Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Her Majesty's Attorney-General for the Colony of Trinidad and Tobago v. *Hugh Clarence Bourne, Victor Schwap, and Joaquin Ribeiro, from the Supreme Court of Trinidad and Tobago; delivered* 15*th December* 1894.

Present:

LORD WATSON.
LORD HOBHOUSE.
LORD SHAND.
SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

This suit commenced with a writ of intrusion, at the instance of the Appellant as representing the Crown, the object of the writ being to have the Respondents Victor Schwap, and Joaquin Ribeiro, his tenant, removed from possession of an acre of land adjacent to the Pitch Lake at La Brea, which was alleged to be unalienated Crown land. Whether these Respondents had the right to set up any equitable plea in defence to the action was one of the main subjects of controversy in the Courts below. Mr. Justice Lumb held that they had not, and gave judgment for the Crown, on the ground that they had neither alleged nor shewn a legal title. On appeal, the majority of the Full Court, consisting of the late Chief Justice Gorrie and Mr. Justice Cook, overruled his finding upon the first point, and entered judgment for the Defendants, on the ground that they had established a good

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equitable defence. At the hearing of this appeal, counsel for the Appellant conceded (very properly in the estimation of their Lordships) that, notwithstanding the form of the action, every defence was available to the Respondents which would have been open to them in an ejectment suit at the instance of a subject.

It is not disputed that, in the year 1868, the land was within the title of the Crown, and had never been alienated. From the year 1862 until that date, it had been possessed by the Respondent Schwap as a squatter, or, in other words, without any title either legal or equitable. In April 1868, the Colonial Secretary issued a letter of instructions to the Warden of the district in which the land is situated, specifying the terms and conditions upon which grants of Crown land were to be made to persons willing to purchase. One of these conditions is material to the present case:—"In cases of occupation before 1st "January 1868 the occupant is to be allowed "the option of paying at the rate of 2*l*. per acre "by instalments, but you are at liberty to accept "from any petitioner any amount that may at "any time be tendered by him in aid of the "purchase of the land prayed for—the Crown "reserving to itself the right to decline to grant "the land should it be thought undesirable to do "so—in which case the amounts paid will be "returned to the persons from whom they were "received."

Schwap, thereupon, lodged a petition stating that he was desirous of becoming the purchaser of the land, and praying that the Governor might be pleased to order that it should be sold. It is admitted that the upset price of the lot was fixed at $18. 52, and also that Schwap, who was allowed to continue in possession, on the 10th June 1868, paid $5. 20 to the Warden, and received from that official an acknow-

ledgment bearing that the payment had been made "on account of one acre land and a small "house petitioned for at La Brea." The effect of these transactions was, to raise an equitable contract for the sale and purchase of the land, at the upset price, defeasible at the instance of the Crown, at any time before the issue of a grant to the purchaser, on repayment of the sum paid to account. From the year 1868 until the year 1889, no action was taken upon the contract by either of the parties to it. Schwap made no farther payment to account during that period, but continued in undisturbed possession of the land.

It was pleaded by the Respondents Schwap and Ribeiro, in the Courts below, that, in the circumstances of the case, the delay which thus occurred had the effect of extinguishing the right of the Crown to exercise its reserved power of defeasance, a proposition which was controverted in the argument addressed to this Board by Counsel for the Appellant. In the view which their Lordships take of the present appeal, it is unnecessary for them to express any opinion upon the point.

After the date of the transactions in 1868 already noticed, no communication passed between the Crown and Schwap, with reference to the land in question, until the year 1889. Meanwhile the Crown had, on the 12th July 1888, granted an exclusive license for the term of fourteen years to certain concessionaires to work and win all asphaltic and bituminous substances from the Pitch Lake at La Brea. There was no demise except of the Lake itself; but the deed of grant contained a covenant binding the Crown, during the currency of the license, not to permit the winning or carrying away of such substances, from any lands within three miles of the Pitch Lake which then were, or might thereafter come, into the possession of

Her Majesty, without the previous consent in writing of the concessionaires.

Early in 1889, Schwap presented a second petition to the Governor, in which, after referring to his application in 1868, and the fact that he had paid $5.20, he prayed that his Excellency might order a grant to be issued in his favour on payment of survey fees. On the 8th May 1889, he received an answer from Mr. Wilson, the Sub-Intendant of Crown Lands, which concluded with this intimation,—" His Excellency is " prepared to grant you the land in question on " payment of the usual upset price and fees, " subject however to the reservation and condition " that no asphalt be dug or removed from it."

