Chapter 1. Introduction

There is not any Town or City, which hath a Navigable River at it, that is poore; nor scarce any that are rich, which want a River with the benefit of Boats.

John Taylor. A Discovery by Sea. 1623

1.1 The Thesis

In this dissertation it is argued that, 'In common law there is a public right of navigation on all non-tidal rivers which are naturally physically navigable by small boats and on those rivers which have been made physically navigable at public expense.' This thesis may be contrasted with the statement in *Halsbury's Laws of England* that, 'There is no general common law right of public navigation in non-tidal rivers.'[1]

In 1973 the Select Committee of the House of Lords on Sport and Leisure stated that, 'The legal question of rights of way over water must be settled. A number of different legal interpretations of this right of way have been referred to in evidence and it is time for these to be resolved.'[2] It is considered that this dissertation is the first study of these different legal interpretations.

Jackson, in an article on the Derwent case,[3] wrote, 'In the absence of fresh legislation to clarify the position the outcome of such disputes may turn upon fine points of construction involving Acts of Parliament passed many years ago.'[4] These Acts were passed so that the rivers could be used by commercial vessels. Use today is almost entirely by people involved in recreation and education. If more appropriate legislation is to be introduced it would seem to be important first to establish what the common law is in respect of the public rights of navigation.

---

[1] *Halsbury's Laws of England 4th Edition, Reissue. Volume 49(2)* (London: Butterworths, 1997), para 741
[2] Second Report from the Select Committee of the House of Lords on Sport and Leisure. (1973), HL 193, lxxiii
[3] *Yorkshire Derwent Trust Limited* v *Brotherton* [1992] 1 All ER 230
[4] S.R. Jackson, 'Navigation rights after the Derwent Case' June 1992 RWLR Section 6.3, 19

In the introduction, the background of the subject is described. In Chapter Two the writings of the early commentators are considered. It is noted that Bracton wrote that there is a public right of navigation on all rivers which are physically navigable.[5] This is compared to the early statutes and the use made of the rivers prior to the introduction of the pound lock in 1618. Consideration is then given to the writings of the 17th century.

In Chapter Three it is shown that the texts of Acts for making rivers navigable are not inconsistent with Bracton's concept of the law. In Chapter Four it is shown why two influential *dicta* of the late 18th and early 19th century are considered to be erroneous. In Chapters Five and Six the commentaries and cases of the 19th and 20th centuries are considered. In the conclusion it is argued that the law has not been changed and that it remains as originally stated by Bracton.

Appendix A is a survey of rivers which were made navigable by statute. This provides evidence that most such rivers had previously been used by boats for the carriage of goods. Appendix B is a copy of the parts of Woolrych's *A Treatise of the Law of Waters and Sewers*[6] which relate to the public right of navigation. This is the first commentary specifically on this topic. The work is criticised in this dissertation.[7] Appendix C is a survey of the Sussex rivers[8] which shows that Woolrych's interpretation of the law fails to establish where there is now a public right of navigation on a river.

From 1830[9] to 1991[10] all the commentators on the law of waters followed Woolrych in their description of the law relating to the public right of navigation on non-tidal rivers. The key principle in his interpretation is that, 'there is no public right of navigation on any river unless one has been created by statute, use or ancient use, or dedication.' In this paper this is referred to as 'Woolrych's interpretation of the law'. In the only commentary

---

[5] See section 2.4 below.
[6] Humphrey W. Woolrych, *A Treatise of the Law of Waters, 2nd Edition* (London: Saunders and Benning, 1851)
[7] See Section 5.3 below
[8] The rivers of Sussex were chosen purely because they are close to the home of the author and thus well known to him. There is no reason to think that different conditions exist in other counties.
[9] The date of the first edition of Humphrey W. Woolrych, *A Treatise of the Law of Waters and of Sewers* (London: Saunders and Benning, 1830)
[10] The date of the judgement in the House of Lords in *A-G ex rel Yorkshire Trust* v *Brotherton* [1992] 1 AC 425

written specifically on the Law of Waters since 1991 Bates[11] questions whether dedication is a way of creating a public right of navigation.[12]

This dissertation relates to the territory of England and Wales. This qualification is only noted when a comparison is made with Scots Law or the law of another country. The qualifier 'non-tidal' is often omitted when using the word river as 'non-tidal rivers' are the subject of the dissertation.

No attempt is made to consider the regulations relating to statutory navigations. There are at least 32 authorities responsible for various waterways, each of which has different regulations. Some, like the Environment Agency, have different regulations for each of their waterways. To find the regulations governing each waterway the relevant statute law, bye-laws and regulations must be consulted. Also the law relating to harbours and ports is not considered.

In this dissertation there is no attempt to establish the existence of a public right of navigation on any particular river.

Most of the statutes relating to named rivers state the section of the river to which the Act relates and the name of the county in which the river is situated. Normally these points are not stated as they do not affect the understanding of the common law.

The law is stated as at 30th June 2004.

The research for this paper has involved the critical examination of every known available Act, case and text which appeared to relate to the law of navigation on non-tidal waters and the common law. It was not possible to obtain a satisfactory translation of one case[13] and of one Act.[14] One part of the research has been to examine the references in the better known texts and cases, then the references in these, and continuing until all further references were outside the scope of the dissertation. The second approach has been to

[11] J.H. Bates, *Water and Drainage Law* (London: Sweet and Maxwell, 1990, revised to April 1997), para 13.16 – 13.19
[12] See Section 5.8 below
[13] (1349) 22 Ass 93
[14] 1570 13 Elizabeth I c 26

search library catalogues for key words like 'boat', 'river' or 'navigation'. Where it has not been possible to examine a primary source the secondary source is stated in the footnotes as, 'quoted in …'. No guarantee can be made that every relevant Statute, case or text have been found.

No attempt has been made to discuss the rival moral claims of 'private property' and 'public interest'. These matters were widely discussed prior to the passing of the Countryside and Rights of Way Act[15] and Section 1 of the Land Reform Act (Scotland).[16] In both cases the legislature decided that the public interest required that the public should have access. In a case decided under Scots Law a judge in the House of Lords stated that such considerations were not a matter for the Courts but for the Legislature.[17]

In this dissertation it is claimed that, in general, there is a continuing right of access to rivers and so there is no increase in the public rights. Thus, if the thesis is accepted, public rights which have not been exercised for some years will again be recognised. There would be no valid claims for compensation from the State for those who thought, in error, that they had exclusive rights to the use of the rivers.

1.2 The People and Organisations Involved

1.2.1 The Navigators

The present-day problems relating to access relate to recreational and educational use rather than commercial use of the rivers. Historically rowing boats, punts, sailing boats and coracles have been used to travel on many rivers.[18] However most of the present-day touring by boat, on the rivers which are not regulated by a statutory authority, is in canoes.

---

[15] Countryside and Rights of Way Act 2000, c37

[16] Land Reform (Scotland) Act 2003, 2003 asp 2

[17] '(The Lord President) expressed the opinion, "That there is a preponderance of public benefit in the continued use of the Spey for canoeing which is of sufficient materiality to justify recognition that the defenders as members of the public have the right to do what they have been doing since … 1969." ….. I doubt whether such an enquiry could in any event be appropriately conducted by the courts.' *Per* Lord Fraser *Wills' Trustees* v *Cairngorm Canoeing and Sailing School Ltd*, 1976 SLTR 162, 214 -215

[18] F.E. Prothero and W.A. Clark, Editors, *A new oarsman's guide to the rivers and canals of Great Britain and Ireland* (London: G. Philip & Son, 1896)

So it is often more relevant to refer to canoes and canoeists rather than to more general titles like boats and sailors.

In a reply to a question in the House of Commons, the Secretary of State for Culture, Media and Sport said that it is estimated that there are two million people who participate in canoeing each year.[19] No survey has been found which indicates the percentage of canoeists who are male or female.

While there are several different competitive canoeing disciplines[20] most people enjoy non-competitive canoeing activities. Canoes are widely used for education. There are about 22,000 members of the British Canoe Union[21] which seeks to speak on behalf of all canoeists on access topics in national fora.

There have been some judicial references to pleasure boating being a modern activity.[22] The truth is rather different. There are references to pleasure barges from 1422[23] and pleasure boats from 1610.[24] The first statutory reference which has been found to pleasure boats was in an Act passed in 1699.[25]

---

[19] House of Commons Hansard Written Answers for 12 May 2003 (pt 9) column 32W

[20] Competitive disciplines include the Olympic Sports:- Flat Water Racing and Slalom. The International Competitive Sports include:- Marathon Racing, White Water Racing, Canoe Polo, Surfing and Rodeo. Canoes are also used for Environmental Surveys.

[21] The British Canoe Union includes 'Canoe England' and the 'Welsh Canoeing Association'.

[22] 'The use of the river for recreational purposes started in the middle of the 19th century' Vinelott J, *Yorkshire Derwent Trust v Brotherton* (1988) 59 P & CR 60, 88

'Obviously at the time that the locks were made pleasure-boats were not within the contemplation of the patent or the patentee.' Lord Macnaghten, *Simpson* v *A-G* [1904] AC 476, 492

See also 'It has, however, also been abundantly clear from the research carried out that there was little or no recreational user of inland waterways until the 20th Century.' A.E. Telling and Sheila E. Foster, *The Public Right of Navigation Volume 2* (Severn-Trent Water Authority, Project PFA 12, 1978), 93

[23] Henry Humpherus, *History of the Origin and Progress of the Company of Watermen and Lightermen of the River Thames Volume 1* (London: Prentice, 1887), 43 - 43

[24] 'Taylor tells us that the prostitutes too were 'wont after they had any good trading, or reasonable comings in, to take a boat and air themselves upon the water.' Bernard Capp, *The World of John Taylor the Water Poet 1578 - 1653* (Oxford: Clarendon Press, 1994), 9

[25] (1699) 11 William III c 22 s 23

1.2.2 The Anglers

There seems to be considerable doubt as to the number of freshwater anglers. The Environment Agency Report, *Public Attitudes towards Angling* stated that the number of people aged 12 and over who have been freshwater fishing in the last 2 years was 3,895,830.[26] This number would include those who had accompanied an angler to the bank.

