Judgment of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeal and Cross-Appeal of The New Trinidad Lake Asphalt Company, Limited, v. *The Attorney-General for Trinidad and Tobago; and The Attorney-General for Trinidad and Tobago* v. *The New Trinidad Lake Asphalt Company, Limited, from the Supreme Court of Trinidad and Tobago; delivered the 8th June* 1904.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD LINDLEY.
LORD KINROSS.
SIR ARTHUR WILSON.

(*Delivered by Lord Kinross.*)

The question in this case is whether the Appellants, The New Trinidad Lake Asphalt Company, Limited, have established certain breaches which they allege, on the part of the Crown, of a covenant contained in a Deed of Concession made on 12th July 1888, between Her late Majesty Queen Victoria of the one part, and Joseph Weedon Previté, Henry Alfred Greig, and the New York and Trinidad Asphalt Company, of the other part. The Appellants are assignees of the Deed of Concession.

By that Deed it was stipulated that the Concessionaires should, for considerations stated in it, have exclusive liberty to dig, work, search for, and win, all pitch, asphaltum, oil, petroleum, coal, anthracite rock, and other substances, from a parcel of land known as the Pitch Lake in the Island of Trinidad. The grant was for a term of fourteen years from 1st February 1888, and its duration was afterwards extended to a period

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of forty-two years from 1st February 1888. The Deed of Concession further provided, *inter alia*, that "so long as the licenses, powers, and "privileges hereby granted shall continue in "force by virtue of these presents, or by virtue "of any renewal granted pursuant to these "presents, no asphalt, pitch, or other asphaltic "or bituminous substance shall be won or "carried away for export or otherwise, by "Her Majesty, her heirs or successors," (except for certain purposes of the Executive Government of the Island), "or by any other "person, for any purpose whatsoever, from "any lands situate within three miles of the "said parcel of land known as the Pitch Lake, "which now are, or at any time during the said "term or terms shall come into, the possession "of Her Majesty, without the previous consent "in writing of the Concessionaires."

The Appellants maintain that a parcel of land known as Lot 68, situated within three miles of the Pitch Lake, and on which asphalt had been dug without the consent of the Concessionaires, was at material times in the possession of Her late Majesty, within the meaning of the Deed of Concession.

The Pitch Lake is in the Ward of La Brea; it is upwards of 114 acres in extent, and it is about 100 feet above the level of the sea. Between it and the sea there is a road about a mile long known as the Pitch Lake Road. Lot 68 is not marked *eo nomine* on any of the plans produced, but the ground so designated by the Appellants lies to the east of the Pitch Lake Road and to the east of the parcel marked as the Rest House. Part of the land comprised in Lot 68 seems to have been sold to Montout Louis, but there is little reliable information as to the particulars of the different lots of ground in the locality. Montout Louis is stated to have left Trinidad in 1879, and Athanase King claimed the land as having

purchased it from him. King however appears to have failed to prove a valid transfer from Montout. In May 1897 a man named Rogers was convicted of digging on Crown lands without a license, contrary to the Ordinance (No. 4 of 1889) and was fined. He appealed against this conviction, but it was upheld by the Court of Appeal. The lessees of Montout's land then stopped digging on the part of Lot 68 marked out as Crown land, and desired the Government to say whether they claimed that portion of Lot 68 as Crown land or not. Various negotiations took place in regard to this land, which it is unnecessary to narrate, and in the result, on 11th October 1899, the Governor gave his consent under the Rules and Orders in force in the locality, to the bringing of a suit by the Appellants against the Attorney-General for the determination of the claims of the Appellants against the Government in the matter of digging of asphalt from the lands known as Lot 68. A suit was accordingly brought by the Appellants in October 1899, in which they alleged that there had been such digging on Lot 68, which was within three miles of the Pitch Lake, without their consent, and claimed a declaration that Lot 68 was in the possession of the Government at the date of the Deed of Concession in their favour, or, alternatively, that it came into the possession of the Government during 1896–1897 and 1898, by reason of the marking out of the lot, and the prohibition of digging upon it, at that time. An injunction and damages were also craved in respect of the alleged breach of covenant on the part of the Government.

The Attorney-General, by his statement of defence, dated 15th December 1899, demurred to the claim on the ground that no action lay against him in respect of any alleged breach of contract committed by the Governor of the Colony in the exercise of any executive discretion, and

that no Petition of Right, or analogous procedure, was available to the Appellants in that Court, as also that the Rules and Orders merely regulated matters of procedure, or that if they purported to confer substantive rights, they were *ultra vires* and invalid. The Attorney-General further traversed the allegations of fact contained in the statement of complaint, and denied that Lot 68 had, at any material time, been in, or had come into, the possession of the Crown.

By an Order dated 19th March 1900, the questions of law raised in the defence were put down for preliminary hearing before the Full Court of Trinidad and Tobago, and on 4th December 1900, that Court, composed of Sir W. J. Anderson, Chief Justice, and Mr. Justice Baynes, held that a right to sue the Government existed, and that this right, recognised and regulated for more than 21 years previously, had become part of the law of the Colony. Against this decision the Attorney-General obtained special leave from His Majesty to cross-appeal; but in the circumstances the Cross-Appeal was not argued.

