

**NOTE.—Please substitute for copy of Judgment previously issued.**

*Privy Council Appeal No. 115 of 1921.*

Sim E Bak and another - - - - - *Appellants*

*v.*

Ang Yong Huat - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE STRAITS SETTLEMENTS (SETTLEMENT  
OF SINGAPORE).

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL. DELIVERED THE 19TH FEBRUARY, 1923.

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*Present at the Hearing :*

VISCOUNT HALDANE.

LORD DUNEDIN.

LORD ATKINSON.

LORD WRENBURY.

[*Delivered by* LORD WRENBURY.]

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In this case an action was brought claiming against the defendants an injunction to restrain them from trespassing upon the plaintiff's land and damaging and removing his property. The defendants counterclaimed to restrain the plaintiff from erecting an obstruction so as to interfere with the free flow of water over and to the defendants' land. The primary Judge dismissed the plaintiff's action, and granted an injunction upon the counterclaim. Upon appeal that decision was reversed, and an injunction was granted in favour of the plaintiff. This is the appeal of the defendants from that order.

The plaintiff is the owner of a plot numbered 742 in the plans which are in evidence in this case. The first defendant is the occupier and the second defendant is the owner of an adjacent plot lying to the south of 742. The site of these plots is a short distance to the east of the Kalang River, Singapore. Plan A, one of the exhibits shows a "10-foot reservation," which has evidently been at one time a reservation 10 feet wide, forming a road or way of some kind. It is easily identified through all the

plans by its deviations and sharp turns. By reference to this 10-foot reservation, the plaintiff's land and the defendants' land can be identified in plans which at first sight seem hard to reconcile. The Kalang River must have shifted its bed between 1843 and the present time, a matter which is highly probable in a place which obviously is more like a mango swamp than a public navigable river.

The part of the 10-foot reservation relevant to the present matter runs first from south-west to north-east to a point marked A on this plan. It then turns almost at a right angle and runs to the east with a little south. Then it turns again almost at a right angle and runs to the north with a little east. The scene of the dispute is immediately to the east of the point A, and just to the north of the "10-foot reservation."

The earliest information before their Lordships as to the two sites in question is obtained from Tompson's plan of 1843. The 10-foot reservation is found there marked by a thick line. There is upon that plan no trace of the land being in 1843 covered with water or of the existence of the bridge presently mentioned. The evidence shows that there is brick clay in the land in this neighbourhood, and that the owners of plots have from time to time dug out the clay, leaving large and deep holes. And there has come into existence at a date which is not known but is more than twenty or thirty years ago a bridge through which the water of the Kalang River (which runs from north to south at a short distance to the west) has been admitted, and this has filled the holes or basins made by excavation of the brick clay so that plot 742 and many adjacent plots have become ponds or lagoons, and the 10-foot reservation is now as the tide flows covered with water. The Kalang River is a tidal river, and the result of that which is above described is that the tide now rises and falls in plot 742 and over some substantial part of the adjacent land, and forms what may be called a creek of the sea. The second defendant's land lies to the south of that which has been called the creek. He also has excavated the brick earth on his land, and there has resulted a pond on his land. He has recently cut through the bank at the north-west corner of his land, so that the tidal water has obtained access to his land. He is a fisherman, and his purpose was to allow prawns and fish to come up with the tide over his land and be there intercepted by a sluice, by which he confined the outflow when the tide began to fall.

In this state of facts the plaintiff erected in the water on the soil of his land to the north of and extending to the west of the defendants' sluice a fence of posts and planks the result of which was that the prawns and fish were intercepted by the fence and could not get into the defendants' pond. The plaintiff no doubt wanted to take them himself. The first defendant pulled down this fence. The question is as to the respective rights of the plaintiff and of the defendants in this state of facts.

The learned Judge of first instance was of opinion that the creek formed part of a tidal navigable river. That it is tidal in the sense that the water in all the ponds or excavations which formed the creek rises and falls with the tide there is no doubt. That it is navigable in the sense that boats within limits of size could and did pass through the bridge and up the waterway and could and did bring away brick, earth or bricks burnt in kilns which have been erected there there is also no doubt. But from those facts it does not follow that the creek is a tidal navigable river. The question is one of degree, to be determined by reference to all the facts. "The flowing and re-flowing of the tide does not make it a navigable river; for there are many places into which the tide flows which are not navigable rivers; and the place in question may be a creek in their own private estate." *Per* Lord Mansfield in *Mayor of Lynn v. Turner*, 1 Cowp., p. 86. An instance of this might be a boathouse or boat harbour which an owner might create on his own land. "It does not necessarily follow because the tide flows or re-flows in any particular place that it is therefore a public navigation although of sufficient size." *Per* Bayley J., *Res. v. Montague*, 4 Barn. and Cr. 601. The flowing of the tide is strong *prima facie* evidence of the existence of a public navigable river, but whether it is one or not depends upon the situation and nature of the channel. Not every ditch or cutting which is reached by the tide forms part of the public navigable river, even though it be large enough to admit of the passage of a boat. The question is one of degree, and is for the jury, having regard to all the facts.

The evidence as to user is that "boats come in and go out over 100 times a month," say, four a day. There is no evidence at all that these are not boats used by the owners of the plots to bring out their bricks—and presumably they are. There is absolutely nothing to induce any member of the public to take a boat up this creek, and there is no evidence that any member of the public ever did so. On the other hand, it is the convenient and obvious way of bringing out the bricks.

The case, therefore, stands thus: There is evidence of the creation of the waterway by the excavation of the brick earth. There is nothing beyond the fact that the tide rises and falls in this creek to show that it is a public navigable river. There is no evidence of public user, and the facts are such as to negative any probability of public use.

The fence was erected by the plaintiff on his own land. The defendants, in removing it, were guilty of trespass, unless they could justify their act by establishing that the place where the fence was erected was part of the bed of a public navigable river, and that a right of the defendants was affected by its creation. In their Lordships' opinion they fail in establishing this proposition. They agree with the judgments under appeal, and will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

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SIM E BAK AND ANOTHER

v.

ANG YONG HUAT.

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DELIVERED BY LORD WRENBURY.

Printed by

Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2.

1923.