

In the Privy Council.

No. 9 of 1896.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

BETWEEN

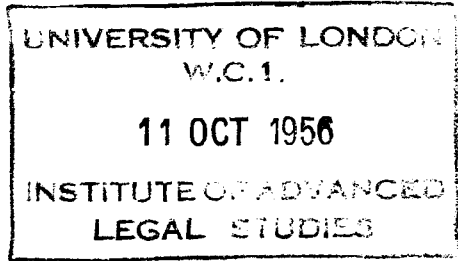
THE ESQUIMALT AND NANAIMO
RAILWAY COMPANY (*Defendants*) *Appellants*,
AND
WILLIAM HERBERT BAINBRIDGE (*Plaintiff*) *Respondent*.

RECORD OF PROCEEDINGS.

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In the Privy Council.

No. 9 of 1896.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

BETWEEN

THE ESQUIMALT and NANAIMO RAILWAY COMPANY (Defendants) Appellants, AND WILLIAM HERBERT BAINBRIDGE (Plaintiff) Respondent.

RECORD OF PROCEEDINGS.

In the Supreme Court of British Columbia.

Between

William Herbert Bainbridge. Plaintiff

and

The Esquimalt and Nanaimo Railway Company . . . Defendants

WRIT OF SUMMONS.

Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith

10 To the Esquimalt and Nanaimo Railway Company whose head offices are at the City of Victoria in the Province of British Columbia

We command you that within eight days after the service of this Writ on you, inclusive of the day of such service, you cause an appearance to be entered for you in an action at the suit of William Herbert Bainbridge of Alberni in the Province of British Columbia

And take notice, that in default of your so doing the Plaintiff may proceed therein, and judgment may be given in your absence.

20 The Plaintiff's claim is for the sum of \$1,000.00 damages for wrongful ejection and for an injunction restraining the Defendants by their servants or agents from in any way interfering with the Plaintiff's rights to work and mine a Placer Claim situate in the District of Alberni and known as "The Blue Ruin Placer Claim" on China Creek in the said district.

RECORD.

In the Supreme Court.

No. 1. Writ of Summons, 27th July, 1894.

RECORD.

*In the
Supreme
Court.*

No. 1.

Writ of
Summons,
27th July,
1894

—continued.

Witness, Henry Pering Pellew Crease, Senior Puisne Judge the twenty-seventh day of July in the year of our Lord one thousand eight hundred and ninety-four.

HERBERT E. A. ROBERTSON,

Solicitor for the Plaintiff.

N.B.—This Writ is to be served within twelve calendar months from the date thereof, or, if renewed, within six calendar months from the date of the last renewal, including the day of such date, and not afterwards.

Appearance is to be entered at the Registry, for the Victoria Judicial District Law Courts, Bastion Square, Victoria, B.C.

10

No. 2.

Affidavit of
William
Herbert
Bainbridge,
28th July,
1894, with
Exhibits "A"
and "B."

Affidavit of W. H. Bainbridge.

I, William Herbert Bainbridge of the District of Alberni in the Province of British Columbia, free miner, make oath and say:—

1. That I am a free miner at present mining on China Creek in the District of Alberni and have taken out a license, which license is dated the 3rd day of March 1894 and is still in force.

2. On the 21st day of June 1894 I located a claim on China Creek in the said District of Alberni, and in compliance with the provisions of the Act in that behalf on the 23rd day of June 1894 I duly recorded the same in the office of Thomas Fletcher, the Mining Recorder, at Alberni, and received from him a ²⁰ Certificate of Record numbered 54928 which certificate is now shown to me and marked as Exhibit "A" to this my affidavit.

3. That at the time I recorded the said claim I paid to the said Mining Recorder the sum of \$2.50 being the fee payable for recording the said claim and received a receipt from the said Fletcher, which receipt is now shown to me and marked as Exhibit "B," to this my affidavit.

4. That on the 23rd day of June 1894 I started to work the said claim and had not worked for very long when I was ejected from the said claim by one Charles Green who informed me that he was employed by the Defendants and that they claimed all the gold and silver and precious metals on the claim which ³⁰ I had recorded and was then working.

5. That I am informed and verily believe that the said Defendants have no right to the said gold and silver and precious metals as claimed by them and that the said Defendants had no right or title to prevent my working the said claim or to eject me therefrom.

Sworn before me at Alberni in the Province of British }
Columbia this 28th day of July 1894. } W. H. BAINBRIDGE.

F. T. CHILD, J.P.

Exhibit "A"

(Form B.)

To be retained by the Free Miner.

British Columbia Placer Mining Act, 1891. Record of a Placer Claim.

The "Blue Ruin" Placer Claim 54928 No. of Certificate.

Located by W. H. Bainbridge.

The claim is situate on China Creek about 7 chains S. 14° E. from E. and N.

Mineral Monument No. 10.

The length of claim is 100 by 100 feet.

Recorded for one year.

10 Located on the 21st day of June 1894.

Recorded this 23rd day of June 1894.

Located as Bench diggings.

RECORD.

In the Supreme Court.

No. 3.

Exhibit "A." Record of a Placer Claim, 23rd June, 1894.

THOS. FLETCHER,
Mining Recorder.

Exhibit "B"
British Columbia
Mining Receipt.

No. 47590

Date June 23rd 1894.

Received from W. H. Bainbridge the sum of (2.50) Two dollars and fifty cents in payment of Record of "Blue Ruin" Placer Claim on China Creek.

\$2.50.

(Signature) THOS. FLETCHER,
Office Alberni.

No. 4.
Exhibit "B." Mining Receipt, 23rd June, 1894.

Notice of Motion

Take notice that this Honourable Court will be moved on Saturday the 4th day of August 1894 at the hour of eleven in the forenoon or so soon thereafter as counsel can be heard at the Court House, Bastion Square in the City of Victoria, by Mr. Theodore Davie, Q.C., of Counsel for the above named Plaintiff for an Injunction to restrain the said Defendants by their servants, agents and workmen from ejecting from or in any way interfering with the rights of the Plaintiff to work and mine a certain Placer Claim in the District of Alberni known and recorded as the "Blue Ruin" Placer Claim, until the trial of this action or further order.

No. 5.
Notice of Motion to restrain Defendants from interfering with right of Plaintiff to work a Placer Claim, 1st Aug., 1894.

And take further notice that the affidavit of the Plaintiff William Herbert Bainbridge sworn the 28th day of July 1894 and filed herein this day, a copy whereof accompanies this notice, will be read in support of this motion.

Dated the 1st day of August, 1894,

HERBERT E. A. ROBERTSON,
41 Langley Street, Victoria, B.C.
Solicitor for the Plaintiff.

40 To the above named Defendants.

RECORD.

Affidavit of James Dunsmuir.

*In the
Supreme
Court.*No. 6.
Affidavit of
James
Dunsmuir,
6th Aug.,
1894.

