Judgment of 21 June 2001 serial number 4B/2001:
1. Jon Inge Sirum (et al. a total of 200 parties)

(Advocate Ola Brekken) versus

1. Essand Reindeer Pasturing District and 2. Riast/Hylling Reindeer Pasturing District

(Advocate Erik Keiserud).

Justice Matningsdal: This case concerns a dispute as to whether Essand and Riast/Hylling Reindeer Pasturing Districts have common of pasture for their reindeer in privately owned unenclosed areas within the district boundaries in the Municipal Authority Area of Selbu in the county of Sør-Trøndelag.

The areas in dispute

The two districts were established by Royal Decree on 10 July 1894 under section 6 of what was called the Joint Lapp Act – the Act of 2 June 1883 concerning the Lapps in the United Kingdoms of Norway and Sweden. The districts have been retained unchanged under subsequent reindeer husbandry legislation. Riast and Hylling were originally separate districts, but for the last fifty or sixty years they have been considered and administered as one district.

Essand covers an area of approximately 2,300 km^2. In the east the boundary of the district follows the national border with Sweden. The southern boundary starts at the national border at Skardsfjellet [Mount Skard], and goes westwards from there to Lake Stugu in Tydal, where it follows the Rivers Tya and Nea to Lake Selbu, then follows the latter and the Rivers Tømra and Kleivåa over into the county of Nord-Trøndelag to the River Stjørdal, and thereafter follows the latter up through Hegra and Meråker back to the national border.

Riast/Hylling covers an area of approximately 1,900 km^2 and lies south of Essand. In the east the boundary of this district too is along the national border. The southern boundary starts at Mount Vigelskaftet and goes in a north-west direction to Lakes Tufsingen and Aursunden in the municipal authority area of Røros. The boundary goes out from Lake Aursunden where the River Glomma has its source, follows the valley, Rugeldalen, down to the River Gaula in the municipal authority area of Holtålen, follows the Gaula to the municipal boundary between Holtålen and Midtre-Gauldal, follows the latter to the boundary with Selbu, and follows the boundary farther between Selbu and Holtålen to Mount Bringen, where the boundary veers towards the north and goes down to the Nea at Flaknan east of Lake Selbu. Thereafter it follows Essand's southern boundary eastwards to the national border.

Each district has at present 10 units in operation, and approximately 4,500 reindeer in winter herds. The areas are spring, summer and autumn pastures, and are used from April to December. Winter pasturing is sought farther south – in Femund Reindeer Pasturing District.

The dispute relates to privately owned unenclosed areas in the Municipal Authority Area of Selbu covering a total of approx. 412 km^2. Of this land, approx. 320 km^2 lie within Essand, north of the Nea and east of Lake Selbu. The remaining area, approx. 92 km^2, lies within Riast/Hylling, south of the Nea immediately west of the municipal boundary with the Municipal Area of Tydal. In Essand the dispute includes all the privately owned area west of the state-owned Roltdal Common. Common of pasture on the state-owned common, which also lies in the Municipal Area of Selbu, is not in dispute. In Riast/Hylling the dispute includes that part of the district that lies within the Municipal Area of Selbu.

The Joint Lapp Act of 1883

A central purpose behind the passing of the Joint Lapp Act was to regulate the Sami's crossing of the national border with their reindeer. Section 3 of the Act provided that "The Lapps have freedom to move annually with their reindeer from the one realm into the other and to sojourn in those places to which the Lapps of each realm have hitherto resorted in accordance with ancient custom …". However, the Act also applied to Sami who engaged in reindeer husbandry exclusively in Norway.

Section 6 of the Act imposed on the Sami a subsidiary joint and several liability for any damage caused by pasturing, and further provided for the establishment of reindeer pasturing districts. The provision read as follows:

"The stretches in which the Lapps seek pasture for their reindeer might be divided into districts within which those Lapps who sojourn there with their reindeer should in such cases and in such manner as provided by the third and fourth paragraphs of section 9 of the present Act be liable for any damage that is caused by the reindeer to the property of the agricultural population.

In which areas the division into districts shall take place and the boundaries of the districts are to be determined by the King.

In order for it to be possible to include in the division into districts a stretch of land on which the Lapps have the right to seek pasture for their reindeer, there ought to be or there ought to be opened reindeer roads within the same of such a kind that in using them the Lapps could by exercising proper supervision keep their reindeer away from cultivated land. The districts should, with appropriate consideration for the nature of the animals and for the extent and nature of the landscape and any building, be delimited in such manner that the reindeer seeking pasture within each district could in

the event of lack of supervision be assumed in the course of the pasturing period to wander all over the district, but without going over to any other district."

Establishment of the Lapp Commission and its work

In 1888 and the winter of 1889 proposals were made from different quarters to appoint a commission to investigate the relationship between reindeer husbandry and the permanent residents north and south of Røros. An important meeting in this connection was held at Røros on the Tuesday after Easter 1889, attended by 95 farmers from Røros, Ålen, Holtålen, Budalen, Tolga, Tynset and Kvikne. The meeting was also attended by two Sami, of whom one was Paul Johnsen, the largest reindeer-owner in the Røros and Tydal areas at that time, who was in conflict with a number of landowners concerning the extent of the Sami's common of pasture. All those present, including the Sami, voted for a resolution that a commission must be established to draw up the boundaries for the areas where the Sami had common of pasture. Further, division into districts ought to be introduced. Some other requests were also passed, and the only request the Sami voted against was the introduction of joint liability for the Sami outside the reindeer pasturing districts, cf. Haarstad: Sørsamisk historie. Ekspansjon og konflikter i Rørostraktene 1630-1900 [South-Sami history. Expansion and conflicts in the Røros area 1630-1900], Trondheim 1992 pages 266-267.

On 30 April 1889 three members of the Storting, the Norwegian national assembly, Hans I. Storeng, Ingebrigt Flønæs and Nils Melhuus, tabled a motion that the Storting should grant funds for the "Appointment of a commission to investigate the circumstances of the Lapps in the shires Hedemark, South Trondheim and North Trondheim". The proposal was in the main supported by seven other members. In this proposal, Doc. No. 93 (1889), it says inter alia:

"In some places in the county of South Trondheim, namely in the districts of Røros, Aalen, Selbo and Tydalen there has been reindeer pasturing from time immemorial, and as long as the Lapps and their animals kept within these ancient rights, there was of course nothing to be said about this.

In the districts of Holtaalen, Singsaas, Støren, Budalen, Soknedalen and Tolgen with the annexed parishes of Vingelen and Dalsbygden as well as Kvikne and Tønsæt, there have never been reindeer pastures with the possible exception of quite a small area on the eastern boundary of Tolgen. All these districts, which are almost exclusively dependent on cattle rearing as their only economic activity, and which have in their good pastures and haymaking areas the conditions for this, had until the last 10 to 12 years had their rights unrestricted …

This ancient state of affairs has in the aforementioned districts been completely reversed. In the course of the last 10 to 12 years there has been a constant stream of Lapps with their herds of reindeer,

who have come partly from northern Sweden and partly from the northern regions of our own country. A number of these Lapp families are wealthy and can at times own several thousand animals. The most valuable of the mountain stretches in the said districts are to such a degree covered in reindeer both summer and winter that the permanent residents' ancient and in our opinion undisputed rights are being greatly threatened with complete ruin …

As a consequence of the Lapps' encroachment on the permanent residents' rights a large number of legal actions have arisen, of which a number are at present before the courts. It has shown itself to be difficult in those areas earlier frequented by the Lapps to arrive at a rapid and certain conclusion in such lawsuits precisely because boundaries and rights of use have been very much in dispute …

In other words there appears to be lacking here a measure that can lead to provisions as to where and, in the event, to what extent the Lapps can travel with their reindeer herds …

As far as we have been able to ascertain, and we are supported in this by the statements of a number of experts, the current Lapp legislation will be nowhere near applicable in the said districts until more clearly defined boundaries for the Lapps' grazing areas, in their places, and perhaps also a division into districts have been laid down … ."

The Storting granted funds for the appointment of a commission as proposed. By Royal Decree of 12 July 1889 the Lapp Commission was appointed with the following terms of reference:

"to investigate the circumstances of the Lapps in the shires of Hedemark, South Trondheim and North Trondheim and to make proposals for the determination of the boundaries of the Lapps' common of pasture as well as for the good ordering otherwise of the relationship between these and those permanently resident in the said shires."

The Chairman of the Commission was Haakon Bernhard Berg, a solicitor with the right to appear before the appellate court, from Elverum, while Karl Kværness, a farmer from Rendalen and District Sheriff Indian Bernhard Herstad from Røros were members. In 1891 the Commission was enlarged to include Mr H. K. Foosnæs, a farmer from Beitstad. On the work of the Commission it says in its report on page 3:

"The members of the Commission assembled at Røros on 13th August next [i.e. 1889] and continued with meetings and inspections in the northern part of the valley of Østerdalen and in the region around Røros until the following 10th September, when the season and the weather placed obstacles in the way of inspections in the mountain districts concerned. During its tours of inspection the Commission was present at judicial site visits in second-instance proceedings between permanent residents and Lapps, whereby it was afforded a favourable opportunity, in those places where the

conflicting interests particularly confront one another, to meet both Lapps and permanent residents and to hear an account of their different points of view.

In the past summer (1890) the Commission continued its inspections and sought information at meetings and gatherings namely in the District of Tolgen in the County of Hedemarken as well as in districts concerned in the County of South Trondheim, and further – as far as time permitted – in adjacent regions of the County of North Trondheim (Meraker and Hegre).

These journeys and investigations occupied the time until 4th October …

From the District Sheriff and the district councils in the counties of North and South Trondheim the Commission sought information by obtaining responses to sets of questions … Further, during its journeys the Commission acquired written declarations from a large number of persons, since it did not find that it should let things rest with the oral information that the Commission constantly sought at meetings and gatherings both from the permanent residents and from the Lapps."

The Report of the Lapp Commission

The Lapp Commission's report was presented in July 1892. According to its terms of reference, as has been mentioned, it was "to make proposals for the determination of the boundaries of the Lapps' common of pasture" and "for the good ordering otherwise of the relationship between these and those permanently resident". However, the Commission did not put forward any proposal for the boundaries of the extent of the common of pasture. On the other hand it did propose the introduction of reindeer pasturing districts, which for Essand was coincident with the boundaries that were laid down. For Riast/Hylling the proposal was more comprehensive than the boundaries that were laid down. Here it was proposed to include a fairly large area south of Lake Selbu between Mount Bringen and Mount Reinsfjellet which then followed the municipal boundary with Klæbu down to Lake Selbu.

Even though the Commission did not put forward any proposal concerning the boundaries of the extent of the common of pasture, it did examine "The Lapps' earlier and present distribution and conditions in districts concerned", before concluding as follows, cf. page 29 of the Report:

"In view of what the Commission has stated above, especially in the course of its Report, it has thus as a result of its investigations come to the conclusion that Norwegian Lapps may be assumed to have sought sojourn and pasture for their reindeer by ancient custom within the following stretches:

…

3. in Selbu: Rotladalen common.

4. in Tydalen: all mountain stretches."

The Commission made it clear that it did not have any judicial authority, and stated, cf. page 42 of the Report:

"In so far as the Commission under its description of areas concerned has dealt with the boundary of the Lapps' use by ancient custom, this is only a statement of opinion founded on the local investigations, during which the Commission sought, out of consideration for the standards to be met by actual use, to keep in mind the rules concerning use from time immemorial."

The Commission also proposed the appointment of Lapp inspectors in newly created posts, and furthermore some new statutory provisions.

Introduction of the relevant reindeer pasturing districts

The Ministry distributed the Commission's proposal for consultation, and the municipal council of Selbu and Tydal went against it, cf. Departements-Tidende 1894 pages 503-504:

"Advise against any form of division into districts as simply entailing disadvantages. Protest against the local authority's being included in any district, since at the present time the Lapps have no common of pasture in the local authority area."

I should point out that at that time Selbu and Tydal constituted one municipal authority.

The sheriff of Strinden and Selbu on the other hand took the opposite view, and stated, cf. Departements-Tidende 1894 page 504:

"The proposed division into districts is deemed to be favourable for the local authority of Selbu too. Of course it will not entail any extension of the Lapps' rights."

The matter was thereafter put before Mr Berg, the Chairman of the Commission. After having conferred with the other members, he proposed the boundaries that were thereafter laid down, cf. Departements-Tidende 1894 pages 535-536.

The division into districts was introduced by Royal Decree of 10 July 1894 and was announced on 28 July 1894. The announcement stated:

"The Ministry shall take this opportunity to impress on all concerned *that the Lapps have the right to seek pasture for their reindeer solely in those places which in accordance with ancient custom they have frequented*. In this respect the division into districts that has been introduced makes no change whatsoever. The Lapps' right of pasturing remains the same, whether or not the division into districts has been introduced.

For reasons of expedience, in the case of several of the said districts stretches were included which the Lapps are *not* deemed to have any customary right to frequent, and in which therefore all pasturing is forbidden to the Lapps, so that they are liable for any damage their reindeer might cause.

That such stretches have been included in the division into districts does not therefore affect in any way whatsoever the Lapps' right to sojourn in parts of the district which they do not have any customary right to frequent.

The inclusion of these stretches during the division into districts has the sole consequence that joint liability is incurred for such damage as is caused by the Lapps' unlawful pasturing and that this liability is altogether subject to stricter control."

On 15 August 1894 the member of the Lapp Commission, Indian Bernhard Herstad, was appointed Lapp Inspector for inter alia the two districts. The Lapp Inspector submitted annual reports on his activity. In his report for 1894, submitted on 26 January 1895, it says by way of introduction:

"… I began, at the same time as I was distributing to Lapps and interested permanent residents copies of the Royal Interior Ministry's announcement of 28th July last year, in which the Royal Decree of 10th July is included, to explain to those concerned the importance and utility brought about by the division into districts, and I went through and explained the meaning of different provisions of the Act of 2nd June 1883."

When the Lapp Commission submitted its report in 1892, there was nobody engaged in reindeer husbandry in Essand. The Commission proposed inter alia that Niels Bull and some Sami who were spoken of as "Jacobssønnene" [the Jacob sons] should continue their reindeer husbandry there. Earlier they had been engaged in reindeer husbandry in this area and inter alia used a number of huts on the state-owned Roltdal Common. During Mr Herstad's meeting with them in the autumn of 1894 they refused to move to Essand, and referred to the problems with stray Swedish reindeer.

The Act containing Supplementary Provisions concerning the Lapps and Reindeer Husbandry within the Regions south of the County of Finmarken was passed on 25 July 1897. Section 1 of this Act made it a criminal offence to graze reindeer outside a reindeer pasturing district unless there was "specific permission or authority granted by the owner or user of the land". In his annual report for 1897 Mr Herstad states that at a meeting with some Sami in Tydal in November he "went through several provisions of the new Lapp Act".

Towards the end of the 1890s and up to the turn of the century a number of attempts were made to take up domestic reindeer husbandry again in Essand. These were unsuccessful,

it seems, particularly on account of the problems with stray Swedish reindeer, and it is only since 1910 that domestic reindeer husbandry has again been conducted there. How far into the present municipal area of Selbu it has been exercised is something to which I shall return.

The Reindeer Husbandry Act of 1933 and the handling of the new district boundary of Essand

Act No. 3 of 12 May 1933 brought in a new statute for reindeer husbandry. With respect to the geographical limitation of reindeer husbandry, the first paragraph of section 2 of the Act provided:

"The nomadic Sami's pasturing of reindeer must only take place in such parts of the counties of Finnmark, Troms, Nordland, Nord-Trøndelag, Sør-Trøndelag and Hedmark as the King determines. As far as possible only such areas must be included as those where nomadic Sami have conducted reindeer husbandry from time immemorial and where it is found appropriate to permit the exercise of reindeer husbandry."

Under section 103 (c) and (d) of the Act, the established districts were to remain until the contrary was decided. In a letter of 23 July 1934 the County Governor of Sør-Trøndelag made an application to the Ministry of Agriculture "concerning the determination of boundaries for the grazing of reindeer in Essand Reindeer Pasturing District". The County Governor sought the Ministry's consent to "undertake the drawing of a boundary in the aforementioned reindeer pasturing districts [the application also included Ålen] to bring about clarity in the questions now raised". For this he was given the Ministry's consent. I must mention that at that time Selbu and Tydal were different municipal authorities.

During a meeting with the County Governor on 12 September 1934, Mr P. Norbye, a farmer, made a speech about the relationship between reindeer husbandry and farming in the district. After having gone through the Sami's use of pasture, he made the demand that "the Sami's customary use of pasture in the north, from Stråsjøvolden and northwards, shall go along the coniferous timberline". Stråsjøvollen lies in the disputed area by the River Garberg slightly west of Lake Stråsjø and a good distance west of the state-owned Roltdal Common.

During the further work on the matter the County Governor wrote to the Ministry on 23 May 1935 concerning the interpretation of section 2 of the Act. In his letter he said inter alia:

"The provisions of the new Act as to reindeer pasturing districts have been taken to mean that the district shall include as far as possible all areas where the nomadic Sami have conducted reindeer husbandry from time immemorial and where it is found appropriate to permit the exercise of reindeer

husbandry (section 2 of the Act); there is thus no entitlement, when determining the boundaries of the reindeer pasturing district, to make the district more extensive than its delimitation in accordance with the boundaries of ancient pasturing. Notification is sought of whether this has been correctly understood."

In its letter of 26 June 1935 the Ministry of Agriculture replied:

"In reply to the County Governor's letter of 23 May this year, notification is given that it must be assumed that section 2 of the Reindeer Husbandry Act of 12 May 1933 must be taken to mean that in the determination of new reindeer pasturing districts in pursuance of the said section 2, efforts ought to be made to avoid the inclusion of areas where the nomadic Sami have not conducted reindeer husbandry from time immemorial."

After this, on 9 September 1935, the County Governor held a meeting in Selbu attended by the chairman of the local council, three aldermen, the Lapp Inspector, the District Lapp Sheriff, the District Sheriff, the chairman of the land council, the chairman and vice-chairman of Essand Reindeer Pasturing District, two reindeer owners, two farmers and an advocate. During the meeting Mr Norbye, one of the farmers, made the demand – changed from that of 1934 – that "the state-owned Roltdal Common's west boundary shall form the boundary in the west for the Sami's customary right to pasture reindeer". The Sami appear to have claimed that they had common of pasture in the whole district. In the minute book it is recorded that the County Governor asked the Sami and the farmers to express their views on the appropriateness of a boundary from Rolset just east of the confluence of the Rotla and the Nea and in a somewhat north-easterly direction, but along its whole length west of the state-owned common. Thereafter it says:

"The farmers were unable to express any opinion thereon. The Sami will in the event not object to this."

Thereafter a tour of inspection was undertaken.

At a meeting on 1 February 1936 Selbu municipal council supported Mr Norbye's demand that Essand Reindeer Pasturing District in Selbu should be limited to the state-owned Roltdal Common. In a letter of 16 March 1936 the Lapp Inspector, Mr Bagaas, stated that

"… the fact that there have been reindeer on the state-owned Roltdal Common means that the reindeer have pastured farther westwards on some occasions. I base this supposition on the habits of the reindeer and on the nature of the terrain. The west boundary of the common does not form any natural boundary.

As the matter now stands, I do not find it very expedient to propose any boundary line, but it does strike me that a line Rolset – Åtollen – K in Kråsjåfjell – B in Brentorp – Stråsjøen – Stentjern would be the fairest thing – account being taken of both parties."

This boundary line is to a great extent the same as the County Governor suggested on 9 September 1935.

