1905
*Oct. 23, 24.
*Nov. 27.

W. G. CLARK (DEFENDANT) .... APPELLANT;

AND

JOHN DOCKSTEADER (PLAINTIFF) .. RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Mining law — Staking claim — Initial post — Occupied ground— Curative provision—R.S.B.C. c. 135, *s.* 16 — 61 *V. c.* 33, *s.* 4 (*B.C.*).

In staking out a claim under the mineral Acts of British Columbia the fact that initial post No. 1 is placed on ground previously granted by the Crown under said Acts does not necessarily invalidate the claim, and sub-sec. (*g*) of sec. 4 of 61 Vict. ch. 33 amending the "Mineral Act" (R.S.B.C. ch. 135) may be relied on to cure the defect. *Madden* v. *Connell* (30 Can. S.C.R. 109), distinguished.

Judgment appealed from (11 B.C. Rep. 37) affirmed, Idington J. dissenting.

APPEAL from a decision of the Supreme Court of British Columbia(1) affirming the judgment at the trial in favour of the plaintiff.

The action was brought by the owner of the "Colonial" mining claim to adverse the "Wild Rose" claim, owned by the defendant Clark. The trial judge held that the "Wild Rose" claim was invalid, and on appeal to the full court and also on the present appeal the only question dealt with was whether or not the "Colonial" was a good claim.

*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Idington and Maclennan JJ.

(1) 11 B.C. Rep. 37.

The objection to the "Colonial" was that its initial post No. 1 was placed some 290 feet in on the "Chicago," another claim located and held by grant from the Crown. The trial judge and the Supreme Court of British Columbia held that this was not, under the circumstances, calculated to mislead other prospectors in the vicinity; that the plaintiff had actually discovered mineral in place; and that he had, *bonâ fide,* attempted to comply with the provisions of the "Mineral Act"; therefore his claim was valid. The defendant then appealed to the Supreme Court of Canada.

W. A. Macdonald K.C. for the appellant. Under the mineral Act of British Columbia the initial post, No. 1, is the root of title to the claim: *Madden* v. *Connell*(1); and must be placed on the ground to be located; *Madden* v. *Connell*(1); *Belk* v. *Meagher*(2).

The defect in this case is not a mere formality which can be cured by sub-section(*g*) of the Act of 1898(3); *Pellent* v. *Almoure*(4); *Callanan* v. *George* (5); *Coplen* v. *Callahan*(6); *Collom* v. *Manley*(7).

Sub-section (*f*) of the Act of 1898 provides a means whereby the locator of a fractional claim could make it valid notwithstanding such an error which shews, by implication, that a full claim could not, *Expressio unius est exclusio alterius.* See *Hamilton* v. *Baker*(8).

S. S. Taylor K.C. for the respondent. The maxim *expressio unius est exclusio alterius* cannot be applied

(1) 6 B.C. Rep. 76, 531; 30 Can. S.C.R. 109.
(2 104 U.S.R. 279.
(3) 61 Vict. ch. 33.
(4) 1 Martin M.C. 134.
(5) 8 B.C. Rep. 146; 1 Martin M.C. 242.
(6) 30 Can. S.C.R. 555.
(7) 32 Can. S.C.R. 371.
(8) 14 App. Cas. 209.

1905
CLARK
v.
DOCKSTEADER.

as contended; see *London Joint Stock Bank* v. *Mayor of London*(1); *Thames Conservators* v. *Smeed, Dean & Co.*(2); Broom's Legal Maxims, 493.

As to position of the post see Lindley on Mines, (2 ed.) pp. 548-9, 656-8; *Del Monte Mining Co.* v. *Last Chance Mining Co.*(3); *Sandberg* v. *Ferguson*(4).

THE CHIEF JUSTICE.—I would dismiss this appeal. The finding at the trial, approved of by the court *in banco,* that the position of the No. 1 post was not calculated to mislead other persons desiring to locate claims in the vicinity cannot be reviewed here, and that puts an end to the controversy. Sub-section (*g*) of section 16, as amended by the Act of 1898, must be given a liberal interpretation. It applies in express terms to all the preceding provisions of the section.

I entirely agree with Chief Justice Hunter's reasoning.

GIROUARD J.—The appeal should be dismissed with costs, for the reasons given by Chief Justice Hunter.

