Judgment of 5 October 2001 Serial No. 5B/2001, No. 340/1999:
Landowners and right-holders in Manndalen, under cadastral Nos. 29 – 35
in the Municipal Area of Kåfjord: 1. Erik Andersen (et al. a total of 146 parties)
(Advocate Christian B. Hjort – trial appearance) versus
The Norwegian State represented by the Ministry of Agriculture (Advocate Steinar Mageli).

Justice Matningsdal: This case concerns the question of whether the State owns a piece of unenclosed land with an area of 116 km^2 at the upper end of Manndalen in the Municipal Authority Area of Kåfjord in the county of Troms, and it raises inter alia questions concerning the conditions for the acquisition of the right of ownership through use from time immemorial.

In 1666 King Frederick III sold the crown estate in among other places the Administrative District of Tromsø to Joachim Irgens. In 1682 the properties were taken over by Baron de Petersen from Holland. In 1751 his heirs transferred the estate to Johan Hvid. A dispute arose between Hvid and the King as to the extent of Hvid's rights based on the sale in 1666 – inter alia as to whether the right of ownership to the common lands in the area had been transferred. The dispute was resolved in 1761 by the King's issuing a deed to Hvid for the common lands in the Administrative District of Tromsø for the sum of 200 rixdollars.

Three years later, in 1764, Hvid sold the estate to Johan Hysing. In 1783 it was divided into three parts. The Skjervøy Estate, which lay in the northernmost part of Troms, constituted one of the parts. It included inter alia properties in the present Municipal Area of Kåfjord. The Skjervøy Estate was taken over by Ahlert Hysing, who transferred it to his son, Johan Hysing Jr. After the death of Johan Hysing Jr in 1787, the estate was managed by the widow, Ovida Fredrikke, née Kildahl. She married Thomas Andreas Lyng, who died in 1817.

Ovida Lyng died in 1848, and at the distribution of her estate the Society for the Abolition of Tenant Farming in Skjervø, later called the Society, purchased the whole estate with the exception of the Hamnnes farm.

The Skjervøy Estate included inter alia Manndalen, which goes in from the Kå Fjord on its south side for some kilometres before the fjord opens out into the Lyngen Fjord. Manndalen is a valley just over 20 km in length, relatively flat, and goes directly south. The dispute concerns the upper – southern – part of the valley with adjacent high-mountain areas. The lower – northern – boundary of the area in dispute, which goes approx. 15 km from the fjord, lies approx. 150 m above sea level.

The first known tenant farmers in Manndalen appear in the trial cadastre from 1723, where two tenant farmers are registered with equal cadastral debt. In the county accounts from 1738 the farms are described as "old Finnish red" – which may suggest that there were permanent residents in Manndalen a good while before 1723. Concerning the further development of the population it is mentioned that

in the light of the register of those liable to pay extra tax from 1763, the population was at that time estimated to be approx 60 persons. The subsequent development is as follows:

1801	*1865*	*1900*	*1970*	*1990*
130	270	476	1,069	858

The number of inhabitants in 1970 must be reduced to approx. 1000, since the figure for that year also includes a smaller, neighbouring valley, Skardalen. It is reported that the population in 1996 was approx. 800.

The population has in the main been Sami. With respect to which language was used in the home, the censuses from 1865, 1875 and 1900 show the following distribution:

	1865	*%*	*1875*	*%*	*1900*	*%*
Finnish	27	10.0	7	2.2	1	0.2
Norwegian	17	6.3	42	13.1	97	20.4
Sami	214	79.3	257	80.3	378	79.4
Mixed	12	4.4				
Sami/Norwegian			14	4.4		
Total	**270**		**320**		**476**	

The development of the population in the 20th century has not been documented in the same way. It is reported that the population mainly has its basis in those families and farms that had already been established by the previous turn of the century. However, there has been some movement into the area.

It is reported that the awareness of Sami affiliation among the population in Manndalen remained on a relatively high level throughout the 20th century. It is further reported that Kåfjord has over half of all the electors appearing in the register of electors for elections to the Sami Assembly for the constituency of Nord-Troms, which consists of six municipal authority areas. Within Kåfjord, Manndalen has most registrations. At the first elections in 1989 all three representatives of this constituency had ties to Manndalen. It has been further mentioned that a Sami centre has been developed in the valley, Aja, and that between 40 and 50 children had Sami at school in the school year 1995/1996.

After the purchase of the Skjervøy Estate in 1850, the Society soon began the sale of the individual rented properties to the tenant farmers. Today Manndalen has eight cadastral numbers. All had been established by 1850 and are: CNo. 29 Løkvold, CNo. 35 Sandmelen and CNo. 36 Samuelsberg, which lie close to the fjord and farthest north in the valley. On the east side, counting from the north, lie CNo. 30 Manndalen, CNo. 31 Storvolden and CNo. 32 Dalen. On the west side,

also counting from the north, one finds CNo. 34 Vatnet and CNo. 33 Kjerringdalen. The number of cadastral farms was stated to be 21 in 1848.

It is reported that in Manndalen the Society sold its first property in 1863, and at the turn of the century most of the properties had been sold.

Information in the population censuses, as well as figures from the Swedish/Norwegian Reindeer Pasturing Commission of 1913, whose terms of reference were to gather information about reindeer husbandry, shows the following development:

	Tenants	*Owner-occupiers*	*Cotters*	*Lodgers*
1865	18	9	9	7
1875	9	23	11	9
1900	6	42	21	13
1914		77	11	

There is an element of uncertainty in the case of the population census from 1900 since it does not operate with tenants as a category of their own. The number of tenants has been calculated by assuming that those in possession of cadastral farms without its being noted that they are owner-occupiers, are tenants.

The population censuses from 1865 and 1875 divided the category of cotters into two groups – cotters with and without land. There were cotters without land all over the valley – right from Samuelsberg to Kjerringdalen. This group too had animals. Lodgers also included persons who were designated as “inderster” [lodgers with their own household]. These people resided in the same dwelling as the landowner/tenant, and might often be sons/daughters who had recently married, but who for the time being had not established themselves in their own place. This category too had domestic animals to some extent.

The farms that were already established in 1850 stretched over half the length of the valley, reckoned from the Kå Fjord. The area uppermost in the valley, which also includes the area in dispute, was designated “Manndalen Common”. In 1879, following a petition from the Society, a division of the northern part of the undivided area was performed between CNo.32, Dalen and CNo. 33, Kjerringdalen in the north and the River Apmelasjohka in the south. This river flows out into the River Manndal from the east. The area that had been separated out stretches roughly four to five km up the valley.

In accordance with the petition the “common” was to be allotted to 19 holdings. Of these, thirteen had been sold, while five were unsold. One holding was the common property of the Society and an owner-occupier. At the time of the division, the area was distributed among 18 holdings, while one holding, serial number 125 under Samuelsberg, “waived its right to a share of the common”. Kjerringdalen did not take part in the division, so it was not allotted any property either.

The properties were allotted to the individual holdings free of charge. The record of the proceedings shows that

"Merchant Giæver [a member of the Board of the Society who attended on behalf of the Society] pointed out that the section of haymaking land lying within the now determined boundaries of the common, known as Vadja with adjacent forest, was not to be allotted to any of the aforementioned holdings, if the users had not previously had any right to the same, but until further notice remain the separate property of the Society."

Vadja is the only area within the territory that was divided, that was not allotted to any holding. The area was being rented to an occupier who was not a party to the division proceedings.

Concerning the legal situation after the division of the land, the record states by way of conclusion:

"According to the information received there is no cotter or inderster [lodger] here who has a lawful right to use any part of the common, with the exception of the said cotter Nils Olsen at Vandet, who must hereafter exercise his right of use solely on the strips of the common land allotted to the residents of Vandet. People still have a right to use the essential old roads to and through the common. Any person has a right to keep his hay on the common. The new properties come into effect immediately as far as foresters are concerned, and in the case of haymakers from the first day of this coming January, with the right for each with a view to the eviction of the possessor … ."

At that time there was a certain amount of conflict between sections of the permanent residents of Troms and those engaged in reindeer husbandry. An important ground seems to have been that the border with Finland was closed to reindeer in 1852 so that many Kautokeino Sami resorted to new areas for summer pasturing. This led to the appointment of a committee in 1866 to investigate these matters and to put forward proposals for a solution. One of the proposals was to buy up some properties for the reindeer husbandry industry. This proposal did not include Manndalen.