In a letter of 21 March 1936 to the Ministry of Agriculture the Sami protested in the person of Lars Stinnerbom, Chairman of Essand, against the boundary Selbu municipal council had proposed. At the same time he gave a relatively comprehensive account of how he believed pasturing had taken place west of the state-owned common.

The County Governor put the letter before the Municipal Authority of Selbu. At its meeting of 17 June 1936 the municipal council maintained its standpoint. This statement too was put before the Sami in the person of Lars Stinnerbom. In a letter of 14 November 1936 he maintained that the current boundary of the reindeer pasturing district must be kept. In a letter to the County Governor of 23 November 1936 the Lapp Inspector stated inter alia:

"For my part I have nothing particular to add. The best, or more correctly the only viable proposal for boundaries is for those the Sami claim. These boundaries are natural boundaries and barriers for the reindeer."

Subsequent to this letter the County Governor requested the Lapp Inspector to put forward proposals for boundaries for Essand. His enquiry was answered in a letter of 19 December 1936. For the area in dispute his principal proposal was that the current boundary be maintained. The Lapp Inspector also submitted a secondary proposal which, with a minor reservation, excepted the whole of the privately owned area in Selbu.

On 23 August 1937 the County Governor forwarded the matter to the Ministry of Agriculture with the following endorsement:

"Forwarded most respectfully with enclosures to the Royal Ministry of Agriculture, since I support the Lapp Inspector's principal proposal with his intimated change in the enclosed letter of 1st ult."

It is somewhat unclear what the County Governor means by "intimated change", but the context shows that it did not concern the area in dispute.

The Ministry of Agriculture's handling of the matter is not known today. It is however clear that the district boundary was not changed.

The Reindeer Husbandry Act of 1933 was later replaced by Act No. 49 of 9 June 1978 concerning reindeer husbandry, to which I shall return.

The court case

The case was brought before Midt-Trøndelag District Court on 12 December 1995 by the owners of altogether 229 holdings. The background to the commencement of legal proceedings was that the Municipal Authority Area of Selbu had given the reindeer pasturing districts the right to be heard in matters involving the use of land coming under the Planning and Building Act, in particular matters concerning development plans for roads and groups of log cabins. It was further contended that the reindeer herds had become larger in recent decades, with greater pressure on the grazing areas and pasturing in new areas as a consequence. The writ of summons sought the following judgment:

"Essand Reindeer Pasturing District and Riast/Hylling Reindeer Pasturing District have no right to pasture reindeer on the properties of the plaintiffs."

Midt-Trøndelag District Court, sitting with two expert lay judges, a farmer and a reindeer husbandry agronomist, pronounced the following judgment on 19 August 1998:

"1. The Court finds for Riast/Hylling and Essand Reindeer Pasturing Districts.

2. Compensation for the costs of the case is not awarded. The parties each pay their own costs.

3. The parties are to share the court costs and the expenses relating to inspection by means of a helicopter. Jon Inge Sirum et al. – jointly and severally liable – are to pay NOK 28,557.50 – twenty-eight thousand five hundred and fifty-seven 50/100 kroner. Essand and Riast/Hylling Reindeer Pasturing Districts are to pay NOK 28,557.50 – twenty-eight thousand five hundred and fifty-seven 50/100 kroner.

The judgment of the District Court was pronounced with dissenting opinions. One of the lay judges voted for judgment to be given in favour of the landowners. The two judges who constituted the majority each had their own grounds. The lay judge found that the reindeer pasturing districts had proved that they had common of pasture in the disputed areas, while the President of the Court decided the case on the basis of the presumption rule provided by the third sentence of the first paragraph of section 2 of Act No. 49 of 9 June 1978 (Reindeer Husbandry Act), which lays down that stretches of unenclosed land that are part of reindeer pasturing areas are to be deemed to be lawful reindeer husbandry territory unless anything else follows from "particular legal circumstances".

The landowners appealed against the judgment to the High Court of Frostating. During the preparation of the appeal, one of the landowners withdrew from the case. The High Court, also sitting with expert lay judges – a farmer and a reindeer husbandry agronomist – pronounced the following judgment on 17 August 1999:

"1. The judgment of the District Court, conclusions 1 and 2, is upheld.

2. The costs of the case before the High Court are not awarded.

3. The expenses relating to lay judges and inspection by means of a helicopter for the District Court and the High Court are to be shared equally."

The judgment of the High Court was pronounced with dissenting opinions. The majority, the President of the Court and the two lay judges, found that common of pasture had been acquired through use from time immemorial in 1892 at the latest, and that this right covered the whole of the disputed areas. The minority, two professional judges, found that Essand did not have common of pasture in its disputed area. Riast/Hylling on the other hand, in the view of the minority, has common of pasture in roughly half the disputed area for this reindeer pasturing district – south of a straight line drawn between the sources of the rivers from the two lakes, Usmesjøen and Lille Kalvsjøen.

An appeal against the judgment of the High Court was brought before the Supreme Court by the owners of a total of 201 properties. The grounds of appeal were that the law was wrongly applied and the evidence was wrongly assessed.

After the appeal proceedings had been conducted before a divisional sitting of the Supreme Court, the Court decided on 28 November 2000 in pursuance of the first paragraph of section 4, cf. section 3, of Act No. 2 of 25 June 1926 (Plenary Sessions of the Supreme Court Act) that the case in its entirety should be decided by the Supreme Court in plenary session.

The Supreme Court has had put before it a considerable number of new documents that I find no grounds for specifying. But I should mention that some of the documents are professional historical accounts, some of which were produced in respect of this case. Such accounts were also produced incidentally before the hearing in the District Court. Further, 13 written declarations have been submitted by parties/witnesses. Statements have been taken from 15 parties/witnesses through the recording of evidence. The statements confirm and supplement the submitted declarations to a considerable degree. Fourteeen of the persons who made statements at the taking of evidence, also made statements to the High Court. In the

main the case stands in the same position before the Supreme Court as it did before the High Court.

The appellants, Jon Inge Sirum et al., have essentially argued as follows:

The case is an industrial dispute between agriculture and reindeer husbandry. It does not concern the material basis of Sami culture in South Norway, which in the event would be a matter for the State and the legislature.

The High Court took the correct legal point of departure in the judgments in Retstidende 1988 1217, the Korssjøfjell case, and Rt 1997 1608, the Aursunden case. But the majority was mistaken in its application of the general principles for use from time immemorial when it found in Selbu a basis for common of pasture outside the state-owned Roltdal Common. No basis has been proven for such a right prior to 1894, when the reindeer pasturing districts were established, nor has it been proven in the period subsequent to their establishment.

In the Korssjøfjell case it was decided that the Sami do not without reservation have common of pasture within the whole of the reindeer pasturing district. And the provision contained in the third sentence of the first paragraph of section 2 of the Reindeer Husbandry Act, which was added in 1996, is no more than a weak presumption rule that simply requires that the landowners show that on the balance of probabilities the Sami do not have common of pasture in the disputed area.

For the period up to 1894 the majority of the High Court did not set sufficiently strict standards to be satisfied by such use from time immemorial as would provide grounds for common of pasture outside the state common. In the light of the Korssjøfjell case, common of pasture may be acquired in respect of the central grazing areas and areas that have been in use to a more limited extent. In the present case, large areas of Tydal satisfy the first criterion, while the state common and the area up to Bukkhammeren satisfy the second. On the other hand no common of pasture is acquired with respect to areas that have been used sporadically. The areas in dispute, which are not natural grazing areas for reindeer, have a sufficiently natural topographical delimitation. It has only been a question of occasional pasturing that does not satisfy the case-law use requirement – nor is the requirement satisfied through the delimitation of the area in terms of a right of pasturing. The roaming, grazing reindeer have sporadically and on their own initiative wandered into the areas in dispute at dispersal time in spring and autumn. But the reindeer cannot through its own roaming give the Sami common of pasture.

In its assessment of the evidence the majority of the High Court placed too little weight on the information provided by the Report of the Lapp Commission from 1892. The weighting of the report is contrary to what was done in Rt 1981 1215 and Rt 1988 1217. The majority has also incorrectly interpreted the Lapp Commission's own statements. Its statements are founded on an overall assessment of the body of evidence that was available, and there is no basis for the criticism that the majority direct at the Lapp Commission.

There is no support for the majority's statements about finds of Sami relics in the disputed areas. Nor does one find Sami place names in the disputed areas in independent scholarly sources from the period before the Lapp Commission's Report.

One cannot build on an overall evaluation in which account is also taken of Sami reindeer husbandry in other areas. And even though in the assessment of what is required for the acquisition of a right through use from time immemorial, one must take into consideration the special circumstances within reindeer husbandry, there is no foundation for any special treatment of it. The distinctive nature of reindeer pasturing and the topography of the area can only be taken into account in the assessment of the use that has taken place, but within the framework of general principles for use from time immemorial.

The majority of the High Court did not go into the unenclosed land activity exercised by the landowners, with the production of millstones, forestry, summer farming, pasturing and haymaking. This activity has been so massive that seen as a whole it rules out reindeer pasturing of any extent. It must be taken into account that the areas in dispute are the rural community's immediate surroundings, with distances that for the most part are far less than ten kilometres. And reference has been made to the fact that large parts of the disputed areas are fairly low-lying areas of coniferous forest right down to 160 metres above sea level. At any rate in South Norway there is no tradition of domestic reindeer husbandry in such agricultural and sylvicultural rural communities.

The majority of the High Court ignored the essential changes in the exercise of reindeer husbandry that have taken place since before 1890 and up to the present day. The common of pasture in Selbu and Tydal was acquired at a time when reindeer husbandry took place with relatively small herds that were well guarded because milk and cheese were produced. In modern times reindeer husbandry is based purely on meat production, and motor vehicles and helicopters are used. The reindeer herds have become considerably larger than they were, and the reindeer are less domesticated and have acquired a different pasturing pattern. The

pressure from the reindeer herds has thus become considerably greater, and the reindeer seek pasture beyond the traditional grazing areas.

Nor is there any evidentiary foundation for the acquisition of common of pasture through use from time immemorial in the areas in dispute in the 20th century. In this period too it was primarily a matter of occasional pasturing by roaming animals, and the farmers' use of the areas on the whole excluded the pasturing of reindeer. Furthermore, in Essand there was no reindeer husbandry up to 1910, when movement into the area took place on the instruction of the authorities. And it is only in the last few years that pasturing has assumed any great extent – on account of larger herds and because the Sami have for several years moved reindeer into the area by lorry.

Furthermore, in the twentieth century in both Essand and Riast/Hylling there were ambiguities and disputes about the right of pasturing that rule out good faith on the part of the Sami. The Sami were quite familiar with the division into districts that was introduced in 1894, and with the explicit and precise statement in the announcement that the districts covered more than the prescriptively acquired pasturing areas.

The appellants refute the contention that in this instance the Sami can be recognised as having common of pasture on the basis of section 2, cf. section 3, of Act No. 30 of 21 May 1999 concerning the strengthening of the position of human rights in Norwegian law (Human Rights Act), cf. Article 27 of the UN International Covenant on Civil and Political Rights of 16 December 1966. Nor can Article 14(1) of ILO Convention No. 169 from 1989 concerning Indigenous and Tribal Peoples in Independent Countries have any significance. Since the Sami came to Selbu after the farmers, they cannot invoke these conventions in the Selbu area. Furthermore, these instruments of international law do not afford protection beyond de facto use, which has not been proven in this case. For the de facto use, protection has been established under the Reindeer Husbandry Act and rules of law concerning use from time immemorial, which satisfies Norway's obligations under international law.

Nor can Article 110 a of the Constitution have any significance in the present case.

If Norway's obligations under international law should give the Sami greater rights than they have under the principle of use from time immemorial, this would in the event represent an infringement of the landowners' right of ownership. That is also protected by our obligations under international law. A right of acquisition for the Sami must in the event be

brought about by means of expropriation where the landowners are awarded compensation, cf. Article 105 of the Constitution.

It has been contended that although the case has been brought by most of the landowners in the areas in dispute, they are entitled to individual assessment. But it is accepted that if the Supreme Court should conclude that there is common of pasture in a part of the disputed areas, a boundary may be drawn without its being explicitly specified which properties are encumbered with common of pasture.

The appellants have submitted the following claim:

"1. Essand Reindeer Pasturing District and Riast/Hylling Reindeer Pasturing District do not have common of pasture for reindeer on the properties of the appellants.

2. Essand Reindeer Pasturing District and Riast/Hylling Reindeer Pasturing District are ordered to pay in solidum the appellants' costs of the case before the District Court, the High Court and the Supreme Court with the addition of interest in pursuance of the first sentence of the first paragraph of section 3 of the Interest on Overdue Payments Act from the date due until payment is made.

The respondents, Essand and Riast/Hylling Reindeer Pasturing Districts, refer to the judgment of the High Court and in the main to the grounds given by the majority.

The majority of the High Court built on a correct view of the principles for the acquisition of common of pasture through use from time immemorial. The crucial point is the use requirement. The standards to be satisfied with respect to length of time and good faith must unreservedly be deemed to have been satisfied for the period prior to the Lapp Commission's Report.

When it comes to the use requirement, in the case of reindeer husbandry one cannot only take account of those areas that have been central. What is stated about this in Rt 1988 1217 on page 1225 misses the point. The reindeer is a range animal, and account must be taken of its pasturing pattern. Even though use of a certain extent is required, regular or annual use of the whole area cannot be required. Nor can greater intensity of use be required. A bridge must be built between the traditional view of use from time immemorial in property law with its basis in the farmers' economic activity and the special conditions prevailing in reindeer husbandry.

The extent of the common of pasture must be decided by means of an overall assessment, in which account is taken of the fact that the basis of South-Sami culture has been

threatened in recent years by several judicial decisions that have gone against the Sami. Reference has also been made to the fact that there is a real possibility that corresponding cases will be brought before the courts in other parts of the districts.

The majority of the High Court correctly took it as established that common of pasture in the disputed areas had already been acquired through use from time immemorial prior to 1890.

The majority of the High Court attached appropriate weight to the Lapp Commission's Report and it was correctly weighed and balanced against other and more recent evidence. The Commission was appointed because conflicts had arisen over land areas, in Sør-Trøndelag among other places. The central element in the Commission's work was not to lay down boundaries for common of pasture, but to propose arrangements for the protection of the landowners' interests. The Lapp Commission's statements must therefore be evaluated critically. The Commission was at any rate mistaken in the central question of when the Sami and the farmers came to the area. It looked at the situation as it was in the period of time in question, and it did not go into the organisation of Sami in earlier times in "towns", of which there had been two when the reindeer pasturing districts in our present case were established. Incidentally, the Commission did state that what it said was only an expression of opinion.

In the assessment of the evidence account must be taken of the fact that the Sami have had a nomadic way of life, and that reindeer husbandry leaves few permanent traces. Indirect evidence, such as Sami place names and reports, must be ascribed significance as evidence of reindeer husbandry in the disputed area.

It is not disputed that today's reindeer husbandry is of a somewhat different nature from reindeer husbandry in 1890. But it is rather a matter of a difference of degree, since it was of course only does with calves that were milked earlier. Furthermore milking took place for only a relatively short period in the summer. In the 19th century too there were large herds, which at any rate at times roamed freely. The use is in the main as it was earlier, governed by the nature of the animals and other naturally determined factors such as pastures, topography, wind etc. The fact that the Sami have on some occasions in recent years transported some reindeer into the disputed area in Essand by lorry is due to the need to prevent the animals from roaming towards the winter pasture in Femund Reindeer Pasturing District too early.

The landowners' unenclosed land activity has not been an obstacle to reindeer husbandry, and there is no natural boundary between the state common and the areas to which

this dispute relates. Incidentally there are few possibilities of conflict between the Sami's and the landowners' use. The two groups' use has on the whole taken place at different times of the year.

Secondarily it is claimed that common of pasture was acquired through use from time immemorial in the 20th century. The Sami have been pasturing reindeer in Essand since 1910 and in Riast/Hylling the whole time. They have taken it as established that they had common of pasture within the district boundary, and they have been in conscious good faith with respect to their right.

Again secondarily it is claimed that the use in the 20th century seen in relation to earlier use is sufficient for the acquisition of common of pasture in both districts.

In response to the appellants' contention that common of pasture must be assessed in relation to the individual holding it is claimed that this is not possible, given the way in which the case has been presented by the landowners. On the foundation that has been presented it is not possible to extend any boundary for common of pasture into the areas in dispute.

As a new contention before the Supreme Court the Sami have invoked Norway's obligations under international law in respect of indigenous peoples. Irrespective of whether the Sami or the farmers came first to the inner parts of Sør-Trøndelag, the Sami have a claim to rights as indigenous people there too.

Pursuant to Act No. 30 of 21 May 1999 concerning the strengthening of the position of human rights in Norwegian law (Human Rights Act), Article 27 of the UN International Covenant on Civil and Political Rights of 16 December 1966, which inter alia protects the position of indigenous peoples, takes precedence over Norwegian law in the event of conflict, cf. section 2 cf. section 3 of the Act. This provision must be seen in connection with the second sentence of Article 14(1) of ILO Convention No. 169 from 1989 concerning Indigenous and Tribal Peoples in Independent Countries which describes more precisely what this protection consists in. According to this provision the Sami are entitled to the use of areas "to which they have traditionally had access for their subsistence and traditional activities". If use from time immemorial according to traditional interpretation does not protect the Sami's reindeer husbandry, which is the basis for the maintenance of Sami culture, in areas in which reindeer husbandry has traditionally been exercised, they can invoke these conventions also in a dispute with private landowners.

Reference is further made to Article 110 a of the Constitution.

The respondents have submitted the following claim:

"1. Conclusion 1 of the judgment of the High Court of Frostating of 17 August 1999 is to be upheld.

2. The appellants are to be ordered in solidum to cover Essand and Riast/Hylling Reindeer Pasturing Districts' costs of the case before the District Court, the High Court and the Supreme Court with the addition of 12% interest from the due date until payment is made.

My view of the case:

I shall first discuss the general questions this case raises.

Third sentence of the first paragraph of section 2 of the Reindeer Husbandry Act

Section 2 of the Reindeer Husbandry Act contains the current provisions as to reindeer pasturing areas and reindeer pasturing districts. A reindeer pasturing area covers two or more districts. The first sentence of the first paragraph provides that in the reindeer pasturing areas reindeer husbandry has "such particular rights and duties as are laid down in sections 3 and 4 and chapter III of this Act". In the determination of the reindeer pasturing areas, pursuant to the second sentence, "weight shall be placed on whether the nomadic Sami have engaged in reindeer husbandry there from time immemorial".

Under Act No. 8 of 23 February 1996 the first paragraph of section 2 was given the following addition as a new third sentence:

"Those stretches of unenclosed land (cf. section 11) that are included in the reindeer pasturing areas are deemed to be lawful reindeer husbandry territory with such particular rights and duties as are mentioned in the first sentence of this paragraph unless anything else follows from particular legal circumstances."

What occasioned this addition appears to have been the judgment of the Supreme Court in Rt 1988 1217 – the Korssjøfjell case. Prior to this judgment the Ministry of Agriculture had for a long time, perhaps ever since the 1930s, taken it as established that the right to exercise reindeer husbandry included all unenclosed land within the reindeer pasturing districts. Incidentally this view was also expressed in the travaux préparatoires of the present Reindeer Husbandry Act, cf. the Proposition to the Odelsting, Ot.prp.nr. 9 (1976-1977) page 47 first column. Through this judgment it was laid down that this was not correct.

In a Report to the Storting on sustainable reindeer husbandry, St.meld. nr. 28 (1991-1992), En bærekraftig reindrift, the Ministry of Agriculture discussed inter alia the legal position of reindeer husbandry. On page 83 the Ministry states:

"Since the Storting passed the Reindeer Husbandry Act in 1978 there have been legal developments that have essentially changed the legal position of reindeer husbandry. In the wake of the first report of the Sami Law Committee, we have got a new provision in *Article 110 a of the Constitution of Norway* by which the State is bound to protect and support the Sami language, culture and way of life.

