ext of Decision in Gase of Star vs. White

JUDGMENT OF IRVING J

ALSO FINDING OF MR. JUSTICE MORRISON WHO DECIDES IN FAVOR OF THE DEFENDANT COMPANY-OTHER JUDGMENT NOT RECEIVED.

The decision of the full court of B. C. in the famous extralateral rights case of Star vs. White, in which John M. Harris is successful, has created widespread interest. The Daily News published the result of the finding in Mr. Harris' favor on Sunday morning and in response to may requests will publish the delivered judgments in full.

Mr. jus'ice Irving's judgment is a lengthy one, covering some 26 pages of closely type-written matter, and consequently its reproduction will be in instalments. Mr. justice Morrinon's finding is comparatively brief and the judgment of Mr. justice Martin only yester

day been handed to the registrar.

Appended will be found the first instalment of Mr. justice Irving's judgment, which covers a resume of the itigation up to the time of the second

trial before the full court.
In the published judgment some liberties are taken with the text, such as the omission of the page references in the evidence only intelligible to counsel, ut otherwise the decision is printed in its entirity.

Judgment of Irving, J. This is, in one sense, an appeal from the chief justice, but owing to the turn exents took after he had delivered his judgment, we are called upon to de cide the case upon evidence not ad-

duced before him.

The plaintiffs, who are the owners of the Rabbit Paw and Heber Fraction mineral claims issued a writ on 31st July, 1901, to restrain the defendants from trespassing on their claims, and

for damages.

The defendants justified the trespass complained of under the authority of section 31 of the Mineral Act 1891. which conferred upon them certain extralateral rights in respect of a laims called the Slocan Star and Sil-

versentth, respectively.

The plaintiffs case, as put forward at the trial held in February, 1904, was that this vein in respect of which the defendants claimed that extralateral defendants. rights had been "faulted" by a fissure vein near the westerly end line of the Slocan Star mine, and that the de-fendants' vein instead of being a continnous vein consisted of two s and distinct veins, viz.: the Shocan Star vein, broken as already stated at the westerly end of the Slocan Star claim. Id the Silversmith vein; the connecting or running 1. was a fault a tre, which from the colour of its ling they called the

black fissure.

There is also another section of the defendants' alleged vein to be mentioned, viz.; that portion lying to the west of the so-called black fissure, and with the Silversmith connecting it with the Silversmith vein. This portion, the plaintiffs say, is not vein matter, nor mineralized in any way.

The trespass complained of wa

committed in June, 1900, and consisted of taking ore from the stopes to the west of the end line of the Slocan Star mineral claim.

The defendants alleged in evidence

that they were not aware that they had gone beyond their end line until gone beyond their end line that no work had been done on the Sliver-smith claim; on the Slocan Star claim the apex pits had not been continued rthwest beyond pit 19; levels 1, 2 and 3 were as they are today; No. 4 tunnel had not been run into the Silversmith, nor had the upraise to run into the pit 19 on the surface from No. 4 been . 5 level had only reached a short distance into the Heber Fraction, say about station 1, and the winze was being sunk from the No. 5 level be-

low, for prospecting purposes.

When therefore, the Slocan Star people were informed that they were outside of the westerly end line of the Slocan Star in an ore-bearing vicinity, we can assume that there was some consideration given as to how this apparent trespass was to be justified. statute conferring extralateral rights which would justify them going utside of their side lines gave them o excuse for going beyond the end line of their claim. Their justification must therefore be sought in shewing that they were following down on the dip of the Silversmith vein through the side lines of that claim; with a view to establishing this connection they, in the spring of 1891, commenced to trace the outcrop by digging the surface pits from pit 19 on, in a northwesterly direction so as to connect up, on the surface, the Slocan Star vein with the Siversmith vein, and in June they started to run No. 4 Silversmith tunnel in from station 48 in a southwesterly direction, and they continued to drift on their No. 5 level so as to

connect the two claims underground.

At the date of the issue of the writ. 31st July, 1901, No. 4 level of the Star ched station 18, the face of No. 5 level was at 21. No. 4 tunnel on the Silversmith would be in only some 100

feet or so. Looking at case, as to that date, I cannot see that the defendants had at that time any evidence upon which they could substantiate the devise which they subsequently set upon ciz.; that they as owners of the Silversmith mineral claim were entited under the extralateral righes given to that claim by section 31, to the veins or lodes in the Heber Fraction lying to the west of the Slocan Star end line.

