is there anything in our law which should prevent a disposition of such a subject as a mill-lade, a permanent construction, an *opus manufactum*—it may be on another man's ground—becoming a subject of conveyance in property? I can see none. It may be a question what is the effect of that conveyance in some respects, but that it is a good conveyance of the *opus manufactum*, the mill-lade, I see no reason whatever to doubt. Whether that would convey the *solum* of the ground so taken possession of for the purpose of the construction of this mill-lade *a cœlo ad centrum* I do not know that it is necessary to inquire. If I had to express an opinion, I should be disposed to think that it did, but that is not necessary for the decision of this case. That it is a conveyance of the whole *opus manufactum* as well as the ground necessary for its support, and of the ground in all time coming, I see no reason to doubt, or to see where the difficulty lies in law. Therefore I say it humbly appears to me that this conveyance of the mill-lade to Mr Hilson's predecessor gives him an absolute right of property in the mill-lade. Well, then, if that be so, if this mill-lade and the walls and embankments which were constructed to contain the water, are his exclusive property, as I think they are, what right has anyone to interfere with them? If there were two *pro indiviso* proprietors, they might do as they liked with the walls and embankments; they were their property, just as much as an iron pipe carried through the property. Nobody had a right to pierce these walls as was proposed by Mr Scott, and to put sewage in it. Nobody has a right to put sewage in it, because that is an interference with private property, and is not a case of servitude. The water is no longer flowing in its natural channel. It may be, in a certain sense, flowing very much *in situ* where it was before, but it is no longer flowing in the natural channel. It is flowing in an artificial channel, in a channel which is the private property of other people, and the water itself has been appropriated and applied to the private uses and purposes of other people. It is in my view just as much, while it is so confined within the channel belonging to Mr Hilson, his property and applied to his uses as if it was flowing in an iron pipe which he had laid down upon the ground. Well, if that be so, what right has any third party to interfere by putting a quantity of sewage or other matter into it? That is an interference, it appears to me, with private exclusive property which ought not to be tolerated. Therefore in my view, in this case, no question of amount of injury caused by the proposed proceedings arises. It may very well be that the parties along whose lands this mill-lade flows may, by taking water from it for forty years, or by using it in other ways for forty years, have upon their part acquired a servitude over it for certain purposes. That may very well be, and it may be that the respondent here has a right to take water from it in certain ways for certain purposes. I do not know, because no such questions are raised in this case. These being my views of the case, I come to the conclusion that we must reverse the Lord Ordinary's interlocutor, and find that this mill-lade is the property of the suspender, and that the respondent has no right to interfere with it by putting any sewage into it.

LORD TRAYNER—I agree with your Lordship in thinking that the interlocutor reclaimed against should be recalled. By the decree of sale in 1845, and in that part of it which the Lord Ordinary calls the dispositive part, I find what is to all practical effects an unambiguous conveyance of the mill-lade in question. I think there is no room for discussion as to whether that means only the *opus manufactum* erected on the soil, or the soil separate from the erections thereon. I think it is what it is called, the mill-lade, and in that includes at least both the soil and erections so far as these are necessary and proper constituent parts of the thing itself. The subsequent part of the decree does not militate against this view. It contains a declaration that the owner of another mill shall have a joint *pro indiviso* right of property in the mill-lade. What right that declaration may give to the other mill-owner is a question with which the respondent has no concern. But one thing is clear from the declaration, namely, that whether joint or not, it is a right of property, not merely servitude, which the complainer has in the mill-lade. The complainer has been infeft in that right of property, with the exclusive use appropriate to a proprietor, for more than the prescriptive period, and I think he is entitled to interdict the respondent, whose proceedings, the legality of which he maintains, are an invasion of the complainer's rights.

The Court recalled the interlocutor reclaimed against, and granted interdict as craved.

Counsel for the Complainer—J. B. Balfour, Q.C.—George Watt. Agents—Winchester & Nicolson, S.S.C.

Counsel for the Respondent—W. Campbell—M'Lennan. Agent—J. Murray Lawson, S.S.C.

Tuesday, December 10.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

GOLDIE *v.* SCHOOL BOARD OF TORTHORWALD.

School—Schoolmaster—Retiring Allowance—Salary—School Fees—Parochial and Burghs Schoolmasters (Scotland) Act 1861 (24 *and* 25 *Vict. cap.* 107), *sec.* 19.

A schoolmaster appointed prior to the passing of the Education (Scotland) Act 1872 resigned his office and became entitled to a retiring allowance of two-

thirds of his salary, under section 19 of the Parochial and Burgh Schoolmasters (Scotland) Act 1861.