DAVIES J.—I am of the opinion that this appeal should be dismissed and the judgment of the majority of the Supreme Court of British Columbia affirmed for the reasons stated by the Chief Justice of that court speaking for the majority.

I will add a few words only to those reasons which commended themselves to my mind as alike comprehensive and conclusive, and I do so only because of the differences in the opinions of the members of this court.

(1) 1 C.P.D. 1, at p. 17.
(2) [1897] 2 Q.B. 334, at p. 351.
(3) 171 U.S.R. 55.
(4) 35 Can. S.C.R. 476.

The question before us is as to the true construction of sections 12, 15 and 16 of the "Mineral Act" of British Columbia, as amended by the Act of 1898, and the particular point we are asked to decide is whether a free-miner in staking his claim under the 16th section invalidates and voids the claim *in toto* if he inadvertently places its initial stake within the legal bounds of another miner's claim or location, or whether the curative provisions of sub-section (*g*) of section 16 are applicable and can be invoked even in such a case so as to validate that part or portion of the claim sought to be located which did not infringe upon any other claim.

The arguments against the curative section applying to correct an error arising out of an initial stake being placed inadvertently in another claim or location were that such latter claim was expected by section 12 out of the waste lands of the Crown which a free-miner could enter upon and locate, and, therefore, the mining locator could not place his stake there at all, it being "proscribed land" to him, that he was really trespassing in so doing, and the provisions of the curative section could only apply to correct inadvertent mistakes in marking out a legal location selected and entirely within the area allowed by section 12.

Reliance was placed upon the case of *Madden* v. *Connell*(1), decided before the curative section in question had been introduced into the Act, where it was held that a location which had its No. 1 post on foreign territory is void. I see no reason whatever to call in question that decision or the principle on which it was based. The legislature of British Columbia had no jurisdiction whatever over the lands of a foreign

(1) 30 Can. S.C.R. 109.

1905
CLARK
v.
DOCK-
STEADER.
Davies J.

country and none of the provisions of the Mining Act could by any possible intendment be held as applicable to a stake driven in the soil of that country and indicating where a mining location was to be found and bounded in British Columbia. To my mind there is a marked and vital difference between such a stake and one set within the territory generally allocated to mining prospectors in British Columbia, but which on a proper survey of the location turns out to be set within the legal limits of an adjoining prior location; a totally different set of questions at once arises.

Of course, no one could contend that the setting up of such a stake in an adjoining location operated to take away any of that location from its owner. All that is contended for is that under certain well defined statutory conditions such a placing of the initial stake is not necessarily *fatal* to the entire claim or location of the miner setting it up.

Then we were pressed with our decision in *Collom* v. *Manley* (1). The curative section of the Act as it exists at present could not be invoked in that case, because it was not passed until after the disputes there had arisen, and I fail to understand how our decision in that case affects this one. In delivering the judgment of the court, Sedgewick J. explaining what our holdings were in the previous case of *Coplen* v. *Callahan* (2) said, at page 374,—

> We held that every direction of section 16 was imperative, that any deviations from or irregularity in respect to such directions were fatal to the location unless they came within the curative provisions of sub-sec. (*g*); that these were the only statutory provisions that could be invoked in favour of an otherwise invalid location.

There is nothing, however, in that case putting any

(1) 32 Can. S.C.R. 371. (2) 30 Can. S.C.R. 555.

construction upon this curative section or attempting to place any limitation upon its provisions.

We have, therefore, now to put a construction upon it for the first time and unfettered by any previous decision.

To my mind the argument of the appellant that the placing of the initial post of a location or claim within the limits of a prior location was fatal and could not be cured must logically, under our decision in *Collom* v. *Manley*(1), apply also to the second stake, because the placing of one as of the other is by the same section 16 made imperative and the absence of either or the placing of either on "proscribed lands" would be equally fatal; and so I am unable to see why the logical conclusion of the argument would not extend to a location sought to be made where both stakes were placed properly enough upon waste lands of the Crown, but the line between the two embraced within it part of a prior location. Such part was equally "proscribed lands,"and if the placing of one of the posts in such proscribed lands was fatal so the crossing of such lands by the line between the posts and embracing them within the junior location must be fatal also to that location. The statute requires that such line shall be marked

so that it shall be distinctly seen in timbered localities by blazing trees and cutting underbrush.

