Chapter 5. The Commentaries.

How commentators each dark passage shun,
And hold their farthing candle to the sun.
Love of Fame: The Universal Passion
Edward Young. 1683 - 1765

5.1 Introduction

Woolrych wrote his first text on the *Law of Waters and of Sewers* in 1830.[1] In this section the balance between private rights and public interests during the first half of the 19th century is considered.

The Law Commission Committee on 'The Transfer of Land: Appurtenant Rights' wrote, 'The development of the law took place, moreover, at a time when rights of private ownership were held sacrosanct to a degree not now regarded as consistent with the interests of the community as a whole.'[2]

Abbott CJ said in 1821, 'Public convenience, however, is, in all cases, to be viewed with a due regard to private property, the protection whereof is one of the distinguishing characteristics of the law of England.'[3]

Atiyah wrote, 'Despite some qualifications which recent research suggests may need to be made to the traditional picture of eighteenth-century judges and their work, it remains broadly true that through the eighteenth and nineteenth centuries the primary function of law was conceived as the protection of these individual rights of freedom, the protection of property, and so on. Only towards the middle of the nineteenth century did the law come to be widely used for the pursuit of collective social goals.'[4]

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[1] Humphrey W. Woolrych, *A Treatise on the Law of Waters and of Sewers* (London: Saunders and Benning, 1830), 31 - 33
[2] The Law Commission Working Paper No 36 'The Transfer of Land: Appurtenant Rights' (1971), 1
[3] *Blundell* v *Catterall* (1821) 5 B & Ald 268, 313
[4] P.S. Atiyah, *Law and Modern Society, 2nd Edition* (Oxford: Oxford University Press, 1995), 127

1750 to 1830 was the main period of enclosure of the commons by means of Parliamentary Acts. As a result of the enclosures commoners could no longer graze their cows or geese on the common, their pigs in the woods or their ducks on the ponds. The right to glean was lost. Ancient tracks and pathways were closed.[5]

Yet the right of navigation on rivers was not lost by the Enclosure Acts. Not even the tow paths were within the jurisdiction of the Commissioners.[6] No Act was passed to remove any right the public might have had to pass and repass on the rivers. The apparent effect of the culture of the time seems to have been more insidious. The writers about the law just assumed that the rights had gone.

5.2 Kent and Wellbeloved

Kent

In 1828 Kent wrote, [7]

> It is a settled principle in the English Law, …… But grants of land, bounded on rivers, or upon the margins of the same, or along the same, above tide water, carry the exclusive right and title of the grantee to the centre of the stream; and the public, in cases where the river is navigable for boats and rafts, have an easement therein, of a right of passage as a public highway.[8]

The word 'navigable' here appears to mean physically navigable. Kent it seems had the same concept of the law of navigation as Bracton.

Wellbeloved

[5] Michael Turner, *Enclosures in Britain 1750 – 1830* (London: Macmillan Press, 1984)
[6] *Simpson* v *Scales* (1801) 2 Bos & Pul 496
[7] James Kent, *Commentaries on American Law, Volume 3* (New York: O. Halsted, 1828)
[8] The words omitted are, 'that the right of soil of owners of land bounded by the sea, or on navigable rivers, where the tide ebbs and flows, extends to high-water mark; and the shore below common, but not extra-ordinary high-water mark, belongs to the public; and in England the crown, and in this country the people, have the absolute proprietary interest in the same, though it may, by grant or prescription, become private property.' James Kent, *Commentaries on American Law, Volume 3* (New York: O. Halsted, 1828), 344

The treatise on the law of highways by Wellbeloved[9] is not considered here because it is an accurate statement of the law in 1829. Rather it is considered to show the lack of understanding of the law which existed at that time.

His text was meant to give a systematic account of the Law of Highways. About rivers he wrote, 'It will not be disputed, that a public river is a highway. If so it must be regulated by the same principles, which govern the *genus* of which it is the species.'[10, 11] Thus Wellbeloved considered that there were five types of highway all regulated by the same laws.[12] He makes no mention of any difference in the law relating to public rights of navigation between tidal and non-tidal rivers.