However, District Sheriff Hegge, who was the Society's accountant, took the question up in an internal letter of 24 August 1874 after an inspection in Manndalen. In his estimation the State ought to redeem the area south of the River Apmelasjohka and erect a fence right across the valley. And in a letter of 9 December 1879 from Mayor Wennberg of Lyngen, of which Kåfjord was then a part, to the County Governor of Troms, the mayor proposed that the State should purchase the area and erect the said fence. The County Governor submitted the proposal to the administrator of the division proceedings in 1879, President Falck, who in a letter of 26 January 1880 recommended it. Thereafter the County Governor asked in a letter of 19 April 1882 to District Sheriff Hegge whether Hegge could recommend purchase. In his reply dated 17 November 1882 Hegge recommended purchase for 300 kroner.

Proceedings for property division and apportionment of the cadastral debt were held on 2 July 1885. The upper part of the "common", Svartskogen [the Black Forest], which has an area of 116 km^2, was separated from serial number 131a Dalen, which in 1879 was allotted a minor parcel on the west

side of the River Manndal, which borders Svartskogen. The Society still owned this property, and the tenant was Jon Mortensen. At the apportionment of the cadastral debt the main holding kept 11/12 of the original debt, while the separated holding was apportioned 1/12. In other words, Svartskogen was deprived of serial number 131a even though at the division of property in 1879 it had not been allotted to this holding or any other holding.

District Sheriff Hegge, who on behalf of the Society attended the proceedings for property division and apportionment of the cadastral debt, thereafter wrote to the County Governor on 16 July 1885 concerning the conveyance. In his letter he returned to the question of the said fence and stated that the sum of 100 kroner, which had been granted, was "absolutely inadequate". Should the fence be erected in the lowermost part of Svartskogen, and be effective, it would cost at least 300 kroner. Nevertheless the purchase was made. A deed was issued on 23 and judicially registered on 24 October 1885, but the fence was never erected. Even though this did not happen, there are no reports of any significant conflict of use between the permanent residents and those engaged in reindeer husbandry.

Svartskogen was originally administered by the Forestry Administrator in Lyngen. In 1936 its administration was taken over by the Lapp Inspector in Troms. Since 1980 it has been administered by the Directorate of National Forests, now called Statskog.

After its purchase in 1885 all use of Svartskogen, with the exception of its use for reindeer husbandry, was exercised by the population of Manndalen. I shall return to the more precise details. The State's exercise of its right of ownership was very sporadic.

The first attempt on the part of the State to regulate the population's use of Svartskogen was made in December 1920, 35 years later when the Forestry Administrator in Lyngen announced that "In future it is most strictly forbidden to cultivate and harvest hay in the State's purchased property, the upper common of Manndalen". In the summer of 1921 fourteen residents entered into leasehold agreements for haymaking land in Svartskogen, but since neither these agreements nor the prohibition were respected by the valley's population, the Forestry Administrator reported several people to the police in the autumn of 1921 for "having unlawfully harvested hay on the property of the Lapp Administration". During the subsequent police investigation a number of people were questioned. They stated that they had a right to exercise the use for which they had been reported, and all of them denied guilt. In a letter of 15 March 1922 to the Forestry Administrator, the Chief of Police in Tromsø wrote inter alia as follows:

> "In view of the information to hand it will not in my opinion serve any purpose to institute criminal proceedings against those who have been reported, since these people have reasonably claimed rights of use on the common."

Even though in a letter of 16 August 1922 the Forestry Administrator still maintained that the population of Manndalen did not have rights of use in Svartskogen, the case was dropped.

In 1928 five new leasehold agreements for haymaking land were entered into. These were not respected either.

Five persons from Manndalen sought in 1935 to be allowed to purchase parts of Svartskogen with a view to the establishment of four new independent farms on previously uncultivated land. Their application was not successful. In this connection Lyngen Forestry Administration wrote inter alia as follows to the Forestry Inspectorate in Nordland:

"People in Mandalen claim that they have rights of use on the common in the same way as was the situation at the time they were tenant farmers. Among the population the conceptions of these matters are confused and unclear. Even the Chairman of Kaafjord Forestry Council was a couple of years ago under the impression that the common was under the management of a local board. … Thus it is no doubt hardly advisable for the Forestry Administration either to lease or sell arable land until the alleged right of use has been clarified through the bringing of an action in private law."

As has been stated, the Lapp Administration took over the management of Svartskogen in 1936. In a letter dated 20 December 1943 the Lapp Inspector wrote concerning Svartskogen to the Mayor of Kåfjord, Edvard A. Mandal, Samuelsberg. In the letter it says that in the course of an inspection the same month together with Mr Mandal, he had noted that Svartskogen was used "absolutely without any control, which in particular out of consideration for the forest cannot continue in this manner". Further he refers to the possibility that "perhaps most of those who use the property are under the belief that this is a common where they have rights of use and that they thus do not consider themselves to be bound to comply with any provisions as to their exploitation of this right". At the same time he states that this view is "erroneous", before going on:

"However the question of ownership or rights of use is not the most important issue at this moment. What must first and foremost be achieved is the putting of a stop to the absolutely senseless felling of young trees that is going on there.

In this connection I must request you to inform the residents concerned at the earliest possible moment that any felling that is hereafter undertaken in the forest concerned, without special permission having been obtained in advance from such person as is empowered to look after the forest, will be reported to the police and the person or persons concerned will without any doubt be liable on conviction to fines or imprisonment. With reference to the haymaking areas, the persons wishing to make use of these must also apply in advance to the relevant verderer to obtain permission for this."

The Mayor was asked to take charge of the inspection of the property and to summon the residents to a meeting concerning the use of Svartskogen.

In a letter dated 5 January 1944 the Mayor replied that he would until further notice take charge of this inspection. And immediately he had received a copy of the proceedings for the division of the

property and the apportionment of the cadastral debt, and a copy of the contract of purchase, he would summon

"all people in the rural community who have an interest in the forest with respect to protection and overfelling and, as you suggest, enter in the records the views of most of them concerning rights. In the meantime, under the provisions of the Protection of Forests Act all felling up there will be forbidden and this will be announced by display on notices."

Further he pointed out that the use of the haymaking areas was unfortunate because it was carried out too early in the year. This was also a matter he would be taking up.

The meeting with the residents was held on 5 February 1944, and in a letter of 12 February 1944 to the Lapp Inspector, the Mayor wrote:

"… The attendance was 72 men of whom all were over the age of 21 years.

An account of the matter was given and reference was made to those documents available re. the issue of ownership, but it turned out that the majority were of the opinion that they had a right to uncontrolled use of the common since they claimed to have rights of use.

As mediation was not successful, a vote was taken among those present in order to determine how many were against controlled use. Fifty-five out of 72 voted against control and wanted to have the old system with the same use as before. There were thus only 17 who were for humane and rational use of the common."

Immediately after the meeting the Mayor announced a prohibition against all felling in Svartskogen. On 26 July 1944 he further announced that those wishing to have haymaking areas there must apply to the appointed verderer. Also on this occasion some agreements for haymaking land were entered into, but the number is not known. On this occasion too the agreements were not respected by the rest of the population.

After the Second World War the Lapp Inspector himself announced in a notice dated 13 February 1946 that those who wanted haymaking land in Svartskogen must apply to the verderer to obtain "permission to cut timber where prescribed". The notice continued:

"At the same time attention is drawn to the fact that the provisions laid down in the aforementioned announcements have not been made for any other reason than to preserve the possibilities there are on the property. The unique re-growth that is now there, in particular of birch, will in the future, through protection until it becomes mature forest ready for felling, be the best source for the residents of Mandalen to procure for themselves timber, both for fuel and materials."

The residents did not comply with the announcement and on 15 March 1946 they were reported to the police for unlawful felling in pursuance of the Protection of Forests Act. In his report of 18 March the District Sheriff stated that after having received the application for prosecution, he travelled

to Svartskogen where he met a considerable number of people and "then read aloud section 40 of the Protection of Forests Act, whereupon they shouted that that was not Norwegian law".

Also on this occasion a considerable number of people were questioned, but those who had been reported to the police consistently maintained that they had the law on their side.

The Chief of Police and the Lapp Inspector chose in the first instance to attempt to reach a settlement out of court. The Lapp Inspector thus announced again that those who wished to engage in felling or haymaking in Svartskogen must enter into an agreement for this. Now too some agreements were entered into that were not respected by the rest. So there was a new report to the police and again people were questioned. In a comprehensive endorsement of 24 January 1948 from the Troms Police to the County Governor the case was dropped, with reference being made to the unclear issues of rights. It was further stated:

"We therefore take the liberty of requesting the appropriate person – if the rights of use are not found to be recognisable without further consideration – to seek to have the material legal relationships in this stretch of forest determined by a court of law."

No legal steps were taken to have this disagreement clarified.