The Environment Agency Report *Economic Evaluation of Inland Fisheries* estimated that there are approximately 2.3 million coarse anglers and 0.8 million game anglers, giving a total of 3.1 million freshwater anglers.[27]

However, although all freshwater anglers over 12 years of age are required to purchase a fishing licence, whether fishing on rivers, still water lakes or ponds, only 1,212,668 licences were sold in the year 2002/3.[28] Some anglers buy two or more day or week licences which may be cheaper for them than a full year's licence.
Angling is predominately a male sport with 95% of licence holders being male.[29] It appears that about half of all angling is carried out on still water lakes.[30] There is no accurate figure for the number of people who fish exclusively away from rivers. But it would appear that the number of legal anglers fishing on the rivers is well below one million.

Some anglers seem to see their sport as being under threat. Some see their territory being invaded by canoes.[31] Among the non-fishing public, the sport is considered not to be cruel by 48% of adults[32] and 35% of young people.[33]

---

[26] Environment Agency, *Public Attitudes towards Angling, R&D Technical Report W2-060/TR* (Bristol: Environment Agency, 2002), 7
[27] Environment Agency, *Economic Evaluation of Inland Fisheries, R&D Technical Report W2-039/TR/1* (Bristol: Environment Agency, 2001), 71
[28] Angler's Mail, 3 April 2004, News, 6
[29] Environment Agency, *Public Attitudes towards Angling, R&D Technical Report W2-060/TR* (Bristol: Environment Agency, 2002), 9
[30] Environment Agency, *Economic Evaluation of Inland Fisheries, R&D Technical Report W2-039/TR/1* (Bristol: Environment Agency, 2001), 56
[31] 'Anglers generally are sick to death of canoes and some of the undesirables that sail in them.' Letter, James Wilson, Trout and Salmon, January 2004, 26
At a meeting to discuss an agreement for canoeing on the river Teme it is reported that the anglers refused point blank even to consider the idea. Trout and Salmon, October 2003, 11

1.2.3 The Land-owners

There are many riparian rights relating to a river, the ownership of the bed of the river, the right to receive the water unpolluted in its normal quantity and at the normal rate of flow, the right to abstract water, the right of fishing and the right of navigation. The rights are interrelated and yet may be held separately by different people. The public may have the right to exercise some of these rights.

There has been no survey to establish who owns each of these rights. On some rivers one owner may be the riparian owner of several miles of a river whereas in towns each property owner may own the equivalent rights over one side of a short section of the river. A railway company may be the riparian owner of a section of a river no longer than the width of a railway bridge and there may be other 'localised' ownership by other public authorities for diverse purposes.

1.2.4 The Environment Agency

Government policy is that, 'The Government wants to encourage people to make use of the inland waterways for leisure and recreation, tourism and sport. We will support the greater recreational use of the waterways for all, including the towpaths and waterside paths, where practicable.'[34]

The Environment Agency is a body corporate which has included in its responsibilities, 'the duty, to such extent as it considers desirable, generally to promote – (a) the conservation and enhancement of the natural beauty and amenity of inland and coastal waters; … (c) the use of such waters and land for recreational purposes.[35]

The Agency appoints statutory Regional Fisheries, Ecology and Recreation Advisory Committees. The primary interests of the members are as follows:-

---

[32] Calculated from figures given in Environment Agency, *Public Attitudes towards Angling R7D Technical Report W2-060/TR* (Bristol: Environment Agency, 2002), 5
[33] *ibid*
[34] Department for Environment, Food and Rural Affairs, *Waterways for Tomorrow*, published on www.defra.us/environment/bw/tomorrow/chp6.htm. 22/03/04
[35] Environment Act 1995 (c25) 6

Angling / Fisheries	91
Navigation	17
Recreation	14
Conservation	13
Riparian Owners	6
Academics	4[36]

On the more influential Chairman's Committee which meets with the senior staff of the Environment Agency four times a year, all the chairmen have as their primary interest angling or fisheries.[37]

1.2.5 Protection of the Environment

Public interest in protecting the environment has rapidly increased over the last 50 years.[38] No evidence has been found that touring canoeing damages the environment.[39] A House of Commons Committee recently reported that canoeing is compatible with protecting biodiversity.[40]

Recently the British Canoe Union signed a memorandum of understanding with English Nature. This stated that 'there is unlikely to be any significant impact on or lasting disturbance to wildlife and the water environment from the passage of canoes.' It confirmed that low intensity use of rivers is unlikely to harm wildlife but that when more organised or intensive activities are to take place in sensitive sites canoeists are expected to contact English Nature in advance.[41]

---

[36] Figures provided by the Committee Services Officers for each Region. As at 1 December 2003.
[37] Statement of Interest supplied by each Chairman.
[38] Royal Society for the Protection of Birds membership:- 1960 - 10,000; 1969 – 50,000; 1975 – 200,000; 1986 – 400,000; 1997 – 1,000,000.
[39] 'Where other wildlife (non-fish) may be disturbed by canoeists (eg dipper/kingfisher nesting sites, nests on gravel beds, etc) bailiffs should bring this to their attention, if the opportunity arises. Disturbance is only likely to result from sustained activity at a given location. Quiet, steady passage of a canoe is unlikely to cause a problem.' NRA Policy Implementation Guidance Note. Canoeing and Fisheries: Guidance for NRA Bailiffs. TE/RE/001, October 1992
[40] 'The Environment, Transport & Regional Affairs Committee of the House of Commons recently stated that "canoeing is another quiet activity which is generally accepted by environmental organisations as compatible with protecting biodiversity."' www.riversaccess.org/whyproblem.htm. 19/03/2004
[41] Memorandum of Understanding. English Nature and the British Canoe Union (Canoe England). October 2003.

When appropriate orders can be made under the Wildlife and Countryside Act 1981 to protect Sites of Special Scientific Interest.

1.3 The Social Context

1.3.1 The History of the Problem

It seems that before 1939 there were few if any disputes between canoeists and anglers. There were certain rivers where the land-owners expected canoeists to ask permission to use rivers flowing through their properties.[42] There is anecdotal evidence that between 1955 and 1965 there was an increasing number of disputes between those using the rivers. Because of these problems the British Canoe Union formed its Access Committee in 1965 to negotiate agreed access to rivers for its members at times and places acceptable to the land-owners and anglers.

In 1973 The House of Lords Select Committee on Sport and Leisure reported that, 'One source of conflict which ought to be mentioned is that between angling and boating.'[43] Since that date it seems that the conflict has become ever more intense. The committee also stated that, 'At a time when navigation for pleasure on inland waterways has overtaken commercial carriage the rights of navigation cannot be allowed to rest on an antiquated basis which is becoming increasingly irrelevant.'[44]

In 1981 the British Canoe Union and National Anglers' Council published a *Statement of Intent.* Again, it was stated that the 'legal question of rights of way over water must be settled.'[45] If the Statement had been implemented it would have provided for negotiated access for British Canoe Union members to rivers. However few land-owners or fishery-owners responded to the initiative. Reports of continued conflict between anglers and canoeists resulted in the Environment Agency, in 1999, sponsoring the publication of

[42] See river reports in F.E. Prothero and W.A. Clark, Editors, *A new oarsman's guide to the rivers and canals of Great Britain and Ireland* (London: G. Philip & Son, 1896)
[43] Second Report from the Select Committee of the House of Lords on Sport and Leisure. (1973), lxxii
[44] *ibid*, lxxiii
[45] *Statement of Intent* Sponsored by Sports Council, National Anglers Council, Water Space Amenity Commission, British Canoe Union. 1981

Agreeing Access to Water for Canoeing.[46] Again few (if any) land-owners or fishery-owners responded to the initiative.

Both of these proposals would have provided for a formal, or informal, licence to be granted to members of the British Canoe Union for the use of a section of a river on various dates. The licences could have been withdrawn, without notice, at any time. The problem with such arrangements was well illustrated on the river Dee at Llangollen where there was an agreement for use of a section of the river for touring on three weekends a year. It appears that there was a dispute among the property owners regarding the amount of canoeing which should be allowed and as a result the licence was withdrawn. This resulted in the loss to the local community of £100,000 of retail sales and accommodation charges for each weekend.[47]

A report has been prepared under of auspices of the Countryside Agency to see if it is practicable to negotiate access on rivers for canoeists.[48] The report is at present being considered by the Minister for Rural Affairs and Local Environmental Quality.
Apart from the Statutory Navigations,[49] the law relating to the public right of navigation on non-tidal rivers has never been created or altered by statute. The law developed when people caught fish to eat and most people who travelled on rivers did so for commercial purposes. Yet the same law applies today when most fishing and boating is for pleasure and recreation.

1.3.2 Legal Uncertainty

If Woolrych's interpretation of the law[50] is accepted there are three main problems for those wishing to use boats on rivers:- the legal uncertainty as to where there is a public right of navigation; the perceived injustice in the allocation of resources; the frustration of Government policy.

---

[46] *Agreeing Access to Water for Canoeing* (Bristol: Environment Agency, July 1999)
[47] *Canoeist*, December 2003, 13
[48] Brighton University Consortium, *Improving Access For Canoeing on Inland Waters*, 2004
[49] No official list of the Statutory Navigations has been found. It is thought that a section of about 16 non-tidal rivers, out of about 550, are statutory navigations.
[50] See section 1.1 above.

The law as to where there is legal access on rivers is unclear. For example, the Sports Council sponsored a report on access to rivers which concluded that on the river Arun there is a statutory right of navigation to Newbridge and on the river Rother there is a common law right to Fittleworth and that, 'The question is open to argument, but we tend to the opinion that the statutory right to navigate the river (from Fittleworth to Midhurst) remains in so far as the river is physically navigable.'[51] The Environment Agency have stated that they consider that there is no public right of navigation on either river.[52]

Appendix C is a survey of all the non-tidal Sussex rivers which are physically suitable for canoeing.[53] It is shown that on not one of them is the extent of the public right of navigation clearly established. If Woolrych's interpretation of the law is applied then only confusion exists. For rivers on which a statutory right was created it is uncertain if such a right has been terminated by abandonment, by order or by neglect.[54] It is not clear how much historic use needs to be proved to establish a public right at common law.