Ievel very painly all through, Parks Ellowing their coming north they were following that their destruction the determined to run this crossout, BX (812). Now the distance from B to X is 35 or 40 feet (822); the pleadings had been closed evidence, taken it is true on commission, to be presented to them in the first instance; see Bank of Chi or lodes in the Heber Fraction lying to the west of the Slocan Star end line. think this is a fact of some importance, because work done issued or after trespass committed, should be scanned with some degree of suspicion. I do not want to press this principle too far, but in considering an argument put forward by the defendants' leading exponent, Mr. Elmen-dorf, in support of his contention that the Slocan S'ar was a continuous vein.
viz.: that the best proof of continuity
was that the ore bodies in the Silversmith had been reached by the miners
running No. 5 drift without any connection from above to guide them and

(at 52-3 on No. 5 Silversmith) notwithstanding the very irregularity of form of the drift itself, one should renember that although the workings in mine (Morrison, p. 417, cap. 318) made in mining operations and not in support of litigation, are generally im-portant as evidence of any facts which may be inferred from them; that in-ference cannot be drawn with confi-dence where the work has been done.

after litigation for purposes of

action.

After the writ was issued there was an application for an injunction and some affidavits filed. Those proceedings have been referred to in connection with Mr. Oscar White's credibility, so that matter will be deal with 1450. as that matter will be dealt with later, it will be sufficient to state now, that in resisting that application, he, Oscar White, on the 31st of August, 1901, made an affidavit that the total amount of ore taken from the ground claimed by the plintiffs did not exceed the net value of \$500, and that Byron White in an affidavit of same date said the amount of ore excavated in all from the ground of the Rabbit Paw and Fraction amounted to, in his beief, the sum of \$500. This statement by Byron White, as to value, was based on information furnished by Oscar

White, In the autumn of that year the de-

during the examination of Mr. Harris, for discovery, in October, 1903, before trial, an indication of the plaintims line of attack was given, he then expressed an opinion that the Slocan Star According to his theory the Silversmith vein was an independent parallel vein some 850 feet to the north (1291, 1063-4). After the

have by turning the levels run on the Slocan Star vein proper into the black fissure at the south turn, and at the north by following non-ore-bearing planes and the stratification of country rock have given to their No. 5 level an appearance of continuity on ore or in

material in which they ran between the winze and station B on the 5th level, is the filling of the black fissure. On the other hand the defendants say the drift on No. 5 level, between the winze and B, is in their vein, that the Slocan Star vein continues from the winze to B. and there turns. The filling they say vein matter, and that its crushed appearance is the result of movement in the vein but the movement has not interfered with the continuity of the vein, which they claim they have followed in their work-

The defendants contend that there may be a fault in the vein, but that a fault in. the vein does not necessarily prevent the vein from being continuous,

When the trial opened on the 12th February, 1904, the defendants upon whom the onus of proof is, began, and gave evidence of the stopes in question being on the dip vein; but the pleadings being vague, Mr. his witnesses on re-examination.

erintendent when the trespass complained was committed; Mr. Cavanaugh, a re'ative of the Whites', and an assistant in two miners employed in the mine; Mr. Drewery, a land surveyor in the employ of the defendant company; Mr. Twigg, another land surveyor; two foreign experts, Mr. Elmendorf, retained in September, 1903, and Mr. Parks, retained in September 1901; and two local mine managers of the Slocan district Messrs. Sharp and Davys. With the exception of Mr Twigg and the two local mine managers, the others were interested, either by direct pecuniary interest or sympathy in the suc-

cess of the defendants' case.

The evidence of the defendants was directed to showing the unbroken continuity of the vein from Sandon creek to the westerly workings in the Silversmith claim. They represented that the hanging wall fatory solution of the problem we have

The plaintiffs' contention was that the Slocan Star vein was cut off by the black fissure, which extended to the south and beyond the hanging wall of the Slocan Star vein, and that it was the black fissure the defendants were following; that the black fissure does not turn at B., but continues on to X.; that the material difference from the country rock that the defendants saw in running from B. to C. was black fissure material which they had to break through; and that there is no connection on ore between B. and 52: planes.
On the opening of the plaintiffs' case,

counsel stated that he would show that from the winze or turn at the south end of No. 5 level to X., at the extreme north, there existed a separate and distinct fissure, separate from the fissure containing the Slocan Star vein and separate from the fissure containing the Slocan Star vein and separate from the fessure containing the slocan Star vein and separate from the reasons for judgment given by the fissure containing the Sliversmith vein.