After this the population of Manndalen continued their use of Svartskogen for a long time without the State's in any way attempting to regulate it. And since the beginning of the 1950s there has been a considerable amount of summer pasturing – in particular in the lower part of the area in dispute. I shall come back to the details, but can mention at once that when new summer farms were established at the beginning of the 1950s, permission was not sought for this. Only since 1980 has the State again tried to mark its right of ownership to the area in dispute. As an illustration of the State's passivity I may mention that when two people from Manndalen applied to the Lapp Inspector in Troms in December 1973 for permission to purchase arable land in Svartskogen, the Lapp Inspector wrote as follows to the Ministry of Agriculture in a letter of 10 December 1973:

"We are unable to find anything about the said property in our archives, and by the District Recorder's office we have been informed that the property belongs to the State, while the Forestry Administrator is reported to have claimed that the property is alleged to belong to the Lapp Administration.

We should very much like to know whether the Ministry perhaps has any information about the property. If so, we should like to be informed of this, and we shall then come back to the application with further details of the circumstances."

The reply from the Ministry of Agriculture in a letter dated 10 January 1974 indicates that nor did the Ministry have any particular knowledge of the property. Its letter said:

"From the accounts for the 1940s and 1950s that are filed in the Ministry of Agriculture it appears that the said property at any rate at that time belonged to the State in the person of the Lapp Administration. It has not been possible to find any documentation concerning the property.

On application to the Directorate of National Forests we have had it confirmed that the local forestry administration states that the property belongs to the State in the person of the Lapp Administration.

Accordingly it must be assumed that the matter of ownership is as mentioned."

Since the end of the 1970s, particularly after the forestry administration was taken over by Statskog in 1980, the population of Manndalen has to a certain degree related to the State. In 1978 Manndalen Youth and Sports Club and Manndalen Hunting and Fishing Association applied for permission to put up a log cabin in Svartskogen. However, after it had been built the same year, no lease was drawn up until 1986. Further it may be mentioned that in 1981 an agreement was entered into between the Municipal Authority of Kåfjord and the State in the person of Troms Forestry Administration concerning "the right to build and maintain a bridge over Abmelassætra, as well as an access road across Manndalen Common". I may also mention that the Jan Baalsrud Foundation applied in 1989 for permission to lay down and use a footpath for hikers through Svartskogen. Such an agreement was entered into the same year.

It may also be mentioned that in 1982 Manndalen Sheep and Goat-breeding Association sent to Troms Forestry Administration a draft of a lease for Svartskogen. Troms Forestry Administration was positive to this approach, but no lease was drawn up. There is no information concerning the reason for this. Finally it may be mentioned that in 1992 two residents applied to Statskog for the lease of land to erect buildings for a summer goat-pasturing farm in the area in dispute, approx. three km south of the boundary of the disputed area. In their application it was stated that they considered themselves to have common of pasture "on an equal footing with other farmers in Manndalen". However, Statskog stated that no such right existed. Until documentary evidence was produced, the condition for the leasehold agreement was inter alia that a pasturing rent was paid. The two applicants were originally ready to enter into such an agreement, but some months later they withdrew their application because they found "grounds for believing that Statskog had no right of ownership to 32/2".

By writ of summons of 16 June 1993 the State in the person of the Ministry of Agriculture instituted legal proceedings in order to have the property boundaries determined in the high-mountain area between state land and private land in the municipal authority areas of Kåfjord and Storfjord in the county of Troms. Further the State wished to have it determined whether there were rights of use, including rights of common, on the State's areas of land, and if so, who were the holders of such rights. Under section 2 of Act No. 51 of 7 June 1985 the case was brought before the Unenclosed Land Commission for Nordland and Troms. With reference to section 10 of the Act the case was divided so

that the part relating to the Municipal Area of Storfjord was decided by a judgment pronounced on 25 January 1995.

The decision for the part relating to Kåfjord, including the area in dispute in our case, was deferred in anticipation of further investigations – especially concerning rights of use in Svartskogen. As appointed experts, Professor Trond Thuen and Associate Professor Bjørn Bjerkli at the University of Tromsø produced a comprehensive report "On the Use of Svartskogen in Manndalen". Prior to this report Torbjørn Låg, a departmental archivist in the National Archives of Norway, produced an analytical report on the Kåfjord/Manndalen land.

In addition to the Manndalen land, the case also included the Kåfjord land innermost along the Kå Fjord. On 5 March 1999 the Unenclosed Land Commission pronounced judgment, which as far as the Manndalen land is concerned has the following conclusion:

"2. The boundary between the State's mountain stretches and the adjacent private properties is to be laid down in straight lines between the said points as follows:

…

The west side of Manndalen:

From the River Manndal midway off the River Apmelasjohka, in a roughly west-southwest direction to a deep ravine that can be seen against the sky from the River Manndal, and farther in the same direction to the municipal boundary with Storfjord, formerly Lyngen, where the boundary ends.

The east side of Manndalen:

Along the River Apmelasjohka to UTM 883013 (where the stream divides), farther in an easterly direction to elevation 1131, and farther in an east-southeast direction to trig. point e. 1176 (northeast of Ruostavarri), where the boundary meets the point of the limit of the west side of the Kåfjord valley.

The determined boundaries have been entered on the enclosed section of a topographical map in the M 711 Series, made up of map sheets 1633 I Manndalen and 1634 II Kåfjord, both published in 1961, and 1733 IV Raisduoddarhaldi, published in 1960. The UTM grid in blue refers to geodetic data WGS 84.

3. Rights of use.

…

Manndalen.

a) Owners of farms under cadastral numbers 29, 30, 31, 32, 33, 34, 35 and 36 in the Municipal Area of Kåfjord have common of pasture on the State's land in Manndalen for those domestic animals that can be fed during the winter on the farm.

b) Permanent residents of Manndalen have common of estovers in the State's forest in Manndalen for their own consumption.

c) Claims for any other rights of use on the State's land in Manndalen are dismissed.

4. The costs of the case, including payments to legal representatives, elected office-holders and experts, and payment for consultancy work are to be met by the public purse in the sum of NOK 674,377.16."

The principal claim of the permanent residents of Manndalen was that the State did not own land in Manndalen with appurtenant mountain stretches. This claim was not successful. Secondarily with respect to item 3 (a) in the conclusion of the judgment a claim had also been made for the right to carry on haymaking and operate summer mountain farms, while with respect to item 3 (b) a claim had also been made for the right to hunt, trap and fish.

Before the Unenclosed Land Commission, the Society claimed that it owned parts of the relevant mountain stretches. Its claim was not successful. Reindeer-pasturing districts Nos. 36 and 37 were also parties to the case, but the State and the reindeer-pasturing districts entered into a settlement during the preparatory proceedings so that as far as they were concerned the case was closed.

An appeal has been brought against the judgment of the Unenclosed Land Commission concerning the Manndalen land by 146 residents under CNos. 29-35 in Kåfjord. None of the appellants is a landowner under CNo. 36, Samuelsberg. It is stated that the majority have a Sami background. This appeal relates to the assessment of evidence and the application of law.

The State in the person of the Ministry of Agriculture has exercised its statutory right in civil law to lodge a cross-appeal concerning the common of estovers for the permanent residents of Manndalen. This cross-appeal has not been allowed to proceed.

To the Supreme Court three witnesses have made statements through judicial recording of evidence. They also made statements to the Unenclosed Land Commission. Associate Professor Bjerkli was also appointed an expert witness for the Supreme Court and produced a supplementary report. He also gave oral testimony during the appeal proceedings.

The case appears in a somewhat different position before the Supreme Court than before the Unenclosed Land Commission. Before the Unenclosed Land Commission the residents claimed defect in title in that the area that was transferred in 1885 did not belong to the Society. This claim was not maintained before the Supreme Court. Further, the argumentation relating to the sources of international law has been developed – both as an element in the application of traditional legal principles and as an independent – secondary – basis for claiming that the State does not own the area in dispute. Reference has been made to the Human Rights Act and Article 27 of the United Nations International Covenant on Civil and Political Rights of 16 December 1966, cf. the first sentence of Article 14(1) of ILO Convention No. 169 from 1989 concerning Indigenous and Tribal Peoples in Independent Countries. Before the Unenclosed Land Commission only the ILO Convention was invoked. A number of new documents have been submitted, but in terms of evidence the case stands in roughly the same position as it did before the Unenclosed Land Commission.

The parties are in agreement about the boundaries of the area in dispute.

