

[HOUSE OF LORDS.]

JOHN YOUNG AND COMPANY . . .	APPELLANTS ;	H. L. (Sc.)
AND		1893
THE BANKIER DISTILLERY COMPANY } AND OTHERS }	RESPONDENTS.	July 27.

*River—Right to have Purity of Water Preserved—Mine—Right to Pump
Water from Mine into River.*

Every riparian proprietor is entitled to have the natural water of the stream transmitted to him, without sensible alteration in its character or quality. Any invasion of this right causing actual damage or calculated to found a claim which may ripen into an adverse right entitles the party injured to the intervention of the Court.

The respondents were riparian proprietors on one side of a stream, called the Doups Burn. They and their predecessors had for sixty years used the water of the burn for the purpose of distillation, when the appellants, without any prescriptive right so to do, poured into the stream a large body of water which they pumped up from their mines, which water, if it had been left to the law of gravitation, would have never reached the stream. The respondents did not complain of the increased volume of the stream, but that the foreign water was of a character and quality different from that of the natural stream, and that it prejudicially affected the water of the stream for distillery purposes:—

Held, affirming the decision of the Court of Session (19 Court Sess. Cas. 4th Series (Rettie), 1083), that the respondents were entitled to have the appellants interdicted from discharging the mine water into the stream.

APPEAL from the First Division of the Court of Session, Scotland (1), in an action raised against John Young & Co., the appellants, by the Bankier Distillery Company and others, the respondents, in the Sheriff Court of Stirling, and appealed to the Court of Session by the appellants, when the order for proof was made.

The appellants are lessees of the Banknock Colliery, and pump water from their workings into a stream called the Doups Burn, stated to be the only natural outlet for carrying the water off. The respondents are the proprietors of the Bankier Distillery, and Mr. James Risk heritable proprietor of the mill and mill

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lands of Bankier, which are occupied by the distillery company, and which are situated on the Doups Burn lower down than the lands of Banknock. The feu under which the lands of Bankier are held excepts minerals, and the appellants are tenants of that reserved coal and also of the adjoining coal seams.

A tributary of the Doups Burn flows past the Banknock Colliery, and after the junction of these two treams the Doups Burn runs along the western side of the lands of Bankier, a portion of the water being used by the respondents for the purpose of distillation. The material question was, whether the appellants were entitled to discharge the pumped water from their coal workings into the Doups Burn, they not being able to establish a prescriptive right to alter the quality of the water.

The respondents stated that the burn had its sources on the higher grounds to the north-west, and in its natural state contained pure and soft water fit for primary purposes; and on account of its softness, particularly suitable for the distillation of whiskey. That it has been used by them and their predecessors for the purpose of distillation, ever since the mill was converted (now more than sixty years ago) into a distillery. That the appellants became tenants of Banknock Colliery in 1887; that since then they had discharged water from their coal workings into a cut leading into the burn at a point above the respondents' property; that this water, besides other imperfections, is very hard, and the natural water is polluted to such an extent as to render it quite unfit for use in the distillation of whiskey; that the respondents were willing for a time to tolerate this pollution for the sake of good neighbourhood, provided the appellants took proper means to prevent the pollution from getting into the water taken to their reservoir, by discharging the pit water lower down the stream than the respondents' intake; that this was done up to 1890, but afterwards, owing to the appellants' cut having fallen into disrepair, the polluted water obtained access to the brewing supply, and the respondents suffered loss; that the defect was repaired, but that owing to this loss the respondents have called upon the appellants to cease discharging water from their workings into the Doups Burn, and demanded damages for their loss; and that the appellants still continue to

discharge the water from their mine into the stream in question, and have moreover refused to make any compensation for the damage done. In these circumstances, the respondents, in August, 1891, instituted in the Sheriff's Court, an action to have the appellants interdicted from discharging the water from their coal workings into the Doups Burn, and for payment of £250 damages sustained. Before proof the action was appealed to the Court of Session, and proof was there allowed and taken by Lord M'Laren.

