Thursday, Oct. 28.

(Before WRIGHT and KENNEDY, JJ.)

STOKES (app.) v. ARKWRIGHT (resp.). *(a)* Metalliferous mines—Abandoned—Obligation to fence—Person interested in minerals—Derbyshire Mining Customs and Mineral Courts Act 1852 (15 & 16 Vict. c. clxiii.}—Metalliferous Mines Regulations Act 1872 (35 & 36 Vict. c. 77), s. 13.

A. was the owner of certain land in which there was a lead mine, containing, besides lead ore, calk and calcspar, minerals having a marketable value. By the mining customs of the county —as recognised by 15 & 16 Vict. c. clxiii. —any member of the public was entitled to work .this mine for the lead ore, subject to his paying to the Crown (as Duchy of Cornwall) a certain royalty on all lead ore brought to the surface. The lead ore could not be got without raising the calk and calcspar, which were intermixed with it and by the custom of the county, A, was entitled to such calk and calcspar on its being separated from, the lead ore. The mine having become abandoned, though both lead ore, and calk and calcspar were still in it, the question arose, who was liable to fence the mine under sect. 13 of the Metalliferous Mines Regulation Act 1872 (35 & 36 Vict. c. 77).

Held, that A. was liable to fence it, as he was a person interested in the minerals of the mine within, that section, inasmuch as (1) the calk and calcspar while in the mine were his property as part of his freehold; and (2) on being taken from the mine by one entitled to take them, they were his property by the custom of the county.

Case stated by the justices of Derbyshire, Wirksworth Division.

An information was laid by A. H. Stokes, Her Majesty's Inspector of Mines for the Midland District, against F. C. Arkwright, that he, on the 21st Oct. 1896 being the owner of or a person interested in the minerals of a certain mine to which the Metalliferous Mines Regulation Act 1872 (35 & 36 Vict. c. 77) applies, situate in a certain close or field called or known as the Potters Rough Field (which mine was then abandoned or the working thereof discontinued) the top of each of the shafts and each of the side entrances from the surface to such mine he, the said Frederick Charles Arkwright did fail to cause to be and to be kept securely fenced for the prevention of accidents contrary to sect. 13 of the said Act, the said shafts and side entrances to the said mine being situate within fifty yards of a public pathway leading from Cromford to Matlock Bath.

At the hearing the justices put the prosecutor to the election between proceeding against the defendant as owner of and as a person interested in the minerals. The prosecutor elected to proceed against him as a person interested in them.

The mine in respect of which the information was laid was situated within the Soke and Wapentake of Wirksworth, in the county of Derby, and was a mine from which lead and the other minerals hereinafter referred to were obtained. Lead mining in the district in question is subject to—and regulated by the Derbyshire Mining Customs and Mineral Courts Act 1852, and by the articles and customs established by that Act and embodied in the schedule thereto. The said Act (which is made a public Act by 52 & 53 Vict. c. 63, s. 9—the Interpretation Act 1889) was to be taken as part of the case.

The respondent Arkwright was the owner in fee simple of the soil in which the mine was situated.

The Crown as the owner of the Duchy of Lancaster, possessed under the Act above referred to, within the Soke or Wapentake of Wirksworth, which included the mine here in question, the sole right to mining dues or royalties in respect of all lead ore gotten from mines within the said Soke or Wapentake.

Prior to the year 1857 the mine had been worked subject to the articles and customs above referred to by a body of miners known as the Ball Eye Company, since which date the working of the mine as a lead mine had been discontinued.

In 1862 the mine was transferred in accordance with the provisions of such articles and customs to a man named Frances Owen Barton. Barton, however, never worked the mine, and died some time after its transfer to him.

The justices found as a fact that the mine was a mine which had been abandoned and the working discontinued prior to the passing of the Metalliferous Mines Regulation Act 1872.

Among the minerals contained in the mine other than lead were calcspar and calk, through which the vein of lead ran. Neither the lead nor the calc-spar or calk was, in fact, at the present time exhausted in the mine, and when the mine was inspected by the appellant Stokes prior to laying the information, lead, calcspar, and calk were found in the mine.

(a) Reported by J. Andrew Strahan, Esq., Barrister-at-Law.