Wilkinson has drawn attention to the fact that the question as to whether there is a right of navigation on the Yorkshire Derwent depended partly on whether it could be established that the river was used 'by right', (that is without force, not secretly, nor with permission,) prior to 1702.[55] A legal system which has such a requirement without a straightforward means of resolving the factual issues may be considered to be unsatisfactory.

This case also showed the random nature of the statutory right of navigation. The River Derwent Navigation Act had been repealed by a Minister.[56] If the responsibility for maintaining the navigation had just been abandoned, as happened on many other rivers, then the right of canoeing on the river would, it seems, not have been terminated.

The lack of clarity in the law has resulted in frequent disputes on the banks of rivers. In 2001 30% of the members of the British Canoe Union reported having had an argument on

---

[51] Arthur Telling and Rosemary Smith, *The Public Right of Navigation* (London: Sports Council, 1985), 24 - 25

[52] Letter, Allison Thorpe, Principal Officer – Recreation, Environment Agency Southern Region, 17 December 2003

[53] See footnote 8

[54] See Appendix C.

[55] D. Wilkinson, 'Public Access to Inland Waterways: Recreation, Conservation and the Need for Reform.' (991) Journal of Historical Geography, 525

[56] See section 6.5.1 below.

the bank side in the previous year.[57] On Waller's Haven, where there seems to be a strong argument for the existence of a public right of navigation,[58] anglers often tell visiting canoeists that they should not be on the water and that they should leave.[59] Such instructions are often resented.

1.3.3 Perceived injustice in the allocation of resources

If Woolrych's interpretation of the law is adopted, the second problem is that some people perceive an injustice in the current allocation of resources. As has been shown there are about two million people who canoe on the rivers and less than one million legal anglers wishing to fish in them.[60] It will be shown that the land-owners and anglers claim exclusive use of about 97% of the rivers.[61] Thus, from the figures provided in the report *Water-Based Sport and Recreation: the facts,*[62] it seems that two thirds of the potential river users are restricted to 3% of the rivers.

The perceived injustice in the allocation of resources and the existence of antiquated laws has resulted in many people canoeing rivers without permission. A study of the River Guides and of the Canoeing magazines makes it clear that many rivers have been used in this way.[63] However until it is determined whether there is a public right of navigation on each river it is not known where trespass occurs.

The lack of rivers where it is known that canoeing is legally permitted has resulted in a 'honey-pot' effect at some sites. In 2003 there were at one time 200 canoes on a 400 yard

---

[57] Information from the *British Canoe Union Paddlesports Survey* 2001, Unpublished.
[58] See Appendix C
[59] Personal comment Alan Bates, July 2001
[60] See section 1.2.1 and 1.2.2 above.
[61] See Section 1.4.1 below.
[62] Brighton University Consortium. Water-Based Sport and Recreation: the facts. 2001
[63] eg Canoeist Magazine,
Terry Storry and J. Hargreaves, *North Wales White Water* (Cascade Press: 1981).
It has been written about Terry Storry that, 'the water bailiff aggressively told him he couldn't paddle any further on a river he was descending. When Terry asked calmly, why not? He was told 'because the water is private.' The laugh was on the water bailiff, as at the time it was coming down in 'stair rods'. Terry just held his hands out and just looked at the sky. The water bailiff meanwhile proceeded to turn purple, and have a apoplectic fit.' Nigel Timmins, *CoDe* Issue 116 April 2004, 2,

section of the river Wye at Symonds Yat.[64] This is one of the few sections of river owned by the British Canoe Union.

1.3.4 Frustration of Government Policy

The government policy is that there should be greater recreational use of the waterways.[65] Woolrych's interpretation of the law results in many rivers being used for recreation at less than their sustainable potential. They are often deserted during the closed season for angling. Many people are denied the possibility of peacefully enjoying the countryside. If one canoes on a river it is never known when a person on the bank may object to one's presence on the water. Such an objection may be justified and it may not be. The House of Lords Select Committee reported that, 'The tradition of a right of navigation on many broad rivers and on the canals has built up a habit of mutual tolerance between users.'[66] It is difficult for the canoeist to discover if such tolerance exists on any particular river.

The problem of limited public access to the countryside, other than to rivers, was addressed in the passing of Countryside Act and Rights of Way Act 2000.[67] This Act did not provide for increased access to rivers.

While it has been noted that some people consider that there is an injustice in the allocation of resources, it is not the purpose of this dissertation to discuss the moral rights and wrongs of the present situation. The purpose is to seek to establish the law relating to the public right of navigation on the rivers.

[64] Personal comment. Chris Hawkesworth. British Canoe Union Facilities Officer. October 2003
[65] See Section 1.2.4 above
[66] Second Report from the Select Committee of the House of Lords on Sport and Leisure. (1973), lxxii
[67] Countryside Act and Rights of Way Act 2000, c37

1.4 The Physical Environment

1.4.1 The Rivers

A river is, 'a running Stream, pent in on either side with Walls and Banks'.[68] Canals, lakes, ponds and drains are thus not rivers. There is no clear separation between a stream which is a small river and rivers in general, but streams are included within the general definition of a river.[69]

A list of the rivers of England and Wales and their tributaries was provided for a Select Committee of the House of Lords in 1877 which had 545 entries.[70] The Editor of *Canoeist* has a list of 610 named rivers parts of which are over 2 metres wide and so are potentially canoeable.[71] But enumeration is uncertain because some rivers have more than one name.

The report *Water-Based Sport and Recreation: the facts*[72] stated that there are 17,705 km of major rivers[73] in England and Wales and 50,605 km of minor rivers.[74] Thus there are about 68,310 km of river which could be used for boating. This figure can only be an approximation for all rivers have a seasonal variation in their rate of flow of water. There is a section of the upper reaches of almost every river which can be used by boats in winter but not in summer.[75]

The same report also stated that there are 2,179 km of rivers with public navigation rights. This is 3.2% of the total length of all rivers. As has been shown the existence of a legal right of navigation according to Woolrych's interpretation of the law can be very difficult

---

[68] Robert Callis, *The Reading of The Famous and learned Robert Callis; Upon the Statute of 23 H. 8. cap. 5. of Sewers: as was delivered by him at Gray's Inn, in August, 1622. 2nd Edition* (London: Thomas Basset, 1685), 77

[69] The word 'watercourse' normally includes a wider range of kinds of moving water including estuaries, rivers, streams, and their tributaries above and below ground, natural and artificial, percolating and restricted to a defined channel. See Willam Howarth, *Wisdom's Law of Watercourses, 5th Edition* (Shaw & Sons Limited: Crayford, 1992), 1

[70] *Report of the Select Committee of the House of Lords on Conservancy Boards, Appendix B, 282 – 286* 1877.

[71] Personal comment. Stuart Fisher, February 2002

[72] *Water-based Sport and Recreation: The Facts.* Report prepared for the Department of Environment, Food and Rural Affairs (Countryside Division) by University of Brighton. (2001), 30

[73] Defined as 'Rivers over 4 metres wide at their widest point'. *Ibid*, 6

[74] Defined as 'Rivers less than 4 metres wide at their widest point'. *Ibid*, 6

[75] In Scotland, at least, there may be a public right of navigation on a river which can not be used by boats for more than a part of a year. *Orr Ewing* v *Colquhoun* [1877] 2 AC 839

to determine.[76] The authors of the report seem to have ignored this problem and do not state in the report how they attempted to determine where a public right of navigation existed.

Over the period that the common law has developed the width, depth and rate of flow of the rivers, the main factors which effect physical navigability may have been different to those which exist today. It seems that no one has studied the state of the rivers of England and Wales in the 12th to 16th centuries. It is clear that some factors are almost unchanged. There is still a Roman paved ford across the river Tees.[77] However some rivers have had their course changed by human action.[78] Some rivers have changed their course by their own power. Kinderley reported that the channel of the Nene gradually changed its course a full mile from west to east in two years from June 1721.[79] Rivers have dried up like the River Og.[80] Others like the Fleet and Westbourne have been put into drains.[81]

Although it is difficult to generalise about the changes to the rivers over the last 900 years there has been a general trend in one direction. The object of most land owners has been to drain their lands. One of the ways used to improve drainage is to make cuts across the neck of meanders in rivers. This reduces the length of the river, increases the gradient of the river, and hence the speed of the water increases. Scouring the river and removing weeds also increases the speed of the water. The lower velocity of the water in the past would have made navigation easier. If precipitation and evaporation have remained constant the average flow will have remained constant. From this it follows that the product of the depth and width of the river would have been greater. The lower velocity and the greater depth and/or width of the rivers would, in general, have made navigation easier in the past than it is now.

---

[76] See Section 1.3.1 above
[77] Raymond Selkirk, *Chester-le-Street and its Place in History* (Birtley: Casdec Printcentre, 1901), 240
[78] Dorothy Summers, *The Great Ouse* (Newton Abbot: David & Charles, 1973), 12
[79] Nathaniel Kinderley, *The Ancient and Present State of the Navigation of the Towns of Lynn, Wisbech, Spalding, and Boston* (1751) quoted in H.C.Darby, *The Draining of the Fens* (Cambridge: University Press, 1940), 137
[80] Raymond Selkirk, *Chester-le-Street and its Place in History* (Birtley: Casdec Printcentre, 1901), 143
[81] N.J. Barton, *The lost Rivers of London* (London: Phoenix House Limited, 1962), 29 and 37

The abstraction of water from the sub-soil has reduced the flow of some rivers so that a river previously physically navigable has become little more than a trickle.[82]

Knighton has suggested that average rainfall was higher in the Middle Ages than it is now. He wrote, 'From miscellaneous reports of floods and droughts, it seems that many parts of Europe experienced a marked period of flooding from AD 1150 – 1500.'[83] This again, in general, would cause the rivers to be deeper and wider than they are now. It seems that in the period AD 1200 to 1600 navigation on rivers may have been easier than it is today.