At the time of his resignation the schoolmaster's emoluments, exclusive of Government grant and house and garden, consisted of £52 paid by the School Board, probate grant in lieu of school fees (£23, 8s.), and interest on mortified money (£2, 6s. 8d.). After the passing of the Local Government Act 1889, the school fees up to the fifth standard were remitted, but no arrangement for compensation was entered into between the pursuer and defenders in terms of the 86th section of that Act.

Held that in fixing the amount of the retiring allowance, the salary proper (amounting to £52) was to be taken as the basis of calculation, exclusive of the school fees, or probate grant received in lieu of fees, and exclusive of the interest on the mortification.

By section 19 of the Parochial and Burgh Schoolmasters Act 1861 it is provided, *inter alia*, that where the resignation of a schoolmaster "shall not be occasioned by any fault on the part of the schoolmaster, the heritors shall grant a retiring allowance, the amount whereof shall not be less than two-third parts of the amount of the salary pertaining to said office at the date of such resignation thereof, and shall not exceed the gross amount of such salary, which retiring allowance shall be payable in all respects in like manner with the salary of the schoolmaster."

By section 55 of the Education (Scotland) Act 1872 it is enacted—"Subject to the provisions hereinafter contained regarding the removal of the teachers of public schools appointed previously to the passing of this Act, such teachers shall not, with respect to tenure of office, emoluments, and retiring allowance, as by law, contract, or usage, secured to or enjoyed by them at the passing of this Act, be prejudiced by any of the provisions herein contained."

By section 61 of the last-mentioned Act, it is provided that "a school board may permit any teacher of a public school to resign his office upon the condition of receiving a retiring allowance, and the said board may award or pay to such teacher out of the school fund such retiring allowance as they shall think fit: Provided always that nothing herein contained shall affect the right under the existing law to a retiring allowance of any teacher appointed under the recited Acts or any of them."

William Goldie, sometime parochial schoolmaster in the parish of Torthorwald, and lately teacher of Torthorwald Public School, raised an action against the School Board of Torthorwald, in which he prayed the Court (1) to find and declare that the defenders were bound to grant him a retiring allowance, the amount whereof should not be less than two-thirds of the emoluments or salary pertaining to the pursuer's office of schoolmaster at Torthorwald at the date of his resignation on 3rd September 1894; and (2) to ordain the defenders to make payment to the pursuer of £51, 16s. 5d. yearly, or such other sum as should be found to be the true amount of the retiring allowance, at two terms in the year—Whitsunday and Martinmas—beginning the first payment of £25, 18s. 2d. at Whitsunday 1895 for the half-year preceding, and £9, 16s., or such other sum as might be ascertained to be due by the defenders to the pursuer at Martinmas 1894, for the period from 4th September 1894, in respect of the retiring allowance, with interest at 5 per cent per annum from said term till payment.

The pursuer averred—"(Cond. 1) At a meeting of the minister and heritors of the parish of Torthorwald, held on the 18th day of January 1868, the pursuer was duly elected and appointed parochial schoolmaster of the parish of Torthorwald, with right to all the emoluments pertaining to the office. The emoluments or salary which, up till 20th June 1873, pertained to the said office amounted, exclusive of Government grant and house and garden, to £78, 15s., consisting of salary paid by heritors, £47, school fees £30, interest on mortified money, £1, 15s. (Cond. 2) In consequence of the passing of The Education (Scotland) Act 1872, the parochial school of the said parish became a public school under the Act, and was named by the School Board Torthorwald Public School. The pursuer continued to fulfil the duties of his office under the defenders till 3rd September 1894, when, in consequence of infirmity and old age, he resigned his office. (Cond. 3) By sections 19 and 20 of the Parochial and Burgh Schoolmasters (Scotland) Act 1861, and section 61 of the Education (Scotland) Act 1862, the pursuer is entitled, as a matter of right, to a retiring allowance during his lifetime of not less than two-thirds of the emoluments or salary pertaining to his office at the date of his resignation. At the date of the pursuer's resignation the emoluments or salary pertaining to the said office, exclusive of the Government grant and house and garden, was £77, 14s. 8d., consisting of £52 paid by the School Board, probate grant in lieu of school fees, £23, 8s., and interest on mortified money, £2, 6s. 8d. Two-thirds of this is £51, 16s. 5d. per annum, the sum sued for. (Cond. 4) In virtue of the rights conferred on him by statute, the pursuer has made a claim to a retiring allowance equal at least to two-third parts of his emoluments or salary as these stood at the date of his resignation. The defenders, however, dispute his right to such an allowance beyond the sum of £34, 13s. 4d., being two-thirds of the said sum of £52. The present action has therefore been rendered necessary."