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The First Division, on the 20th of July, 1892, gave judgment (1) in favour of the respondents for £25 in the name of damages, and declared the appellants were not entitled to discharge into the Doups Burn water pumped from the coal workings to the injury of the pursuers. The pursuers, to have two-thirds of their costs. Their Lordships expressed their opinion, that in order that each owner might get as much out of the stream as should be consistent with the substantial interest of the other riparian proprietors, it was enough if the water was returned to the stream fit for the ordinary purposes of a running stream.

On appeal,

June 12, 13. *The Lord Advocate (J. B. Balfour, Q.C.)* (with him *Dickson*, of the Scotch Bar), for the appellants:—

As to the proceedings in the Court of Session, that Court gives its decision upon the facts if the appeal is brought from the Sheriff Court before proof; and an appeal lies from such finding upon the facts to this House. This is the case where, as here, important questions of law are involved. The judges of the Court of Session while holding that there had been no interference with the primary purposes of the water, found that a certain hardness had been communicated to it. By common law the appellants are entitled to pump out this water, although it varies the character of the neighbouring stream, if it does not, as has been found to be the case here, exclude the primary use of the stream. Such an interference with the quality of the

(1) 19 Court Sess. Cas. 4th Series (Rettie), 1083.

H. L. (Sc.) water as is here proved is not enough to compel the Courts to
 1893 wholly stop the working of the appellants' coal mine.
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 JOHN YOUNG It may be that the appellants cannot quite establish a pre-  
 & Co. scriptive right, but there were pumpings [intermittently from  
 v. 1828, with a break from 1849 to 1869; and the feu of the  
 BANKIER distillery contains very large reservations.  
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 COMPANY.

[LORD HERSCHELL, L.C., that point is not taken on the pleadings.]

They cited: *West Cumberland Iron and Steel Company v. Kenyon* (1); *Duke of Buccleuch v. Cowan* (2); *Rigby & Beardmore v. Downie* (3); *Campbell v. Bryson* (4); *Irving v. Leadhills Mining Company* (5); *Wilson v. Waddell* (6); *Baird v. Williamson* (7); *Pennington v. Brinsop Hall Coal Company* (8); *Clowes v. Staffordshire Potteries Waterworks Company* (9); *Pennsylvania Coal Company v. Sanderson* (10); *Erschine*, 2. 9. 2. and *Bainbridge on Mines*, 4 ed. 321.

Sir *Horace Davey*, Q.C. (with him, *H. Courthope Monroe*, and *John Wilson*, both of the Scotch Bar), for the respondents:—

The right of the riparian proprietor to the use of the water is absolute; and he is entitled to have it unimpaired in quality and quantity. One riparian proprietor finds that the water of the stream is soft and peculiarly adapted for distillation, and he accordingly places his distillery near the stream. Another riparian proprietor higher up the stream is not at liberty to pollute the water to such an extent as to render it unfit for that which nature has adapted it. And this, although the pollution in question does not cause the water to be unfit for drinking and washing, which may be called its primary use.

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|-------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------|
| (1) 6 Ch. D. 773; on appeal, 11 Ch. D. 782.           | (6) 2 App. Cas. 95; 4 Court Sess. Cas. 4th Series (Rettie), H. L. 29.                                                  |
| (2) 5 Court Sess. Cas. 3rd Series (Macpherson), 214.  | (7) 15 C. B. (N.S.) 376.                                                                                               |
| (3) 10 Court Sess. Cas. 3rd Series (Macpherson), 568. | (8) 5 Ch. Div. 769.                                                                                                    |
| (4) 3 Court Sess. Cas. 3rd Series (Macpherson), 254.  | (9) Law Rep. 8 Ch. 125.                                                                                                |
| (5) 18 Court Sess. Cas. 2nd Series (Dunlop), 833.     | (10) 56 American Repts. 89; also reported 86 Penn. Rep. 481; 94 Penn. Rep. 302; 102 Penn. Rep. 70; 113 Penn. Rep. 127. |

He commented on *Baird v. Williamson* (1); *Hodgkinson v. Ennor* (2); *Durham v. Hood* (3); *Blair v. Hunter, Finlay, & Co.* (4); *Irving v. Leadhills Mining Company* (5), and *Rylands v. Fletcher* (6).

