

BYRON N. WHITE COMPANY } (DEFENDANTS) ..... }	APPELLANTS;	1908 { *Oct. 8, 9, 12.
AND		
THE STAR MINING AND MILL- } ING COMPANY (PLAINTIFFS) ... }	RESPONDENTS.	1909 { *Feb. 12.

ON APPEAL FROM THE SUPREME COURT OF BRITISH  
COLUMBIA.

*Mines and mining—B.C. "Mineral Act, 1891"—Apex location—Exploitation of vein—Continuity—Extralateral workings—En-  
croachment—Trespass—Onus of proof.*

To justify an encroachment in the exercise of the right, under the British Columbia "Mineral Act, 1891" (54 Vict. ch. 25) of following and exploiting a mineral vein extralaterally beyond the vertical plane of the side-line of the location within which it has its apex, the owner of the apex must prove the identity and continuity of the vein from such apex to his extralateral workings. In the present case, as the appellants failed to discharge the onus thus resting upon them, the judgment appealed from (13 B.C. Rep. 234) was affirmed.

**A**PPEAL from the judgment of the Supreme Court of British Columbia(1) reversing the judgment of Hunter C.J., at the trial(2), and maintaining the plaintiffs' action with costs.

The circumstances of the case are stated in the judgment of Mr. Justice Davies, now reported.

*Bodwell K.C.* and *Lennie* for the appellants.

*S. S. Taylor K.C.* for the respondents.

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\*PRESENT:—Sir Charles Fitzpatrick C.J. and Girouard, Davies, Idington and Maclellan JJ.

(1) 13 B.C. Rep. 234.

(2) 12 B.C. Rep. 162.

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THE CHIEF JUSTICE.—I would dismiss the appeal for the reasons given, in the court below, by Mr. Justice Irving.

GIROUARD J. agreed in the dismissal of the appeal with costs.

DAVIES J.—This was an action of trespass brought by the respondents against the appellants for mining within the vertical plane of the west end line of their mining location called the “Heber Fraction.”

The defendants did not dispute the fact of their having mined within this location of plaintiffs, but justified it on the ground that they were only following the dip of their own “Slocan Star” vein from its apex within their own location, and contended that they could follow such dip of the vein across and beyond the side lines of their locations indefinitely as it descends and so long as they proved continuity in the walls and ore of the vein, and kept within the extent of their side lines.

The claim of the defendants to this extralateral right was based upon section 31, chapter 25, of the statutes of British Columbia (1891), the first part of which was practically copied from section 2322 of Title XXXII., ch. 6 of the United States Revised Statutes and reads as follows:

The lawful holder of a mineral claim shall have the exclusive right and possession of all the surface included within the lines of his location, and of all veins or lodes, throughout their entire depth, the top or apex of which lies inside of such surface lines extending downward vertically, although such veins or lodes may so far depart from a perpendicular in their course downwards as to extend outside the vertical side-lines of such surface location; but his right of possession to such outside parts of such veins or lodes shall be confined to such portions thereof as lie between vertical planes

drawn downwards, as above described through the end lines of his location so continued in their own direction that such planes will intersect such exterior parts of such veins or lodes; and nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

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The latter part of this British Columbia section (not copied here), had reference to certain relative bearings of the location and the vein or lode which traversed it in which case, the section provided, the side lines of the location became the end lines thereof for the purpose of defining the rights of the owners. An important legal contention was submitted by the respondents' counsel in the course of his argument on the effect of this latter part of the section upon the appellants' rights even if upon the facts with regard to the continuity of their "Slocan Star" vein the finding should be in the appellants' favour.

He contended that under the proved facts of this case the appellants' side lines of their "Silversmith" location became their end lines for the purpose of defining their rights and that as a consequence they could not under any circumstances have the right to mine on the disputed territory or justify the trespass complained of. I merely mention the point in passing because in the view I take of the facts it does not become necessary to determine it.