Chief Justice Hunter has, I think, satisfactorily answered the argument that the placing of the initial post in located lands was a trespass. The limited nature of the locator's rights in his location sufficiently shews that. If it was held to be a trespass as against a prior locator, so would be a similar placing

(1) 32 Can. S.C.R. 371.

of No. 2 post, and so would be the mining and marking out of a line across a prior location, even if the two posts were properly placed.

In fact it seems to me that the result of the argument invalidating the entire location in any and every event and condition because the initial post was in a prior location would be so to minimize the effect of the curative sub-section as to render it practically inoperative.

Mr. McDonald, for the appellant, was obliged to concede that even if that post was placed on a prior location with the full consent of its owner, the result would be equally the same.

Now what does the curative sub-section (*g*) say? It reads as follows:

> Provided that the failure on the part of the locator of a mineral claim to comply with any of the foregoing provisions of this section, shall not be deemed to invalidate such location, if upon the facts it shall appear that such locator has actually discovered mineral in place on said location, and that there has been on his part a *bonâ fide* attempt to comply with the provisions of this Act, and that the non-observance of the formalities hereinbefore referred to is not of a character calculated to mislead other persons desiring to locate claims in the vicinity.

Now, one of the foregoing provisions of section 16 required both posts, Nos. 1 and 2, to be placed in waste lands of the Crown not previously located. That is the very contention of the appellant as to the meaning of the section, and in the present case one of the posts was admittedly not so placed. But the trial judge has found as facts on evidence which the court below held, and which I hold, as fully satisfactory that

> the locator had actually discovered mineral in place; and there was a *bonâ fide* attempt on his part to comply with the provisions of the Act, and his blunder—if it is a blunder—is not of a character calcu-

lated to mislead other persons desiring to locate claims in that vicinity.

I cannot, therefore, entertain any reasonable doubt that this finding brings the locator within the very object and scope of the sub-section, and that his inadvertent mistake was not, under the circumstances and findings a fatal one, though, of course, it did not and could not operate so as to take away any of the rights of the prior locator.

IDINGTON J. (dissenting).—If the British Columbia Act, known as "The Mineral Act," had not been amended, since the case of *Madden* v. *Connell*(1) arose, would that decision bind us here to allow this appeal?

The judgments in this court and in the court below in that case are so brief and pointed that I do not think it difficult to apprehend their meaning.

The initial stake in question there had been erroneously planted 289 feet beyond the boundary line between Canada and the United States.

Mr. Justice Martin, in that case, which is reported in 6 British Columbia Reports at page 531, speaking for the full court, said:

> The Mineral Act of British Columbia does not contemplate the existence of a claim which takes its root, *i.e.*, has its initial post, in a foreign soil, and, as I regard it, the whole situation is void *ab initio*, or, to put it in another way, there never was in law such a claim as the Sheep Creek Star.

Sir Henry Strong, then Chief Justice of this court, in delivering the unanimous judgment of the court on the appeal from the above mentioned judgment, briefly stated the conclusion, and then said:

(1) 30 Can. S.C.R. 109.

1905
CLARK
v.
DOCK-
STEADER.
Idington J.

As Mr. Justice Martin says in giving judgment for the Supreme Court of British Columbia, the position is the same as if there had never been such a claim.

Did these judicial deliverances rest upon any legal impossibility of going across the line that divides the two countries, to verify the courses and length of boundaries that the claimant of the location had thus mistakenly defined?

I should think not. Neither international law, nor the relations between the countries at the time, had placed the slightest obstacle in the way of verification of the boundaries of the location, and of rectification thereof, if the mining law of British Columbia had permitted of such rectification.

It seems to me that these judgments were the result of a long line of authorities that treated literal compliance with the requirements of the statutes in regard to mining locations as a condition precedent to the validity of any claim to a license to mine in a particular location.

The miner locating had no right to invade the territory of another, whether that other happened to be a foreign state, or a neighbouring proprietor, or licensee, for the purpose of either selecting a place to plant, or of planting, an initial stake.

The law clearly defined where he had a right to go to do so. It was on the waste lands of the Crown, or lands over which the Crown had a right to license mining to be done.

It was never supposed that the free-miner would go elsewhere.

It was, indeed, I think, pre-supposed that he would not.