Paragraph 8 of the case found that the respondent became entitled to the calcspar and calk after, but not until, it had been raised and brought to the surface by persons working the mine for lead ore. The market value of calcspar varies from 1*s*, to 1*l*. per ton, and that of calk is about 13*s*. per ton.

The respondent was entitled to no dues or royalties from lead ore gotten within or from the said mine, and could grant no mining rights in respect of the lead ore.

Under the Act of 1852 any person was at liberty to mine for lead ore within the soil of the respondent upon paying dues or royalties to the Crown as the owner of the mining rights, and duly observing the mining customs referred to in that Act and the schedule thereto.

A public path ran within fifty yards of two shafts and also of a side entrance from the surface to such mine, and such shafts and side entrance were totally unfenced and open at the date of the laying of the information,

It was contended before the justices, on behalf of the appellant, that, inasmuch as the respondent as the owner of the soil in which the mine was situated was entitled at common law to all minerals other than lead ore existing in such mine, and was entitled by the articles and customs referred to above to sell and dispose of all minerals other than lead, he was a "person interested in the minerals of the mine" within the meaning of sect. 13 of the Metalliferous Mines Regulation Act 1872, and liable as such, to a penalty for failure to cause the top of the shaft and side entrance from the surface to be kept securely fenced for the prevention of accidents. The justices held that he was not a "person interested in the minerals of the mine" within the meaning of such section, and dismissed the information accordingly.

The question for the opinion of the court was whether the justices were right in so holding on the facts above stated.

Paragraph 8 of the case as above set out was the interpretation placed upon Article 2 in the First Schedule of the Derbyshire Mining Customs and Mineral Courts Act 1852 (15 & 16 Viet. c. clxiii.), which deals with the rights of the landowners under the Derbyshire Mining Customs.

Article 2 runs as follows:—

In all cases the landowner shall have power to sell and dispose of the calk, feagh, spar, and other minerals and rubbish (except lead ore) and to remove the same from his land so soon as the lead ore has been extracted from it, when and as often as he thinks proper, and when not required for the use of the mine, but not so as to destroy or injure any mineral property, without the consent of the barmaster and any two members of the grand jury ; Provided always that the landowners shall have the power of removing such calk, feagh, spar, and other minerals and rubbish at the expiration of eighteen months after the same shall have been raised, notwithstanding all the lead ore may not have been extracted therefrom; provided also that the calk, feagh, spar, and other minerals and rubbish now raised and from which the lead ore has been extracted, shall not be removed -until after the expiration of eighteen months from the passing of this Act.

Sect. 13 of the Metalliferous Mines Regulation Act 1872 (35 & 36 Vict. c. 77):—

Where any mine to which this Act applies is abandoned or the working thereof discontinued, at whatever time such abandonment or discontinuance occurred the owner thereof and every other person interested in the minerals of the mine shall cause the top of the shaft and any side entrance from the surface to be and to be kept securely fenced for the prevention of accidents, provided that . . .

(2) Where such abandonment or discontinuance has occurred in the case of a mine before the passing of this Act, this section shall apply only to such shaft or side entrance of the mine as is situate within fifty yards of any highway, road, footpath or place.

The *Solicitor-General (H. Sutton* and *E. W. Garrett* with him) for the appellant.—This case is not concluded by the *Duke of Devonshire's* case. There the Duke was not merely the owner of the soil and all the other minerals except lead absolutely, but he was also owner of the lead, though by the customs of Derbyshire any miner was entitled to enter and take the lead provided he paid the Duke a royalty.

Duke of Devonshire v. *Stokes,* 76 *L. T. Rep. 424.* Here the right to the royalty is not in the land-owner but in the Duchy of Lancaster. But the Duchy is not an owner or interested in the mines. It has no right to the dead ore. It is only when it is brought to the surface that the Duchy becomes entitled to a royalty. By sect. 41 of the Metalliferous Mines Regulation Act the definition of "owner" is made to exclude expressly "a person or body_ corporate, who merely receives a royalty, rent, or fine," and it is not a person "interested in the minerals" any more than any member of the public is who begins mining the lead; and such a person has been held not to have any interest in the lead till he has got it, that is, has taken it out of the mine :

