29, 1971

No. 44 of 1970.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA HOLDEN AT PENANG (APPELLATE JURISDICTION)

BETWEEN:

THE GOVERNMENT OF THE STATE OF PENANG
and
THE CENTRAL ELECTRICITY BOARD OF THE
10 FEDERATION OF MALAYA

Appellants
(Defendants)

AND

BENG HONG OON alias LIM BENG HONG
(Married Woman)
OON GUAN YONG
OON PEH TCHIN and
OON PEH SENG

Respondents
(Plaintiffs)

20 CASE FOR THE RESPONDENTS

RECORD

1. This is an appeal from an Order of the Federal Court of Malaysia (Appellate Jurisdiction) in Penang made on 9th February 1970, allowing with costs the appeal of the Plaintiffs against the Defendants from an Order of the High Court in Malaya at Penang made on 19th February 1969 in Civil Suit No. 118 of 1962, dismissing the action. p. 135 p. 83

30 2. The Appellants in this Appeal are the Defendants, and the Respondents are the Plaintiffs, in the action.

RECORD

p.83 3. By the said Order made on 19th February 1969 it was ordered that the action should be dismissed with costs to be taxed and paid by the Respondents to the Appellants.

4. The Federal Court of Malaysia by its Order made on 9th February 1970 reversed the Order of
p.135 the High Court in Malaysia at Penang and granted the relief sought by the Respondents.

5. The facts of the case may be summarized as follows. 10

6. The four Respondents were at the date of commencement of the action the registered proprietors in fee simple of the freehold land known as Lot 275 (1) and situate in Mukim 14 in the northern district of Province Wellesley (hereinafter called "Lot 275 (1)"), and the first Respondent is the registered proprietor in fee simple of the freehold land known as "Lot 275 (3)" situate in the same Mukim and district (hereinafter called "Lot 275 (3)"). Lots 275 (1) and 275 (3) both formed part of land the subject of a Crown grant made on 10th November
p.152 1852 and which comprised a defined area of "93 square acres 4 square roods and 11 square poles" with a western boundary described in the grant as "Sea Beach". 20

7. The dispute between the parties concerns the land, of some 4 acres in area, which now lies between the western boundary of Lots 275 (1) and 275 (3) and the sea (hereinafter called "the alluvion"). The formation of the alluvion was first noticed in December 1924 since when its extent has considerably increased. 30

8. From 1949 to 1958 the Respondents enjoyed rights of occupation over the alluvion pursuant to temporary occupation licences issued to them
pp.267 - 274 by the First Appellant.

9. The Respondents claim title to the alluvion by virtue of the rule of accretions, which governs the question of ownership of land formed by alluvial deposits from the sea, and which is 40

explained by Lord Hale in his work "De Jure Maris et Brachiorum Ejusdem", Part I, Chapter 4, in the following terms:

> "The increase per alluvionem is when the sea, by casting up sand and earth, doth by degrees increase the land, and shut itself out further than the ancient bounds went; and this is usual. The reason why this belongs to the Crown is because in truth the soil, where there is now dry land, was formerly part of the very fundus maris, and consequently belonged to the King. And indeed, if such alluvion be so insensible that it cannot be by any means found that the sea was there, idem est non esse at non apparere; the land thus increased belongs as a perquisite to the owner of the land adjacent."

10. The Appellants deny the Respondents' title to the alluvion.

11. The First Appellant is the person entitled to the alluvion if the Respondents are not entitled to rely on the rule of accretions. The Second Appellant is a tenant of the First Appellant in respect of part of the alluvion.

12. The Appellants deny the Respondents' title to the alluvion on the grounds:

(1) that the Respondents cannot rely on the rule of accretions;

(2) that the Respondents, having applied for the temporary occupation licences mentioned above, are estopped from asserting title to the alluvion against the Appellants.

13. As to their ground (1), the Appellants contend:

(a) that in order to rely on the rule of accretions the Respondents must establish by evidence a case of gradual and imperceptible accretion;

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(b) that because the original grant of 1852 was a grant of a defined area, the rule of accretions is excluded;

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(c) that because the western boundary of the land comprised in the original grant of 1852 was a fixed boundary described as "Sea Beach" the rule of accretions is excluded.

14. As to these contentions (a), (b) and (c) the Respondents submit:

(a) that the rule of accretions is a rule on which the claimant to the alluvion can rely, without leading evidence in his own favour (in the absence of evidence to show that, contrary to his claim, the alluvion was formed suddenly or perceptibly, as distinct from gradually and imperceptibly); and that, in any event, there was in fact evidence, in the present case (namely, the considerable increase in the size of the alluvion between 1924 and 1962, the date of commencement of the action) from which the only reasonable inference can be that the alluvion was formed imperceptibly and naturally;

(b) the rule of accretions is not excluded by the fact that the original grant is a grant of a defined are (Attorney-General of Southern Nigeria v. John Holt & Co. (Liverpool) Limited. /1915/ A.C. 599);

(c) the rule of accretion is not excluded by the fact that the western boundary of the land comprised in the original grant of 1852 was a fixed boundary (Secretary of State for India in Council v. Foucar & Co. Limited, (1934) 50 T.L.R. 241), and that in so far as it is decided or stated otherwise in Attorney-General v. Chambers, (1859) 4 De. G. & J. 55 and Attorney-General v. Reeve, (1884) 1 T.L.R. 675, the two latter cases ought not to be followed.

15. As to their ground (2), the Appellants contend that the Respondents, having applied to

the First Appellant for the temporary occupation licences mentioned at 8. above, are estopped from claiming title to the alluvion as against the Appellants. The Appellants rely on Section 116 of the Evidence Ordinance, 1950 which provides (among other things) that: pp.267 - 274

> "..... no person who came upon any immoveable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given."

16. As to this ground, the Respondents submit that the Appellants are not entitled to rely on Section 116 of the Evidence Ordinance 1950 (1) because the Section does not apply where the issue between the parties is, not which of them has the right to possession, but which of them has the better title to ownership of the land; and (2) because the Section does not apply against a claimant who is not at the commencement of the action in possession of the land in question pursuant to the licence mentioned in the section.

17. The Respondents therefore respectfully submit that this appeal should be dismissed for the following (among other)

R E A S O N S

(1) BECAUSE the Respondents are entitled to the alluvion by virtue of the rule of accretions;

(2) BECAUSE the Respondents are not estopped from claiming title to the alluvion by the operation of Section 116 of the Evidence Ordinance, 1950;

(3) BECAUSE the other objections of the Appellants to the Respondents' claims to the alluvion are ill-founded;

(4) BECAUSE the order of the Federal Court of Malaysia is right and ought to be affirmed.

G. STARFORTH HILL.

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O N A P P E A L

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CASE FOR THE RESPONDENTS

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