danish Supreme Court has disengaged itself from the doctrine of *stare decisis* and, as will be shown later, the Supreme Court feels quite independent of decisions made by lower courts. But the lower courts show an exaggerated respect for earlier decisions.

When weighing the advantages and disadvantages it may be discussed whether in cases of doubt it would not be preferable to abide by the older decision. The view is sometimes expressed in these terms: that there is a *presumption* that the older decisions are right.[3] In the decision 1908 N.Rt. 631 the judge first voting states that the precedent should only be departed from if the opposite view is "undoubtedly right". It cannot, however, be considered just that a later litigant should not have an equal right to submit the same question for a decision on the merits.[4] When, despite the earlier decisions, the parties determine to bring the question before the courts again, it will normally be because they do not feel convinced that the decision is right. In counselling so much weight is generally attached to earlier decisions that it might be better to provoke counsel to take the opposite view—that there is a supposition that the earlier decision is wrong. What is important is that the judges should feel completely independent of the older decision. The real substance of the "rule of presumption", then, is that deviations from older decisions may entail concrete or general injurious effects, so that it will not do to consider *only* the advantages of arriving at a right decision for future reference. These injurious effects are, however, slight in the case of a quite recent decision.

[3] Cf. *op. cit.*, p. 117.

[4] Mr. Justice Berg (Chief Justice of the Norwegian Supreme Court) in his study *Prejudikater,* Oslo 1948, pp. 13 f.

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III. SPECIAL CONSIDERATIONS CONCERNING VARIOUS GROUPS OF CASES

8. The more *general* considerations in favour of, or against, attaching decisive importance to an earlier decision having now been stated, the following pages discuss a number of *special* considerations which may indicate that it would be unwarrantable to make a decision different from the one already existing.

First, the fact should be taken into account that the parties of the earlier case—and consequently others, too—have *adjusted themselves* in accordance with the result established by the judgment. If circumstances caused by the earlier case are still prevailing, an unjustifiable situation might arise if parallel facts were now to be judged differently.

Precisely such a problem as this was at issue in the case 1948 U.f.R. 72. The question was whether a rule in the statute concerning municipal rates, according to which mutual insurance associations are exempt from taxation if they have been founded "as provided by statute", also applies to an insurance company which is recognized as entitled to take over insurances under the Workmen's Compensation Act. In the decision 1915 U.f.R. 393 this question had been answered in the affirmative. In the decision of 1948 a majority of the judges stated: "The Court having previously assumed that the term ... (in the earlier statute) must be interpreted to include a company of the said description ... seven judges find that it (the corresponding provision in a later statute) must be understood in the same manner." We are told by Chief Justice Drachmann Bentzon in *T.f.R.* 1948, p. 342, that during the deliberations before the voting there was a majority in favour of abandoning the old interpretation. But the circumstances of the case stood out with especial force because the decision of 1915 concerned a company which was still existing, so that an "unwarrantable legal inequality" would arise if tax liability were imposed on a company of a quite similar kind.

When importance is attached to the adjustment consequences of a previous decision, this may appear to bring a new source of law into operation, namely legal usage. But adjustment and legal usage as factors in judicial decision-making are not identical. According to the traditional view, an established legal usage exists if a certain procedure has been used *ex opinione obligationis*, generally, constantly, and over a long period. It may be thought that

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if people have to a large extent adjusted themselves on the basis of a judgment, the requirements for the coming into existence of a particular usage are fulfilled, and that it is this usage that forms the decisive foundation in the event of a new adjudication.[5] This viewpoint is sometimes stressed in Norwegian judgments, e.g. *Fjeld* v. *City of Kristiania,* 1924 N.Rt. 18.

Adjustment, however, need not consist in adjusting oneself because one feels legally bound to do. Nor need the adjustment be a widespread one affecting a large number of people. Inequality of the law may also occur even when only two subjects are affected by different decisions. Even if the earlier decision is quite recent, the adjustment may be of such a kind that it ought to be respected.

> Adjustment as an important factor was especially emphasized by a dissenting judge in 1935 N.Rt. 692 (Mr. Justice Paulsen): "When we have a definite legal practice, in my opinion a statutory amendment is needed to introduce a rule different from the one which the courts have established, and which must now be considered law *by force of usage*" (author's italics).

Actually nothing is gained by sticking on the label of "usage". It is doubtful whether one may properly use the term "a binding usage".[6] So no solution is to be found by referring the question to some other category. The injurious effects will grow in proportion with the degree of adjustment to the earlier decision. Strong counter-considerations would then be required to overrule the earlier decision.

9. The weight to be attached to precedent presents itself in a special light in suits to recover sums of money on the ground that earlier decisions finding a legal obligation to make payment were misfounded in law. Danish rules of law determining when the right to reimbursement exists or does not exist are so flexible that these repayment cases furnish no argument in favour of adhering to a precedent that should otherwise be set aside. In these cases, the courts should feel quite at liberty to rectify a previous error and to establish a new doctrine of law for the future, while safely relying upon the rules of repayment for adjusting what inequalities may arise as a consequence of the changed practice. Thus in a tax case, the right to repayment would be denied if it resulted in

[5] Mr. Justice Berg, *op. cit.*, p. 23; a different view is expressed by Bentzon, *op. cit.*, p. 114.