Certainly in the medieval period some rivers, if not all, were used for the full length which boats could navigate.[84]

1.4.2 Mills, Weirs and Flashlocks.

With over 5,000 mills listed in Doomsday book[85] it might be thought that almost every river was obstructed before the days of Edward I. But this would be to misunderstand the nature of mills on rivers.

There are three main ways of providing a suitable supply of water for a mill:- by using the natural flow of a river, by drawing off some of the water and cutting a channel along the valley side until there is an adequate height to operate a mill as the water falls back to the river, or by building a dam to hold back either some or all of the water.

---

[82] '(The) booklet: *The Dever Valley In Old Photographs* … featured various familiar scenes along the upper and middle Dever as they were in the early 20th century. Familiar that is, apart from the river; broad, clear gravels; gentlemen in punts; Dr Wickam, inventor of the Wickam's Fancy, casting from carefully tended banks. There was even a watermill where today you'd do well to power a Pooh stick.' James Owen, 'Running on Empty', Trout and Salmon, January 2004, 28.

[83] David Knighton, *Fluvial Forms and Processes* (London: Edward Arnold (Publishers) Ltd, 1984), 171

[84] 'Geoffrey the fisherman of Coningsby, by a charter of about 1200, received from William of Keal the grant of a toft, in return for which he was to find a man to carry William or his men by boat, 'as far as the sweet water (of Witham) extends its course.' F.M. Stenton, *Danelaw Charters*, 358 quoted in M.W. Barley, Lincolnshire Rivers in the Middle Ages, (1938) Lincolnshire Architectural and Archaeological Society Report and Papers, New Series 1, 1, 15

[85] Peter Wenham, *Watermills* (London: Robert Hale, 1989), 18

The first needs a relatively small river or the mill will be in danger of regularly being flooded. The second will often not obstruct the whole river.[86] The third may well assist boats by providing a flashlock.

At the time of the Doomsday book there were about 50 households to each mill.[87] Most mills did not need a large supply of water. Thus William Fitzstephen wrote, about a hundred years later in 1180, 'On the north side (of London) are fields for pasture, and a delightful plain of meadow land, interspersed with flowing streams, on which stand mills, whose clack is very pleasing to the ear.'[88] It was the streams which were used to drive the mills not the main river Thames.

Lightman J said in a recent case concerning the river Thames,

> The status of weirs and locks as obstructions to navigation has long been a problem for the law. Weirs were originally placed on the River Thames by owners of mills in order to regulate the supply of their water and winches were also erected to haul boats over them. In 1347 a statute was passed ordering all locks and weirs to be removed as obstructions to the public right of navigation. Legislation condemning locks and weirs as nuisances continued until the 17th century. But during a period when water transportation was vital and its utility and safety were matters of the foremost importance, the increasing size of barges converted mill dams and weirs from nuisances to navigation into useful and necessary adjuncts to navigation: the deeper water they ensured (except in very dry seasons) made navigation by the very large vessels practicable.[89]

Nevertheless some weirs were built which obstructed the passage of boats. The Knights Templars constructed a mill on the River Fleet in London. In 1307 they were required to remove it as it obstructed boats on the river. The River Fleet continued to be used by boats until 1766, when it was put into a drain.[90]

---

[86] See for example *Orr Ewing* v *Colquhoun* (1877) 2 AC 839
[87] Leslie Syson, *British Water-mills* (London: B T Batsford Ltd, 1965), 33
[88] William Fitz-stephen, *Vita Sancti Thomae*, quoted in J. Stow, *Survey of London* (1598) which is quoted in N. Barton, *The Lost Rivers of London* (London: Phoenix House Ltd and Leicester University Press, 1962), 13
[89] *Josie Rowland* v *The Environment Agency*, 2002 WL 31784495 (Ch D), para 51
[90] N. Barton, *The Lost Rivers of London* (London: Phoenix House Ltd and Leicester University Press, 1962), 86

There were regular disputes about weirs, but the law provided that navigation on rivers had priority over all other interests except those weirs which had been established from before the time of Edward I.[91]

It has been suggested that few rivers were physically navigable in the medieval period because there are many reports of rivers being obstructed.[92] This seems to show an error in the interpretation of historical sources. Normally the only way by which we know that these rivers were obstructed is that the person who created the obstruction was sued so that boatmen could continue to use the river. Where the river was not obstructed we have, in general, no record of the use. Historical records tend to concentrate on disputes, not the peaceful passage of people and goods across the country.

1.4.3 Boats

In Scotland there has been a case when the right of passage on a river was influenced by a history of floating logs down the river.[93] In the United States there have been many cases involving the question as to whether a river was floatable by logs.[94] However in England and Wales it no report of a court case involving the floating of logs or the use of rafts has been found.

On both tidal and non-tidal waters the law is the same for small boats as for large,[95] except that it would be considered unreasonable for a large vessel to attempt to pass along a channel which is too small for it[96] and different tolls may apply. Thus on one part of the

---

[91] *Williams* v *Wilcox* (1838) 8 Ad & El 314

[92] eg:- 'Despite the importance of river navigation, its early history shows that most attempts to preserve navigation ended in a losing battle against other interests in the rivers. The fishermen constantly obstructed the rivers with their weirs, traps and nets; millers obstructed them with dams for their mills; neighbouring landowners tried to levy tolls on passing boats; even the boatmen were part authors of their own misfortunes, for they threw ballast stones overboard to float their boats over the shallows.' Frank A Sharman 'River Improvement in the Early Seventeenth Century' (1982) 3 JLH, 222

[93] *Wills' Trustees* v *Cairngorm Canoeing and Sailing School Limited*, 1976 SLTR 162,

[94] See John M. Gould, *A Treatise on the Law of Waters* (Chicago: Callaghan and Company, 1891), 207

[95] Lord Chief-Justice Hale, *De Jure Maris et Brachiorum eiusdem* Contained in: Francis Hargrave Ed, *A Collection of Tracts* (London: E. Brooke, 1787), 8.

[96] Sir James Hannen, 'It may be reasonable and right that a small vessel should go up to the farthest point she can reach in order to give the public the benefit of the public way. But the same right does not exist in the case of a large vessel.' *Octavia Stella* (1887) 6 Asp MLC 182

Trent in 1228 the Lord of Torksey was entitled to take tolls of 4d for a ship with oars, 2d for those without oars and 1d for small boats.[97]
Considerable work has been done in studying the characteristics of logboats which were used throughout the Middle Ages.[98] There seems to be no reason to think that, in the hands of a skilled paddler, they were much less manoeuvrable than modern boats of comparable size.

Callis wrote that there were two types of people who used boats on the rivers at the start of the 17th century. Their legal status may have been different. He refers to 'those persons which had free and customary passage thereon, as a liberty and inheritance' who were to contribute to the repair of a river. Whereas, he states that the charge for repair 'was not meant or intended of poor Boatmen which come thereon with their Boats accidentally, by the general Custome of the Realm.'[99]

Boats may be propelled by a motor, sailed, rowed, paddled, poled or towed by horses or men. Moving downstream they may just float with the current. There may be a general perception that a river is not navigable even at a time when one or more people are regularly using it.

---

[97] M.W. Barley, 'Lincolnshire Rivers in the Middle Ages', (1938) Lincolnshire Architectural & Archaeological Society reports & Papers New Series 1, 13 -14; quoted in James Frederick Edwards, *The Transport System of Medieval England and Wales*, Ph D Thesis University of Salford (1987) Unpublished
[98] S. McGrail, *Logboats of England and Wales* , BAR 51 (Oxford: British Archaeology Reports, 1978)
[99] Robert Callis, *The Reading of The Famous and learned Robert Callis; Upon the Statute of 23 H. 8. cap. 5. of Sewers: as was delivered by him at Gray's Inn, in August, 1622, 2nd Edition* (London: Thomas Basset, 1685), 137

1.5 The Legal Environment

1.5.1 The boundary tidal to non-tidal

The boundary between the tidal and non-tidal parts of a river is determined by whether the water rises and falls and/or ebbs and flows by the ordinary effect of the sea tide.[100]

The question as to whether a section of a river is tidal where it was naturally tidal but the effect of the tides has been cut off by a sluice or weir seems not to have been considered by the courts.[101] The Ordnance Survey shows such rivers as non-tidal. The legal position regarding the right of navigation on such rivers is considered below.[102]

1.5.2 Ownership of the river beds, the fisheries and the water

Hale[103] started his treatise *De Jure Maris* by stating that, 'Fresh rivers, of what kind soever, do of common right belong to the owners of the soil adjacent; so that the owners of the one side have, of common right, the propriety of the soil, and consequently the right of fishing, *usque filum aqua.*'[104] [105] With regard to the ownership of the soil of the river this was confirmed by Bowen, LJ in *Blount* v *Layard*.[106] With regard to the ownership of the right of fishing Hale was confirming the law as described by Bracton.[107] However the ownership of the bed of the river and of the right of fishing may be separated from ownership of the banks.

---

[100] *Horne* v *Mackenzie* (1839)6 Cl & Fin 834, 841
Reece v *Miller* (1882) 8 QBD 626, 630
West Riding of Yorkshire Rivers Board v *Tadcaster Rural District Council* (1907) 97 LT 436
Ingram v *Percival* [1969] 1 QB 548

[101] Eg Western Rother, Waller's Haven, Glynde Reach

[102] See section 4.6

[103] For the authenticity of Hale's treatise see Section 2.11.3 below

[104] 'To the centre of the water.'

