

His lordship—You mean this turn running from 44 to 50?

Witness—Yes; I tried to point out without being impertinent in the matter that a vein could not take that circular shape and connect by any possibility on its dip with the same vein in No. 4 Silvermine, and the work that has been done since in the way of mining is convincing proof to me that that portion from 44 around to 50 is entirely outside the vein.

His lordship—You are speaking now of this new work in the Silvermine?

Witness—The new work on the Silvermine that was put on the map yesterday. Now, this is a very unfortunate position of affairs. One expert says the admission was made with reference to all the drift west of some point between 33 to 43 or D and 43, both of which are at some distance west of D77. The other expert (the person who is alleged to have made the admission) says the admission was made as to the drift west of station 50-51 (the next turn of the drift to the south). The judge seems to have been of the opinion that the admission was made as to a third place, viz: D77, for he very pertinently asks Sizer: "How is it that D77 came to be chosen as the point at which this work was to be done?" See page 184.

Now how is this dispute to be settled? Not by the judge's recollection as he does not agree with either of the experts. The conflict between them must be determined by their own evidence. On the face of it, Mr. Elmdorf's statement seems extraordinary because Mr. Sizer had at the trial in February, 1904, taken such strong grounds, asserting that there was another black fissure at 43. Mr. Elmdorf's story is that (100) the original plan was that after examining the eastern portion of the Star mine they were to inspect the western portion of No. 5 level around this drift into the Silvermine. In the extract I have given from his evidence (719) it will be seen that he states they did not proceed on No. 3 level further west than station 43. From this evidence I find that on the second day's inspection there is nothing to establish that they went any further than 43. On the third day they went, as arranged to the Silvermine tunnel and that portion of the mine.

In the cross-examination by Mr. Bodwell of Mr. Sizer we find the following (183) no doubt with reference to the place where the admission was made:

Q.—Will you say on your inspection with his lordship the chief justice and Mr. Elmdorf, you went on to point 50?

A.—Yes.  
Q.—That you went beyond 43?  
A.—That is my recollection; that we went as far as 50.

Q.—Have you a note of that?  
A.—No; I made no note of it.  
Q.—You are not in a position to speak definitely?

A.—I am depending on my recollection. Q.—My instructions are different. But you are positive of this, that you did not admit that from D77 on there was a vein and that it was the vein you have called the Silvermine?

His lordship: Where is point 50?  
Mr. Bodwell: Point 53 is in that new drift. His lordship: Don't you remember being at point 52?

Witness: I went to 52 and saw this new drift at the time of the inspection. My recollection is that you did not go there.

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His lordship: There is ore to be found at 52 and 51 at the face of the drift.

Witness: Then that proves we did go there (p. 184).

That piece of evidence evidently taken from the chief justice's notes taken on the spot (183) seems to show that they did not stop at 43 or proceeded as far as 51 or 52 where ore was found at the face of the drift. This corroborates Sizer's contention that they went on to 51 (180) and as both experts are agreed that when the admission was made it was determined not to go any further (180) I have come to the conclusion that the admission made by Sizer was applicable only to the portion of No. 5 level west of station 50 and that Mr. Elmdorf is mistaken.

This is a matter of considerable importance because the defendants relying on this admission gave no further evidence as to the drift being in the vein since the passing of D or 33 going westerly. I am not satisfied that it is.

The learned chief justice does not refer expressly to this incident in his final judgment, but at p. 203 he says in effect that in selecting D 27 as the western limit of his cross-examination he was guided by what the two experts, Sizer and Elmdorf, had said when he made the examination in December, 1904.

As I have already said that was, in my opinion, a misapprehension on his part, and I cannot help thinking it was in consequence of these two disagreements that Sizer's testimony was regarded by the chief justice as too elastic to be reliable.

From questions interposed by the learned chief justice at the hearing held in July, 1905, it would seem that the presence of alken sides in the drift from C to D minus 27, was strong evidence that the drift was run in the vein. I refer to his questioning Elmdorf, p. 179; Sizer, 183, and Fowler, 202 as to this.

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regularly closely; I didn't see anything that was remarkable or worthy of any special attention at the time; I didn't see any vein matter.

Q: From 43 to 50 is that tunnel or drift; that work from 43 to 50, is that in your opinion any part of the fissure which has followed down from the turn we call the Star fissure?

A: Certainly not.

Q: Is that work from 43 to 50 and part, in your opinion, of the Silvermine vein, shown over these workings in the Silvermine ground?

A: Certainly not.

It may not be out of date to mention that this examination of Fowler followed that of Sizer, who had just denied making the damaging admission imputed to him by Elmdorf, the order of events being as follows:

December, 1904, alleged admission by Sizer.

May, 1905, inspection by chief justice, and Fowler and Oscar White.

July, 1905, inspected by Elmdorf. Fowler and Sizer visited this mine together. I cannot say, but Sizer and Elmdorf did (1900). It is impossible to suppose that Sizer would not communicate to Fowler the fact that he had made this admission attributed to him, if he had indeed made it.

July 28th, Elmdorf gives evidence of alleged admission, "as he understands it." Sizer denies making such admission.

July 28, Fowler gives this answer as to the drift from 43 to 50: "I didn't examine it particularly closely."

July 28, Fowler's mind shows that Fowler had not been made aware until after his inspection of the mine in July that this alleged admission had been made by Sizer. That fact and the simplicity of the answer strengthens my belief that Mr. Sizer never made or even supposed that he had made the admission imputed to him. Mr. Fowler, a mining engineer residing in this province since 1889, with nine or ten years' experience in the Slovan country, and who at one time was familiar with the workings of the Ruth mine, a mine only a few hundred feet to the north of the mine in question in this action, of all the witnesses, except Mr. Oscar White and Mr. Harris, whose experience in the Slovan country is also considerable, is, by reason of his long familiarity with the surrounding country, entitled to speak with most weight.

For these reasons, I think the defendants' case has failed. Judgment should therefore be reversed, with costs here and be referred to the amount of one thousand, and contain a declaration that the Slovan Star location does not give to the defendants any rights to the west of the west end line of that claim, and that the vein or fissure in question is not the same as the one shown to extend to the Rabbit Paw or Heber Fraction. There should be an injunction also, but the terms of the judgment had better be spoken of later.

(JUDGMENT OF MORRISON, J.)

The judgment of Mr. Justice Morrison, wherein he dismisses from a majority of the court and holds that the appeal should be dismissed with costs, is appended:

This is an action for damages and an injunction, brought by the defendants, the plaintiffs' mineral claims known as the Rabbit Paw and Heber fraction.

Markedly divergent theories were advanced at the trial, and when it was deemed advisable that the workings and condition of the mine should be inspected, two engineers, selected by the two parties hereto, visited the mine, ordered certain additional work done, and then had a second view. From the voluminous evidence before the court, the following facts of inspection were made:

At the close of the evidence following this view of the locus in quo counsel for the plaintiff requested that further work be done on the ground that not enough had been done to establish the theory, and that without additional work as indicated by him, it was useless for him to proceed with his case. This was refused, and the learned judge then gave the judgment appealed from, which is a result mainly of his inspection. Upon appeal to this court, however, such leave was given the plaintiff to have certain further work done and to advance if necessary, such further evidence as the parties might be advised respecting the locus in quo, and that without additional work as indicated by him, it was useless for him to proceed with his case. This was refused, and the learned judge then gave the judgment appealed from, which is a result mainly of his inspection. 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