I, James Dunsmuir of Victoria in the Province of British Columbia, Vice-President of the Esquimalt and Nanaimo Railway Company make oath and say as follows:—

1. On the 19th day of December 1883 an Act 47 Victoria chap. 14 was passed by the Legislature of the Province of British Columbia whereby certain lands therein defined were granted to the Dominion Government for the purpose of constructing and to aid in the construction of a railway between Esquimalt and Nanaimo.

2. In the year 1884, the aforesaid Act was ratified, confirmed and approved **10** by an Act 47, Victoria chap. 6 passed by the Parliament of Canada.

3. The Defendants built the line of railway from Nanaimo to Esquimalt by agreement with the Government of the Dominion of Canada.

4. That the Dominion Government by deed dated the 21st day of April 1884 under the great seal of Canada did grant, assign and convey to the Defendants all the lands granted to them by the Act of the Legislature of the Province of British Columbia passed on the 19th December, 1893, chapter 14, and entitled "An Act relating to the Island Railway, the Graving Dock and the "Railway Lands of the Province" a copy of which said deed is annexed to this my affidavit. The said lands were part of the consideration the Defendants were to **20** receive for the building of the said railway.

5. That the claim located by the Plaintiff as alleged in his affidavit sworn herein on the twenty-eighth day of July A. D. 1894, is a mineral claim located under the "Mineral Act, 1891" and amending Acts situate within the lands aforesaid of the Defendants.

6. That I verily believe that by the terms of said Act of the Legislature of the Province of British Columbia and the aforesaid grant and conveyance from the Dominion Government to the Defendants, that the Defendants are entitled to all the precious metals gold and silver upon in and under the aforesaid lands.

7. That for many years prior to the grant of the said lands to the Defendants, **30** gold had been extracted from the said lands in large quantities and the Government of the Province of British Columbia and the Legislature of the said Province were well aware of the existence of gold and silver and precious metals within upon and under the said lands at the time of the passing of the said Act 47 Victoria chapter 14.

Sworn before me at Victoria this 6th day }
of August 1894

JAMES DUNSMUIR.

GORDON E. CORBOULD,
A Commissioner, &c., in and for
Supreme Court of British Columbia.

Canada

John J. McGee

RECORD.

In the
Supreme
Court.

No. 7.

Letters
Patent
granting and
conveying
land, minerals
and mining
rights to
Defendants,
21st April,
1887.

(Great Seal of Canada.)

Deputy Governor.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, &c.

To all to whom these presents shall come, greeting.

Whereas by an Act of the Legislature of British Columbia, passed in the forty-seventh year of Our Reign, chapter 14 and intituled an Act relating to the Island Railway, the Graving Dock and Railway Lands of the Province, after
10 reciting as is therein recited, there was by section three of the said Act granted to the Dominion Government for the purposes of constructing and to aid in the construction of a railway between Esquimalt and Nanaimo and in trust to be appropriated as they may deem advisable, but save as is therein excepted, all that piece or parcel of land situated in Vancouver Island described as follows: Bounded on the south by a straight line drawn from the head of Saanich Inlet to Muir Creek on the Straits of Fuca; on the west by a straight line drawn from Muir Creek aforesaid to Crown Mountain; on the north by a straight line drawn from Crown Mountain to Seymour Narrows; and on the east by the coast line of
20 Vancouver Island to the point of commencement and including all coal, coal-oil, ores, stones, clay, marble, slate, mines, minerals, and substances whatsoever thereupon therein and thereunder.

And whereas by section four of the said Act there was excepted out of the tract of land granted by the said section three, all that portion thereof lying to the northward of a line running east and west half way between the mouth of the Courtenay River (Comox District) and Seymour Narrows.

And whereas by section five of the said Act it was provided that the Government of Canada should be entitled out of such excepted tract to lands equal in extent to those alienated up to the date of the said Act by Crown Grant, pre-emption or otherwise within the limits of the grant mentioned in the said section
30 three.

And whereas by section six of the said Act it was provided that the grant mentioned in section three of the said Act should not include any lands then held under Crown Grant, Lease, Agreement for Sale, or other alienation by the Crown, nor should it include Indian Reserves or Settlements or Naval or Military Reserves.

And whereas by section twenty-three of the said Act it was provided that the Company which might acquire the said lands from the Dominion Government for the construction of the railway should be governed by sub-section (f) of the agreement in the said Act recited and that each *bonâ fide* squatter who had con-
40 tinuously occupied and improved any of the lands within the tract of land to be acquired by the Company, from the Dominion Government for a period of one year prior to the first day of January 1883, should be entitled to a grant of the freehold of the surface rights of the said squatted lands to the extent of one hundred and sixty acres to each squatter at the rate of one dollar an acre.

And whereas by sub-section (f) of the agreement in the said Act recited it is provided that the said lands should except as to coal and other minerals and also

RECORD.

*In the
Supreme
Court.*

No. 7.

Letters
Patent
granting and
conveying
land, minerals
and mining
rights to
Defendants,
21st April,
1887
—continued.

except as to timber lands as thereafter mentioned be open for four years from the passing of the said Act to actual settlers for agricultural purposes at the rate of one dollar an acre to the extent of 160 acres to each such actual settler and that in any grants to settlers the right to cut timber for railway purposes and rights of way for the railway and stations and workshops should be reserved.

And whereas by section twenty-four of the said Act it was enacted that the Company should at all times sell coals gotten from the lands that might be acquired by them from the Dominion Government to any Canadian Pacific Railway Company having the terminus of its railway on the sea-board of British Columbia and to the Imperial Dominion and Provincial authorities at the same rates as might be charged to any railway company owning or operating any railway in the United States or to any foreign customer whatsoever. 10

And whereas by section twenty-five of the said Act it was provided that all lands acquired by the Company from the Dominion Government under the said Act containing belts of timber fit for milling purposes should be sold at a price to be thereafter fixed by the Government of the Dominion or by the Company.

And whereas by section twenty-six of the said Act it was provided that the existing rights if any of any persons or corporations in any of the lands so to be acquired by the Company should not be affected by the said Act nor should it affect Military or Naval Reserves. 20

And whereas by an Act of the Parliament of Canada passed in the forty-seventh year of Our Reign, chaptered six and intituled an Act respecting the Vancouver Island Railway, the Esquimalt Graving Dock and certain Railway Lands of the Province of British Columbia granted to the Dominion after reciting as is therein recited it is amongst other things in effect enacted that the Governor in Council may grant to the Esquimalt and Nanaimo Railway Company in aid of the construction of a railway from Esquimalt to Nanaimo, British Columbia, and of a telegraph line of the said railway besides the subsidy in money mentioned in the said Act, all of the land situated on Vancouver Island which has been granted to us by the Legislature of British Columbia by the Act hereinbefore in part recited in aid of the construction of the said line of railway in so far as such land shall be vested in us and held by us for the purposes of the said railway or to aid in the construction of the same; and also all coal, coal-oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever in on or under the lands so to be granted to the said Company as aforesaid and the foreshore rights in respect of all such lands as aforesaid, which are to be granted to the said Company as aforesaid and which border on the sea together with the privilege of mining under the foreshore and sea opposite any such land and of mining and keeping for their own use all coal and minerals herein mentioned under the foreshore or sea opposite any such lands in so far as such coal, coal-oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever and foreshore rights are vested in us as represented by the Government of Canada. And further that no lands shall be conveyed to the said Company until the road is fully completed and equipped, and further that the land grant shall be made and the land in so far as the same shall be vested in us and held by us for the purposes of the said railway or to aid in the construction of the same shall be conveyed to the said Company upon the completion of the whole work to the entire satisfaction of Governor in Council 30 40

but so nevertheless that the said lands and the coal-oil, coal, and other minerals and timber thereunder, therein or thereon shall be subject in every respect to certain provisions set out in the seventh section of the said Act.