The appellants, landowners and right-holders in Manndalen under CNos. 29-35 have in brief outline argued as follows:

The principal contention is that the permanent residents of Manndalen have by positive prescription or use from time immemorial acquired title to Svartskogen. The right of ownership that

has been acquired has a somewhat different character from the locally administered commons in that all the permanent residents of the valley are entitled, while section 1-1 of the Local Commons Act (Act No. 59 of 19 June 1992) defines the local commons by stating that the right of ownership is enjoyed by "at least half of the agricultural properties which from ancient times have rights of common." Furthermore the administration is different in that the local commons are administered by the commons board, cf. Chapter 3 of the Act, while there has not been any board that has administered Svartskogen. The permanent residents have exploited the area to the extent that they have had a need to do so.

The inhabitants of the valley had already started using Svartskogen before its sale to the State in 1885 – a sale of which the population of Manndalen was not aware. And the use has been very intensive practically ever since this acquisition. With the exception of the use made of the area by the reindeer husbandry industry, the inhabitants have exploited all the available resources – especially timber and haymaking. When the use of the unenclosed haymaking areas ceased in the 1950s, the area was immediately taken into extensive use for summer farms. This reflects a view that Svartskogen belongs to the population of the valley. The permanent residents have made exclusive use of this area and they have reacted when persons resident outside the valley have on exceptional occasions exploited the resources, especially the forest, in the area.

The condition that the use must have been exercised in good faith is satisfied both in relation to positive prescription and use from time immemorial. It is sound law that the acquisition of a right through positive prescription for a large group of persons is not prevented by the fact that some persons might possibly not satisfy this condition. The same must apply to acquisition through positive prescription. The population's good faith was not lost as a consequence of the State's marking of ownership in the 1920s and 1940s. And since both applications for prosecution ended in the dropping of the case, this must have strengthened and not weakened the view held among the permanent residents.

Exclusive and all-embracing use has accordingly been exercised in good faith for more than 100 years, so that the conditions for both bases for acquisition have been satisfied. And if the Supreme Court should conclude that the State's marking of ownership in the 1920s brought about the loss of the population's good faith, it is contended that acquisition through positive prescription had already been completed in 1920.

Secondarily it is contended that Article 27 of the United Nations International Covenant on Civil and Political Rights of 16 December 1966, cf. the first sentence of Article 14(1) of ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, adopted at the 76th International Labour Conference in Geneva in 1989, entails that any title the State might have to Svartskogen is not compatible with Norway's obligations to indigenous peoples in international law. The first-mentioned provision [in Norwegian translation for the proceedings] reads 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."

The invoked provision in the ILO Convention [in Norwegian translation for the proceedings] has the following content:

"The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised."

The Covenant and this Convention apply even if not all the permanent residents of Manndalen have the status of indigenous people. Furthermore, section 3 of the Human Rights Act provides that the said UN Covenant shall "in the case of conflict take precedence over provisions in other legislation".

If for the permanent residents the right of ownership cannot be built directly on these obligations prescribed in the Covenant and the Convention, they must in any event be ascribed weight in the assessment of whether the conditions for the acquisition of title through positive prescription or use from time immemorial have been satisfied. In the present case this is of particular significance in that the Sami with their collective exploitation of resources do not have the same tradition as Norwegians of thinking about rights of ownership. Thus it cannot be decisive that there are not so many examples of the population's having given direct expression to the view that they had title to the area.

If the claim that the State does not own Svartskogen should not be successful, it is contended secondarily that the owners of farms in Manndalen, in addition to the awarded common of pasture, also have the right to haymaking and the operation of summer mountain farms in Svartskogen. Further, all permanent residents also have, in addition to the awarded common of estovers, the right to hunt, trap and fish.

The appellants have submitted the following claim:

"*Primarily: Right of ownership and boundaries*

The State is not the owner of land in Manndalen with adjacent mountain stretches, delimited by the State's alleged boundary in the north, the municipal boundary between Storfjord and Kåfjord in the west and south and properties in the Municipality of Kåfjord in the east according to a boundary line that runs from the municipal boundary between Storfjord and Kåfjord, UTM 922889 in a north-northwest direction in straight lines to elevation 1201, thence in a northwest direction in straight lines over e. 1081 and e. 1193, thence in a northeast direction in a straight line to e. 1169, thence in a north-northeast direction to the eastern corner of a small lake, UTM 919923, thence in a straight line in a north-northwest direction to e. 1057, thence in a northwest direction to e. 1145, thence in a north-northeast direction in a straight line to a peak northwest of Moskkurassajavri (e. 1154), UTM 909985, thence in a straight line in a north-east direction to e. 1193 at Ruostavarri and thence in a northeast direction to trig. point e. 1176.

Secondarily: Rights of use:

1. The owners of farms in Manndalen have the right to make hay and operate summer mountain farms in that part of the area that might be delimited as the property of the State.
2. The inhabitants of Manndalen have the right to hunt, trap and fish in that part of the area that might be delimited as the property of the State.
3. In all other respects the judgment of the Unenclosed Land Commission is to be upheld.

In both cases:

The appellants are to be awarded costs to the extent that they have paid a standard charge under the free legal aid system with the addition of statutory interest from the due date until payment is made."

The respondent, the State in the person of the Ministry of Agriculture, has in brief outline argued as follows:

The claim that the permanent residents of Manndalen have acquired title to Svartskogen through positive prescription or use from time immemorial is rejected.

The acquisition of title is in the first place ruled out because the use has been exclusively exercised on the understanding that it was a question of right of use, not right of ownership. With the exception of Erik Jonssen's statement in 1914 to the Reindeer Pasturing Commission of 1913, one finds no examples of the permanent residents' having used formulations that would indicate that they believed they owned Svartskogen. Quite the reverse, they have the whole time spoken of right of use – of which there are numerous examples from the police interviews in both the 1920s and the 1940s.

The purchase in 1885 took place in the interest of the permanent residents to protect their properties against the reindeer. It is therefore improbable that this acquisition should have been unknown to them.

That there cannot have existed any unanimous view of collective right of ownership is also illustrated by the fact that there are examples from practically the whole of the 20th century of persons in the valley relating to the State as the owner of Svartskogen. In the first place reference has been made to the fact that in 1914 a farmer made an application to purchase the whole of Svartskogen, and that in 1935 an application was made for the purchase of land for the establishment of four new farms in Svartskogen. Further, reference has been made to the leasehold agreements that were entered into both in the 1920s and in the 1940s, to the application from Manndalen Youth and Sports Club and Manndalen Hunting and Fishing Association in 1978 for a lease to put up a log cabin, and to the application a couple of years later for free land for the erection of a bridge over the River Manndal at the lowermost point of Svartskogen.

Furthermore, use has not been exercised in good faith for a sufficiently long period of time for it to be able to constitute grounds for acquisition of title. By the announcement in December 1920 the population were made explicitly aware that the area had been purchased by the State, and the State's right of ownership was further marked by the application for prosecution the following year. The farmers cannot claim that after this time they were in good faith about their right. This applies even

though for acquisition through use from time immemorial it is not required that the whole of the valley's population should be in good faith.

In the light of this the requirement for a period of use in good faith has clearly not been satisfied for acquisition through use from time immemorial. But the same applies for positive prescription since the intensive use of Svartskogen did not start until well into the 20th century.

The claim that the conventions invoked constitute grounds for depriving the State of title to the area is rejected.

Nor can the farmers' secondary claim for further rights of use if their claim for title is not successful, be upheld.

The respondent has submitted the following claim:

"The judgment of the Unenclosed Land Commission is to be upheld in so far as it has been appealed against."

My view of the case:
I have come to the conclusion that the appeal is successful.

The appellants' primary contention is positive prescription or use from time immemorial on the part of the population of Manndalen as grounds for claiming that the State does not own Svartskogen. Since use for more than 100 years has been invoked, I find it natural first to consider whether the alleged use has provided grounds for acquisition of rights through use from time immemorial. Use from time immemorial requires that there has been a certain amount of *use* that has taken place for a *long time* and been exercised in *good faith*.

I shall first discuss what *use* the population of Manndalen has made of Svartskogen, and for *how long* this has been going on. The State's view is, as has been mentioned, that use of any significance was not commenced until around the year 1900. In my opinion use of considerable extent started a good deal earlier.

In this connection I wish to emphasise in the first place that until the division of land in 1879 the "common" lay there as a communal area that was used by the population of Manndalen. And even though the River Apmelasjohka forms a marked boundary on the east side of the valley, there is no corresponding dividing line on the west side. This is illustrated by the fact that in the lowermost part of Svartskogen today summer farms have been established on this side of the river. It is true that the valley is narrow roughly one kilometre south of the area that was divided in 1879. However, this cannot have had particular significance for the possibility of exploiting the area farther into the valley. This use consisted mainly of felling and haymaking. What was harvested and felled was transported out in the winter. I also refer to the fact that the uppermost parts of Svartskogen were considerably exploited in any case in the 20th century. And in the first half of the 20th century, probably even longer, this transport must have been the same as in the 19th century: horse and sleigh. Thus the question of

access does not indicate that the uppermost part of the "common" was not used for felling and haymaking in the 19th century.