[6] Cf. Ross, *op. cit.*, pp. 107–116.

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an unjust enrichment because the tax consequences had been passed on to others.[7]

10. More closely related to the repayment cases than to the cases referred to in section 8 of the present paper, are judgments for the restitution of property, i.e. judgments in which it is decided whether a chattel must be handed over or may remain in the holder's possession. The question is elucidated by the judgments concerning the extinction of retention of ownership.

> Until as late as 1923 it was established in Danish legal practice that a *bona fide* purchaser was not protected against restitution, cf. the case 1923 U.f.R. 1. But in accordance with contentions put forward by legal writers (Fr. Vinding Kruse concerning the transfer of property rights, and the discussion connected therewith) the practice has evidently been changed since then. Cf. the case 1929 U.f.R. 262. Although the Supreme Court in this case ordered restitution with reference to the fact that it was not a case of *bona fide* in the purchaser, in its opinion it broke with the doctrine of absolute restitution earlier prevailing. See further *T.f.R.* 1929, p. 501, Fr. Vinding Kruse, *Ejendomsretten,* Copenhagen 1957 Vol. 3, p. 1247, Illum, *Dansk Tingsret,* Vol. I, p. 413. It seems that in connection with this judgment a court-of-appeal practice has developed of denying restitution when the "intermediary" is a dealer—or at any rate might have been expected to contemplate a resale—and the acquirer is in good faith. The decision reported in 1952 U.f.R. 69 also seems to follow this conception, since the result—an order for restitution—is based on the fact that the first-mentioned condition was not fulfilled.

It is hardly possible to point to any concrete injurious effects caused by this change of legal practice. It is true that sometimes cases occur in which parallel facts may be judged differently. Thus in some cases from an earlier period the possessor might have surrendered chattels that were claimed back, because the prevailing view, according to which the rules of restitution were more or less unconditional, was submitted to. But the unfortunate effects that arise in this manner during a transition period cannot be very extensive. Many kinds of chattels have only a limited lifetime. Moreover, the original owner will be denied restitution if he fails to exercise the right within a reasonable time.

[7] Troels G. Jørgensen in *T.f.R.* 1928, p. 387, and in *18 Aar af Højesterets Historie,* Copenhagen 1947, p. 67, cf. 1952 U.f.R. 974, and Mr. Justice Frost in *T.f.R.* 1953, p. 640, Anders Vinding Kruse, *Restitutioner,* Copenhagen 1950, p. 252.

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11. In one particular field, labour law, the Danish courts have observed precedents more absolutely than in other fields of Danish law.

> This is clearly demonstrated by a number of decisions of the Permanent Court of Arbitration. In case No. 4611 of May 6, 1953, the Court supported its construction of the so-called "September Agreement of 1899"[8] with the reasoning that such a construction was "established through the sustained and invariable practice of the court so that it must now be considered the law".

The stronger adherence to precedent in labour law cases may be attributable to any of the following facts: the decisions are made by a single court, the Permanent Court of Arbitration, which knows its own practice. It is a special field where the interested parties keep themselves well informed of the decisions made, so that they are able to adjust themselves accordingly. The decisions are of great practical scope, since test cases are selected, in which a decision is sought that may cover a larger sphere. Finally, it is a special feature of these cases that normally they concern interpretations of collective agreements that form a compact whole in conjunction with the individual employment contracts made, so that a departure from a practice in one particular point spreads in ever-widening circles to other problems. Thus, there is a very great possibility that changes of practice may lead to concrete injurious effects that cannot easily be prevented.[9]

12. A particular injurious effect arises in those cases where in consequence of a judicial decision an *extensive administrative practice* has been formed.

> In a Court of Appeal decision in 1944 U.f.R. 598 it was established that secs. 35 and 37 of the Danish Companies Act concerning a reduc-

[8] The September Agreement is an agreement between the central organizations of labour and management which is of fundamental importance for Danish collective bargaining. See Adlercreutz in *Scandinavian Studies in Law* 1958, pp. 54 f.

[9] Sometimes reference has been made to the fact that judges of the Permanent Court of Arbitration may suffer consequences, such as being passed over for re-election, for failure to follow the practices in the field of labour legislation. If this were the only, or most essential, justification, the system would be most inadvisable. In reality this means that a judge commits himself to adhere to a particular view, and disregard of this commitment may have pecuniary consequences for him. If he wishes to keep a clean conscience, a judge ought in that case to refuse an appointment as member of the court. But since good reasons have been stated why the practice ought to be adhered to in this field, this clash between conscience and pecuniary interests does not occur.