And, as a result, when he did, and invaded, though only slightly, land in a neighbouring state, but yet

held by no more sacred rights of ownership than that of any other neighbours, he never acquired, thereby, any right of location.

It is upon the principle I thus indicate that I conceive the decision of *Madden* v. *Connell*(1) was rested.

I, therefore, am constrained to hold that having regard to the principle that guided this court to that(1) decision, it is now, here, binding upon us, unless the law has been changed by the amendments that have been so elaborately discussed before us.

What has since been done, is to repeal section 16 of the Mining Act, and substitute for it another which provided, first, for fractional mineral claims, being located, and described, by a plan that need not be rectangular; and then, secondly, at the end of the amended section, the curative provision that still remains part of the section, and to which I will hereafter advert, was added.

Then the legislature in a year or two, apparently intending to restrict the liberty of description that the preceding amendment had given the free-miner in regard to fractional claims, further amended this section by repealing and substituting an amended section, which directed that

a fractional mineral claim shall be marked by two legal posts placed *as near as possible on the line of the previously located mineral claims* and shall be numbered 1 and 2, etc., etc.

This was a departure that imposed by law upon the free-miner a duty, the proper execution of which involved some risk. If regard was to be had to the recognized legal methods of interpretation, and the same canons of construction were to be applied

(1) 30 Can. S.C.R. 109.

1905
CLARK
v.
DOCKSTEADER.
Idington J.

to these requirements as had hitherto for a long time been applied to such like enactments respecting posts for defining general mining locations, the free-miner should in justice be protected against this risk.

And he was by this amended section protected accordingly by providing for the Gold Commissioner of the District, moving *in the case of an honest mistake the post that had been inadvertently placed on another previously located mineral claim, instead of on the line as required by the Act.*

Now, without pressing unduly the application of the maxim *expressio unius est exclusio alterius,* what does appear to me as very singular is, that if placing posts or selecting a place in which to place posts as means of defining a location is a mere formality, that the curative proviso of this section would be applicable to, why was this particular method of protecting against mistakes honestly made in regard to those posts, locating the fractional mineral claim adopted and specially enacted?

I am unable to see any good purpose it could serve if the present contention of the respondent be well founded.

The curative proviso stood in the section *before this amendment.*

It remained word for word, as much more of the section did, when amended.

One thing from this is quite clear, that the legislature did not think lightly of the consequences of invading with such posts the territory of another.

The legislature did not see fit to rely on the efficacy of this curative proviso, with serene confidence that it would protect all honest miners who had within the fraction discovered mineral.

Of course, if the maxim of which so much has been

said were to be strictly applied, there would seem to be an end of the respondent's case. But we are trying to get at the meaning of a complicated enactment that was not framed all at one time, but at many times, and, therefore, allowance has to be made in such cases. See remarks of Baron Martin in *Miller* v. *Salomons*(1).

I think we must look at the curative proviso, and interpret it in the light of the history of the legislation in question and of the history of the judicial interpretation of such legislation, the probable wrongs such a proviso was intended to remedy and the measure of protection it probably was designed to give to honest discoverers, and adopt a result if we can that will not be fantastical.

It is quite clear that posts properly placed have ever been intended to bind the discoverers as well as protect the prospectors.

It is equally clear, that the rigid interpretation of the minor and formal requirements of legislation, in relation to the nature of the post, and the markings thereon and in relation thereto, had harsh and unexpected results, and that a necessity arose for relaxing these.

It is not so clear that this relaxation was ever intended to go the length of sweeping away everything but a discovery and honest intent.

Much less could it be supposed that the place selected by the miner for his initial stake, which has been properly called the root of his title, might be chosen with impunity and be looked upon entirely as a *formality*.

If that had been the purpose of the legislature I

(1) 7 Ex. 475, at p. 531.

1905
CLARK
v.
DOCK-
STEADER.
Idington J.

think the whole plan of legislation would have been changed, and the Act recast.

And when we come to read this proviso which is as follows:

> Provided that the failure on the part of the locator of a mineral claim to comply with any of the foregoing provisions of this section shall not be deemed to invalidate such location, if upon the facts it shall appear that such locator has actually discovered mineral in place on said location, and that there has been on his part a *bonâ fide* attempt to comply with the provisions of this Act, and *that the non-observance of the formalities hereinbefore referred to* is not of a character calculated to mislead other persons desiring to locate claims in the vicinity,

we must read it as a whole.