Further, the UN organisation ILO has passed a new *Convention, No. 169 concerning Indigenous and Tribal Peoples*, to which Norway is a party, and which came into force on 5 September 1991.

It is quite clear that Sami reindeer husbandry in Norway is covered both by the new provision in the Constitution and by the ILO Convention, so that these new rules of law contribute directly to deciding the position of the right to herd reindeer in Norway today.

Without entering into any discussion of the precise content of these rules, it can be stated that both Article 110 a of the Constitution and ILO Convention 169 entail demands for legal protection of the Sami reindeer husbandry that was in fact being conducted in Norway when the rules came into force. Without clear rules of law that may be taken as a basis by the courts and in the development of society otherwise, it would not be possible to maintain Sami reindeer husbandry as a still important foundation for Sami culture and the Sami way of life, which it indisputably is today. The Norwegian state authorities have furthermore previously taken it as established that Article 27 of the UN International Covenant on Civil and Political Rights from 1966 also entails an obligation to protect the material basis of Sami culture in Norway, including the reindeer husbandry territories.

Further, both case law and administrative practice since 1978 have shown that the Reindeer Husbandry Act has not brought about the clarification of the legal position of reindeer husbandry that had been intended and hoped for at the time of its enactment. This applies to the reciprocal right of disposition between reindeer herdsmen and landowners ...

The most serious lack of clarity that has arisen concerns, however, the very question of *where* the Sami right to engage in reindeer husbandry applies."

Thereafter the Ministry goes through the situation that had arisen after the Korssjøfjell case, before continuing:

"Subsequent to this legal development the situation may be summed up as follows: The Constitution and rules of international law by which Norway is bound require that the Sami reindeer herders in Norway have effective legal protection for the exercise of the economic activity they are

engaged in today. The highest court in the land has found it established that the relevant legislation does *not* provide such legal protection.

This state of affairs is in the view of the Government untenable ..."

The most effective remedy was in the view of the Ministry to *"invite the Storting to clarify matters through a precisely worded amendment to the Reindeer Husbandry Act"* – "an amendment to the Reindeer Husbandry Act that unambiguously lays down where the right to herd reindeer applies, with the content that is today defined in the Act", cf. page 84 second column of the report. On page 85 the Ministry concludes with the words:

"In the first place there ought to be inserted in the Act a *provision that directly states that the rights and obligations of the Sami reindeer herders, as they are defined in the Act, apply from the commencement of the Act within the current borders of the Sami reindeer husbandry areas.*

...

In the second place the statute's present *authority for expropriation* to the advantage of reindeer husbandry ought to be reformulated so that it makes clear that the State is entitled to expropriate the right to engage in reindeer husbandry for any land within Sami reindeer pasturing areas in respect of which the courts might conclude that the right to engage in reindeer husbandry nevertheless does not apply ... The State will for its part have ensured the future legal basis of reindeer husbandry and also expressly satisfied the requirements of Article 110 a of the Constitution and of international law."

The report was followed up in Proposition to the Odelsting, Ot.prp.nr. 28 (1994-1995), in which the Ministry proposed inter alia the addition of the provision that I have already quoted. During the period of consultation some of the bodies consulted expressed the view that a provision under which the landowners were to have imposed on them the burden of proving that areas within the reindeer pasturing districts were not encumbered with common of pasture would in reality mean that rights were transferred from the landowners to the reindeer husbandry industry, and this would be contrary to Article 105 of the Constitution, cf. pages 12-13 of the Proposition. However, in its comments on the provision the Ministry stated, cf. Ot.prp.nr. 28 (1994-1995) page 39:

"There is reason to emphasise that the Bill does not entail that any person will be deprived of rights that are clearly laid down today. Where there are particular legal circumstances to suggest that the right to engage in reindeer husbandry has ceased, it is clear that reindeer husbandry can no longer be conducted there. "Particular legal circumstances" may be for example a *judgment* against which there is no further appeal, a particular *agreement*, or those cases in which, on the basis of general rules of property law, "adverse use" indicates that reindeer husbandry has ceased …

The Ministry wishes to emphasise that the statutory amendment will be in conformity with the State's obligations under international law. In ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries it says in Art. 14(2): *"Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession."* The clarification that the statutory amendment means will be clear fulfilment of what the State has undertaken."

In a recommendation to the Odelsting, Innst. O. nr. 8 (1995-1996) pages 11-12, the majority of the Standing Committee on Trade and Industry supported the Ministry's proposal, while the minority went against it. When it was debated in the Odelsting on 13 December 1995, the proposal was adopted by 54 votes to 40, cf. the proceedings of the Odelsting, Forh. O. (1995-96) pages 106-107. At the debate in the Lagting on 18 December 1995 the Odelsting's resolution was not approved, cf. the proceedings of the Lagting, Forh. L. (1995-96) pages 18-19.

Prior to the second reading in the Odelsting, the Ministry of Agriculture sought a statement from the Law Department of the Ministry of Justice. In its letter of 17 January 1996, the Law Department stated inter alia:

"The point of departure according to the wording of the draft Bill is that it shall be taken as established that the boundaries of the pasturing areas and the reindeer pasturing districts coincide "unless anything else follows from particular legal circumstances". To the extent that there are areas of unenclosed land where up to the change in the law there was no common of pasture for reindeer, the wording of the Bill may be understood to mean that such a right of pasturing is now established (and other rights in pursuance of Chap. III of the Act). This is due to the fact that the Bill makes exceptions only where something else follows from "particular legal circumstances", and it is unnatural to call the landowner's right of ownership a "particular legal circumstance". If the Act should be taken here at its word, it cannot be ruled out that the statutory amendment would mean that common of pasture would be established in areas in which there had not been any common of pasture earlier, at any rate if the owner himself had not made any use of the land. This would in the event mean a certain infringement of the landowner's right of ownership."

After having gone through different statements in the Proposition, the Law Department concluded that they "give a somewhat unclear picture of what will be the material content of the new third sentence of the first paragraph of section 2. Thereafter the Law Department continues:

"If this statutory provision should be passed in the form it has now been given, in the interpretation of it account would have to be taken of the debate in the Storting on the question …

The committee stage shows that both the majority and the minority view the draft of the third sentence of the first paragraph of section 2 as a presumption rule (or an onus of proof rule). On the other hand there does appear to be disagreement about what kind of legal consequences such a presumption rule (onus of proof rule) will have. Correspondingly, as is shown by the debates in the Odelsting … and the Lagting …

On the basis of the sources of law that are available today, we are of the opinion that the provision contained in the third sentence of the first paragraph of section 2 cannot be understood as being anything else than a pure presumption rule (onus of proof rule). The question is then whether the rule can be understood in such a way that it requires a qualified preponderance of probability for one (in the final instance the court) to have to take it as established that common of pasture is not present in an area within the boundaries of the reindeer pasturing districts, or whether the rule simply applies to a situation in which one (in the final instance the court) considers the one alternative as being just as probable as the other. We are inclined to take the provision as meaning the latter; if the court, after the evidence has been presented, considers it equally probable that common of pasture exists as that it does not exist, the decision shall go in favour of the person who claims that common of pasture does exist … ."

With this interpretation the Law Department found it clear that the proposal was not contrary to Article 105 of the Constitution.

During the second reading in the Odelsting on 23 January 1996 the spokesman for the matter, Lars Gunnar Lie, stated inter alia, cf. the proceedings of the Odelsting, Forh. O. (1995-96) page 179:

"Both in the Proposition and the travaux préparatoires of the Act as well as in the Recommendation from the Standing Committee on Trade and Industry it was made clear that the amendment shall not apply to established relationships in private law. This means that it is the areas that have been and are de facto in use as pastures within the Sami reindeer pasturing areas to which this Act applies. As I see section 2, there is no statutory laying down of correspondence between administratively determined reindeer pasturing areas and the boundaries for common of pasture.

Section 2 introduces, as recommended by the majority, a rule concerning the onus of proof. I view and have understood this rule to mean that it will only be used if it is just as probable that common of pasture applies as that it does not apply. In such cases the decision shall be in favour of reindeer husbandry. In legal terms one can say that this is a weak presumption rule."

By 44 votes to 36 the Lagting's comment was not approved, cf. the proceedings of the Odelsting, Forh. O. (1995-96) page 187. At its meeting on 30 January 1996 the Lagting passed the proposal by 14 votes to 13.

If the wording of the Act is read in isolation, it indicates that there must be proof of a particular legal basis that leads to there being no right to exercise reindeer husbandry in stretches of unenclosed land within the reindeer pasturing areas. But in the light of the statements about its interpretation which were available at the time, and which must be deemed to have had a motivating influence, the provision must be given a more limited scope. It is unfortunate that the wording does not express the real content of the provision, but it must be understood to mean that it imposes on the landowners an onus of proof in the reindeer pasturing areas. However, the standard of proof is not so strict that anything more is required than a preponderance of probability that the use was not of sufficient extent for the area to be lawful reindeer pasturing territory.

The question in the present case is therefore whether the landowners have established the probability that Essand and Riast/Hylling Reindeer Pasturing Districts do not have the right to pasture reindeer in the areas in dispute.

Other judicial points of departure

The right of reindeer husbandry is an independent right in respect of which the legal basis is use from time immemorial. It is a matter of a right, not simply of tolerated use. The precise content of this right is provided by Chapter III of the Reindeer Husbandry Act.

Section 9 of the Reindeer Husbandry Act provides that the right to exercise reindeer husbandry includes both the right of pasturing and a number of associated rights, such as the right to bring in equipment that is needed for reindeer husbandry, the right to take firewood and timber etc. Where common of pasture has been acquired through use from time immemorial, this will as a general rule entail that the Sami have also acquired the associated rights. However, the present case has only been brought with the claim that the Sami have no right to pasture reindeer on private land in Selbu. In what follows I shall relate to this claim and on the whole use the term common of pasture.

The acquisition of a right through *use* from time immemorial rests on three elements: There must be a certain amount of use, which must have taken place for *a long time* and been exercised in *good faith*. However, there are no fixed criteria for the determination of whether the individual conditions have been satisfied. Brækhus/Hærem: Norsk Tingsrett [Norwegian property law], page 610, maintain that the conditions are not independent – "one may for example relax to some extent the requirements relating to time, where the exercise of the use has been more marked and vice versa, and secondly account is also taken of other factors such

as the nature and quality of the right, how burdensome it is for the serving property and how necessary it is for the person or persons who claim to have the right". This is in my opinion an adequate description.

This basis of acquisition is relevant in many situations. And as is emphasised in the quotation above, weight must be placed inter alia on the "nature of the right". Since the present case concerns common of pasture for reindeer, consideration must be given to the particular circumstances within reindeer husbandry. This was also emphasised by the Lapp Commission, cf. the first column of page 42 of its report. It has also been taken as established in case law, thus cf. Rt 1985 532, the Mauken case. The requirements must be adapted to the use of the area made by the Sami and the reindeer. Account must be taken of the fact that the Sami have had a nomadic form of life. Factors that have been stressed for other grazing animals cannot be automatically applied to the pasturing of reindeer. These aspects must be brought into the assessment.

Of concrete factors I wish to stress in particular that reindeer husbandry is very land-intensive and that the amount of territory used varies from year to year depending on the weather, wind and quality of the pastures. Thus it cannot be required that reindeer have pastured in a specific area every year. Both for this reason and on account of the Sami's nomadic way of life, an interruption cannot prevent the acquisition of a right even where any such interruption is of considerable length. In this connection I may mention that in the Mauken case reindeer husbandry was deemed to have protection against tortious liability even though, since the beginning of the 1920s, it had not been exercised in the area for more than a generation. But in the case of any interruption a longer total period of time must be required.

The consequence of taking account of the nature of the reindeer is that weight must be placed on its pasturing pattern. The reindeer makes use of huge areas, and the surroundings, topography, food supply, weather and wind etc. determine its use of the area. A typical pasturing pattern is that reindeer roam. The fact that reindeer have certain core areas, for example for calving, does not mean that the area of use is not considerably larger. Thus the acquisition of a right cannot be excluded solely because it is what is called "occasional pasturing" that has taken place.

The two districts are used for spring, summer and autumn pasturing, and the intensity of use of the different areas varies in the course of the season. In the areas in dispute it is primarily a matter of spring and autumn pasturing. But not in these periods either is the whole area used equally much. This is particularly relevant in the case of the western parts of the

disputed area in Essand, where the district also includes considerable agricultural areas both in Øverbygda and Innbygda and down towards Lake Selbu. The landowners' activity here lessens the reindeer's use of those areas that lie closest to built-up places and enclosed land. This raises the question of whether in this border zone of reindeer pasturing there may be grounds for relaxing to some extent the requirements for the acquisition of a right through use from time immemorial. This is something to which I shall return.

Before the Supreme Court the Sami have, as has been mentioned, also invoked Norway's obligations to indigenous peoples under international law. In the first place they have referred to the UN International Covenant on Civil and Political Rights of 16 December 1966, Article 27 of which reads [in Norwegian translation for the present case] as follows:

"In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

Pursuant to section 2 of Act No. 30 of 21 May 1999 concerning the strengthening of the position of human rights in Norwegian law (Human Rights Act), this provision applies "as Norwegian statute law", and shall "in the event of conflict take precedence over provisions in other legislation", cf. section 3 of the Act.

Further the Sami have referred to ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, adopted at the 76th International Labour Conference in Geneva in 1989, which Norway has ratified and which came into force on 5 September 1991. Article 14(1) of the Convention [in Norwegian translation for the present case] lays down:

"The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect."

It is the second sentence of this provision that is invoked in the present case.

Historians are in disagreement about whether the Sami came to the inner parts of Sør-Trøndelag before or after the farmers had cleared the land for their farms there. This discussion has no relevance to the question of whether the Sami can invoke the provision

concerned also in Selbu. Article 1(1)(b) [in Norwegian translation for the present case] provides that

> "This Convention applies to:
>
> …
>
> Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

There is no doubt that according to this definition the Sami have the status of an indigenous people in Norway, and that our obligations towards them under international law in pursuance of Article 14 of the Convention also apply in Sør-Trøndelag.

I do not find it necessary to go any further into the two conventions, the relationship between them and their application in disputes between private parties. As I see it, the Norwegian rules of law concerning use from time immemorial, based on traditional Norwegian sources of law and with the adaptation that must be allowed for reindeer husbandry, are sufficient to provide grounds for common of pasture in the disputed areas.

On the basis of these legal points of departure I shall take a closer look at the areas in dispute within each of the two reindeer pasturing districts. Since the Lapp Commission's statement concerning where the Sami "by ancient custom" had sought "sojourn and pasture" is central to the present case, I shall first discuss what weight shall be ascribed to the Commission's statement.

General Remarks on the significance of the Lapp Commission's Report

The Lapp Commission did a thorough piece of work and collected a considerable body of material. In performing its assessments it had a far greater proximity to the evidentiary material than we have today. And in contrast to the Supreme Court it had undertaken inspections and received statements directly from a large number of persons with knowledge of reindeer husbandry prior to 1890. These statements are important evidentiary material.

But since a large number of statements were entered in the records, we have a basis for reviewing the Commission's conclusions. The statements were subsequently entered in the

Minutes of the proceedings and were forwarded to the Ministry. They were later transcribed and processed by University Librarian Anders Løøv.

In the assessment of the Commission's conclusions account must be taken of the fact that it must also have received information that was not entered in the records, and that through its journeys and inspections it gained impressions that the Supreme Court cannot share. But I take it as established that the most important statements were entered in the records.

It should be mentioned that some statements in the Report indicate that the Commission shared a widespread view at that time of the value of reindeer husbandry. On page 33 of the Report reindeer husbandry is discussed from an economic point of view. Here it says that even though it will not be able to "reckon with many defenders of its economic justification", the Sami's rights must be respected. It then goes on:

"But also when one is to weigh and balance the mutual rights and obligations of the Lapps and the permanent residents against one another, one cannot forget the different conditions of their livelihoods, and that the farmer performing his diligent and laborious work of cultivation has often had great toils and heavy burdens imposed upon him, while the Lapp, whose existence alternates between exertions and sloth, as a rule escapes such things."

I must also point out that there was no Sami representation on the Commission. And when it was enlarged in 1891, it was an additional farmer who came in. Today it would have been unthinkable that the Sami were not represented on an equivalent commission. Furthermore the majority of the statements recorded were made by permanent residents.

The topography is central in the assessment of where reindeer have pastured, it can be examined just as well today. However, the farmers' use of the areas in dispute is different today from what it was in the 19th century. The difference consists in two factors: In the first place a number of tracts that were previously unenclosed land or forest are today cultivated terrain, as is the situation in Nekåbjørga in Riast/Hylling, for example. Seen in isolation, this would suggest that in the 19th century reindeer may have pastured to a greater degree than today on private land in Selbu. The second factor is that in the 19th century and for that matter also far into the 20th century, there was relatively active summer farming and use of haymaking areas on unenclosed land. This may for its part immediately seem to suggest that the reindeer kept away from private land to a greater extent. I shall come back to this.

The landowners have contended that the reindeer were more domesticated in the 19th century, and that they were better herded than today. The area of land used must therefore have been less, and the Lapp Commission's statements must be read in the light of this. Their contention is closely linked to the fact that at this time the Sami used to milk the reindeer, and that the herding is reported to have become more poorly performed when they somewhat later went over to pure meat production. In my opinion this has limited significance in the assessment of what weight shall be placed on the Commission's statements about where the Sami had sought "sojourn and pasture". I shall also come back to this question in more detail.

My conclusion is that the material left by the Lapp Commission, viewed in connection with topography, the nature of the reindeer etc., provides a good foundation for reviewing the Lapp Commission's standpoints.

Particular methodological problems

In cases of this kind one is confronted with a particular problem of method: On the basis of their economic adaptation and social structure, the Sami reindeer herders had no great need to make use of the written language, cf. Pareli and Severinsen: Noen metodeproblemer i sørsamisk historieforskning [some problems of method in South-Sami historical research], printed in Ottar nr. 116-117 pages 29-37 on page 30. On the other hand, like the permanent residents, the Sami did of course have oral accounts. Such accounts that have been handed down must be assessed meticulously, but cannot be generally rejected. And where they are supported by other information, they may be given increased weight.

Further, I refer to the fact that since the Sami were nomads and on the whole used organic materials that decompose, it might also be difficult to find physical traces of reindeer husbandry.

These factors indicate caution when it comes to drawing conclusions from the fact that there is a lack of concrete information about the Sami's presence in an area. This applies not least in Selbu where the investigations in respect of Sami cultural relics have had a very modest scope.

Account must also be taken of the fact that in communication between Norwegians and Sami, misunderstandings can arise because linguistic and cultural differences may lead to their taking one another to mean something they do not. This is also emphasised in recent

public reports on the organisation of the courts, cf. for example Report to the Storting, St.meld. nr. 23 (2000-2001) page 28, first column.

Riast/Hylling Reindeer Pasturing District

As has been mentioned, the Lapp Commission concluded that "by ancient custom" the Sami had not sought "sojourn and pasture" in that part of the district that lies in the municipal authority area of Selbu, cf. the second column of page 29 of the Report. The question thus becomes whether it had evidence to support this statement, and if so whether the Sami do not have common of pasture here.

On the Sami's use of the area in dispute the Commission states on page 10 first column:

"In that part of Selbu (the principal parish) that lies west of this boundary [i.e. west of the boundary with Tydal], in other words south of the Nea and Lake Selbu, the Lapps are on the other hand known not to have turf huts or places of sojourn for use in the summer. Nevertheless, the reindeer have, especially in recent years and without any watching, more often wandered during pasturing over the said parish boundary and have thus in particular reached Mount Bukhammer [in the south-east corner of the area in dispute] and sometimes Mount Bringen [in the south-west corner], … If the reindeer during their summer pasturing have moved farther west than Mount Bringen and the tracts north of the same, this must be deemed a pure exception."

