

Supreme Court Decisions

COURT: Supreme Court - Judgement.

DATE: 24 October 1997

KEY WORDS: Reindeer Husbandry Act (1978) § 2

SUMMARY: The case refers to a dispute about the right to graze reindeer in an area located in the Riast/Hylling Sami homelands.

CASE PROCEEDING: Frostating Lagmannsrett LF-1995-00034 A, Supreme Court HR-1997-00061 A, No. 96/1996

PARTIES: The Riast/Hylling Sami homelands represented by the chairman (Attorney-at-law Erik Keiserud) *versus* 1. Kjell Bendixvold 15. Helge Mølmann 2. Torbjørn Bendixvold 16. Rune Mortensen 3. Leif Nilsgård 17. John Haugsbak 4. Ola Brynhildsvold 18. Lisabet Solhus 5. Arne Sommer 19. Per Jørgen Jamtvoll 6. Svein M. Evavold 20. Torvald Torpet 7. Steinar Løkken 21. Leif Kokkvoll 8. Birger Sommer 22. Peder H. Sødals 9. Agnar Sjøvold's estate 10. Bjørnar Sundt represented by Ingmar H. Sødal 11. Lars T. Ormhaug 23. Jon Ryttervold 12. Kåre Holdbakk 24. Aage Engesvold 13. Liv Karin [Sandkjernan] (sic) 25. Hans B. Sødal Sandkjernan 26. Lars Tørresvold 14. Stein Ove Kuraas 27. Ole Klemmetvold (Attorney-at-law Arve Rosvold Alver)

JUSTICES: Rieber-Mohn, Lund, Schei, Holmøy - Minority: Matningsdal

Justice Rieber-Mohn: The case involves a dispute over reindeer grazing rights in an area located in the Riast/Hylling Sami homelands.

The area at issue is located north of Aursund Sound. Most of its southern border is formed by the northern shore of Aursund Sound. To the west, the Store Molinga River and Storbekken form the border, while the northern border is in the municipality of Holtålen, with Litl-Skarven at the northernmost point. To the north-east, the border is identical with the southern border of Røros northern Crown lands and, to the east, the Lillesøa River. The area is located in the municipality of Røros.

When originally established in 1894, the Riast/Hylling Sami homelands consisted of two separate areas, Riast and Hylling, but in recent years the two have functioned as a single unit. The homelands cover a gross area of 1836 sq. km. The area is used exclusively for summer reindeer grazing from March-April until December-January. Winter grazing takes place farther south in the

Femund Sami homelands. Thus the area under dispute is located on summer grazing grounds and comprises four to five per cent of the total area.

The western section of the area under dispute has been the subject of earlier conflicts and legal disputes between landowners and reindeer owners. Pursuant to a Supreme Court judgement of 6 July 1897 (*Rettsstidene* 1897:759), the reindeer owners were found not to be entitled to graze reindeer on parts of the area currently under dispute. The question of the force of law of this judgement has been a key element in the arguments presented to the Supreme Court, as has the question of the judgement's probative value.

Recent years' conflicts between landowners and reindeer owners are related, not least, to the reindeer herd's foraging and grazing down the land near Aursund Sound. Reindeer grazing on outfarm pastures and hayfields has also engendered conflicts. The grazing has caused landowners to lodge a number of complaints against reindeer owners with the police, but all the complaints have been dropped by the police because of the underlying civil disagreement regarding the purview of the grazing grounds.

This was the immediate reason that, with two exceptions, the landowners in the area under dispute brought the question of the area of the grazing grounds before Gauldal Municipal Court through a summons dated 11 November 1993. There were 27 plaintiffs in the case filed against the Riast/Hylling Sami homelands, comprised of 10 operative units (reindeer owners).

The Gauldal Municipal Court, convened with two lay assessors, rendered the following decision on 25 October 1994:

- “•1. The cases of plaintiffs numbers 1, 2, 3, 4, 9, 10, 12, 14, 15, 17, 18 and 26 are dismissed.
- 2. The reindeer owners belonging to the Riast/Hylling Sami homelands are found not to be entitled to engage in any form of reindeer grazing on the plaintiffs' properties located north of Aursund Sound and bordered on the east by the Lillesøa River, in the north-east by the Røros northern Crown lands, in the north by the municipality of Holtålen and in the west by the Store Molinga and Storbekken rivers, all in the municipality of Røros, but they do have the right of passage to move their stock across Aursund Sound at Sommarlia/Evavollen towards Gråhøgdipiken to the north.
- 3. The defendants shall be required jointly to pay the plaintiffs' court costs of NOK 80 000 - eighty thousand Norwegian crowns - within 2 - two - weeks of service of the judgement.”

The decision was rendered against the vote of one of the lay assessors.

The Riast/Hylling Sami homelands, as represented by the chairman, appealed the judgement to the Frostating Court of Appeal - Civil Division, making the same statement of claim as before the municipal court. However, the right of passage in the eastern part of the disputed area, which the municipal court upheld, was not disputed before the Court of Appeal.

On 15 December 1995, the Frostating Court of Appeal rendered the following decision:

- “•1. The decision of the municipal court, point 1 of the conclusion, is set aside.
- 2. The decision of the municipal court, point 2 and point 3, is upheld.
- 3. To defray court costs incurred before the Court of Appeal, the Riast/Hylling Sami homelands, as represented by Jarle Jonassen, shall pay, jointly and severally, to Kjell Bendixvold et al. represented by Attorney-at-law Arve Rosvold Alver, the sum of NOK 117,489 – one hundred and seventeen thousand four hundred and eighty-nine Norwegian crowns – within 2 – two – weeks of service of the judgement.”

The facts of the case and the parties’ submissions before the lower courts are evident from the decisions of the municipal court and the court of appeal.

