

William Eden Thompson - - - - - Appellant

v.

The Honourable François Stephanus Malan, Minister of Mines and  
Industries, and as such representing the Government of South  
Africa - - - - - Respondent

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF SOUTH AFRICA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 1ST MARCH, 1921.

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*Present at the Hearing :*

LORD BUCKMASTER.

LORD DUNEDIN.

LORD SHAW.

[*Delivered by* LORD SHAW.]

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This is an appeal from a judgment of the Appellate Division of the Supreme Court of South Africa, dated the 31st July, 1919 (Solomon, A.C.J., and De Villiers, J., with Maasdorp, J., dissenting). This appeal resulted in the reversal of the judgment of Lange, J., in the Griqualand West Local Division of the Supreme Court of South Africa. The judgment of Lange, J., was dated the 18th March, 1919.

The question in the appeal is as to the proper construction to be placed upon the first portion of Section 41 of the Precious Stones Act, 1899, of the Cape of Good Hope.

The fact which raises the question is this, that between the times of prospecting for and discovery of diamonds upon a farm called "Thompson's Hope B," followed by Government inspection and all the procedure according to statute—between those times and the actual proclamation itself, the farm changed ownership. It is admitted that the owner at the date of prospecting, etc., would have been bound by the proclamation, but it is maintained that the owner at the date of the proclamation is not. The transfer of ownership is said to give the transferee, the new proprietor, a right to the judicial declaration which he claims, the fundamental portion of which is that the proclamation and the Government Notice are unlawful and *ultra vires*.

Although the point can be thus briefly stated, and is limited as mentioned to the construction of a few words in this section, the question is one of considerable importance. As will be shown, it affects the rights, not only of the owner of the land where diamonds are found, but of the prospector of diamonds therein, and of the Government as owner of precious stones reserved from the land grant and as representing the public of the Colony. Mr. Malan, the Minister of Mines and Industries, and as such representing the Government of the Union of South Africa, was properly convened as defendant in the action and is the respondent in this appeal.

The history of the property, so far as material to the issue, may be stated in a few sentences. The narrative is confined to the farm mentioned, namely, "Thompson's Hope B," and no reference need here be made to other properties covered by the suit but with regard to which there is no question in appeal.

The appellant bought the farm on the 16th April, 1918, his predecessor in title being one Cyril George Holliday. "Thompson's Hope B" extended to 665 morgen and was a portion of a larger piece of land called "Boesmanspoort." Holliday had owned Boesmanspoort for less than two years, viz., between the 15th June, 1916, when he bought it, and the 16th April, 1918, when, as stated, he sold it to the appellant. During Mr. Holliday's ownership it is an admitted fact of the case that diamonds were discovered upon the farm. It is indeed sufficient to adopt the summing-up, upon this subject, made by the learned Maasdorp, J. :—

Under the admissions contained in paragraph 1 of the plaintiff's replication that the farm Thompson's Hope B as portion of Boesmanspoort was duly prospected during the ownership of the plaintiff's predecessors and diamonds discovered thereon, we must take it that at that time a duly licensed prospector or the owners themselves had duly prospected the property, and it would follow that during the tenure of such predecessors all conditions had been fulfilled which would have entitled the Governor to proclaim the land an alluvial digging whilst they owned the land."

The question accordingly is broadly raised whether a change of ownership subsequent to all this, but prior to the actual proclamation, renders the proclamation void.

In view of the differences of opinion in the Courts below and of the careful arguments presented to the Board, a brief survey may be made of the procedure prescribed by Act No. 11 of 1899 of the Cape of Good Hope relating to the prospecting and mining for precious stones. The property in question is stated to be an alluvial digging "as distinct from a mine" under the statute. No materiality, however, attaches to that distinction so far as the question to be settled is concerned.

By Section 4, any person satisfying the Civil Commissioner that he is a person of good character is at liberty to take out a licence to prospect, and by Section 5 this licence lasts for twelve months. It is provided, however, by Section 6 that no owner of private property shall be obliged to allow a licensed prospector to

prospect thereon, but he may give the Government licensee leave to prospect for such consideration as may be agreed upon between the prospector and himself. Once this leave is granted, the prospector may start operations within the limits defined. Under Section 11, if he find any precious stones, he is bound within one month to give notice thereof, making declaration of the number and value, and being liable, if he fails to do so, to conviction, fine and imprisonment.