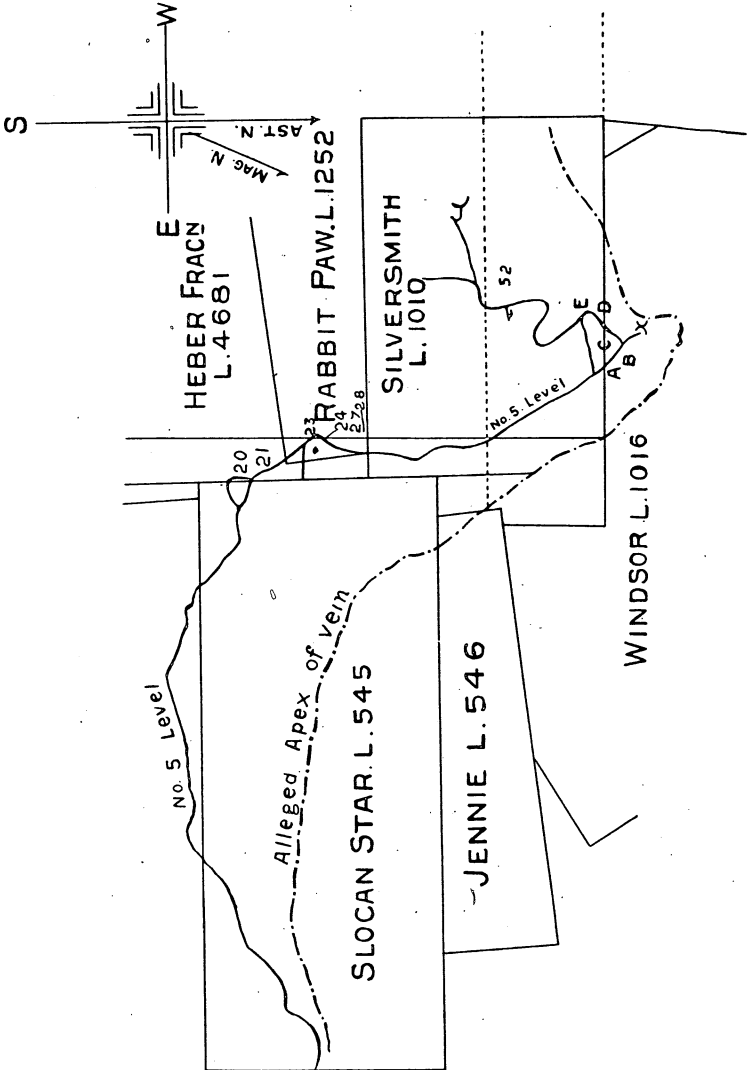
In order to make the dispute and contentions of the respective parties intelligible, it is necessary to have before one's eye some sort of sketch of the mining locations of the respective parties shewing the relative situations they bear to each other and also the course of the level or drift the mining of which constituted the trespass complained of and the course of the alleged apex of the vein by virtue of which through

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the "Silversmith" location of the appellants they claimed the right to mine within the vertical planes drawn downwards of the respondents' "Heber Fraction" location.

Such a sketch or outline of the location I here

Davies J. insert.



The contention of the appellants shortly was that the "Slocan Star" vein after running through the "Slocan Star" location from east to west suddenly turned to the north as and after it had entered the "Heber Fraction" and continued generally on that northerly course through the "Heber Fraction," the "Rabbit's Paw" and the "Silversmith" until it reached Point B in the "Windsor" location when it turned to the west and ran in the southwesterly though somewhat tortuous course through the "Silversmith," that an apex of that vein was in the "Silversmith" location from the point where it left the "Jennie" till it reached the "Windsor," and that this apex entitled them as owners of the location to follow the vein down its entire depth to No. 5 level and so on such level southerly to and embracing the alleged trespass on the "Heber Fraction."