[105] Hale, Lord Chief-Justice, A Treatise in Three Parts (normally called *De Jure Maris*). Contained in Hargrave, Francis. Editor. *A Collection of Tracts relative to the Law of England* (London: T. Wright, 1787), 5
See also *Blount* v *Layard* [1891] 2 Ch 681, 689; Reported under *Smith* v *Andrews* [1891] 2 Ch 678
R v *Wharton* (1701) 12 Mod 510

[106] *Blount* v *Layard* [1891] 2 Ch 681, 689; Reported under *Smith* v *Andrews* [1891] 2 Ch 678

[107] Sir Travers Twiss, Editor, *Henrici De Bracton de Legibus et Consuetudinibus Angliae, Volume 3* (London: Longman & Co and others, 1878), 375

In tidal waters there is a presumption that the bed of the river belongs to the Crown[108] and that there is a public right of fishing.[109] However the rights may be owned by an individual due to grant or prescription.[110]

The water in both tidal and non-tidal rivers is public.[111]

1.5.3 The differences between Rivers and Roads

Confusion has been created by people referring to a river as a 'highway'. The qualities which relate to one type of highway, a road, have been attributed to a different type of highway, a river, sometimes without justification.[112]
When referring to passage by land, a 'way' is a route along which people pass. A 'right of way' is a right to pass from point A to point B by a defined route. The right may be private or public. A public right of way is called a 'highway'.[113]

Navigation has been defined as 'passage or transit through navigable waters'.[114] Thus a 'right of navigation' is the right to pass across water. Where one is referring to a river, as opposed to a lake or the sea, a right of navigation is the right to pass from point A to point B along the river, which by its nature is a defined route.

---

[108] *R* v *Smith* (1780) Doug 441
Fitzharding v *Purcell* [1908] 2 Ch 139
Malcomson v *O'Dea* (1863) 10 HLC 593
Bulstrode v *Hall & Stephens* (1664) 1 Sid 148
[109] *Case of the Royal Fishery of the Banne* (1619) Davis Ir 55
Malcomson v *O'Dea* (1863) 10 HLC 593
[110] *Idem.*
[111] *Embrey* v *Owen* (1851) 6 Ex 353, 369
Liggins v *Inge* (1831) 7 Bing 682, 692
Williams v *Morland* (1824) 2 B & C 910, 913
Robert Callis, *The Reading of The Famous and learned Robert Callis; Upon the Statute of 23 H. 8. cap. 5. of Sewers: as was delivered by him at Gray's Inn, in August, 1622. 2nd Edition* (London: Thomas Basset, 1685), 78 - 79
[112] 'Since a river which is navigable at law is a highway, the general principles which apply to highways must apply to such a river …..' A.E. Telling and Sheila A. Foster, *The Public Right of Navigation* (Severn-Trent Water Authority, Project PFA 12, 1978), 61
[113] John Riddall and John Trevelyan, *Rights of Way* (London: Open Spaces Society and Ramblers' Association, 3rd Edition, 2001), 26
[114] *Crown Estates Commissioners* v *Fairlie Yacht Slip Ltd* 1979 SC 156, 182

It is, therefore, not surprising that rivers have been referred to as highways. Balcombe LJ quoted eleven cases and two early commentaries where rivers had been referred to as 'highways'.[115]

Although a strip of land on which there is a right of way and a river on which there is a right of navigation are both called 'highways', there is no reason to assume that there is any similarity in the way in which the two types of highway are created, in the rights granted to a user of each, in the responsibilities assumed by the people using them nor the way in which the right is terminated. The fact that two objects have a common descriptor in English does not establish that there are the same legal rights appertaining to each. There are, of course, certain things which roads and rivers have in common.

Gray and Gray recently wrote, 'Despite isolated statements that a navigable river is a 'public highway', the supposed analogy between rights on water and rights on land is generally regarded today as incomplete and misleading.'[116]

There seem to be only two early cases when courts disagreed with the concept that a river is a highway. Lord Kenyon, CJ said, 'Callis compares a navigable river to an highway; but no two cases can be more distinct.'[117] A much more subtle, but also more telling example, occurred in *Sury* v *Pigott*[118] where it was held that a private right to a water-course was not made extinct by unity of possession. Under similar circumstances a private right of way would have been extinguished.

---

[115] *A-G ex rel Yorkshire Derwent Trust Ltd* v *Brotherton* [1991] Ch 185, 193 - 196; quoting *R* v *Hammond* (1717) 10 Mod Rep 382; *Ball* v *Herbert* (1789) 3 Durn & E 253, 262 – 263; *Rose* v *Miles* (1815) 4 M & S 101, 104; *Williams* v *Wilcocks* (1838) 8 Ad E 314; *R* v *Betts* (1850) 16 QB 1022, 1032; *Marshall* v *Ulleswater Steam Navigation Company* (1871) 7 QB 166, 172; *Original Hartlepool Collieries Co* v *Gibb* (1877) 5 Ch D 713, 720 and 723 – 724; *Bourke* v *Davis* [1889] CD 110, 120; *A-G* v *Simpson* [1901] 2 Ch 671, 708; *Blundy, Clark and Co Ltd* v *London & North Eastern Railway Co* [1931] 2 KB 334, 365; *Hargrave's Law Tracts* (1787) and Hawkins, *Pleas of the Crown*, Book 1, ch 76, para 1

[116] Kevin Gray and Susan Francis Gray, *Elements of Land Law* (London: Butterworths, 3rd Edition, 2001), 121. Footnote 'See *A-G ex rel Yorkshire Derwent Trust Ltd v Brotherton* [1992] 1 AC 425 at 435C per Lord Oliver of Aylmerton ('I cannot … think that any reader of Alfred Lord Tennyson would have regarded the Lady of Shalott, as she floated down to Camelot through the noises of the night, as exercising a right of way over the subjacent soil'). *Quaere* Should Lord Oliver have referred to a right of bathing rather than a right of way?

[117] 'Callis compares a navigable river to an highway; but no two cases can be more distinct. In the latter case, if the way be founderous and out of repair, the public have a right to go on the adjoining land: but if a river should happen to be choked up with mud, that would not give the public a right to cut another passage through the adjoining lands.' *Ball* v *Herbert* (1789) 3 TR 253, 263

[118] *Sury* v *Pigott* (1625) 3 Bulstrode 280

Lord Oliver of Aylmerton has listed some of the differences, which have been recognised by judges, between traffic on land and waterborne traffic:-[119] on land there is an exactly determined course decided on by man, whereas a river exists permanently and is a natural feature;[120] in Scotland at least, the right does not depend on there being two public termini;[121] a right of navigation may embrace the right to navigate in no defined channel over the whole surface of an inland lake;[122] there is, apart from statute or custom, no person under the obligation of keeping the banks in repair or the channel free for navigation;[123] for waterborne traffic there may be passage of articles without human accompaniment;[124] there may be a right to moor or to drop anchor.[125]

In the same case Lord Jauncey of Tullichettle said, 'To treat a right of navigation as though it were a right of way over water similar in all respects to a right of way on land is misleading. The two rights are similar inasmuch as each confers upon the public the right of passage but it has always been recognised that there are important distinctions.'[126] He added to Lord Oliver's examples the fact that if a footpath becomes impassable the public may deviate onto adjoining land but if a river silts up they may not cut a new channel.[127]

To these differences may be added the fact that the Legislature have always passed separate statutes referring to rights of way on land and rights of navigation on water. Roads maintain the same line, unless a person deviates from the line due to the path being impassable, whereas rivers change their course without human intervention. The number of roads is forever changing, whereas the number of rivers is almost the same as it was before man set foot in the land.

It has also been held that, in the context of the National Parks and Access to the Countryside Act 1949, the exercising of a public right of navigation on tidal water is not 'using a public right of way'.[128]

---

[119] *A-G ex rel Yorkshire Derwent Trust Ltd* v *Brotherton* [1992] 1 AC 425, 434
[120] *A-G* v *Simpson* [1901] 2 Ch 671, 687
[121] *Wills' Trustees* v *Cairngorm Canoeing and Sailing School Ltd* 1976 SC (HL) 30, 125, 126, 167
[122] *Marshall* v *Ulleswater Steam Navigation Co* (1871) 7 QB 166, 172
[123] *Williams* v *Wilcocks* (1838) 8 Ad E 314, 329
[124] *Wills' Trustees* v *Cairngorm Canoeing and Sailing School Ltd* 1976 SC (HL) 30
[125] *A-G* v *Wright* [1897] 2 QB 318, 321, 323
[126] *A-G ex rel Yorkshire Derwent Trust Ltd* v *Brotherton* [1992] 1 AC 425, 445
[127] *Ball* v *Herbert* (1789) 3 Durn & E 253, 262 – 263
[128] *Evans* v *Godber* [1974] 3 All ER 341

A river is not only a way from one place to another. It may also be a source for the supply of water, a place for cultivating fish, a source of power, a method of waste disposal, a threat from flooding, an ornament or a place of recreation.[129]

Essentially roads are made by man. Rivers are made by God. In the days when this was a God fearing nation it seems likely that the roads would have been be considered to belong to their creators, that is - publicly made roads would be public, privately made roads private, unless dedicated for public use. But all rivers would have been considered a gift to the nation of the eternal creator.[130]

There are other public rights over private land, 'the right of a town or village green' and 'the right to roam'. Just as the legal rights appertaining to each of these rights are different so the way in which they are created vary. These are considered below.[131]

1.6 The Right of Navigation

1.6.1 The meaning of the word 'navigable'

Kekewich, J said, 'The word navigable has a popular and also a legal and technical meaning, although no doubt essentially requiring navigation to be possible, it requires also something more – namely, the ebb and flow of the tide.'[132]

Saunders wrote, 'The test of a navigable river is its navigability and the flux and reflux of the sea. No river was ever held to be navigable so as to vest the soil in the Crown, and to vest in the public the right to fish, merely because the river became a "public highway" ….

---

[129] S.M. Haslam, *The Historic River* (Cambridge: Cobden of Cambridge Press, 1991)

[130] (A particular line of travel on land) 'is therefore in itself a creature of human activity, as is the right of public use which arises consequentially. A river is the work of nature, as is its course, its character and its capacity for the carriage of traffic in persons or goods. ….. It is therefore not difficult to appreciate that in the one case the law will require evidence of use both to identify and to open a public right of way on land, while in the other identification and capacity and potential as a means of communication between already existing places of public access are ascertainable by instant examination.' *Per* Lord Cameron, *Wills' Trustees* v *Cairngorm Canoeing and Sailing School Limited* 1976 SLTR 162, 182 - 183

[131] See chapter 7 below.

