from the conclusions of the petition: Find the pursuer, as executor of said David Dinwoodie, entitled to £50, with the interest due thereon, and find the defender, as executor of Mrs Mary Dinwoodie or Carruthers, entitled to the balance of £350 of said deposit-receipt, with the interest due thereon: Ordain the Clerk of the Sheriff Court to make payment to them accordingly," &c.

Counsel for the Pursuer—Dickson—Clyde. Agents—Beveridge, Sutherland, & Smith, S.S.C.

Counsel for the Defender—Comrie Thomson—Wilson. Agents—Buchan & Buchan, S.S.C.

Saturday, December 7.

SECOND DIVISION.

[Lord Low, Ordinary.

(With Lord Adam, and without Lords Young and Rutherfurd Clark).

HILSON *v.* SCOTT.

Property—Mill-Lade—Title—Construction—Property or Servitude.

A decree of ranking and sale of a mill and mill machinery conveyed, *inter alia*, "and particularly the mill-lead and that portion of ground or embankment lying to the west of the said mill and between the mill-lead and the water of Jed, and extending upwards from said mill to and including the waste-water sluice on the side of the lead between the said mill and the Abbey Mill."

Held (*rev.* the Lord Ordinary) (1) that these terms imported a conveyance of the whole mill-lade, and not merely of the mill-lade extending up to and including the sluice, and (2) that such a conveyance conferred not merely a servitude of aqueduct in the water and a right of property in *opus manufactum*, but a right of property in the lade and in the *solum* of the lade so far as necessary to its support.

Property—Mill-Lade—Prescription on Title a non domino—Exclusive Possession.

The owner of a mill maintained and used the mill-lade for the prescriptive period for the purposes of his mill. His title to part of the mill-lade rested upon a conveyance *a non domino*, that part of the lade being constructed on the property of riparian proprietors. These proprietors raised no opposition to the construction of the lade, and continued to use the stream during the period of prescription to the extent of drawing water from the lade, for which purpose steps were constructed down to it.

Held that the possession by the mill-owner was sufficiently exclusive to confer a title by prescription as against the original proprietors, and that he was entitled to interdict them discharging sewage into the lade.

In 1835 the dam-head or cauld and intake of a mill-lade formed in the river Jed were destroyed by a flood. The magistrates of Jedburgh, who were the owners of the mills supplied by the lade, rebuilt the cauld further up the stream, and constructed a new mill-lade on the northern half of the bed of the river. This mill-lade passed *ex adverso* of lands then belonging to Thomas Miller, which were described as bounded on the south by the river Jed. These lands, therefore, *prima facie* extended to the *meduim filum* of the river, and the magistrates in constructing the mill-lade on the northern half of the bed of the river, were constructing it on ground belonging to Thomas Miller. He, however, raised no objection to the construction of the mill-lade.

The mill-lade supplied two mills, the upper of which was known as the Abbey Mill, and the lower as the Waulk Mill. The latter is now known as the Canongate Mill. The magistrates of Jedburgh remained in possession of the said mills and mill-lade until 1845. In 1845 the magistrates, under the powers conferred by a private Act of Parliament, sold, under a ranking and sale, the upper or Abbey Mill to Mr Robert Laing, town clerk of Jedburgh, and the lower or Waulk Mill to Mr George Hilson, manufacturer in Jedburgh. The decree of sale, dated 1st July 1845, describes the subjects sold and adjudged to Mr Laing as follows:—"All and whole that corn mill of Jedburgh commonly called the Abbey Mill, with the whole machinery thereof, and the waterfall, dam-head, sluices, and other works thereof, and all and sundry multures, sequels, mill lands, particularly that portion of the ground or embankment lying to the east of the said mill, and between the mill-lead and the water of Jed, and extending downwards from the said mill to the waste-water sluice in the side of the lead between the said mill and the Waulk Mill, and the houses, biggings, yards, and the whole parts and pertinents thereof, all as presently occupied by William Dodd, the tenant therein." By the same decree the subjects sold to Mr Hilson are thus described:—"All and whole the mill commonly called the Waulk Mill of Jedburgh, with the machinery house and all machinery thereof, and the waterfall, dam-head, and sluices, and other works thereto belonging, and mill lands, and particularly the mill-lead, and that portion of ground or embankment lying to the west of the said mill, and between the mill-lead and the water of Jed, and extending upwards from said mill to and including the waste-water sluice in the side of the lead between the said mill and the Abbey Mill, and the houses, biggings, yards, and whole parts and pertinents pertaining thereto, all as presently occupied by Messrs James and George Hilson, the tenants thereof." The decree subsequently contained the following findings:—"Find and declare that the said Robert Laing and George Hilson, purchasers of the Abbey Mill and Waulk Mill, being lots first and second, have a joint *pro indiviso* right of property in the waterfall, dam-head, or

cauld, sluices, and mill-lead thereof, subject always to the conditions as to keeping up, maintaining, and upholding the same and cleaning the mill-lead, which apply and are stipulated for during the currency of Messrs Hilson's lease of the Waulk Mill; and after the expiry of the said lease, then the said purchaser of said mills shall be bound to keep up, maintain, and uphold the said dam-head or cauld and sluice, and clean out the said mill-lead down to the said waste-water sluice between the said mills at their mutual expense."