And whereas it has been agreed by and between the Government of Canada the Government of British Columbia and the said Company that the grant of the said lands to the said Company shall be by the description hereinafter contained, that the exact boundaries of the lands covered by such grant shall be as settled and agreed upon by and between the Government and the said Company, and further that it shall not be necessary for settlers under sub-section (f) of the agreement recited in the said Act of the Legislature of British Columbia to pay the price of lands pre-empted by them in full before the expiry of four years from the passing of the said Act and that the terms of payment by such settlers for their land shall be those provided by the laws affecting Crown lands in British Columbia and that the Company shall grant them their conveyances upon demand when such price shall have been paid in full.

And whereas the whole work undertaken by the said Company has been completed to the entire satisfaction of our Governor in Council and our Governor in Council has recommended that the land grant provided for by the said Act should now be made subject however to the stipulations and conditions herein-
20 after mentioned and we deem it expedient that such grant shall be so made.

Now know ye, that we do by these presents in consideration of the premises and under and by virtue of the said Acts of the Parliament of Canada and of the Legislature of British Columbia hereinbefore in part recited and by virtue of every other power us in that behalf enabling and by and with the advice of our Privy Council for Canada grant, assign and convey unto the Esquimalt and Nanaimo Railway Company, its successors and assigns, all and singular the land situated on Vancouver Island which has been granted to us by the Act of the Legislature of the Province of British Columbia passed in the forty-seventh year of Our Reign, chaptered fourteen, and intituled "An Act relating to the Island Railway, the
30 "Graving Dock and the Railway Lands of the Province," in aid of the construction of the said line of railways in so far as such lands are vested in us and held by us for the purposes of the said railway or to aid in the construction of the same, and also all coal, coal-oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever in on or under such lands and the foreshore rights in respect of such of the said lands as border on the sea together with the privilege of mining under the foreshore and sea opposite any such land and of mining and keeping for its and their own use all coal and minerals herein mentioned under the foreshore or sea opposite any such lands in so far as such coal, coal-oil, ores, stones, clay, marble, slate, mines, minerals and substances and foreshore rights
40 are vested in us as represented by the Government of Canada. And also the full benefit and advantage of the rights and privileges granted to us by section five of the said Act of the Legislature of British Columbia, to have and to hold the said lands, coal, coal-oil, ores, stones, clay, marble, slate, mines, minerals and substances and the said foreshore rights and privileges of mining and the said rights and privileges in the said section five of the said Act of the Legislature of British Columbia referred to unto and to the use of the said Company, its successors and assigns for ever:—Subject nevertheless to the several stipulations and conditions

RECORD.

*In the
Supreme
Court.*

No. 7.

Letters
Patent
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rights to
Defendants,
21st April,
1887

—continued.

RECORD.
*In the
Supreme
Court.*

No. 7.

Letters
Patent
granting and
conveying
land, minerals
and mining
rights to
Defendants,
21st April,
1887
—continued.

affecting the same hereinbefore recited and which are contained in the Acts of the Parliament of Canada and of the Legislature of British Columbia, hereinbefore in part recited as such stipulations are modified by terms hereinbefore recited of the agreement so made as aforesaid by and between the Government of Canada, the Government of British Columbia and the said Company.

Given under the Great Seal of Canada.

Witness John Joseph McGee Esq., Deputy of Our Right trusty and entirely beloved Cousin the Most Honourable Henry Charles Keith Petty Fitzmaurice Marquess of Lansdowne in the County of Somerset, Earl of Wycombe of Chipping Wycombe, in the County of Bucks, Viscount Calne and Calnestone, in the County of Wilts and Lord Wycombe Baron of Chipping Wycombe in the County of Bucks in the Peerage of Great Britain, Earl of Kerry and Earl of Shelburne, Viscount Clanmaurice and Fitzmaurice, Baron of Kerry, Lixnaw and Dunkerron, in the Peerage of Ireland; Knight Grand Cross of Our Most Distinguished Order of St. Michael and St. George; Governor General of Canada and Vice-Admiral of the same, &c.

At Ottawa this 21st day of April in the year of our Lord, 1887, and in the 50th year of Our Reign.

By command

A. M. BURGESS,

Deputy of the Minister
of the Interior.

G. POWELL,

Under Secretary of
State.

20

No. 8.
Affidavit of
Herbert
Ewen Arden
Robertson,
8th Aug,
1894.

Affidavit of H. E. A. Robertson

I, Herbert Ewen Arden Robertson of the City of Victoria in the Province of British Columbia, Barrister-at-Law, make oath and say as follows:

1. That I am Solicitor for the Plaintiff herein.

2. That I searched the files of the Lands and Works Department at the City of Victoria at the Treasury and found that William Herbert Bainbridge the Plaintiff herein had taken out a free miner's license on the 3rd day of March, 1894, and was informed that the said license was still in force.

30

Sworn before me at the City of Victoria in }
the Province of British Columbia this } HERBERT E. A. ROBERTSON.
8th day of August 1894.

SAMUEL D. SCHULTZ.

A Commissioner for taking affidavits for use
in the Supreme Court of British Columbia.

REASONS FOR JUDGMENT.

2nd October, 1894.

This is a motion by the Plaintiff to restrain the Defendants from interfering with the Plaintiff in his alleged right to mine for gold on a certain Placer Claim in Alberni District known as "Blue Ruin" claim and by consent of both parties the motion was turned into a motion for judgment.

On the 21st June 1894, the Plaintiff a free miner located a claim on China Creek, Alberni, and duly recorded the same with the Mining Recorder at Alberni and all necessary preliminaries were complied with to enable the Plaintiff to prosecute his work. On the 23rd June 1894 the Plaintiff was summarily
 10 ejected by the Defendants.

The Defendants' case is that by the Act 47 Victoria cap. 14 the Legislature of British Columbia granted certain lands in Vancouver Island which included the lands in question to the Crown as represented by the Dominion Government to aid in the construction of the Esquimalt and Nanaimo Railway and that on the 21st April 1887 the Crown by deed granted to the Defendants all the lands granted to them by the Provincial Legislature and claim that by the terms of the deed and Act that they are entitled to all the precious metals in or under the said lands.

The statute in question was passed to carry out an agreement which had
 20 been arrived at between the Dominion and Provincial Governments and was confirmed by a Dominion Statute of 47 Vic. cap. 6.

By section 3 of the Provincial Act the land granted to the Dominion is defined by metes and bounds and is stated to include all coal, coal-oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever.