The Riast/Hylling Sami homelands, as represented by the chairman, has appealed the decision of the Court of Appeal to the Supreme Court. The appeal pertains to the application of the law and the assessment of evidence. On 12-14 August 1997, the Supreme Court deposed individual parties (reindeer owners) and witnesses, among them individual expert witnesses, in Gauldal Municipal Court. The appellants have invested significant effort in trying to find traces of Sami settlement in the area under dispute and in adjacent areas. The appellants have also contested before the Supreme Court the purview of the area on which reindeer grazing was prohibited pursuant to the judgement published in *Rettsstidene* 1897:759.

The appellant - the Riast/Hylling Sami homelands - has essentially submitted the following argument:

Sami reindeer owners acquired the right to graze reindeer in the area under dispute long before the 1897 Supreme Court judgement was handed down. The appellant party does not submit that the reindeer herding conducted in this century constitutes independent legal grounds for reindeer herding in the area, but that it is an indication that reindeer herding was practised there in earlier times. The herding pattern has generally remained the same. The fact that reindeer herding has lost viability for rather long periods during the present

century can not entail that the grazing rights have lapsed owing to disuse, cf. the so-called Mauken decision in *Rettsstidene* 1985:532. Use from time immemorial provides the basis for reindeer grazing rights elsewhere in the Røros area, as has been established by precedent, cf. e.g. *Rettsstidene* 1988:1217 - the Korssjøfjell decision.

The Supreme Court's 1897 assessment of the evidence on the question of the establishment under customary law of the reindeer owners' grazing rights in the area then under dispute was incorrect. The legal requirements that the Court set for acquisition of a right derived by use since time immemorial were overly strict. At that time, part of the material submitted to the Court was the Lapp Commission's recommendation of 1892, even though the document took no position on the existence and frequency of reindeer grazing in the area being disputed at that time. The Commission was set up to deal with the growing conflict between farmers and reindeer owners during the 1870s and 1880s, and it was far from pro-Sami in its approach. The Sami were not represented on the Commission.

It is traditional for the burden of proof regarding the acquisition of a right derived by use since time immemorial to rest with the claimant. Thus the Sami had to render it probable that they had been exercising their grazing rights from time immemorial. When the Reindeer Husbandry Act was amended on 23 February 1996, § 2, first subsection, received a new litra 3:

“Those wilderness areas (cf. § 11) that are part of Sami homelands are to be considered lawful reindeer grazing areas with such special rights and obligations as mentioned in litra 1, unless there are extenuating legal circumstances that would indicate otherwise.”

The provision, which entered into effect on 1 July 1996, must also be applicable to actions pending, according to the Storting's discussions when debating the act. This should be viewed as a “weak presumption rule”: where there is absolutely doubt about reindeer herding rights, the decision shall favour the Sami. The Court of Appeal erred when it found that the 1897 Supreme Court ruling should be considered a case of “extenuating legal circumstances” within the meaning of the Act.

We contest the respondents' argument that it was the increase in the reindeer stock that created the problems at the end of the previous century. The number of reindeer has always varied, and there is no basis for the supposition that it particularly high just then. The conflict at that time may have had other causes.

The Sami had been in the area for a long time, and reindeer occasionally grazed in the area under dispute. The traditional requirements for the acquisition of a right derived by use since time immemorial cannot be interpreted in the same

way for reindeer herding as they are for keeping livestock. We must take into consideration the special nature of reindeer herding. Reindeer herding makes heavy demands on acreage, and no one can require that reindeer graze in a certain area every year. Expressions such as “random grazing” or “sporadic grazing” are unknown in reindeer herding. Reindeer herding makes use of entire areas. It is the nature of reindeer to adapt to their surroundings, the topography, the food situation, weather and wind conditions, etc. These are the conditions that determine the amount of acreage used. It is typical for reindeer to engage in random foraging at certain times of the year. The fact that reindeer have certain core areas for calving, for example, does not mean that the total area of which they make use is not significantly greater.

In its 1897 judgement, the Supreme Court did not take such an overall view into account when it emphasised that grazing “rarely” took place in the area under dispute. At that time, the Supreme Court described the use of the grazing area as too infrequent. But even if one accepts this description, there would be sufficient grazing to validate the possibility of “habitual use”, which provides grounds for a right in customary law. Even in 1897, there was no disagreement about a core area for Sami reindeer herding around Lake Busjø. Further, it was assumed that the Sami had acquired grazing rights based on use since time immemorial north of the area under dispute. However, a proper understanding of the unique nature of reindeer herding and the significance of the topography makes it practically impossible to operate with such a boundary.

In its 1897 judgement, the Supreme Court seems to have given a great deal of weight to the fact that farmers had farms, hayfields and outfarm pastures before the Sami came into the area. In this connection, mention was made of Professor Yngvar Nielsen’s “advance theory”, which described Sami migration from the north until the mid-1600s.

There are those who contest this view. Recent research, as represented *inter alia* by Professor Knut Bergsland, indicates that there were Sami in the area when the Røros copper mine was established in 1644. At about that time, the Sami people began herding domesticated reindeer to make a living.

Discoveries of *gamme* [Sami turf hut] mounds – *koie* [earthen dug-out] sites – in and around the area under dispute bear witness to ancient Sami settlement. These are completely new finds. Although the matter was discussed by the Supreme Court in 1897, at that time there were nothing but sketchy details available regarding Sami cultural artefacts. The latest finds were by and large made subsequent to the decision taken on this case by the Court of Appeal. The artefacts have been verified by experts from the Sami Cultural Heritage Council. Several of the artefacts – including some from within the area under dispute – exhibit definite signs of Sami origin.

In this century, reindeer herding in the area under dispute represents a continuation of the pattern that has existed for several centuries. When the conflict between the landowners and reindeer owners re-emerged in the 1960s and later, it was solely because the Sami resumed herding reindeer according to the pattern that prevailed earlier. The Sami have never followed the 1897 judgement, which did not coincide with their idea of justice. Moreover, they interpreted the judgement as being limited to non-nomadic reindeer herding – a job the Sami performed in return for remuneration until about the turn of the century.