And when we do that we must read it as dealing with "the *formalities*" and not with the very essence of the whole work or plan of action.

It was never necessary to do so.

The miner had ample means of fully protecting himself in making a general mining location.

The law provided that prior prospectors should not only erect posts, but also blaze lines or erect posts to mark clearly the ground already taken, so as to clearly distinguish it from the remaining waste lands upon which the newcomers could operate.

Thus the free-miner could, with due care, protect himself, by keeping well within the waste lands and clear of the established lines of prior locations, when selecting the place to plant an initial post; and *to the right and left of that selected point, or the line drawn therefrom,* he could claim as much as the law allowed him.

And if by chance he overlapped, such overlapping and all else that followed in his work might or might not be of the nature of a "formality."

It is to be observed that the discoverers do not rest

such claims as are put in issue here, upon a grant from the Crown or any one else. At this stage the claimant prescribes, of his own motion, and to be effective must comply strictly with the requirements of the statute permitting him to prescribe such a right, unless the requirements be clearly qualified by some protecting proviso.

To go so far as the respondent asks, in order to protect him, would savour, I venture with due respect to think, of legislation rather than adjudication.

I think, therefore, the appeal should be allowed with costs, and the declaration be made that Mr. Justice Martin suggests in favour of the "Wild Rose" claim.

MACLENNAN J.—I am of opinion that the respondent's location is valid and that the judgment in his favour to that effect is right.

The contest is between two mineral locations covering in great part the same ground. The respondent's location was made on the 7th of October, 1900, and that of the appellant on the 4th September, 1902. It is not disputed that but for the previous location of the respondent's location called the "Colonial" the appellant's location called the "Wild Rose Fraction," would be in all respects valid. The sole question, therefore, is the validity of the "Colonial."

The first objection made to the validity of the "Colonial" is that when it was located the ground was occupied by a previous location called the "Cody Fraction." The courts below all held unanimously that the "Cody Fraction" was and always had been an invalid location, for reasons in which I entirely agree, and that the validity of the "Colonial" was not thereby affected.

1905
CLARK
v.
DOCK-
STEADER.
Maclennan J.

The only serious question in this appeal is whether or not the "Colonial" is invalid on the ground that stake No. 1 was placed within the limits of another location called the "Chicago," which had then been surveyed and Crown granted, at a point as much as 290 feet from the boundary; and that the line between stakes No. 1 and No. 2 passed on a part of its course a few feet within the limits of another location called the "Freddie Lee." The "Colonial," as described, is a tract 2,500 feet square, lying to the left of the line drawn between the posts 1 and 2,—that line being one of the sides of the square. According to one of the plans produced, the encroachment of this square upon the "Chicago" is in the form of an acute angled triangle containing about 2½ acres, and the encroachment upon the "Freddie Lee" is a long and very narrow strip containing perhaps half or three-quarters of an acre of land.

Now, there is no question that this encroachment was made in good faith and by inadvertence. The whole location contains 51½ acres, of which about three acres overlap or encroach upon the "Chicago" and "Freddie Lee," and the remaining 48½ acres are upon perfectly lawful ground. Of course, the respondent could get or take nothing within the limits of the "Chicago" and "Freddie Lee" locations. Those locations had already been secured by others to whom grants had been made by the Crown. But why should his location not be good for the 48½ acres? His description covered that perfectly, although it also covered a little more. If the Crown having granted the "Chicago" and "Freddie Lee" had afterwards granted the "Colonial" by the very description adopted by the respondent, there can be no doubt the later grant would be good for all not previously included in the other two.

The object of the mining Acts is to promote the discovery of minerals in the lands of the Crown, and an inducement is held out to persons to search for them by enabling them to secure the exclusive possession of ground or rock in which they may have found minerals and to take the minerals for their own use. The essential thing to secure that privilege is the discovery of minerals, and the Act contains certain directions to enable the discoverer to describe and to secure his location, and to obtain the reward offered by the legislature for his industry.