It was not an ore bearing fissure, but containing the size of the third that the would show that in our opinion, without full opportunity to plaintiffs to establish their case, as a pluggment shifting the onus from the defendants on whom it was originally cast, on to the plaintiffs.

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The same that the would show that in our opinion, without full opportunity to plaintiffs to establish their case, as a pluggment shifting the onus from the definition of the vein, and ran the drift 41 to 43, to connect with the Si.versmith ore which they knew existed on No. 4 level. I do not know why it was that station 41 to 41, which is about 100 feet north of the vein, and ran the drift 41 to 43, to connect with the vein and ran the drift 41 to 43, to connect with the vein our opinion, without full opportunity to plaintiffs to establish their case, as a the turn of the vein, and ran the drift 41 to 43, to connect with the vein and the It was not an ore bearing fissure, but contained a filling having for its constituent a soft crushed slate, of dark color, en account of which they had designated it the black fissure; that in this fissure there was a 1200 foot barren stretch; that the line run by the defendants as their vein tage of the additional work and verbal to justify me in rejecting Oscar White's into one ;that this union brought about the defendants had neither walls nor ore to es-tablish the continuity of the'r vein.

as to their credibility.

The new work consisted of three separ

Sizer had proceeded a certain distance on the 26th February, counsel for the paintiffs referring to the issue of fact which had been gradually developed during the state of the paintiffs referring to the issue of fact which had been gradually developed during the state of the paintiffs had said the Siocan Star vein was cut off and terminated by the black fissure, tiffs referring to the issue of fact which had been gradually developed during the trial, and fully stated by Mr. Sizer, proposed that certain work should be done and that that work should determine the issue. This was agreed to in a more or main, the testimony of experts and persons interested in the result, and at the fendants discovered considerable ore in No. 4 Silversmith about 140 feet from the portal, between stations II and 13 At that time the drift which was being run in a northerly direction from the Heber Fraction had reached station 29, on No. 5 level. on No. 5 level.

The pleadings closed on the 25th November, 1901. They were of the most general character and gave no indication of the theory that the plaintiffs intended to set up at the trial, but, during the examination of Mr. Harris, for discovery, in October, 1908, before trial an indication of the plaintiffs' line of attack was given, he then experienced to the trial to the south. Mr. Elmendorf admitted the chief justice himself, accompanied by the new work a fissure 28 feet broad and three days' visit to the mine. This inspection by the judge accompanied by the experts of attack was given, he then experienced in the south was not continuous but that the fissure with a filling similar to that found in the black fissure ran out to the south. Mr. Elmendorf admitted (p. 528) that the plaintiffs had exposed by the leading experts on each side, paid a three days' visit to the mine. This inspection by the judge accompanied by the experts of attack was given, he then experienced in the superintendence of a Mr. Parish but own for a sund in the black fissure ran out to that found in the black fissure ran out to the south. Mr. Elmendorf admitted the chief justice himself, accompanied by the new work a fissure 28 feet broad and some 98 feet in length, running through the hanging wall of the Slocan Star vein. arrangement. I think it is to be regretted that counsel did not also attend, for, inthat counsel did not also attend, for, instead of turning to the north continued on in a straight line across the property for an that the Rabbit agreed upon, vis., that work should be on his first visit that there was no evidence of a fissure extending out to the south contention that the counsel did not also attend, for, instead of turning to the chief justice agreed upon, vis., that work should be on his first visit that there was no evidence of a fissure extending out to the south that the contention that there existed three separation demonstrates beyond question that ate fissures, the chief justice thought it demonstrates beyond question that a would be sufficient to enable him to reach fissure extends from B to X, and as it a conclusion if a drift was run from C. plaintiff's experts had obtained inspec-tion of the mine (viz.; on 4th Febru-ary, 1904) the theory that the Slocan of, testing Sizer's black fissure theory, Star vein continued on westerly was abandoned, and at the trial which open-ed on the 12th February, 1904, the new theory of a fault fissure occurring at the bend was set in. the bend was set up.