The Court should attach importance to the fact that the 1897 judgement forms the basis for legal decisions made during the present century. These disputes involved no independent evaluation of the evidence that formed the basis of the 1897 judgement.

The Supreme Court's 1897 judgement does not carry the force of law for anyone except those landowners among the parties to the present suit who have acquired ownership of the farms that were parties [to the case] in 1897. According to the Court of Appeal, this amounts to twelve farms. The judgement is not binding on the remaining landowners in the present dispute, and, of course, not on those who own properties outside the area under dispute in 1897. The 1897 judgement cannot be binding on present-day reindeer owners. They did not acquire their rights by succession from the reindeer owners who were party to the case in the 1890s. It is generally true that legal judgements in cases involving collective rights are not binding on claimants other than those who are party to the case. In addition, new information is available which makes it reasonable to consider the entire case anew. The Court of Appeal's opinion on the question of the force of law is correct.

Otherwise, it has been pointed out that there is a lack of clarity regarding precisely what the Supreme Court bound the parties to in its 1897 judgement. The property lines were unclear. The conclusion of the judgement of the appellate court, which was upheld by the Supreme Court, makes no mention of fields outside of outfarm pastures and forests. This must be seen in connection with the fact that the entire area under dispute was once Crown land, and that the land which was deeded to private ownership was only that part of the Crown lands which had been developed through use.

The appellants submitted the following statement of claim:

- “1. That the Court find for the Riast/Hylling Sami homelands, as represented by the chairman.

- 2. That the Riast/Hylling Sami homelands, as represented by the chairman, be awarded court costs for the Municipal Court, the Court of Appeal and the Supreme Court.”

The respondents – Kjell Bendixvold and the others, 27 landowners in all – submitted the following statement of summary:

The 1897 Supreme Court judgement enjoys the full force of law – in terms of both the legal persons and the chose in possession – for the successors of the landowners at the time and the reindeer owners today insofar as it pertains to the area under the dispute covered by the judgement

In the matter of the limitations of the force of law, strictly speaking, the Court must start with the object under dispute in 1897, the respondents’ properties. The appellate court expressly referred to these in its conclusion, which the Supreme Court upheld. And the property lines abutting the Crown lands were as clear then as they are today. The Supreme Court expressly stated in its judgement that the parcels of land under dispute had long since passed into private ownership.

There is no dispute that the 1897 judgement is binding upon present-day landowners who, through succession, have assumed ownership of those properties to which the judgement applied. The problem is the force of law regarding the reindeer owners. Grazing rights do not follow private-law succession. They pertain to those who engage in the occupation collectively, in this case to the Sami as a group, not to the individual reindeer owner. Reference is made to Strøm Bull: *Studier i reindriftsrett* [Studies in Reindeer Husbandry Law], pp. 48-49. Those who participated in the proceedings at the end of the previous century appeared on behalf of the reindeer herding industry. It is therefore of no consequence that only two reindeer owners were appellants before the Supreme Court in 1897. The judgement was binding on all those who exercised grazing rights then, and on all who have exercised them subsequently. Fair consideration also favours such a solution. Accordingly, the Municipal Court judged this issue correctly. The Supreme Court must *ex officio* reject the case insofar as those who are bound by the 1897 judgement are concerned.

With regard to the facts of the case, the Supreme Court’s judgement of 1897 is a key part of the assessment of evidence. It should not be necessary to determine who settled the area first – the Sami or the farmers. There is no dispute as to whether there were Sami in the area from at least the mid-1700s. The crucial question is whether there is evidence that the grazing in the area

under dispute has been extensive enough to justify the acquisition of a right derived by use since time immemorial. In the alternative, the court will, in any event, touch upon the historical issues, since the appellants claim that the Supreme Court made an incorrect assumption in 1897 when it determined that the farmers were there first. There is copious documentation dating back a long time which corroborates the presence of farmers along the northern shore of Aursund Sound, and for established farming settlements from the 1600s, at the very least. On the other hand, a number of experts contend that the Sami did not enter the area until the mid-1700s.

The presence of the Sami in the area is one matter; another is the size of the reindeer herds, and it is the latter which determines the pressure on the farmers' home fields and outlying fields. There are strong indications that there were relatively few reindeer in the area until approx. 1870, when the Sami Paul Johnsen began to graze reindeer there. According to the Lapp Commission's 1892 report, there were 548 reindeer in Røros in 1875. By 1890, the number had risen to 3600. Of these, the farmers owned 1000 head. Paul Johnsen alone had 1500 head. The Commission itself expressed the view that the numbers were unreliable, even misleading, but stated that there could be no doubt that the number of reindeer had increased sharply in recent years.

As regards the situation from 1897 to the present, the number of reindeer remained high until approx. 1920. Then the number decreased and remained low for a long time. During the war, the herding of domesticated reindeer was phased out as reindeer owners let their stock run wild. A large new wave of reindeer arrived in the 1960s when the Fjellheim brothers started herding reindeer in the area.

Today reindeer owners claim grazing rights extending to the northern shore of Aursund Sound, whereas the contested area in the late 1880s and 1890s was located in the mountains near Lake Gjeltsjø. This is stated in the Lapp Commission's 1892 report.

It would not be right to re-evaluate the conclusion of the 1897 judgement today. The Court was closer to the evidence then than it is now. Nor does this judgement stand alone. Subsequent rulings have been based on it. One such case took place in 1934 and involved the exchange of several strip holdings for one compact holding, and representatives of the reindeer owners claimed that the grazing rights pertained to an appreciably smaller area than the one the appellants claim today. Another took place in 1941 and involved a boundary line, while yet another involved a criminal case in 1968. Without exception, the judgement of 1897 has been used as the basis for the rulings. It has served as an established legal opinion for more than 100 years.

Nor should the court attach importance to the cultural artefacts alleged to be of Sami origin which are supposed to have been found subsequent to the appellate court judgement in this case. They have not been fully substantiated and cannot be dated. Many of them were located down in the rural area where farmers have lived for several hundred years. And even if the artefacts are of Sami origin, they need not have been associated with reindeer herding.