The defenders averred that prior to 1873 "the schoolmaster's salary was £47 a year, at which sum it was fixed in pursuance of the Parochial and Burgh Schoolmasters (Scotland) Act 1861, which took the place of an earlier Act passed in 1803 (42 and 43 Geo. III., cap. 54), dealing with schoolmasters' salaries, which in turn amended an Act passed in 1696 (1 Will. III., cap. 26) dealing with the same

subject. By the whole of the said Acts the term salary is restricted to the termly payments therein provided for, and is quite distinct from the school fees, the right to which belongs to the schoolmaster at common law. The pursuer's salary, received from the minister and heritors, did not include either school fees or the interest of the mortified money. . . . Explained that, immediately after the Education (Scotland) Act 1872 came into operation, the School Board, at a meeting held on 20th June 1873, fixed the pursuer's salary at £52, and allowed him to receive in addition his own school fees, and what grant he might receive from Government. At first the fees were collected by the treasurer of the School Board, and paid over to the pursuer as they were received. But after 11th May 1875 the pursuer, in terms of a resolution of the Board to that effect, collected the fees himself. This he did up till the passing of the Local Government (Scotland) Act 1889, when, at a meeting held on 5th September 1889, the Board resolved that from and after 1st October thereafter all the fees in the schools under their management should be remitted, up to and including the fifth standard. No agreement for compensation for loss of fees was entered into in terms of the said Act between the pursuer and defenders; but the whole probate duty grant thereafter received by the defenders in respect of Torthorwald School in lieu of fees was handed over to the pursuer. The pursuer's salary, the probate grant, Government grant, and interest of mortified money were all paid to the pursuer by the defenders' treasurer at different times, and separate receipts were taken for each payment, stating the source from which the money was derived. . . . Neither the school fees nor interest of mortified money form part of the salary upon which, in terms of the Parochial Schoolmasters Act of 1861, the pursuer's right to a retiring allowance is based. By section 85 of the Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), under which Act the probate duty grant was substituted for school fees, the pursuer's right to compensation is limited to the loss sustained by him by the passing of the Act. The defenders have all along been willing to pay, and hereby judicially tender to the pursuer a retiring allowance of £34, 13s. 4d., being two-thirds of his salary, payable at the terms mentioned in the summons, together with £6, 13s. 4d., being two-thirds of the salary accruing between 3rd September and 11th November 1894, with bank interest on the said termly payments till paid."

On 26th October 1895 the Lord Ordinary (KYLLACHY) pronounced the following interlocutor:—"Finds that the retiring allowance payable to the pursuer amounts to £34, 13s. 4d., being two-thirds of his salary at the date of his resignation, and to that extent decerns and declares in terms of the conclusions of the summons: Further, decerns the defenders to make payment to the pursuer of the sum of £6, 13s. 4d. as tendered: *Quoad ultra*, assoilzies the defenders from the conclusions of the summons," &c.

Note.—"The pursuer here is the late schoolmaster of the parish of Torthorwald, and the question is as to the amount of his retiring allowance, he having lately resigned, and the School Board and he being at issue as to his rights under the Education Statutes.

"The pursuer is admittedly entitled to a retiring allowance. He is an old schoolmaster. That is to say, he was appointed in 1868 under the Act of 1861 and prior to the Act of 1872. His rights therefore depend on the former of these statutes—the Act of 1861—the Act of 1872 providing merely that nothing in that Act shall prejudice the rights of schoolmasters in office at the date of the Act in respect of a retiring allowance or otherwise. Now, what the Act of 1861 provides as to retiring allowance is this—[*His Lordship read section* 19 *quoted supra.*]

"It is not disputed that the pursuer is entitled to two-thirds of the salary which he enjoyed at the date of his resignation. That salary was, it appears, somewhat larger than it was at the passing of the Act of 1872; but the defenders do not dispute that the pursuer is entitled to the benefit of any increase of his 'salary' proper. The question is whether 'salary' in the sense of the Act of 1861 can be held to include school fees, and the interest of a certain mortification which has always been paid to the schoolmaster.

"Now, I should be quite disposed to take a liberal view as to what is covered by the word 'salary.' But throughout the whole legislation on the subject it is impossible, in my opinion, to doubt that a schoolmaster's salary is something different from and exclusive of the fees, to which formerly he had right at common law; and also different from and exclusive of emoluments coming to him from endowments or Parliamentary grants. The salary is and always has been an annual sum fixed and paid, formerly by the heritors, and now by the School Board; and while it may well include (as has been indeed held) sums so fixed and paid in commutation of fees or in commutation of endowments, it is not suggested that anything of that kind occurred here. The minutes of the defenders carefully distinguish between the pursuer's salary and the school fees and Government grant which he received in addition; and, indeed, I do not see how, if the school fees were held to be part of the pursuer's salary for the purposes of this question, the Government grant could be held to be in a different position.