Even though the means of transport were the same both before and after the turn of the century, prior to the division of land Svartskogen cannot have been exploited as much as the area north of the area in dispute. This is illustrated by the fact that in 1865 there were 270 people living in Manndalen, while the population in 1900 had increased to 476. The sum of owner-occupiers, tenant farmers, cotters and lodgers increased in the same period from 43 to 82. Since the greater part of the population in both periods, in addition to fishing, must have engaged in agriculture, this shows that the need to exploit the "common" increased considerably. It is in the nature of things that the significant use took place in the nearest areas. But the more farmers there were, the farther into the valley the intensive use must have stretched.

That the use in 1879 did not stop at the River Apmelasjohka is illustrated in my opinion by two things in particular: In the first place, as has been mentioned, there is no clear topographical dividing line between the divided and the undivided areas. So therefore, in the second place, it was not natural for the population to assume that the areas north and south of the River Apmelasjohka were in different positions in legal terms.

It is not however necessary to arrive at any determination of how extensive the use was prior to 1879. In my opinion the need to exploit Svartskogen increased considerably after the division of land. This was due to two main factors: In the first place people had to resort to Svartskogen if they were to harvest and fell more than there was a basis for on their own property. And for cotters with no land and inderster [lodgers with their own household], who could also have animals, Svartskogen must have been the only place that could be exploited without special agreement. In the second place the population trend towards the turn of the century shows that the need for exploiting Svartskogen must have become considerably greater.

In addition I refer to the fact that most of those who were questioned by the police in 1921 claimed very long use of Svartskogen. I shall not quote any of these statements, but I am going to quote part of the statement made by Erik Jonssen in 1914 to the Reindeer Pasturing Commission of 1913. This is of particular interest because it was made before the State protested against the population's use of Svartskogen. Mr Jonssen, who was then 72 years of age, stated:

"As evidence of the growth of building in Manndalen, J. mentioned that 50 to 60 years ago there were only 21 farms there, of which J.'s farm, which at that time belonged to J.'s father [Erik Jonssen was from Dalen, serial number 131a, and the son of Jon Mortenssen who was a tenant farmer on the property when Svartskogen was divided], was the uppermost. Above this was common property for the whole valley, and there were haymaking fields only up to the opening of Abmilasvagge [the valley through which the Apmelasjohka runs]. Now there are about 65 farms in the valley, and there are haymaking fields right up to the end of the main valley, more than 10 kilometres above the opening of Abmilasvagge. There are now a number of farms above Jonsen's

farm, beside the few farms that are only inhabited during the winter … The very uppermost part of the valley is, as it were, still the common property of Abmilasvagge."

The development that Jonssen described in 1914 is in my view incompatible with the notion that intensive use of Svartskogen did not start until the 20th century.

The extent and nature of the use in the 20th century is on the other hand not a matter of dispute. Throughout the whole century there was in the first place intensive felling. It was even so intensive that some farmers were reported to the police for overfelling. And the forest was not only used for cutting firewood. Even though only deciduous trees grow there, some building materials were also taken out. A lot of stakes were also taken out for fences, gates and hay-drying racks. And bridges were built with wood from Svartskogen. Birch bark was also gathered – and also sold as a substance for treating fishing nets.

The grass was also extensively exploited. Up to the beginning of the 1950s, when the need for haymaking fields disappeared as a consequence of a considerable amount of new cultivation, haymaking was very extensive. To put it briefly, the farmers used all the land that could be used. This is illustrated not only by the application for prosecution in 1921, but perhaps even better by the Mayor of Kåfjord, Edvard A. Mandal's reply to the Lapp Inspector in his letter dated 5 January 1944 in which he says:

"Since in 'Svartskogen' too there is quite a lot of good haymaking land that has hitherto been exploited in such a manner that it does not provide anything like a full return particularly on account of too early cutting (as a rule people up here are in the habit of beginning to cut hay about 2 weeks later than they ought to) while the opposite is the case when it comes to 'Svartskogen', up there they start two or even three weeks too early, … C.f. the great importance of the property for increasing food production, I therefore find it reasonable that at the same time as the forest is protected orderly conditions should be brought about when it comes to the haymaking land up there which in spite of inappropriate exploitation provides year after year its 10000 fodder units or approx. 100 loads of hay, but with sensible harvesting and choice of harvesting time can be brought up to the double."

The letter illustrates the competition that must have gone on for the haymaking areas, and shows that all the land that could be used for hay was in use.

The extensive haymaking indicates that pasturing cannot have been particularly extensive in the same areas in the first half of the 20th century. But this case also concerns considerable mountain stretches. And I can mention that in this period there were approximately 1,000 sheep wintering in Manndalen. In a Master's Degree dissertation in geography from 1957 written by Turid Blytt Schjøtt, which is based on field studies in 1955 and 1956, entitled Bosetning og erverv i Manndalen [settlement and acquisition in Manndalen], published in 1958 in Samiske samlinger, Vol. IV-2, it says on page 55 concerning conditions from the beginning of the 20th century:

"The sheep were now out the whole summer and kept to the mountains where the temperature was lower than down in the valley."

This, seen in connection with the extensive haymaking in Svartskogen, suggests that the sheep first and foremost pastured in the mountains. But there is also information that they at times wandered down into the bottom of the valley in Svartskogen.

From the middle of the 1950s the use was changed. Haymaking ceased but was replaced by summer farming. The major part of this summer farming had its basis in summer mountain farms on both sides of the River Manndal at the lowermost point of Svartskogen. These summer farms were constructed without any permission being sought for this. The first summer farm was established in 1950, and during the first years it was exclusively cows that were taken to Svartskogen. But in the middle of the 1950s goat herding took over. Further, in 1953 a summer pasturing farm for cows was established at Cearpmat-vollen farther into Svartskogen that was in use until 1968. In this period considerable quantities of hay were also harvested at Cearpmat. Incidentally in 1995-1996 this summer farm was restored with public support and taken into use again. Between 9 and 15 single holdings have continuously had summer farms in Svartskogen, and there is information that today there are between 800 and 900 dairy goats on the summer farms there. The summer farming in the lowermost part of Svartskogen has made its mark on the landscape. As a result of pasturing and felling, the forest has had to yield, and the landscape appears here as an open pasturing landscape. The County Governor's Department of Environmental Protection judged this area to be in the highest protection category. And the experts state that

"One of the most important contributory factors to the shaping of the special agricultural landscape in Svartskogen is the local status of the area as a rural community common for all those resident in Manndalen, which people have in the main administered on their own. The way in which this has happened, without any formal management, and with such long and still very active use, is seldom to be found elsewhere in Norway. Seen in this light, the use and form of administration ought in themselves to be considered in the context of protection, and in the event not as clear and fossilised, but in their dynamic and open form."

In addition to summer farming other pasturing increased in the second half of the 20th century. Since the 1960s considerable numbers of sheep have been taken to Svartskogen. This use for pasturing takes place not only in the valley, but also in adjacent mountain areas. The expert witness, Mr Bjerkli, has estimated that there are now approximately 2,000 sheep and lambs pasturing in Svartskogen. Some young animals have also been pasturing there.

The Agricultural Office in the municipal authority area has further provided information that with respect to the planning of the running of new holdings, and in the case of extensions, when the plans were approved for some holdings it was stated that the unenclosed pasture should be in Svartskogen.

Throughout the period the population engaged in hunting, fishing and trapping in the whole of the area in dispute. Two mountain lakes were also limed. It may also be mentioned that in 1961 Manndalen Hunting and Fishing Association entered into a leasehold agreement with a number of landowners in Manndalen concerning the management of fishing in the River Manndal. In this connection it was clearly stated that the persons concerned did not have "any objection to the Association's being allowed to administer fishing on the rural community common". This declaration would not have been natural unless the population viewed Svartskogen as their area.

Since the area is topographically clearly delimited, there has never been conflict with the neighbouring rural communities concerning the exploitation of it. The expert witnesses state that people with family ties to Svartskogen, but who have moved away, are said to have cut wood in Svartskogen to a certain extent. But in the light of interviews with persons in Manndalen they are of the opinion that this activity was disapproved of. Furthermore, since 1984 the farmers on a holding outside Manndalen have been taking their sheep and lambs to pasture in Svartskogen. Even though the owner was born and grew up in the valley, and rents a property there, according to the experts there have been somewhat divided opinions about the desirability of this pasturing.