The respondents, on the other hand, contended, in accordance with the findings of the appeal court of British Columbia, that the "Slocan Star" vein ended at the bend to the south on its entering the "Heber Fraction"; that in fact it was there broken and cut off by a fault fissure, called throughout the trial the "Black Fissure" that this "Black Fissure" was a non-mineralized fissure or vein and continued away to the north from the bend or turn where the "Slocan Star" vein ran up against it, and again at point B where appellants alleged the vein turned towards the west continued on in a northerly direction and did not turn at all; that the apex claimed to justify the trespass is not on the other or faulted end of the "Star" vein, but is the apex of the fault or "Black Fissure" itself; and that the "Silversmith" vein away to the west does not connect with this "Black Fissure" at all.

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It was plain from these several contentions that the main fight between the parties must concentrate around the facts as they are found to exist at the two great bends of the No. 5 level drift, though the character of the intervening and other parts of the vein or drift is important as determining identity and continuity.

The appellants contended that a quantity of ore in place had been found from the bend at or about station 21 along the drift for a distance of about 280 feet, and that this fact was absolutely inconsistent with the theory of a separate and independent vein or fissure running in a northerly and southerly direction and cutting off or faulting the "Slocan Star" vein, and shewed that in fact the "Black Fissure" was a myth and had no existence, the vein or lode or fissure, as it was variously called, being really and truly a continuation of the "Slocan Star" vein turning to the north, and again at the north point B to the southwest. They further contended that the evidences of the vein so turning alike at the south at station 21 and again at the north point B were apparent and could be seen by any one making an examination as they had been seen by their workmen and experts.

The respondents submitted that there were no evidences of any turn in the "Slocan Star" vein at or about station 21, and that what were alleged as such evidences were inconclusive and most unsatisfactory and that as regard the ore found in the drifts for a distance of 280 feet from the bend or turn it was easily accounted for, and as one of the experts, Fowler, said, its presence was, on the assumption that the respondents' theories were correct, not to be excused but expected. In the first place they say that from the

turn at the shaft going northerly from station 21 there was 80 feet shewing ore which was the cut off end of the original "Slocan Star" vein by the "Black Fissure"; then came a gap of thirty feet shewing no ore; then for 15 feet more evidence of ore in place shewing, as they contended, evidence of another vein running up against and into the "Black Fissure" and beyond that point for the remainder of the 280 feet the ore found was not ore in place, but drag ore from this independent vein subsequently called vein No. 2.

At the extreme northern end the appellants contended that the vein turned at B and ran south-westerly to E and then tortuously to station 52, where ore was again found, while the respondents' contention was that all the drifting and tunnelling done between B and station 52 was through country rock and not along any vein or lode at all, and that as a fact from station 27 to station 52 the level or drift was absolutely without ore and non-mineralized. They further contend that the "Black Fissure" was a separate independent fissure not in any way part of the "Slocan Star" vein or the "Silversmith" vein and which continued on to the south at one end and to the north at the other away past the alleged bends or turns in dispute and that these two veins, the "Slocan Star" and the "Silversmith," were in no way now connected whatever plausible grounds might exist for contending that at some distant period they may have formed one vein or lode.

The trial took place before the Chief Justice who, at one period, ordered some additional work to be done for the purpose of testing the truth of the rival theories respecting the continuity or discontinuity of the "Slocan Star" vein. The appointee being unable

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from sickness to carry out the work ordered the Chief Justice determined to make a personal inspection of the work. He did so, accompanied by the chief expert on each side, and, between points B and C, ordered some further work to be done which he also inspected.

The conclusion he reached was that the "Black Fissure" theory was a myth; that the whole of the No. 5 drift was along and part of the "Slocan Star" vein, as evidenced by what he concluded was alike continuity of walls and vein and ore found in the drift for a distance of 280 feet from the turn at the south, and that the theory of the respondents' experts as to the "Black Fissure" being a separate and independent fissure cutting off the "Star" vein or lode and of an independent vein running eastwardly from station 22, and thus accounting for the ore found in the No. 5 drift at that station and north of that was a theory "born of despair."