In Rt 1988 1217, the Korssjøfjell case, in which only a modest extension of the area of common of pasture was undertaken in relation to the Lapp Commission's standpoint, the Supreme Court emphasised that the Commission's boundary specification seemed "firmly anchored in the material that the Commission had procured as a basis". I shall now examine whether the same applies in the present case.

At an early stage of its work the Lapp Commission sent a questionnaire to mayors and district sheriffs in the municipal areas concerned. One of the questions was from which "elderly, locally acquainted and reliable persons the Commission was believed to be able, where necessary, to seek further information?" The Mayor of Selbu named among others a mine foreman, Erik Næsvold in Tydal. Mr Næsvold testified before the Commission on 18 July 1890. He was then 76 years old, and stated that he had stayed in Tydal all his life so that "ever since his early childhood he had knowledge of Lapp matters in the district". From the earliest time he could remember, there had been two teams of Sami in Tydal, the "Holm

Team", who stayed west of the Tya and Lake Stugu, while the other team, the "Kant Team", kept to the east side. He further stated:

"The Holm Team had huts at Grønvolen, Grønsøen, Hultsøen [Holdsjøen], Holta [Hulta], Heina [Hena] and at Ustensøen [Usmesjøen] north of Bukhammeren. They were in these places in the spring, summer or in the autumn, and all these places are old hut sites. It is a matter of course that the reindeer have pastured considerably farther westwards into Sælbo, without my making so bold as to indicate a specific boundary; probably they will have wandered as far as there are mountains."

I should draw attention to the fact that the square brackets here and in the continuation, unless otherwise indicated by the context, were added by Anders Løøv.

Of the hut sites that Mr Næsvold described, Lake Usme lies in the border area between Tydal and the disputed area – a little closer to Bukhammeren than the Nea. The remaining ones lie at different distances south-east of the area in dispute.

The following day, 19 July 1890, the Commission questioned Lars Løvøen, a farmer, who was living somewhat north-west of Lake Stugu. Mr Løvøen was 51 years of age. In most essentials he was able to support Mr Næsvold's statement, and he informed the Commission that with respect to the older times, he based his statements on what his late father and other old people had told him. For a period of 20 years up to about 1885 he had himself owned reindeer, and he was of the opinion that he had considerable experience of reindeer husbandry. Mr Løvøen also touched on the pasturing in the disputed area:

"Even though the Lapps were not in the habit of staying in the said west tract farther north than Ustensøen [Usmesjøen], the reindeer nevertheless went farther in accordance with ancient use, and in particular they pastured in Bringen and around there and sometimes reached Reenfjeldet. I therefore suppose that ancient use will mean that the boundary of the Lapp stretch must be drawn somewhat outside or farther towards the north-west [F.p. Nordøst (north-east)] than the parish boundary between Tydalen and Sælbo. The outermost boundary, of which it may be a question, must however be over Reenfjeldet. Whether the reindeer seek pasture at Reenfjeldet in the summer depends essentially on what kind of summer it is."

The abbreviation F.p. in square brackets means according to Mr Løøv that there is a discrepancy between the statement entered in the records and what was later entered in the Minutes of the proceedings. In this instance it is obvious that it is north-west that is correct.

The same day Mr Løvøen's statement was put before Mr Næsvold. It is recorded in the Minutes that he had "no significant comment to make as far as the factual information provided therein was concerned".

Further I can mention that on 21 July 1890 the Commission questioned John Pedersen Uthus, aged 58, who was a pensioner on his own farm, Uthus, by the Nea in the northern corner of the disputed area in Riast/Hylling roughly midway between Selbu's boundary with Tydal and the west boundary of the disputed area. Mr Uthus informed the Commission that he was born at Stranden by Lake Selbu, but that for the past 33 years he had been living at Uthus. In other words he must have come there in 1857, and he stated that "as far as this period is concerned" he had "knowledge of Lapp matters here in Sælbo". His statement then reads:

"In the early days, particularly in the spring, the reindeer often came right down to the enclosed land of the farm and caused damage, but in recent years, especially over the past 10 years, this has not happened. On the other hand the reindeer have come to the summer farm meadows. Since Niels Bull moved, people have not however been so exposed to the Reindeer on the east side of the Nea, but on the other hand the damage and the drawbacks have been felt on the west side. On this side there have in fact been a lot of reindeer in later [F.p.: sidste (recent)] times especially in the spring, while this was not the case in the first years he was at Uthus. Now the reindeer on the west side sometimes come right down to the river (the Nea). The reindeer are very much in evidence around Mount Bringen, where there are summer farms to whose meadows the reindeer have more often done damage, as at Høstakker and mostly to these ... Without having any special knowledge thereof, he takes it as probable that the animals have sought summer pasture right down to Reensfjeldet, and that damage has been caused on the west side of the Nea and Sælbosøen as far as Sælbo stretches."

Until about 1883 Niels Bull, whom Mr Uthus mentions, spent a great deal of time on the state-owned Roltdal Common north of Flora.

On 29 July 1890 the Commission also recorded testimony from Ole Andersen Kant, a Sami who was born in 1815. At this time he no longer had reindeer, but made his living by fishing in Lake Essand. Some summers he had pastured west of Lake Stugu, and had been in the valley of Heina, which lies somewhat east of the disputed area. He stated that:

"… however my animals might get to Bukhammeren on some occasions. So I am not aware that Bringen and the tract around Reenfjeldet are said to have been used for summer pasturing for reindeer."

In the assessment of Mr Kant's statement it is an important factor that he belonged to what Mr Næsvold called the "Kant Team", so that he must have had a better knowledge of the conditions prevailing in the present Essand than in Riast/Hylling.

The Commission may well also have received information that has not been recorded. But, as has been mentioned, it must be taken as established that the most significant statements were entered in the records. And there are clear differences between the Commission's description and what was recorded. It is difficult to reconcile the Commission's assertions about where the reindeer had pastured with the principal impression of the statements that have been quoted above.

Since the Commission states that the said pasturing had "especially" taken place "in recent years", it may seem as if it paid particular attention to Mr Uthus' statement. But he stated that the reindeer were "very much in evidence around Mount Bringen", while the Commission states that the reindeer had "sometimes" reached there. Incidentally a corresponding discrepancy also seems to have occurred in the Chairman of the Commission, Mr Berg's statement to the Ministry when he was asked to make a statement on the north-west boundary of Riast/Hylling. He stated on that occasion that during pasturing the reindeer had "only exceptionally wandered in from Tydalen while pasturing, especially now and again to Mount Bringen", cf. Departements-Tidende 1894 page 535.

It is also difficult to reconcile the Commission's statement that the reindeer have "especially" in recent years "reached Mount Bukhammer" with the material it had: In its discussion of when the Sami came to Tydal, which I shall be going into in the treatment of the disputed area in Essand, the Commission built on Yngvar Nielsen's Advance Theory. In the article in which Nielsen advanced this theory, he referred inter alia to the description of a journey by Gerhard Schøning from 1773:

"When Gerhard Schøning (Reise gjennem en Deel af Norge, [journey through a part of Norway] I, p. 95) travelled through Tydalen in 1773, there were also Lapps at Bukhammeren, a mountain that lies between the said valley and Guldalen. At that time this was regarded as their most important place of sojourn."

Yngvar Nielsen's quotation of Schøning is possibly not quite precise, and is perhaps slightly exaggerated, cf. the 1910 edition of Schøning's work page 62. But with the confidence that the Commission otherwise appears to have had in Nielsen, it is striking that it

does not appear to have placed weight on what he wrote about Bukkhammeren. This applies even more when Mr Næsvold, confirmed by Mr Løvøen, described Lake Usme as one of the "old hut sites".

When the statements are read in the light of the topography of the area, the Commission's description of the Sami's use of the disputed area is further weakened: Parts of the disputed area lie far down in the Nea Valley just before the valley narrows sharply before opening out again just before the place where the River Rotla flows into the Nea. The lowest areas bordering the Nea lie roughly 300 metres above sea level, so that the spring comes earlier there than farther into the country. Furthermore, Nekåbjørga, which today is an important agricultural area in the disputed area, was not bought by the County of Sør-Trøndelag until 1935 and divided into twelve holdings for the farming of new land. In other words, in the 19th century there was much less cultivated land in the area. To me it does not seem very probable that the reindeer only used parts of the area in dispute. This is strengthened by the fact that Mr Næsvold, with confirmation from Mr Løvøen, stated, as has been mentioned, that Lake Usme was an old hut site. With the pasturing pattern of the reindeer the whole of the disputed area lies in reasonable proximity to this hut site.

My conclusion is that the information that the Lapp Commission had, compared with topography, the nature of the reindeer and its pasturing pattern and so forth, shows that the Sami have most probably used the whole area for pasturing since time immemorial, and that there was no basis for the Commission's limitation in its description of the pasturing. The fact that it nevertheless did not include the area in its indication of where the Sami "may be assumed to have sought sojourn and pasture by ancient custom", may also be due to its having built on an interpretation of the law that I cannot share. The Commission's formulation "sojourn and pasture" may be taken to mean that the Commission presupposed that the formulation "by ancient custom have hitherto sought" in section 3 of the Joint Lapp Act required that both conditions should be satisfied. But in that case one would exclude large areas that have been used and are necessary for reindeer husbandry. And one would make different and stricter requirements than those applying in the case of other grazing animals.

In the light of this I have come to the conclusion that the information the Lapp Commission had, compared with topography etc., means that as early as 1892 it could be concluded that the Sami had common of pasture through use from time immemorial in the whole of the area in dispute. This standpoint is strengthened by later information.

Since I have already found an adequate foundation for my conclusion in the material the Lapp Commission had, I shall content myself with mentioning that in 1973 the Specialist Committee for the Agricultural, Sylvicultural and Unenclosed Land Industries appointed by the Regional Planning Council for the Mountain Region of Sør-Trøndelag submitted a report on this area. The introduction shows that the purpose of the report was to bring about increased interest in reindeer husbandry, and it was proposed that the reindeer husbandry area be extended, cf. page 27 of the report. The members of the Committee were the county agronomist, the county director of forests, the district agronomist of Støren, the district director of forests in Selbu and the local Lapp inspector. On a map in the report the whole of the disputed area is drawn in as calving land, and on another map it is designated as a pasturing area from April to November.

I must also point to Reindeer Agronomist Sletten's Opinion in the District Court, to which I shall later return in my own Opinion.

Essand Reindeer Pasturing District up to 1892 – the statements made to the Lapp Commission

In this district, as has been mentioned, the Lapp Commission came to the conclusion that the Sami "by ancient custom" had sought "sojourn and pasture" on the state-owned Roltdal Common. With reference to this the landowners have contended that Essand does not have common of pasture on private land in Selbu – in other words in the area from the state common westwards to Lake Selbu.

On the Sami's use in this area the Commission states in its report pages 9-10:

"While the Lapps have habitually roamed around everywhere on the mountain stretches in Tydalen, they have on the other hand in Selbu sought only sojourn and pasture for reindeer in the tracts immediately bordering Meraker and Tydalen and in particular kept within Rotladalen State Common lying in Selbu along the county boundary … On the Common they have had turf huts in different places such as Kvityttan, by the waters at Kværnfjeld, at Sprøiten, Bratslaatshøgda, Drøia, north of Melshogna and in Rotladalen, in which latter valley they have in particular sojourned in the spring. … notwithstanding the fact that the Lapps have so to speak regarded the Common as their territory and not considered themselves justified in extending their pasturing into the private stretches to the west, this has nevertheless occurred, in that the reindeer during pasturing have wandered westwards and in so doing have caused damage to summer farm meadows, haymaking areas and

haystacks, especially in the spring, when it has happened that they have come right down to the rural community around the main church by Lake Selbu."

In response to the Commission's question about locally acquainted and reliable persons in Selbu, the Mayor named Thomas P. Kallar and Ingebrigt Flønæs jr.

Mr Kallar testified on 28 July 1890. He was then aged 72, and informed the Commission that he was a cotter under the Kallar farm in Selbu where he had lived his whole life. Kallar lies in the upper part of Øverbygda – some distance north-west of where the Rotla flows into the Nea. Mr Kallar stated:

"Even in my youth I heard talk of Lapps with reindeer having sojourned from earlier days in Sælbo and especially in Tydalen. When I was a shepherd as a young boy (11 years old), I saw Lapp huts in Rotladalen and between Fongene and Ruten, and at that time these huts were being used by the Lapps. As far as I recall, it was especially in the spring that they sojourned in Rotladalen and then caused there, more often in recent years as it were, damage to the summer farm meadows through the reindeer's pasturing. In my youth I did not see huts in other places than those mentioned, but later I saw or was in other ways aware of the fact that there were or had been huts in most of the places that Niels Bull has named, and which lie on Sælbo Common. … The places named by Niels Bull in this stretch of land are thus all deemed to lie within the Common, outside which the Lapps in my opinion have not had the confidence to choose places of sojourn or sites for huts. The Lapps have as it were considered the Common as their territory. [In the Minutes of the Proceedings the preceding sentence is underlined] A number of them have spoken in this way. But of course, during pasturing the reindeer have gone much farther westwards than the Common. In the spring it may have happened that reindeer have come right down [F.p: ind (into)] to the rural community around the main church, but this is of course exceptional … ."

As is apparent from the quotation, the sentence "The Lapps have as it were considered the Common as their territory" is underlined in the Minutes of the Proceedings. This indicates that the Commission took note of this sentence – which is reinforced by the fact that it is reproduced almost verbatim in its report, cf. the quotation above. But in the continuation there is considerable divergence between the Commission's description and Mr Kallar's statement. The Commission states that the Sami have not "considered themselves justified in extending their pasturing into the private stretches to the west", while Mr Kallar stated that "of course, during pasturing the reindeer have gone much farther westwards than the Common". This difference may be due to the Commission's not reckoning pasturing alone as sufficient for the acquisition of a right. As has already been pointed out, if that is so, it is incorrect.

Mr Kallar's testimony was strengthened at a meeting the Lapp Commission held on 24 September 1890 with some central persons in Selbu. Ingebrigt Flønæs sr., whom the mayor had named as a locally acquainted and reliable person, was present at this meeting. He was 71 years of age, and he had Mr Kallar's statement read aloud. In connection with this the following was recorded in the Minutes of the meeting:

"Ingebrigt Flønæss senior found nothing to comment on in Thomas Kallar's declaration of 28th July this year, which was read aloud. He remarked that he was of the opinion that the number of animals had increased. In earlier days there were no doubt more Lapps than now, but it was seldom that anybody had so many animals as some have now.

In other words Mr Flønæs had no comment to make on Mr Kallar's statement that the pasturing had "of course" extended farther west than the Common. And for his own part he stated that he had heard "that the reindeer have come during pasturing to different summer farm meadows east of Indbygden in Sælbo right to within a couple of kilometres of the rural community". There is altogether no particularly good correspondence between the Commission's description of the facts and these two statements.

The question then becomes: Did the Commission have support for its description in the other statements?

A third permanent resident who testified about the state of affairs in Selbu was the stationmaster at Reitan railway station, Albert Christian Schive. He gave his evidence on 12 September 1889. At that time he was 45 years old. From 1851 to 1877 he had lived in Selbu, where his father was the district sheriff. From 1870 to 1874 he had assisted his father, and after his father's death in 1874 he was acting district sheriff for nine months. In these positions he had come "into considerable contact with the Lapps". Mr Schive states that in Selbu and Tydal there were two teams of Sami, of whom one team was

"… the so-called mountain Lapps by Vatna [Great and Little Lake Kvernfjell] (Hvidtyten) [= Kvityten] in Sælbo. These had huts at Hvidtyten and a smallish pasture on Sælboe's land, but went for the most part over to Meraker, where they sojourned especially in the winter … nor do I know how it was when it comes to the presence or sojourn of nomadic Lapps and the latter's circumstances in Sælbo and Tydalen from time immemorial, but both the Østby tract or rather the Essand tract and the Vatna tract [Vatna = Great and Little Lake Kvernfjell] were spoken of and considered as ancient Lapp tracts for Norwegian Lapps."

The Lapp Commission's description no doubt harmonises better with Mr Schive's statement, but he did not have the same background experience as Mr Kallar and Mr Flønæs senior. Mr Schive describes the area by Lake Kvernfjell – on the state common just east of the area in dispute – as "ancient Lapp tracts". I shall come back to this.

Statements made by two Sami, Niels Bull and Jacob Jacobsen, were also entered in the records. Mr Bull gave evidence on 19 September 1889. The Commission was thus aware of his statement when the following year it took statements from Mr Kallar and Mr Flønæs senior. When Mr Bull testified, he had left Roltdalen and had been living in Hesjedalen in the present Municipal Authority Area of Holtålen for the past six years. Mr Bull's father was born in Overhalla, but he moved from there together with John Johnsen, Jacob Jacobsen's grandfather. It is unclear when Mr Bull's father took up residence in Roltdalen for the first time – probably this did not happen until the 1850s. In his statement Mr Bull mentioned where he and his father had had turf huts:

> "1. Grønlien [F.p: Granlien] in the vicinity of the Siller Tarns [Sildretjørnin] south of the Son Waters (not until the spring), 2. between the Son Waters, one on each side of these, 3. by the Skrei Waters [Skrøytjørnin], 4. on Mount Fon south of Gudaa station in Meraker 5. by the Volaklep Tarns [Great and Little Klepptjørna] south of Volakleppen [Vålåkleppen], 6. at the north end of Mount Naut 7. on the east side of the same mountain, 8. in Haarraadalen, immediately above the Dam Tarns, 9. on Mount Sau to the south-east of Mount Naut 10. Kvitytan by the Kværnfjeld Waters to the west of the same mountain 11. in Høistakken 12. in Knippen [Solemsknippen] south of and between the Kværnfjeld Waters 13. on Mount Sprøit [Sprøyten], south-east [in the Minutes of the Proceedings changed to: south-west] of Mount Naut 14. at Rimsøen or Kroksøen north of Bratslaathøgda [Brattslåtthøgda], to the south-west of Mount Sprøit 15. by the River Fager [Fagermoa] 16. by the River Rotla on the south-east side of Mount Sprøit 17. at Stuthøgden east of Volakleppen, 18. on Mount Lillefongen [Litlefongen] on the west side, south of Mount Sprøit [Sprøyten], 19. at Vægskaret between Ruten and Melshogna 20. at the River Drøia not far from Røsetvolden 21. at Grey Waters [Gråvatnet] in the vicinity of Varhaugene [east Gråvatnet Hegra/Selbu west of Hævla [Hevla]. The extreme points of the stretch on which pasturing took place from these turf hut places might be from west to east 30 to 40 kilometres and from north to south roughly 20 kilometres."

Mr Bull further stated that his herd had increased from 40 in 1870 to roughly 400 in 1889.

Of the turf hut places that Bull specified, at any rate ten lie within the state-owned common – specifically Nos. 10-16 and 18-20. The huts are spread out over the whole common, and No. 11, Høystakken, is a boundary point between the common and the area in dispute. Incidentally Høystakken lies just west of Kvernfjell Water, which Mr Schive described as "ancient Lapp tracts". No. 10, "Kvitytan", and No. 12, "Knippen", also lie in this area. Further I must mention that No. 21 lies in the boundary area between Selbu and Stjørdal – roughly midway between the west boundary of the common and of the reindeer pasturing district.

In my estimation there is good correspondence between Mr Bull's and Mr Kallar's testimony. Mr Bull stated that the pasturing extended "from west to east 30 to 40 kilometres" away from the turf hut places, and Mr Kallar stated that it "of course" extended "much farther west than the Common".