George Hilson conveyed the subjects thus purchased to himself and his brother James Hilson, equally between them, by disposition dated 9th December 1845, and the brothers then obtained a charter of sale and confirmation from James Grieve, the superior of the mill, on which they were infeft conform to instrument of sasine recorded in the General Register of Sasines on 5th May 1846. The said charter of sale and confirmation contained a description of the subjects included in the conveyance of the Waulk Mill in the same terms as those used in the decree of sale above quoted. It also contained the following confirmation clause:—"And further, I have ratified and approved, and for me, my heirs and successors, perpetually confirmed, likeas I hereby ratify, approve, and for me, my heirs and successors, perpetually confirm to and in favour of the said James Hilson and George Hilson and their foresaids a disposition of, *inter alia*, the subjects above disponed, dated the 4th day of April 1818, and registered in the Sheriff Court Books of Roxburghshire the 13th day of February 1819, made and granted by Alexander Thomson, stationer in Jedburgh, to and in favour of John Jackson, Esquire, Provost, Thomas Caverhill, George Hilson, William Young, and John Rutherford, Bailies, William Hope, Dean of Guild, and John Robinson, Treasurer, all of the burgh of Jedburgh, for themselves and as representing the town council and community of the said burgh, and to their successors in office, community of the said burgh, and their assignees, containing obligation to infeft by two several infeftments and manners of holding *a me vel de me*, with procuratory of resignation and precept of sasine, also the instrument of sasine following on the said disposition in favour of the disponees therein above mentioned, dated the 13th, and registered in the Particular Register of Sasines, Reversions, &c., at Kelso the 20th days of April 1818, or of whatever other dates, tenor, or contents the same may be, and that in the whole heads, articles, clauses, tenor, and contents thereof, but that allenarly in so far as regards or can be extended to the subjects before disponed." The description in the disposition referred to, which constituted the title of the Town Council of Jedburgh at the date of the decree of sale in favour of George Hilson, was—"All and whole these three corn mills of Jedburgh, commonly called the Abbey Mill, Town Mill, and East Mill or Flour Mill, with the Waulk Mill of Jedburgh, and all and sundry multures, sequels, mill lands, houses, biggings, yards, and whole parts and pertinents thereof respectively." George and James Hilson and their successors have since carried on business in the Waulk or Canongate Mill, and have used the mill-lade for the purposes of their mill. The subjects, by successive transmissions, are now the property of Oliver Hilson, manufacturer, Jedburgh, the complainer in the present action.

George Scott, merchant, Castlegate, Jedburgh, is now the proprietor of the lands *ex adverso* of the mill-lade, which belonged, in 1835, to Thomas Miller. The subjects conveyed to the said Thomas Miller were held by burgage tenure, and were described in the instrument of sasine in his favour dated 14th October 1825, as bounded, *inter alia*, by "the water of Jed on the south parts." He proposed to build a house on this property, and to construct drains discharging into the mill-lade above Hilson's mill. Hilson in consequence brought the present action of interdict against him.

The complainer pleaded—"(1) The complainer being proprietor or joint-proprietor of the mill-lade referred to, as condescended on, and the respondent having no right or interest therein, the complainer is entitled to interdict as craved. (2) The complainer and his predecessors in the title having used the water of the said lade for the purposes of their manufactures for over forty years, for which the said water has all along been fit, and as the discharge of sewerage, &c., by the respondent into the lade would make the water unfit for these purposes, the complainer is entitled to interdict with expenses."

The respondent after narrating the history of the construction of the new dam-head and lade in 1835, stated—"This extension was formed by encroaching on the property of the respondent's predecessors in title and of the conterminous proprietors, cutting a channel through said properties, and forming an embankment between said channel and the course to which the river was subsequently confined. The embankment was erected in that half of the original river bed lying between the lands of the respondent and his conterminous proprietors and the *medium filum* of the river. The said proceedings were taken without any sanction or authority being sought or obtained by the magistrates and town council from the respondent's authors, or from any of the said proprietors, and constituted an unwarranted interference with their proprietorial rights. By the said proceedings the respondent's authors became the proprietors of said mill-lade, *solum* thereof, and embankment separating the mill-lade fram the river bed, all so far as *ex adverso* of their said lands respectively, subject to a servitude in favour of the magistrates and council of permitting the water to flow through the said lade as if in a natural channel passing their lands."