He was pressed several times to order some work in the nature of cross-cutting to be done at or near station 21 and north of the alleged bend which would either prove or disprove the theory of an independent fissure cutting off the "Slocan Star" vein and continuing in its southerly course past where it crossed such vein at station 21, and also some other work at the most northerly end of the drift past where it turned at point B which would prove or disprove its continuance on to the northward as contended, and also some work at station 22 which would prove the existence or non-existence of the separate independent vein contended for by respondents' experts.

The Chief Justice, however, feeling confident in the conclusions he had reached as the result of his inspection declined to make the order asked for,



whereupon counsel for the respondents decided it would only be a waste of time to argue the case on the evidence then before the trial judge and in the absence of the evidence the work they asked to have done would supply. The Chief Justice accordingly formulated the conclusions he had reached and gave judgment for the present appellants.

On appeal to the full court from that judgment the application for an order to have the three pieces of work above referred to done was renewed and granted.

Indeed it is hard to see how it could be refused or on what reasonable ground it could be opposed. It may well be that on the evidence the Chief Justice had before him coupled with the personal inspection he made in the presence and with the assistance of the experts on both sides his decision would not in the absence of this further work and the disclosure it resulted in have been interfered with.

What we have to deal with is not the Chief Justice's decision on the partial evidence he had before him coupled with his own inspection, but the judgment of the full court of British Columbia after the work which they had ordered had been done and the great mass of testimony taken before them had been given respecting the actual works done and the results they disclosed. The original experts were fully re-examined and their theories tested in the light of the actual facts disclosed and several new experts were brought forward and examined.

No question was raised before us as to the power of the court to make the order it did or to receive the evidence it heard. Before the trial judge the contentions of each side rested largely upon theories. They were no doubt ably supported by skilled and experi-

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enced mining engineers and the Chief Justice, after personal examination of the mine, accepted that of the defendants. But it does appear to me that the test asked for by the plaintiffs of the correctness of the theory they put forward as to the separate independent character of the so-called "Black Fissure" and its prolongation past each of the disputed bends, south as well as north, as also as to the existence of the separate and independent vein or lode at point C, was a most reasonable one and could hardly fail of being a decisive one. If the result had shewn either that the "Black Fissure" so called was not prolonged north and south beyond the disputed bends, or if no independent vein had been found at station 22, then it seems to me the theories of Mr. Sizer, Mr. Fowler and the other experts of the respondents would have been so weakened as might have justified at least acquiescence in, if not full acceptance of, the conclusions reached by the Chief Justice.

At the hearing of the appeal in this court we had the advantage of having the contentions on both sides very fully and ably submitted by counsel with the assistance of elaborate plans and models without which their arguments would have been difficult if not impossible to follow intelligently. Since then I have read and re-read the carefully compiled factums of both sides, as also a large part of the evidence, and as a result I have reached the conclusion that the contentions of the plaintiffs have been sustained and that the onus which rested upon the defendants has not been discharged.

In my judgment when the owner of a mining location seeks to exercise his statutory right and follow downwards and outside of and beyond the vertical

plane of the side limits of his location a vein or lode an apex of which is found within and upon or near the surface of his location he is bound, in case he claims to mine and work within the vertical plane limits of another miner's location, to shew by evidence so clear and cogent as to be irresistible that such mining as he claims to justify is on the same vein or lode as has its apex within his location. If such vein or lode has been faulted and severed and he claims to follow the severed part I think the rule laid down in the United States cases, on a similar statute, that he must prove by preponderating evidence identity and continuity alike a reasonable one. It is, as Lindley says in his book on mines, section 615, impossible to prescribe any definite rule as to what degree of continuity or identity, in a legal sense, the miner must establish when he invades property adjoining the location containing the apex of the vein. Each case necessarily presents its own peculiar features. But that there must be alike identity and continuity shewn is I think clear.

The continuity may it is true be interrupted even to a closure of the fissure without destruction of the identity provided the extent of the interruptions or closure does not prevent the tracing of the lode or vein through the fissure to be identical in its parts as a geological fact.

*Butte & Boston Mining Co. v. Société Anonyme des Mines de Lexington*(1), cited with approval in Lindley on Mines, section 615.