In the light of this the conclusion is that almost ever since the division of property in 1879, with the exception of reindeer husbandry, the population of Manndalen has exploited all the forms of use that Svartskogen afforded. People from all the cadastral numbers have taken part, even though not all of them exploited the area equally intensively. And the view has been that no single holding has a greater right than others. Furthermore, internally among the population of the valley there have been few conflicts over use, and in the event of disagreement, solutions have been found locally. I also emphasise that this exploitation has changed character in conformity with what was, and has been, natural use in the different periods. In shorthand form the use bears the stamp of continuity, and it has been all-embracing and intensive, and it bears the stamp of flexibility. The requirement relating both to the extent of the use and to its duration for acquisition of title is accordingly satisfied. I should like to point out that in conclusion I shall return to the question of whether the use has been of such a kind that it has led to the acquisition of full right of ownership.

In my discussion of the third condition, that disposal must have been exercised in good faith, I shall take my point of departure in the situation prior to the division of land in 1879.

That the population from ancient times believed themselves entitled to exploit the "common" is apparent from O. No. 1 (1868-69) from the Norwegian members of the committee which was appointed in 1866 to look at the relationship between the permanent residents and reindeer husbandry. On page four, second column, it says:

"Only on Mandalen Common do the adjacent commoners believe they have the right to graze animals, to make hay and to cut firewood, without even the present owner's acknowledging any such right."

The division of property may have strengthened the population in their view. I have mentioned that in his letter of 24 August 1874 to the Board of the Society, District Sheriff Hegge put the value of Svartskogen at 100 to 150 rixdollars, while the value of the divided area was put at 250 to 300 rixdollars – in other words twice the value. He went on to state that during an inspection in Manndalen just before this, he had ordered the population to cease using the "common", while all

> "maintained their right to use the common that they had used from time immemorial."

When five years later the divided area was allotted to the individual holdings free of charge, and the Society only retained the haymaking land Vadja, it must have appeared to the population as if common property were being distributed and that the Society had given up its standpoint. The letter dated 26 January 1880 to the County Governor of Troms from Mr Falck, who presided over the division proceedings, may suggest that Mr Falck also understood the Society's behaviour to mean that the boundary of the divided area was chosen on grounds of appropriateness and not on the basis of how far the farmers' right extended. This is illustrated by the letter's introduction in which it says:

> "The aforementioned division of Mandalen's common was in accordance with the Company's demand not extended farther up through the valley than it was believed the inhabitants of the valley would find it worthwhile to fetch grass and firewood, …"

A central question is thus what significance the sale in 1885 had for the population's perception of their rights in Svartskogen. In this connection I must mention that in Mayor Wennberg's letter of 9 December 1879 to the County Governor of Troms, in which the question of the State's acquisition of the area was taken up, it says that "the uppermost part of the common" belonged to the Society. He then continues:

> "I have not personally been up there; but from statements made by various people who know the place there is a large piece of land that still belongs to the said Society, and it is reported to be possible to erect a fence right across the valley to prevent reindeer from wandering down, just as there is said to be enough timber in the place for the erection of the fence."

As one can see, the Mayor does not identify his source. The letter shows that he does not know the area, and in my opinion it is more likely that he had spoken with District Sheriff Hegge than with the farmers in Manndalen.

District Sheriff Hegge's letter of 17 November 1882 to the County Governor does on the other hand show that he had spoken with farmers in Manndalen. Here Mr Hegge appears to be referring to the inspection of 1874, in the course of which a number of farmers are said to have complained about

damage they suffered from reindeer husbandry – complaints that are said to have been repeated every year at the local council meeting in Lyngen. The letter goes on:

"On the occasion of my inspection of the valley when these complaints became known to me for the first time, I was already aware that one could easily and at low cost prevent reindeer from coming down onto the permanent residents' properties in the valley and avoid damage by erecting a fence right across the valley at "Gunolasjokke", since I presupposed that the public purse, for the suitable ordering of Lapp matters in this region, might be willing to purchase the above-lying stretch of the valley … Since, on closer consultation with the farmers in Manndalen, I have been strengthened in my conviction that the most convenient and least costly manner in which to deal with the matter is the aforementioned …"

The letter shows that District Sheriff Hegge had put his plans to at any rate some of the farmers. In interpreting this letter, I must mention that it is apparent from O. No. 1 (1868-69) page 4, second column, that the Sami reindeer herders had demanded that the permanent residents should erect a reindeer fence. When District Sheriff Hegge states that he "presupposed that the public purse, for the suitable ordering of Lapp matters in this region, might be willing to purchase the above-lying stretch of the valley", his letter does not reveal explicitly that he had taken the farmers into his confidence with respect to his plans for sale. And when it is read in connection with his letter of 24 August 1874 to the Board of the Society in which he provided information about the population's standpoint on their rights on the "common", a question mark can no doubt be placed against whether he also took the population into his confidence concerning the plans for sale – something which in the event might be significant for the rights they believed themselves to have in Svartskogen. And that the population, with their standpoint and in the light of the demand put forward by the Sami reindeer herders, only took notice of the plans to erect a fence does not seem unnatural.

The proceedings for property division and apportionment of the cadastral debt make it explicit that they were held on account of the fact that the property was "intended to be sold to the State". But of the farmers in the valley it was only the tenant farmer at serial number 131a, Jon Mortensen, who was present. At that time he was 84 years old. He lived on the uppermost farm in the valley, and what he told the population of the valley is not known. That it cannot have been much is illustrated by the fact that, as has been mentioned, his son, Erik Jonssen, who had been managing his farm since about 1860, stated in 1914 to the Reindeer Pasturing Commission of 1913 that Svartskogen was "common property for the whole valley".

In this connection I can also mention a statement that Lars Pedersen made to the Reindeer Pasturing Commission the same day. He was then 40 years old and had been living at Skogvold in Manndalen for the last 27 years. The conclusion of his statement reads:

"According to what S. knows, valuations have not taken place in the lower part of Manndalen. Only farther up on the haymaking land in Olmaivagge … have there been assessments. Since assessments were conducted, the Lapps have usually kept a watch on their reindeer so that they do not go down into the valley."

Olmaivagge lies at the very top of the valley. In addition to the fact that this statement shows that the haymaking areas must at that time have covered the whole valley, it has even greater interest in that it illustrates Mr Jonssen's view that Svartskogen was "common property". The valuations show that the population considered themselves entitled to make hay. If the view had been that haymaking was not something to which they were entitled, assessments would not have been conducted.

For the population's perception of what happened it is in my view of considerable significance that the sale resulted in absolutely no physical signs when the planned fence was not erected. The only way in which it was visible was in the cadastre. No documentary evidence has been submitted to suggest, nor has it been contended, that prior to 1920 the State claimed title to Svartskogen in relation to the population. Against this background there is in my opinion nothing striking about the fact that the population do not seem to have thought any more about the matter. And with the State's passivity they had in my view no urge to examine the cadastre. In this connection I refer to the fact that nor is positive prescription always ruled out because the adverse possessor could have been brought out of his mistaken view by examining the land registers, cf. Rådsegn 6 frå Sivillovbokutvalet. Om hevd [recommendation 6 from the Civil Code Committee. On prescription] page 11, Proposition to the Odelsting No. 30 (1965-66) pages 28-29 and Falkanger: Tingsrett [law of property] 5th edition, Oslo 1999 page 299.

The documents of this case do however show that there was at any rate one person living in the valley who was aware of the sale: In a letter dated 23 June 1914 Hans Joramo, who was in charge of the sub-post office and a farmer with his abode at Samuelsberg, wrote to the Ministry of Agriculture seeking to be allowed to purchase, "free of any encumbrance", Svartskogen, which in his view was "pretty worthless". This knowledge also came to light during his statement on 20 September 1914 to the Reindeer Pasturing Commission. But even though in June the same year he had attempted to purchase the area free of any encumbrance, he now stated that in Svartskogen "the inhabitants of Manndalen have from ancient times the right to make hay and to cut firewood".

Mr Joramo's letter and statement in 1914 are the only known examples of the fact that prior to 1920 somebody in Manndalen was aware of the sale. But with respect to the significance of his knowledge I refer to the fact that he originally came from Southern Norway and had moved to Samuelsberg in 1894. For him it was therefore more natural to investigate proprietary relationships than for the other inhabitants of the valley, who were, as has been mentioned, mainly Sami and thus traditionally less concerned about formal questions of ownership.