It is convenient in this connection to note Section 45, which provides for the case of what may be termed the owner being his own prospector. He can himself prospect without taking out any licence, and if he makes a discovery of diamonds he shall have the same rights and the same obligations to disclose the results to the Government; while with regard to the penalties, the result of his failure to make a full and proper disclosure is that in his case he forfeits all rights reserved to him under the Act. The stage has accordingly been reached in which there are brought into view the respective rights of the owner, the Government and the prospector.

By Section 12 the holder of a prospecting licence who has got the owner's leave, has prospected, and has proved to the satisfaction of the Civil Commissioner his discovery of precious stones, is entitled to fifty claims in block at the place where the precious stones have been found on its being proclaimed a mine; and by Section 82 the discoverer is entitled to twenty claims in block if the precious stones are proclaimed as in an alluvial digging.

Section 14 may be considered of importance at this stage, for it provides that should the Governor not proclaim within three months after the granting of the certificate to the prospector then the prospector as holder of the certificate may beacon off and hold "subject to the terms and conditions of any agreement between himself and the owner," the claims to which the certificate entitles him in the same manner as if the proclamation had been made. An important proviso however follows, namely, that "nothing herein contained shall be deemed or taken in any way to interfere with the rights and power of the Governor at any time to proclaim a mine including the claims so beacons off." Up to this stage, accordingly, the assumption apparently is that matters proceed with reasonable despatch and that the prospector, notwithstanding a certain Government delay, may, on agreeing with the owner, have his rights fixed, but yet that the Government may subsequently, when they do issue the proclamation, see that it includes those portions so to speak beacons off by way of anticipation by the prospector.

As to the Government itself, Section 15 provides that the Governor may at any time and shall prior to proclamation take proper steps for testing the character, payable qualities and extent of the deposit, and may incur the requisite expenses; and by Sections 19 and 20, after the proclamation and on a day intimated in the "Gazette" an inspector visits the spot with plans and

surveys, the discoverer, owner and prospector select their claims ; and the remaining claims are publicly sold.

All these operations proceed by steps which make the ultimate proclamation and the division of the diamond field follow the initial step of the prospecting with licence and leave. And it must be remembered that the owner of the diamonds is not the owner of the surface. The latter holds his property subject to the reservation to the Crown of precious stones and minerals. Before, however, the Crown property can be realised, the steps of notice are taken by the Act as prescribed, and the laying out of the mine, the allowances prescribed for the surface owner and to the prospector have to be made.

The rights of the Crown are not left to rest merely upon reservation. In this connection Section 27 of the Statute is of much importance :—

“ Whenever precious stones shall be discovered on Crown lands or on private property and the Governor shall be satisfied after taking the steps mentioned in Section 15 of this Act that precious stones do exist in payable quantities it shall be lawful for the Governor to proclaim the area described in the proclamation a mine and the Governor shall be empowered to make all such rules orders regulations or bye-laws as he may deem necessary or expedient for the proper laying out surveying enlargement or contraction of any mining areas and depositing floors in connection with such mine and generally all matters and things connected with the proper and efficient working thereof.”

By Section 101 the above quoted Section 27 is made to apply to alluvial diggings.

Three general conditions are therefore required as preliminaries to proclamation : 1st, the discovery (after licence and leave in the case of a prospector who is not himself the owner) ; 2nd, under Section 15, steps taken by the Government for the purpose of testing the character, payable qualities and extent of the place ; and 3rd, that the Governor be satisfied “ that precious stones do exist in payable quantities.” It is an admitted fact in this case that each one of these conditions was satisfied prior to the issue of the proclamation which is challenged. Their Lordships are accordingly of opinion that Section 27 is equivalent in such circumstances to a definite declaration of the lawfulness of the proclamation. The question that remains accordingly is whether the further language of the Statute is sufficient to operate in the case of a change of ownership between the satisfying of these conditions and the proclamation itself as a repeal of Section 27, or an impediment of such a character as to justify the declarations by a court of law such as are asked for in the present case, namely, first, that the proclamation is unlawful and *ultra vires*, and, second, that if and so long as the new and existing owner should not prospect or allow prospecting upon his farm, the Government has no power or right to issue a proclamation.