On 28th June the Lord Ordinary (Low) pronounced the following interlocutor:—"Finds (1) that by virtue of the titles produced and the possession admittedly following thereon, the complainers have, along

with the proprietors of the Abbey Mill of Jedburgh, a joint *pro indiviso* right of property in the mill-lade set forth and described in the prayer of the note of suspension and interdict *ex adverso* of the respondent's property; (2) that it is admitted that the respondent has constructed or laid a drain or pipe for the purpose of discharging or adapted for the purpose of discharge of sewage from a house or houses recently erected by him on his property into the said mill-lade; (3) that the respondent is not entitled to discharge sewage or other matter into the said lade by means of pipes or drains: Therefore to the above extent and effect sustains the complainer's pleas-in-law, suspends the proceedings complained of, and interdicts, prohibits, and discharges the respondent and all others acting by his authority from sending or discharging into the said mill-lade sewerage or any other impure stuff or matter of any kind, or impure liquid or water, by means of pipes or drains," &c.

Against this judgment the respondent reclaimed, and argued—(1) The decree of sale relied on by the complainer did not convey to his author the mill-lade in question *ex adverso* of the respondent's property. (2) By the respondent's titles he had a right to the river Jed *usque ad medium filum*. (3) The Lord Ordinary had made an obvious error in holding that the respondent admitted that the possession which the complainer had enjoyed following upon a title *a non domino* was adequate to exclude the respondent's prior right. The respondent distinctly denied such possession, and possession in order to fortify a title *a non domino* required to be exclusive and adverse—Act 1617, c. 12; *Campbell* v. *Duke of Argyle*, May 19, 1836, 14 S. 798; *Christina* v. *Hope*, November 18, 1847, 10 D. 111; *Earl of Fife* v. *Sir John Sinclair*, November 19, 1849, 12 D. 223. The respondent further in the course of the argument offered to amend his averment that the extension of the lade "was formed by encroaching on the property of the respondent's predecessors in title, cutting a channel through said properties, and forming an embankment between said channel and the course to which the river was subsequently confined" by averring that the channel had been cut outside the river bed.

The Court thereupon, without pronouncing any opinion, recalled the Lord Lord Ordinary's interlocutor, allowed the respondent to amend, and remitted back to the Lord Ordinary to allow parties a proof.

A proof was accordingly allowed by the Lord Ordinary on 27th November 1894, and thereafter on 4th December 1894 the complainer lodged a minute of admission in the following terms:—"WATT, for the complainer, stated that for the purposes of the present note of suspension and interdict he was prepared to admit, and hereby admitted, that the discharge of sewage from the respondent's recently erected dwelling-house and offices into the said mill-lade would not render the water of the said lade unfit for the purposes for which the complainer and his predecessors have used it for the last forty years or prejudice his manufacturing processes."

The proof was taken on the 4th of June, and thereafter on 20th July the Lord Ordinary pronounced an interlocutor refusing the prayer of the note of suspension and interdict.

Note.—"I have again carefully considered this case in the light of the evidence and the full argument which was addressed to me, and I shall now state the conclusion at which I have arrived.

"A great part of the evidence was directed to the question whether the mill-lade is situated upon what was formerly the bed of the stream, or was formed by cutting into the bank.

"I am of opinion that the most reliable evidence is that it was formed wholly in the bed of the stream. Prior to 1835 the bed of the stream, where the upper part of the lade is now situated, was a mill-dam. The bank upon the side upon which the respondent's property is situated rises abruptly from the river bed, and there was a rough retaining wall built along the foot of the bank. In ordinary states of the stream the water of the mill-dam rose some distance up the retaining wall. When the cauld was swept away in 1835, and a new cauld built higher up the stream, the retaining wall was utilised as one of the sides of the new part of the mill-lade, and an embankment with another retaining wall was constructed further into the bed of the stream. These facts may account for there having apparently been no opposition to the construction of the mill-lade at the time, because it made no practical difference to the proprietors upon that side of the stream. The only difference was that instead of having the water of a mill-dam flowing against their bank they had the water of a mill-lade.

"I am therefore of opinion that the case must be dealt with upon the footing that the mill-lade formed in the bed of a stream was substituted for a mill-dam which formerly occupied the bed of the stream.

"Turning now to the titles. The earliest title produced by the respondent is an instrument of sasine, dated in 1825, in favour of Thomas Miller, in which the lands are described as bounded on the south by the 'water of Jed.' It appears from the instrument that the lands were held of the Crown in free burgage. The lands being bounded by the water of Jed, presumably extended to the *medium filum* of the stream. That presumption was in no way lessened by the existence of the mill-dam, and it is plain that the right of the respondent's predecessor in the *alveus* could not be taken from him by the substitution of a mill-lade for a mill dam.