That Mr Joramo, and perhaps also some other individuals in Manndalen, also prior to 1920 were aware of the sale is, however, no obstacle to the Manndalen population's having acquired title to

Svartskogen through use from time immemorial. As was pointed out in the Supreme Court's judgment of 21 June 2001, serial number 4B/2001, it is not required in cases such as this that everybody was in good faith. In my opinion Recommendation 6 from the Civil Code Committee On prescription, page 16, provides adequate expression of what is required:

"When it comes to use from time immemorial, practice has established corresponding standards for good faith as for ordinary prescription. Here it is often difficult and impractical to see the individual adverse possessors separately, and it then becomes a question of what people in the place in purely general terms knew and assumed, … ."

In the light of the discussion above it must be found established that this requirement had been satisfied up to 1920.

The question thus becomes whether the population's good faith was lost later. In this connection it is in particular the two periods in which the population's use of the area in dispute led to reports to the police, that are central, but other factors must also be weighed and balanced.

I shall first deal with the application to the police for prosecution and the other events at the beginning of the 1920s. The Forestry Administrator's announcement of 10 December 1920 contained, as has been mentioned, not only a prohibition against "cultivating and harvesting hay" in Svartskogen, but also a piece of information that it was a matter of "the State's purchased property". The announcement was made public by being read aloud in front of the church and by the District Sheriff's putting it on display in busy places. At any rate some of the population of the valley must thereby have become aware of it.

That the Forestry Administrator meant business is illustrated by the subsequent application to the police in the autumn of 1921 for the prosecution of some farmers for unlawful haymaking on "the property of the Lapp Administration", in that they had used haymaking areas which that same summer had been leased to farmers in the valley. The application for prosecution also stated that the property had been purchased by deed of 23 October 1885, and a copy of the deed was enclosed.

During the subsequent investigation, Nils P. Nilsen, who had been appointed as a verderer in the spring of 1921, stated that the announcement of the leasing of the haymaking areas had been made known by a notice displayed at Samuelsberg at the beginning of May. Further, "in the course of the spring and summer he made this known among the population of Mandal through oral announcements and conversations in so far as it was possible for him, and he supposes that this was brought to the knowledge of everybody".

During the police interviews that were conducted by the District Sheriff in Lyngen on 19 December 1921, all those who had been reported, who were of Sami descent, claimed that they had "right of use" and that they had been using Svartskogen for a long time. All denied guilt. By way of

illustration the following may be quoted from the statement made by John Nikolai Eriksen, who was born in 1871:

> "He justifies this haymaking area on the grounds of the ancient right of use, enjoyed by his grandfather, his father and himself, … ."

After the police had taken the case up with Forestry Administrator to obtain more information about the alleged right of use, the District Sheriff in Lyngen was asked in January 1922 to undertake further questioning of those who had been reported and to interview others who might have information about this right of use. One of those questioned was Erik Jonssen, who had also made a statement to the Reindeer Pasturing Commission of 1913. Like most of the others he spoke of use going way back into the 19th century, and which most people in Manndalen had exercised.

The case appears to have been dropped for lack of evidence, and when the documents were sent to the Forestry Administration, the Chief of Police stated, as has been mentioned, that the farmers "have reasonably claimed rights of use on the common".

In the assessment of whether the population's good faith ceased, account must also be taken of the fact that in the summer of 1921 fourteen farmers, as has been mentioned, entered into leasehold agreements for haymaking areas in Svartskogen. But this cannot be decisive. In the first place these agreements are not automatically proof that these persons accepted that they were without rights in Svartskogen. The reason may just as much have been that they more easily than others gave in to an order from the authorities, or that they could see advantages in getting themselves allocated a specific piece of land – provided that this was respected by the other farmers. In the second place, as has been mentioned, it is no obstacle to the acquisition of a right through use from time immemorial to the advantage of a fairly large group of persons that some of them are not in good faith. And the 14 farmers constituted a modest share of the total number of farmers in Manndalen. Figures from the Reindeer Pasturing Commission thus show that in 1914 there were 77 owner-occupiers and 11 cotters in the valley.

On the significance of the report to the police for the population's good faith, I refer to the first paragraph of section 6 of the Prescription Act which provides that "Prescription ceases where an action has been brought against the adverse possessor concerning the right to the thing, provided judgment is given in favour of the plaintiff". This provision is also of interest for the acquisition of a right through use from time immemorial, and shows that a dispute out of court, including the threat of legal action, does not automatically stop the acquisition of the right. It must be assessed in concrete terms whether the good faith is lost in such instances, cf. Recommendation 6 from the Civil Code Committee On prescription, pages 11-12, in so far as prescription is concerned. The Norwegian Supreme Court Reports (Rt. 1955 page 304) provide an example of the fact that an application for prosecution that was not successful, was not an obstacle to prescriptive acquisition.

I cannot see that this standpoint is shaken by the fact that the application for prosecution also mentioned the sale in 1885, and that the deed was enclosed. The documents submitted do not show that it was presented to those who had been reported. And even if this should have happened, it would not have been unnatural for them to consider the sale as having taken place contrary to their rights.

In the present case, extensive use of Svartskogen had been going on ever since the sale in 1885 without the State's protesting against it. Since the application for prosecution then ended with the dropping of the case, and the Forestry Administrator did not immediately follow up the demand that leasehold agreements must be entered into, I am in agreement with the appellants that this rather contributed to strengthening the population's view that they had a right to use Svartskogen.

In the assessment weight must also be placed on the fact that a large proportion of the population at that time, according to what I must take to be established, had a poor command of the Norwegian language. And as emphasised in the Supreme Court's judgment of 21 June 2001, serial number 4B/2001, 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.

In the light of this my conclusion is that their good faith was not lost at this time. And this is not shaken by the fact that five farmers entered into leasehold agreements for haymaking land in 1928. The background to these agreements has not been illuminated, and since, as has been mentioned, it is not required that all must be in good faith, the entering into an agreement by five farmers cannot have legal consequences. The same applies in my opinion to the application from five persons in 1935 for the acquisition of land in Svartskogen for the establishment of new farms. Again it is striking that attempts at privatisation of the land were not successful.

The question becomes on the other hand whether the population's good faith was lost in the 1940s. The State's behaviour this time distinguishes itself from the report to the police in 1921 in that the Lapp Administraton now contacted Mr Mandal, the mayor, who was living in the valley. The letter dated 20 December 1943 shows that during a visit to the valley some days earlier the Lapp Inspector had shown him the documents from the proceedings for property division and apportionment of the cadastral debt in 1885, and drawn attention to the deed. Thus in this way at any rate the mayor must have been aware of it. And in the letter it says that it should be clear "that the property is not a common, but a purchased state property subject to the Lapp Administration".

The mayor's letter to the Lapp Inspector of 12 February 1944 shows that during his meeting with the farmers of the valley on 5 February he had referred to the documents concerning the conveyance. But they nevertheless claimed to have rights of use.

However, the Lapp Inspector's approach shows that he was not primarily concerned with marking the State's right of ownership, but with bringing the use of Svartskogen into more controlled forms and "putting a stop to the absolutely senseless felling of young trees that is going on there". The mayor's letter to the Lapp Inspector in the winter of 1944 shows that he too was most concerned about

the same thing. His letter of 12 February 1944 indicates that this was also the main topic during the meeting on 5 February. The right of ownership seems altogether to have remained in the background. Furthermore, the population's view must have been influenced by the fact that also in 1921 the State claimed right of ownership without there being a prosecution as a result of this. And for the population it was not unnatural to regard the prohibition against felling of 7 February 1944 and the announcement of 26 July 1944 in any other manner than as a manifestation of the attempt to get an administrative system introduced for Svartskogen.

After the War, when the Lapp Inspector repeated the announcement from 1944 on 13 February 1946, the administration aspect came out even more clearly in that he emphasised that "the order has not been made for any other reason than the need to preserve the possibilities that exist on the property". The same thing is illustrated by the fact that the application for prosecution of 15 March 1946 was made under the Protection of Forests Act, and that it was with this Act the District Sheriff confronted those who had been reported when he started his investigation. And during questioning all of them claimed that they had common of estovers in Svartskogen, but that if in a court of law it should be determined that they had no such right, they would be willing to pay compensation.

In the assessment of the population's good faith it must be taken into account that in this period too haymaking and wood-cutting agreements were entered into. As has been mentioned, during the War some haymaking agreements were entered into, and after the War, in co-operation with the Chief District Forestry Administrator in Nord-Troms, both haymaking and wood-cutting agreements were entered into. A letter from him to the Lapp Inspector of 23 March 1947 shows that 18 farmers had announced their interest in being allocated pieces of forest land. A subsequent letter of 1 April 1947 suggests that 12 of these also applied to be allocated pieces of haymaking land.