The grant from the Crown to the Defendants uses the same terms as to the lands and its appurtenances as that contained in section 3.

The Attorney-General on behalf of the Plaintiff relies on the judgment of the Privy Council in the case of the Attorney-General of British Columbia *versus* The Attorney-General of Canada, 14 Appeal Cases 294.

30 Mr. Pooley Q.C. for the Defendants argues that although gold and silver are not expressly mentioned yet they are included in the terms mines, minerals and substances and points out that the term lands would be quite sufficient to pass everything but the precious metals, that the terms used sufficiently indicate an intention to include both gold and silver especially as in the then existing and antecedent legislation of the Province the term mineral was used to define gold and silver.

By the Gold Mining Ordinance of 1867 cap. 123 of the Consolidated Acts of 1877 the term mine is stated to mean any vein, stratum or natural bed of auriferous earth and in the Mineral Act cap. 82 of the Consolidated Stat. 1888
 40 sec. 2, minerals include all precious and base (other than coal) found in veins or lodes or rock in place and whether such minerals are found separately or in combination with each other.

And the Crown Lands Act cap. 98 of the Consolidated Acts 1877 sec. 80 and cap. 66 of the Consolidated Acts 1888 sec. 95 and 96 it is enacted that nothing therein contained should be construed so as to interfere with the rights of miners under the Mineral Act or subsequent Acts relating to gold mining.

RECORD.

*In the
Supreme
Court.*

No. 9.

Reasons for
Judgment of
Mr. Justice
Drake.

RECORD.

*In the
Supreme
Court.*

No. 9.

Reasons for
Judgment of
Mr. Justice
Drake

— *continued*

The use of a general term to indicate the precious metals in these statutes does not in my opinion extend the meaning of the word minerals when used in any other Act. The interpretation clause in these Acts is merely a dictionary to define particular expressions in the Acts to which it is attached and unless there is any clause incorporating the Mineral Act in the statute in question in this case, I do not consider that I can give to the terms used any other meaning than their ordinary and legal signification.

If I might hazard a conjecture why the special terms which were used in the present Act were inserted it is possible that the parties interested in the agreement did not desire to have their right to coal and coal-oil questioned, as coal is expressly excepted in the Mineral Act and does not pass under the term mineral there.

Gold and silver mines as Lord Watson says in the case of Attorney-General of British Columbia *versus* The Attorney-General of Canada until they have been aptly severed from the title of the Crown and vested in the subject are not regarded as *partes soli* or as incidents of the land in which they are found. The question is, have these mines royal been severed from the title of the Crown by the language used here, under the term mines, minerals, and substances they would not pass, the statute in question commences with coal, coal-oil, indicating in my opinion all minerals and mines which would pass under the term of lands in ordinary cases in a grant to the subject and has no reference to mines royal.

A further question arises in this motion and that is have the Defendants the right to prevent the extraction of gold and silver from their lands owned and occupied by them by free miners?

The rights of miners to enter upon land for mining purposes is apparently not limited to Crown lands, see sects. 11 and 12 Placer Mining Act 1891.

Independent of statutory authority no person has a right to trespass on private lands but sec. 959 of the Crown Lands Act 1888 authorises free miners to enter upon any lands in the Province to search and work for gold and silver following in substance the language used in the Act existing at the date of the grant of these lands to the Crown.

These lands in my opinion are therefore subject to the right of entry by free miners to search for the precious metals, subject to the conditions precedent contained in section 11 of the Placer Mining Act 1891 which conditions both parties admit have been complied with.

I therefore give judgment for the Plaintiff with costs.

M. W. TYRWHITT DRAKE, J.

JUDGMENT.—Drake J.

The 17th day of October 1894.

No. 10.
Judgment,
17th Oct.,
1894.

Upon motion made unto the Court on the 2nd day of October, 1894, by the Honourable Theodore Davie Q.C. and Herbert E. A. Robertson of Counsel for the Plaintiff for an Injunction restraining the Defendants their servants or agents from in any way interfering with the Plaintiff's rights to work and mine a Placer Claim situate in the district of Alberni and known as the "Blue Ruin"

Placer Claim, on China Creek in the said district, in the presence of the Honourable Charles E. Pooley Q.C., of Counsel for the Defendants and the motion by consent of Counsel having been turned into a motion for judgment, upon reading the affidavits of the Plaintiff and Herbert E. A. Robertson sworn and filed on behalf of the said Plaintiff, and the affidavit of James Dunsmuir sworn and filed on behalf of the Defendants and upon reading what was alleged by Counsel as aforesaid it was ordered that the said motion should stand over for judgment.

RECORD.
*In the
 Supreme
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 No. 10.
 Judgment,
 17th Oct.,
 1894

—continued.

10 And the said motion having come on this day for judgment IT IS ADJUDGED that the Defendants their servants and agents be and they are hereby restrained from in any way interfering with the Plaintiff's right to work and mine the aforesaid claim.

AND IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff was and is entitled to enter on and mine the lands belonging to the Defendants upon having complied with the conditions contained in section 11 of the Placer Mining Act of 1891.

AND IT IS FURTHER ORDERED AND ADJUDGED that the Plaintiff do recover from the Defendants his costs of action to be taxed.

By the Court.

20

HARVEY COMBE,
 Deputy Registrar.

(Seal)

NOTICE OF APPEAL TO FULL COURT.

Take notice that the Defendants appeal from the judgment of this Honourable Court dated the 17th day of October 1894.

No. 11.
 Notice of
 Appeal to the
 Full Court,
 20th Feb.,
 1895.

30 And further take notice that the Full Court will be moved at the Court House, Bastion Square, Victoria, on Monday the 10th day of March next at the hour of eleven o'clock in the forenoon or as soon thereafter as Counsel can be heard by Mr. C. E. Pooley Q.C. of Counsel for the Defendants that the judgment of this Honourable Court given in this action and dated the 17th day of October 1894 may be reversed and that judgment entered in this action for the Plaintiff W. H. Bainbridge be set aside and judgment entered for the Defendant Company upon the following grounds:—

1. That the learned Judge erred in law in holding that the gold and silver or precious metals were not included in the grant from the Provincial Government to the Dominion Government made by section 3 of chap. 14 of the British Columbia Statutes 1884.

2. That the learned Judge erred in law in holding that the gold and silver or precious metals were not included in the grant from the Crown to the 40 Defendants by deed dated 21st April 1887.

3. The learned Judge erred in law in holding that the Plaintiff had any right to enter upon the lands and work the mines referred to in the affidavit of the Plaintiff sworn and filed herein.

4. That by virtue of the said section 3 of the said Act chap. 14 and of the said grant the said gold and silver are vested in the Defendants.

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*In the
Supreme
Court.*No. 11.
Notice of
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Full Court,
20th Feb.,
1895
—continued.

5. That even if the said gold and silver are not vested in the Defendants by virtue of the said Act and grant the Plaintiff had no right to enter upon the Defendants' lands and work and carry away the said gold and silver.