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tion of the share capital and involving payment to the shareholders must also comprise loans to the shareholders. This decision was criticized from various quarters (cf. Bruun in *U.f.R.* 1948, B, pp. 42 ff., David *ibid.*, pp. 105 ff., Christoffersen, in *U.f.R.* 1949, B, pp. 55 ff., Klerk *ibid.*, pp. 61 ff., but was defended by Estrid Jacobsen (Assistant Registrar of Companies) in *U.f.R.* 1948, B, pp. 237 ff., whereas an intermediate attitude was taken by Thomsen in *U.f.R.* 1948, B, p. 286. The Registrar of Companies made extensive use of this judgment. After this criticism of the judgment a new case was brought to the courts, 1952 U.f.R. 30. The Court of Appeal overruled its earlier decision and acquitted the defendant. The Supreme Court, precluded from trying the weight of the evidence, ruled that the case before the Court was not directly covered by the Act, and that there had not been found such particular circumstances in it that it could be regarded as a violation of the legal provisions. It therefore sustained the Court of Appeal.

The concrete injurious effect in this reversal is that in the 1944 case fines were imposed, which have presumably been paid long ago. Injuries of this kind, however, are not great, at any rate much less important than the harm caused by following an already established practice that the defendant should be held guilty of an offence, not because one feels convinced of the justice of so doing, but simply because the practice is like that. It may be added, parenthetically, that injurious effects of this kind may be redressed by a free pardon, or by a retrial of the case, that to date it has not been possible to effect such shareholder loans and that the case of 1944 was reopened, resulting in an acquittal.[1]

In the 1952 case it was a question of introducing a more lenient course of administrative action towards private individuals. A willingness to discontinue an administrative practice that is unfavourable to the citizen is, it seems, defensible on the grounds that the main task of the courts is to protect the citizen against encroachments by the administration. This reasoning, however, is not always acceptable. Decisions which favour individual citizens by awarding them money out of the public funds are obviously unfavourable to all other taxpaying citizens.

13. There are several cases where one may say that no *concrete* injurious effects can arise from the fact that an earlier precedent is deviated from. They do not involve problems of legal inequalities of repayment, of restitution of chattels or of intervention in complicated contractual disputes.

[1] In the long run the administration won, for an amendment to the Danish Companies Act, Statute No. 232 of June 7, 1952, prohibited shareholders' loans.

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In 1926, the Danish Supreme Court decided a question concerning the liability of the board of a co-operative store for the failure to supervise properly the activities of the manager. The Court of Appeal found that the members of the board must be held jointly responsible for this, even if it could not be stated how great a part of the deficit related to the term of office of the various members of the board, 1924 U.f.R. 613, but the Supreme Court arrived at the opposite result; 1926 U.f.R. 239. The members of the board were acquitted because it was found inadvisable to impose on them the liability for the total deficit merely because of the neglect which each member had shown during his term of office. Nevertheless, in a later case, 1940 U.f.R. 713, the Supreme Court arrived at the opposite result, joint liability according to the available information, as the Court had not been furnished with the necessary information for a limitation or distribution of the responsibility, the procurement of which information must rest with the members of the board. It may be noted, however, that in the latter case it is expressly stated that it was a question of *gross* negligence in the supervision. Whether this was the situation is not mentioned in the case of 1924. On this particular point there is much doubt concerning the rules of law, cf. Ussing, *op.cit.*, pp. 203–05, Hartmann in *T.f.R.* 1950, pp. 232–41.

Even should the two decisions of the Supreme Court be at variance with one another—which they may not be—the concrete injurious effects are unimportant. Cases of this kind occur at rare intervals. It would, of course, be easier if fairly well-defined rules were given, but the value of such rules actually only consists in the fact that the courts may be spared a few cases. It is not the fact that people in their everyday activities, or in ordinary contracts, adjust themselves with reference to what is considered right in cases of this kind.

IV. SECONDARY CONSIDERATIONS

14. One often sees the viewpoint advanced that there is a difference between the weight of a single precedent and the weight of a practice of long standing.[2] When several decisions in favour of the same rule have greater weight than a single decision, this is due to various factors. In the first place, there are strong reasons for expecting that those grounds which the Court has accepted on several occasions are in fact right. In the second place, the concrete injurious effects of a change will grow in proportion to the num-

[2] Cf. Bentzon, *op.cit.*, p. 110 f., Trolle in *Juristen* 1953 pp. 120 ff., Arnholm in *T.f.R.* 1933 p. 170, and pronouncements in Norwegian judgments, 1908, N.Rt. 631, 1924 N.Rt. 18, 1952 N.Rt. 566, a critical view by Ekelöf, *Kompendium i civilprocess,* Uppsala 1952, Vol. 3. p. 82.

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ber of cases that have been decided in accordance with the earlier conception of law.

In Danish law there are two considerations which emphasize the significance of the difference in weight between a single decision as a precedent and numerous decisions as as precedent. There is first the special feature that in several cases the dispute is reconciled in court during the preliminary step of the trial because reference is made by the judge to a precedent from which the court does not find it necessary to deviate. One need only refer to the fact that in the police courts settlements about damages in traffic cases are made by the hundred.