Because he thought the laws relating to a public river were identical to those for a highway Wellbeloved wrote, 'A public river should also be a thoroughfare.'[13] (That is, it must pass from one public place to another.) This was a popular understanding of the law relating to highways at that time.[14] He ignored the finding in *Miles* v *Rose*[15] where the creek did not reach to a public place. He criticised Gibbs CJ and Heath J for implying that a public right of navigation might be established by the flowing of the tide.[16]

A more serious error in his approach is evident from his consideration of the repair of highways. He had earlier stated that public highways are always repaired by the public.[17] Of the repair of rivers he wrote, 'Although a navigable river may not require

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[9] Robert Wellbeloved, *A Treatise on the Law relating to Highways* (London: Samuel Brooke, 1829)
[10] *Ibid*, 22
[11] See section 1.5.3 above
[12] Footpath, Bridleway, Carriageway, Driftway (a way for cattle), Public Rivers.
[13] *ibid*, 19
[14] See for example Kay J *Bourke* v *Davis* [1889] 44 CD 110, 121
[15] *Miles* v *Rose* (1814) 5 Taunt 705
[16] 'But, nevertheless, the requisites to a highway do not appear to have been kept clearly in view, when the nature of a public river has been considered. In one case both Gibbs CJ and Heath J said that the flux and reflux of the tide, though not absolutely inconsistent with a right of private property, *is strong prima facie evidence* of its being a public navigable river.' Robert Wellbeloved, *A Treatise on the Law relating to Highways* (London: Samuel Brooke, 1829), 20
[17] This is an error. '(A highway) may be *privately maintainable*, ie an individual or body has the duty of maintaining it, or it may be maintainable by no one. A private duty to maintain can arise by prescription, … by tenure …. By enclosure of a previously unenclosed highway or under special enactment.' (footnotes omitted) John Riddall and John Trevelyan *Rights of Way, 3rd Edition* (London: Open Spaces and Ramblers' Association, 2001), 271

to be repaired as constantly as a road, yet the case of *The Mayor of Lynn* v *Turner* is a point to shew, that a charge for its amendment may sometimes be incurred.'[18] He failed to note that in this case it was a river which had been assumed to be private which was to be repaired at public expense, something which would never happen to a way on land.

5.3 Woolrych

As a sequel to his book *A Treatise on the Law of Ways*[19] Woolrych in 1830 published *A Treatise on the Law of Waters and of Sewers.*[20] This was the first commentary written specifically on the subject and was for almost thirty years the only commentary on the law of rivers.[21] Woolrych may be considered to have taken a fundamentalist approach to the cases he studied.[22]

In the third paragraph of the book he states,

> The law of navigation does not belong to the subject of this work; to say more upon that point than that the 'sea is the great highway of the world," and that public navigable rivers are considered in law as "highways," would be invading the province of writers on the Commercial Law. …… as a general principle, it must be laid down, that a right of passage over the sea and great rivers is free, common and universal.[23]

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[18] *ibid*, 22
[19] Humphrey W. Woolrych, *A Treatise on the Law of Ways* (London: Saunders and Benning, 1829)
[20] Humphry W. Woolrych, *A Treatise on the Law of Waters and of Sewers* (London: Saunders and Benning, 1830)
[21] A second edition was published in 1853 with the *Law of Sewers* omitted.
[22] The word 'Fundamentalist' here is given the meaning 'accepted the judgements of the courts without question.'
'Writing treatises had become a legitimate way of making a professional mark, or of earning a living when fees dried up; and for such writers a full methodical analysis and statement of all the case-law, without too much abstract comment, was the principal end.' J.H. Baker, *An Introduction to English Legal History, 3rd Edition* (London: Butterworths, 1990), 220
[23] Humphry W. Woolrych, *A Treatise on the Law of Waters and Sewers* (London: Saunders and Benning, 1830), 1

In the first chapter of his book Woolrych is consistent in using the word ‘navigable’ to mean tidal.

Woolrych writes in Chapter Three,

> Rivers are either public, as where there is a common right of navigation exercised, and then the soil is in the king, or in the lord of the manor; or private, where the soil is the property of the individual who owns the land on both sides, or of each proprietor, *ad medium filum aquae*, where the same person is not owner of the shore on either brink.*
> * footnote:- see Schultes,134 [24]

This is taken here to be the first error in the text. Woolrych has confused the two meanings of the word ‘navigable’:- ‘where there is a common right of navigation’ and ‘tidal’. Ownership of the soil of a river depends on whether the river is tidal or non-tidal. It does not depend on whether there is a public right of navigation.