6. On such other grounds as the Defendants may be advised.

Dated the 20th day of February 1895.

CHARLES E. POOLEY
Of the firm of Davie, Pooley & Luxton,
Solicitor for the Defendants.

To H. E. A. Robertson, Esq.
Solicitor for the Plaintiff.

10

No. 12.
Reasons for
Judgment of
Full Court.

JUDGES' REASONS.

In the Full Court

Before Crease J. McCreight J. Walkem J.—In Appeal.

Bainbridge

v.

Esquimalt & Nanaimo Railway Coy.

Crease J.

REASONS FOR JUDGMENT OF MR. JUSTICE CREASE.

This is a test case which puts in issue the exclusive right of the Esquimalt and Nanaimo Railway Company to the precious metals in what is known as the Esquimalt and Nanaimo or Island Railway Belt.

20

Briefly stated, the facts are as follows:—

The Plaintiff William Herbert Bainbridge, a free miner, under the British Columbia Gold Mining Acts, having duly fulfilled all the preliminary requirements of the law for the purpose, and having taken up, recorded and worked a gold mining claim at Alberni called the "Blue Ruin" Placer Claim, within the said belt, was ejected by the Defendant Company as a trespasser.

Thereupon he obtained an injunction against them; which, by consent, was turned into a motion for judgment before the Supreme Court.

The Court, at the hearing on the 17th October, 1894, by its judgment and the reasons which accompanied it established the two questions raised in the case, 30 in favour of the Plaintiff:—

1. That the precious metals, gold and silver had not been conveyed by the Crown to the Company and

2. That such being the fact, a free miner, on fulfilling the ordinary statutory conditions in that behalf, had the same right to mine and work a Placer Claim for gold within that belt as he had to do so in other private lands in the Province.

It is against this decision that the present appeal has been taken.

The motion was heard and fully argued before the Full Court on the 10th May 1895 and judgment reserved.

It is this judgment we have now to render. It is conceded that the title to 40 the lands and minerals within the Island Railway Belt depends on the Statutes Local and Dominion, and the Crown Grant affecting it, cited *in extenso* on both sides and set out in the Appeal Book.

And the two points at issue depend on the construction which the law places on those authorities.

It is admitted also that the Plaintiff's mining claim is situated within the Island Railway Belt and included in the lands, the fee in which is granted to the Defendant Company.

The Railway Company claim that the Province, by the British Columbia Act 47 Vic. c. 14 (1883) ratified and confirmed by the Dominion Act 47 Vic. c. 6 (1887) and the Crown grant from the Dominion to the Company (1887) (each) passed the same public lands and all mines and minerals whatsoever in the same language, which also included the right to the precious metals.

They further maintain that by implication such of the Legislation of British Columbia as to private lands before and at that time, which deals with gold mines, points with sufficient clearness to the interpretation which includes the precious metals in their grant, and claim a decision in their favour.

But an examination into the actual wording of the statutes and of the grant and the settled construction which the law places upon the wording employed in them do not bear out that conclusion.

The 47 Vic. c. 14 (British Columbia) (The Act relating to the Island Railway, and Graving Dock and the Railway Lands of British Columbia) and the grant of 21st April 1887 made in pursuance thereof,—after granting the lands of the Railway Belt to the Railway Company,—granted “also all coal, coal-oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever in, on or under such lands” unto and to the use of the said Company, its successors and assigns for ever, subject to certain conditions and stipulations (which do not affect the present case).

These words “mines, minerals and substances” it has been long settled are not “precise and apt” to carry with them a grant of the Royal mines of gold and silver. From the earliest time in an unbroken chain down to the present, nothing less than unmistakable language conveying the gold and silver is allowed by law to pass these Royal mines and metals. The law on the subject in England is the law in British Columbia, and has been so, at the least, since 1858.

As far back as the time of Elizabeth and before (see 1. Plowden 310 to 333) it was settled that “nothing of prerogative can pass without express and “determinate words,” and since then the precious metals have always been recognised as a part of the prerogative rights of the Crown; and the above rule for their transmission has ever since then been strictly observed, and handed down.

In the case reported in 1. Plowden 336a, “All the Justices and Barons agreed that a mine Royal, whether of base metal containing gold or silver, or of “pure gold and silver only may by grant of the King be severed from the “Crown etc. by apt and precise words.”

They also agreed that “the words in the Letters Patent conveying ‘land’ and ‘mines’ should be taken to common intent and shall not make the ores “Royal, and the mines Royal to pass, to convey which there ought to be in the “patent precise words expressing them”—and there are none such here.

Nay, even more strongly:—for he says “that in many cases the construction

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*In the
Supreme
Court.*

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—continued.

RECORD. "of law may, for the benefit of the King be against the expresse letters of the
 "grant; as, when the King granteth the Manor of Dale and all manner of under-
In the "woods mines and quarries in the same;—yet the mynes of gold and silver shall
Supreme "not passe."
Court.

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 —continued.

And the other high authorities (Davis 576) (Littleton 116) (Hobart 243) all express themselves on the point to the same effect.

In a later case (1877) before the Court Woolley *v.* Attorney-General of Victoria in an appeal before the Privy Council (2 Appeal Cases) the same rule of construction is emphatically confirmed.

There the question was whether upon the sales of waste lands of the Crown¹⁰ the gold which might be found therein passed to the purchasers;—there being no words in the grant of the Crown expressly granting it.

Sir James Colvile, delivering the judgment of the Court, speaking of the rule in the "Mines Case" I have referred to (1 Plowden 336) laid down that, "it is perfectly clear that ever since that decision, it has been settled law in England that the prerogative right of the Crown to gold and silver found in mines will not pass under a grant from the Crown; unless by apt and precise words the intention of the Crown be expressed that it shall pass."

In another part of the same judgment the same learned Judge says:—

"There is no reference to the rights of the Crown in the precious metals to²⁰ be found under the soil; and it is a recognised principle of the construction of the statutes that the prerogative rights of the Crown can be affected only by express words, or necessary implication."

In the case under citation, it was conceded that "this rule must be taken to have been introduced as part of the Common law of England into the Colony of Victoria."

And it is not disputed that the same rule has been introduced and obtained here as part of the Common law of England in British Columbia.

In a case of considerable importance heard before the Privy Council in 1889 The Attorney General of British Columbia *v.* The Attorney General of Canada³⁰ 14 App. Cases 295, the question raised was whether the grant by the Province of certain "public lands" to the Dominion now The Canadian Pacific Railway Belt where the expression "lands" admittedly carried with it the baser metals, "mines" and "minerals" and I might add for this case, "substances" "as incidents of land" also carried with it the right to "the precious metals."

Lord Watson in a long and well considered judgment reviewing all the authorities on the question from Plowden downwards, delivered the decision of the Court that "Jura regalia" (of which the right to gold and silver is one) "are not accessories of land."

And declared that the precious metals within that Railway belt are vested in⁴⁰ the Crown subject to the control and disposal of the Government of British Columbia.