Moreover, it may be noted that it is not always known exactly how many decisions exist on some particular question. It is true that all Danish Supreme Court decisions are to be found in printed reports. But among the Court of Appeal decisions a very critical selection is made. So it depends on the judgment of the editors whether a decision will be printed or not. A study of the law reports will yield no information on this point. Specialists in various fields may have a thorough knowledge of decisions in their domain. Insurance people may mention several unprinted decisions in their field. The counsel of the Government may adduce decisions concerning special problems which are within his sphere in the State administration. Trade organizations may have a thorough knowledge of decisions in their own field. Yet if questions of a similar nature are presented in court by non-experts, the information supplied to the court will be incomplete.

There is a classical instance of the courts having changed their practice without knowing it. This is a Supreme Court decision of 1796 which interpreted the provision of King Christian V's Danish Code of 1683 (5–14–56) as not requiring that receipts for instruments of debt be written on the document itself. This was contrary to a decision of 1766. It appears from the voting that one judge specifically pointed out that he did not know if there was an older practice concerning this question of interpretation, cf. Thøger Nielsen, *Studier over ældre dansk formueretspraksis*, Copenhagen 1957, p. 149 footnote 62. On the other hand, the judgment of 1766 was well known in banks and savings banks, as appears from the legislative materials of a statutory amendment of 1798.

15. Often the view is advanced that the weight of a precedent depends upon its age. But the view has two aspects. On the one hand it is said that it is easier to overrule very old decisions, but on the other hand this is also said to be true of decisions which are fresh.

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So there seems to be some truth in the saying that judgments have an age of manhood, in which they function with their full force. Before that they must pass through childhood, a period in which their power of resistance is not great; they end up as decrepit individuals whose hold on life is easily ended. These suppositions are probably quite in accordance with the facts.

There are instances, however, that show that even very *old* judgments have been fully respected.

A Court of Appeal judgment in 1869 J.U. 152 exempting the landowners of Reersø from paying land-tax on the Royal tithes was based on a Zealand Court of Appeal judgment of 1686 concerning an owner of land in Reersø. As the old judgment was "unabated and not appealed against", no investigation of the *ratio decidendi* could be made. On the other hand, the Supreme Court, in 1898 U.f.R. 443, has overruled the interpretation established by some Icelandic decisions of the 16th century concerning the obligation to pay dues for grazing, whether or not the right to graze was in fact exercised. The court stated: "Even if, however, decisive importance could be attached to these decisions (which are themselves inconsistent), there is at any rate no information whatever to indicate that the obligation for a person who did not use the right of grazing to pay dues has been acknowledged, or even merely assumed to be acknowledged during the following centuries, whereas certain statements produced during the trial even imply the opposite situation." So, the main arguments for overruling these very old decisions were that people had not in fact adjusted themselves to them. A corresponding problem was under debate in another Icelandic case, 1858 H.R.T. 734, where the Court of Appeal discussed the significance of a decision of the *Alting* (the ancient Parliament of Iceland) of 1629.

Another case also illustrates the continuing value of an old precedent. By the decision in 1858 H.R.T. 406 it was established that even if the ancient title-deeds did not entitle the Municipality of Viborg to the ownership of the eastern part of Lake Viborg, they did show that a right of use had belonged to the Municipality from time immemorial. Accordingly, the Municipality possessed the rights of fishing and reed-cutting. In 1942 U.f.R. 356 the question was decided whether a private landowner could protest against a municipal bathing jetty in the lake. The lower court discussed what is implied in the term "right of use" as distinct from "right of property", but the Court of Appeal, whose grounds were confirmed by the Supreme Court, cut through the discussion by stating that the Court had at one time acknowledged that the right of use *in general* belonged to the Municipality. *Therefore* no argument could be based on the fact that the placing of the bathing jetty was at variance with a right belonging to the landowner. (The Court then proceeded to discuss views concerning the regulations relating to adjoining properties.)

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The view might be advanced that old precedents carry more weight in the law of real property which is a more static field than for instance the field of family law, cf. Trolle in *Juristen* 1953, p. 125. This, however, does not get to the core of the matter. Several fields within the law of real property cannot be considered static. The rules, for example, of the transfer of ownership, and the very basic problem of protecting ownership against encroachments on the part of public law have been subjected to substantial re-appraisal in recent years. There is this to be said, however, for the view mentioned, that special weight should be attached to precedents concerning rights as to disposal of real property, because otherwise there may be a risk that various permanent relations will be judged differently. (However, in the case concerning Lake Viborg, there was no question of any concrete injurious effect, if, on the basis of new information, the result was arrived at that the right of use did not involve a right to put up a bathing jetty.)

If older decisions are more easily overruled than decisions in the "age of manhood", it is mainly due to the following facts: (1) only rarely will the overruling cause any concrete injurious effects, since the relations which have been evaluated on the basis of older decisions have generally ceased to exist; (2) social conditions may after a long period have undergone a modification, so that a changed practice is called for; (3) it is often the case that the legislation in related fields has undergone a change; (4) the older decision may be based on a doctrine now abandoned[3]; (5) there may now be new members on the Bench who take a different view.

But as has been mentioned, it has also been found that quite fresh decisions are particularly open to challenge. Some Norwegian Supreme Court decisions may serve to demonstrate this point.

