

THE
BRITISH COLUMBIA REPORTS

BEING

REPORTS OF CASES

DETERMINED IN THE

SUPREME AND COUNTY COURTS AND IN ADMIRALTY

AND ON APPEAL IN THE

FULL COURT

WITH

A TABLE OF THE CASES ARGUED

A TABLE OF THE CASES CITED

AND

A DIGEST OF THE PRINCIPAL MATTERS.

REPORTED UNDER THE AUTHORITY OF

THE LAW SOCIETY OF BRITISH COLUMBIA,

BY

OSCAR CHAPMAN BASS, - - - BARRISTER-AT-LAW.

VOLUME XII.



VICTORIA, B. C.

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1906.

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HUNTER, C.J. or licensing, or which may be promulgated in due and anticipated course of departmental regulation or legislative enactment, creating thus what is practically equivalent to a Crown grant.

FULL COURT

July 12.

EMERSON

v.

SKINNER

It would be so contrary to manifest justice in my judgment for the Legislature to invade this settled and well recognized policy by passing retrospective, or what in a case of this kind would savour of confiscatory legislation, that I cannot accede to the contention of counsel for the appellant that this Act goes so far.

MORRISON, J. I agree with the learned Chief Justice that the timber in question was not in the possession of the Crown when replevied. I would dismiss the appeal.

Appeal dismissed.

HUNTER, C.J. STAR MINING AND MILLING COMPANY v. BYRON
1905 N. WHITE COMPANY.

Nov. 23.

STAR

v.

WHITE

*Mining law—Extralateral rights—Trespass workings—Continuous or faulted veins.
Evidence—Inspection—Conflicting theories.*

In a contest to determine the question as to whether a particular vein, called the Star vein, was continuous, or whether it was faulted by another vein styled the Black or Barren Fissure, the court, after inspection of the mine, in presence of an engineer chosen by each party, ordered certain work to be done with a view to ascertaining which theory was correct.

The facts that in three different places identically the same material was found in the Star vein and in the Fissure; that ore was found in the first 230 feet of the Fissure of the same character as that in the Star vein, and distributed over its entire width; that experiments destroyed the theory of junction or cut off in all slopes and levels in the mine where it was alleged that such existed; that in all pits dug on the apex the same vein matter was visible; that assay ore was found in a pit on the apex corresponding to the middle of the barren vein; that the de-

endants had followed for over 1,000 feet with conclusion that the vein did not fault the Fissure was shattered and contorted dyke of porphyry.

ACTION for damages alleged taking of ore by and Heber fractional note C.J., in February, 1905 in the reasons for judgment.

*Davis, K.C., and S. J.
Bodwell, K.C., and J.*

HUNTER, C.J.: The action arising from the Rabbit Paw and Heber plaintiffs.

The ore was admitted said claims, but the defendants' claims (known as is to say, they allege that to a vein, the apex which they have in due plaintiffs' ground.

The mountain on which the north, and the vein south. The defendant worked thence westerly tend along their vein, and ore in question has been

The plaintiffs claim to have been pursuing the Slope by what they term the point at or near the head westerly direction to the defendants' model, and be

defendants had followed up their vein into and along the Black Fissure for over 1,000 feet without cross-cutting, were sufficient to warrant the conclusion that the two veins were continuous in fact, and that one vein did not fault the other; and outweighed the circumstance that the Fissure was barren for about 1,000 feet, and that it presented a shattered and contorted appearance in making a sharp curve around a dyke of porphyry.

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ACTION for damages and an injunction in respect of the alleged taking of ore by the defendants from the Rabbit Paw and Heber fractional mineral claims, tried at Nelson by HUNTER, C.J., in February, 1904. The points in dispute are incorporated in the reasons for judgment.

Davis, K.C., and S. S. Taylor, K.C., for plaintiffs.
Bodwell, K.C., and Lennie, for defendants.

23rd November, 1905.

HUNTER, C.J.: This is an action for damages, and an injunction arising from the taking of ore by the defendants from the Rabbit Paw and Heber fractional mineral claims, owned by the plaintiffs.

The ore was admittedly taken from within the limits of the said claims, but the defendants justify under the law governing their claims (known as the Slocan Star and the Silversmith), that is to say, they allege that they are entitled to the ore as belonging to a vein, the apex of which is on their own claims, and which they have in due course of mining followed down into the plaintiffs' ground.