With regard to the Company's contention that the use and interpretation of the words "mines and minerals" in several British Columbia Acts passed before, as well as at the time of the grant, indicates the intention of the Crown that the words "all mines and minerals whatsoever" in the grant shall include "gold and silver." A very short examination however of these shows not only that such

could not have been the case, but that the British Columbia House of Assembly has been anxious, if only for the sake of the miners themselves, in all their legislation and Crown grants, whether relating to land or mines, carefully to give public notice in them, that the Crown retains intact all its prerogatives with regard to the precious metals.

In 47 Vic. c. 10 p. 24 (secs. 10, 60 and 69) the British Columbia Mineral Act and Amending Acts—under which the Plaintiff claims and which was passed at the same session as the Island Railway Act—the word “mineral” is declared “to mean and include all minerals precious and base (other than coal) found in
10 “veins or lodes or rock in place” and the Crown grant under it is declared “to
“pass and transfer the right to all metals precious or base (other than coal) found
“in veins, lodes or rock in place.”

But this only refers to the rights which the Legislature intended to be conveyed to gold miners under the particular Acts in which such special sections occur.

And shows that when they wished the precious metals in any case to pass having the power to do so the Legislature knew very well how to do it; and invariably used “apt and precise” and clear words to effect that object.

Where, as in this case, they did not do so—the only inference is that they
20 omitted to do so designedly, and that their real intention was that by the words used in the Railway grant, the precious metals should not pass.

The same observations and reasoning apply to the British Columbia Acts referring to the Royal prerogatives passed before the Railway grant such as the Mineral Acts and Land Acts, and the forms of Crown grants attached to them.

Throughout the Legislature seem to have taken as a matter of course the long established rule that the Crown only expresses its intention to part with the precious metals by apt and precise words the meaning of which cannot be mistaken.

I am therefore of opinion that the judgment of Mr. Justice Drake must be
30 supported, and the appeal dismissed with costs.

HENRY P. PELLEW CREASE, J.

Bainbridge

v.

Esquimalt & Nanaimo Railway Company.

REASONS FOR JUDGMENT OF MR. JUSTICE McCREIGHT.

The law seems to be so thoroughly settled to the effect that mines of gold and silver will not pass by a grant from the Crown without express words granting them (see *Woolley v. Attorney General of Victoria* 2 Appeal Cases 165, and see the distinct admission of the counsel for the Appellant at page 165, whilst arguing
40 before the Judicial Committee to the above effect, and the judgment of the Court at page 166) that it would not be right to dwell on the older authorities to the same effect, such as *re Earl of Northumberland's mines* 1 Plowden 310, 333a, 333b, 336a, and see pages 332 and 333 of the same report, where it is said that

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Supreme
Court.*

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—continued.

McCreight J.

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—
*In the
 Supreme
 Court.*
 —

No. 12.
 Reasons for
 Judgment of
 Full Court
 —continued.

“nothing of prerogative can pass without express and determinate words,” with which agree Abert’s Reports, 243, Davies 57b, Lyttleton’s Reports 116, Noy 175, and see 2 Appeal Cases 167 and 168. The Judicial Committee say in their judgment at page 166 that the point is “simply whether upon the sales of waste lands of “the Crown etc. the gold that might be found in such lands passed to the “purchasers there being no words in the grant from the Crown expressly granting “it. Now, whatever may be the reasons assigned in the case in Plowden for the “rule thereby established, and whether they approve themselves or not to modern “minds, it is perfectly clear that ever since that decision has been settled law in “England, that the prerogative right of the Crown to gold and silver found in 10. “mines will not pass under a grant of land from the Crown unless by apt and “precise words the intention of the Crown be expressed that it shall pass. It “was fairly conceded by the learned counsel for the Appellant that this rule must “be taken to have been introduced as part of the common law of England into “the Colony of Victoria.” (See also Attorney-General of British Columbia v. Attorney-General of Canada, 14 App. C. 302 and 303) These authorities seem to me to leave no doubt that under 47 Vic. c. 14 s. 3. B. C. Island Railway Graving Dock and Railway Lands Act 1884 the words “including all coal, coal-oil, ores, “stones, clay, marble, slate, mines, minerals and substances whatsoever therein, “thereupon and thereunder” do not pass gold and silver, that is the precious 20 metals. No doubt the local legislature might have by apt and precise words altered the law in this respect but as the judicial committee say in Woolley v. Attorney-General of Victoria 2 App. C. 167 and 168 “it is a recognised “principle of the construction of statutes that the prerogative rights of the Crown “can be affected only by express words or necessary implication” and when we come to look at the British Columbia Acts it is apparent the legislature have always been anxious to retain unimpaired the rights of free miners or to adopt the grave and respectful language of the law, the prerogative rights of the Crown in respect to the precious metals; and with a view no doubt to prevent misapprehension care has always been taken that in Crown grants to individuals 30 (see Chapter 16 of 47 Victoria) page 96 Land Act of 1884 notice of the retention by the Crown of its prerogatives in reference to the precious metals should be inserted. Again in 47 Vic. cap. 10, an act to consolidate and amend the laws relating to gold and other minerals excepting coal 1884 at p. 24, we find that the word “mineral” shall include all minerals, precious or base, other than coal found in veins or lodes. By section 61 the word mineral as used in this act shall mean and include all minerals precious and base other than coal found in veins or lodes. Again in section 69 we find “Such Crown Grant shall “be deemed to transfer and pass the right to all minerals precious or base, “excepting coal,” etc. and the same expression is to be found in the form of 40 Crown Grant page 39. These acts were passed during the same session as that in which the act relating to the Island Railway was passed, and show that the legislature knew well that the precious metals could only be conveyed by apt and precise words, and were certainly far from showing any disposition to alter the law in that respect, or in any way to affect the prerogatives of the Crown in reference to the precious metals. Not merely do these cotemporaneous acts of the province show this, but antecedent legislation is in the same direction,

(see the form of Crown Grant in the Mineral Ordinance of 1869, and sections 80 and 81 of the Land Act of 75, continued or re-enacted by the Land Act of 1884 secs. 64 and 65 and see form No. 7 of Crown Grant in the schedule reserving to free miners the right to enter on land alienated by the Crown and search therein for precious metals). For these reasons I think the judgment of Mr. Justice Drake is correct and the appeal should be dismissed with costs.

J. F. McCREIGHT J.

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Supreme
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Bainbridge.

v.

Esquimalt and Nanaimo Railway Company.

10

REASONS FOR JUDGMENT OF MR. JUSTICE WALKEM.

