

Wishart v Wyllie, (1853) 1 Macq. 389.
 Considered in *Magistrates of Hamilton v
 West Colliery Co.*, 1929 S.C. 686; 1929 S.N.
 7; 1929 S.L.T. 569.

WISHART, APPELLANT.
 WYLLIE, RESPONDENT (a).

1853.
 4th, 5th, 7th,
 11th, and 14th
 April.

THIS case was one almost entirely of unreportable detail; the contest relating to the alleged encroachments of a certain brook or burn; the value of the disputed matter falling short of 40*l.*—the litigation extending over thirteen years—the chief contending parties being two gentlemen of the law—a writer to the Signet at Edinburgh, and a solicitor in Paisley.

In the ordinary case—*prima facie*—proprietors on each side of a river are respectively entitled to the soil, *usque ad mediam aquæ*.

The *Lord Advocate* (*Moncreiff*), the *Solicitor-General* (*Bethell*), Mr. *Rolt*, Mr. *Anderson*, and Mr. *Gordon* appeared as counsel for the different parties.

Opinion of the Lord Chancellor as to the course of proceeding under the 6 Geo. 4, c. 120, s. 40, when a Lord Ordinary reviews a judgment by the sheriff.

The LORD CHANCELLOR (b), in moving that the decision appealed from should be affirmed, adverted to a point upon which the Court below had not expressed any positive opinion—namely, what ought, in general, to be deemed the boundary where two estates are separated by a river.

Lord Chancellor's opinion.

The LORD CHANCELLOR laid it down that the law on this subject admitted of no doubt. “If,” said his Lordship, “a stream separates properties A and B—*prima facie*, the owner of the land A, as to *his* land, on one side, and the owner of the land B, as to *his* land, on the other, are each entitled to the soil of the stream, *usque ad mediam aquæ*—that is, *prima facie* so. It may be rebutted; but, generally speaking, an imaginary line running through the middle of the stream is the boundary; just as if a road separates two properties,

(a) Reported in the Court below, 12th June, 1851; Second Series, vol. xiii. p. 1100.

(b) Lord Cranworth.

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the ownership of the road belongs half-way to one, and half-way to the other. It may be rebutted by circumstances, but if not rebutted, that is the legal presumption. Then if two properties are divided by a river, the boundary is an imaginary line in the middle of that river—but to say that the whole of the river is a sort of common property, which belongs to no one, is not a correct view of the case” (a).

The LORD CHANCELLOR also delivered the following opinion as to the manner in which the Court of Session ought to proceed under the Scotch Judicature Act, 6 Geo. 4, c. 120, s. 40, enacting that—

When in causes commenced in any of the courts of the sheriffs matter of fact shall be disputed, and proof shall be taken, the Court of Session, in reviewing the judgment proceeding on such proof, shall distinctly specify in their interlocutor the several facts material to the case, which they find to be established by the proof, and express how far their judgment proceeds on the matter of fact so found, or on matter of law, and the several points of law which they mean to decide; and the judgment on the cause thus pronounced shall be subject to appeal to the House of Lords, in so far only as the same depends on, or is affected by matter of law, but shall, in so far as relates to the facts, be held to have the force and effect of a special verdict of a jury, finally and conclusively fixing the several facts specified in the interlocutor.

With reference to this clause, the LORD CHANCELLOR expressed himself in these terms:

My Lords, I apprehend it was the duty of the *Lord Ordinary* in the present case to find what the facts were, as he deduced them from the evidence before the Sheriff, and apply the law to the facts so found. But instead of doing so, the *Lord Ordinary* adheres to the finding of the Sheriff *simpliciter*. The Judges of the Inner House, however, to whom the case was carried, said most correctly—“*That* will not do; you must find

(a) See as to public navigable rivers, which are *inter Regalia*, the case of *The Lord Advocate v. Hamilton*, *suprà*, p. 46.

what the facts are, and then to the facts so found, you must apply the law." My Lords, I entirely agree with the Judges of the Inner House.

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RICHARDSON, LOCH, & M'LAURIN.—DEANS & ROGERS.
—ROBERTSON & SIMSON.