Such being the object and purpose of the Act, I think in construing it every reasonable intendment ought to be made to uphold the validity of a claim where there has been actual discovery and an honest attempt to comply with the directions of the legislature in staking and describing the location of the discovery. Except the encroachment on adjacent locations the respondent has complied in every respect with the directions of the Act, and the learned Chief Justice of British Columbia in his judgment has pointed out how difficult it is in a mountainous region to ascertain with exactness the limits of locations, and how easily a person staking a claim might, notwithstanding the greatest care, place his post No. 1 over the boundary of another claim.

Therefore, unless the Acts contain something which expressly or by implication declares a location to be invalid by reason of such an error as was committed by the respondents, I think we should hold it not to be fatal in this case.

Section 16 of the "Mineral Act," R.S.B.C. (1897) is that which prescribes the proceedings to be taken on the ground in locating a claim. It directs the planting of two posts 1,500 feet apart, and that the location is

1905
CLARK
v.
DOCK-
STEADER.
Maclennan J

to be at right angles to the straight line between them. It directs certain particulars to be inscribed on the respective posts. No. 1, among other things, to be marked "Initial Post," and with a statement of the bearing or direction of post No. 2 therefrom. It is further directed that in the event of its being discovered on a survey that No. 2 is more than 1,500 feet distant from No. 1, it shall be moved to the proper distance. It is declared that it shall not be lawful to move No. 1. It may justly be said, therefore, that post No. 1 is a more important post than No. 2, but granting it to be so, I do not see why if it should happen to be placed a foot or even as many as 290 feet within the boundary of an adjacent claim, it should not still answer its purpose of defining the miner's location. The posts are to be placed as nearly as possible on the line of the ledge or vein of mineral which he has discovered, and, of course, to the extent, if any, that such vein or ledge is upon ground already located his location would be inoperative; but his posts would still serve their purpose of defining the ground which he claimed as the reward of his discovery.

Now, section 16 instead of containing any declaration that the planting of an initial post beyond the line of another location is illegal and void, contains the following sub-section (*g*):

> Provided that the failure on the part of the locator of a mineral claim to comply with any of the foregoing provisions of this section shall not be deemed to invalidate such location, if upon the facts it shall appear that such locator has actually discovered mineral in place on said location, and that there has been on his part a *bonâ fide* attempt to comply with the provisions of this Act, and that the non-observance of the formalities hereinbefore referred to is not of a character calculated to mislead other persons desiring to locate claims in the vicinity.

It is clear that the conditions which make the pro-

viso applicable exist in this case. It is not disputed that the locator had discovered mineral in place on the location, and it is evident that he made a *bonâ fide* attempt to comply with the provisions of the Act, and I think that, although the contrary was very strenuously argued, the fault in locating the initial post within the limits of the "Chicago" was not calculated to mislead other persons desiring to locate claims in the locality.

It was argued that the fault committed by the respondent was a violation of sections 12 and 15, and that violations of those sections are not cured by sub-section (*g*).

Section 12 provides that a free-miner may enter, locate, prospect and mine upon any waste lands of the Crown with certain exceptions, one of which is "land lawfully occupied for mining purposes"; and section 15 provides that such miner may locate a claim 1,500 feet square "subject to the provisions of the Act." Now, what the respondent did was a literal compliance with section 12. He did, in fact, enter upon waste lands of the Crown and found mineral thereon, and the land on which he found mineral was not land then occupied for mining purposes. In making his discovery he had not committed any infraction of either section 12 or section 15. It was not until he came to comply with section 16 by defining and describing his location by marking it with posts that he committed an error. By mistake he planted his initial post outside of the waste lands of the Crown on which he had discovered mineral. That was something he did in endeavouring to comply with section 16, and his mistake, in my judgment, is cured by sub-section (*g*).

It was argued also that this case is governed by

that of *Connell* v. *Madden*(1), in which the decision of the courts of British Columbia was affirmed in this court. In that case the initial post was planted in the United States at a distance of 289 feet south of the international boundary, and it was held that the claim was thereby made utterly void, and that the position was the same as if there never had been such a claim. The location which was there in question was located in August, 1894, before sub-section (*g*) was enacted. I think that is a very different case and not decisive of the present. A post planted in a foreign country could be nothing whatever in this country.

For these reasons, and those expressed in the opinion of the learned Chief Justice of British Columbia, in which I concur, I am of opinion that the appeal fails and should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant: *W. A. Macdonald.*

Solicitors for the respondent: *Taylor & O'Shea.*

(1) 6 B.C. Rep. 76, 531.