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*The Lord Advocate*, replied.

Judgment after consideration.

LORD WATSON :—

My Lords, the facts of this case, which may be shortly stated, give rise to a question of general importance.

The respondents are owners under a feu right which excepts minerals of a parcel of land in the county of Stirling, bounded on the west by a small stream known as the Doups Burn, which has its course from north to south. A distillery was erected about sixty years ago by their predecessors in the feu, and has been in use ever since. The appellants are tenants of the reserved coal below the feu, and of a considerable tract of the adjoining coal seams. In the course of their mineral workings they raise water by pumping from a pit on the north, which they discharge into the Doups Burn before it reaches the respondents' land. So far the facts do not appear to have been disputed in the Court below.

Upon the evidence the learned judges of the First Division have unanimously held, and I have seen no reason to differ from their conclusions: (1.) That the water added by means of the appellants' pumping operations could never reach the burn either before or whilst it flows along the respondents' feu, if it were left to the law of gravitation. (2.) That the water of the burn is pure and soft in quality. (3.) That the added water, though pure, is hard in quality. (4.) That the addition is of volume sufficient to make the water of the burn, as it passes the respondents'

(1) 15 C. B. (N.S.) 376.

(2) 4 B. & S. 229, at p. 241.

(3) 9 Court Sess. Cas. 3rd Series  
(Macpherson), 474.

(4) 9 Court Sess. Cas. 3rd Series  
(Macpherson), at p. 207.

(5) 18 Court Sess. Cas. 2nd Series  
(Rettie), at p. 841.

(6) Law Rep. 3 H. L. 330.

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1893 produced is much less suitable for distilling than the naturally  
soft water of the burn.

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From the judgment delivered by the Lord President it appears that the respondents in maintaining their right to have the appellants interdicted from discharging the pit water into the Doups Burn presented their case in two different aspects. In the first place, they complained of the quality of the pit water on the same footing as if it had been water taken from the burn used by the appellants for some secondary purpose, and then returned to the stream in a pure but hard condition. In the second place, they complained that the pit water, which could not find its way to the burn in the natural course of events, had been introduced by artificial means to their prejudice.

Upon the first hypothesis their Lordships' decision was in favour of the appellants. They appear to have affirmed that it is the right of a riparian proprietor not only to use water for secondary purposes, but in so using it to alter its chemical properties to any extent, so long as he does not render it impure, in the sense of being unfit for primary uses. To that view of the law I am not prepared to assent. It was not necessary to decide the point; and its decision is unnecessary for the disposal of this appeal. But seeing that it was decided, I think it right to say that I am not satisfied that a riparian owner is entitled to use water for secondary purposes, except upon the condition that he shall return it to the stream practically undiminished in volume and with its natural qualities unimpaired. I am not satisfied that in returning the water in a state fit for primary uses he has any right to alter its natural character, and so make it unfit for uses to which it had been put, or might be put, by a riparian proprietor below.

Upon the second contention, their Lordships decided against the appellants, and granted interdict accordingly. The ratio of their decision is very clearly and forcibly stated by the Lord President, with whose opinion I entirely concur.

The right of the upper heritor to send down, and the corresponding obligation of the lower heritor to receive, natural water, whether flowing in a definite channel or not, and whether upon

or below the surface, are incidents of property arising from the relative levels of their respective lands and the strata below them. The lower heritor cannot object so long as the flow, whether above or below ground, is due to gravitation, unless it has been unduly and unreasonably increased by operations which are in æmulationem vicini. But he is under no legal obligation to receive foreign water brought to the surface of his neighbour's property by artificial means; and I can see no distinction in principle between water raised from a mine below the level of the surface of either property, which is the case here, and water artificially conveyed from a distant stream.