"The complainer's authors first acquired the Waulk Mill (now called the Canongate Mill) under a decree of sale pronounced in the Court of Session in 1845. In that year an action of sale and ranking of various properties belonging to the burgh of Jedburgh was brought, and among them were four mills. There were, first, the

Abbey Mill and the complainer's mill, which were situated upon the mill-lade in question, and then there were two mills, called respectively the Town Mill and the East Mill, situated upon another lade further down the stream.

"The Abbey Mill was sold and adjudged to Robert Laing, and the description in the decree of the subjects so sold and adjudged was as follows—[*His Lordship read the description.*]

"The Waulk Mill was purchased by George Hilson, the complainer's author, and the subjects are described thus—[*His Lordship read the description.*]

"It is to be observed that in these descriptions there is no mention of the part of the mill-lade now in question—that is to say, the portion above the Abbey Mill—the only part of the mill-lade sold and adjudged being that lying between the Abbey Mill and the Waulk Mill.

"The Town Mill and the East Mill were both sold and adjudged, 'with the waterfall, damhead, sluices, and other works thereof . . . and the whole parts and pertinents,' without any special mention of the lade upon which they are situated.

"The decree, after decrees of sale applicable to each of the properties which were sold, contained various declaratory findings of the rights of the various purchasers in regard to the lades and damheads, and it is among these that the declaration in regard to the right of property in the part of the lade in dispute, upon which the complainer's case is rested, is to be found.

"It is first declared that Laing, the purchaser of the Abbey Mill, is to have right to remove certain machinery which had been used to drive water into the town reservoirs. There is then the declaration upon which the complainer relies. It is in the following terms—[*His Lordship read the declaration.*]

"I think that it is clear that the part of the mill-lade there referred to includes that in dispute, namely, between the cauld and the Abbey Mill, because Laing and Hilson are to maintain the cauld and to clean out the 'said mill-lead down to the said waste-water sluice,' which is below the Abbey Mill.

"It is then declared in the decree that Laing shall not, by lowering the sluices, obstruct the flow of water down to the Waulk Mill, and that Hilson shall not, by raising the backfall, interfere with the free run of the water from the Abbey Mill.

"There are then declarations in regard to the East Mill and the Town Mill similar to these to which I have referred to in regard to the Abbey Mill and the Waulk Mill. . . .

"I have referred to the decree at length, because I think that it is of importance to observe that the declaration in regard to the right of property in the upper part of the mill-lade is not introduced in what I may call the dispositive part of the decree, but in the part which deals with the rights, *inter se*, of the purchasers of the properties situated upon, and more or less interested in, one or other of the mill-lades.

"Passing now to the way in which George Hilson made up his title under the decree of sale. He first disponed the subjects to himself and his brother James upon the narrative that he had made the purchase for his brother as well as for himself; and then the brothers obtained a charter of confirmation and sale from James Grieve, the superior of the lands. George and James Hilson took sasine upon that charter, which forms the first writ in the prescriptive progress upon which the complainer founds.

"The charter follows precisely the terms of the decree. The superior dispones the mill with the machinery, and so forth, in the words used in what I have called the dispositive part of the decree; and then it is declared that 'these presents are granted under the whole declarations . . . referred to in the decree of sale,' and then the declarations—including that in regard to the joint right of property in the mill-lade—are repeated.

"Now, I have already said that the respondent's property was held burgage; and that also seems to be the tenure by which nearly all the properties upon the north side of the stream above the Abbey Mill were held. The Abbey Mill and the Waulk Mill, on the other hand, were held by the magistrates in feu of Grieve as subject-superior. The magistrates, therefore, had no title to sell, and Grieve had no title to dispone, the mill-lade above the Abbey Mill, so far as the ground upon which it was constructed was concerned. Of course, if the charter unequivocally dispones the *solum* upon which the mill-lade is constructed, and possession has been had upon it for forty years, the complainer's right cannot be affected by showing that it was originally granted *a non domino*. But if the charter is open to construction, then I think that it is competent to inquire into the state of the title, and the circumstances when it was granted.

"Here I think that the charter is open to construction. The upper part of the mill-lade is not part of the subjects disponed, but is only mentioned in the declarations and restrictions subject to which the disposition is granted. In other words, the disponees are declared to have a joint right of property in a part of the lade which is not disponed to them.

"Further, from the nature of the subject, the right of property which is declared is not necessarily a right of property in the *solum*. A mill-lade involves an artificially constructed channel, and I do not think that the declaration in the charter necessarily refers to more than the artificial channel. If there was a servitude of mill-lade over lands other than those disponed, of which the two mills were the dominant tenement, it is quite intelligible that the respective owners of the mills should be declared to have, as between themselves, a joint right of property in the mill-lade, that is, in the artificial channel by means of which the water was conveyed to their mills. And so to construe the declaration is the only construction of the charter which can be at all reconciled with the circumstances which existed at the time.