Jacob Jacobsen testified at the same time as Niels Bull. I cannot see that his statement contains anything of particular interest to the present case. My impression is that before moving, he and his family generally stayed somewhat farther east and furthermore in Tydal. But he stated that they too had used a number of the turf hut places on the common that Mr Bull had used.

To sum up so far: The Lapp Commission did not in my opinion have an adequate foundation in these statements for saying that the Sami had not "considered themselves justified in extending their pasturing into the private stretches to the west" of the state-owned common. But since I am for the moment concentrating on what information we have, and what conclusions can be drawn about Sami reindeer husbandry in Selbu, I shall wait before going into this more deeply.

Other information about use in Essand prior to 1892

The statements the Lapp Commission received gave limited concrete evidence of the pasturing that had gone on in Selbu prior to 1850. The question thus becomes whether on any other basis one can draw conclusions about this with a view to acknowledging use from time immemorial even before 1892.

Introductorily in its Report the Lapp Commission discusses when the Sami came to Tydal. It refers in particular to Professor Yngvar Nielsen's Advance Theory, which was

presented in 1889, and in which he claimed that the Sami in Sør-Trøndelag and Hedmark had immigrated from the north. On page 4 of the Report it then says that "Within Norway nomadic Lapps thus came south to Tydalen probably somewhat before the end of the 17th century".

According to what I have understood, this Advance Theory continues to find a certain amount of support among historians. But I am not aware that anybody today dates their arrival in Tydal to the end of the 17th century. The landowners' private expert, Professor Haarstad, thus claims that the Sami came to the mountains of Tydal in about 1620. In the further proceedings I shall take my point of departure in the assumption that the Sami came to Tydal at any rate at the beginning of the 17th century. And since Meråker lies just north of Tydal, they must, if one builds on the Advance Theory, have arrived there at least equally early.

It was roughly in the first years of the 17th century that the transition to domesticated reindeer husbandry took place. Thus it had in Tydal an almost 300-year long tradition at the time of the Lapp Commission.

This in itself indicates that long before 1850 reindeer husbandry was being conducted in Selbu within both Riast/Hylling and Essand. I refer to the fact that for reindeer it is a matter of reasonable distances. Since the spring, which is an important time for the reindeer, comes earlier in Selbu than in Tydal, it would be almost striking if there were not reindeer husbandry in Selbu as well.

For Selbu, church registers have been submitted for the years 1699-1738 and 1757-1801 as well as the sexton's register for 1740-1752. I shall not go into the information in these registers in detail, but suffice it to say that Terje Erik Garberg produced a report for the landowners on the attendance of the South Sami at Selbu Church from 1699-1800. He concludes as follows:

"Through the church records and other sources we can find about 50 Sami – women and men – who stayed here for more or less lengthy periods in the 18th century. It is difficult to find family connections between them because marriages and deaths were seldom entered in the church register, and baptisms only irregularly."

Nevertheless, the majority of Sami stayed in Tydal. How many stayed there may no doubt have varied over time. But I should point out that Major Schnitler's report on the boundary investigation in 1742, on which both Yngvar Nielsen and the Lapp Commission

placed great weight, shows that the Sami at that time had their own Sami system for the administration of justice in Tydal, under which they themselves decided internal disputes. Henr. Kvandahl: Samenes historie [history of the Sami] II, page 214, thus provides the information that in 1734 there were 15 Sami families numbering 50 persons in Tydal.

There are also sources that give a clear indication that the Sami in Schnitler's time were divided into two main groups, Saanti sijte, north of the Nea and east of Lake Essand, and Gåebrien sijte, south of the Nea and west of Lake Essand. And for Saanti sijte Professor Falkenberg relates in Samiske bruksområder og stedsnavn i Rørostraktene, Samer i sør, Årbok [Sami areas of use and place names in the Røros tracts, Sami in the south, yearbook] 1982-83, page 68, that in 1942 he had a conversation with Lars Jakobsen Nordfjeld. Nordfjeld was born in 1863 and he was the brother of Jacob Jacobsen who testified before the Lapp Commission together with Niels Bull. Mr Nordfjeld told Professor Falkenberg that the Sami in Saanti sijte were divided into three groups, of which one, Tjohkeli-saemieh, had its summer pastures around Mount Skarven. Skarven lies in the north-east corner of the state common on the boundary with Meråker and Stjørdal – just north of Lake Kvernfjell, which Mr Schive described as "ancient Lapp tracts". This information is also supported by Mr Bull's statement, in which Mr Bull named a number of turf hut places north and east of Skarven. Further, it is supported by Mr Kallar's statement that even in his youth he had "heard talk of Lapps with reindeer having sojourned from earlier days in Sælbo and especially in Tydalen". And it is supported by a piece of information provided by Erik Olsen Langlid senior, aged 67, during the meeting the Lapp Commission had in Selbu on 24 September 1890:

"Prior to 1856 the Lapps are not known to have had sojourn in this tract or reindeer to have roamed there pasturing, as long as people can recall, but Erik Olsen further states that he heard it said by his grandfather, who died at the age of 94 some 40 to 50 years ago, that before his grandfather's days Lapps were reported to have had sojourn with their reindeer in the said tract. His grandfather had himself heard talk of this, but did not have any personal experience of it."

From the context the "said tract" seems to refer to the tracts by Son Water just north of Skarven and by Kvernfjell Water on the state common.

When these items of information are seen in relation to one another, there is in my opinion a great deal to suggest that in the 18th century too reindeer husbandry was being conducted at any rate on Roltdal State Common. I shall come back to the question of whether this pasturing extended beyond the Common.

If one builds on official census figures, they may seem to indicate that reindeer husbandry in Selbu and Tydal was on a modest scale in parts of the 19th century. In 1835 not one single reindeer was registered, while 388 were registered in Røros and one in Stadsbygden. In 1845, the first census containing information about the number of Sami outside Finnmark, there were according to the census 44 Sami and 2000 reindeer in Selbu and Tydal. Ten years later, in 1855, the figures had been reduced to 14 Sami and 491 reindeer. And in 1865, according to the census, there were four Sami and no reindeer. In 1875 the number of reindeer had increased dramatically in that there were now 1,171 reindeer, but only one Sami.

These censuses cannot give a correct picture of the number of Sami and reindeer. I content myself with referring to Niels Bull's and Jacob Jacobsen's statements that have been mentioned earlier. Furthermore, Erik Olsen Langlid senior testified that since 1856 and up to 1890 Sami had been sojourning by Kvernfjell Water ever year, in parts of the year.

The factors that I have stressed above are supported by a statement made on 19 July 1890 by Ole Johnsen Østby, who was 73 years of age and living at Østby in Tydal. He was one of the witnesses named by the mayor. With respect to the presence of Sami he stated:

"I have never heard anything else than that from time immemorial there have been Lapps with reindeer here in Tydalen and Sælbo, without my having heard or experienced anything to do with the time from which it all started. It has struck me that the Lapps could be just as original inhabitants in this tract as the farmers."

As one can see, Mr Østby mentioned Selbu in particular.

His statement was put before Lars Johnsen Østby, who was 74 years old and living in the same place. He too had been named by the mayor. He could "in all essentials support Ole Johnsen Østbye's present declaration".

In my opinion it is doubtful whether for any lengthy period of time there was an interruption of reindeer husbandry in the present Municipal Authority Area of Selbu. I recall that Mr Kallar, who must have been born in 1818, stated that he was a shepherd boy at the age of 11. And he testified that at that time he saw huts on the state-owned common, and also that damage was done to the summer farm meadows. Further he stated that the "oldest Lapps who sojourned here with reindeer, and whom I can remember, were a Lapp by the name of

Klemmet and one by the name of Niels-Jonassen, of whom the latter arrived in Rotladalen in 1840; further a girl by the name of Litle-Margret and several members of the Kant family".

In the light of this my conclusion is that there is a great deal to suggest that the Sami at any rate from way back in the 18th century sought "sojourn and pasture" in Selbu. There may well have been interruptions, but hardly of such length that the acquisition of a right through use from time immemorial must start anew.

Pasturing on the disputed area in Essand prior to 1892

The next question is whether there was pasturing not only on the state common, but also on the area in dispute. For the moment I have not made up my mind as to whether the pasturing was of such an extent that the Sami had common of pasture in the whole of the disputed area.

In this connection I refer in the first place to the statements the Lapp Commission received, in particular the statements from Mr Bull and Mr Kallar, which pull in the direction of there having been pasturing far into the area in dispute.

From Mr Bull's statement I recall particularly his information about where he had had turf hut sites. At any rate seven of these – namely Nos. 10-12, 14, 15, 19 and 20 – lie relatively close to the disputed area for almost the whole length of the common. In view of the fact that in addition he mentioned the turf hut "at Grey Waters" in the border area between Selbu and Stjørdal, and further that "The extreme points of the stretch on which pasturing took place from these turf hut places might be from west to east 30 to 40 kilometres and from north to south roughly 20 kilometres", I must take this to mean that he pastured on private land in Selbu, and that the pasturing from the individual turf hut site covered considerable areas.

The landowners have however contended that the reindeer were better herded in the days of milking than after the transition to pure meat production, and that the amount of land used was thus less at that time than it is today. For that matter I have no foundation for doubting that the herding was better in the 19th century than it is today, but the central question is the extent of the territory used by the Sami and their reindeer.

In this connection I refer to the fact that there are known to have been complaints about inadequate supervision of reindeer long before the Lapp Commission's time. By way of

illustration may be mentioned the report from a committee that was appointed in 1843 with County Governor Cappelen and Dean Rode as members, and whose terms of reference were, together with a Swedish committee, to put forward proposals for amendments and additions to the Lapp Codicil from 1751 "in so far as concerns matters with respect to the Lapps in the united kingdoms". In the report it says inter alia:

"It will be easily realised that such a mass of reindeer, which is a species of animal that by its nature requires a meticulous guardian, but in which respect the Lapps to a greater or lesser degree let there be a lack of the necessary care, must be likely to cause the kingdoms' permanent inhabitants considerable damage on their properties … ."

Furthermore I refer to the fact that two of the witnesses who complained about the problems with reindeer husbandry in the district, primarily stressed that the Sami, in addition to their own reindeer, had begun to look after reindeer for the permanent residents. This applies in the first place to the statement from Erik Næsvold:

"In earlier times it was solely the Lapps who had reindeer, but in recent years farmers or permanent residents have also started keeping reindeer, and this later use has increased sharply, particularly over the past few years. That the farmers keep reindeer I blame on the fact that the circumstances surrounding reindeer husbandry have caused so much inconvenience and discontent over the last few years – beside the situation that the Lapps themselves have changed their way of life and no longer guard or domesticate their animals as they did earlier."

Lars Løvøen emphasised the same thing.

It is true that two other witnesses did not stress this connection, but Mr Næsvold's and Mr Løvøen's statements do at any rate indicate that there were a number of circumstances that led to reindeer husbandry's being alleged to have become more annoying to the permanent residents at the end of the 19th century. But if in fact the herding had become poorer in the Lapp Commission's time, it is nevertheless difficult to see that these statements can shed light on how the transition to pure meat production might possibly have influenced the amount of land used. This change did not take place until around and somewhat after the turn of the century, and for Essand there is information in the present case that milking did not cease until around 1920. In other words, the statements were made, and are based on experience, prior to the cessation of dairy production. The same applies to the Lapp Commission's own observations.

With respect to the significance of the change for the amount of land used, I also refer to the fact that information has been provided that the proportion of bucks was considerably greater in the 19th century than today. Further, the yearlings were not milked in any case. What is more, milking went on only for a fairly short period – from a little before Midsummer Day and up to August.

Statements that were made to the Lapp Commission illustrate in addition that the reindeer also at that time pastured over both short and long stretches. I recall Niels Bull's statement that from his turf huts "from west to east" pasturing could extend over "30 to 40 kilometres". Further I recall that Mr Løvøen stated that even though the Sami in Riast/Hylling had not been in "the habit of staying" farther north than Lake Usme, "the reindeer nevertheless went farther in accordance with ancient use, and in particular they pastured in Bringen and around there and sometimes reached Reenfjeldet".

Paul Johnsen's statement is also of interest. According to the Lapp Commission he was the largest reindeer-owner in the Røros and Tydal tracts at that time, and he owned 1500 of a total of 1880 reindeer within the two reindeer pasturing districts, cf. pages 79-80 of the Report. In his testimony given on 15 July 1890 he stated that "Farther north than Grønsøen I have no hut, but on the other hand during pasturing the reindeer of course roamed farther, right up to Bukhammerfjeldet". Since Mr Uthus, in the statement I have quoted, then complained that "in later times" there had been "a lot of reindeer especially in the spring" coming right down to the Nea in the rural community of Flora, this indicates that Mr Johnsen's reindeer pastured over longer stretches than he himself said.

Furthermore the state-owned common does not represent any topographic border with private land. And since, as has been mentioned, there is information about turf hut sites in the vicinity of the boundary of the common right from Høystakken to south of the River Rotla, it cannot be taken as established that the pasturing was limited to the state-owned common.

What has been stated above is in my opinion supported by the reindeer agronomist, Mr Sletten's Opinion in the District Court:

"Mr Sletten has weighed and balanced the information from the witnesses in relation to what he knows about the reindeer's roaming in the pasturing areas and what he has been shown in the way of topographic factors in these areas. His conclusion is that it has the presumption against it that reindeer on their way westwards in the spring stopped at Lake Usme, given that spring came earlier on the

north side of Bukkhammeren and Bringen. It also has the presumption against it that reindeer did not roam beyond Roltdalen and farther westwards on the private properties when they were at Melshogna, Høystakken or Skarvene. In his assessment of the reindeer's pasturing in these areas from time immemorial, Mr Sletten has placed weight on the fact that even if the reindeer-owners originally had smaller herds and milked some of the does in the summer, so that they had to guard them well, then the bucks and the yearlings nevertheless wandered over large areas. Since it is known that reindeer were milked both at Lake Usme and at Høystakken because there were old huts there, it is also clear that the herds of bucks and yearlings were to be found much farther west in the spring and large parts of the summer. The land is lower farther west and spring arrives there first. That no gathering and slaughtering places have been shown to exist in the westerly areas is not considered unnatural. Milking took place by the huts. So bucks and young animals pastured westwards. Gathering for the marking of calves and slaughtering took place later in the year in the easterly areas."

The Lapp Commission also stresses that the reindeer herd did not move in one body, cf. the Report, page 31:

"Especially when it comes to the number of reindeer, it is as good as unfeasible to procure reliable information, for the very reason that there is seldom the occasion to see a Lapp's reindeer herd gathered together."

In the light of this I cannot see that the transition to pure meat production had the considerable significance for the amount of land used as the landowners have contended.

The landowners have also contended that it is of significance for the amount of land used that up to the Lapp Commission's time reindeer husbandry was conducted with relatively small herds. To this I must respond that Lars Johnsen Østby stated that "The said Lapps who sojourned here in this tract had many reindeer." However, there is no reliable information about the size of the reindeer herds at that time. I therefore place decisive weight on the information we have otherwise concerning the amount of land used.

On the face of it, it might seem to go against any Sami presence in the disputed area that there are no formal recordings of cultural relics there. But there is no information that investigations have been carried out with a view to such recording. And the lack of formal recordings nevertheless does not mean that the area has no trace of such relics.

I refer to the fact that in July 1985 investigations were carried out in the catchment basin of the River Garberg, which essentially lies in the northern part of the disputed area, in connection with the Overall Plan for Watercourses. In a field report produced by Hartvig

Birkely, which describes an inspection that was performed by ethnologists and archaeologists, it says that

"An overall consideration of the extent of the cultural relics in this area reveals a Sami area of dwelling and use with long traditions … The Sami cultural relics are spread over the whole project area … ."

Since Mr Birkely states that the area was inspected by ethnologists and archaeologists, and that the cultural relics are spread "over the whole area", it is difficult to find it established that there are no Sami cultural relics in the area in dispute. Even though it is only a matter of a field report, it does at any rate rule out conclusions that there are no Sami cultural relics in the area.

This is strengthened by an interview on the same occasion with Johan Krogstad, which is mentioned in the field report. Mr Krogstad was at that time 89 years of age, and had been a merchant in Selbu. The interviewer says that Mr Krogstad had "a very good memory" and that he had "got himself a number of old sources about the Sami". Krogstad provided the information that there were Sami dwelling places at "Rotladalen, Krossådalen, by Kvernfjell Water, the south side of Tjohkeleh, by Lake Strå and on Mount Turilar". Information has been provided that he marked the dwelling places on the map. Kråssådalen and Stråsjøen lie in the disputed area.

Also in the mayor's reply to the Lapp Commission and in the discussion in the 1930s about the district boundary, information was provided to indicate that prior to 1892 reindeer husbandry was being conducted in the disputed area. I shall come back to this.

In my opinion the discussion above pulls strongly in the direction of the Sami's already having acquired in 1892 common of pasture through use from time immemorial west of the state common. However, I do not find it necessary to take a standpoint on this, since it is also natural to look at what use has taken place since 1892.

Use in Essand since 1892

Before I go more closely into information about later use in Essand – which also applies in part to the time prior to 1892 – there is reason to comment on the Lapp Commission's standpoint with respect to the Sami's possibility for the acquisition of rights after the Joint Lapp Act had come into force. In the Report it says on page 42, first column:

"According to the Act of 1883 the *Lapps' right* to travel and seek pasture for their reindeer rests in this country on *what* "hitherto", that is to say *until the commencement of the Act, must be presumed to have been ancient custom*. Hereby the limitation is assumed to have been laid down that no subsequent use may come into consideration or is conducive for the future to securing for the Lapps any new or extended rights."

The Joint Lapp Act only provided authority for establishing reindeer pasturing districts, and the prohibition against exercising reindeer husbandry outside a reindeer pasturing district "without particular permission or authority from the owner or user of the land" did not come in until 1897 with the passing of the Supplementary Act. In other words the Lapp Commission was nevertheless of the opinion that Section 3 of the Joint Lapp Act barred the possibility for subsequent acquisition of rights through use from time immemorial. The reality would in the event have been that reindeer husbandry received special treatment of a negative kind in relation to the keeping of other animals. This cannot be right. In my further discussion I therefore take it as established that pasturing subsequent to 1892, in addition to being able to provide indications of earlier use, may also constitute a foundation for the acquisition of rights through use from time immemorial.

In this connection I wish to state precisely that in the first place the testimony from both Sami and landowner quarters to the Supreme Court contains information about pasturing inside and outside the state-owned common also subsequent to 1892. But the Sami have spoken of considerably more comprehensive pasturing than the landowners and their witnesses accept.

I shall not go into the reliability of the individual statement, and whether the testimony of the one group is more reliable than the other's. As far as I am concerned, I find adequate material in the information we have from the time before the dispute arose.

By way of introduction I recall that lasting domestic reindeer husbandry in Essand did not start up again until 1910. However, this interruption cannot be an obstacle to seeing the period subsequent to 1910 and the period prior to approximately 1885 in relation to each other. I refer to what I said earlier about interruption of use – including the Mauken case in Rt 1985 532.

In the way of information about this later use, in my opinion some interesting things came out during the previously mentioned discussion in the 1930s about the extent of the

district in Selbu. During his speech at a meeting with the County Governor on 12 September 1934 Mr P. Norbye, a farmer, stated that in the first years after the start in 1910 the reindeer had not caused problems for the owners of the summer farms. But

"Every year the reindeer moved farther and farther west and in the years 1915 – 1916 they started doing damage to our summer farm meadows in the spring. The guarding had become worse … This changed way of life of the Sami has led to the watching of the herds becoming more and more casual and the larger reindeer population has especially in the spring spread farther and farther over the district and finally so far that damage is being caused in stretches which earlier, as far back as people remember, were free from reindeer pasturing. Especially in the spring the Sami had no hesitations about letting their reindeer have greater freedom. This saved them a great deal of work and guarding and there was no danger of losing them. The Sami knew that the reindeer would wander down into the band of forest where they found fresh pasture on the farmers' summer meadows.