By section 3 of Chapter 14 of the statutes of 1883, the provincial legislature granted (I am quoting the words) “to the Dominion Government for the purpose of constructing and to aid in the construction of a railway between Esquimalt and Nanaimo, and in trust to be appropriated as they may deem advisable . . . all that piece or parcel of land situate in Vancouver Island and described as follows,” (here follows the description) “and including all coal, coal-oil, ores, stones, clay, marble, slate, mines, minerals and substances whatsoever thereupon, therein and thereunder.” In furtherance of the same project, the Dominion Government, subsequently by patent from the Crown, granted the same tract of land and inclusive substances to the Esquimalt and Nanaimo Railway Company, the now appellants in this action. Briefly stated, the question we have to determine is whether the words “all mines, minerals and substances whatsoever,” etc., had the effect of divesting the Crown as represented by the Province of its prerogative right to the precious metals. In *Woolley v. Attorney-General of Victoria* (2 App. Cases 166) the judicial committee after referring to the mines case reported in Plowden, makes the following observation. “It is perfectly true that ever since that decision it has been settled law in England that the prerogative right of the Crown to gold and silver found in mines will not pass under a grant of land from the Crown unless by apt and precise words the intention of the Crown be expressed that it shall pass.” In the *Attorney-General of British Columbia vs. Attorney-General of Canada* (14 Appeal Cases) Lord Watson observes that “Gold and silver mines, until they have been aptly severed from the title of the Crown, and vested in a subject, are not regarded as *partes soli*, or as incidents of the land in which they are found. Not only so, but the right of the Crown to land and the baser metals which it contains stands upon a different title from that to which its right to the precious metals must be ascribed.” The words “all mines, minerals and substances whatsoever thereupon, therein and thereunder” are certainly very comprehensive and in their ordinary sense would probably be deemed to include precious as well as base metals, but in the present instance their meaning is controlled and limited to base metals by the several words which precede them, in accordance with the maxim *noscitur a sociis*, of which numerous examples are given at p. 406 of Maxwell on Statutes 2nd Ed. and consequently

Walkem J.

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*In the
 Supreme
 Court.*
 No. 12.
 Reasons for
 Judgment of
 Full Court
 —continued.

that meaning cannot be expanded so as to include prerogative rights or *jura regalia*, which admittedly do not exist in respect of the grant of the coal, coal oil, lands, beds of clay, and stone, slate and marble quarries mentioned. It seems to me that the legislature, by its very act of minutely particularising the substances mentioned, designedly meant to exclude the precious metals. Had it been otherwise the term precious metal or perhaps royalties (as in section 109 of the B.N.A. Act) or some equivalent term would have been found in the section. Nor, in my opinion was the omission to include the precious metals an oversight on the part of the legislature, for during the same session it had before it a measure in amendment of what is commonly known as the Gold Mining Act 1882 in which 10
 “mines” and “minerals” are respectively defined, in substance, as auriferous earth or rock, or lodes or veins containing any minerals excepting coal. (Sec. 45 Vic. chap. 8; 46 Vic. chap. 19) While thus careful to define these words in the general minerals acts, it has left them to be defined in the present instance according to the well known rule I have referred to. In any event, there are no apt or precise words in the section to show that the legislature intended to part with the prerogative rights of the Crown, and even if that were doubtful the fact of itself would be in favour of the province, whom the plaintiff, as a “free miner” licensed by the Government to mine for gold, may be said to vicariously represent. The appeal must in my opinion be dismissed with costs. 20

GEO. A. WALKEM, J.

No. 13.
 Order of Full
 Court,
 7th Aug.,
 1895.

Victoria Registry
 Aug. 23, 1895

In the Supreme Court of British Columbia.

Between

William Herbert Bainbridge Plaintiff (*Respondent*)

and

The Esquimalt and Nanaimo Railway Company . Defendants (*Appellants*)

Crease J., McCreight J., Walkem J.,

ORDER OF FULL COURT

30

Wednesday August 7th, 1895.

Upon motion by way of appeal made unto this Court on the 10th day of May 1895, by Counsel for the Appellants, from the judgment of this Honourable Court dated the 17th day of October 1894, upon hearing Mr. C. E. Pooley, Q.C. of Counsel for the Appellants, and Mr. D. M. Eberts Q.C. Attorney-General of Counsel for the Respondent: upon reading the case on appeal filed herein This Court did order that the said appeal should stand for judgment: And the same coming on for Judgment this day in the presence of the aforesaid Counsel This Court doth order that the appeal herein be dismissed.

By the Court,

40

ARTHUR KEAST,
 Deputy Registrar.

(Seal)

In the Supreme Court of British Columbia.

RECORD

Between
 William Herbert Bainbridge *Plaintiff (Respondent)*
 and
 The Esquimalt and Nanaimo Railway Company *Defendants (Appellants)*

In the Supreme Court.

No. 14.
 Notice of Motion for leave to Appeal to Her Majesty in Council, 13th Aug., 1895.

NOTICE OF MOTION

Take notice that the Full Court will be moved two clear days after the service of this notice viz. on Friday the 16th instant at 11 a.m. at the Court House Bastion Square Victoria or so soon thereafter as the Court shall sit and
 10 Counsel can be heard by Counsel for the Defendants for leave to appeal to Her Majesty the Queen in Her Privy Council from the judgment of this Court pronounced herein on the 7th day of August 1895.

Dated August 13th 1895,
 DAVIE POOLEY and LUXTON,
 Solicitors for the Defendants.

To H. E. A. Robertson Esq.
 Plaintiff's Solicitor.

AFFIDAVIT OF JAMES DUNSMUIR.

No. 15.
 Affidavit of James Dunsmuir in support of Motion, 14th Aug., 1895.

I James Dunsmuir of Victoria in the Province of British Columbia Vice-
 20 President of the Esquimalt and Nanaimo Railway Company the above named Appellants make oath and say as follows:

1. That the paper writing produced and shown to me at the time of swearing this my affidavit and marked with the letter "A" is a copy of the appeal book in this case.

2. That the value of the property in dispute in this action is greatly in excess of the sum of Three hundred pounds sterling.

Sworn before me at Victoria this 14th day } JAMES DUNSMUIR.
 of August, 1895

FRANK A. BENNET
 A Commissioner for taking affidavits.

30

RECORD.

In the
Supreme
Court.

No. 16.

Order of Full
Court giving
leave to
Appeal, 14th
Aug., 1895.

In the Supreme Court of British Columbia.

Between

William Herbert Bainbridge Plaintiff (Respondent)

and

The Esquimalt and Nanaimo Railway Company Defendants (Appellants).

Present: Mr. Justice Crease Mr. Justice McCreight Mr. Justice Walkem

ORDER ALLOWING APPEAL.

Wednesday 14th August 1895

Upon motion this day made to the Full Court by Mr. C. E. Pooley Q.C. of Counsel for the Appellants, and upon hearing Mr. D. M. Eberts, Q.C. on behalf 10 of the Respondents and upon reading the affidavit of James Dunsmuir, sworn herein this day It is ORDERED that the Appellants have leave to appeal to Her Majesty in Her Privy Council from the judgment of this Court pronounced herein on the 7th day of August 1895.

By the Court

HARVEY COMBE

Deputy Registrar

“ A.”

This is the exhibit marked “ A ” referred to in the affidavit of Charles E Pooley sworn before me this 5th day of December 1895. 20

S. PERRY MILLS,

A Commissioner &c.

BOND.

No. 17.

Bond as
security for
Costs, 2nd
Nov., 1895.

