

Technical Papers of the Arctic Institute

The latest publication in this series is the following: No. 17. *THE CHANDALAR KUTCHIN*. By Robert A. McKennan. 1965. 156 pages, 2 figures, 26 plates. Copies may be obtained from the Montreal Office; price to Associates \$2.00; to non-members \$3.00.

The Chandalar Kutchin group of Athapaskan Indians inhabit the territory about the East Fork of the Chandalar River in Alaska. At the time this

field work was done they were still living in relative isolation and their contacts with Europeans were largely confined to periodic trading visits to Fort Yukon. The present monograph describes the native culture as it was at the time of white contact and the changes that have occurred since. In addition to these ethnographic data the study also includes a large collection of myths, source material that is relatively scarce for much of the Athapaskan area.

Reviews

THE EASTERN GREENLAND CASE IN HISTORICAL PERSPECTIVE. By OSCAR SVARLIEN. *Gainesville: University of Florida Press. University of Florida Monographs, Social Sciences, No. 21, Winter 1964. viii + 74 pages.*

This little booklet appears as the twenty-first in a quarterly series of social science monographs that the University of Florida has been publishing since 1959. It is a varied series, dealing with such miscellaneous topics as early and medieval Japanese historiography, Jacques Maritain's political philosophy, the Slavophile Konstantin Aksakov, sea power in relation to Chilean independence, and criminal asylum in Anglo-Saxon law. Thus, if the subject seems remote from Florida geographically and otherwise, it is in good company. Author Oscar Svarlien, of Norwegian

birth, has spent some years at the University of Florida, but his research interests lead him back to the lands of his forebears. He has written an introductory text on international law in the *McGraw-Hill Series in Political Science*, and in addition a number of articles on the polar regions, primarily concerning the involved question of territorial sovereignty. Currently he is working on a more comprehensive study of the same subject, which is evidently planned to deal with territorial claims throughout the polar regions. No definitive treatment of this subject on such a complete scale has yet appeared, the nearest thing to it, so far as I know, being Elmer Plischke's unpublished doctoral dissertation *Jurisdiction in the Polar Regions*, completed at Clark University in 1943.

The small size of this monograph should deceive no one as to the complexity and significance of the subject. The dispute over Eastern Greenland between Denmark and Norway, decided by the Permanent Court of International Justice in 1933, was one of the weightiest cases to be handled by that body, and had implications of an importance disproportionate to the value of the territories involved. The case aroused much comment in legal circles at the time and afterwards, as a glance at the author's numerous references will attest; and, as he shows in his text, it brought to culmination and settlement a growing dispute which had its roots in the remote past. It is no exaggeration, in fact, to say that its origins go back to the very beginning of European experience in the western hemisphere.

Greenland was apparently discovered by Norwegian-Icelandic sea voyagers about 900 A.D., and one of them, Eirik Raude (Eric the Red), established a settlement on the southwest coast about 985. In time another settlement grew up, also on the southwest coast, and the two together came to number perhaps two or three thousand souls. For many years they remained independent, but, in or about 1261 A.D., they became subservient to the Norwegian crown. About 1380 the Norwegian and Danish monarchies were joined, a union formalized in 1397 by the Treaty of Kalmar, which initially included Sweden too, and which, for Norway and Denmark, lasted until 1814. Contact with the Greenland settlements was gradually lost, for a variety of reasons; and the inhabitants disappeared in mysterious circumstances which have never been authoritatively explained. In the sixteenth century, starting with Martin Frobisher's three voyages in 1576-1578, communication with these regions was restored; and in 1721 the Norwegian pastor Hans Egede started a small colony in southwestern Greenland which was later taken over by the Danish-Norwegian crown. By the Treaty of Kiel in 1814, near the end of the Napoleonic Wars, the monarch of Denmark-

Norway was compelled to cede Norway to Sweden, Sweden herself having already lost Finland to Russia. However, by a Danish stratagem and a Swedish oversight, the cession left Norway's former colonies, Iceland and the Faeroe Islands as well as Greenland, in Danish hands. Norway, now under Swedish rather than Danish domination, remained in a subservient state until she won her independence in 1905.

During the end of the nineteenth and the early twentieth centuries Denmark gradually extended her activity and control in Greenland. Starting in 1915 with a request to the United States, Denmark sought general recognition of her title in the island; but whether she was asking for acknowledgement of her sovereignty over all of it, or of her right to extend her sovereignty over all of it, was uncertain, and became one of the main points disputed before the Court. In any case, her quest was successful without exception until Norway, whose foreign minister Ihlen had given a verbal promise in July 1919 that his government would raise no difficulties in the matter, balked in 1921 at a request for written confirmation of the promise, allegedly because Denmark had violated the 1919 understanding by coupling the request for recognition with the claim of unlimited control over economic activities as well. A convention on 9 July 1924 established a *modus vivendi* and stabilized the situation for a few years without achieving a final solution. Denmark, who since winning Great Power recognition had been forthrightly claiming sovereignty over all Greenland, continued to pass laws regulating economic and other activities throughout the island, capping them with a restrictive three-year plan in 1930. This and other disagreements led to a Norwegian royal proclamation on 10 July 1931, to the effect that the occupation of part of Eastern Greenland by Norwegian nationals a short time earlier was now confirmed as Norwegian ownership of the section between 71°30'N. and 75°40'N. Denmark promptly appealed to the Permanent Court of International Justice, under