The appellants have argued that the migration of the reindeer all the way down to Aursund Sound – especially during mushroom season in the autumn – is natural, given the local topography and the nature of the reindeer. But the northern shore of Aursund Sound has been farmed for several hundred years. It is marginal farming at best, approx. 700 meters above sea level under difficult climatic conditions. If these farms had been regularly inundated by reindeer as they were in about 1890 and in recent decades, farming would not have been possible there.

The reindeer owners have neglected their statutory custodial obligations for long periods of time.

The respondents submit the following statement of claim:

- “•1. That the judgement of the Court of Appeal be upheld.
- 2. That the Riast/Hylling Sami homelands, as represented by Jarle Jonassen -- jointly and severally – pay the court costs incurred before the Supreme Court to Kjell Bendixvold et al., as represented by Attorney-at-law Arve Rosvold Alver.”

I have arrived at the same conclusion as the Court of Appeal. However, on the matter of the force of law pertaining to the Supreme Court judgement of 6 July 1897, I base my judgement on a different premise.

In many respects, the current quarrel between the landowners and reindeer owners in the areas north of Aursund Sound is a recurrence of the disputes that led to lengthy court proceedings at the end of the previous century – from 1887 to 1897. At that time, the area under dispute per se extended somewhat further to the west than the present-day claim, although the areas overlap to some extent. Thus the western reaches of the area currently under dispute were disputed in the previous century as well. It is for this area, shown on maps with the boundaries for the properties involved, that the issue arises of the force of law of the Supreme Court’s 1897 ruling. As for the rest of the area currently under dispute – the eastern part – the Supreme Court must, in any event, take a position regarding whether the right to graze reindeer obtains there as well.

First, I will deal with the question of the force of law. The previous century’s dispute began in 1887 when 28 landowners filed a complaint against 27

reindeer owners for unlawful grazing. Before the case reached the court of first instance, 17 of the reindeer owners agreed to settle by paying compensation for the damage caused by grazing, and damage assessments were arranged for that purpose. On 26 January 1893, the court of first instance ruled on the case with regard to nine named reindeer owners, and found none of them entitled to allow their animals to graze on the area under dispute. Although it was not stated, one reindeer owner must have withdrawn before the court ruled on the case. Only two of the nine reindeer owners on whom the court of first instance passed judgement appealed the judgement before the appellate court, which, on 4 June 1894, arrived at the same conclusion as the lower court. The reindeer owners appealed the judgement to the Supreme Court which, in a judgement handed down on 6 June 1897, upheld the judgement of the appellate court insofar as it applied to the privately-owned areas where the Sami had been found not entitled to graze reindeer.

The point of departure for both the Municipal Court and the Court of Appeal is that the 1897 Supreme Court judgement is binding on those landowners who currently hold title to the properties to which the 1897 judgement applied. There is no dispute that the force of law applies to the properties belonging to parties numbers 1, 2, 3, 4, 9, 10, 12, 14, 15, 17, 18 and 26. In addition, counsel for the respondents has proved to the Supreme Court that the cases of respondents numbers 6, 11, 13 and 16 are warranted because these properties are within the scope of the 1897 judgement. I take this as the basis for my rationale. Accordingly, the 1897 Supreme Court judgement is directly binding on 16 of the present landowners and respondents, while the remaining 11 landowners own properties located to the east of the area disputed at that time.

Insofar as the reindeer owners are concerned, the question of the force of law is more difficult. In all probability, the initiation of legal proceedings in 1887 applied to all known reindeer owners in the area. At that time, it was necessary to sue as many individual reindeer owners as possible for the judgement to have the required effect. It was not until the Reindeer Husbandry Act of 9 June 1978, that the chairman of the Sami homelands was given the right to represent the homelands and the reindeer herders in matters of collective concern, including the right to enter into court settlements - cf. § 8, subsection 2, of the Act. In deciding the question of the binding effect of the 1897 judgement on present-day reindeer owners in the area, I begin by noting that grazing rights – to the extent they apply in the Røros region – are derived through use from time immemorial by the industry as such, rather than by individual reindeer owners. There is no question of any individual right of succession in private law, or any individual protection from expropriation under the law of eminent domain. The Supreme Court clearly demonstrated the latter in its judgement in *Rettsstidene* 1975:1029. The respondents have insisted that the two reindeer owners who were parties to the 1897 judgement, and the seven that accepted the judgement

of the court of first instance, therefore acted on behalf of the occupation, so the judgement is binding on reindeer owners in the area after subsequent to that time and up to the present day.

The fact that grazing rights pertain to the reindeer herding industry as such must in principle entail that judgements affecting the extent of grazing rights in a particular area must be binding on all those involved in the industry and not limited to those directly affected by the judgements. Given the enactment of § 8, subsection 2 of the 1978 Reindeer Husbandry Act, this issue is not being pushed to the extreme. However, this fundamental viewpoint must be supplemented by assurances that the reindeer owners involved in the case were representative of reindeer owners in general. The case does not offer sufficient information on this point. As mentioned, 27 reindeer owners were named in the original suit, and of these, 17 agreed to settle the case by paying compensation. No one can document these settlements today and no one is familiar with the details of their terms and conditions, nor does anyone know whether they were in-court or out-of-court settlements. The parties remaining are the seven reindeer owners who accepted the judgement of the court of first instance and the two who brought the case before the Supreme Court. One of the two – Paul Johnsen – seems to have been the one who owned the most reindeer.

Since the case offers little information on precisely this point, I hesitate to decide it on the basis of the rules regarding the force of law. I therefore have no justification for further examining the issue of which areas were directly affected by the 1897 judgement.

I now turn to the issue of the extent to which reindeer owners have grazing rights in the area currently under dispute, and shall first discuss the western part, which coincides with the eastern part of the area under dispute in 1897. As mentioned earlier, this applies to 16 properties which belong to 16 of the parties to the present litigation.