The soil of a non-tidal river, on which there is a public right of navigation is, in general, owned by the riparian owner and it is only the property of the king when he is the riparian owner.[25]

Schultes always used the word ‘navigable’ in the sense ‘tidal’, as in the phrase, ‘A river is considered navigable so high as the tide flows.’[26] He wrote on page 134, to which Woolrych refers, ‘It must be admitted as an unquestionable conclusion deduced from the law already exemplified, that all rivers not navigable, together with their channels, …., must belong to the subject, and are private property.’ Woolrych has apparently assumed that ‘navigable’ and ‘where there is a common right of navigation’ had the same meaning. In Schultes text this is not so.

Woolrych then wrote,

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[24] *ibid*, 31
[25] See section 1.5.2 above. It has not been possible to find the source of the reference to the Lord of the Manor.
[26] Henry Schultes, *An essay on Aquatic Rights intended as an illustration of the Law relative to fishing and to the propriety of Ground or soil produced by alluvion and dereliction in the sea and rivers* (London: W. Clarke and Sons, 1811), 133

> A public navigable river frequently owes its title to be considered as such from time immemorial, by reason of its having been an ancient stream; but very many acts of parliament have been passed to constitute those navigable rivers which were not so before.* Waters flowing inland where the public have been used to exercise a free right of passage from time whereof the memory of man is not to the contrary, or by virtue of legislative enactments, are public navigable rivers. This is the most unfailing test to apply, in order to ascertain a common right; others have been attempted, and frequently without success. * footnote:- "Few of our rivers besides the Thames and Severn, were naturally navigable, but have been made so under different acts of parliament." 3 T.R. 255 by counsel, arg. [27]

Here Woolrych uses the words 'public navigable river' to mean 'a river on which there is a public right of navigation', as opposed to 'tidal' in chapter one.

The unquestioned acceptance by Woolrych of the footnote is taken here to be the second error in the text. Appendix A is a survey which shows that of the 73 rivers 'made navigable' at least 59 had previously been used for the transport of goods and so were physically navigable before the relevant Act was passed.

The final clause is 'others have been attempted, and frequently without success'. Woolrych fails to state which other tests have been applied and which other tests had been successful.[28] This omission, and the failure to refer to such cases in the subsequent text, is taken here to be the third error in the text.

Woolrych then accepts without question Lord Mansfield's statement that there are many places where the tide flows which are not navigable rivers.[29] This is considered here to be his fourth error.

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[27] Humphry W. Woolrych, *A Treatise on the Law of Waters and Sewers* (London: Saunders and Benning, 1830), 31

[28] See for example:- The test suggested by Lord Macclesfield, Section 2.11.4 above; Hale's statement that there is a public right of navigation on a river made navigable at public expense, Section 2.11.3 above;

[29] See section 4.4 above.

Woolrych then accepts without question the statement of Bayley J that there is no right of navigation on tidal channels which are navigable only by small boats for a very short time.[30] This is considered here to be his fifth error. He then gives a summary of the case *Miles* v *Rose*[31] deducing that the flowing of the tide is strong evidence for the existence of a public right of navigation.

Woolrych continued,

> Public user for the purposes of commerce is, consequently, the most convincing evidence of the existence of a navigable river, and that fact being established, the accompanying rights of fishery, and of ownership of soil, &c are easily defined.[32]

This is taken here to be the sixth error. The existence of the public right of navigation, rights of fishery and ownership of the soil are independent rights.[33]

Woolrych continued,

> It follows from hence, that a river is a common highway, or, as Lord Coke expresses it, a common river is as a common street.* And, by analogy to the case of highways, there may be a dedication of a private right in a river to the public.
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> * Footnote:- 13 Rep. 33, Noy. Rep. 103[34]

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[30] See section 4.5 above.
[31] (1814) *Miles* v *Rose* 5 Taunt 705
[32] Humphry W. Woolrych, *A Treatise on the Law of Waters and Sewers* (London: Saunders and Benning, 1830), 31
[33] See section 1.5.2 above.
[34] Humphry W. Woolrych, *A Treatise on the Law of Waters and Sewers* (London: Saunders and Benning, 1830), 31

Woolrych quotes Lord Coke as writing, 'a common river is as a common street.' This passage is taken from a chapter headed 'Repair of Bridge, Highways, &c.' The context is 'So of a common river, of common right, all who have ease and passage by it, ought to cleanse and scour it; for a common river is as a common street.' Coke is referring to the responsibility for the repair of the river not to the way in which the public obtain a right of way or a right of navigation. This is taken here as being the seventh error.