Their theory is that the defendants piece of work was done. As to this work

ary, 1905, while this new work, i.e., the quest to have certain work done, in my appearance of continuity on ore or in appearance of continuity on ore or in appearance of continuity on ore or in drift from C to D Z, was being run; an opinion is cogent evidence of partizanship. An opinion on a technical matter formed oppication for other work was made and oppication for other work was made and oppication was renewed in May, under such guidance can be of little value that application was renewed in May. The defendants say that the wall of material in which they ran their drift material in which they ran their drift the defendants' superintendent and Mr. Oscar White, dence that guide admits he was mistaken; the defendants' superintendent and Mr. I have no headtation, therefore in saying Fowler, an expert retained by the plain-tiffs, made a second examination of the mine. To both of these applications there was a refusal, with the resu't that on the 25th July, 1905, when the case came on again for what was called the second trial. the work, for the doing of which the hearing in February, 1904, had been adjourned. was still undone. Once more the plaintiffs applied for further experimental work, but this was not granted and the trial proceeded and judgment reserved. At the close of the trial the same appli-

cation was made for more experiment work with the same result; and in the end udgment was given in favor of the defe

The learned chief justice proceeded on the ground that the 5th level shows that the vein was continuous and that between C and D27 there was a clearly defined hangof their vein and of the continuity of their ing wall and the characteristic wein filling which was to be found in the Slocan odwell found difficulty in dealing with Star and Silversmith was to be found in the crosscut run between these points He examined on behalf of the defen- by hi scirection in December, 1904.

dants, Mr. Bruce White, the first superin-tendent of the defendants' mine; Mr. Os-to this court and at the same time an apcar White, who succeeded Mr. Bruce peal from the interlocutory decision refus White in October, 1896, and who was sup- ing to allow the experimental work to be done was also taken. After the argument this court came to the conclusion that th plaintiffs should have been allowed to have the defendants' mine; Isaacson and Fox, the work done which they contended was necessary for the proper presentation of their case, and we therefore set aside the judgment of the learned chief justice and mentioned by Mr. Sizer in his examination

in February, 1904.

The parties to the action selected a Mr. Zwicky as a proper person to have the management of the work and under him it | p. 562 and 562. was proceeded with and finished about February, '07, and the case came on before

us in April last. Some question has been made as to the convenience of the course adopted. Perhaps it has thrown on this court a greate amount of work than we expected, but it

had to break through; and that there is infon the case before the learned chief no connection on ore between B. and &; justice had not been fully tried and thereno connection on ore between B and 52: justice had not been fully tried and thereand that the wal's followed by them from
B to 62 were merely non-mineralized practically a new trial. It would be altogether out of reason to regard a judg-ment which had been reached, at any rate to 41, which is about 100 feet north of the

on to the plaintiffs.

From the reasons for judgment given by the learned chief justice it is apparent that he relied very much on his own inspection of the premises and he was, after that he relied very much on his own inspection of the premises and he was, after having made such an examination, able to decide which of the experts was right to decide which of the experts was right.

gvidence on both sides, and a though we should pay due regard to the opinion of peculiar contortions shown in the northern the witnesses formed by the chief justice the first trial said was not in the vein and western parts of their level; that the yet it is for us to form our own opinion (235) but was in hard slate (413). Having completed that evidentiary work by timber-ing it up (682) they took their man out and

started them, about the end of December,

1902, at station 41, running 140 feet west-

erly to station 43, not on the vein (235).

This work took about two months to run

(902) so that in February, 1903, they were at

back from station 43 to B (reaching B in

body of ore (578.)
At the first trial (February, 1904) the defendants' witnesses were strong in their assertion that the vein turned at B.