the "optional clause" of the Statute's Article 36 which both parties had accepted, and also in accordance with a previous agreement between the two. In its judgment of 5 April 1933, the Court ruled, by a vote of twelve to two, that Denmark had sufficiently demonstrated her sovereignty to have a valid title to all Greenland, and that Norway's occupation of "Eirik Raude's Land" was illegal and invalid.

It is evident from this capsule summary that the background of the case involves the entire history of Norwegian and Danish activity in Greenland, and also many aspects of their relations with each other. The proceedings of the case occupy six large volumes; and the judgment itself, with dissenting opinions, fills over 100 pages. Dr. Svarlien thus had a considerable job of compression and abbreviation on his hands. His method of treatment, as indicated in the preface and the table of contents, seems appropriate, i.e., to give first a summary of the historical background, then an outline of the judgment, and finally a brief comment. However, one may justly complain, I think, that within this reasonable framework he has occasionally lapsed into confusion of topics, illogical sequence, inconsistency of opinion, and unnecessary repetition. For example, the circumstances surrounding the Ihlen declaration of 22 July 1919, are given repetitively on pages 29-30, 33, and 47-48. The period of sole Danish administration in the nineteenth and early twentieth centuries is treated in some detail on pages 25-30 and repeated in fairly similar terms in a section appraising the judgment on pages 70-72. The Danish proclamation of 10 May 1921, declaring that all Greenland was thereby brought under Danish rule, is given verbatim in two places in the text, on page 30 and again on page 71, but from different sources and with different wording. There are other instances of the kind. To complain about them individually would doubtless be rather picayune, but collectively they indicate, I think, a certain lack of organization.

There are a few minor typographical

or other errors which have evidently escaped proofreading. However, these are not excessive, and apart from them the booklet is well edited and attractively presented.

Of more concern, no doubt, are any deficiencies in the author's treatment of his subject, either in fact or in interpretation. If I understand him correctly, he is factually wrong in his apparent suggestion (page 52) that the so-called Donation of Constantine was elaborated by St. Augustine into the doctrine that the whole world was the property of God. It is true that St. Augustine followed Constantine in the fourth century A.D., but Constantine's "donation" was later shown by Lorenzo Valla (c. 1407-1457) and others to have originated as a forgery in the eighth century A.D., thus St. Augustine could hardly have been aware of it. It seems doubtful, also, that Pope Alexander VI invoked it specifically when issuing his famous Bull. It is surely an exaggeration to say (see page 19) that Prussian foreign minister Bernstorff "called the tune" in the Concert of Europe after the Napoleonic Wars. After all, Metternich was in the high tide of his career at this time, so was Castlereagh, so was Alexander I, and so, for a while, was Talleyrand. Such slips, however, are few.

The author speaks of "intertemporal law" in connection with the question of effective occupation, and refers approvingly to Judge Huber's exposition of it in *The Island of Palmas Case* in 1928, especially Huber's assertion of the principle that rights validly acquired may be lost if they are not continually maintained in accordance with changes in the law. He alleges (page 66) that in this sense Denmark did not meet contemporary requirements for sovereignty over all Greenland in 1931, and then quotes C. C. Hyde as authority to support his contention. This would appear to be a misinterpretation of Hyde, who evidently disagreed strongly with Huber's concept of intertemporal law. In his *International Law* (2nd rev. ed., I, 329, fn. 27), Hyde says: "It is suggested that the learned arbitrator might well

have reached the conclusion that the mere seeing or finding of the Island of Palmas did not produce a right of sovereignty. But if it did, it is not apparent how a mere change of the law touching the acts necessary to bring into being such a right, served in itself to destroy the existence of one that had in fact already come into being." In fact Hyde does not dispute the Court's opinion that Denmark had qualified for sovereignty over all Greenland; what he does do (page 340) is point out that in this instance a "manifestation of State activity" without genuine occupation or control sufficed to win legal recognition of sovereignty. He refers (page 329, fn. 27) to the comment on *The Island of Palmas Case* (*The American Journal of International Law* (1928), XXII, 739-740), by his colleague Philip Jessup, who condemns Huber's theory of intertemporal law in even harder terms than Hyde, saying that its retroactive effect would be "highly disturbing", as every state "would constantly be under the necessity of examining its title to each portion of its territory in order to determine whether a change in the law had necessitated, as it were, a reacquisition".