It would seem that Woolrych's conclusion that all non-tidal rivers are private unless made public by statute, immemorial use or dedication rests upon the succession of errors that have been identified.

Woolrych started by writing 'the law of navigation does not belong to the subject of this work'. If he had written no more on the subject, the development of the understanding of the law might have been very different.

5.4 Coulson & Forbes

Coulson and Forbes treatise was the standard reference work on the Law of Waters from 1880 until at least 1962.[35] The authors can be seen to have relied heavily on the work of Woolrych. Thus on page 643 of the 6th Edition there are five footnotes giving references to *Woolrych on Waters* as an authority.

[35] H.J.W. Coulson and U.A. Forbes, *The Law of Waters* (London: Sweet and Maxwell, 1st Ed, 1880; 2nd Ed, 1902; 3rd Ed, 1910; 4th Ed by Stuart Moore, 1924; 5th Ed, 1933; 6th Ed by S. Reginald Hobday, 1952 titled *Coulson and Forbes on Waters and Land Drainage*)

Coulson and Forbes considered the public right of navigation on tidal waters to be limited in the same way as Woolrych.[36]

Under the side heading 'Right of navigation in private waters. Not a public franchise, but acquired by dedication or Act of Parliament,' in the 6th Edition it is stated that,

> The public right of navigation may exist in non-tidal as well as in tidal waters; but where it does exist, the principles of law which have been stated with regard to tidal waters do not equally apply.* Thus, the right of passage does not exist as a public franchise paramount to all rights of property in the bed, but can only be acquired by dedication, or user presuming dedication by the owners of the soil over which the water passes. It would not, therefore, appear to extend *prima facie* to a right of passage over the whole of the navigable channel, as in the case of tidal rivers, but to be strictly limited to the extent of the right acquired or user proved.[37]
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> *Footnote:- *Orr-Ewing* v *Colquhoun* (1877), 2 App Cas at p 873

What is remarkable about this passage is that the authors quote no authority for their statements except for one case decided according to Scots Law. The ideas expressed are those of Woolrych but the authors do not quote his text or his sources. It is as if Woolrych had created a new law of the land.

Possibly equally surprising is the fact that in the 2nd Edition the second phrase of the first sentence of the above quotation reads, 'the principles of law which have been stated with regard to tidal waters will equally apply.'[38] No reason is given by the authors for this reversal of their opinion of the law.

The continued confusion as to the meaning of 'private waters' is well illustrated in the side heading, 'Right of navigation in private waters'. Many writers would consider private waters to be those in which there is no public right of navigation.

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[36] *ibid 6th Edition*, 100 - 101
[37] *ibid, 6th Edition*, 546-547
[38] *ibid, 2nd Edition*, 453

5.5 Wisdom

Wisdom's *Law of Waters and Watercourses* was first published in 1962.[39] Again the text shows respect for the work of Woolrych.[40] There is an uncritical acceptance of the limits of the public right of navigation on tidal waters as stated by Lord Mansfield and Holroyd J.[41] Regarding the public right of navigation on non-tidal rivers there was no material change between the different editions:-

> **Navigation on non-tidal rivers**
> The public have no right at common law to navigate on non-tidal inland waters,[a] but a right to do so may be acquired by immemorial usage by the public,[b] by dedication of riparian owners[c] or under statute.[d] A claim to establish a public right of navigation over a non-tidal stream must be treated as if it were a claim for a right of way on dry land,[e] and the right thus acquired is simply a right of way.[f]
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> a *Bourke* v *Davis* (1889) 44 Ch. D. 110; *Johnston* v *O'Neill,* [1991] A.C.552.
> b *Bower* v *Hill,* (1835) 2 Scott 535.
> c *Simpson* v *A-G.*, [1904] A.C. 476.
> d See, e.g. s. 79 of the Thames Conservancy Act, 1932.
> e *Bourke* v *Davis, supra.*
> f *Orr Ewing* v *Colquhoun* (1877) 2 A.C. 839.[42]

While Coulson and Forbes had given no authority for their statement of the law, Wisdom provides one or more references for each phrase. However on investigation these are less persuasive than might be expected.