The effects of the repeal or impediment referred to are sufficiently manifest. It is plain on the one hand that the interests of the colony may be deeply affected both in its revenues and its

development if a change of ownership of the surface were thus to prevent the exploitation of the colonial mineral resources. On the other hand the rights given to the surface owner must not be impaired by reason of any general consideration except and so far as the latter bears upon the true construction of the Act, but must be measured by the provisions of the statute themselves.

Their Lordships desire to record their sense of the careful analysis of the statute made by all the Judges of the Court below, who appear to have had those considerations fully in mind.

The sole foundation of the appellant's case is Section 41, the material words of which are as follows:—

“It shall not be lawful for the Governor to proclaim any portion of private property a mine or alluvial digging so long as the owner thereof does not himself prospect thereon for precious stones or give permission to any duly licensed prospector to do so.”

What is meant by the words “so long as the owner thereof does not himself prospect . . . or give permission to any . . . prospector to do so”? They are used in the present tense, and a literal construction of them is accordingly impossible, because it would point to a Government act of proclamation taking place while the owner or his prospector was at the job of prospecting. It is quite manifest that proclamation and prospecting cannot thus synchronize. Such a proclamation is an impossibility because no proclamation whatsoever is permitted until after those proceedings which have been referred to, under which prospecting and Government examination and the Governor's satisfaction with the result have been all concluded. Such a thing accordingly is, as has been stated, an impossibility, and the present tense “so long as the owner does not prospect or give permission” must accordingly be a form of expression used in a past sense, a sense which might have been better put into words by saying, “in the event of the owner not having prospected or given permission to prospect.”