§ 2, subsection 1, litra 2 of the Reindeer Husbandry Act states: “When the authorities fix the boundaries of the Sami homelands/reindeer grazing areas, they shall attach importance to whether nomadic Sami traditionally engaged in reindeer herding there”. The official division of regions and districts is not in and of itself decisive in the matter of the purview of grazing rights. Grazing rights must in each individual area rest on fulfilment of the private-law conditions for use since time immemorial. I refer here to the judgement in *Rettsstidene* 1988:1217, in which the Supreme Court pointed out that the Lapp Commission had already contended this, when, in 1892, it proposed the first division of land into Sami homelands. The Court also based its judgement on the fact that the Reindeer Husbandry Acts of 1933 and 1978 did not intend to change this.

Counsel have presented arguments before the Supreme Court regarding the application of § 2, subsection 1, litra 3 of the Reindeer Husbandry Act, which was introduced through the amendment of 23 February 1996 and entered into effect on 1 July the same year. I see no need to take a position on the interpretation of this provision since, in my view, the respondents have rendered it probable that the reindeer owners are not entitled to allow their animals graze in the area currently under dispute. Besides, the aforementioned provision cannot be understood in such a way as to impose a stricter burden of proof than this upon the landowners.

The appellant party has made it clear to the Supreme Court that the reindeer owners are not basing their claim on an independent right derived from the use of the grazing lands which has taken place subsequent to the 1897 judgement. Therefore the question is still whether the reindeer owners secured grazing rights in the area currently under dispute through use from time immemorial prior to 1897. This is – for 16 of the land owners – exactly the same dispute that the Supreme Court ruled on in 1897. Accordingly, in my view, this judgement must be key to the assessment of the evidence today as well.

This case involved the submission of copious evidence, with testimony from parties and witnesses on behalf of the Sami and the landowners alike. In addition, the court of first instance visited the site. At that time, the question of remains of Sami settlements was also at issue. I attach importance to the fact that the courts were considerably closer to the evidence a century ago, mainly the alleged use of the area under dispute for the purpose of grazing reindeer. Several of the witnesses who testified in the court of first instance, on whose ruling the Supreme Court founded its judgement, had experience [of the situation] dating all the way back to the 1820s.

In the light of this, it is clear to me that one must be wary of disregarding the Supreme Court's 1897 assessment of the evidence. The Supreme Court found evidence that reindeer herding had occasionally taken place in the area under dispute and, insofar as anyone could tell, there had been virtually no reindeer passage across the properties. Incidentally, the Supreme Court referred to the judgement of the court of first instance which concluded its assessment of the evidence with these words:

“According to the testimony now before us, the Court finds it far from substantiated that the Lapps have moved about in earlier times on the properties at issue in Kuraas and the surrounding area, along the northern edge of Lake Aursund, in Lille and Store Molingdal valleys and along Lake Gjeltsjø, and, in fact, it seems more probable that such movements scarcely took place prior to the past few decades and, in all likelihood, not until about the eighties, and we

are, accordingly, in agreement with the lower court that we must rule that the appellants are not entitled to allow reindeer to move about on these properties.”

The appellants have maintained that the Supreme Court took the wrong point of departure in 1897 by basing their decision on the claim that farmers occupied the area before the Sami, and that this view affected the entire resolution of the case. In the present case, great efforts have been invested in proving that the opposite obtained, i.e. that the Sami came to the area first. In this matter I refer to the submissions. Both parties have cited copious source material, which also documents a great deal of disagreement among experts in the field. They have cited works by Professors Yngvar Nielsen, Knut Bergsland, Kjell Haarstad and Jørn Sandes, among others.

I see no reason to take a position on the question of which group came to the area first. In my opinion, this was not an issue for the Supreme Court in its 1897 judgement. In any event, there was then – as there is today – agreement that the Sami herded domesticated reindeer in the area from the mid-1700s, and that they had derived grazing rights through use from time immemorial of the area adjacent to the area under dispute. It is clear from the Supreme Court’s judgement that court attached decisive importance to comprehensive testimony on the existence and frequency of reindeer grazing in the disputed area itself. There are no grounds for the view that the court was biased from the outset in the weighing of evidence. Prompted by certain comments made by the lower courts, the first-voting Justice felt it necessary to make the following clarification:

“I cannot regard the majority of the witnesses produced by the Lapps as unreliable merely because they as Lapps happen to have an interest in the resolution of the issue. In a sense, most of the witnesses on both sides probably have equally salient interests.”

I also refer to the statement made by the minority – extraordinary lay assessor Motzfeldt – favouring limited grazing rights in the disputed area. He nonetheless concurred with the conclusion of the first-voting judge.

I do not find, as the appellant contended, that the peculiar nature of reindeer herding, the nature of reindeer, forage-based migration and the significance of the topography allow me to significantly lower the standard for the acquisition of a right derived through use from time immemorial from what is otherwise the case in property law. Moreover, these conditions are of evidential significance regarding the question of use. I am not, by the way, without sympathy for a certain degree of special legal treatment for reindeer herding. A long-term interruption in reindeer herding does not automatically lead to the loss of grazing rights, cf. the Mauken decision in *Rettsstidene* 1985:532. However, in my opinion, the appellant takes this viewpoint too far. One obvious

consequence of the appellant's view would be that it would be practically impossible to draw a boundary for reindeer grazing rights in mountain wilderness terrain. And there is no reason to assume that, in previous centuries, the courts were not acquainted with the unique character of reindeer herding and the demands it places on acreage. I do not find any valid reason to maintain that the Supreme Court in 1897 was excessively zealous in applying the terms and conditions attached to the acquisition of a right derived by use from time immemorial. I should add that the respondents – in my view – have rendered it more or less probable that the two disputes between landowners and reindeer owners exemplified by this case, and which have culminated at an interval of approximately 100 years, are related to the particularly large number of reindeer in both periods. In any event, it is safe to assume that the present conflict is related to the reindeer owners' failure to fulfil their statutory herding obligations, namely, the obligation to keep the reindeer under adequate control on legal grazing areas, cf. § 20 of the Reindeer Husbandry Act.