Duke of Devonshire v. *Stokes (ubi sup).* Accordingly, if the respondent is not liable as a "person interested in the minerals" to fence this mine, nobody is liable. We contend he is liable on two grounds. The case finds that this mine is not merely—though no doubt it is primarily—a lead mine. Among the lead are calk and calcspar. The schedule to the Derbyshire Mining Customs and Mineral Courts Act 1852 shows that in Derbyshire these are to be considered minerals, and the case finds that they have a marketable value. Now the respondent, as the owner in fee simple of the soil, is owner of these if not also of the lead ore at common law:

Duke of Devonshire v. *Stokes (ubi sup.).*

And in the second place, under article 2 of the same schedule, he has a special ownership given to him in them contingent on the right which the public have to work for lead. That section does not take away his common law rights as owner of the freehold in the calk and calcspar while they are part of the freehold; it merely gives him a statutory right to them after they are lawfully removed from the mine by other persons.

Dugdale, Q.C. *(Hextall* with him).—First, as to the point that the Duchy of Lancaster is not liable as being interested in the minerals. See *Evans* v. *Mostyn, 36 L. T. Rep. 856; 2 C. P. Div. 547.*

There Grove J. says: "A lien upon the minerals raised for the rent and royalties clearly gives them an interest therein.

They are to be paid before the minerals are carried away. . . . The power to distrain, and more particularly the lien for rent and royalties, gives them, I think, such an interest as is contemplated by the statute." The Duchy of Lancaster has such a lien on the lead ore here. We are in a different position. This is primarily a lead mine. If there are calk and calcspar in it at all they are only subsidiary to the lead ore, and they can be reached only by working the lead ore. I submit, then, that this is a lead mine, and that we are not interested in the minerals of the mine—that is, the lead. I go further, and say we are not interested in the calk and calcspar. As long as it is in the mine we have no interest in it; it is only when it is brought to the surface that we become entitled to it subject to certain limitations. That is the clear meaning of paragraph 8 of the case, and the point is dealt with by Grove, J. in *Evans* v. *Mostyn (ubi sup.)*.

The *Solicitor-General* in reply.

WRIGHT, J.—If paragraph 8 of the case bore the meaning which counsel for the respondent contended it does bear, there would be considerable doubt and difficulty as to how we should decide this case. But I do not think paragraph 8 does bear that meaning. It is quite plain here that the respondent is the sole owner of the soil in which the mine lies. No other person is interested in it or in the minerals in it except so far as the public has under the customs of the county the right to enter upon the soil for the purpose of mining for lead. That being so, it is said that this being a lead mine he is not owner of it nor interested in the minerals in it, and is under no obligation to fence it. Now this mine is no doubt a lead mine, and, in popular language, nothing but a lead mine. In other words it is a mine worked because of the lead in it. But in working it other minerals are obtained. It is perfectly clear that it contains calk and calcspar, and that these are minerals having a marketable value. It is urged, however, that these are not minerals of the mine within the provisions of sect. 13 of the Metalliferous Mines Regulation Act 1872. The words there are not interested in the *chief* minerals of the mine. That being so, I think calk and calcspar are here minerals of the mine, and anyone interested in them is interested in the minerals of the mine. Is the respondent interested in these? He is in two respects. In the first place, as owner of the soil and all it contains subject to the public right to search and mine for lead, he is interested in these minerals. In the second place he is interested contingently in them, inasmuch as by paragraph 8 of the case he is shown to be entitled to them after they have been brought to the surface by other persons' labour and separated from the lead ore. This is a statutory right in addition to his right as owner of the soil and not in lieu of it. These interests both ways are, in my opinion, sufficient to make him interested in the minerals of the mine within the intention of the Act.

KENNEDY, J.—I agree more particularly on the grounds stated by my brother Wright in the latter part of his judgment. I cannot see how it can be contended that calk and calcspar are not minerals of this mine, and as they are the property of the respondent, no matter who gets them from the mine, I cannot see how it can be contended that he is not interested in them.

Solicitor for the appellant, *Solicitor for the Treasury.*

Solicitor for the respondent, *F. J.* and *O. J. Braikenridge,* for *Small* and *Talbot,* Burton-on-Trent.