The mountain on which the claims are situate looks towards the north, and the vein works backward with depth towards the south. The defendants sank a shaft from their fifth level, and worked thence westerly into the defendants' ground, as they contend along their vein, and it is from this drift that most of the ore in question has been taken.

The plaintiffs claim that in so doing the defendants have not been pursuing the Slocan Star vein, but that this vein is cut off by what they term the Black Fissure, which extends from a point at or near the head of the shaft on the fifth level in a north-westerly direction to the point B on the plan affixed to the defendants' model, and beyond into the slates.

Judgment

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At the trial a large mass of evidence was given in support of the respective theories, the plaintiffs claiming that the Slocan Star vein was cut off, as already stated, by the Black Fissure, and the defendants maintaining that the Slocan Star vein continues around point B to a point C on the model, and connecting with the Silversmith vein which they were working at the same level, and in fact that the Silversmith and Slocan Star constitute one and the same vein.

Difficulties having arisen as to the selection of an indifferent engineer to inspect and report upon the condition and appearance of the workings, I considered it advisable to inspect them myself in conjunction with an engineer chosen by each of the parties, and counsel were invited to attend the inspection, which, however, they both agreed was unnecessary. The plan adopted was that each engineer was to point out and explain upon the ground the principal facts in support of his contention, and that the other was then to explain them from his point of view. The result was that as the connection of the two veins between points C and D-27 on the fifth level was not apparent to the eye, it was ordered that such work should be done as would, if possible, shew the continuity of the vein through that distance.

Judgment This work having been done and a second view having been had, I have come to the conclusion, after hearing further evidence and what was urged, that the defendants' contention is correct, and that the fifth level shews a continuous vein traversing the Silversmith and Slocan Star.

With respect to the origin of this vein, I incline to accept the defendants' theory in preference to that of the plaintiffs. The former was that the remarkable curve which the vein takes at the point where the work was ordered to be done arises from the fact that the fissure passes around the nose of a large dyke of porphyry (which had long before intruded in a heated condition through the slates which there constitute the country rock), in preference to traversing it, the porphyry being a much harder and denser material than the surrounding slates; and I do not consider that the theory is weakened by the fact that the fissure does traverse small tongues of that material. The defendants' theory was that the Black Fissure cutting off the Slocan Star

vein was caused by it seems difficult to see if porphyry are for siderite which in the presence of an may be, I do not think the correctness of the confirmatory evidence of Slocan Star veins.

Mr. Elmendorf, the places in the east part on the Slocan Star the second in the ridge at the junction of the same material which composes the barrier Sizer, the plaintiffs although he admitted levels of the Slocan self same material a less evidence of crustal Fissure, but I do not ground alone to determine is continuous in fact notably at and beyond the adjoining slates and contorted than owing to the sharp curve the superincumbent

Inspection of the fault between stations 19 and or shaft (i.e., where the of the Slocan Star and the Heber fraction); the shaft as far as the Black Fissure, and that in the Slocan Star of ore in this 280 feet

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vein was caused by the contraction of the heated porphyry, but it seems difficult to reconcile this with the fact that small tongues of porphyry are found cut by the fissure, and that spathic iron or siderite which is found close to the porphyry cannot exist in the presence of any considerable degree of heat. However this may be, I do not think I am called on to definitely decide as to the correctness of either theory, as I consider there is abundant confirmatory evidence of the contention that the Silversmith and Slocan Star veins constitute one and the same vein.

Mr. Elmendorf, the defendants' engineer, pointed out several places in the east portion of the fifth level which is admittedly on the Slocan Star vein—notably three—one being at the face, the second in the rise 75 feet east of the cross-cut, and the third at the junction of the level and the cross-cut—where identically the same material and appearance is to be found as that which composes the barren portion of the Black Fissure, which Mr. Sizer, the plaintiffs' engineer, admitted to be the case. And although he admitted that there were many spots in the different levels of the Slocan Star which were barren and composed of the self same material as the Black Fissure, he maintained there was less evidence of crushing movement in the Star vein than in the Fissure, but I do not see how any distinction can be based on this ground alone to differentiate different portions of a vein which is continuous in fact. It is true that at one or two points, notably at and beyond B, the material composing the vein and the adjoining slates appeared to be more compressed, shattered and contorted than usual, but I think this was to be expected owing to the sharp curve taken by the fissure and the weight of the superincumbent mass of porphyry.