Nor is the appellant party's demonstration of cultural artefacts in and near the area under dispute a factor that can provide the grounds for an assessment of evidence different from the one in the 1897 judgement. Even if we were to base our argument on the likely presence of Sami *gamme* sites, there is some uncertainty attached to the finds. The appellants concede that there is uncertainty attached to the dating; it is claimed that the artefacts date from the 1600s, 1700s or 1800s. The finds were made in areas where there have been farms and permanent dwellings back as far as the 1600s in any case. When account is taken of the available information regarding the scope of reindeer herding up until the end of the 1800s, I cannot see that these finds constitute any appreciable evidential factor for grazing rights deriving from use since time immemorial.

As far as I can see, the grazing rights that the Sami claim to possess today in the area extending all the way down to the northern shore of Aursund Sound are considerably more comprehensive than those the Sami have previously maintained. During the court proceedings in the 1890s, the Sami appear to have asserted "that ancient custom should allow them to extend their pasture a good deal farther south and west 'than the landowners' primary claim during the suit' in such a way that they especially may pasture their animals around Lake Gjeltsjø, in the upper reaches of the Stormolingdal valley and in area near the Killingdal mine", cf. the Lapp Commission's 1892 report, [p.] 13. The alternative claim advanced by the landowners showed, in my opinion, that it was by and large these parts of the plaintiffs' properties to which the dispute pertained. In this context, I refer to extraordinary lay assessor Motzfeldt's vote in the 1897 case, which appears to confirm this.

Further, I would mention that the 1897 ruling forms the basis of several legal decisions handed down in this century. I do not see that there is any basis for the narrow interpretation of the judgement suggested by the appellant.

With regard to the question of reindeer grazing rights in the eastern part of the area currently under dispute, i.e. the area not covered by the 1897 judgement, the judgement must have more or less the same legal force for this area. In this matter, I refer to what I have already emphasised and point out that there are no natural boundaries between the eastern and western parts of area under dispute. In both areas, farms and home fields are located at the bottom towards Aursund Sound, and stretches of forest are located up towards the chain of mountains.

Pursuant to the main rule of law, I find that the appellants must defray the respondents' court costs before the Supreme Court. The court costs amount to NOK 255,307.

I vote for the following judgement:

- 1. The judgement of the Court of Appeal be upheld.
- 2. The Riast/Hylling Sami homelands, as represented by the chairman, shall pay court costs in the amount of NOK 255, 307 – two hundred and fifty-five thousand three hundred and seven Norwegian crowns – jointly to Kjell Bendixvold, Torbjørn Bendixvold, Leif Nilsgård, Ola Brynhildsvold, Arne Sommer, Svein M. Evavold, Steinar Løkken, Birger Sommer, Agnar Sjøvold, Bjørnar Sundt, Lars T. Ormhaug, Kåre Holdbakk, Liv Karin Sandkjernan, Stein Ove Kuraas, Helge Mølmann, Rune Mortensen, John Haugsbak, Lisabet Solhus, Per Jørgen Jamtvoll, Torvald Torpet, Leif Kokkvoll, Peder H. Sødal's estate, as represented by Ingmar H. Sødal, Jon Ryttervold, Aage Engesvold, Hans B. Sødal, Lars Tørresvold and Ole Klemmetvold within 2 - two - weeks of the service of this judgement.

Justice Matningsdal: I have reached a different conclusion from the first-voting judge.

I subscribe more or less to the statements of the first-voting Justice regarding for whom the 1897 judgement has the force of law. However, in my estimation, we have sufficient information to ascertain that the judgement is also binding on the Sami for the area under dispute.

Insofar as the Sami are concerned, in this case, the reason for the insufficient force of law is chiefly that we do not know enough about the settlements agreed by most of the defendants. However, this cannot be a decisive argument: According to the information the Lapp Commission provided about Sami reindeer owners in the area, most of them were party to the suit. Consequently,

it should not matter that we do not have full knowledge of the settlements and the extent to which they might possibly have been concluded out of court. The point at issue is that the reindeer owners were drawn into the case in any event, meaning they had an opportunity to influence the outcome.

Accordingly, the next question pertains to the areas covered by the judgement and those for whom it carries the force of law. More explicitly, the question is whether the judgement covers all the outlying fields on the present landowners' properties, or whether it is limited to parts of the properties. The appellate court, whose judgement the Supreme Court upheld, came to the following conclusion:

“We find the appellants Paul Johnsen and Lars Holm not entitled to allow Reindeer to move about on or pass across the properties at issue, their home fields, outlying fields, hayfields, outfarm pastures, pasture paths, lakeside or forest areas in Kuraasen and the surrounding area, along the northern shore of Lake Aursund, in Lille and Store Molingdal valleys or near Lake Gjeltsø.”

At first glance, this enumeration might seem to indicate that the judgement is limited to parts of the landowners' present properties. However, the Supreme Court stated that at one time the area in question north of Aursund Sound was Crown land, but that the Court found that it had to “be regarded as given that it had long since passed into private ownership”. In the light of this, the decision mentions “outlying fields” without reservation or qualifications, giving the strong impression that the judgement covers the properties within the present-day boundaries. Thus I have no reason to cast aspersions on the validity of the borders along the Røros northern Crown lands, which were established later. The reason for specifically mentioning the northern shore of Aursund Sound and Lille and Store Gjeltsjø lakes may be that the home field parcels were located here, and that the grazing damage was greatest here.

Given this, I am of the opinion that the judgement applies to the current landowners' properties in their entirety. As a result, the appeals of respondents numbers 1 to 4, 6, 9 to 18 and 26, must be denied and the judgement of the Court of Appeal must be overturned insofar as they are concerned.