The plaintiffs, on the other hand, in-sisted that at B there was no sign of a

turn; that the soft fissure filling continu-ed down past B on the left hand upper side

Cavanaugh, (p 432) before us, was not

prepared to deny that this fissure extend-ed to X. Oscar White thinks the black

fissure does not extend to X. That there is two feet of crushed material he admits

(p. 464) and that there is a well defined

must be remembered that from 41 down to X was run under Osar White's superinten-

dence and the lagging erected from B to X was put up by him in order to prevent

this very filling coming in on him and

White's testimony. I have already referred to his explanation or excuse for running

down to X past B where they subsequently made the drift turn, and I now mention

some other incidents. He stated in an affi-

davit used in resisting the application for an injunction, that they had not taken ore

from the ground in dispute to an amount

in value of \$500 net, was misleading, as he

could only reduce it to that sum by mak-

ing deductions, i.e., cost of development

making such deductions, (p 1528). Again, his statement that he was not aware that

there was ore in the bottom of the winze

is past belief. Again, as to the interme-

diates below 5 (p. 1530). He was not can-

did. Again, his explanation of his reading

White told him there was no ore between

explanation. I therefore refuse to believe

his story that when he was at B he

thought that the vein or material he had

he found he was getting so far to the

north that he could not expect to connect

with the ore which he knew existed in the

not entitled to any credence and I reject

done under his orders I regard with sus-

picion. The ability of his men to carry

into execution his designs is shown by the

mouth of a crosscut so that, so far

way in which they covered up the gaping

the eye was conecrned, it was impossible

to tell that there ever existed anything

but solid wall and lagging in front of it. It is unfortunate for him that a pile of dirt was left at the entrance to the cross-

B to X (1926) when so much turned or

versmith. In my opinion his evidence is

leve's, and I do not accept Oscar White's

wall running north and south. Now it

terial, 18 inches wide.

43, but as yet they had not shown any connection on ore (by following the vein, which they said turned at B, so they hark

issue. This was agreed to in a more or less indefinite way, but the examination of witnesses proceeded. Like the evidence on behalf of the defendants it was, in the March, 1903) and at the same time con-tinued drifting, first to the south, then to the southeast, then to the southwest, then to the south or southwest from station 50 to station 52, where sometime about September, 1903 (645) they struck a large body of ore (579.)

ion, complete y established the theory con-tended for by the paintiffs as to the se-parate existence of the black fissure. It showed positively beyond question that the hanging wall on No. 5 level and the stopes ed down past is on the left hand upper sides 1018, 1207, 1029, and that the crosscut at X would establish that fact; that crosscut was made by Zwicky, and Elmendorf, (p. 510) found there a seam of softer mawhere a certain amount of ore had been left in a corner, and where Mr. E men

confirms the testimony given by the plain tiffs' experts on that point I see no reason for not accepting their opinion that it is the same fissure which is exposed by the new work to the south. It completely disposed of the evidence given by the defendants' witnesses that the crosscut B to X was driven in country rock; 413, 727, 813 Had the chief justice heard the testimony adduced before us I feel sure that he would not have felt confident in accepting Mr. Elmendorf's expert testimony as more re-

liable than that of Mr. Sizer. liable than that of Mr. Sizer.

Elmendorf's action in persuading the chief justice not to accede to Sizer's rethat in these circumstances we are not bound, in any degree, by the opinion formed at the view taken by the learned chief

justice.

The contention put forward by the defendants at the trial that the vein turnthe Ruth map (484) is more than nonsen-sical. I accept Harris' story that Oscar ed at B. was also in my opinion disproved Mr. Boehmer, a new expert introduced by the defendants on the hearing before us, thought that the real turn was at static 38, and that the vein indications seen in the neighborhood of B. C. and D43 we foot fractures of the same vein;, but his been following up from the south, turned to the west at B.

It is my opinion that when he ran past B he was still seeking the turn in the fissure and that he harked back only when evidence has not shaken my confidence in Mesers. Sizer and Fowler, a confidence reached after hearing their oral testimon before us, and reading their evidence be

In view of some of the expressions use by the chief justice in his reasons for judgment I thought it proper to go through the evidence taken before him with very great care and to make some observation with regard to the witnesses examined

before him.