"I do not say that the magistrates had a valid right to a servitude of mill-lade, because they were not entitled at their own hand to substitute a mill-lade for a mill-dam. But they had in fact done so, and for ten years the mill-lade had been in use. It is, therefore, intelligible that they should have exposed the mills for sale upon the footing that the servitude of mill-lade would pass with them, and also such a right as the owner of the dominant tenement in a servitude of the kind has in *opera manufacta* by which the servitude is made available.

"Reading the charter, therefore, in the light of the circumstances under which it was granted, I am of opinion that it was not intended to convey, and does not convey, the lands upon which the lade is constructed.

"The next question is, What has been the possession which the complainer and his authors have had upon the charter? They have had the use of the water coming down the mill-lade for the purposes of their mill, and they have cleaned out the lade and kept it free of obstructions. No other or further acts of possession have been proved. Now, there is nothing in that possession going beyond what would be naturally referable to a right of servitude, and I do not think that the possession has been exclusive of the right of the respondent and other riparian proprietors, whose titles, *ex facie*, carry them *ad medium filum*. Further, it is proved that the proprietors along the side of the lade had steps down to it which they used for the purpose of drawing water. That is what one would have expected to find if the mill-lade was a servitude, but not if it was altogether outside the properties adjoining it.

"I am, therefore, of opinion that the complainer is not proprietor of the *solum* upon which the mill-lade is constructed, and that the lade is only a servitude with which the lands through which it passes are burdened.

"The remaining question is, Whether, in these circumstances, the complainer has a right to object to the drain which the respondent has made from the new house which he has built?

"Now, it is proved that the drain does not cut through, or in any way interfere with, the sides of the lade, but is entirely within the respondent's lands. It is true that any sewage which is discharged from the drain will find its way, by the natural slope of the ground, into the lade; and there is no doubt that the respondent had that in view when he constructed the drain. But the complainer does not now say that he will be injured thereby. He has led no evidence in support of his averments of pollution, but stands entirely upon his claim of property, which, for the reasons which I have stated, I am of opinion is not well founded.

"In these circumstances, I am of opinion that the complainer is not entitled to the interdict which he asks."

The complainer reclaimed, and argued —(1) The Lord Ordinary was wrong in holding that the decree of sale did not convey to the complainer the mill-lade *ex adverso* of the respondent's lands. It did so in express terms, vesting the lade either in the complainer exclusively, or at least *pro indiviso* with the purchaser of the Abbey Mill. (2) Admitting the respondent's property was held burgage, and that the magistrates had no title to sell the lade in question, this interposed no obstacle to the complainer's acquiring an exclusive right by title recorded in the feudal register and prescriptive possession following thereon. (3) A river boundary raised only a presumption that the proprietor's right extended to the *medium filum* of the stream, and the silence of the respondent's authors in 1835, when the lade was extended, at least suggested that they did not claim any right in the stream. (4) The complainer had enjoyed all the possession of which the subject was capable, and the slight use made of the water by the riparian proprietors was inconsistent with ownership, and instructed only tolerance, or at best servitude in their favour. (6) In any view, the complainer had a right of servitude in the mill-lade, and this gave him a right in the *opus manufactum*, consisting of the retaining walls and *solum* of the lade. The drain-pipe which the respondent proposed to insert penetrated through the retaining wall of the lade, and therefore the complainer was entitled to interdict—*Scottish Highland Distillery Company* v. *Reid*, July 7, 1877, 4 R. 1118. Notwithstanding the minute of 4th December 1894, the complainer, as proprietor, was entitled to resist any introduction of sewage into the lade, although the quantity taken by itself was insufficient to cause material increase of pollution in the lade.

Argued for the respondent — The Lord Ordinary's judgment was sound. The titles of the respondent and of the adjoining proprietors made it clear that along the extended part of the lade the subjects had been held burgage, and had been bounded by the water of the Jed. Such a boundary raised a strong presumption that the grant extended to the *medium filum*, and no attempt had been made to rebut this presumption—*Bicket* v. *Morris*, July 13, 1846, 4 Macph. (H.L.) 44; *M'Intyre's Trustees* v. *Magistrates of Cupar-Fife*, May 24, 1867, 5 Macph. 780; *Gibson* v. *Bonnington Sugar Refinery Company*, January 20, 1869, 7 Macph. 394. The riparian proprietors had had no interest to object to the extension of the lade in 1835, because the stream flowing through the lade was more useful to them than the former river bed. The effect of the extension was to constitute in the mill-owners a servitude of aqueduct, precisely corresponding to the right which an ordinary inferior heritor has against an ordinary superior heritor, to insist that the water in a natural stream flowing through their lands should be transmitted undiminished in quantity and quality. The decree of sale of 1845 was clearly *a non domino* so far as it purported to confer any right of property in the mill-lade *ex adverso* of the respondent's lands. The Lord Ordinary

