***Judgment of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeals of The Trinidad Asphalt Company and The New Trinidad Lake Asphalt Company, Limited,* v. *Ambard and Another, and of Ambard and Another* v. *The Trinidad Asphalt Company and The New Trinidad Lake Asphalt Company, Limited, from the Supreme Court of Trinidad and Tobago; delivered the 8th July* 1899.**

Present at the Hearing:

THE LORD CHANCELLOR.
LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
LORD DAVEY.

[*Delivered by Lord Macnaghten.*]

At La Brea in the Island of Trinidad where the land slopes down from the Pitch Lake to the sea a distance of about a mile there is found near the surface a stratum of asphalt or pitch. Pitch lands as lands within this district are called are not cultivated nor are they apparently suitable for cultivation. Their whole value depends on the pitch they contain. Of late years there has sprung up a great and an increasing demand for this substance. It is now worth 20*s.* a ton. With the increase in the value of pitch there has been a corresponding rise in the value of pitch land. A lot which might have been bought for $40 a few years ago would now it seems probably fetch not less than $4,000.

In some few places the pitch crops out on the surface of the ground. For the most part it lies

at a depth varying from 4 to 7 feet. So long as it is undisturbed it is stable and firm enough to support the soil above it in its natural state. But if an excavation is made and the stratum of pitch cut through the consequence is that the edge exposed to the influence of the heated atmosphere begins to melt and the pitch oozes out. It may then be collected at the bottom of the excavation or caught as it is exuding. "Pitch" as one witness said in answer to a question by the Court "bulges out and they "shave it off each morning. That" he added "is "the plan adopted when you want to dig your "neighbour's pitch."

The original Plaintiffs the Trinidad Asphalt Company to whose rights the new Company lately added as Appellants have succeeded were the owners of a lot of pitch land containing about a quarter of an acre and known as Lot 15A. The lot immediately adjoining it on the side towards the sea and lying at a somewhat lower level belonged to the Defendant Ambard. It was known as Lot 15. In January 1896 the Defendants began digging for pitch on Lot 15. They dug right up to Lot 15A to a depth of 12 feet and so close to the boundary that some of the boundary posts fell in. The excavation was continued the whole length of the boundary line except for the space of about 10 feet on one side which was left as a loading place.

The usual results followed. The section of the stratum of pitch thus exposed to the atmosphere began to melt. The pitch oozed out and the excavation yielded abundantly. Between 200 and 300 tons of pitch were "won" as the phrase goes. The surface of the Plaintiffs' land began to sink and crack. A depression was formed in shape like half a saucer about 5 feet deep in the centre at the boundary line and going back in a semi-circle with a radius of about 60 feet. A series of

cracks appeared on the surface from 8 to 10 feet long by 6 to 18 inches wide and some buildings or sheds of no great value were more or less wrecked.

For this injury to their property the Plaintiffs sued the Defendants asking for an injunction and damages.

The action came on for trial before the Chief Justice Sir John Tankerville Goldney. His Honour granted an injunction restraining the Defendants from digging and winning or otherwise removing asphaltum from the parcel of land known as Lot 15 in such a way as to destroy or seriously injure the surface of the Plaintiffs' Lot 15A and the sum of 100*l*. was awarded by way of damages.

From this judgment there was an appeal to the Full Court. The Appeal was heard by the Chief Justice and Nathan and Lewis J J. The learned Chief Justice adhered to the opinion he expressed at the trial. The other two learned Judges differed from him and differed from each other. Nathan J. was for dismissing the Plaintiffs' action altogether with costs. Lewis J. was of opinion that as a matter of law the Plaintiffs were entitled to support for their lands but his conclusion was that no injunction ought to have been granted and that the damages should be reduced to 10*l*. He thought 10*l*. "would "amply compensate the Plaintiffs for damage "through mere subsidence." He considered that the injury caused to the Plaintiffs' land by the withdrawal of pitch from it ought not to have been taken into account at all. In the result the order of the Court was that the judgment of his Honour the Chief Justice be set aside so far as regards the injunction that the sum of 100*l*. allowed as damages be reduced to 10*l*. that the Chief Justice's order as to costs be set aside that each party do bear their own costs of the hearing before the Chief Justice and that the

Plaintiffs do pay to the Defendants the costs of the Appeal.

From this order both parties have appealed to Her Majesty in Council.