From 1915-1916 onwards the damage done by reindeer to the summer meadows became greater and greater. The first years this passed without the taking of any action by the summer farm owners, but in the end some of these found they could no longer put up with the new traffic and considered it necessary to demand that appraisement of the damage be carried out in pursuance of the Reindeer Pasturing Act. The first appraisement of damage in Selbu took place on 2 June 1921. This was at Eidemvollen and Stråsjøvollen. Since then a lot of damage assessments have been held, where the Sami were obliged to pay compensation to the summer farm owners, compensation that has been paid by the Sami without appeal, even for damage on such remote summer farms as Svartåsen and on Roltdal State Common. But in addition to this compensation ordered to be paid by the Sami at appraisement proceedings, the Sami have in far more instances come to amicable arrangements with the summer farm owners and paid compensation by agreement. The first time the Sami refused to pay compensation determined at appraisement proceedings was in 1932, when they refused to pay P. Nordbye and A. Kvello the damages and costs due to them as a result of appraisement proceedings held on 21 June that year. As the ground for this refusal the Chairman of the Essand District, Lars Nilsen Brandfjell, contended in his statement to the police of 10th May 1933 that Storvollen lies within the Essand District and that he considers himself justified in pasturing his reindeer there as in other parts of the district and this he had been doing since he moved to the district in 1910. In other words he believed that he had common of pasture everywhere within the boundaries of the district since he was not aware of the Royal Interior Ministry's announcement of 28 July 1894 reading thus: …

Through statements from witnesses … we have established that pasturing of reindeer as far west as Præstfossan, Storvolden and other nearby summer meadows never took place as far as anybody can remember before the years 1915-1916 … What applies to the State's property

Præstfossan and to Storvolden also applies to a lot of summer farm meadows within the Essand District that are used as spring farms lying down in the coniferous forest."

He concluded his speech by submitting the claim that the new boundary should be drawn some distance into the disputed area from Stråsjøvollen and northwards following the coniferous timberline. Of the place names that Mr Norbye mentions, I should say that while Stråsjøvollen lies just west of Lake Strå, Præstfossan and Storvolden lie some distance farther west along the River Garberg. Eidemsvollen lies in the north-east corner of the area in dispute. Svartåsen, which Mr Norbye describes as a "remote" summer farm, seems to lie some distance east of Lake Strå, but within the disputed area.

My overall impression of Mr Norbye's speech is that he describes quite comprehensive pasturing that extended far west of the state-owned common.

His speech was strengthened by what the Sami stated at the meeting on 9 September 1935 with the County Governor. As an illustration I may mention that the Chairman of Essand, Lars Stinnerbom, stated that "Norbye and Kvello's summer farms lie within the area in which reindeer pasturing has taken place". Seen in conjunction with what Mr Norbye stated during the meeting with the County Governor on 12 September 1934, this statement must inter alia refer to damage to a summer farm at Storvolden, which lies by the River Garberg south-east of Børsjøen. And Lars Jakobsen Nordfjeld, with whom Professor Falkenberg had a conversation in 1942 about reindeer husbandry in earlier times, stated that "reindeer pasturing went on in the Essand District to above Krossådalen in the west towards Hersjøen. He remembers that in the event of a late spring the reindeer pasturing had to be moved towards the west."

In the letter of 21 March 1936 to the Ministry of Agriculture in which Mr Stinnerbom contended that the district boundary must be maintained, he incidentally touched even more precisely on the Sami's use and rights in the disputed area. Here it says:

"It is so that for some time there has been diminution of the area in which the pasturing of reindeer has gone on, but here it is of course not a question of the form of use in recent years, but the form of use from time immemorial and when there were reindeer over the whole of the District of Essand at various times of the year.

… We have considered ourselves entitled to pasture outside the common and there has for years been pasturing within the major part of the area comprising the district, so almost every year reindeer

have pastured down to Tømra, even though this has been by roaming animals and not the main mass of the herd."

The Lapp inspector, Mr Bagaas, gave the letter an endorsement stating that he was "on the whole … in agreement with the contents".

In other words Mr Stinnerbom claimed that the whole of the area in dispute had been used for reindeer pasturing from time immemorial. When Mr Stinnerbom states here that the "form of use" from time immemorial was that "there were reindeer over the whole of the District of Essand at various times of the year", he gives in my opinion a picture of considerably more comprehensive pasturing in this area than can be read out of the Lapp Commission's Report on pages 9-10, quoted earlier. And the statement that "for some time there has been diminution of the area in which the pasturing of reindeer has gone on" must be seen in the light of the assertion that the Sami "almost every year [had] pastured down to Tømra". The River Tømra constitutes the west boundary of the district, and the outlet is into the north-east end of Lake Selbu. The river lies almost as far west as the westernmost parts of the built-up section in the disputed area.

Further I refer to Mr Norbye's account of what the Chairman of Essand, Lars Nilsen Brandfjell had said in his statement to the police in 1933, and to the Sami's standpoint during the discussion about the district boundary.

Of other statements from the proceedings in the 1930s concerning the district boundary I quote the following from Lapp Inspector Bagaas' letter of 16 March 1936 to the County Governor of Sør-Trøndelag:

"Concerning the Sami's customary right it is my view that given that there have been reindeer on Roltdal State Common, then the reindeer have also pastured farther west at certain times. I base this assumption on the habits of the reindeer and the nature of the terrain. The west boundary of the common does not form any natural boundary."

And in a subsequent letter to the County Governor of 23 November 1936 the Lapp inspector wrote that "… the only workable proposal for boundaries is those that the Sami claim. These boundaries are natural boundaries and barriers for the reindeer". Since the Sami claimed that the district boundary must be maintained, it is to this that the Lapp inspector is referring.

The disagreement between the landowners and the Sami in the 1930s over the district boundary concerned in my opinion where the Sami had common of pasture. When in 1935 the landowners changed their standpoint from 1934 to claiming that the Sami did not have common of pasture at all on private land, they wanted a corresponding reduction of the reindeer pasturing district. The County Governor described this in his letter of 23 May 1935 to the Ministry of Agriculture, in which it says:

"… since the Sami claim that their right of pasturing follows the boundary of the responsible districts (right down to Lake Selbu), while the farmers firmly claim that the boundaries have been determined for those areas where reindeer pasturing has gone on from time immemorial."

When account is taken of the fact that the County Governor was also of the opinion that the district should "as far as possible" be limited to those areas in which the Sami had conducted "reindeer husbandry from time immemorial", and the Ministry of Agriculture confirmed the County Governor's view of the law, the County Governor's conclusion of the case, whereby new boundaries were not proposed, provides a strong indication that he shared the Sami's view of where pasturing had gone on.

Other information pulls in the same direction. In this connection I must mention that in particular the report from the Specialist Committee for the Agricultural, Sylvicultural and Unenclosed Land Industries, about which I spoke under Riast/Hylling, contains a map that includes the whole of the disputed area, with the exception of the westernmost parts down towards Lake Selbu, in the pasturing area.

As a particular objection against the claim that there can have been any pasturing worth mentioning west of the state-owned common, the landowners have made reference to the large number of summer farms and unenclosed haymaking fields in the area. And in a declaration for use before the Supreme Court, Bjørn Thoralf Aune, the leader of Selbu Unenclosed Land Council from 1966 to 2000, states that there are 200 summer farms registered in the disputed area and 50 in Roltdalen. I have further understood the landowners to mean that there are said to have been relatively more unenclosed haymaking fields in the area in dispute than on the state-owned common.

This objection cannot in my opinion be decisive: In the first place both P. Norbye and the Sami testified in the 1930s that there was comprehensive pasturing west of the common.

Furthermore there was an almost equal density of summer farms in Roltdalen, where the Sami have undisputed common of pasture.

In the light of this, my conclusion is that the Sami have had reindeer pasturing in the area in dispute for as good as the whole period since 1910. And if this period is seen in conjunction with the period prior to 1892, the Sami have in any case satisfied the standards that must be set for use from time immemorial.

The requirement for good faith

For pasturing in the 20th century the landowners have contended that this use cannot give rise to the establishment of any right since it was not exercised in conscious good faith.

In the consideration of this question it may be natural to start with the fact that the announcement in 1894 concerning the introduction of reindeer pasturing districts explicitly stated that this division did not make any change to the extent of common of pasture, and that it only applied "where they had travelled by ancient custom". But the announcement gave no information about the Lapp Commission's conclusions.

In the light of Lapp Inspector Herstad's report, it must be taken as established that he made at least a good number of the Sami aware of the announcement and of central statutory provisions. But I am not aware of any entry in the records to show that the Sami's attention was drawn to where the Commission believed that they had "by ancient custom" sought "sojourn and pasture". They would have had in that case to examine the report.

There is no documentary evidence that the report was sent to the Sami. Furthermore the report is somewhat difficult to understand with respect to where the Commission believed they had common of pasture. By way of introduction it gives a factual description for the individual municipal authority areas. And for Selbu it is only for Reinsfjellet that it is directly stated that the Sami did not have common of pasture, cf. page 10, second column, of the report. In the remaining areas the conclusion of the Commission's investigations must be read in conjunction with the subsequent treatment of use from time immemorial on page 42. The Sami reindeer herders with their limited use of written Norwegian cannot be expected to have been able to see these connections.

For those parts of Riast/Hylling that lie within the area in dispute, Lapp Inspector Herstad's passivity must have strengthened the Sami in their view. As has been mentioned,

every year Mr Herstad wrote relatively detailed annual reports on the activity. And in the report for 1903 he quotes a report from District Lapp Sheriff Svelmo in Selbu, in which it says:

"Since May last year the Lapp families Paal Johnsen and Nils Brandsfjeld have been sojourning with their reindeer herds in the Riast District and for the most part these have stayed together. At the present time both these families have their reindeer at Bukhammerfjeldet partly on Selbo and Tydalen's land, partly on Aalen's and Singsaas' land, on the latter's only insignificantly."

In the annual report there is no comment that the sojourning in Selbu was unlawful.

The same year domesticated reindeer caused damage to enclosed land belonging to three landowners in Flora. During the appraisement proceedings a settlement was reached, but there is no entry in the record that says anything about the landowners' having claimed that pasturing on private land in Flora was unlawful.

The same applies to damage that for that matter was caused on enclosed land in Selbu in the 20th century. As is apparent from Mr Norbye's speech at the meeting with the County Governor on 12 September 1934, the landowners had contented themselves with claiming compensation. If one ignores the discussion about the district boundary in the 1930s, not a single example has been invoked of the submission of a claim for eviction from the area in dispute or for the payment of rent for pasturing on unenclosed land. And in contrast to what was the case in Rt 1981 1215, the Trollheimen case, not a single example has been given of any prosecution of the Sami for alleged unlawful pasturing in the area in dispute.

On the other hand a case from 1933 shows that there was a claim for eviction in connection with pasturing *outside* the district. In a letter to the Lapp inspector, the district Lapp sheriff speaks of a case in which reindeer from Riast/Hylling had come out of the district west of Bringen. After having received notification, he had immediately instructed the Chairman of Riast/Hylling to remove the reindeer. And in the covering letter to the County Governor, Lapp Inspector Bagaas wrote that the Sami were to be given "a serious warning so that they would in future keep their animals away from the tract". From the 1960s there is a corresponding example from the area north of Lake Selbu.

The overall impression is in other words that the Sami, the landowners and the authorities all drew a distinction between pasturing inside and outside the district. The landowners' standpoint in the 1930s that the Sami did not have common of pasture west of

the common may perhaps have led to the Sami's inevitably being in doubt for a period. But when the case ended with the County Governor's proposing that the boundary be maintained, and since subsequently for a period of approximately 50 years the Ministry of Agriculture also took the view that the right to exercise reindeer husbandry comprised the whole of the reindeer pasturing areas, it must be possible to take it as established that the Sami were in good faith for the whole period.

I must add that when, as in the present case, it is a matter of the acquisition of a right for an industry, it cannot be required that all the Sami within the industry – or a sector thereof – have been in conscious good faith. The same also applies incidentally in other connections where it is a question of the acquisition of a right for a major circle of persons, cf. Brækhus/Hærem: Norsk Tingsrett [Norwegian property law], page 612 and Falkanger: Tingsrett [property law], 5th edition page 319.

In the light of this the conclusion is that even if the Sami's use of the area up to 1892 should not be sufficient for the acquisition of common of pasture through use from time immemorial, they have in any case acquired such right when account is also taken of use in the 20th century.

Does the right of pasturing comprise the whole of the disputed area in Essand, or must a boundary be drawn?

The next question thus becomes whether the right of pasturing in Essand extends all the way to Lake Selbu, or whether another boundary must be drawn west of the state-owned common, but east of the district boundary.

In this connection I refer to what has already been claimed about the extent of the pasturing. Of statements to the Lapp Commission I place particular weight on the testimony from Mr Bull and Mr Kallar. The latter's statement, as has been mentioned, was supported by Ingebrigt Flønes senior. Further, during the discussion about the district boundary in the 1930s, both P. Norbye and the Sami described pasturing far to the west in the 20th century. And as has been mentioned, Mr Stinnerbom claimed that "from time immemorial … there were reindeer over the whole of the District of Essand at various times of the year". The Sami's attitude and statements during this discussion show – when they are seen in conjunction – that they claimed to have used, and still wished to use, the whole area for pasturing. For them a reduction of the district would have meant that they avoided the

subsidiary joint and several liability in areas that might be excepted. Since they nevertheless opposed a reduction, it is difficult to see that this could be due to other factors than the fact that they regarded the whole area as the pasturing grounds of the reindeer and something they wished to keep.

As I have previously argued, it must be taken as established that the reindeer, also at the time the does were milked, pastured in the main in the same areas as today. I refer to Mr Kallar's statement in which it says:

"In the spring it may have happened that reindeer have come right down [F.p: ind (into)] to the rural community around the main church, but this is of course exceptional. Here around the church I have not heard that the reindeer have done damage, but on the other hand in Øverbygden and Indbygden as well as in Floren. Øverbygden is the part of the parish that stretches from Rolset down to the Berge farms (just over a kilometre from the church). Indbygden is the farms that lie along the River Garberg, from where its outlet into the lake and up to the Alseth farm."

Both these stretches lie far down towards Lake Selbu. Mr Kallar himself lived in Øverbygda, roughly midway between Rolset and Berge. And Ingebrigt Flønæs senior, who had no comment to make on Mr Kallar's statement, testified himself that he had "heard that the reindeer have come during pasturing to different summer farm meadows east of Indbygden in Sælbo right to within a couple of kilometres of the rural community".

The mayor's reply to one of the questions the Commission posed pulls in the same direction. The question was: "Has the Lapps' pasturing caused great damage in the district and in particular where and how?" To this the mayor replied:

"Yes, very great damage to summer farm meadows, grazing land and haymaking fields in the summer and to haystacks in the winter in nearly all the tracts around the built-up part of the district."

It is difficult to interpret this in any other way than that the mayor by "built-up part of the district" was also referring to the built-up section east of Lake Selbu as well as in Øverbygda and Innbygda.

Further I must mention that the Chairman of the Commission, Mr Berg, when he was asked in 1894 to express his view on the district boundaries, stated, cf. Departements-Tidende 1894 page 535:

"Particularly in view of the fact that reindeer have more often roamed and must be expected to want to wander from the tracts lying to the east down to the River Nea and Lake Selbu and do damage there, I still find I should maintain the proposed district boundary … ."

The topography also suggests that the reindeer moved westwards. The terrain contains no natural obstacles, and the season is at its longest down towards Selbu. Furthermore, noisy agricultural equipment, to the extent that it might affect the reindeer's behaviour, is something that belongs to the last few decades.

I also make reference to Lapp Inspector Bagaas' assessments in the 1930s, with respect to which in his covering letter to the County Governor on 23 November 1936 he wrote that "the only workable proposal for boundaries is those that the Sami claim". Further I refer to the fact that three of the four expert lay judges in the District Court and in the High Court – two reindeer husbandry agronomists and a farmer – concluded after a visit of inspection that the right of pasturing extends all the way to Lake Selbu.

In the light of what has been said above, I find it established that reindeer have pastured all the way to Lake Selbu. But the pasturing in the westernmost areas has not been as intensive as farther east in the area in dispute.

This raises the question of whether the pasturing in the westernmost areas has been of a sufficient extent to constitute the basis for acquisition of right through use from time immemorial, or whether a boundary must be drawn in the disputed area in Essand. In this assessment one must in my opinion accept acquisition of right with a somewhat lower intensity of pasturing in the outer zone – the border zone – of those areas where pasturing is sufficiently intensive on its own to be able to provide grounds for acquisition of right through use from time immemorial. In the opposite case the Sami will, if they are to avoid rendering themselves guilty of unlawful pasturing with the consequences that has, be pushed back from the areas where they have traditionally pastured.

In my opinion one cannot therefore exclude the acquisition of right through use from time immemorial in this border zone on the grounds that the use therein has been below what is required for common of pasture if the border zone is considered in isolation. In the assessment of how far common of pasture stretches, account must be taken of topographic factors. Lake Selbu provides an effective barrier in reasonable proximity to areas in which pasturing has been sufficiently intensive to justify common of pasture. So in my opinion it

must be natural in the delimitation of the area for common of pasture to lay down that it stretches all the way to Lake Selbu.

The pasturing with which we have been concerned in Essand has its origin and greatest concentration some distance east of Lake Selbu. And since in the westernmost parts of the area in dispute it is a matter of pasturing which when considered in isolation perhaps would not have constituted a foundation for the acquisition of right through use from time immemorial, this raises the question of whether the right of pasturing in these parts of the disputed area has a different content than farther east.

In this respect I must point out that the landowners have brought this action exclusively with their contention that the Sami do not have common of pasture at all. They have not gone into whether the qualitative content may be different in the different parts of the areas in dispute. Nor have the parties prepared their case with a view to the Supreme Court's going further into this question. Therefore I take no standpoint on the matter.

However, I must emphasise that the more limited use of the westernmost areas for pasturing may have significance for the weighing and balancing of interest which in pursuance of section 15 of the Reindeer Husbandry Act shall be conducted between the landowners' and the Sami's use of the area. Since section 15 provides that the landowner must not exploit his property "in such manner that it is of significant detriment or inconvenience to the exercise of reindeer husbandry", the weighing and balancing of interest will often have to be in favour of the landowners in the westernmost parts of the area in dispute. And if the parties do not reach agreement, the Court of Land Reallocation will be able to weigh and balance their interests in the area, cf. third paragraph.

Further I wish to stress that the rights which in pursuance of sections 10 to 14 of the Reindeer Husbandry Act follow from the exercise of reindeer husbandry, apply "in so far" as nothing else "follows from particular legal circumstances", cf. section 9 of the Act. The travaux préparatoires do not appear to provide any guidance with respect to what the legislature meant by this limitation, cf. Proposition to the Odelsting, Ot.prp. nr. 9 (1976-1977) page 56. But I do not exclude the possibility that it may have significance for the westernmost parts of the area in dispute.

With the limitations that I have pointed out, I do not in the circumstances find grounds for making any exception for Flønesneset, which the landowners particularly emphasised in their closing argument.

Costs of the case

The appeal is not successful. This case has raised questions of principle, at times involving matters of doubt, of both a factual and judicial nature. In the light of this I have come to the conclusion that costs ought not to be ordered to be paid for the case before the Supreme Court, cf. the first paragraph of section 180 of the Civil Procedure Act. Nor should costs be imposed for the earlier instances.