There was an instance of this in the condemnation case mentioned above in section 4, 1916 N.Rt. 695. The Norwegian Supreme Court had decided the same question a few months previously, but now it came before other judges. The earlier decision was overruled, the judge first voting stressing the fact that the principle to be decided was one of great importance, and that the earlier judgment was very recent.

The problem of what weight should be attached to a fresh precedent was under debate in 1908 N.Rt. 631. That time the Court held another view. When the case 1908 N.Rt. 631 was pending at a lower court, the Supreme Court in the case 1906 N.Rt. 177 delivered a

[3] Arnholm in *T.f.R.* 1933, p. 170, referring to an instance from Norwegian law, 1931 N.Rt. 1254, compared with a decision from 1844.

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decision on the same question. It was therefore quite clear that the parties in the later case had not adjusted themselves on the basis of the judgment delivered in the case that was decided first. This was indeed acknowledged in the opinion of the judge first voting, but he nevertheless found that great caution was advisable and the conclusion was that the Court should submit to the precedent. The pronouncements of some judges were still more severe in 1892 N.Rt. 828, in which it was said in a straightforward manner that there must be considerable hesitation in departing from such a definite and recent precedent. The last case concerned the interpretation of the term "stillborn" in the old Criminal Code.

It is unreasonable that the incidental fact that one case happens to be tried in court before another case should rob the other party of his full right of access to plead his point, and possibly have his contention upheld. In these cases the concrete injurious effects are unimportant, as people cannot have had time to adjust themselves on the basis of the decision just made.

16. It has been widely discussed how much the various courts should defer to *decisions made by other courts,* and especially whether *lower courts* are bound to follow the decisions of the higher courts. The problem was pushed to its logical conclusion in the debate which followed the incident when the Swedish *Justitieombudsman*[4] criticized a judge of a lower court for not following a decision by a plenary session of the Supreme Court in which it was laid down—albeit with a dissenting opinion—that an increase of the maximum sentence after a crime had been committed was to be taken into account in deciding the question whether the prosecution of an offence was barred by statute or not; cf. 1941 N.J.A. 251. The Parliamentary Committee, in its report on the *Justitieombudsman's* performance of his duties, was at variance with that official.[5] It acknowledged, indeed, that the Supreme Court decisions are of paramount importance as a guide for the lower courts, but nevertheless proceeded to make the statement quoted above (p. 59) that only the strength of grounds laid down by the Court ought to be decisive.

In the discussion that followed it was mentioned that it may often be difficult, even for an astute jurist, to draw general conclusions from the decisions made.[6] When the Swedish university

[4] See *supra* p. 59.
[5] *Riksdagens protokoll* 1947, 1st section, pp. 3–4.
[6] *Sv.J.T.* 1947, pp. 285 f.

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teachers of law of procedure were consulted it turned out that in principle they supported the view held by the committee, maintaining that each judge must arrive independently at his own opinion. Engströmer assumed that this was actually prescribed by the *Domarereglerna,* a code of general instructions to the judges dating from the 16th century, a point of view which had also previously been emphasized by Mr. Justice Södergren. Hassler pointed out that if the opinion of the *Justitieombudsman* was the correct one, the consequence must be that far more exhaustive grounds should be stated by the Swedish Supreme Court than hitherto. Ekelöf questioned the statement that only the strength of grounds laid down by the Court should be decisive for its impact, since the Court in its opinion often only evaluates the facts which are relevant as the basis of the decision, leaving obscure the underlying legal grounds. Ekelöf has since returned to the same subject and expressed the opinion that the lower courts are not bound even by plenary decisions in the Supreme Courts. His reason for this view is particularly that the Supreme Court will then more often have the opportunity of re-examining the justice of its own decisions, a state of affairs which he considers desirable.[7]

In Denmark the attitude towards the question is not as definitive as in Sweden. A lower court once gave the following grounds for its decision: "As it must be taken for granted, on the basis of the information received, that the case tried is analogous with case No. 244. 1924 which was decided by *Vestre Landsret* (Western Court of Appeal) in a judgment of November 3, 1924, and as it cannot be paralleled by a judgment pronounced by *Østre Landsret* (Eastern Court of Appeal) on December 20, 1926, cf. 1927 H.R.T. p. 595, the accused is to be acquitted."

The case was brought upon appeal to the Supreme Court. In its opinion, the Supreme Court, 1930 U.f.R. 6, criticized the lower court for not having satisfactorily stated the grounds for its decision.

In this case the lower court judge evidently went to the other extreme, showing too much deference to the decisions of the higher courts. The higher courts arrived at a result which was the opposite of the decision given by the lower court judge, on grounds nearly the same as in the case which the lower court judge would not accept as being parallel. It is important to note that the criticism by the Supreme Court was directed only to the wording of the lower court's opinion. If, instead, the lower court judge had merely copied the *ratio decidendi* from one of the decisions quoted, he would have escaped this

[7] *Kompendium i civilprocess,* Uppsala 1952, Vol. 3, p. 81.

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criticism—though his judgment might have been overthrown if he had chosen the wrong precedent.