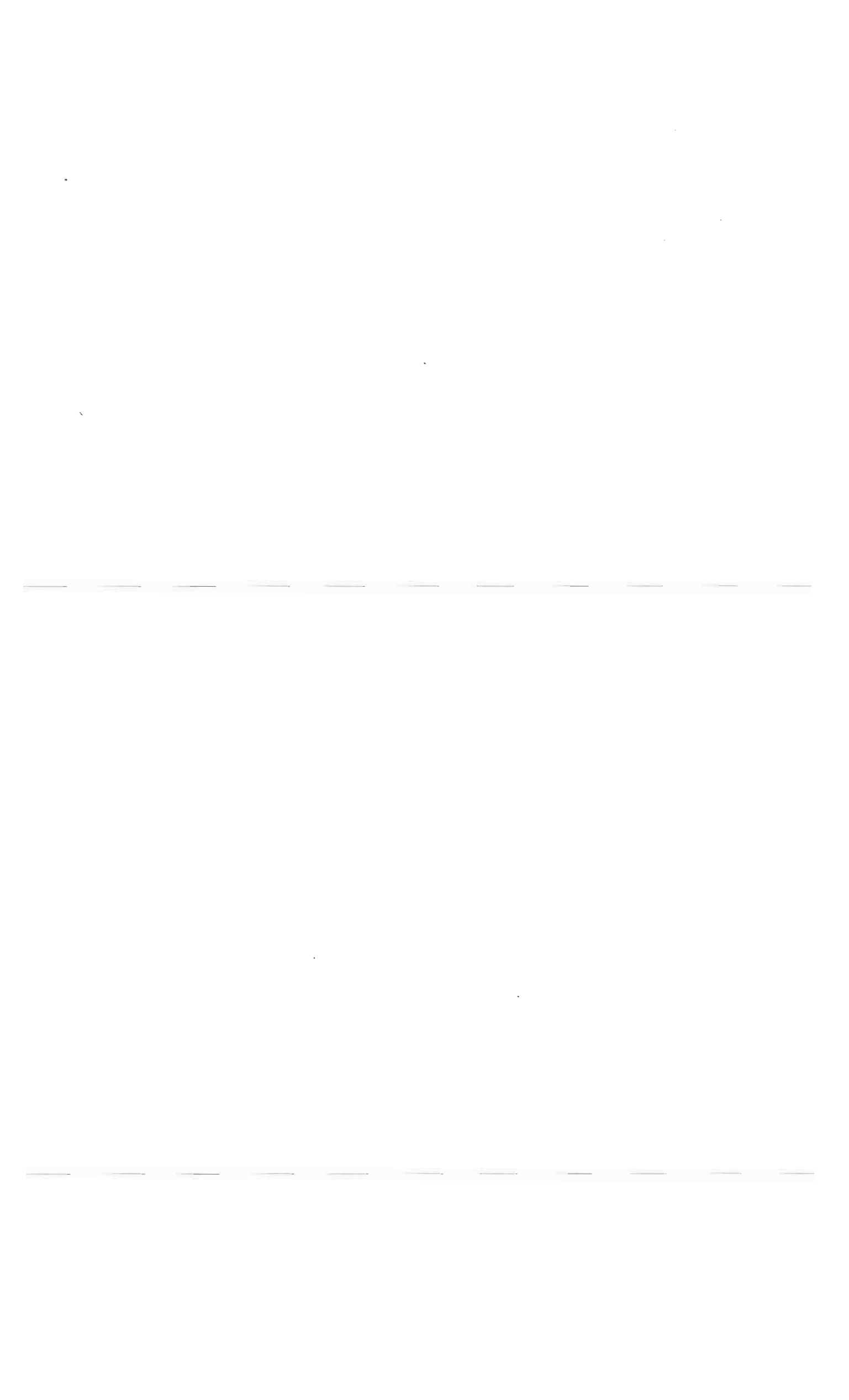
The Act, in short, makes a proclamation the legitimate culmination of the other steps which have been legitimately taken—licensing, leave, prospecting, inspecting, Government satisfaction—all as set forth in the Act. The only one of these steps in which the owner of the surface had to be appealed to was the step of leave given by him to a person duly licensed by the Government to prospect. All the other steps, once that leave be granted, duly proceed under the statute. Who then is the owner who is referred to in the phrase “so long as the owner does not prospect or give permission”? In their Lordships' opinion, it was that owner who *de facto* had prospected or given permission. In the present case the owner did give permission, and once this statutory procedure has thus been set in motion it is, in the opinion of the Board, illegitimate by a transfer of ownership to avoid the regular sequence of procedure up to a proclamation.

When leave is granted by the owner for the time being to a prospector, he does so on such terms and conditions as he can

make with the prospector, and once the prospector, having, it may be, had imposed upon him very onerous terms and conditions, has obtained the surface owner's leave, that prospector as well as the Government has rights under the statute which fall to be respected. A change of ownership effected as in the present case might result in hanging up the prospector's rights indefinitely unless indeed he were to enter into a fresh bargain with the fresh owner, with the identical risk that a fresh change of ownership prior to proclamation would substantially undo that transaction also. These are only some illustrations of what would follow were the term "owner" in Section 41 to be construed as owner at the date of the issue of the proclamation. In the opinion of the Board, the words do not mean that, but they mean the owner at the time of the prospecting or granting of the leave to prospect. Once that leave has been granted, then the condition has been satisfied and the awkward words "so long as," which truly mean "in the event of" have been given their full scope.

It is possible to figure a case in which, after prospecting, nothing more is done for a long space of time, and all parties allow the land to remain undisturbed so far as the discovery of precious stones is concerned; and no doubt in such a case it might be maintained that all proceedings had to start *de novo*. But no such course of years was run in the present case, and no such problem is presented.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.



In the Privy Council.

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WILLIAM EDEN THOMPSON

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THE HONOURABLE FRANÇOIS STEPHANUS  
MALAN, MINISTER OF MINES AND  
INDUSTRIES, AND AS SUCH REPRESENTING  
THE GOVERNMENT OF SOUTH AFRICA.

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DELIVERED BY LORD SHAW.

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