I vote for this

judgment:

1. The judgment of the High Court is upheld.

2. Costs of the case before the Supreme Court are not to be paid.

Justice Rieber-Mohn: Under doubt I have come to the same conclusion as the first Justice to state his Opinion in the matter of the extent of the right of pasturing in the disputed area in Riast/Hylling Reindeer Pasturing District. In Essand Reindeer Pasturing District the pasturing boundary goes in my opinion, which also here is subject to doubt, somewhat farther west than the boundary of the common. I shall return in more detail to where in my opinion the boundary goes.

The general questions of law

I agree with the first Justice's understanding of the third sentence of the first paragraph of section 2 of the Reindeer Husbandry Act as a weak presumption rule. The provision turns the onus of proof and requires the landowners to prove that common of pasture does not exist on their land. It is sufficient for the landowners to show that it is more probable that such a right does not exist than that it does.

I am essentially in agreement with the first Justice in his general analysis of the conditions for the acquisition of right through use from time immemorial, including the adaptation of the conditions that must be undertaken out of consideration for the form of use

in Sami reindeer husbandry. The Lapp Commission was already aware that such an adaptation must take place. Thus it says on page 42 of the Commission's Report:

"The question of what within the meaning of the Act is ancient custom will in these circumstances certainly often be not so easy to answer, particularly with respect to the difficulty of keeping the factual circumstances under precise review. On account of the distinctive features of the nomadic way of life the use exercised by the Lapps also differs on such essential points from the use that one may in other circumstances demand to have been exercised as a condition for the recognition of a customary right, that the same requirements cannot be applied."

In my opinion there cannot be any particular doubt that the Commission applied more lenient standards to the intensity of use of an area for reindeer pasturing than those applying to the exercise of other use. And it is expressly apparent that the Commission was aware of and took into consideration the particular evidentiary difficulties that make themselves felt in nomadic reindeer husbandry. As far as I can see, the Lapp Commission does not state precisely, beyond what has been said here, what the adaptation consists in.

In my view, in the assessment of whether rights have been acquired through use from time immemorial, one must take account of what kind of exercise of use one is concerned with. Even though Sami reindeer husbandry has changed its form of use in the course of history, a matter to which I shall return, it has always been a distinctive feature of the activity that it is far more land-intensive and dependent on movement between pasturing areas than is the case when domestic animals are kept on unenclosed grazing land. This means that for reindeer husbandry the same intensity of pasturing cannot be required as otherwise for the acquisition of a right from time immemorial. A fundamental condition must nevertheless be that the area has been used by the Sami for pasturing as part of a recurrent pattern, even though the periods of absence from the area may be more or less lengthy, cf. also Rt 1997 1608 on page 1617. That reindeer on rare occasions – and independently of any such pattern – have been in an area, cannot in my view provide the basis for common of pasture. This must apply even after the adaptation of the standards for the acquisition of right through use from time immemorial. Nor in such cases will the landowners who might be of the opinion that common of pasture does not apply, have had cause to speak out about this. If a right should be acquired on such a foundation, it would be altogether difficult to draw any boundary to the right to pasture reindeer.

I wish to return to the question of whether the Commission had a correct understanding of the standard to be satisfied by the use that must have been exercised. I must point out straight away that the first Justice to deliver an Opinion, by referring in this connection to the "nature of the reindeer" and to the fact that "topography, food supply, weather and wind etc. determine its use of the area", does not in my opinion place sufficient weight on the fact that reindeer husbandry has changed in the course of the last 200 years. I shall later describe the changes in the way it is exercised – first and foremost an increase in the number of animals and poorer supervision of them – which particularly took place in the latter half of the 19th century, and which I believe must have significance for the assessment of evidence in the present case.

The first Justice has provided an account of the general rules of international law concerning the rights of indigenous peoples. I cannot see that the material before us constitutes a basis for supposing that in the present case these rules give the reindeer owners rights or impose on the landowners obligations, beyond what follows from the traditional rules concerning acquisition of right through use from time immemorial as I believe these must be adapted to the particular circumstances that manifest themselves within reindeer husbandry. It may be mentioned that the dispute in this case concerns areas in which reindeer husbandry has from time immemorial come up against the landowners' use of the unenclosed land, and in which a certain delimitation of the conflicting interests has of necessity had to take place. I must add that I cannot under any circumstances see that the obligations under international law that are in evidence here can have brought about a change in the domestic rules of law concerning use from time immemorial that causes a shift in the legal relationship between the private parties to this case. In this respect reference is made to the presuppositions that seem to be apparent from the travaux préparatoires of the amendment of section 2 of the Reindeer Husbandry Act in 1996, of which the first Justice has given a detailed account. Nor can I see that this question – for the issue with which this case is concerned – has come into a different position since the Human Rights Act of 1999. So it is not necessary for me to go more deeply into those questions that would otherwise have arisen concerning its relationship to Article 105 and Article 97 of the Constitution.

Further it is my view that the common of pasture that is acquired according to the rules concerning use from time immemorial, also confers other rights within the framework of the provisions of the Reindeer Husbandry Act, cf. in particular Chapter III of the Act. Thus it is a question of far more than common of pasture, and the expression 'right of reindeer

husbandry' is appropriate for the sum of rights and obligations that follow from the fact that common of pasture has been acquired through use from time immemorial. Even if one today should find it established that common of pasture was acquired prior to 1892, it will be the current Reindeer Husbandry Act that regulates the content of those rights and obligations the reindeer owners have.

The first Justice to state his Opinion draws attention to the fact that the landowners have brought this action exclusively with their contention that the Sami do not have common of pasture at all, and that they have not gone more closely into whether "the qualitative content [of common of pasture] may be different in the different parts of the areas in dispute". For my part I have difficulty in seeing that there is any basis for a view that the right of reindeer husbandry changes content according to where common of pasture is exercised. Such a principle will incidentally easily trigger disputes about the precise content of the right of reindeer husbandry in different parts of a pasturing area, and about the boundaries of the varying rights. Another matter is that the permanent residents or others may have acquired on a special legal foundation exclusive rights in unenclosed land that limit the right of reindeer husbandry, cf. the reservation in the first paragraph of section 9 "and in so far as it does not follow from particular legal circumstances", but such circumstances have not been invoked as applying in the present case.

In general about the questions of evidence – in particular on the Lapp Commission's Report

Beyond what is apparent in the way of nuances in the understanding of the standards to be satisfied by Sami reindeer husbandry with respect to use from time immemorial, it is first and foremost in the assessment of the evidence in the case, in general and in concrete terms, that I have a view that diverges from that of the first Justice to state his Opinion.

Before I go more closely into the concrete evidence, I find it necessary to make some general remarks – in the first place about the Lapp Commission. I refer to the first Justice's account of the appointment of the Commission, its composition, terms of reference, method of work and proposals. As far as I can see, the Commission performed a thorough and conscientious piece of work. Its proposals were based on conversations with Sami, with landowners and other local permanent residents with particular insight, with local politicians and with persons in positions of authority. Partly it was a matter of individual conversations,

and partly of meetings. In addition the Lapp Commission went on numerous inspections in the areas in question. The most important statements were entered in the records.

The Lapp Commission placed weight on talking to elderly and insightful persons. In this way it had access to material relating to experience dating back to the early 19th century. Some of the older witnesses also referred to what their parents and even grandparents had experienced with respect to the Sami's presence and the extent of reindeer pasturing in the individual districts.

The Lapp Commission submitted its report in 1892. The respondents' principal contention is that the reindeer owners had acquired common of pasture in the disputed areas prior to this date. For such a contention to be upheld, in whole or in part, the Commission's assessments and standpoints must be reviewed and set aside. As long as there are no recent scientific finds of Sami dwelling places and the like inside the disputed areas, one will have to resort to reviewing the Commission's assessment of its own evidence. The Commission worked with the material for a number of years, and its proximity to this body of evidence was very different from our own situation today. The conditions for interpreting and understanding the body of evidence correctly were significantly better in 1892 than they have been since, and the task has become all the more difficult with the passage of time. In addition comes the fact that the Lapp Commission based its proposals on the whole body of evidence, including inter alia material relating to experience from inspections and conversations, and not only the recorded statements that posterity must resort to building on. These factors have also been stressed when in earlier cases the Supreme Court has placed considerable weight on the Lapp Commission's assessments of questions of fact, as in the Korssjøfjell case in Rt 1988 1217 on page 1225 with further reference to the minority of the High Court on page 1240.

The respondents have claimed that the Lapp Commission had an outdated view of the Sami and the significance of their reindeer husbandry, and that the Sami's traditional culture has a very different level of recognition and esteem today, cf. inter alia developments in international law and the adoption of Article 110 a of the Constitution. I cannot however see that there is support for supposing that the view of reindeer husbandry at that time had any significance for the Commission's assessment of the concrete evidence.

There is on the other hand reason to stress that the Lapp Commission stated expressly and precisely that the final determination of the boundaries of common of pasture would be

the task of the courts, and that it had itself "only" submitted a "statement of opinion founded on the local investigations". In this there lies in my opinion an openness both in respect of evidence that might come to hand later, and with respect to the possibility that the evidence the Commission had assessed might provide the basis for other views.

In its assessments of evidence the Lapp Commission concentrated on where the Sami had by ancient custom "sought sojourn and pasture", cf. for example page 29 of its report. In the light of this the question has been raised – also by the first Justice to deliver his Opinion – whether the Commission had a correct understanding of the use requirement in the rules concerning use from time immemorial. The majority of the High Court in the present case put it as follows:

"The Lapp Commission seems however to have placed decisive weight on where the Sami have their dwelling places without to a sufficient degree having given consideration to which parts of the unenclosed land were in fact used for reindeer pasturing, or to the topographic factors."

I have difficulty in seeing that generally speaking there is any support for this criticism of the Lapp Commission. The very fact of the vast areas of unenclosed land that the Commission considered as "Lapp tracts" from time immemorial, and in which common of pasture for reindeer had been acquired, makes it rather inappropriate to say that it placed "decisive weight" on where the Sami had their places of sojourn. There are also numerous statements in the Report that show the Commission went in search of areas in which pasturing had in fact taken place, as an element in customary use. For this purpose the Sami's places of sojourn, shelters and turf huts were important circumstantial evidence of the starting points from which pasturing took place. An illustrative example is what the Commission says on page 9, with reference to another area than the one in dispute in the present case:

"In the main, however, pasturing has been conducted on that side of the county boundary on which the Lapps have had their place of sojourn."

In my opinion it is important to be aware that the places of sojourn as circumstantial evidence of reindeer pasturing areas are of great significance for the period up to the last part of the 19th century, when a gradual change began in the form of activity. This change is apparent from a number of sources.

An article by Anne Severinsen on "Reineiernes sedvanerett i reinbeitedistriktene Essand og Riasten" [The reindeer owners' customary right in the reindeer pasturing districts of

Essand and Riasten], produced in 2000 at the request of the respondents in the present case, describes on page 15 the development from milking to more extensive reindeer husbandry that started towards the end of the 19th century:

"This marked the transition to more extensive reindeer husbandry, with larger herds and not such domesticated reindeer as the dairy farming required. But guarding was still important to keep predators away, to prevent the reindeer herds from doing damage to summer farm meadows, haystacks and haymaking areas, and in addition to avoid any mixing with alien reindeer."

Anne Severinsen describes how this extensive reindeer husbandry was introduced in Sweden as early as the late 1860s, and states that this was the reason that large numbers of straying reindeer came over the national border and caused great problems for traditional reindeer husbandry on the Norwegian side. Incidentally these problems led to the Sami's temporarily moving away from Tydalen in the 1880s and not coming back permanently to Essand until 1910. The change in reindeer husbandry on the Norwegian side, the transition to meat production with higher numbers of reindeer, the use of larger areas of land and the concomitant conflicts have been dealt with in detail by Professor Kjell Haarstad in his book "Sørsamisk historie" [South-Sami history], 1992, pages 219-293.

The Lapp Commission (page 31 of the Report) points to the problems of obtaining reliable information about the number of animals, and expresses its view in the following terms: "However, there is no doubt that particularly the number of reindeer has increased sharply in recent years."

I also find reason to cite what Anne Severinsen writes about the traditional intensive dairy farming that the Røros Sami, Paul Johnsen, conducted and which his daughter Julie Axman described (loc. cit. page 16):

"Julie Axman's father was thus one of the largest reindeer owners in the Røros area, but at that time most Sami had no more than from 20-30 to 250 animals each. In the whole of the county of South Trondhjem there were in 1890 altogether 5380 reindeer distributed among 104 owners. … It therefore becomes quite obvious that these Sami did not engage in any form of extensive reindeer husbandry with large herds and little watching."

In spite of relatively small herds and continued guarding around 1890, as Anne Severinsen reports here, the Lapp Commission had before it a pretty solid body of documentary evidence that the supervision and domestication of the animals had been

significantly better 30-60 years earlier, something that Anne Severinsen incidentally touches on in the previously quoted general description of the changes in the form of the activity in the 19th century. It is to this part of the changes in the form of the activity, the increased number of animals and the poor guarding, I particularly ascribe significance. This development seems to have started before the change from dairy farming to meat production, but was probably reinforced after the change.

There are a number of clear statements from central witnesses before the Commission that the guarding of the animals had become poorer in the tracts that this case concerns. I mention in particular Ole Johnsen Østby, aged 73 in 1890, who refers to his childhood in the following terms: "But in those days the Lapps kept their reindeer under strict guard, so the latter did not show themselves down in the rural community." Lars Johnsen Østby, aged 74, was in most essentials able to concur with the statement made by Ole Johnsen Østby. Other witnesses made statements along the same lines, for example Erik Næsvold, aged 76, and Lars Løvøen, aged 51. Mr Næsvold pointed to the particular problems that came with the fact that the Sami in recent years had begun to keep animals for permanent residents, and that particularly this was the cause of "inconvenience and discontent – beside the fact that the Lapps themselves have changed their way of life and no longer guard or domesticate their animals as before". Erik Næsvold thus describes the change in the form of activity as an independent factor in the negative development. The same is true of Lars Løvøen, who mentions the same problems with the Sami's taking over permanent residents' reindeer, and he adds: "When in addition there comes the fact that the Lapps' guarding has altogether become more deficient and their supervision changed …." The Lapp Commission's own view of the "guarding" comes out in several places in the Report. On page 57, where the complaints from the farmers are described, the Commission states: "And it may well be that the complaints are now so much stronger precisely because that type of damage in earlier days, when the Lapps guarded their reindeer better, was as good as unknown."

I should add that – under a form of organisation with guarding and herding – it was not only the dairy does that were herded; the attempt had to be made to keep all the animals under control, even though this could at times give rise to difficulties. I refer to the fact that the purpose of herding, as mentioned by Anne Severinsen, was to protect the reindeer against predators and the farmers' enclosed land etc. against unlawful pasturing, and to keep the herds away from loose reindeer, which also indicates keeping watch over all categories of animal. A more intensive form of reindeer husbandry of this kind did not of course prevent the Sami

from making use of large areas in the course of the pasturing season. To a considerable extent the reindeer owners had to take account of the reindeer's nature and habits. But because it was also an important aim to keep the herds under the best possible control, it was essential to change places of sojourn more frequently.

There is no reason to doubt that the Lapp Commission had full insight into these matters. My view is that the gradual change in the form of activity, with the transition to more extensive reindeer husbandry and a greater number of more poorly supervised animals as the second half of the 19th century progressed, is an important key to understanding the Lapp Commission's assessment of the evidence for customary pasturing in the areas in dispute in the present case.

In the assessment of the extent of the common of pasture it is also of significance that the areas in dispute are a part of the farmers' immediately adjacent areas, in which from time immemorial there has been agricultural activity, and to a greater degree the closer one gets to Lake Selbu and the rural community. In earlier times summer farms, unenclosed haymaking fields and haystacks were scattered over large parts of the area. This applies to a particular degree to Essand, in which there is information that in the disputed area there are approximately 200 old summer farms. A not insignificant fact is that the unenclosed land had relatively speaking greater importance in earlier times as a pasturing area for the farmers' domestic animals than it has had for the last 50-60 years. Prior to that time the conduct of summer farms was important in the keeping of domestic animals, and had increased significance going backwards into the 19th century. Fewer and smaller areas of land were cultivated, and the pasturing on enclosed land near the rural community was not so comprehensive. It has further been stated that one when comes below roughly 400 metres above sea level, the most productive agricultural land in the disputed areas is to be found. Lake Selbu lies roughly 160 metres above sea level. Coniferous forest is predominant in the unenclosed stretches of land in the lower-lying parts.

Before going into the more concrete assessment of evidence, I wish to mention that I am in agreement with the first Justice to state his Opinion that one is faced with particular problems of method in the assessment of whether Sami reindeer husbandry has been conducted in a mountain area, and that one must be cautious about concluding from the lack of traces that there was not reindeer husbandry there in earlier times. Decisive weight cannot

therefore be placed on the fact that there are no registered Sami cultural relics within the areas in dispute.

So I now turn to taking a closer look at the material the Lapp Commission had as a foundation in its assessment of whether the Sami reindeer herders had used the areas in dispute from time immemorial, and to seeing whether this use can provide grounds for acquisition of common of pasture prior to 1892. The respondents claim that such acquisition came about in both the areas in dispute, while the appellants, in particular with reference to the Lapp Commission, believe that they have shown on the balance of probability that common of pasture was not acquired in any part of the areas in dispute.

For both the disputed areas information is scant up to about 1855-1860, when the Sami Niels Bull and his father together with some other Sami arrived in the Tydal area with their reindeer. The lack of information is nevertheless most marked in the case of Essand. The paucity of information is assumed to be related inter alia to the fact that reindeer husbandry in this area – according to what the parties to the present case seem to agree on – was to some extent abandoned from about 1810 to about 1860. If we go back to the 18th century, there is naturally enough an even greater paucity of information, even though we know that there were Sami in both Tydal and the Selbu area.

In my opinion the Lapp Commission must be understood to mean that the most essential part of the basis for the Sami's acquisition of common of pasture from time immemorial was established prior to the period 1810-1860, and that this acquisition rested on the fact that Tydal and Roltdal state common were considered as "ancient Lapp tracts", cf. what the first Justice to express his Opinion states on this point. The reindeer husbandry that took place in the latter half of the 19th century must thus have appeared to the Commission as a manifestation of a right that had essentially been acquired far earlier. For the first half of the 19th century too there is, however, information that from time to time there were Sami with reindeer in the mountain areas in Selbu and Tydal. This is what the central witnesses Erik Næsvold and Lars Løvøen stated. Mr Næsvold put it this way: "As long as I can remember there has been pasturing of reindeer on all the mountains in Tydalen in the summer." Mr Løvøen said the same on the basis of what his late father and old people had related. But there is no information about pasturing disputes between the Sami and the permanent residents from that period, in spite of the fact that we know that the farmers increased in number and extended their activity on the unenclosed land. For me this bears a message of the correctness

of the previously quoted statements from 1890 about better "guarding" and more domesticated and fewer reindeer in earlier times, and it strikes me that pasturing thus on the whole took place in mountain stretches and in those areas that lay immediately adjacent to these.

In the light of this I shall take a closer look at the two areas in dispute.