There are numerous lower court decisions that employ this method of reciting the opinions of higher courts, but there are also decisions that expressly state that the judges have felt bound by the decision of a higher court. Klerk in *U.f.R.* 1949, B, p. 61, quotes a lower court decision, concerning the problem mentioned above on pp. 71 f.: shareholders' loans. The court says in its opinion: "Referring to the basic question of the case, the court feels bound by the said Court of Appeal decision of February 17, 1944." Similar phrases are also found in Norwegian decisions; cf., for instance, 1930 N.Rt. 1017, 1924 N.Rt. 1145.

It may be laid down as a general rule that it is the lower court judge's duty to adopt an independent attitude towards the legal problem before him. *The starting point must be that he is not bound by an earlier decision to any greater extent than a judge sitting in a higher court.* If, after an evaluation on the one hand of the advantages of changing the practice, and on the other hand of the concrete and general injurious effects of such a change, it is thought justifiable to follow another procedure than that of the precedent, the lower court must be permitted to do this. There is no reason whatever to believe that this will lead the lower courts to take too many liberties. Very few lower court judges are eager to have their decisions overthrown by the court of next instance and they therefore exercise self-restraint.[8] If the lower courts are to bow always to the decisions of the higher court, this may lead to a situation where the higher court will not be provided with the necessary opportunities to consider new viewpoints and evaluations.

Against the view that the lower court judge should judge each case independently is sometimes adduced the argument that the lower court must be careful not to burden the parties of the case with additional costs. This view stresses the possibility that the decision will be changed in the higher court,[9] and it is in practice of real and great importance. Furthermore, there is the consideration that an undesirable legal inequality may arise if a different practice is followed in different jurisdictions. That will be the result if the party concerned desists from appealing to the higher court against the conflicting decision.

But even if these considerations carry some weight they also

[8] Cf. in *Sv.J.T.* 1947, p. 287.
[9] Cf. Ørsted, *Haandbog,* Vol. 1, pp. 120–22, Bentzon, *op. cit.,* p. 106.

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involve a risk of exaggeration. It is possible, of course, that a lower court will stubbornly persist in its view—though fully aware that it has been overruled by one or several unambiguous decisions by higher courts—that the cases are completely parallel, and that no new viewpoints have been advanced which can possibly lead to a changed conception. There is no doubt that the lower court judge has not acted as he ought to act, but this would apply with equal force to the judges of the higher court—the conclusion being that both lower and higher court judges ought to act with care and moderation when attempting to change an established practice.

The situation is different when it is doubtful what was decided upon in the earlier cases or whether the present case is altogether parallel with the earlier ons, and when new viewpoints have appeared that cannot be supposed to have been considered in the earlier cases. In such a situation the judge of a lower court must have a free hand. It is not the task of the judge to play the rôle of a performer in a kind of guessing competition, in which he tries to find the decision that the higher court may be expected to sanction.

After the thorough criticism that had been directed against the earlier decisions concerning shareholders' loans it was not necessary for the lower court to submit to the decision of the Court of Appeal (cf. pp. 71 f.).

So far as concerns higher courts, it is fairly certain that they do not feel bound by a practice followed by the lower courts, however well established.[1]

In the foregoing pages mention has been made of several instances of lower court decisions by which the Supreme Court has by no means felt bound. There are decisions of quite recent date concerning two domains in which the Danish Supreme Court has changed a fairly well established practice of the lower courts.

One domain comprises the so-called *værnemager* cases (profiteering in connection with collaboration with the German occupation forces). In the lower courts a regular practice had developed, but in 1949 U.f.R. 817 the result was an acquittal by the Supreme Court in a case where the Court of Appeal had decided in accordance with the usual practice. This was probably due to the fact that the Supreme Court had received new information concerning the attitude of the wartime Cabinet towards contractors, and on the basis of this, collaboration (with the Germans) in the case before the court could not be regarded as improper. After this a number of cases had to be

[1] A somewhat divergent view is expressed by Bentzon, *op. cit.*, pp. 108 ff.

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reopened. In *T.f.R.* 1950, p. 423, Mr. Justice Frost pronounces: "It is deeply to be regretted that a case of this description had not been presented to the Supreme Court for trial earlier. The decision of the Supreme Court has had, and will have consequences for a long series of cases of a similar kind." One may say that it is a question not of interpreting certain legal terms differently from what was earlier supposed to be right but of the facts proving to be different from what they originally seemed to be, so that adjudication would necessarily result in a different decision.

On the basis of a quite fixed and extensive practice in lower courts supported by the courts of appeal, sec. 35, subsec. 3, cf. also sec. 33, subsec. 2, of the Danish Licensing Act had been interpreted in such a manner that a restaurant proprietor may be punished when a waiter serves spirits to a person who must be presumed to be intoxicated, even if the proprietor is not to blame in the case in question. Mention is made in the Act of the person who serves or "causes such drinks to be served" to persons who must be presumed to be intoxicated. The Supreme Court arrived at the opposite result and the proprietor under prosecution was acquitted, 1948 U.f.R. 849. It can be seen from the records that the Courts of Appeal immediately changed their practice in accordance with this decision, cf. 1949 U.f.R. 473 and 683. Presumably it was quite unobjectionable to depart from even a very fixed practice in these cases, since a more favourable interpretation for the accused persons was involved.