The law of Scotland upon this point is the same with that of England. In *Blair v. Hunter, Finlay & Co.* (1), Lord Gifford said: "Although there is a natural servitude on lower heritors to receive the natural or surface water from higher grounds, the flow must not be increased by artificial means, although reasonable drainage operations are permissible." The rule that the upper heritor cannot interfere with the gravitation of the water so as to make it more injurious to the land below is clearly stated by Erle, C.J., in *Baird v. Williamson* (2), which was rightly accepted by the First Division as establishing a principle conclusive of the present case. Against that principle the appellants were only able to cite one American case, which I do not notice further, because it was decided on the express ground that in so far as concerns the present question the law of Pennsylvania essentially differs from the law of England.

I therefore move that the interlocutor appealed from be affirmed, with costs.

LORD HERSCHELL, L.C. :—

My Lords, although I was not able to be present during the whole of the argument, I heard the case forcibly presented to your Lordships on behalf of the appellants, and I desire to add my complete concurrence with the views which have been expressed by my noble and learned friend who has just addressed your Lordships.

(1) 9 Court Sess. Cás. 3rd Series (Macpherson), at p. 207.

(2) 15 C. B. (N.S.) at p. 392.

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LORD MACNAGHTEN :—

My Lords, this case has been very fully and ably argued on the part of the appellants. It is said to be a case of general importance, and it certainly contains an element of novelty. But the question involved in it is not, I think, attended with any difficulty.

The law relating to the rights of riparian proprietors is well settled. A riparian proprietor is entitled to have the water of the stream, on the banks of which his property lies, flow down as it has been accustomed to flow down to his property, subject to the ordinary use of the flowing water by upper proprietors, and to such further use, if any, on their part in connection with their property as may be reasonable under the circumstances. Every riparian proprietor is thus entitled to the water of his stream, in its natural flow, without sensible diminution or increase and without sensible alteration in its character or quality. Any invasion of this right causing actual damage or calculated to found a claim which may ripen into an adverse right entitles the party injured to the intervention of the Court.

The respondents are riparian proprietors in regard to the Doups Burn. They carry on the business of distillers on their property by means of a distillery which has been in work there for the last sixty years. The appellants, without any prescriptive right so to do, are pouring into the burn a large body of water which they pump up from their mines. The respondents do not complain of the increased volume of the stream. The increase in itself is no disadvantage to them. But they say that the foreign water is of a quality different from that of the natural stream, and that it prejudicially affects the burn water for distilling purposes. The appellants insist that they are entitled to continue their operations, and therefore, although the respondents can, and do at present, protect themselves by taking their supply at a point higher up the stream, it is necessary to determine the question of right.

It is proved that the water of the burn flowing past the respondents' property is less suitable for distilling purposes



than it used to be. It used to be very soft water. It has been made very hard. The appellants have thus seriously impaired the manufacturing value of the burn. They have in fact destroyed its special value. Their answer is that the ingredient introduced is only water—and very good water too. It may be very good water for some purposes. But that is not much satisfaction to the respondents if it will not do for the one purpose for which they want to use it. It seems to me that the appellants have no more right to pour into the burn foreign water which has the effect of changing its natural quality than they would have to put into it some chemical substance which would produce a similar alteration.

Then the appellants urged that working coal was the natural and proper use of their mineral property. They said they could not continue to work unless they were permitted to discharge the water which accumulates in their mine—and they added that this water-course is the natural and proper channel to carry off the surplus water of the district. All that may be very true; but in this country at any rate it is not permissible in such a case for a man to use his own property so as to injure the property of his neighbour.

I have therefore no doubt that the appellants are not justified in pouring into the burn foreign water to the injury of the respondents.