The area in dispute in Essand

When it comes to the question of whether the reindeer owners had acquired the right of reindeer husbandry through use from time immemorial in the disputed area in Essand prior to 1892, this case is my opinion characterised by lack of concrete information, in particular from the time before roughly 1860. Since the Lapp Commission concluded that the area with common of pasture covered the state-owned common, it probably built on the fact that, as has been mentioned, there is great deal of support for saying that this area was "ancient Lapp tracts". The first Justice to state his Opinion seems to justify right-establishing use in the disputed area before 1850 in a similar manner. As far as I can understand, it must have been difficult enough for the Lapp Commission to delimit the area with common of pasture with reference to the fact that it appears to have been ancient Sami territory. But it strikes me as being even more difficult today – a good hundred years later – to draw the boundary considerably farther west on the basis of general facts such as that there have been Sami in Selbu and the Tydal area for several hundred years, that there have been Sami who had reindeer in all the mountain stretches in the areas as long as elderly witnesses in 1890 could rememeber, or that there are some Sami place names within the disputed area, which from time immemorial have also had Norwegian names. And the difficulties undoubtedly become greater the farther away from the central mountain stretches one gets.

As has been mentioned, there are no registered Sami cultural relics within the disputed area. The first Justice has referred to some undocumented information from the 1980s concerning possible Sami cultural relics in the area, but no information has been provided about what sort of cultural relics are concerned, or in the event how old they are. This information is said to have come to light in connection with plans for the development of a watercourse and originates from a handwritten memorandum that does not name the ethnologists and archaeologists who inspected the area. I cannot place any weight on this memorandum from an inspection, written by Hartvig Birkely, whose professional background and affiliation have not been specified in the present case. Incidentally the final report from

the Overall Plan for Watercourses contains no concrete information about the Sami cultural relics that Mr Birkely believed to have been discovered.

The one informant in Mr Birkely's handwritten memorandum who is named by the first Justice, Johan Krogstad, aged 89 in 1985, had been a merchant in Selbu and stated that he took a personal interest in Sami history. He spoke of two places with Sami dwellings in the disputed area, in Kråssådalen and by Lake Strå. But this record of a conversation from an inspection in the 1980s must be held up against the many locally acquainted and elderly people who in 1889 and 1890 testified before the Lapp Commission as to where the ancient hut sites were. None of these mentioned hut sites outside the common – nor did the Sami Niels Bull. I add that the two alleged places of sojourn in the disputed area lay in the event within that part of the area where I also find that common of pasture has been acquired from time immemorial.

Central to the respondents' submission of evidence of reindeer pasturing has been the statement Niels Bull made to the Lapp Commission in 1889. Mr Bull stated that he and his father had turf huts in several places within Roltdal State Common, including Høystakken, which lies on the west boundary of the common and thus immediately alongside the area in dispute. He then said: "The extreme points of the stretch on which pasturing took place from these turf hut places might be from west to east 30 to 40 kilometres and from north to south roughly 20 kilometres." This statement must be very imprecise. From the west boundary of the common and to Lake Selbu it is approximately 15 kilometres. I find I cannot ascribe any significant weight to this statement, even though it is an indication that Mr Bull and his father let their animals pasture westwards into the disputed area.

There is also evidence, and this has furthermore the probability in its favour, of there having from time to time been reindeer pasturing west of the boundary of the common. It is the frequency, duration and extent of such pasturing that will be of essential significance for the acquisition of right. What the first Justice builds on here is first and foremost the statements made by Thomas P. Kallar and Ingebrigt Flønæs senior, quoted from a meeting with the Lapp Commission in 1890. Mr Kallar reports pasturing much farther west than the boundary of the common, and adds that in the spring "it may have happened that reindeer have come right down into the rural community around the main church, but this is of course exceptional". Further Mr Kallar mentions that he has heard that reindeer have caused damage in "Øverbygden and Indbygden". He also says: "The complaints about damage caused by the

pasturing of the reindeer on the summer farm meadows has been general and has not become less in recent years." He goes on: "In particular this applies to summer farms lying on the common or in the vicinity of the same, since the damage to the home farm meadows has been less", and Ingebrigt Flønæs stated at the said meeting that he had "heard that the reindeer have come during pasturing to different summer farm meadows east of Indbygden in Sælbo right to within a couple of kilometres of the rural community".

However, what makes these statements problematic in relation to the question of acquisition of right through use from time immemorial prior to 1892 is in the first place that there is a lack of information about when such pasturing far west in the disputed area is in the event supposed to have taken place. There is much to suggest that the description relates to individual episodes after 1855-1860, when among others Niels Bull and his father arrived in the area of the common and reindeer husbandry increased, cf. the Lapp Commission page 10. On the basis of what I have maintained earlier, there is reason to suppose that there were increasing numbers of reindeer and less control of the herds as the latter half of the 19th century progressed. In my opinion it is therefore probable that the instances of pasturing down towards the rural community in Selbu occurred in this period. Secondly there is reason to understand the information about such pasturing, which first and foremost Thomas P. Kallar provides, to mean that pasturing was decreasing rapidly the farther west of the boundary of the common one came, and that it only exceptionally occurred down by the built-up area.

In my opinion the source material before us thus reveals only random pasturing on rare occasions in the forest and lowland tracts down towards Lake Selbu after about 1860. Prior to this date we have no sources at all relating to such pasturing. Thus even the duration requirement for the exercise of use that would establish a legal right can hardly be said to have been satisfied in 1892. On the other hand, as has been mentioned, the use of the private stretches of unenclosed land for reindeer pasturing will undoubtedly have been more frequent and more general eastwards towards the boundary of the common and most intense in the areas near this boundary. This is apparent from the source material from which I have already quoted, and has in addition good grounds in its favour. Given that the Lapp Commission found reindeer husbandry had been conducted on the common in accordance with ancient customary use at the very least throughout the 19th century, it does appear to me to be also probable that the west boundary of the common was not decisive for where the Sami pastured their animals. I can mention here that Lapp Inspector Bagaas wrote as follows in 1936:

"Concerning the Sami's customary right it is my view that given that there have been reindeer on Roltdal State Common, then the reindeer have also pastured farther west at certain times. I base this assumption on the habits of the reindeer and the nature of the terrain. The west boundary of the common does not form any natural boundary."

And if one looks at the map, there can hardly be said to be a topographically founded boundary, at any rate if one keeps in mind the significance of the topography for reindeer husbandry. For a large part the boundary goes through mountain stretches that are a direct continuation of corresponding stretches of the common. In the light of this, there is a great deal to suggest that the right-establishing use of the common from time immemorial for the pasturing of reindeer that was acknowledged by the Lapp Commission, has so to speak made itself correspondingly applicable in those mountain stretches that lie west of the boundary of the common. And even if the use should have been somewhat less frequent on the west side of the boundary, this will not be any obstacle to the acquisition of right. Here it is a matter of a relatively vast area that on the whole lies from 600 metres to 800 metres above sea level.

There may be several reasons for which the Lapp Commission did not draw the boundary farther west. One of the reasons may have been that a condition for the acquisition of right from time immemorial other than use, the requirement for conscious good faith, was not satisfied. Thus it says in the Report on pages 9-10 that "the Lapps have so to speak regarded the Common as their territory and not considered themselves justified in extending their pasturing into the private stretches to the west". However, this statement occurs in a context in which the Commission is discussing where reindeer pasturing has taken place, and it does not go into detail on the question of good faith.

I cannot see that the Commission gives any source for its statement about the Sami's own view of their pasturing boundary. An idea which immediately seems to suggest itself is that the Commission drew this conclusion from the fact that the Sami had huts exclusively on the state-owned common, at times near the west boundary, and not outside. Without any support in written material it does seem, at any rate today, less natural to draw such a conclusion. Niels Bull said in his statement to the Commission, which I quoted earlier, that he let his reindeer pasture far from the turf hut sites on the common, also in a westerly direction from these. This statement is at the very least an indication that pasturing extended into the area in dispute, and that such pasturing by Mr Bull and the other Sami was not considered unlawful in itself. Against this background, the Lapp Commission's statement about the Sami

view of the extent of common of pasture westwards appears as an expression of opinion that I cannot share.

The landowners have contended that the extensive use of the disputed area for agricultural purposes has been an obstacle to the acquisition of common of pasture from time immemorial. However, this view has particular validity in the western part of the area in dispute, in which from time immemorial the agricultural activities have been most intense. In Roltdalen – within the common – agriculture in the form of the operation of summer farms has been taking place for several hundred years and on a considerable scale, and here it has not been an obstacle to the acquisition of common of pasture. In my opinion the situation is roughly the same in the higher-lying areas west of the common which topographically speaking naturally belong to this.

Having assessed the total body of evidence, I have – under considerable doubt – come to the conclusion that the best grounds indicate that the Sami who have used the common for pasturing from time immemorial, have in much the same way used the nearby private mountain stretches which adjoin the common without any topographical obstacles. My doubt relates in particular to the absence of concrete information about such pasturing prior to about 1860.

If follows from the same body of evidence that common of pasture cannot have been acquired before 1892 in the lower-lying and western parts of the disputed area. For these areas there is no concrete information about reindeer pasturing prior to roughly 1860. Nor was pasturing down towards the rural community a probable and natural consequence of the fact that the common was considered by the Lapp Commission as a “Lapp tract” from time immemorial. I refer to what I have previously said about this.

In the light of what I have maintained so far, the necessity arises of drawing a limit to the common of pasture. I must mention that the parties to the case have not wished to contribute to procuring a basis for the determination of such a limit. No secondary claim has been submitted. Since as a result of our deliberations I know that I am in the minority, I shall content myself with indicating the boundary without determining it in detail. As I see the use of land for pasturing, it is natural for me to build on the pasturing boundary that Lapp Inspector Bagaas put forward in his letter of 16 March 1936 to the County Governor of Sør-Trøndelag, in a phase of the dispute that arose between landowners and reindeer owners at that time, and to which I shall return. The line of the boundary he sketched seems to refer to a

map that has not been put before the Supreme Court today, and it goes as follows: "… it does strike me that a line Rolset – Åtollen – K in Kråsjåfjell – B in Brentorp – Stråsjøen – Stentjern would be the fairest thing – account being taken of both parties". But the Lapp Inspector's boundary line was hardly determined solely by "fairness". His proposal was made as a direct continuation of the earlier quotation from the same letter concerning inter alia the topography of the area and the "habits of the reindeer".

Also within that part of the area in dispute that will become a reindeer pasturing area in accordance with the boundary I have indicated, down towards the Nea there will be agricultural areas and buildings. However, I cannot see that a reasonable and practical rounding off of the boundaries will be able to take place without such areas to some extent being covered by common of pasture. Should conflicts arise here between agriculture and reindeer husbandry, they must be resolved in accordance with the normal rules of law, cf. section 15 of the Reindeer Husbandry Act.

The first Justice to deliver his Opinion has concluded that common of pasture in the disputed area has been acquired through use from time immemorial also west of the boundary I have indicated, at any rate if the exercise of use after about 1860 is added to the use that is alleged to have taken place throughout the 20th century. This is a view with which I have difficulty in concurring. As has been mentioned, even the exercise of use in the second half of the 19th century took place on the whole in the tracts approaching the west boundary of the common. Even if reindeer husbandry on the common was practically an annual event in this period, and the number of reindeer increased and the guarding gradually deteriorated, it is according to the available information – which I have previously cited – only seldom and by way of exception that reindeer seem to have pastured right down towards the built-up area of the rural community. I must also mention that it appears to have been only a couple of landowners who mentioned this to the Lapp Commission. No Sami confirmed this, if I discount the previously quoted, very imprecise statement from Niels Bull. The first Justice to state his Opinion quotes what the Sami Lars Stinnerbom wrote in 1936 – during the dispute with the landowners – about there being from time immemorial "reindeer over the whole of the District of Essand at various times of the year". But in my opinion this statement is not based on anything but quotations from the Lapp Commission's Report on pages 9-10, which again seem to have built on the well known statements from Thomas P. Kallar and Ingebrigt Flønæs senior, which I dealt with earlier. Thus Lars Stinnerbom does not bring to this case new information about reindeer pasturing in earlier times. Altogether I have difficulty in

seeing that the pasturing of reindeer that is alleged to have exceptionally occurred in the western and lower-lying part of the disputed area prior to 1892 had the nature of an exercise of use that may constitute the basis for acquisition of right in accordance with the rules concerning use from time immemorial, even when an attempt is made to adapt these rules as reasonably as possible to the distinctive nature of reindeer husbandry.

Nor in my opinion is there subsequent to 1892 any basis in this case for acknowledging acquisition of the right of reindeer husbandry in the west of the disputed area. I mention first that in the years from about 1884 to roughly 1910 there were only sporadic attempts at reindeer husbandry in Essand. Between 1910 and the 1930s there is no information about reindeer husbandry in the areas in dispute other than what is to be found in statements from the parties in the conflict that arose in the mid 1930s between the landowners and local politicians in Selbu on the one side and representatives of reindeer husbandry on the other side over the boundaries for common of pasture for reindeer. A letter that a number of Sami from Riast and Essand wrote to the Ministry of Agriculture in April 1920 is not without interest. In their letter the reindeer owners complain about the fact that they will "despite every possible application of guarding cause damage to the permanent residents' interests – such as summer farm meadows and haymaking land". The purpose of the letter was that they should be relieved of paying compensatory damages in those places in which the causing of damage was a considerable problem. The reindeer owners point out that "the high mountain tracts in these districts" are cut by small valleys "in which some farmers in the adjacent rural communities have summer farm meadows and mountain haymaking grounds". Even this wording in itself suggests that the problems occasioned by unlawful pasturing are greatest inside the mountain valleys, not in the border zones down towards the lower-lying areas where the areas of enclosed land are most numerous and largest. The reindeer owners then put forward a proposal for where in Essand they ought to be relieved of the obligation to pay compensation: "Part of the valley of the River Lødøljas … etc." It is a question of a valley in Essand far from the disputed area in the present case.

When it comes to the statements from both sides during the dispute in the 1930s, I place less weight on what is said there. At that time there was quite an intense tug-of-war over the boundary of the area with common of pasture, and what is written must in my opinion be understood against that background. The municipal authorities were concerned to have the west boundary of the district moved to the boundary of the common, and pointed out in that connection that the Sami had at times let their animals go into the private stretches causing

damage to summer farm meadows, haystacks etc. The Sami for their part were interested in establishing that reindeer pasturing in the whole district was based on very old customary use. What I find striking in these statements by the parties is that only to a very small degree do they contain information about reindeer's having pastured west of the boundary that I have drawn. The essential, however, is that in this relatively acrimonious conflict there is not a single piece of information that reindeer pasturing occurred down towards the built-up area in Selbu, as had happened by way of exception prior to 1892 according to the Lapp Commission – probably in Niels Bull's time.

Nor is there any information worth mentioning about reindeer pasturing in the lower-lying and western parts of the disputed area from the 1930s and up to the 1980s. Thus I cannot see that throughout the 20th century there was use of this part of the area in dispute that can constitute a basis for any acquisition of right. For use by the Supreme Court the parties and representatives of the parties have testified through the taking of evidence or in written declarations with respect to the use of the western parts of the area in dispute. I do not find reason to place weight on these statements, which were made for the occasion of this case and are at times very contradictory.

In general terms I can agree with the first Justice to state his Opinion that – at any rate for reindeer husbandry – one ought not to rule out the acquisition of right through use from time immemorial in the border zones of the traditional and more central areas in which pasturing has been "sufficiently intensive on its own to be able to provide grounds for acquisition of right through use from time immemorial". Here I also refer to the decision of the Supreme Court in the Korssjøfjell case, cf. Rt 1988 1217 on page 1225. I am however of the opinion that this consideration has been fully safeguarded through the west boundary of the common of pasture that I have drawn in the present case. West of this one comes rapidly down into areas with far more home farm meadows and gradually to cultivated land and dwelling houses, at times densely built-up areas. I must remind the Court that down in Selbu there have been buildings and farms with enclosed land for many hundred years, and that in this area we are at times well below 200 metres above sea level and thus far below the coniferous timberline. In the west of the disputed area one is in my view well outside what can reasonably be called a border zone for reindeer pasturing.

The area in dispute in Riast/Hylling

When it comes to the disputed area in Riast/Hylling, there is some information that may bear witness to use from time immemorial. Like the first Justice to state his Opinion, I refer here to Gerhard Schøning's travel description from 1773 concerning Sami who were sojourning "in particular at Bukhammeren", a mountainous area that for a considerable stretch extends into the area in dispute. I also refer to Erik Næsvold's statement that the hut site by Lake Usme lay in an old hut place. Lake Usme lies by the eastern boundary of the area in dispute. He himself recalled that Sami – known as the Holm team – had huts here far back in time, and added: "It is a matter of course that the reindeer have pastured considerably farther westwards into Sælbo, without my making so bold as to indicate a specific boundary; probably they will have wandered as far as there are mountains." I also refer to the first Justice's quotation of Lars Løvøen's statement about reindeer pasturing in the same area. Concerning the use of the area in dispute that took place particularly towards the end of the 19th century, I refer to page 10 of the Lapp Commission's Report. There it says that pasturing "at times" took place even as far as "Mount Bringen". This shows that the animals pastured right across the disputed area, at any rate in the southern part. But as the first Justice mentions, it is difficult to understand that the Commission does not place greater weight on the information that provides evidence of there having been pasturing in the disputed area going back in time in the 19th century.

The information that we have from earlier times, the first half of the 19th century and from the 18th century, must in my opinion be accorded significance. It is possible that the Lapp Commission did not find this information solid enough. It is however difficult to imagine that the ancient place of sojourn by Lake Usme did not occasion pasturing westwards and into the area in dispute. This cannot only have happened – as the Commission says – "in recent years and without any watching" (page 10). Here there is no topographic boundary in the west, and it is not easy to imagine that the parish boundary in earlier times was regarded by the Sami as a limit to the right of reindeer pasturing westwards in the disputed area. There is a great deal to indicate that the Lapp Commission placed too much weight on this boundary.

It is true that there is no concrete information about how often the hut site by Lake Usme was in use in earlier times, so nor is there any about the continuity and intensity of the appurtenant reindeer husbandry. I nevertheless find, albeit under doubt, that the respondents have to a sufficient degree shown that on the balance of probability common of pasture was acquired in the disputed area prior to 1892. My doubt relates first and foremost to the weight

that ought to be ascribed to the Lapp Commission's assessment of the evidence. I have also – like the minority of the High Court – weighed and balanced whether there is any foundation for dividing the area in dispute. In particular it may be doubtful whether common of pasture was acquired from time immemorial right down to the River Nea and the rural community of Flora. The reason that I have come to the conclusion that there are not sufficient grounds for division is that I have placed weight on the fact that in this north-westerly part of Riast/Hylling it is a very short distance from the mountain stretches and the ancient hut site by Lake Usme and down to the lower-lying areas towards the Nea, and that in the 18th and 19th centuries there was much less cultivated land in the area than there is today. I also refer to my conclusion as far as Essand is concerned, where I found that out of consideration for practical rounding off, the boundary for common of pasture could be drawn to the Nea at Rolset, which lies somewhat west of Flora. On the basis of corresponding considerations and an overall assessment of the evidence, I have come to the conclusion that no boundary for the right of pasturing reindeer ought to be drawn within the disputed area. If there should arise pasturing conflicts between farmers and reindeer owners in the Flora district, they must be resolved – as in Essand – within the framework of section 15 of the Reindeer Husbandry Act.

In the light of this I have reached the same conclusion as the first Justice to state his Opinion in the question of acquisition of common of pasture in Riast/Hylling.

On the matter of costs I concur with the first Justice.

Justice Gjølstad: I am essentially and in my conclusion in agreement with the second Justice to state his Opinion, Justice Rieber-Mohn.

Justices Lund, Gussgard, Tjomsland and Coward: Likewise.

Justice Aasland: I am essentially and in my conclusion in agreement with the first Justice to state his Opinion, Justice Matningsdal.

Justices Dolva, Stang Lund, Oftedal Broch, Flock, Bruzelius, Skoghøy and Chief Justice Smith: Likewise.

Following the casting of votes the Supreme Court pronounced judgment in conformity with the conclusion reached by the first Justice to state his Opinion.