The issues of fact raised between the parties were afterwards tried, and evidence led by the Appellants, and on 11th March 1901, Mr. Justice Baynes gave judgment in favour of the Attorney-General, dismissing the action with costs. He decided that according to the true intention of the parties to the Deed of Concession, lands "in the possession of Her Majesty" meant lands in the actual possession of the Crown, and did not include Crown lands which the Crown had granted on lease, or Crown lands to which the Crown had a right to re-enter, although in fact persons having no right were in occupation of them. He, therefore, held, on the evidence, that the Crown was not in possession of Lot 68 in 1888, and he also rejected another contention maintained by the Appellants.

The Appellants appealed against this Judgment to the Appeal Court, and that Court, by an Order dated 16th April 1901, directed that the Judgment of Mr. Justice Baynes should be set aside and a new trial held. The Court considered that the evidence of the Appellants had established a *primâ facie* case that the Crown had in 1897 entered into possession of Lot 68. The new trial took place before Mr. Justice Baynes in April 1901, and on 3rd June he gave judgment in the new trial, again deciding in favour of the Attorney-General, and dismissing the action with costs, holding that the Deed of Concession related to lands in the actual possession of the Crown, and that Lot 68 was not in 1888 in the possession of the Crown, as also that there was not evidence to show in whom the legal estate was then vested. He held that the conviction of Rogers above-mentioned was not evidence of possession by the Crown.

An appeal was taken against this Judgment to the Appeal Court and the case was fully heard before that Court, consisting of Sir W. J. Anderson, Chief Justice, Mr. Justice Baynes, and Mr. Justice Routledge, with the result that these learned Judges differed in opinion, the Chief Justice holding that, upon a true construction of the Deed of Concession, "land in "the possession of the Crown" meant land of which the Crown had the control, and the legal right to deal with, excluding Crown lands which had been granted in, and which were held under, lease. He expressed the view that any other construction would be unreasonable in a Colony where so small a part of the Crown lands was in the actual occupation of the Crown, while the Deed of Concession presupposed Crown lands subject to the control of the Crown, but in the occupation *de facto* of some person without legal right, who dug pitch. He considered that the

evidence showed that Lot 68 was Crown land, and that every attempt to prove its alienation had failed and that consequently it was in the possession of the Crown. Mr. Justice Baynes adhered to the opinion on this subject which he had formerly expressed, and Mr. Justice Routledge agreed with him, for similar reasons, and a Decree was accordingly made on the 25th March 1902 in accordance with the views of the majority of the Court.

The question upon which their Lordships have now to advise His Majesty is whether the view of the Chief Justice or that of Mr. Justice Baynes and Mr. Justice Routledge is right, and their Lordships are of opinion that the view expressed by the two last-named Judges is the correct one. Possession is *primâ facie* a question of fact, and a person may be proprietor of land without being in possession of it. The view of the Chief Justice appears to be that all land belonging by title or right to the Crown, falls within the description in the Concession, whether the Crown has, or has not, done anything with respect to the use or occupation of it. If this had been intended to be the meaning of the language of the Concession upon which the question arises, it is difficult to suppose that it would not have been unequivocally expressed. The Appellants maintain that the description "lands in possession of the Crown," means lands the right or title to which is in the Crown, although the Crown may never have entered into possession of, or interfered with, them, either by itself or by anyone having its authority. This view appears to their Lordships to substitute a different test or criterion for that which is expressed in the Deed of Concession, viz., to take the test or criterion of proprietary right or title, instead of that of possession. It appears that both before and after the date of the Concession, and without the authority of

the Concessionaires, some persons dug pitch in Lot 68, but this was never done with the permission or consent of the Governor. The view taken by both Baynes, J., and Routledge, J., is that the expression "which now are or at any "time . . . . shall come into the possession "of Her Majesty" means land in the actual possession of the Crown or its officers, and the Concessionaires were unable to prove that Lot 68 was Crown land in this sense. But even if the construction put by the Chief Justice upon the word "possession." viz., that it is equivalent to control, or right to control, were adopted, the case would fail, because it is not proved that Lot 68 was ever in the control of the Government. Their Lordships do not think that the conviction of Rogers had the effect of bringing the land into the possession of the Crown in any sense material to the present question. It appears that on the occasion of the prosecution of Rogers, the ownership of Lot No. 68 did not come into question, and that no evidence was given on the part of the prosecution that it was the property, or in the possession, of the Crown.

Their Lordships will humbly advise His Majesty to dismiss the Principal Appeal, and affirm the Decree of the Appeal Court of the 25th March 1902; as also to make no Order on the Cross-Appeal from the Decree of the 4th December 1900. The Appellants will pay the costs of the Principal Appeal. As to the Cross-Appeal, their Lordships have already directed the Attorney-General to pay the Appellants' costs of his Petition for special leave to cross-appeal and these costs will be set off against the costs of the Principal Appeal. With regard to any additional costs which may have been incurred by reason of the Cross-Appeal, their Lordships direct the parties to bear such costs themselves.