Thursday, July 27.

Before the Lord Chancellor (Herschell), and Lords Watson, Ashbourne, Macnaghten, Morris, and Shand.)

YOUNG & COMPANY *v.* BANKIER DISTILLERY AND OTHERS.

(*Ante*, vol. xxix. p. 878, and 19 R. 1083.)

River—Pollution—Right to have Natural Purity of Water Preserved—Mine—Interdict against Pumping Water from Mine into River.

A mine-owner *held* (*aff.* decision of the First Division) not entitled to pump water from the mine into a river, although he may not unfit the river for primary purposes, but only for special purposes for which it is in its natural state peculiarly adapted.

This case is reported *ante*, vol. xxix. p. 878, and 19 R. 1083.

Young & Company appealed.

At delivering judgment—

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' land hard instead of soft; and (5) that the hard water so produced is much less suitable for distilling than the naturally soft water of the burn.

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, & Company*, 9 Sess. Ca., 3rd Series, 207, 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 Chief-Justice Erle in *Baird* v. *Williamson*, 15 C.B. (N.S.) 392, 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 interlocutors appealed from be affirmed with costs.

The LORD CHANCELLOR and LORD ASHBOURNE concurred.

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 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 itself is no disadvantage to them. But they say that the foreign water is of a character and 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 it is necessary to determine the question of right.

It is proved that the water of the burn in combination with the water which the appellants are pouring into it is less suitable for distillery 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 watercourse 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 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 respondent 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 still fit for primary or ordinary uses, they would have been equally liable to an interdict, just as they would be liable if they were to return water unchanged in its chemical constitution but so heated as to be injurious to a lower riparian proprietor.

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 effect injuriously the natural quality of the water restored to the bed to the prejudice of the lower riparian owner, even though the water restored should be fit for the 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 the 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 in a state 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.

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 them to any depth practicable to which they might choose to go. If in doing so in the ordinary course of their 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 mineowner 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*, the decision in which has been approved of by your Lordships.

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 *The Pennsylvania Coal Company* v. *Sanderson*, 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 lower 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 owners. The case had been twice previously before the Court, when judgment was given against the mineowner. 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 weight. These grounds appear to me from a perusal of the judgments 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 proceedings by interdict at the instance of surface proprietors, and to give them 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. 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 interpreting the law, and giving effect to sound and well-recognised principles as to the common interest and rights of upper and lower proprietors in the running water of a stream.

The House affirmed the decision of the First Division and dismissed the appeal with costs.

Counsel for the Appellants—Lord Advocate (Balfour, Q.C.)—C. S. Dickson. Agents—Grahames, Currey, & Spens, for Webster, Will, & Ritchie, S.S.C.

Counsel for the Respondents—Sir Horace Davey, Q.C.—Munro—Wilson. Agents—Andrew Beveridge, for G. Monro Thomson, W.S.

Thursday, August 3.

(Before the Lord Chancellor (Herschell), and Lords Watson and Macnaghten.)

BROOK *v.* KELLY.

(*Ante*, vol. xxx. p. 472, and 20 R. 470.)

Church, Voluntary—Code of Statutes, Construction of—Canon's Stipend.

By the code of statutes of a cathedral church in connection with the Episcopal Church of Scotland it was provided that the clergy of the church were to be appointed by the bishop, and were to consist of a provost and three or more canons residentiary, who were to hold their offices *ad vitam aut culpam*. The code also appointed a board of management, and provided that with them "will rest the due provision . . . for the fitting support of the provost and canons of the cathedral."

An action brought by one of the canons, who had been appointed by the bishop, but whose appointment had never been ratified by the board of management, against the board for £150 per annum, or such other sum as might be proved to be available for his fitting support, *held* (*aff.* the decision of the Second Division) to be irrelevant.

This case is reported *ante*, p. 472, and 20 R. 470.

The Rev. Alfred Brook appealed.

At delivering judgment—

LORD CHANCELLOR—My Lords, in this action the pursuer, who is the appellant at your Lordships' bar, and who is a canon residentiary of the Cathedral Church of St Andrew, Inverness, seeks to have it found and declared that the defenders, the respondents, who are the Board of Management of that Cathedral, "are bound to make due provision for the fitting support of the pursuer, as one of the canons of the Cathedral, out of the funds in their hands." The summons concludes for "payment to the pursuer of the sum of £150 sterling annually, or such other sum as may be shown in the course of the process to follow hereon to be available for the fitting support of the pursuer as a canon of the said Cathedral."

My Lords, on the 2nd of January 1892 the appellant was appointed to the office and dignity of a canon of the Cathedral Church by Bishop Kelly, and obtained no doubt under that appointment all the rights to which any canon of that Cathedral Church was as such entitled, whatever those might be. The Cathedral Church of Inverness and the canons residentiary are of course not bodies having any legal status. The rights of the officials of that church must be determined on the ordinary principles of law in the same way as of members of any other voluntary association. The appellant places his reliance upon the 13th statute of the code of statutes of the Cathedral Church of St Andrew, which appear to have been approved and accepted by the synod of the united dioceses, held in the Cathedral in October 1869, and consented to by the chapter, and ratified by the Bishops in November 1869. The 4th of those statutes provides that "the clergy of the Cathedral shall be appointed by the Bishop, and shall consist of a provost and of three or more canons residentiary, who, together with the treasurer, or other representative of the Board of Management, shall constitute the chapter. The clergy of the chapter shall hold their offices *ad vitam aut culpam*, and shall be subject to the canons of the Episcopal Church of Scotland." The 13th statute is in these terms—"The temporal affairs of the Cathedral shall be vested in a Board of Management, consisting of the Bishop and chapter, the several canonical lay representatives of the diocese, and the lay trustees of the Cathedral. To this Board is entrusted the management and administration of the funds of the Cathedral (subject to the disposition of any persons who may hereafter confer gifts and endowments for behoof of the Cathedral), the due ordering and arrangement of the congregation, and the maintenance of order during divine service, the appointment of the necessary officials, except as above provided for, and the care and preservation of the buildings. With the Board of Management will rest the due provision for the maintenance of divine service, and for the fitting support of the provost and canons of the Cathedral." The appellant places his reliance upon the concluding words which I have just read—"With the Board of Management will rest the due provision for the maintenance of divine service, and for the fitting support of the provost and canons of the Cathedral."

Now, my Lords, the appellant claimed that the Board of Management should allot to him an annual stipend out of the funds in their hands. They declined to do so; they denied that there was any obligation upon them in point of law to do so, and thereupon the present action was brought. The averments upon which the appellant relies are these—In condescendences 5 and 6, after alleging his intimation of a request to the Board of Management to be provided with a fitting support for him in terms of section 13, he avers that on the 4th of April he received an extract from the minutes of a meeting of the Board held on the 1st of April, which bore that they "declined to make any provision for the pursuer." The 6th condescendence adds the fact that two other canons are being paid respectively £200 and £150, and avers