The author's references (pages 50-51) to Hans Kelsen (*Principles of International Law*, 1952, page 95) on the same subject are also of dubious validity. The quotations from Kelsen are correctly given, and in themselves might imply approval on his part for the general application of intertemporal law on sovereignty questions. But Kelsen goes on to say (pages 95-96): 'A legal relation implying duties of one state and corresponding rights of another state is to be judged by that international law under which the legal relation has been established, provided that there is no sufficient reason to assume that the new international law has retroactive force.' A line or two later he refers to 'the norm of general international law which is the legal basis of all treaties, namely, the norm *pacta sunt servanda* ("treaties must be observed")'. All told, Dr. Svarlien's categorical statement (page 50) that this aspect of intertemporal law

"most certainly has application in the determination of territorial sovereignty, and (citing Huber) the principle would seem to have general application" rests on shaky foundations, at least insofar as his references are concerned.

I think Dr. Svarlien errs considerably in certain comments about Norway's case and the reasons for its failure. It did not rest primarily on "an unsteady posture over centuries", as he says (Preface), nor were all the serious flaws in it attributable to "an uncertain posture relative to the whole Greenland question over a long period of time" and "a notorious lack of activity" (Page 69). Norway contended that any rights deriving from the ancient Norse settlements had simply disappeared, and she did not seriously question that those established between 1721 and 1814 had in fact passed to Denmark, although she maintained that Denmark's retention of Greenland in 1814 was quite unjustified. Thus any historical rights left to Norway were moral or sentimental. Even granting the Court's admission that Norwegian sovereignty may have extended beyond the two settlements in the thirteenth and fourteenth centuries, it is difficult to see how Norway could have asserted rights in Eastern Greenland on this basis, unless she maintained that such rights had continued over the centuries and had not passed to Denmark in 1814. The essence of Norway's case was that Eastern Greenland, as distinct from the occupied part, was still "terra nullius" in the twentieth century, that Denmark knew it, and that she had admitted it by asking for general recognition of her right to extend her sovereignty over it. Therefore Norway was as free to occupy it as Denmark was. Norway lost because, in the view of the great majority of the Court, Denmark had demonstrated sufficient interest and activity over the years to merit recognition of her sovereignty throughout the entire island, and Norway, in any case, had barred herself from taking any action by various promises and undertakings, especially the Ihlen declaration of 1919. It should

be added that Dr. Svarlien takes cognizance elsewhere of the points made in this paragraph (e.g., pages 42-45, 64-65), thus manifesting in this instance the inconsistency noted earlier.

The chief importance of the Eastern Greenland Case, as the author observes, lies in its precedent-setting quality in the determination of requirements for territorial sovereignty in the polar regions. As he rightly points out, effective occupation has always been important, and was generally recognized as a requirement after the Berlin conference on Africa in 1884-1885. However, controversies such as those over Bouvet, Palmas, and Clipperton Islands showed that in cases involving small, remote and uninhabited insular territories the requirements might be modified or reduced. Faced for the first time with the responsibility of adjudicating a case involving polar territory, the majority of the Court came to the conclusion that in such circumstances also the requisites for sovereignty might be reduced. Dissenting judges Anzilotti and Vogt argued impressively that in the particular case at hand Denmark had failed to meet the test of sovereignty, but nevertheless, quite apart from the merits or demerits of Denmark's claim, the majority view would appear to be reasonable as a general principle applicable to polar areas. Such adjudications evidently must take into account differing conditions and changing circumstances — if the law is not to be the "ass" that Mr. Bumble said it was — and this in turn necessitates what Dr. Svarlien calls the generally accepted aspect of intertemporal law, that the validity of a particular act or arrangement must be ascertained according to the law of its time. The issue of retroactivity is something else again, and is less clear cut. The conditions laid down in 1885 for effective possession in Africa — a habitable, inhabited, and productive region — were appropriate for the time, place, and circumstances. So, in general, it seems to me, were those judged sufficient fifty years afterwards for sovereignty over a polar territory such as Eastern Greenland — remote,

uninhabited, and unexploitable except on a small scale. In both cases the test was the pragmatic one of what was reasonable in the circumstances, and in both cases the law applied was just.

This review, although attempting to subject the monograph under discussion to critical evaluation, is by no means intended to convey the impression that it amounts altogether to an inferior piece of work. Quite the contrary, in fact. It is painstakingly researched from an impressive collection of sources, Scandinavian and French as well as English; and, apart from what seem to me, at least, to be weaknesses, it is very well written and thoroughly interesting. It should help to publicize an important case, which has probably not received the attention it deserves from non-legal people interested in the polar regions.

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THE PEOPLES OF SIBERIA. M. G. LEVIN AND L. P. POTAPOV, eds. *Chicago and London: The University of Chicago Press. 1964. pp. 948. \$20.00*

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