was therefore justified in subjecting the decree of sale and the charter following thereon to a strict construction, and his construction was sound. The complainer's right, however depended, not on the decree of sale, but on the charter of sale and confirmation granted in 1846. This charter was a charter by progress, and was therefore incapable of extending the vassal's right. It contained, no doubt, the new description of the subjects taken from the decree of sale, but it also defined the subjects conveyed as forming part of the subjects contained in the older titles, which negatived any right of property in the mill-lade—*Hutton* v. *Macfarlane*, November 11, 1863, 2 Macph. 79, *per* Lord Neaves, 88; *Boyd* v. *Bruce*, December 20, 1872, 11 Macph. 243. Infeftment, in order to found a presumptive right, required to be taken in the appropriate register of sasines—Conveyancing Act of 1874, section 34. The mill-lade in question being held burgage, the complainer's sasine, recorded only in the feudal register, was inept. In 1846 sasine in burgage subjects still required to be recorded in the burgh register within sixty days of its date—Act 1681, cap. 11.

Even if the complainer's title was a good foundation for prescription, his right was not fortified by adverse and exclusive possession. His operations were equally consistent with property or servitude, and *in dubio* servitude was to be preferred. Rights of property could not be taken away by equivocal acts of possession. Here the original proprietors had continued to exercise rights which were equally consistent either with property or with servitude, and in the circumstances these must be regarded as a continued assertion of proprietorial rights, and not as fresh servitudes acquired from the complainer at a time when *ex hypothesi* he was himself prescribing a right of property. The use of a running stream was *res merae facultatis*, and the property in it could not be lost merely because the owner did not exercise the full use of which it was capable. Assuming the case to be one of servitude, the respondent was entitled to succeed, because the drain-pipe in question did not pierce the wall of the lade, but was merely rested on the top of it. Further, the servitude in the present instance did not give the complainer any right in the retaining-walls or *solum* of the lade, or in the water itself. The extent of the dominant proprietor's right in a case of aqueduct depended on the special circumstances of the case, and here the proof showed that the complainer's authors had done nothing beyond building a retaining-wall between the lade and the bed of the river. The retaining-wall along the landward back of the lade was the old retaining-wall which existed before the lade was constructed, and it remained the property of the riparian proprietors.

At advising—

LORD JUSTICE-CLERK—The subject which is here in question being the mill-lade and the appurtenances of the mill-lade entering from the Jed into an intake above the Abbey Mill and the Waulk Mill of Jedburgh, was dealt with in a process of ranking and sale in the year 1845. By the decree of sale the Lords "sold, adjudged, decerned, and declared, and hereby sell, adjudge, decern, and declare lot (second)—All and whole the mill commonly called the Waulk Mill of Jedburgh, with the machinery-house and whole machinery thereof, and the waterfall, damhead, sluices, and other works thereto belonging, and mill-lands, and particularly the mill-lead and that portion of the ground or embankment lying to the west of the said mill and between the mill-lead and the water of Jed, and extending upwards from said mill to and including the waste-water sluice in the side of the lead between the said mill and the Abbey Mill," . . . to pertain and belong to George Hilson, manufacturer in Jedburgh. Now, that was a conveyance in language which, in my opinion, does not admit of any doubt as to its meaning. It is prefixed by the word "particularly" as regards this subject, and is a conveyance of that mill-lade. That is, as I hold it, a conveyance of the ground, and such works on the ground as are essential for the establishment and working of a mill-lade, and applicable to the mill in question. It is contended that that is not so, that the conveyance has not the effect of a conveyance of the mill-lade throughout its extent as described, because there is a declaration afterwards that Robert Laing and Hilson together, the purchasers of the Abbey Mill and the Waulk Mill respectively, have a joint *pro indiviso* right of property "in the waterfall, damhead, or cauld-sluices, and mill-lade thereof."

It does not appear to me that this declaration is at all in conflict with the conveyance of the property to Messrs Hilson. It is declaratory and for an obvious purpose. The other owner of the mill interposed between the intake and the complainer's mill necessarily had a right and interest in the mill-lade in so far as it was necessary for the purpose of bringing water down to his mill, and down below his mill, for his tail-race. That he had not some right in that mill-lade as long as his mill was there is a question which could not be argued, and it is a *pro indiviso* right to the mill-lade therefore which is conveyed to Hilson. The mill-lade of Hilson's mill is plainly and necessarily the mill-lade from its intake down to his mill, because otherwise he could not get the benefit of the water. Hilson's title covers the whole lade, and infeftment followed upon that conveyance, with all uses such as property of that kind is capable of. Now, a joint *pro indiviso* right of property does not interfere with his having that title. It is quite plain that if at any time the Abbey Mill came to be disused or to be pulled down, or for any reason not to be carried on at all, then the only interest in the mill-lade and its use would be the interest of the complainer Hilson. Well, then, this declaration of a *pro indiviso* right is given most properly in the interest of the mill-owner that was interposed, but the respon-