In evaluating the facts of the case, I assign less importance to the 1897 Supreme Court judgement than the first-voting Justice does. If the starting point is that the grazing rights are not legally binding on the eastern part of the area, there will have to be a complete re-assessment of the evidence without prejudice to the result of the Supreme Court's 1897 evaluation of evidence. Nevertheless, this does not imply that the Supreme Court's evaluation of the evidence in 1897 is not without merit: As pointed out by the first-voting judge, the matter under dispute is the same in that the question is whether the Sami had acquired the right to graze reindeer derived from use since time immemorial before 1897. It

is in the nature of the case that in 1897 the Supreme Court was in closer proximity to the evidence and for that reason was better qualified than today to make a qualified judgement. Notwithstanding, this does justify the point of departure taken by the first-voting judge.

The fact that I do not assign the same weight to the 1897 Supreme Court judgement as the first-voting judge has done, is not only ascribable to the technicality described above. Given the Supreme Court's grounds for the judgement, I am not convinced that the Supreme Court undertook the far-reaching evaluation this case demands:

In 1889, Yngvar Nielsen published a dissertation in which he launched the "advance theory", that is, the theory that the Sami arrived in the area after the landowners. The Supreme Court's judgement stated that, prior to 1889, it "was often assumed that the Lapps were the original inhabitants of these regions". Since the first-voting Justice in 1897 cited the "advance theory" and otherwise hardly discussed the testimonies of witnesses, I cannot rule out the possibility that Yngvar Nielsen's launching of this theory was given more credence than the thesis has for the assessment of the evidence regarding Sami grazing rights. As I shall discuss below, the tenability of the "advance theory" is not decisive.

The main impression of the testimony is that the witnesses for the Sami spoke in favour of the Sami, whereas the opposite seems to be the case for the landowners' witnesses. Since there is in a number of cases a tendency for witnesses produced by each side, consciously or subconsciously, to give testimony that supports the side to which they feel the greater affiliation, in such a situation one ought to be wary of assigning too much importance to testimony if other elements point in the opposite direction. Such elements were brought to bear in this case, as I shall discuss below.

I point out that the Supreme Court emphasised that "the nearest place where the Lapps are known to have had a frequent abode was Lake Busø ...". The Supreme Court did not discuss the significance of Lapp Commission's statement that the Sami had *koier* near "Fjeldgjætla and Lake Busjø on the mountain plateau north of Aursund Sound." I will revert to the significance of this.

As mentioned earlier, conclusions must be based on a broad overall assessment of the evidence. During the proceedings, considerable evidence was presented on the matter of who settled the area first. I agree with the first-voting Justice that this is not decisive. Notwithstanding, the fact that Major Schnitler did not encounter any Sami south of the Tydal mountains in the course of his examination of the boundaries in 1742 is not conclusive proof that the Sami did not arrive in the Røros area until after 1742. Since the Sami were nomads, his

observations are mainly applicable to the year 1742, and they do not carry the same weight for previous years.

In this context, I would first mention that the Røros Commission, which issued its report in 1879, stated that “Only some nomadic Lapps had temporary dwellings [there]” when the copper mine was established in the years from 1644 to 1646. It is evident that this statement is based on Peder Hjort’s printed reports. Peder Hjort was the chief clerk at the copper mine from 1762, and managing director from 1772 until his death in 1789. Further, I must mention that the church records from Røros show that Sami babies had been baptised at Røros ever since 1693. We can only assume that the parents were Sami who resided in the area. Sami who lived farther north must have had the opportunity to have their children baptised in churches located closer to where they lived.

If the southern Sami made the transition from hunting to nomadic reindeer herding in the 1500s, as the evidence suggests, this in itself indicates that the Sami engaged in reindeer herding in the Røros area prior to Major Schnitler’s journey in 1742. Furthermore, a document from 1660 which was found at an old posting station at Vingelen, twenty kilometres or so south of Røros, was presented as evidence. The document mentions the Sami Morten and Joen who had been to the Borg bailiff’s residence in Hoff parish south of Elverum to turn over three reindeer for delivery to the governor of the area. At the posting station they were given two horses “to transport them back to Røraas safely”. The wording indicates that there were Sami residing in the Røros district, and that, having arrived, they would not be travelling further. Besides, they would hardly have delivered wild reindeer.

I would also mention that in his book, *Sørsamisk historie: Ekspansjon og konflikter i Rørostraktene 1630-1900* (*Southern Sami History: Expansion and Conflicts in the Røros Area 1630-1900*), published in 1992, Professor Haarstad points out that in the course of his research he discovered a royal charter from 1743 that expressly permitted Sami reindeer herding in the mountains around Røros. Haarstad also informs us that Sami were granted leases at Røros that same year. After that point in time, the Røros church records indicate a pronounced increase in the number of Sami children baptised.

In the light of the aforementioned, I base my arguments on the fact that, since 1743 at the latest, the Sami have engaged in the herding of domesticated reindeer in the Røros district. In addition, the information referred to above, as corroborated by other information presented in the case, which I shall not go into here, indicates that the herding of domesticated reindeer began even earlier. However, it is not necessary to take a position on this question for the outcome of this case.

The scope of domesticated reindeer herding after 1743 has significance for whether, and, if so, to what extent, reindeer grazed on the area in question. While there is little reliable information available, we need not attach decisive importance to that: Given their economic adaptation and social structure, the Sami did not have any particular need for a written language, cf. Pareli and Severinsen: “Noen metodeproblemer i sørsamisk historieforskning” (“Some methodological problems in historical research on the Southern Sami”), appearing on page 30 of *Ottar*, vol. 116-117, pp. 29-37.

The Lapp Commission stated that, according to the official census for Søndre Trondhjems Amt in 1835, there were 388 reindeer in Røros, while the numbers in 1845 and 1855 were 446 and 757, respectively. This census could indicate that the number of domesticated reindeer doubled in the twenty years following 1835. It is mentioned that Paul Johnsen, a party to the case decided in 1897 and a large-scale reindeer owner, did not move to the area until about 1870.