There are numerous examples to show that *courts of the same instance* are not following the same practice.

In Denmark there are two Courts of Appeal: the Western Court of Appeal and the Eastern Court of Appeal. Sometimes these two courts follow different practices. By way of example, it may be stated that the Western Court of Appeal has held valid mortgage-bonds where the debt is not stated at a definite amount, but at an amount that may vary according to the value of the estate, cf. 1941 U.f.R. 231, whereas the Eastern Court of Appeal has refused to do this, 1935 U.f.R. 1002, 1933 U.f.R. 142. In connection with various registration problems there have often been different practices, 1933 U.f.R. 545, compared with 1932 U.f.R. 1121, 1934 U.f.R. 786, compared with 1934 U.f.R. 622. In their construction of the provisions of the legislation concerning non-payment of rent the two courts followed different practices, cf. on the one hand 1947 U.f.R. 208 (and various unpublished decisions, see E. Munch-Petersen: *Tvangsfuldbyrdelse*, Copenhagen 1948, p. 256 footnote 10), and, on the other hand 1948 V.L.T. 205 (see Judge Spleth in 1950 *U.f.R.*, B, p. 183 with footnote 4). The Supreme Court followed the standpoint of the Western Court of Appeal, cf. 1950 U.f.R. 858, changing a decision made by the

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Eastern Court of Appeal, and after the later amendment to the rent legislation this was also the result, cf. sec. 112, subsec. 2, of Statute No. 251 of June 14, 1951.

17. It has been much discussed whether a minority of judges is bound to follow the view of the majority in future cases of a similar kind. An extreme attitude has been taken by former Chief Justice Troels G. Jørgensen.[2] "But what one should be aware of now is that as soon as the judgment has been pronounced, indeed, as soon as the votes have been counted, the Court is no longer divided on this question." Even those judges who did not take part in the decision will vote in the same manner. It does not matter that they might have been in favour of the minority view and that a plenary decision would therefore have given an opposite majority.

This is utterly unreasonable, as such a rule would put an effective stop to the development of the law. New principles of law often come into existence by first being favourably received by a small number of judges, and then gradually gaining the support of others, with the result that after a certain point the majority share the new view.

The question may be illustrated by an example from the law of real property. When objects sold under a conditional sale have been inserted or installed in a building under construction, it has been assumed that the objects installed may be removed, if only this can be done *sine laesione priori status*. It is immaterial whether the removal is sound economy. Illum, *Fast Ejendom, Bestanddele og Tilbehør*, Copenhagen 1942, pp. 155 ff., has maintained another view. Removal ought to be refused if the expense caused by it materially exceeds the value of the objects to be removed. The Supreme Court did not accept this view, cf. 1951 U.f.R. 284, but it was supported by a minority of three. It would be quite unreasonable if in future the Court were to be bound by this decision to such an extent that the dissenting judges, and the judges who did not take any part in the case, would have to submit to the majority's decision.

It is hardly conceivable that the Danish Supreme Court as a whole would subscribe to Chief Justice Troels G. Jørgensen's view of the majority's preponderance over the minority.[3] This is indicated by the attitude taken by the minorities in the cases con-

[2] *18 Aar af Højesterets Historie*, Copenhagen 1947, p. 160.
[3] Cf. Mr. Justice Hansen, *Retsplejen ved Højesteret*, Copenhagen 1959, p. 202.

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cerning capital punishment for offences against the statute of 1945 on acts of treason committed during the war. It is true that here it was a question of judging each case on its own merits, not of the establishment of a precise legal rule. But it would seem that a reasonably clear lead had been given as to when to apply the extreme penalty. So the decisions can hardly be understood in any other way than that the minority of the judges have in principle continued to abide by their views, although they may have held somewhat different opinions in the individual cases.

18. It is often maintained that a decision with a dissenting opinion, expecially one supported by a strong minority, does not carry so much weight as other precedents,[4] and the Swedish *Justitieombudsman,* in his statement quoted above, emphasized that he referred to a decision which had been made by "a large majority". This viewpoint is sometimes stressed in the opinions of justices of the Norwegian Supreme Court.[5] It is mentioned fairly often in works on legal theory that belittle the importance of a precedent diluted by dissents.

Behind this view there is undoubtedly a correct observation. When the actual discussion of the legal problems is not reflected in the *ratio decidendi* the person studying the decision cannot form his own impression of the strength of the reasoning. The numbers of judges in the majority and in the minority, respectively, are then valuable data when calculating the strength or the weakness of the decision. To this is added the forecast that the outcome may be different when some of its members have reached the age of retirement and have been replaced by others. Finally, it is possible that the element of doubt in the decision is so evident that a re-examination will be considered necessary in any event.

Because of all these factors, decisions with a dissenting opinion will have less weight than other decisions. But if, in spite of the dissenting opinion, practical life has actually adjusted itself to the judgment (and this possibility, of course, is especially conceivable when, as in Denmark, the dissenting opinions are not published), then the general views previously expressed as to the evil consequences of a change should be fully taken into account.