dent has no concern with the question who is the proprietor of the mill-lade from its intake to its final entry into the river again. He gets the property in the lade and all that belonged to it as necessary for the use which was to be made. Now, that being so, the question between the complainer and the respondent in this case is, whether the respondent has a right to discharge into that mill-lade sewage from his property. Mr Hilson has possessed beyond the prescriptive period upon his infeftment, and I am of opinion that the respondent in the action of interdict has no right to interfere with that mill-lade by discharging into it any sewage from his property. I cannot see upon what ground he can maintain his right to do so. The complainer has a substantial interest to prevent it, and although it may not be in question, whether what is done by this respondent, or proposed to be done by this respondent, might be a substantial injury to Mr Hilson in the use of his mill at present, he is entitled to prevent that mill-lade being used in such a way, because the respondent has no right to do it. It is obvious that if this respondent has the right to do it, because he is not at present doing any tangible damage, he might be preparing the way for damage, because it is always an accumulation of such matter as it is proposed to put into the stream that is ultimately injurious, and makes the stream unfit for the purposes for which the party below has the right to use it. If the respondent has no right to put sewage into the stream, as he has been doing, it is proper that he should be interdicted, because he is discharging into the property of another that which he has no right to discharge.

Upon the whole matter I have come to the conclusion that Mr Hilson is right in his contention in this case, and that we should grant him the interdict which he asks.

Lord Adam—In the year 1835 the Provost, Magistrates, and Town Council of Jedburgh were proprietors of two mills on the water of Jed, one called the Abbey Mill and the other called the Waulk Mill. In that year it appears that a flood carried away the existing damhead and other works connected with these mills. In that same year the town of Jedburgh, as I may say for shortness, rebuilt the damhead at a distance of some 300 or 400 feet further up the water of Jed, and they continued the then existing mill-lade also further up the water of Jed, to the new damhead. Now, in constructing this mill-lade they constructed it upon the bed of the river, and in so carrying it up it passed *ex adverso* of the respondent's property, then belonging to the respondent's predecessor, I have no doubt, as it appears from the titles that the respondent's property was described as bounded by the river Jed, that that carried his right of property *ad medium filum*, and consequently the Provost and Magistrates of Jedburgh, in taking possession of this property for the construction of this new mill-lade, took part of his property and constructed the walls of the new mill-lade upon it. And I see no reason to doubt, from anything that appears in this process, that in so doing the Provost and Magistrates of Jedburgh were doing what they had no right to do. I should have had little doubt that if the predecessors of the respondent had chosen to interfere at the time, the Provost and Magistrates of Jedburgh might have been prevented from constructing this mill-lade as they did; but all that took place so long ago as 1835, which is sixty years ago. Now, matters continued in that state from the year 1835 down to the year 1845. Beyond all doubt the town of Jedburgh was in possession of the new damhead and the whole of the mill-lade, including the new part of it, down to the year 1845. The town seems about that time to have got into pecuniary difficulties, and I see from the decree of sale, which is produced, that they got a private Act of Parliament for the sale of the town property; and accordingly, among other parts of the town property that was sold under a ranking and sale, were those two mills—the upper, or Abbey mill, being sold to Mr Laing, and the lower, or Waulk mill, being sold to the predecessors of the present suspender Mr Hilson. Now, we have here the decree of sale which was pronounced in that action, and it sets forth the proceedings and the subjects sold. With reference to the Abbey mill, which is a higher-up mill upon the same mill-lade, it finds that this Mr Laing had offered for it, and so on, and then the Lords find and decern that it should belong to him. These are the terms in which it is decerned and declared to belong to him—[*His Lordship read the clause above quoted*]—That is not the conveyance of the mill with which we are directly concerned, but here, as in our case, to which I shall presently refer, although there is no specific *nominatim* conveyance of the mill-lade, there is a conveyance of the mill and "the whole machinery, waterfall, damhead, sluices, and other works thereof, with the whole parts and pertinents thereof, all as presently occupied by William Dodd, the tenant therein." There is no doubt whatever, and it is not disputed, that at the date of this conveyance the whole mill-lade was occupied by the tenant of the magistrates in the mill; and I should have thought that the general word, "works," followed by a proof of possession, such as there is in this case by the tenants of the mill, would have been sufficient to show that the mill-lade was intended to be carried. I make that remark in passing, because it serves to explain the terms of this decree. Then when we come to the conveyance of the mill which we have more particularly to deal with, the decree sets forth — [*His Lordship read the clause above quoted*] — These are the terms in which these subjects were decerned to belong to the present suspender's predecessor. Now, it will be observed that there is here, differing from the other case, an express conveyance in favour of Mr

Hilson of the mill-lade. I should have thought that was very clear—that it means what it says—the mill-lade. The Lord Ordinary does not take that view. He says, in stating his view upon the construction of that clause—"The upper part of the mill-lade is not part of the subjects disponed." I do not see any other way in which he could arrive at that conclusion on the construction of this clause than by holding that the description, "that portion of ground or embankment lying to the west of the said mill, and between the mill-lead and the water of Jed," applies to the mill-lade as well as to that portion of ground.