Agreeing with the learned judges of the First Division in this, which is the ground of their decision, I am compelled to add that I am unable to concur in one proposition which their Lordships lay down as a proposition of law. Their Lordships hold that if the particular change in the quality of the Doups Burn of which the respondents complain had been effected, not by the introduction of foreign water, but by some manufacturing process employed by an upper proprietor entitled to the use of the flowing stream, the respondents would have been without remedy. It is not necessary to decide the point. But as at present advised, I am disposed to think that if the appellants had abstracted the natural water of the burn and returned it to the stream so altered in quality or character as to be materially less serviceable for the reasonable use of the respondents, though

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H. L. (Sc.) still fit for primary or ordinary uses, they would have been  
 1893 equally liable to an interdict, just as they would be liable if  
 JOHN YOUNG they were to return water unchanged in its chemical consti-  
 & Co. tution, but so changed in the temperature as to be injurious to a  
 v. lower riparian proprietor.  
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 COMPANY. I therefore concur in the motion which has been proposed.

LORD MORRIS, concurred.

LORD SHAND :—

My Lords, I concur in the opinions of my noble and learned friends. I fully share the doubts which have been expressed as to the right of any upper proprietor so to use the water of a stream as to affect injuriously its natural quality as restored to the bed to the prejudice of the lower riparian owner, even though the water restored should be fit for ordinary primary purposes. It is true that in the cases which have hitherto occurred, both in Scotland and in this country, where the complaint has been of pollution by an upper heritor, the claim made has been that the water shall be transmitted in a state of such purity as to be fit for the use of man and beast, and the other primary uses of running water, and, that where no prescriptive right to pollute has been proved, decree has been given to this effect. The object of the pursuers in these cases was served by having the pollution put down and their right to the transmission of water fit for primary purposes declared. These cases do not, however, establish the proposition that if a running stream should possess natural qualities which may be valuable to lower proprietors for some manufacture or otherwise, an upper proprietor using the water for his own purposes may deprive the water of these qualities, provided he restore it fit for ordinary primary uses. There seem to be strong reasons for holding that the lower owner is entitled to have the water transmitted to him with its natural qualities unimpaired, and that the principle of the cases which have given effect to the claim to have the water transmitted unimpaired in quantity and fit for primary purposes would support that view. But, at all events, I am at present

unable to assent to the view expressed by the learned judges in the Court of Session. H. L. (Sc.)

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I am, however, clearly of opinion that while a lower proprietor must submit to the flow of water coming down upon his lands by the natural force of gravitation, he is not bound to receive water brought up from a depth by artificial means, such as pumping. The appellants would, no doubt, be entitled in mining to excavate and remove the strata of minerals in the lands leased to them to any depth practicable to which they might choose to go. If in doing so in the ordinary course of working they should happen to tap springs or a water waste from which the water by gravitation rose to the surface and flowed down to a lower proprietor's land, this must be submitted to; but the mine owner is not entitled by pumping to increase this servitude or burden on one unwilling to submit to it by pumping up water which might never rise to the surface, or which might only do so more gradually and slowly and in much smaller volume. This is, I think, the rule or principle on which the Court decided the case of *Baird v. Williamson* (1), the decision in which has been approved of by your Lordships.

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I know of no distinction between the law of Scotland and the law of England in the class of questions relating to the common interest and rights of upper and lower proprietors on the banks of a running stream. The whole series of authorities in both countries seem to be entirely against the claim or pretension of the appellants for their own profit to pump up water from the depths of their pit and send it into the stream, greatly enlarging the quantity of water in the bed and impairing its quality. In these circumstances the defenders' counsel invited your Lordships to follow the decision in an American case decided in the Supreme Court of Pennsylvania—the case of *Pennsylvania Coal Company v. Sanderson* (2) decided in February, 1866. In that case undoubtedly the Court held that the owners of a mine were entitled to pump up water from the low strata of the mine, and to send it into an adjoining stream, although the quantity of the water was thereby increased and its quality so affected as to render it totally unfit for domestic purposes by the lower riparian

(1) 15 C. B. (N.S.) 376.