In any event, there is reason to suspect that the census has given a misleading impression about trends in reindeer herding. This is why the Lapp Commission pointed out that it faced a methodological problem:

“Particularly insofar as the number of reindeer is concerned, it is well-nigh impossible to obtain reliable information, as it is almost never possible to see a Lapp’s reindeer herd together in one place; while the Lapps themselves, either because they do not have a sufficient accounting of the number of their animals, or because of superstition or contrariness, often make incorrect reports or even simply refuse to give information, the settlers, on the other hand, are prone to exaggerate their estimates.”

Furthermore, in 1851 the social scientist Eilert Sundt made an excursion to the Røros area where he lived for nearly two months. During his stay, he also visited the Sami. His conclusion was that the reindeer herding Sami were declining both in number and in prosperity. Compared with what the Lapp Commission pointed out regarding the methodological problems involved in counting reindeer, it appears that the 1835 census was severely misleading, and that the number of reindeer may have been higher in 1835 than in 1855.

I would also mention that during the taking of depositions in 1888 for use in the case referred to in *Rettsstidene* 1892:411, the witness Ole Andersen Kant stated that he had heard that “Rignils” was supposed to own 3000 head of reindeer. Ole Andersen Kant was 73 years old. The witness Peder Ellingsen Wehn, born in 1810, testified to the Lapp Commission that “Rignils” had had a *koie* near Riast in 1825. No certain assumptions can be made about the identity of “Rignils” in the light of the information the witnesses gave about him. Nor is his identity decisive: The witnesses in question testified in 1888 and 1890 respectively and were, as mentioned previously, 73 and 80 years of age

respectively. Thus they were familiar with conditions in the early 1800s. Their testimonies provide a strong indication that there were large numbers of reindeer in the area in about 1800.

In the light of the aforementioned, I accept that there was significant reindeer herding activity in the Røros area from at least 1743, and that it lasted into the 1800s, declining in about 1850 and picking up again when Paul Johnsen moved to the area in about 1870.

The next question then is whether the Sami engaged in reindeer herding in the disputed area to an extent that would justify the acquisition of a right derived from use since time immemorial. In making this appraisal, we ought to weigh the testimony given during the previous case against other factors in the case. In my estimation, the topographical conditions are of particular interest.

As mentioned earlier, in 1897 the Supreme Court pointed out that “the nearest place where the Lapps are known to have had a frequent abode was Lake Busø ...” However, the Supreme Court did not discuss the Lapp Commission’s reporting a few years earlier that the Sami had *koier* near “Lake Fjeldgjætla and Lake Busjø”. This information is, in my opinion, of great interest: The earthen hut the Sami had near Fjeldgjetla must have been related to the practice of reindeer herding. Moreover, Lake Fjeldgjetla is located in the middle of the highland plateau just north of Aursund Sound. Lake Busjø is located two to three km farther to the north-east and almost twice that far from the area under dispute. The area under dispute appears to be a natural extension of the areas surrounding both Lake Fjeldgjetla and Lake Busjø, making it unlikely that reindeer have not grazed there. The fact that parts of the disputed area are situated a good deal lower lends credence to this assumption, and, in the autumn in particular, it would have been natural for reindeer to migrate there – not least in search of mushrooms.

In isolation, the lack of information regarding the conflicts between the farmers and the Sami prior to 1850 may seem to contraindicate the occurrence of significant grazing in the area. But, in my estimation, we cannot assign importance to this: In the first place, the farmer’s exploitation of the area that was most attractive for reindeer herding was more modest from 1750 to 1850 than it was later. Moreover, the Sami herded the reindeer more rigorously then than they do today. Finally, I would emphasise that grazing took place primarily in the autumn, at a time when the risk of conflicts was smaller than in the summer. Hence there were not the same grounds for the conflict over use as there are today.

Against this background, on the basis of all contributing factors, I have come to the conclusion that the Sami grazed their animals to a not insignificant extent during the period from 1750 to 1850 on large parts of the area under dispute. In

the area near Aursund Sound, grazing was relatively sporadic, but in the uppermost reaches of the forest belt and in the mountains, the use was not so sporadic as to have been reminiscent of random grazing/foraging. On the contrary, in most years grazing must have taken place on a scale that would provide grounds for the acquisition of a right derived from use since time immemorial on this part of the landowners' properties.

Since I know from the deliberations that I am in the minority, I shall not draft a conclusion.

Justice Lund: I am in agreement with the first-voting judge, Justice Rieber-Mohn, both as to the essentials and the outcome. With reference to Justice Matningsdal's vote, I must point out that the points he made regarding the extent of reindeer herding since 1743 were essentially known and must have been taken into account during the case in the 1890s.

Justice Schei: As Justice Lund.

Justice Holmøy: Likewise.

After voting, the Supreme Court handed down this judgement:

•1. The judgement of the Court of Appeal is upheld. •2. The Riast/Hylling Sami homelands, as represented by the chairman, shall pay court costs incurred before the Supreme Court in the amount of NOK 255,307 – two hundred and fifty-five thousand, three hundred and seven Norwegian crowns – jointly to Kjell Bendixvold, Torbjørn Bendixvold, Leif Nilsgård, Ola Brynhildsvold, Arne Sommer, Svein M. Evavold, Steinar Løkken, Birger Sommer, Agnar Sjøvold, Bjørnar Sundt, Lars T. Ormhaug, Kåre Holdbakk, Liv Karin Sandkjernan, Stein Ove Kuraas, Helge Mølmann, Rune Mortensen, John Haugsbak, Lisabet Solhus, Per Jørgen Jamtvoll, Torvald Torpet, Leif Kokkvoll, Peder H. Sødal's estate, as represented by Ingmar H. Sødal, Jon Ryttervold, Aage Engesvold, Hans B. Sødal, Lars Tørresvold and Ole Klemmetvold within 2 - two - weeks from service of this judgement.