Inspection of the fifth level disclosed the fact that ore is found between stations 19 and 20, as well as all around the "horse" or shaft (*i.e.*, where the vein widens out at the western boundary of the Slocan Star and commences its north-westerly course in the Heber fraction); and also for a distance of 280 feet from the shaft as far as station 27, that is to say, for 280 feet in the Black Fissure, and there is nothing to distinguish this ore from that in the Slocan Star vein. Mr. Sizer explained the existence of ore in this 280 feet by saying that for a distance of 80 feet

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HUNTER, C.J. up to the cross-cut it was the Slocan Star vein broomed out, as
 1905 it were, and butting up against the Black Fissure; and that,
 Nov. 23. since for the next 30 feet there is little or no trace of ore, but
 STAR from that on to the uprise in the Rabbit Paw ground (a distance
 v. of about 40 feet), ore is found to occur, these circumstances point
 WHITE to the existence of another vein separate from the Slocan Star
 vein, and also cut off by and brooming out against the Black
 Fissure; and in explanation of the fact that ore is found in the
 remaining 90 feet up to station '27, invokes the theory of drag
 ore, or suggests that the Black Fissure has been mineralized for
 that distance. I have therefore, on the one hand, the contention
 that the presence of ore in this 280 feet indicates continuity of
 vein, and, on the other, a theory which has little to commend it
 except the ingenuity born of despair, and which the fact that the
 ore is found over the entire width of the vein is of itself sufficient
 to demolish.

Judgment

Certain places were visited which Mr. Sizer claimed supported his theory, and would demonstrate it if exploratory work were ordered to be done. Mr. Sizer contended at the trial that evidence could be found at the angle of the stope near station 19, about 25 feet above the fifth level, in support of his theory of cut off (Exhibits D and 69), but a shot having been put in since the trial, has wiped out any appearance of junction or cut off. In the stope above, where Mr. Sizer contended at the trial a similar appearance could be observed (Exhibits E and 70) the ore has dropped down since the trial and shews the vein continuing on the course shewn by Exhibit 70, and has also uncovered a clear hanging wall of porphyry. At the west face of the Intermediate above No. 5 level, there was before the trial an angle as shewn in Exhibit G, and Mr. Sizer contended that if this were removed a clean cut off would become apparent. Work has been done and the level continued for a distance of 23 feet, with the result that the vein appears to proceed in the course shewn in Exhibit 71, and there is a good ore body now shewing in the face. In the presence of this debacle all that Mr. Sizer could suggest was that the level was not run far enough, and that the vein might be 70 or 80 feet in width, and that it broomed out in the same way as below. There was also a place in the angle of the Inter-

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mediate below five, where Mr. Sizer stated at the trial that a crack 18 inches in depth was to be seen which supported his contention that the Black Fissure cut off the vein and proceeded on beyond; but this spot was not then open to examination as the shaft was full of water.

Silversmith level No. 4 was then examined. This is entered through a horizontal tunnel which penetrates the nose of the dyke for about 50 feet, when vein matter in place becomes observable, and at a distance of 126 feet Mr. Elmendorf pointed out ore, and it was sworn at the trial that ore was found nearer the mouth of the tunnel by a distance of about 50 feet. I have no doubt that this tunnel simply cuts through a downward bulge in the porphyry, and that if it had followed this bulge it would have followed ore or vein matter all the way in from the exit.

The outcrop was next inspected, where a series of pits (over 50 in a distance of about 1,300 feet) had been dug shewing the apex rounding the dyke, its lowest point being at the nose of the dyke. Mr. Sizer candidly admitted that he could not dispute the fact that the Silversmith vein continued its way easterly around the point of the dyke, but that at a short distance east of the mouth of the tunnel, it was intercepted by the Black Fissure. He could not, however, pretend to fix the exact place, nor say which pit was the most easterly of the Silversmith outcrop, or which was the most westerly of the Slocan Star. In fact, such a feat was obviously impossible, for the simple reason that in all the pits identically the same vein matter was visible. Evidence was given at the trial that ore in place had been found in the top of pit 19, i.e., the mouth of the shaft which communicates with the fifth level, and this was not successfully impeached by the plaintiffs. The significance of the fact that ore in place is to be found in and near pit 19 lies in the circumstance that this pit is, roughly speaking, the corresponding point on the apex to the middle point of the Black Fissure as it appears in the fifth level.