It will been shown that *Bourke* v *Davis* is an unreliable source of authority.[43]

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[39] A.S. Wisdom, *Law of Waters and Watercourses* (London: Shaw & Sons Ltd, 1st Ed, 1962; 2nd Ed, 1970; 3rd Ed, 1976; 4th Ed, 1979; 5th Ed by William Howarth, 1992 titled *Wisdom's Law of Watercourses*)
[40] 'Woolrych, in his classic work, *A Treatise of the Law of Waters, ….'* 5th Ed, 3
[41] See sections 4.4 and 4.5 above
[42] A.S. Wisdom, *Law of Waters and Watercourses* (London: Shaw & Sons Ltd, 1962), 49

It is difficult to find a reference in *Johnston* v *O'Neill* to there being no common law right of navigation on inland waters. The case, as Earl Loreburn stated, 'relates to eel fishing alone' in Lough Neagh.[44] He finished his judgement by saying, 'I have come to the conclusion upon the footing that there can be no public right in non-tidal waters.'[45] It seems that this statement refers only to the matter of the case, eel fishing, rather than any public right of navigation.

In the same case, the Earl of Halsbury said, 'In inland waters, apart from tidal waters, there can be no such thing as a public right' but he follows this immediately by saying, 'meaning by the word "public" a right unconnected with any right of fishing which is capable of being described as a profit a prendre in alieno solo.'[46] Here he seems to be saying that there can be no right of eel fishing rather than no public right of navigation. Later he says, 'As Holmes L.J. most truly says, the only claim the defendants make is based on the allegation that Lough Neagh is, and from time immemorial has been, a public and common navigable inland sea.'[47] He does not deny this claim but says that it does not establish a right of fishing.

Lord Ashbourne said, '(The Lough) is navigable'[48] meaning apparently that there is a public right of navigation on the Lough. Lord Shaw said of the lough, 'It … is navigable through out.' ….. 'Steamers, as well as other vessels carrying passengers and merchandize use it as a highway from place to place on its shores.'[49] It is very hard to see how this case establishes the proposition that, 'The public have no right at common law to navigate on non-tidal inland waters.'

The right which it was found not to exist in *Johnston* v *O'Neill* was the right of eel fishing not the right of navigation.

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[43] See section 6.2 below.
[44] *Johnston* v *O'Neill,* [1911] A.C.552, 553
[45] *ibid*, 567
[46] *ibid*, 568
[47] *ibid*, 569
[48] *ibid*, 571
[49] *ibid*, 598 - 599

Bower v *Hill* is a case concerning an easement of a private right of navigation on what appears to have been an artificial ditch. In the reports of the case there is no mention of the acquisition of a public right of way.

Simpson v *A-G* was a case in which it was decided that there had been no dedication of a public right of navigation. The reasoning of the judges seems to imply that dedication could be possible. However no case has been found in which a public right of navigation has been established on a river by dedication.

It seems that the references given by Wisdom do not strengthen the case, first made by Woolrych, that a public right of navigation depends on use, dedication or statute rather than on the physical navigability of the river. Of the five cases quoted, two seem to be irrelevant,[50] one is shown below to be based on false assumptions[51] and one is a case decided according to Scots Law.[52] The statement that 'the public have no right at common law to navigate on non-tidal inland waters' seems not to have been established.