In considering that testimony it will be ecessary therefore to refer to the evidence given at the trial before him in (February, 1903, and again before him at what has been called the second trial, held in July, 1905, and also to the evidence given before this court in April, 1907. At the point where the A. drift was afterwards run, the plaintiffs' exper (Sizer) at the first trial had insisted that

the wall running into the angle on the the question of the continuation of the wall of material along that line right hand or west side was differen from that on the left or north side. The Again, it is unfortunate that the lagging chief justice was not able to recognize the difference nor did Mr. Elmendorf a that time, but I understand now that he mediate below 5 (p.209) that it had to be emoved in order that the plaintiffs' ex-(Elmandorf) admits he was mistaken; perts might point out the crevice they expected to find there-and still more un-

Passing along the fifth level we come to B. In February, 1904, Mr. Oscar White fortunate that they did find it. Again, it was unfortunate that a considerable quantity of ore (546) was left in a had said that he knew that he was at the corner and that subsequently this very place should be selected to establish the turn of the vein (812, 891, 817) that he real! began to turn at A (812), 30 feet south of B, but in order to show that there was no sign of a vein or anything "out there," fact that the hanging wall of the Socal Star was cut by the wall of soft back fisthat is to the north of B, he centinued the sure material. matance to be noted is that drift to X. He said that he expected (this

tended at the trial that there was a vein an inspection of the premises might reasontended at the trial that there was a vein running in from the northeast across the line BX, and to meet that contention he determined to run this crossout, BX (312).

Now the distance from B to X is 35 or 40 feet (682); the pleadings had been closed examining from B. to X.

These extraordinary things have occur-red too frequently to be underigned, and I have reached the conclusion that under the management of Mr. Oscar White the ore was manipulated in two places at least to show an apparent turn in the least to show an apparent turn in the walls where there was in fact no turn.

How Mr. Elmendorf came to say, as he smith that was put on the map yesterday. How Mr. Elmendorf came to say, as he did, that the vein turned at B and that the drift run from B to X was wholly in country rock, and that there was no continuation beyond B of the material they derstand. It is possible that he was deceived by the appearance of the turn of the drift at B and did not examine the extension from B to X with due care. However that may be his evidence before us as to the turn at B is not satisfactory.
In my opin'on the wall material through which the defendants ran their No. 5 tu nel continues on to X without any turn at B. and the drift 44 E, D. C. and B. is not in ore, there is no ore in it. It is a mere fracture of the fissure in the slate; see Boemer, p. 339, 340. I am satisfied that when Mr. Oscar White and his men passed B they saw no indication of a turn at B. That point was adopted later, when having run drift 41 to 43 they found a nonneralized fracture or cleavage leading in a northeaster'y direction, which frac them out at B. evidence.
This crosscut B to X the defendants at

Returning to the inspection by the chief justice: Passing on from B they entered the drift that was driven back from 43, that is, it was driven from the west to B. Mr. Fowler has taken a photo of the roof here, showing that there is no indication of any turn,
Mr. Elmendorf at the trial in February,

1904 was not positive that he saw the vein between B and C, but between C. and D. (p 238) he did. He saw the hanging wall of the vein.

When the chief justice visited the mine

when the chief justice visited the mine in December, 1904 he was not at all satisfied with what he saw in this drift; he was, as I understand it, following up the indications of vein matter and after he had passed some feet into the B, C, D drift, he observed a change, and as a constitution of the construction with reference to the place where the admission was made:

| A constitution of the construction with the construction with the silversmith tunnel and that portion of the mine. sequence a new drift or level was run the north of the o'd drift.

riM. Stzer had, in February, 1904, said, speaking of the old drift. "The drift from B to C goes through the black fissure and passes out into country rock." This would indicate that there would be a radical change to be found as soon as you got be no doubt but that that change was plainly visible to the chief justice; and the fact that in December, 1904, he ordered the new drift shows that Sizer's evidence given in February, 1904, as to condition of things there, was more ac-curate than Elmendorf's, who said that the vein, (257) was more or less visible, 'all the way between C and D.

The trace of the vein having been lost,

carried to a point 27 feet east of D-D minus 27 as it is called.

The point would be selected as the place.

where in the opinion of the chief justice, the vein would again be visible in the old Now at the trial in July, 1905, the chief

his men.

I have carefully read the evidence in this justice seemed to think that Sizer had agreed to point D minus 27 being selected. Sizer says he had not, and from Mr. Elcase, and I have came to the conclusion that I can place no confidence in Mr Oscar mendorf's evidence (p. 1709) it is clear that memor's evidence (p. 10s) it is clear than Sizer did not take any part in selecting D minus 27, because Elmendorf mentioned station D, which is some 27 feet to the west of the point selected, as one of the places Sizer said there were no indications of a vein.