[132] *Earl of Ilchester* v *Raishleigh* 61 LT NS 477, 479

"Navigable" and "tidal", as applied to a river, are synonymous in law, though the former has a popular as well as a legal meaning.'[133]

Bouvier wrote, 'In its technical sense, the term navigable, at common law, is only applied to the sea, to arms of the sea, and to rivers which flow and reflow with the tide, - in other words, to tide–waters, the bed or soil of which is the property of the crown. All other waters are, in this sense of the word, unnavigable.'[134]

The word 'navigable' in the sense 'tidal' was used in the report of the case of the Royal Fishery of the Banne, *'Il y ad 2 kinds de rivers; navigable, & neint navigable. Chescun navigable river cy hault que le mer flow & reflow en ceo, est regale.'*[135] It was used in the same sense by Hale.[136] More recently a 1991 Act has apparently used the word navigable in the same sense.[137]

The Oxford English Dictionary makes no mention of the ebb and flow of the tide in its definition of the word 'navigable'.[138] Thus it is not surprising that confusion has resulted from the different meanings attached to the word.

It will be shown later[139] that the phrase 'make navigable' as used in many statutes means 'make into a navigation', where a 'navigation' is a stretch of water on which barges and lighters can pass and repass at nearly all times of year. In the case of a river it may have been possible for boats, punts and gigs to pass along the river before the Act. It may have been possible for boats and lighters to have passed along the river at some seasons of the

---

[133] John B Saunders, *Words and Phrases legally defined* (London: Butterworths, 3rd ed, 1989), 191

[134] William Edward Baldwin, Editor, *Bouvier's Law Dictionary* (New York: The Banks Law Publishing Co, 1928), 835

Taney CJ wrote, 'In England, undoubtedly, the writers upon the subject, and the decisions in its courts of admiralty, always speak of the jurisdiction as confined to tide waters. And this definition in England was a sound and reasonable one, because there was no navigable stream in the country beyond the ebb and flow of the tide.' 53 US (12 How) at 454-455. Quoted in Glenn J MacGrady, 'The Navigability Concept in the Civil and Common Law' (1975) 3 FSULR 4, 570 – 571.

The Cam and the Isis are examples of rivers which are navigable and non-tidal.

[135] 'There are 2 kinds of rivers; navigable, & not navigable. Each navigable river in which the sea flows and reflows in it, is royal.' *Le Case del Royall Piscarie de le Banne*, (1619) Davis 55, 56

[136] Lord Chief-Justice Hale, *De Jure Maris et Brachiorum eiusdem* Contained in: Francis Hargrave Ed, *A Collection of Tracts* (London: E. Brooke, 1787), 11

[137] 'In this section "foreshore" includes the shore and bed of the sea and of every channel, creek, bay, estuary and navigable river as far as the tide flows.' Water Resources Act 1991 c 57, Part V, s.115 (9)

[138] *Oxford English Dictionary* (Oxford: Clarendon Press, 2nd ed, 1989)

[139] See section 3.1 below

year. The river may also have been used for the floating of wood and timber. After the work was completed larger vessels would have been able to pass and the proprietors would, in general, have been under an obligation to keep the navigation safe and been authorised to collect a toll.[140]

A river may be legally navigable even though boats can only pass up and down the river at certain states of the tide[141] or during certain seasons of the year.[142]

Among the many possibilities reference to a 'navigable river' may mean (1) that the river is tidal, (2) that there is a legal right of navigation for the public, (3) that a boat is physically able to pass up and down the river, (4) that a boat is physically able to pass down the river, but not up, or any combination of these.

It may be noted that a river may be made '*more navigable*'.[143]

In this dissertation an attempt has been made to make clear what meaning is attached to the word 'navigable' whenever it is used. Often when quoting from another source it is necessary to investigate what meaning the speaker or author had attached to the word.

1.6.2 The Right of Navigation

In 1902 Coulson and Forbes defined navigation as, 'a right of way exercised for the purposes of trade and commerce, which may be enjoyed in the sea, in public and private waters.'[144] In the sixth edition of the book, edited by Hobday, navigation is defined as, 'a right of way which may be enjoyed in the sea, in tidal and non-tidal waters.'[145] The requirement that use should be for 'purposes of trade and commerce' has been omitted. The

---

[140] *Bundle Clark* v *LNER* [1931] 2 KB 334
[141] *R* v *Tippett* (1819) 3 B & Ald 192
[142] *Wills' Trustees* v *Cairngorm Canoeing and Sailing School* [1976] SLT 215
[143] An Act for the Advancing and Regulating of the Trade of this Commonwealth *Acts and Ordinances of the Interregnum 1642 – 1660 Volume 2* (London: His Majesty's Stationery Office, 1911), 404
'An Act for making the River Cham, alias Grant, in the county of Cambridge more navigable ….' (1702) 1 Anne c 11
[144] H.J.W. Coulson and Urquhart A. Forbes, *The Law relating to Waters, Sea, Tidal and Inland, 2nd Edition* (London: Sweet and Maxwell, 1902), 408
[145] S. Reginald Hobday, *Coulson & Forbes on The Law of Waters, Sea Tidal, and Inland and Land Drainage, 6th Edition* (London: Sweet & Maxwell, 1952), 492

extent to which the right of navigation applies to recreational use is considered in the next section. The right of navigation certainly includes all rights necessary for the full enjoyment and exercise of the right of passage, provided the rights of others are respected. Thus the right of navigation may be exercised even to the detriment of a right of fishery,[146] provided it is exercised reasonably.[147] Where there is a right of navigation on a river it extends to the full width of the river.[148]

On land, once a right of way has been created it becomes much more than just a way from A to B. It is 'a public place in itself which the public may enjoy for any reasonable purpose'.[149] It has been held that walking up and down a highway shouting and waving flags is not a reasonable use of the highway,[150] nor is it permitted to walk up and down a path taking notes about the performance of various horses.[151] It has been stated that on a highway one may sit and rest or make a sketch.[152] From this it has been deduced that on a highway a person has the right to stop and look at the view, to talk to a passer-by, to take photographs or to have a picnic on the verge.[153] Thus it seems that a highway can be used for certain types of recreation. Indeed on many footpaths now the primary use is for recreation.

The law relating to navigation rights on rivers is not so developed. However it would seem that, providing one does not disturb or potentially disturb[154] another person, the same rights would exist on water as on land. In 1808 Wood B said, 'A navigable river is a public highway; and all persons have a right to come there in ships, and to unload, moor, and stay there as long as they please.'[155] However it seems that a fuller statement of the law would be that in tidal waters a vessel may anchor[156] or ground[157] to wait until tide, wind, weather and possibly season are suitable for it to leave, subject to paying harbour or port dues, if

---

[146] *Gann* v *Free Fishers of Whitstable* (1865) 11 HL 192
[147] *Colchester Corporation* v *Brooke* (1845) 7 QB 339
[148] *Williams* v *Wilcox* (1838) 8 Ad & El 314
Micklethwait v *Vincent* (1892) 67 LT NS 225, 230
[149] *Williams-Ellis* v *Cobb* [1935] 1 KB 310, 320
[150] *Harrison* v *Duke of Rutland* [1893] 1QB 142
[151] *Hickman* v *Maisey* [1901] 1 QB 752
[152] *ibid*
[153] John Riddall and John Trevelyan, *Rights of Way* (London: Open Spaces Society and ~Ramblers' Association, 3rd Edition, 2001), 28
[154] see *Rawson* v *Peters* The Times, 2 November 1972. See also section 6.4 below.
[155] *Anonymous* (1808) 1 Camp 517
[156] *Gann* v *Free Fishers of Whitstable* (1865) 11 HL 192
[157] *Mayor of Colchester* v *Brooke* (1845) 7 QB 339

applicable, so long as such action is an incident of navigation. There is no right to moor permanently in one place.[158] There is no common law right to lay moorings.[159] In non-tidal waters it would appear that there is a right of mooring as an incident of navigation, but not permanently.[160]

Although it is not recorded in the legal texts, it seems that there is a tradition of walking on the bed of rivers.[161] It is a right which has been used whenever boats have grounded. Also, Coke wrote that those using a navigation have the right to scour the bed of the stream, which, in shallow water, can most easily be done by standing on the bed of the river or the bank.[162] Similarly there seems to be a right to use the bed of the river for poling or punting a boat.[163]

As long ago as 1827 Bayley, J said, 'The right of the public on navigable rivers is not confined to the passage: trade and commerce are the chief objects and the right of passage is chiefly subservient to those ends.'[164]

In this dissertation a right of navigation always means a right for the smallest type of boat which could be used on a particular section of a river.

A right of navigation is not an unqualified right. It is doubtful if there is any right which is. It seems that in Scots Law use of a river may be restrained to enable others to use it for other purposes. Thus in *Grant* v *Duke of Gordon*[165] it was decided that the right of navigation could only be exercised between 26th August and 15 May. It appears that the decision was reached because to send timber down the river at other times would have been to use the right of navigation emulously.

---

[158] *Denaby and Cadeby Main Collieries Ltd* v *Anson* [1911] 1 KB 171
[159] *Crown Estate Commissioners* v *Fairlie Yacht Slip Ltd* 1979 SC 156
[160] *Cambell's Trustees* v *Sweeney* 1911 SC 1319
[161] Of a journey on the Thames before 1632, 'rocks, and sands, and flats, Which made us wade, and wet like drowned rats.' John Taylor, *Thame Isis* (1632) quoted in Fred S Thacker, *The Thames Highway, Vol I , New Impression* (Newton Abbot: David & Charles, 1968), 92
[162] (1610) 13 Co Rep 33
[163] In the Thames Commissioners' *Rules for Poundkeepers and Bargemen* of 1828 is the regulation, 'No pole is to be put overboard from any barge whilst within the Pound, nor at any Pole placed at any time against any of the Banks, Bridges or Towing paths.' They could only be used on the bed of the river outside the pound locks. Quoted in Fred S Thacker, *The Thames Highway, Vol , New Impression* (Newton Abbot: David & Charles, 1968), 178
[164] *R* v *Russell* (1827) B & C 566
[165] *Grant* v *Duke of Gordon* 1792 2 Pat App 582

A right of navigation does not create a right of fishing[166] or wild-fowling.[167] Bracton wrote that there is a right to go on the bank of a river. Callis wrote that the bank of a river is like a highway.[168] While it has been held that there is no common law right to tow a boat from the bank, there has been no reported case to decide if the right for a navigator, or any other person, to walk on the bank of a river has been lost.