[4] Cf. Arnholm in *T.f.R.* 1933, p. 169.

[5] Cf. e.g. 1908 N.Rt. 631, Mr. Justice Vogt, whose viewpoint is supported by Mr. Justice Thinn in 1916 N.Rt. 695, cf. also pronouncements in connection with a plenary decision in 1939 N.Rt. 875, and *Ferdinand Schelderup* v. *Milly Haug,* 1955 N.Rt. 137.

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It has been argued that the system of making dissenting opinions public might give some indication whether the legislature wishes decisions to be maintained, or if, on the contrary, it is endeavouring to create a tension.[6] If there is no information as to dissenting opinions, as was the case earlier in Denmark, this might be due to an expectation that the existing practice will be maintained, the court being regarded as an entity. If the judges dissent in their own names, this ought, inversely, to be an expression of the wish to create a tension. If the system currently operating in Denmark is an intermediate one, with anonymous opinions, the present state of the law is less clear. It seems quite unwarrantable to read anything like this into the Danish legislative history concerning the question whether to choose one system or the other. The problem of dissenting opinions was studied very intensely during the dispute between the Danish Government and the Supreme Court, resulting in the introduction, in 1937, of anonymous opinions in the Supreme Court instead of the older system, according to which the Court did not reveal that opinions within the court had diverged.[7]

Even if, as it appears, this is not historically correct, it might well be contended that a judge who has voted in his own name, would presumably stick to his opinion once it was published. It is very difficult to judge whether this is actually the case or not. But at any rate in the deliberations just mentioned it was several times emphasized that for a judge to vote in his own name might expose him to the risk of being subjected to pressure from outside. During the reading of the Bill this was stressed in a parliamentary committee. On the other hand, the wish to submit the judges to public control was the reason why the Minister of Justice had proposed full publicity. So, in these deliberations the basis of the discussion turned to the very opposite view: it was presumed that a judge will find it easier to stick to his standpoint if the fact that he has done so does not have to be made public. In Norway the procedure is a different one. The judges vote in public. It is difficult to say anything in a general way on the question whether the Norwegian Supreme Court has been more inclined to depart from precedent that the Danish Supreme Court. There was a period when Norwegian courts to a great extent felt bound by precedent, whereas now they have adopted a more independent

[6] Cf. Mr. Justice Trolle in *Juristen* 1953, p. 122 f.
[7] Cf. the detailed account in Troels G. Jørgensen, *op. cit.*, pp. 79–93.

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attitude. But both these standpoints have been taken while the present voting system was in force. All things considered, there is presumably no basis for the contention described above.

The Danish courts have sometimes been criticized for a lack of flexibility in adjusting themselves to new times and new views. In the address delivered at the University of Copenhagen on the occasion of the 250th anniversary of the Supreme Court, Professor Torp found occasion to challenge this statement.[8] "It is admittedly of paramount importance to law and order that the Supreme Court should not deviate from earlier decisions, except on very weighty grounds. Even a somewhat exaggerated caution is preferable to excessive mobility, especially in cases where much importance must be attached to the consideration that people have adjusted themselves to a certain usage, relying on an earlier decision. It may be difficult for anyone who is not himself a member of the Court to judge this problem. I can scarcely be the only person to think that the Supreme Court might safely move somewhat more freely than it does."

What Torp was aiming at, and whether at that time he was right in his evaluation, are open questions. His words hardly reflect the present-day situation. The Danish scholar Fr. Vinding Kruse holds in his study on jurisprudence that in our time the Danish courts do actually to a large extent follow a new course when such a course is required by the nature of the case itself, after careful scientific investigation or after the court's own examination and conclusion.[9] Paal Berg, Chief Justice of the Norwegian Supreme Court, in his study on precedents[1] emphasizes that the question of the importance of precedent has undergone a revaluation, judging from the decisions of the Norwegian Supreme Courts during the last few decades. The examples taken from Danish law indicate that this has happened in Denmark too.

In a recent publication,[2] Mr. Justice Victor Hansen, who has served on the Supreme Court for more than 18 years and who previously served for 17 years as a judge in lower courts, concurs in the principal views stated above. He considers the problem of the significance of Supreme Court decisions as precedents and ends with the following statement (p. 214): "It can be stated as a prob-

[8] *U.f.R.* 1911, B, p. 55.
[9] *Retslæren*, Copenhagen 1943.
[1] *Prejudikater*, Oslo 1948.
[2] *Retsplejen ved Højesteret* (Supreme Court Practice), Copenhagen 1959, Chapter 27, pp. 200–214.

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able conclusion that the Supreme Court in general accords very considerable weight to precedents, while in each individual case it attempts to balance a regard for legal uniformity with a regard for the correction of previous mistakes and the development of the law as a social instrument—feeling itself at liberty to reconcile these considerations as it sees fit."

In a footnote, the following is added: "This is in essential agreement with the viewpoint advanced by von Eyben, though perhaps with a somewhat stronger emphasis upon the importance of legal uniformity."

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