Well, leaving that disagreement of re-

collection between the chief justice and Sizer, I come to another: Elmendorf says, after speaking of the ordering of this new drift, C to D minus 27: "We passed along in the direction of D and at some point between E and 43 (or D and 43) the question of No. 5 level west of station 50 as tion of continuing on (westerly) into the Silversmith workings came up, and Mr. Sizer acknowledged from that point on to the end was Silversmith. For that reason it was not considered necessary to visit that portion of the mine, so that portion was not visited by his lordship." This was not visited by his lordship." acknowledgement, if proved, I would regard of considerable importance (2014). In the first place, it was a complete backthown from the position sworn to at first trial. If the leading expert admit that from station 43 on the 5th level, on to the west was Silversmith vein, it wou' only he necessary for the defendants to prove the connection between station 43 and B to dispose of what the plaintiffs called a series of crosscuts through country rock. This is very clearly pointed out by Mr. E'mendorf at p. 1712.

by Mr. Elmendorf at p. 1712. Now, turning to Sizer's evidence (p 1800) I find that he does not deny that at a certain point he did admit that from that place, whichever place it was, he believed the 5th level was run in vein material, which he called the Silversmith, But that point he fixes as 50 or 51, 51 he thinks. He asserts that all round from station 43 to 50-51 was not in the vein; he restated the view he had expressed at the first trial viz. that the drift was in no sense any part of the vein (1800, 1803, 1854, 1856.) At P. 1803 the chief justice puts thi

His lordship-The Silversmith vein you are satisfied, exists from D27 inwards? A .- No, my lord, I did not make that acknowledgment, and I don't make it now. I don't think there is any evidence of the vein all around that turn, which is all the way from D to station 50. His lordship-How is it point D27 comes

to be chosen as the point at which this understood it, convinced your lordship that the vein was to be found up to that point connecting from the other direction.

'His lordship-My idea, Mr. Sizer, is that you hadn't any doubt of it at that time. just prior to the trial fixed for July, when

His lordship-You mean this turn running

Witness—Yes; I tried to point out with-out 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 S'Iversmith, 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 yein.

His lordship—You are speaking now of this new work in the Silversmith 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 B to 43 or D and 43, both of which are at some distance west of D27. 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 p'ace, viz: D27, for he very pertinently asks Sizer: "How is it that D27 came chosen as the point at which

was to be done?" See page 1804. 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. Elmendorf's state-

ment 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. Emendorf's story is that (1083) 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 Silv smith. In the extract I have given from his evidence (1710) 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 Silversmith tunnel and that portion of

the admission was made:
Q.—Will you say on your inspection with

his lordship the chief justice and Mr. El-mendorf, you went on to point 50? A.—Yes.
Q.: That you went beyond 45?

A .: That is my recollection: that we went

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? Q.: My instructions are different. But you are positive of this, that you did not admit that from D27 on there was a vein

and that it was the vein you have called the Silversmith?

His lordship: Where is point 52?

Mr. Bodweli; Point 52 is in that new drift. His lordship: Don't you remember being

at point 52? drift at the time of the inspection, but my recollection is that you did not go there.
His lordship: My recollection is different.
Witness: I did not make any positive
statement about that I said we went as
far as 50 anyway; if we went to 52 we
containly named 55

certainly passed 51.

His lordship: There is one to be found at \

Witness: Then that proves we did go there (p. 1862.)

That piece of evidence evidently taken from the chief justice's notes taken on the spot (1818) seems to show that they did not stop at 48 but 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 (1800 and as both experts are agreed that when the admission was made it was determined not to go any further (1800) I have come by

that Mr. Elmendorf 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 after passing D or B 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. 2026 he says in effect that in selecting D 27 as the westerly point for his crosscut he was guided by what the two experts, Sizer and Elmendorf, had said when he made the examination in Dec her, 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 e astic 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 slicken 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 Elmendorf, p. 1769; Sizer, 1803, and Fowler, 2002 as to this.

Now, if this was his idea, I think he was in error. It true that Eim February, 1903, spoke of slickenslides being found in veins, p. 261; but Fowler and Sizer both said in July, 1905, that slicken sides can be found in any place of mov ment in the country rock, p. 1885, and p. 2002, and Cavanaugh at p. 433 says the same thing. Elimendorf at p. 1768 does not rely on slickensides.