(2) 56 American Repts. 89.

H. L. (Sc.) owners. The case had been twice previously before the Court, and on both occasions the judgment was given against the mine-owner. On the third occasion, which occurred in consequence of a third trial to assess the damages, the jury found a very large sum due to the lower owner; but the verdict was quashed, and the whole case reconsidered with reference to the legal rights of the parties, and with the result I have stated. In a Court of seven judges there were three who dissented from the judgment, including the Chief Justice of the State. This circumstance and the grounds of the judgment seem to me to be sufficient to deprive the case of any real weight. These grounds appear to me from a perusal of the judgment to be fairly stated in the head-note as follows: "The use and enjoyment of a stream of pure water for domestic purposes by the lower riparian owners, who purchased their land, built their houses, and laid out their grounds before the opening of the coal mine, the acidulated waters from which rendered the stream entirely useless for domestic purposes, must ex necessitate give way to the interests of the community, in order to permit the development of the natural resources of the country, and to make possible the prosecution of the lawful business of mining coal." I shall only add, that while the enormous value of the mining interests in the district of Pennsylvania, from which the case came, and which is fully explained in the judgment, might have formed a good reason for appealing to the legislature to pass a special measure to restrain any proceeding by interdict at the instance of surface proprietors, and to confine them to a right to damages only for injury sustained, that value could in my opinion afford no good legal ground for allowing the proprietor of a mine so to work his minerals for his own profit as to destroy or greatly injure his neighbour's estate by subjecting it, by means of artificial operations, to the burden of receiving water enlarged in quantity and destroyed in quality without payment of compensation or damages for the injury done. The case has no application to the present because the decision was based on special circumstances as to the great relative value of the minerals as compared with the surface in the district; and because in any view the decision seems to me to have been making law rather than inter-

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preting the law, so as to give effect to sound, just, and well-recognised principles as to the common interest and rights of upper and lower proprietors in the running water of a stream.

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*Interlocutors appealed from affirmed; and appeal dismissed with costs.*

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Agents for appellants: *Grahames, Currey, & Spens, for Webster, Will, & Ritchie, S.S.C., Edinburgh.*

Agent for respondents: *Andrew Beveridge, for G. Monro Thomson, W.S., Edinburgh.*

[HOUSE OF LORDS.]

TRUSTEES OF THE CLYDE NAVIGATION . . . . . } APPELLANTS;

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AND

LORD BLANTYRE . . . . . RESPONDENT.

*River—Pier—Liability to Repair—Undertaking—Special Acts of the Clyde Navigation Trustees, Construction of.*

By the Clyde Navigation Consolidation Act, 1858 (21 & 22 Vict. c. cxlix.), s. 76, the undertaking of the Clyde Trustees shall in terms of the recited Acts (which include 3 & 4 Vict. c. cxviii.) consist of (inter alia), "The construction and completion of the several wet docks or tidal basins, quays, wharfs, ferry slips, approaches, embankments or river dykes, and all other works and improvements shewn and described on the several plans and sections referred to in the recited Acts, and thereby authorized to be made and maintained." By the 11th section of 3 & 4 Vict. c. cxviii. the trustees amongst other works were authorized to reconstruct the piers of the ancient ferry of Erskine. Sect. 50 enacted, that "the said quays should, at the expense of the said trustees, but with the consent of the proprietors, be repaired, lengthened, altered, or reconstructed," where such repair, lengthening, altering, or reconstruction should be rendered necessary by the works carried out by the trustees for deepening the river.

The trustees having enlarged and reconstructed the piers of Erskine ferry, one of the piers was damaged by a ship, and the proprietor brought an action for a declaration that the trustees were bound to repair the pier