Schwap did not accede to the terms thus offered by Mr. Wilson. On the 16th October 1889, he leased the land, for ten years, to the Respondent Ribeiro, at an annual rent of $180, with power to the lessee to win and work asphalte, pitch, and other minerals. It was suggested by the Appellant's Counsel, and it is certainly probable, that the rent was greatly enhanced by the insertion of that power in the lease. On the 21st November 1889, Schwap made an application, under the provisions of the Real Property Ordinance No. 8 of 1889, to have his name entered on the Register of Titles, as owner in fee simple of the acre of land in question, a proceeding which became known, in due course, to the officers of the Crown.

The Sub-Intendant's letter to Schwap of the 8th May, already noticed, indicates that the writer was not satisfied that any sum had been paid to account in 1868, because he therein makes payment of the full upset price one of the conditions upon which the Crown was prepared to issue a grant. On the 27th November 1889, he sent another written communication to Schwap, which their Lordships regard as of

crucial importance. It refers to the letter of the 8th May, and explains that the proceedings of 1868 had since come to light, from which it appeared that Schwap had then applied for a grant of the lot, and had deposited the sum $5. 20 on account of the purchase money. It then proceeds to intimate,—"In these circum-"stances the administrator has been pleased to "order that a Royal grant in respect of this lot "be issued to you on payment of the sum of "$13. 32, being the difference between the price "of an ordinary village lot, *i.e.* $18. 52 and the "sum already deposited $5. 20."

It is admitted that, on the 28th or 29th November, Schwap went to the Land Office, and there tendered payment of the balance of $13. 32, which was declined.

Upon the 30th November 1889, the Sub-Intendant again wrote to Schwap in the following terms:—"With reference to my "letter No. 1545 of the 27th instant, I am "directed by the Administrator to inform you "that an appeal has been made to the Secretary "of State against the issue to you of a grant in "respect of the lot of land at La Brea claimed "by you, and, under the circumstances, His "Excellency thinks that as he understands you "have already applied for the registration of a "title to the land in question, you had better "proceed with your application under the Real "Property Ordinance, the Crown merely entering "a formal *caveat* in the matter for the balance "of the purchase money."

The Appellant now maintains, that the letter of the 27th November does not either modify or retract the proposal, made in that of the 8th May, to insert a condition in the grant, that no asphalte should be dug or removed from the land. He argued that the contents of the later writing only amount to an explanation that the

Crown, having ascertained that $5. 20 had already been paid, was willing to accept $13. 32 as payment in full of the price. Had that been all that it was meant to convey, the letter could hardly have been conceived in terms more inappropriate. Their Lordships are satisfied that such is not the primary or true meaning of the document; and that it expresses the willingness of the Crown to give a clean title to Schwap, upon his paying the balance therein specified. That the letter was understood in that sense by the officials of the Crown, at the time when it was written, plainly appears from the terms of their letter of the 30th November. The asphalte concessionaires, who are admittedly the persons therein referred to as having made an appeal to the Secretary of State, could have had no possible cause of complaint, if the reservation indicated in the letter of the 8th May was to be inserted in the grant to Schwap. It is quite intelligible that, in order to avoid controversy with these persons, the Crown might prefer that Schwap should establish a legal title by obtaining registration, instead of receiving a grant at that time. Accordingly, the letter conveys to him an intimation that he had better proceed with his application to the Registrar, which was for a title absolute and without reservation; and it also conveys to him the assurance that, if he did so, the Crown would not oppose the application, but would merely lodge a formal *caveat*, for the purpose of securing payment of the balance of $13. 32, before the certificate of title was issued.

In these circumstances their Lordships are of opinion that Schwap's acceptance of the terms offered in the letter of the 27th November, by duly tendering payment of the balance, constituted a concluded contract, from which neither party could retire without the consent of the

other, and that it had the immediate effect of determining any option to refuse a grant of the land which the Crown may have previously possessed. That is practically the same ground upon which the decision of the majority of the Full Court was based.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgment appealed from. The Appellant must pay the costs incurred by the Respondents, including the Respondent Hugh Clarence Bourne.