Slickensides, a miner's term for the striae, furrows, or polished surfaces covering the walls of fissures, and sometimes the surfaces of soft rock. They result from work was to be done

Witness Because Mr. Elmendorf, as I ing one against the other under great not uncommon. It may result from the friction of the mass of a vein moving in a fissure. Silekensides are not necessarily an indication of vein matter. In the oblowing example noted by James D. Dana, Winess—I had the greatest doubt about lowing example noted by James D. Dana, there being any vein whatever at D, or at not only the fissure walls but small bits ided: "In the Triass

dicate participation in the me the slickensides which cover Jas. D. Dana's Manual of Geo Having regard to the state 2059 of the learned chief justic bearing evidence, he was satisf, 5th level shows the continuous of importance that attention drawn to this point. If the le justice had conceived the id presence of silekensides neces cated vein matter (see p. 180 would no doubt regard this vein matter, and would have a son for disbelleving Sizer's tes Before us, Mr. Sizer gave h in a satisfactory way and the I have a rrived at with refere is that he is a close and accurs of facts and of good memory sirous of misleading the court Leaving that subject and tur. Fowler's testimony as to the w to D27, which he visited in Jula day or so before giving his a day or so before giving his the second trial, he says, 1927 to C you are crosscutting the sure. The new drift was on it side going in a wall or plane a this wall and the old drift the lar some six or seven feet, sep old drift from the new drift. wall of the black fissure." To wall he says passes across to new drifts and goes on to the Now I turn to Mr. Oscar W. point. It is another instance ingness to mislead the court found at pp. 1687 and 1688. eH was again crossexamined as to the new work C to D27.

of East Haven, Conn., on th

New Haven, the successive tranite sandstone have been

one another upward bedding, producing great slicke

faces; and these surfaces

very thin white coating,

to ground-up feldspar. In the

there are also ordinary faults ensided walls; and in many

rock is in fragments and all the

not on the right side of the c go in?" To which he replied: sure." I now give the question ide as you as you go in fi A: What kind of wall? Q: Well you have said the ne wal; I want to know wh

stated (1675 that there was on which was on the left hand s

that is on the south side; the he is asked: "Are you sure

On the left hand from Where we started at C

as well as the left? A: Yes, Q: And when you get a litt A we didnt follow that.

Q. When it disappears on w

A: The right hand side. Q: It goes out on the right A: Yes. Now, why did he deny that

Now, why did he deny that two wa'ls revealed by this wo nificance of his suppression of ence of this wall was shown tent when Fowler and Sizer evidence in July, 1906. Sizer's i Q: You heard Mr. White's which he said there was so had the appearance of a wal-out of this new drift to the A: That is the hanging wall

fissure.

In connection with this su
be convenient to give Mr. Ein dence, p. 1765. Q: Did you find another to the south in that drift? A: Going off to the south Q. Yes; north I mean

A: At what point? Q: At any point? A: No air; there is nothing wall crossing that drift to that is what you mean.

Q: You saw nothing that is the a wall as what you call

A: No sir; there is a blo A: No sir; there is a block in there, but nothing that wall going in that direction.
Oscar White saw the wall, istence, but afterwards ack Mr. Elmendorf, after dem culars, is able to say "the there that I consider a wall. The evidence given befor after the work was done by every reason for believing the every reason for believing

a wall. And it is by the ligh dence that I think it was s that Mr. Oscar White allow cut B to X to be blocked up eve of the trial in July, 190 There seems to me to be absolute cut off between t black fissure and all west ler's evidence is most clear

and I accept it.

To the chief justice at the 1905, he said: "There is abs nection between the plane the new drift has been run, to the east of the hanging black fissure." To the chief justice at the

in answer to the question: Q: What in your opinion clusive'y the theory that tinuous vein C? A: As far as I have see disconnection between wha point C and what lies east

reason of that limiting plan to continue across the o'd new drift ordered to be lordship. That, to my min disconnection between ever west of what we call the and everything to the eas He denies that there is a to be found west of C, alth that the new drift is run of sides is to be found there. He was then asked as to plied, p 1931. "I d'd not