Know all men by these presents that The Esquimalt and Nanaimo Railway Company whose head offices are at the City of Victoria in the Province of British Columbia, and James Dunsmuir of Victoria, Province aforesaid, are held and firmly bound unto Brian H. Tyrwhitt Drake, the Registrar of the Supreme Court of British Columbia or to the Registrar of the Supreme Court for the time being in the sum of Five hundred pounds sterling to be paid to the said Brian H. Tyrwhitt Drake or the Registrar of the Supreme Court of British Columbia 30 for the time being. For which payment to be well and truly made we bind ourselves our successors, heirs executors and administrators respectively firmly by these presents.

Sealed with our respective seals and dated this second day of November 1895.

Whereas an action wherein William Herbert Bainbridge was Plaintiff and The Esquimalt and Nanaimo Railway Company were Defendants was recently tried in the Supreme Court of British Columbia and Judgment in the said action was on the 17th day of June 1894 given in favour of the Plaintiff and

Whereas the said Esquimalt and Nanaimo Railway Company appealed from the said judgment to the Full Court of the Supreme Court of British Columbia, and on the 7th day of August 1895, the said Full Court dismissed the appeal

And whereas on the 14th day of August 1895 the Esquimalt and Nanaimo Railway Company applied to the said Court on motion for leave to appeal to Her Majesty the Queen in Her Privy Council from the judgment of the Court pronounced herein on the 7th day of August 1895 on which motion the said Court granted leave to appeal.

Now the condition of the above written bond is that if The Esquimalt and Nanaimo Railway Company shall duly prosecute the said appeal and shall pay all such costs as may be awarded by Her Majesty Her heirs and successors or by the Judicial Committee of Her Majesty's Privy Council to the said Respondent then the above written bond shall be void or otherwise shall remain in full force and virtue.

JAMES DUNSMUIR

20 The Esquimalt and Nanaimo Railway Company. (Seal.)

JAMES DUNSMUIR, Vice-President.

CHAS. E. POOLEY

Secretary, Esquimalt and Nanaimo Railway Company.

(Seal of Esquimalt and
Nanaimo Railway Company.)

NOTICE OF MOTION FOR APPEAL.

Take notice that the Full Court will be moved on Monday the 9th day of December instant at 11 a.m. at the Court House Bastion Square Victoria or so soon thereafter as Counsel can be heard by Mr. C. E. Pooley Q.C. of Counsel on behalf of the Defendants Appellants for an order to admit the appeal to Her Majesty the Queen in Her Privy Council from the judgment of this Honourable Court pronounced herein on the 7th day of August 1895.

Dated 5th day of December 1895.

DAVIE, POOLEY and LUXTON,

Solicitors for the Defendants Appellants.

To H. E. A. Robertson Esq.
Solicitor for the Plaintiff Respondent.

RECORD.

*In the
Supreme
Court.*

No. 17.

Bond as
security for
Costs, 2nd
Nov., 1895.

No. 18.
Notice of
Motion to
admit Appeal
to Her
Majesty in
Council, 5th
Dec., 1895.

RECORD.

AFFIDAVIT OF CHARLES EDWARD POOLEY

*In the
Supreme
Court.*

I Charles Edward Pooley of Victoria, Barrister-at-Law, make oath and say as follows :

No. 19.
Affidavit of
Charles
Edward
Pooley in
support of
Motion for
Order to
admit
Appeal, 5th
Dec., 1895.

1. That on the 14th day of August 1895 an order was made by this Honourable Court granting the Appellants leave to appeal to Her Majesty in Her Privy Council from the Judgment of this Court pronounced herein on the 7th day of August 1895.

2. The said order is produced and shown to me at the time of swearing this my affidavit and is marked with the letter "A."

3. That on the 2nd day of November 1895 a bond for £500 sterling approved 10 by Mr. D. M. Eberts Q.C. Counsel for the Respondent was duly filed in this Court for the prosecution of the appeal and the payment of all such costs as may be awarded by Her Majesty Her Heirs and Successors or by the Judicial Committee of Her Majesty's Privy Council to the party or parties Respondent.

Sworn before me at Victoria this 5th day of } CHAS. E. POOLEY.
December 1895.

S. PERRY MILLS

A Commissioner for taking affidavits in the
Supreme Court of British Columbia.

1894, B. No. 51.

20

No. 20.
Order of Full
Court,
admitting
Appeal, 9th
Dec., 1895.

In the Supreme Court of British Columbia.

Between William Herbert Bainbridge *Plaintiff (Respondent)*

and

The Esquimalt and Nanaimo Railway Company . . . *Defendants (Appellants)*

Present :—The Chief Justice, Mr. Justice Crease, Mr. Justice McCreight,
Mr. Justice Walkem, Mr. Justice Drake.

Monday 9th December 1895.

Upon motion this day made to the Full Court by Mr. C. E. Pooley Q.C. on behalf of the Appellants and upon reading the affidavit of Charles E. Pooley sworn herein the 5th day of December 1895, and the 30 Order of the Full Court dated the 14th day of August 1895, granting leave to appeal to Her Majesty in Her Privy Council from the judgment of this Court pronounced herein on the 7th day of August 1895, and upon hearing Mr. D. M. Eberts Q.C. on behalf of the Respondent who approved of the Bond in the sum of £500 0 0 sterling filed herein by the Appellants on the 2nd day of November 1895, for the prosecution of the appeal and the payment of all such costs as may be awarded by Her Majesty Her heirs and successors or by the Judicial Committee of Her Majesty's Privy Council to the party or parties respondent. IT IS ORDERED that the appeal of the Esquimalt and Nanaimo Railway Company

the above named Appellants to Her Majesty in Her Privy Council from the Judgment of this Court pronounced herein on the 7th day of August 1895 be admitted.

RECORD.

—
In the
Supreme
Court.
—

B. H. TYRWHITT DRAKE,
Registrar.

Approved
18/12/95
D.M.E.—A.G.

I, Brian Halsey Tyrwhitt Drake, Registrar of the Supreme Court of British Columbia, do hereby certify that the paper writing hereunto annexed contains a true and exact copy of all the evidence, proceedings, judgments, decrees and orders had or made in the case of William Herbert Bainbridge Plaintiff *versus* the Esquimalt and Nanaimo Railway Company, Defendants, together with the reasons given by the judges of the Full Court for the judgment appealed against.

No. 21.
Certificate of
Registrar of
the Supreme
Court, 13th
Feb., 1896.

Dated at Victoria this 13th day of February A.D. 1896.

B. H. TYRWHITT DRAKE,
Registrar.

Victoria Feb. 13. 1896 Registry
(Seal)

In the Privy Council.

No. 9 of 1896.

*From the Supreme Court of
British Columbia.*

BETWEEN

THE ESQUIMALT AND NANAIMO
RAILWAY COMPANY . . . *Appellants*

AND

WILLIAM HERBERT BAINBRIDGE
Respondent

RECORD OF PROCEEDINGS.

HEPBURN, SON & CUTCLIFFE,
Bird in Hand Court,
76, Cheapside, E.C.,
for Appellants

GARD, HALL & ROOK,
2, Gresham Buildings,
Basinghall Street, E.C.,
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