The work ordered to be done between C and D-27 was inspected in May last, and the locus shewed in places a clearly defined hanging wall and the characteristic vein filling present in the Silversmith and Slocan Star veins.

Mr. Fowler, the engineer who attended on the inspection on

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HUNTER, C.J. behalf of the plaintiffs in the absence of Mr. Sizer, stated that
 1905 he was unable to see how this wall could be connected with the
 Nov. 23. hanging wall of the Slocan Star vein, and no doubt it would be
 difficult for a stranger on a cursory view to be satisfied that
 there had been any connection by reason of the curvature
 and width of the workings at this point (the former drift having
 cut diagonally across the hanging wall) and by reason of the
 fact that the hanging wall throughout this portion of the vein
 frequently changes its dip, and that, as already stated, the slates
 around the point of the dyke, are much contorted and shattered.

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Inspection in presence of Mr. Elmendorf and Mr. Fowler was
 also had of the place in the Intermediate below five, not acces-
 sible on the former inspection, where Mr. Sizer had discerned a
 crack, and which he claimed, if opened up, would shew the Black
 Fissure cutting off the Slocan Star vein. I am satisfied that this
 is a mere slip in the vein filling, and that it is only one of a
 number of such instances in the mine. I might add that ore
 occurs here and there in this level west of the shaft, the last
 occurrence being about 125 feet from the shaft, and about 12
 feet from the face.

This second inspection having been had, further evidence was
 heard in July last, and the only matter developed which calls
 for any comment was that Mr. Sizer seemed to be uncertain as
 to what width he would assign to the butt-end of his so-called
 No. 2 vein, and as to what portion of the ore found in the
 alleged Black Fissure he would call drag ore.

Judgment

Lastly, it should not be overlooked that the fact that this so-
 called Black Fissure was followed up unerringly for a distance
 of over a thousand feet without cross-cutting into the adjoining
 rocks as far as point B, is a strong argument to shew that the
 defendants were successfully following the Slocan Star vein in
 its various turnings, an argument which is better appreciated
 when one has been underground and seen the *locus in quo*.

Much stress was laid upon the fact that the Black Fissure as
 seen in the fifth level was barren for over 1,100 feet, but in my
 opinion, there is nothing in this to militate against the contention
 for continuity. Other instances of veins being barren for long
 distances were cited and there is nothing to guarantee that this

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portion of the fifth level may not improve with depth, until a point is reached when the ascending solutions were less subject to the influence of the overhanging porphyry and there is, however, the difficult fact to contend with that, as already stated, assay ore was found in pit 19.

I was accordingly at the close of the evidence of the opinion that this so-called Black Fissure is a myth, and that the Slocan Star and Silversmith veins constitute one and the same vein. After the evidence was closed, Mr. *Davis* applied for an order that further work be done on the ground that not enough had been done to establish his theory, and that without fresh work it was useless for him to continue, that there was no object in arguing the case as it stood, and that unless more work was done, the case was practically settled. As I was satisfied on what I had already seen and heard that his theory was false and could not be demonstrated to be true, I refused the application, but left the question open until after I had heard argument on the whole case. The argument was fixed for November 6th last, but on that day Mr. *Macneill* appeared for the plaintiffs and informed the court that he was instructed merely to formally renew the application, which being formally refused, he withdrew from the proceedings.

Nothing, then, having been urged by Mr. *Macneill* as to why I should change my opinion and order further work done, I remain of that opinion, and consider that it would be only imposing a serious burden on the defendants without any advantage to the plaintiffs if I were to order any more work to be done in support of a theory which did not keep its original form, but grew with the litigation, and from time to time shewed great elastic powers in accommodating itself to the facts.

There is, therefore, nothing left for me to do but to dismiss the action with costs.

Mr. *Bodwell* pressed for a declaration as to the nature and extent of the rights of his clients, but as there is no counter-claim praying for such a declaration, it is not open to me to do so. Even if there were, it would not necessarily be incumbent on me to do so. As matters stand, the dismissal of the action determines all the issues in favour of the defendants.

Action dismissed.

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