I do not gather, however, that there is very much difference between the parties as to the law governing this question of the necessity of shewing identity and continuity of the lode or vein.

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(1) 23 Mont. 177.

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The great dispute is as to the facts to which the law is to be applied.

I do not propose to write an analysis of the great mass of evidence taken in the case. Any such analysis would be unsatisfactory without the presence of models and maps to illustrate it. I am satisfied with the analysis and general reasoning of Irving J. which, with the aid of the maps in evidence, can easily be followed.

I think the work done under the direction of the full court of British Columbia established beyond reasonable doubt: First, that the "Black Fissure" was not a myth, but was an independent fault fissure of entirely different material from that of the "Star" vein, being of broken polished country slates, and that it had been formed later than the vein fissure and had no mineralization; that it faulted and cut off the "Slocan Star" vein at the southern turn near station 21, and after so cutting it off continued on away to the south. Secondly, that the presence of the ore found within the first 280 feet of the "Black Fissure" from the shaft at the southern bend was reasonably accounted for in the manner I have before stated, namely, by the "brooming up" against this fissure, to use the expression of the Chief Justice at the trial, of the "Slocan Star" vein and of the No. 2 vein disclosed by the C drift where the fissure faulted and cut off these veins and by the drag ore from each of the veins caused by the great earth movement which the experts speak of. The explanations of the presence of this ore for the distance mentioned along this fissure which I accept are quite consistent with the existence of the "Black Fissure" as a separate independent fault fissure. Thirdly, that the existence of

the vein No. 2 at station 22, as an independent separate vein, was established by the running of the C drift and accounted for much of the ore formed in the first 280 feet of the fissure. Fourthly, that the "Black Fissure" (so called) did not turn in a southwesterly direction at point B as appellants contended the vein did at that point, but was shewn, by the work done at X, to have continued on away to the north, thus adding an additional proof of its independent and separate character.

I think it was proved beyond reasonable doubt that from station 27 or 280 feet north from the place where the fissure faults the "Star" vein, and where the drag ore ceased all the way round to station 52, where the "Silversmith" vein containing ore was first reached on this No. 5 drift, a distance of 1203 feet, the drift was absolutely sterile of ore and non-mineralized.

I also reached the conclusion from the evidence that there was no ore vein turning off westwardly from the "Black Fissure" either at point B or at station 41, and that all the tunnelling and drifting done by the appellants at these several places were simply driftings through the country rock.

The drift had first been driven northerly to "x" along the "Black Fissure" drift, but as that drift was not leading in a direction to connect with the "Silversmith" vein it was abandoned and the entrance to it so blocked up and disguised or hidden by the workmen of the defendants as to conceal the existence of the drift running north from B in that direction. The drift as far as it had been driven to "x" from B had been timbered all the way, work which would have been unnecessary if it was country rock they were drifting through. These drifts from 41 to 43 and from

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B to 43 were no doubt made with the hope and object of establishing connection and continuity between the two ore-bearing veins, the "Slocan Star" and the "Silversmith." It is well, however, to bear in mind that they were all run after this litigation began, as, indeed, was the whole of No. 5 level from station 22 in the south.

These facts, as I have found them, are destructive of the case set up by the appellants and negative any continuity between the "Slocan Star" vein and the "Silversmith" vein.

I would, therefore, dismiss the appeal and confirm the judgment of the court below.

IDINGTON J.—I think this appeal should be dismissed with costs.

It seems to me, as Mr. Justice Martin puts it, that the appellants have not satisfied that onus of proof resting on them.

I agree with the exhaustive analysis of the evidence that Mr. Justice Irving has given us the benefit of and the general conclusions he has arrived at without being quite sure as to how far I should agree in the extent or degree of discredit which he attaches to one of the leading witnesses for appellants.

MACLENNAN J.—I agree in the opinion stated by Davies J.

*Appeal dismissed with costs.*

Solicitors for the appellants: *Lennie & Wragge.*

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