The noun a 'navigation' may be used in as many ways as the word navigable. However often the meaning seems to be 'a stretch of water on which there is a right of navigation which is usable by ships or large boats'.[169]

1.6.3 Recreation and the Right of Navigation

Lord Wilberforce said,

> A distinction was sought to be introduced from the fact that the use for floating was commercial and that for canoeing recreational and that the admission of the former did not therefore admit the latter. But, even if one puts aside the mixed quality of the use in this case (since the respondents at least are a commercial organisation) it is in my clear opinion that once a public right of passage is established, there is no warrant for making any distinction, or even for making any enquiry, as to the purpose for which the right is exercised. One cannot stop a canoe, any more than one can stop a pedestrian on a highway, and ask him what is the nature of his use. The question is purely one of the capacity of the river.[170]

Thus it would seem that where commercial craft have a common law right to go, recreational craft have a similar right.[171] Also where commercial craft may go, educational

---

[166] *Smith* v *Andrews* [1891] 2 Ch 678
[167] *Micklethwait* v *Vincent* (1892) 67 LT 225
[168] Robert Callis, *The Reading of The Famous and learned Robert Callis; Upon the Statute of 23 H. 8. cap. 5. of Sewers: as was delivered by him at Gray's Inn, in August, 1622. 2nd Edition* (London: Thomas Basset, 1685), 74
[169] See section 3.1 below.
[170] *Wills' Trustees* v *Cairngorm Canoeing and Sailing School Limited*, 1976 SLTR 162, 191
[171] On land a right of way may be established by recreational use. *Hue* v *Whiteley* [1929] 1 Ch 440

craft may go. In addition it would seem that where a large craft has the right to go a small one has the same right.[172]

With regard to training, the report *Water-based Sport and Recreation: The Facts* includes the statement, 'Even where navigation rights exist case law suggests that - on non-tidal water – craft are restricted to passing, repassing and 'standing still for a reasonably short time'. … Such rights do not infer any additional or related rights such as ….. static training operations.'[173] The passage from *Elements of Land Law*,[174] to which the authors refer has been deleted from the most recent edition of the book. Possibly this is because it was realised that 'static training' is no different from 'standing still for a short time' which is normally allowed. In addition, on those rivers on which a common law public right of navigation has been exercised, it would seem that new young navigators always learnt the skill of their trade on the rivers. There is no way of separating those who are learning to canoe for recreational purposes from those who are training so that they can use their skills in the Army, Royal Marines, as instructors or elsewhere.

It may be noted that where a reservoir was used by sailing dinghies for recreational activities it has been held that there is no 'navigation' for the purposes of the Merchant Shipping Acts.[175,176] However, it seems to have been the place where the activity took place, a reservoir, rather than the activity, dinghy sailing, which Henry J referred to as 'messing about in boats', which was the deciding factor.

1.6.4 Ending a public right of navigation

Lord Lindley said, 'the doctrine once a highway always a highway is, I believe, applicable to rivers as to roads.'[177] Thus a public right of navigation cannot be lost by disuse. This is

---

[172] See also Balcombe LJ, 'The public right to navigate the river with cargo-carrying vessels and for purposes incidental thereto must be taken to carry with it a general right of public navigation subject to the payment of tolls by cargo carrying vessels.' *Yorkshire Derwent Trust Ltd* v *Brotherton* 61 P&CR 198, 208
[173] University of Brighton Consortium, *Water-based Sport and Recreation: The Facts* (2001), 11
[174] Kevin Gray and Susan Francis Gray, *Elements of Land Law, 2nd Edition* (London: Butterworths, 1993), 1056; and *3rd Edition*, (2001), 131
[175] Merchant Shipping Act 1894 c 60 s 742
[176] *Curtis* v *Wild* [1991] 4 All ER 172
[177] *Simpson* v *A-G* [1904] AC 476, 510

true even in Scotland with its laws of Negative Prescription.[178] Equally a right of navigation is not lost when the river is physically obstructed.[179] It was stated in 1349 that when a river changes its course the right of navigation is continued on the new course of the river.[180] There will then be no right of navigation in the original course of the river, if it is dry or impassable.

Lightman, J has recently stated that a public right of navigation may only be extinguished by legislation or exercise of statutory powers[181] or by destruction of the subject matter of the public right of navigation[182] e.g. through silting up of the watercourse.[183]

It seems that, in general, if an Act creating a public right of navigation is repealed then any prior rights at common law would remain.[184]

However care is needed in assessing when a right of navigation is lost by siltation. If a channel on which there was a right of navigation becomes physically unnavigable due to an accumulation of silt and then, at a later date, a new channel is made on the same line as the original, then there will be a right of navigation in the new channel.[185] Similarly, it is suggested, that if a river, due to a flood, washes away the obstructing silt the right of navigation will be restored. In the same way if the flow of water in a river is diminished by excessive abstraction and then the abstraction ceases so that the river is again physically navigable, it is suggested that a public right of navigation on the river would be restored.[186]

It has been provided by statute that there may be a public right of navigation on a river which has not 'been made navigable'.[187]

---

[178] That is the extinguishment of a right if it is not exercised for a given period of time. *Wills' Trustees* v *Cairngorm Canoeing and Sailing School Limited* 1976 SLTR 162
[179] *Vooght* v *Winch* (1819) 2 B & Ald 662
[180] (1349) 22 Ass 93
[181] Thus the rights of navigation created by the Act for making the River Derwent were extinguished by an order made under s 41 of the Land Drainage Act 1930. *Yorkshire Derwent Trust Ltd* v *Brotherton* 61 P & CR 198, 215
[182] *R* v *Montague* (1825) 4 B & C 598
[183] *Josie Rowland* v *The Environment Agency* [2003] 1 All ER 625, para 50
[184] Transport Act 1968, c 73, s 115 (2)
[185] *R* v *Betts* (1850) 16 QB 1022
[186] Compare:- *Stollmeyer* v *Trinidad Lake Petroleum Company* [1918] AC 485
[187] River Douglas. See section 3.2.5.

On some rivers a statutory navigation has been abandoned. Thus the part of the river Rother from Midhurst to Stopham Meadow was made navigable in 1791.[188] In 1936 the Minister of Transport issued a Warrant[189] authorising the abandonment of the navigation, 'releasing the canal Company or others the proprietors of the unnecessary canal from all liability to maintain the same canal and from all statutory and other obligations in respect thereof.' It would seem that in these cases the right of navigation granted by the original Act remains, as far as the physical state of the river allows.

1.7 Other Legal Systems

1.7.1 Roman Law

Borkowski states that, 'Although Roman law never became a dominant influence in England, it has made a significant contribution to English legal culture.'[190] With regard to the creation of a right of way on land Kerr LJ quoted with approval, 'From early times English authorities have followed the definition of Roman law; (with regard to 'user as of right').[191] Thus it seems appropriate to examine the public right of navigation under Roman Law.

The Institutes of Justinian contain the statements,

> Thus, the following things are by natural law common to all - the air, running water, …..[192]

> The public use of the banks of a river, as of the river itself, is part of the law of nations; consequently every one is entitled to bring his vessel to the bank, and

---

[188] 31 George III cap 66
[189] Under Section 45(1) of the Railway and Canal Traffic Act 1888
[190] Andrew Borkowski, *Textbook on Roman Law , 2nd Edition* (London: Blackstone Press Limited, 1997), 384
[191] *Newnham* v *Willison* (1987) 56 P&CR 8, 17
[192] Institutes Book II, Title I. 1. 'Of the Different kind of things.' Translation from:- J.B. Moyle, *The Institutes of Justinian 5th Edition* (Oxford: Clarendon Press, 1913), 35

> fasten cables to the trees growing there, and use it as a resting-place for the cargo, as freely as he may navigate the river itself.[193]

More information about Roman Law is given in the Digest:-[194]

> A river (*flumen*) is distinguished from a brook (*rivus*), either by its size or the opinions of those living along it.[195]
>
> Some rivers are perennial; some are torrential. A perennial river is one which flows continually. A torrential river is one which flows in cold weather. If, however, a river which has flowed perennially dries up during the summer, it is none the less perennial.[196]
>
> Some rivers are public; others not. Cassius defines a public river as a perennial river. This definition, approved by Celsus, appears correct.[197]
>
> Rivers which flow (perennially) are public, and their banks also are public.[198]
>
> Do nothing on the banks of a public river, or in the stream, neither put anything on the banks of the stream, whereby the landing or the navigation is made worse.'[199]
>
> (Ulpian) In the Praetor's interdict are the words, "or the navigation is made worse." This refers to the shipping. Under the term "shipping" rafts are also comprised, because their use is often necessary.[200]

It seems that Roman Law distinguished between rivers and streams by their size and the fact that rivers flowed perennially or were flowing for a considerable period of the year. The public rivers were those that flowed perennially.

---

[193] *ibid*, II. I. 4.
[194] Translations from the Digest are taken from:- Eugene F. Ware, *Roman Water Law* (St Paul, Minnesota: West Publishing Co, 1905)
[195] Digest 43.12.1.1
[196] Digest 43.12.1.2
[197] Digest 43.12.1.3
[198] Digest 43.12.3
[199] Digest 43.12.1
[200] Digest 43.12.1.14

It also seems that there was a public right of navigation on all public rivers which were physically navigable. The reference to rafts in the final quotation seems to indicate that there could be a public right of navigation on a river on which it was only possible to move in a downstream direction, as rafts are very seldom taken upstream.

In England and Wales nearly all rivers flow perennially. So these quotations would seem to indicate that on all rivers which are physically navigable by boats or rafts, either in both directions or downstream only, there would be a public right of navigation under Roman Law.