In my opinion the reason behind and the significance of these agreements must be assessed in much the same way as the corresponding agreements in the 1920s. But now the agreements reflect perhaps even more clearly than in the 1920s the fact that some people saw it as an advantage to get a more orderly form of administration of Svartskogen. This is illustrated by the vote taken in 1944 when, as has been mentioned, 17 out of 72 present voted for public administration of it.

After this case too was dropped in January 1948, the Lapp Administration does not appear to have intervened in the use of Svartskogen. This is illustrated by the fact that in 1973, as has been mentioned, the Lapp Inspector, who at that time was responsible for the State's administration of Svartskogen, was not aware of the State's purchase of Svartskogen. The dropping of the case combined with this passivity must again have been perceived by the population as confirmation that they were right, and that they had been given the green light for their way of using Svartskogen. And this belief must have been even further reinforced when in the 1950s the farmers established the said summer farms on the common and gradually changed the agricultural landscape in the northern part of the area.

The establishment of the summer pasturing farms is also interesting in another way in that the population then went over to a completely new use of the area without applying to the State for permission to do so. This illustrates the fact that they regarded it and treated it as theirs. When in addition Troms Agricultural Society in a memorandum dated 11 October 1956 was very positive to contributing to the funding of a road that would facilitate summer farming, and Svartskogen was explicitly specified as a grazing area, this must also have reinforced the local view.

An episode from 1953 must also have contributed to this perception: That summer there was a forest fire on the east side of Manndalen approximately in the border area between Cadastral No. 30, Manndalen, and CNo. 31, Storvolden – in other words on private land. Kåfjord Forestry Council applied to the Director of Forests for the expenses to be covered. The response was negative, and the letter of reply referred to the fact that "the Forestry Administration is not the owner of any forest or cadastrally registered property in the district of Kåfjord". This was up to a point correct, but for the population it cannot have been easy to distinguish between the different state bodies. It is thus not unreasonable if they considered the letter as a new confirmation of their standpoint.

Since the end of the 1970s, however, the population have to a somewhat greater extent related to the State – in particular since Statskog took over the administration in 1980. Nevertheless I do not find it necessary to discuss whether the requirements for the acquisition of a right through use from time immemorial were now no longer satisfied. For almost 100 years prior to this period, ever since the sale in 1885, a form of use had been exercised that covered everything with which the area could be associated. And in my opinion this use was, and has been, exercised in good faith. It is true that after roughly 35 and 60 years the State attempted to stop it inter alia by means of applications to the police for prosecution. But on both occasions the cases were dropped, and the State withdrew. Since, with the exception of two short periods, the use has taken place without State interference, this must be able to constitute grounds for the acquisition of a right through use from time immemorial.

The contention from the appellants is that the State does not own Svartskogen. This is grounded in the limitation of competence provided by section 2 of Act No. 51 of 7 June 1985, but the contention means implicitly that the area belongs to the population of Manndalen in concert as a form of rural community common property. This raises the question of whether title can be acquired when the population has to a great extent only claimed to have right of use. But there are also examples of other formulations: In Erik Jonssen's statement from 1914 to the Reindeer Pasturing Commission of 1913, which I quoted earlier, he said that it was a matter of "common property". Further I may mention that in the letter of 5 August 1936 from Lyngen Forestry Administration to the Director of Forests it was stated, as has been mentioned, that even "the Chairman of Kaafjord Forestry Council was a couple of years ago of the opinion that the common was a rural community common".

The formulation "rural community common" has also been used since. When in 1961 Manndalen Hunting and Fishing Association entered into leasehold agreements with a number of landowners on the administration of fishing in the River Manndal, Svartskogen was referred to in the

agreements as “the rural community common”. Further I may mention that in the 1970s when I was presented with plans for the construction of a power line through Svartskogen, an action committee was established – the “Working Committee AGAINST power lines through the rural community common in MANNDALEN”. And in a letter of 27 April 1977 from the Working Committee to the Ministry of Environmental Protection, in other words while the State was still completely passive with respect to the population’s use of Manndalen, it says:

> “The rural community considers the area through which the line is to be constructed as the property of the rural community (rural community common), and feels that any construction without the permission of the rural community is an infringement.”

In my opinion it cannot be decisive that somewhat different formulations have been used, and that “right of use” seems to have been the most commonly used term. In this connection I refer to the fact that the term can be primarily documented in connection with the two occasions on which the State attempted to intervene in the population’s wood-cutting and haymaking in Svartskogen. That this term was used in a situation in which it was a question of particular exercise of disposition is in my opinion not so unnatural. What is more, the right of use is the central element, and the use has throughout the whole period covered all the relevant forms of use. And the use has changed in keeping with what was most natural at any time.

The Unenclosed Land Commission, which also concluded that the applications for prosecution in the 1920s and 1940s did not deprive the population of their good faith, did not find, as has been mentioned, any legal basis for awarding more than common of estovers and common of pasture. In my opinion the all-encompassing use that has been described above must be credited with greater legal consequences. Had corresponding use been exercised by persons with another background, it would have reflected the fact that they believed they owned the area. The Sami on the other hand, who have constituted the predominant share of the population of Manndalen, with their collective exploitation of resources, do not have the same tradition of thinking about rights of ownership. Nevertheless, as has been pointed out, there are some examples of their having used formulations that provide a strong indication of a sense of right of ownership. Should the fact that there are more examples of their having spoken of the right of use prevent the acquisition of a right through use from time immemorial, their exercise of disposition, which in its content corresponds to the exercise of the right of ownership, would be placed in an unfavourable, unique position in relation to the population at large.

Nor can it be decisive, for the same reason, that the right which the population of Manndalen has acquired does not completely correspond with what applies to rural community commons. The circle of those entitled is wider in Manndalen, and the administration is different. Section 1-1 of the Rural Community Commons Act (Act No. 59 of 19 June 1992) defines a rural community common as “any common in respect of which the right of ownership is vested in no fewer than half the

agricultural properties that from time immemorial have the right of use on the common". Thus rural community commons belong to agricultural properties, while the use of Svartskogen reflects a predominant local understanding that all the farmers in the valley are entitled. How these questions are to be resolved internally, and how the area is to be administered in the future, are not matters to be decided in the present case.

Irrespective of Norway's obligations in international law, this indicates that the use provides grounds for the acquisition of rights through use from time immemorial, and that the State's title to Svartskogen is not compatible with the rights that the population of Manndalen have acquired. It does however support the conclusion at which I have arrived that it is in sound conformity with the provision of the first sentence of Article 14(1) of ILO Convention No. 169 from 1989 concerning Indigenous and Tribal Peoples in Independent Countries, and the considerations this provision is intended to safeguard.

The appeal has succeeded, and the question of costs is regulated by the second paragraph of section 180, cf. section 172, of the Civil Procedure Act. The appellants have had free litigation before the Supreme Court. It follows from page 78 of Circular G-73/96 concerning free legal aid that where a party has free legal aid and the State is the opposing party, costs shall not be ordered to be paid to the public purse. The County Governor of Troms has waived the payment of any fee by the appellants to the State, with the exception of the basic fee of 300 kroner which cannot be waived. This sum will be awarded.

I vote for this

judgment:

1. *The State is not the owner of land in Manndalen with adjacent mountain stretches, delimited by the State's alleged boundary in the north, the municipal boundary between Storfjord and Kåfjord in the west and south and properties in the Municipality of Kåfjord in the east according to a boundary line that runs from the municipal boundary between Storfjord and Kåfjord, UTM 922889 in a north-northwest direction in straight lines to elevation 1201, thence in a northwest direction in straight lines over e. 1081 and e. 1193, thence in a northeast direction in a straight line to e. 1169, thence in a north-northeast direction to the eastern corner of a small lake, UTM 919923, thence in a straight line in a north-northwest direction to e. 1057, thence in a northwest direction to e. 1145, thence in a north-northeast direction in a straight line to a peak northwest of Moskkurassajavri (e. 1154), UTM 909985, thence in a straight line in a north-east direction to e. 1193 at Ruostavarri and thence in a northeast direction to trig. point e. 1176.*
2. *In costs to the Supreme Court the State in the person of the Ministry of Agriculture is to pay to the appellants in the person of Advocate Christian B. Hjort 300 – three hundred – kroner within 2 – two – weeks from the serving of this judgment with the addition of the normal interest on overdue payments in pursuance of the first sentence of the first paragraph of section 3 of the Interest on Overdue Payments Act, for the time being 12 – twelve – per cent interest per annum, from the expiry of the time limit allowed until payment is made.*

Justice Oftedahl Broch: I am essentially and in the conclusion in agreement with the first Justice to state his opinion.

Justices Flock, Stabel and Dolva: Likewise.