Their Lordships have to determine between the conflicting views of the Chief Justice and Nathan J. The judgment of Lewis J. who agreed to a certain extent with each of his colleagues may be laid on one side. If his Honour is right in his premises it is plain that his conclusion is opposed to the principles and practice of the Court. Assuming that the Plaintiffs were entitled to have their land in its natural state supported by the adjacent land belonging to Ambard it would seem to follow as a matter of course that this right which the Defendants have invaded should now be protected by injunction and not the less so because in his Honour's view the damages that could be recovered at law would be only trifling. Certainly the decision of the learned Judge if it were to prevail here as it did in the Full Court would leave the Plaintiffs in a very unfortunate position. The Defendants were not to be restrained from digging. They might therefore drain as much pitch as they could from the Plaintiffs' land and sell it and pocket the price. They would only be liable for consequential injury to the surface of the Plaintiffs' land overlying the stratum of pitch and for injury to the Plaintiffs' buildings. The buildings all told are only worth a few pounds. The surface without the buildings is of such a sort that it would be little or none the worse for cracks and depressions. Even if the Plaintiffs cared to bring actions in which they could recover no substantial damages and would not be wholly indemnified against costs the Defendants at the outside would only have to pay in each case damages all but nominal and the costs of an undefended action. Of course the Defendants

would go on with their digging as long as there was any pitch to be got. The pitch won from the Plaintiffs' land would pay the costs and damages over and over again. And in the meantime the Plaintiffs would have to look on and see the value of their land destroyed for the time if not for ever by the withdrawal of the one valuable element in its composition. A conclusion so lame and impotent seems hardly in accordance with the principles of equity or common sense.

The judgment of Nathan J. is not inconsistent with itself. But it appears to be founded on a mistaken analogy. Water dropping from the clouds on the face of the earth and percolating the ground in no definite channel is not the property of any man until it has been appropriated. The pitch which is the peculiar product of this strip of land in the Island of Trinidad resembles water in one respect. At a certain temperature it becomes liquid. When it is liquid its behaviour is more or less like the behaviour of water or any other fluid. It has no angle of repose. From these premises Nathan J. infers that this underground stratum of pitch is no man's property until it has been appropriated and his conclusion is that just as no action will lie for collecting or pumping up underground water percolating the earth in no defined channel though the supply may be withdrawn from a neighbour's property and the withdrawal may leave his well dry and useless so anybody and everybody who owns a lot in the village of La Brea may with impunity win the pitch lying under his neighbour's land. So far the two learned Puisne Judges were agreed. They differed only on one point. Nathan J. thought that it was decided that an owner of land has no right at common law to the support of subterranean water. That is the head note in *Popplewell* v. *Hodkinson* (L.R. 4 Ex. 248). Lewis J. thought that the

head note was not warranted by the decision. Nathan J. therefore came to the conclusion that the Plaintiffs had no case at all while Lewis J. thought they were right up to a certain point and gave them a barren victory.

The judgment of the learned Chief Justice is short and to the point. The argument which Nathan J. has elaborated with much ingenuity and learning is dealt with by anticipation in a single sentence. "Asphaltum" observes the Chief Justice "is a mineral—not water." He found that the Defendants had interfered with the Plaintiffs' right of support that they had let down the surface of the Plaintiffs' land and consequently done injury to the Plaintiffs' house and also that the Plaintiffs had suffered injury by the loss of the asphaltum which on the removal by the Defendants of the lateral support of their land passed into the Defendants' land and was appropriated by them to their own use.

Their Lordships agree with the learned Chief Justice. It is not necessary to discuss the question on which Lewis J. differed from Nathan J. as to the right of support from subterranean water because as the Chief Justice observes the substance which afforded support in this case was not water. As was laid down by the Court of Queen's Bench in *Humphries* v. *Brogden* (12 Q.B. 739) the nature of the strata must be immaterial; it is impossible for the Court to measure out degrees to which the right of support for the surface may extend. "The only reasonable support" as Lord Campbell observed "is that which will "protect the surface from subsidence and keep "it securely at its antient and natural level." The damages awarded by the Chief Justice do not appear to their Lordships to have been assessed on a wrong principle or under the circumstances to be excessive.

One argument was addressed to their Lordships which perhaps ought to be noticed. It was said that digging for pitch was the common industry of La Brea and that if an injunction were granted the industry would be stopped altogether. In the first place there is no evidence that that would be the result. Whatever the result may be rights of property must be respected even when they conflict or seem to conflict with the interests of the community. If private property is to be sacrificed for the benefit of the public it must be done under the sanction of the Legislature which can and generally does provide compensation. If the inhabitants of La Brea cannot dig their own pitch without invading their neighbour's rights it is quite possible that the hope of reciprocal advantage and the apprehension of mutual liability may lead to some arrangement for their common benefit or the difficulties of the case may induce the Legislature to step in and regulate the digging of pitch and the management of the pitch lands.

Their Lordships will therefore humbly advise Her Majesty that the Plaintiffs' Appeal ought to be allowed and the Cross Appeal dismissed and the decision of the Full Court set aside with costs and the judgment of the Chief Justice restored.

The Respondents Ambard and François will pay the costs of the Appeal and Cross Appeal.