I think that is an impossible reading, because if you consider for a moment how the description would read, the Lord Ordinary would read it this way:—"and particularly the mill-lade lying between the mill-lade and the water of Jed, and extending upwards from said mill," and so on. Now, how can you convey a subject and describe it as bounded by itself? That is the result of the Lord Ordinary's construction of this clause. Now I say that cannot possibly be the reading. The real reading is just what the deed itself says, that it is a conveyance of the mill-lade, and of that particular portion of ground or embankment lying to the west of the mill, and between the mill-lade and the water of Jed. Therefore I have not any doubt, upon the construction of this decree, that it is a conveyance of the whole of the mill-lade *nominatim*. Had there been any doubt about that, it would have been cleared up by the last words, because the subjects are conveyed "all as presently occupied by Messrs George and James Hilson, the tenants thereof;" and it is perfectly obvious in this case that those subjects, one and all of them, and the whole of the mill-lade, were occupied and possessed by the tenants thereof, James and George Hilson. Therefore I have no doubt, upon the construction of this deed, that it was a decerniture in favour of the purchaser of the whole of the mill-lade. And that explains how this subsequent declaration which is put in came to be there, whereby the Lords "find and declare that the said Robert Laing and George Hilson, purchasers of the Abbey Mill and Waulk Mill, being lots first and second, have a joint *pro indiviso* right of property in the waterfall, damhead or cauld, sluices, and mill-lead thereof."

Now, I think that is very bad conveyancing. I think the proper way to do it would have been to have decerned and declared that they were each *pro indiviso* proprietors of the mill-lade. That would have been the proper form of conveyance, but it did not the least interfere with the proper construction of this deed, viz., that to each of them is given *ex facie* a right to the whole; and then it is explained that although *ex faiec* each of those two purchasers have a right to the whole of the mill-lade, yet as between themselves the right is merely a *pro indiviso* right; and that being so, the deed goes on with certain provisions as to how this mill-lade is to be regulated as between the two proprietors of it. That is the whole deed. I pointed out before, in my construction of the conveyance to Laing, that it amounted to a conveyance in property, and that although the mill-lade was not particularly conveyed, still, as explained by proof of possession, it came to the same thing. And that is why I said just now that by this decree both the purchaser of the Abbey Mill and the purchaser of the Waulk Mill were declared to be proprietors, and then it declares their real rights as between themselves that it was to be a *pro indiviso* right to the whole. Well, if that be so, that explained the conveyancing—not good conveyancing in my opinion—in questions between the two proprietors, and with which third parties have nothing to do. If I am wrong in thinking that the conveyance to Mr Laing was a conveyance of the property of the mill-lade, then the only result is that there is the undoubted possession ever since of the whole in favour of Mr Hilson. That would be the only result as concerns third parties. Now, if I am right in so construing the deed, there is decerned to belong to Mr Hilson's predecessor the mill-lade in property. Then Mr Hilson's predecessor proceeds to make up his title. I need not go into the detail of it; but he conveys to himself and his brother, and they obtain a charter from the alleged superior under which they took infeftment, and that infeftment is recorded on 5th May 1846. I shall not enter into the particulars of that, because the description of the subjects in it is identical with that in the decree of sale, upon which I have been commenting. Now, at the date of this charter and sasine in favour of Mr Hilson's predecessor in 1845 there is, so far as I can see, no reason to doubt, in so far as regarded this piece of the mill-lade in question, namely, the new bit which had been constructed ten years before opposite the respondent's property, that it flowed *a non habente potestatem*. So far as appears, as I have said before, the magistrates, in constructing that on another person's property, had no right to do so. The property did not appear to be their own, and therefore this title which Mr Hilson's predecessor made up in 1845 is not valid unless it is fortified by possession and prescription. And there is no doubt that he and his predecessors have had uninterrupted possession of this mill-lade during the whole of the time since 1845; and that, in so far as the question of *a non habente potestatem* is concerned, disposes of that objection.

But then the question remains behind—What is the effect of this conveyance of the mill-lade as regards other persons? I beg to point out so far, that the suspender's charter professes to convey the right of property. There is no doubt about that. It does not profess to convey a right of servitude or any minor right whatever; it professes to convey a complete right of property to Mr Hilson's predecessor. Now,

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-