"On the whole, therefore, it appears to me that the defenders' tender of a retiring allowance equal to two-thirds of the £52 a year paid to the pursuer at the date of the Act is an adequate tender, and I propose so to find, and to decern for that amount."

The pursuer reclaimed, and argued—By the Act of 1872 a new state of things was introduced; the salary paid by the School Board consisted in part of the school fees

or their equivalent — opinion of Lord Rutherfurd Clark in *Marshall* v. *School Board of Ardrossan*, March 1881, quoted in Sellars' Manual of the Education Acts, 9th edition, p. 272.

Argued for defenders—Prior to 1872 the retiring allowance consisted of two-thirds of the fixed salary paid by the heritors, which did not include school fees. The Act of 1872 made no change in regard to retiring allowances.

At advising—

LORD YOUNG—I think the judgment of the Lord Ordinary is right.

A schoolmaster appointed after the passing of the Act of 1872 has no right to a retiring allowance at all. The School Board is authorised to grant a retiring allowance, but that is entirely in their judgment and discretion. We have nothing to do with the retiring allowance; that is in the judgment of the Board.

The question here regards an old schoolmaster—one who was in office when the Act was passed. It was thought fit not to put teachers of this class in the same position with respect to the retiring allowance, and also with respect to removability—but here we are only concerned with the retiring allowance—as schoolmasters appointed after the passing of the Act. It was thought proper and just to reserve to them what they were entitled to at the passing of the Act, and that is done by the words in section 55, "that such teachers" (that is, teachers appointed before the passing of the Act) "shall not, with respect to tenure of office, emoluments, or retiring allowance as by law, contract, or usage secured to or enjoyed by them at the passing of this Act, be prejudiced by any of the provisions herein contained."

This action has reference to the retiring allowance to which this old schoolmaster was entitled at the date of the passing of the Act of 1872. Here there is no contract or usage on the subject, and therefore we are only concerned with the retiring allowance to which by law he was entitled at the passing of the Act. Now, the only retiring allowance to which by law he was entitled was a certain proportion of his salary, not less than two-thirds of and not exceeding the whole salary. Now, the Act of 1861, which contains the above provisions, specifies the amount of the salary which is to be paid to the schoolmaster. This salary was in addition to the fees which were at that time payable direct to the schoolmaster, unless there was a contract whereby the fees should be paid to the trustees of the school, viz., the minister and heritors who had charge of the school. But the provision as to the salary is limited to the salary and does not extend to fees at all.

So I think in the present case, dealing with an old schoolmaster whose rights are regulated by the Act of 1861, the retiring allowance is limited to salary, and does not extend to fees. It makes no difference that fees are in the present case paid not directly to the schoolmaster, but are paid to the Board, who give the schoolmaster such proportion of them as they see fit. They are fees all the same, and are not to be taken into account any more than fees prior to the passing of the Act. My opinion, therefore, is in accordance with that of the Lord Ordinary, and I think accordingly that this reclaiming-note should be dismissed and the judgment adhered to.

LORD JUSTICE-CLERK and LORD TRAYNER concurred.

LORD RUTHERFURD CLARK was absent.

The Court adhered.

Counsel for Pursuer—Deas. Agents—J. & A. Hastie, S.S.C.

Counsel for Defenders—Wilson. Agents—Constable & Johnstone, W.S.

Tuesday, December 10.

FIRST DIVISION.

[Sheriff of Inverness.

BUCHANAN & COMPANY *v.* MACDONALD.

Contract—Sale—Trade Discount—Invoice.

By the terms of a verbal contract for the supply of goods from time to time to a retail merchant, it was agreed that upon payment of any current account an abatement of 35 per cent. should be allowed from the invoice price, irrespective of the period of payment. With each consignment of goods an invoice was sent containing the printed condition that accounts not paid in full within three months were not subject to discount.

Held that the condition in the invoices did not affect the original agreement, and that the purchaser was entitled to 35 per cent. discount upon accounts not paid within three months.

On 7th January 1894 Messrs R. Buchanan & Company, brewers, Inverness, raised an action in the Inverness Sheriff Court against John Macdonald, Fort-William, for payment of £45, being the amount of an account rendered by the pursuers for beer supplied by them to the defender. The beer had been supplied at various dates from May 2nd to July 21st 1894. On 1st August the pursuers wrote to the defender in the following terms:—"Dear Sir,—Considering the heavy loss we suffered from you last year, we beg to enclose statement of account, and write to say that we must have settlement in full before sending any more beer, the nett amount of the account, if paid now, being £30." On the 14th January 1895, two days before the date of the citation under the summons, the defender sent to the pursuers a cheque for £29, 5s., being the amount of the account less 35 per cent. discount, which the defender averred to be the usual trade discount allowed to him during his course of dealing with the pursuers.