None of the medieval writers on the common law state any difference between the English law and Roman law regarding the public right of navigation.[201]

1.7.2 Scots Law

In the courts in England and Wales and in the commentaries there have been frequent references to cases decided under Scots Law. These cases are used as persuasive authorities when judges and commentators seek to establish the law. *Orr Ewing* v *Colquhoun*[202] is quoted as an authority in one text[203] 24 times. Thus it seems appropriate to examine briefly the nature of this law.

In Scots Law relating to non-tidal rivers there has been a tendency to change public rights into private privileges.[204] Thus Hume said that there was a public right to fish, other than for salmon, in non-tidal navigable rivers.[205] Stair thought that there were 'common freedoms of every nation' to fish in tidal and non-tidal waters for 'common fishes'.[206]

---

[201] See sections 2.3, 2.4 below
[202] *Orr Ewing* v *Colquhoun* (1877) 2 AC 839
[203] S. Reginald Hobday, *Coulson & Forbes on the Law of Waters, 6th Edition* (London: Sweet & Maxwell Limited, 1952), xxvi
[204] The information relating to Scots Law before 1900 is taken partly from Niall Whitty, 'Water Law Regimes', being Chapter 11 of Kenneth Reid and Reinhard Zimmermann, *A History of Private Law in Scotland Volume 1* (Oxford: Oxford University Press 2000). This text is referred to in these footnotes as 'Whitty'.
[205] 'As far as relates to the inferior sorts of fish – trouts and the like, which are sought for sport rather than profit; it is not disputed, that the lieges at large have right to resort to a public river, and there, to take them in the ordinary and accustomed ways of fishing.' Hume *Lectures* IV, 245. quoted in 'Whitty', 443
[206] 'Whitty', 443

However in 1894 it was held that the public right of trout fishing was limited to tidal waters.[207]

This change seems to have came about due to the fact that 'tidality was accepted as the mark of a public river in the *Colquhoun's Trs*[208] case of 1877.'[209] Previously the institutional writers had used the word 'public' to refer to those rivers, tidal and non-tidal, on which there was a public right of navigation.[210]

The date of the change in the law from the ownership of the bed of non-tidal navigable rivers being in the Crown to being in private ownership is indicated by two judgements of Lord Justice-Clerk. In 1866 he gave a clear statement to the jury that the ownership was in the Crown.

> A public river – that is, a river which is fit for navigation – navigation of any kind, not merely by vessels of large burthen, but by boats and lighter vessels – a river which is fit for navigation, whether it be fresh water or salt, whether it be a tidal river or a river in which the tide does not ebb and flow, is public property. It is vested in the Crown for public uses, and chiefly for the uses of navigation; and to these public uses all private rights are subordinated. ….. The property of the river is in the Crown, and not in the proprietors of the banks, and it is vested in the Crown for the promotion of public objects and uses. But in regard to a private stream – that is to say, a stream which in not navigable – precisely the reverse of this holds.[211]

Eleven years later as Lord President he referred to this statement 'as casual remarks' which were 'loosely made' and reversed his opinion.[212] No reason is given for his change of mind. The change was confirmed by the House of Lords.[213]

---

[207] *Grant* v *Henry* 1894 21 R 358 quoted in 'Whitty', 445
[208] 1877 4 R (HL) 116, affirming 1877 4 R 344
[209] 'Whitty', 445
[210] eg:- 'So all nations have free passage by navigation through the ocean, in bays and navigable rivers. Stair, II, 1, 5 quoted in 'Whitty', 442
[211] *Duke of Bucccleuch* v *Cowan* 1866 MacPherson, 214, 215 - 216
[212] *Colquhoun's Trustees* v *Orr Ewing and Co* 1877 4th Series SC 344, 350
[213] *Orr Ewing* v *Colquhoun's Trustees* 1877 2 AC 839

The history of the law relating to the public right of navigation on non-tidal rivers is not so clear. In 1931 Lord President Clyde stated,

> I doubt if it has ever been settled whether the public character of the non-tidal part of a navigable river depends (1) on the fact of navigability, or (2) on prescriptive possession by the public. What makes the difficulty is that actual *use* for navigation is probably the best evidence of the *fact* of navigability; but it does not necessarily follow that the public character of the non-tidal river is subject to all the qualifications attaching to rights acquired by prescriptive use.[214]

In 1778 a court, 'considered that a river by which the produce of the country could be transported to the sea to be a public benefit entrusted to the King ….. which could neither be given away nor abridged by him.'[215]

In 1821 a court required the removal of a weir which obstructed the floating of timber.[216]

In the only text specifically on the Law of Waters in Scotland Ferguson considered that there is a public right of navigation on rivers which are physically navigable only down stream as well as on those which are physically navigable in both directions.[217]
The only recent reported case specifically on the right of navigation on a non-tidal river in Scotland was *Wills' Trustees* v *Cairngorm Canoeing and Sailing School Ltd.*[218] This case was decided by the courts interpretation of previous cases on the River Spey,[219] together with consideration as to whether there could be a public right of only downstream navigation and whether the floating of timber could establish a right of navigation.

---

[214] *Leith-Buchanan* v *Hogg,* 1931 SC 204 quoted by Lord Wilberforce *Wills' Trustees* v *Cairngorm Canoeing and Sailing School Limited* 1976 SLT 162, 192
[215] *Grant* v *Duke of Gordon* 1778 – 82 M 12,820, 2 Pat 582. Quoted in James Ferguson, *The Law of Water and Water Rights in Scotland* (Edinburgh: William Green & Sons, 1907), 127
[216] *Baillie M'Donnel* v *Lady Salltown* 1821 Hume's Dec 523. Quoted in James Ferguson, *The Law of Water and Water Rights in Scotland* (Edinburgh: William Green & Sons, 1907), 127
[217] 'The character of such rivers (physically navigable and non-tidal) varies in accordance with the volume of water, and depth and character of the channel. Some as the Leven, may be navigable up as well as down stream, and by boats of a considerable burden, while others, such as the Spey, are only navigable for practical purposes down stream, and the nature of the navigation consists in floating down timber or rafts with country produce. But whether they be navigable in the full sense, or, to use the expression of a learned lord, 'quasi-navigable.' They are, if truly navigable even to this limited extent, recognised as public rivers, and the right of navigation will be fully maintained. The right of navigation is the superior right.' James Ferguson, *The Law of Water and Water Rights in Scotland* (Edinburgh: William Green & Sons, 1907), 126
[218] *Wills' Trustees* v *Cairngorm Canoeing and Sailing School Limited* 1976 SLT 162
[219] *Grant* v *Duke of Gordon* 1782 2 Pat. App. 582

However three of the judges in the House of Lords expressed an opinion as to how a public right of navigation is created. Lord Wilberforce considered that, 'there must be shown actual public use for a period of which the memory of man does not run to the contrary – in practice a period of 40 years.'[220]

Lord Hailsham said that the respondents had contended that the sole test of a public right of navigation was the capacity of the river. He said, '(this) is more consistent with theory and with the language of the Roman and Scottish institutional writers. ….. Nevertheless I consider that an intermediate position is preferable. ….. Speaking for myself I cannot conceive of a public right of navigation in a settled country, even if in theory it is a right based on capacity, which did not have to be established by use for a substantial period of time on a substantial scale openly carried on.'[221] It is not clear what his intermediate position was, nor why he rejected the opinion of the Scottish institutional writers.

Lord Fraser said, 'It has never been decided how navigability is to be proved. … There are judicial dicta in favour of both views…'[222] After reviewing various authorities he said, 'I have reached the opinion that a public right of navigation in a non-tidal river depends not only upon the theoretical navigability of the river, but also on the proof of its actual use for that purpose.'[223] He also said, 'It seems most unlikely that any river in Scotland which is capable of providing a useful channel of communication for transport would not have been used by now, especially in the days before 1781 when there was no competition from railways and motor lorries.'[224]

Later Lord Fraser said, 'A river exists as a physical feature plainly marking the route of any right of navigation and the purpose of use by the public is not in my opinion to constitute the right but to prove that the river is navigable.'[225]

---

[220] *Wills' Trustees* v *Cairngorm Canoeing and Sailing School Limited* 1976 SLT 162, 192
[221] *ibid*, 203
[222] *ibid,* 213
[223] *ibid*
[224] *ibid*,
[225] This quotation is set in the context, 'Until the right of way (on land) is constituted along a definite route, it does not exist at all, and even after it has been constituted there may not be any visible indication of its existence. But a river exists as a physical feature plainly marking the route of any right of navigation and the purpose of use by the public is not in my opinion to constitute the right but to prove that the river is navigable. The theoretical basis of the right is that the Crown has not, and could not have, alienated the right

Whitty considered that this case did not clearly resolve the question as to how a public right of navigation is established in Scotland.[226]

In 2003 the Land Reform (Scotland) Act[227] provided a statutory right of access to all rivers for recreational or educational purposes for non-motorised vessels. The position with regard to motor boats seems still to be unclear. It could be argued that there can be no common law right for motor boats on a river as motor boats did not exist when the common law was established. However for non-motorised boats, in Scotland, the law relating to the public right of navigation is now firmly established by statute.

---

to use the river for navigation but has retained it in trust for the public – see the institutional writers referred to above and see also *Colquhoun v Duke of Montrose* (1793) Mor 12, 820 at 12,827, observation from the Bench. If that is right there is no reason why the establishment of a right of navigation should be subject to the same requirements as the constitution of a right of way on land, and I do not think it is.' *ibid*, 215

[226] 'The Anglicizing tidality revolution meant that from 1877 public ownership of the river bed, and from 1894 public rights of fishing, were confined by the courts to tidal stretches. To complete the tidality revolution, one might have expected that the third mark of a public river, - the public right of passage - would also have been so confined. That step was never taken presumably partly because of its effect on vested rights and partly because English law distinguished navigability and tidality. Niall Whitty, 'Water Law Regimes', being Chapter 11 of Kenneth Reid and Reinhard Zimmermann, *A History of Private Law in Scotland Volume 1* (Oxford: Oxford University Press 2000), 448. Footnotes omitted.

[227] Land Reform (Scotland) Act 2003, s 2