5.6 ***Halsbury's Laws of England***

Halsbury's Laws of England[53] follows the earlier commentaries regarding the right of navigation on tidal waters. With regard to non-tidal waters it states that there is no general common law right of public navigation on inland rivers or lakes.[54] It then states,

> the existence of a public right of navigation is established by evidence similar to that which is required to establish a public right of way over land.[a] Therefore it can arise only (1) by immemorial usage;[b] (2) by Act of Parliament[c] or by order made under the authority of an Act of Parliament; or (3) by express grant or dedication by the owner of the soil of the river.[d]

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[50] *Johnston* v *O'Neil* and *Bower* v *Hill*
[51] *Bourke* v *Davis* See section 6.2 below.
[52] *Orr Ewing* v *Colquhoun*
[53] *Halsbury's Laws of England, 4th Edition, Reissue, Volume 49 (2)* (London: Butterworths, 1997)
[54] *ibid*, para 741

[a] Woolrych on Waters c 3. [There are then references to the creation of highways, the lack of necessity of two public termini, and the fact that the Highways Act 1980 s 31 does not apply to rivers.]

[b] *Orr Ewing v Colquhoun* (1877) 2 App Cas 839, HL; *Bourke v Davis* (1889) 44 ChD 110 (insufficient user to establish public right); *Rawson v Peters* (1972) 225 Estates Gazette 89, CA. …… It has been inferred from the sweeping requirement of 25 Edw 1 (Magna Carta) (1297) c 23, that all fish weirs (kidelli) should be completely removed from the Thames and Medway and throughout all England except those along the sea coast, that certain rivers were common highways or public streams from time immemorial.

[c] *R v Betts (1850) 16 QB 1022.* [There is then the analysis of statutes discussed in chapter 3 above and references to the Transport Act 1968 ss 105, 112, 115.]

[d] As to the creation of public rights of way by dedication and acceptance see HIGHWAYS vol 21 (Reissue) para 65 et seq. [There follows a reference to the ownership of the soil of a river.]

The statement by the author of this section of the text that, 'the existence of a public right of navigation is established by evidence similar to that which is required to establish a public right of way over land' was not accepted by the House of Lords in *A-G ex rel Yorkshire Derwent Trust* v *Brotherton.*[55]

In footnote (a) the fact that the author thought it appropriate to quote as a legal authority *Woolrych on Waters*, the author of which stated that, 'the law of navigation does not belong to the subject of this work',[56] seems to indicate that the basis of his writings on the creation of a public right of navigation may be extremely weak.

With reference to footnote (b), the case of *Orr Ewing* v *Colquhoun* was decided according to Scots Law which was, and is, different to the law of England and

[55] See section 6.5 below
[56] Humphrey W Woolrych, *A Treatise on the Law of waters and of Sewers* (London: Saunders and Benning, 1830), 1

Wales.[57] In *Bourke* v *Davis* Kay J said, 'I must treat the claim of the Defendant, therefore, as if it were a claim to establish a right of highway on dry land.' In this dissertation this decision of Kay J is considered to have no authority.[58]

The reference to the public right being created by 'immemorial usage' in *Rawson* v *Peters* is incorrect. Lord Denning said, '(People with canoes) may acquire it by long user, as where the public have passed up and down in boats for a long time.'[59] 'Long user' and 'immemorial user' are not the same thing. A claim of right by 'immemorial usage' can be defeated by evidence that use was impossible at any time after 1189. A claim for a right by 'long user' cannot be defeated in this way since 'long user' is based on a claim of 'implied dedication' or 'lost modern grant'.[60]

In clause (3) it is claimed that a public right of navigation can be established by express grant. Sydenham has shown that a grant at common law requires a capable grantee. 'A fluctuating body, such as local inhabitants or the general public, cannot be a capable grantee. It follows that navigation rights cannot be made by grant to the public.'[61] Reports from the early 16th century seem to be divided on this point,[62] but it seems, as usual, that it has been decided in favour of the individual landowner at the expense of the community. Lord Scott of Foscote said, in 2004, of highways on land, 'A public right of way is not created by grant.'[63] (Although since 1949 it has been

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[57] See section 1.7.2 above
[58] See section 6.2 below
[59] Transcript of the Shorthand Notes of The Association of Official Shorthandwriters Ltd of the case *Rawson* v *Peters* being Appendix I of A.E. Telling and Sheila E. Foster, *The Public Right of Navigation, Volume I* (Severn-Trent Water Authority, Project PFA 12, 1978), 99
[60] Referring to highways on land, for rivers the law may well be different, Riddall and Trevelyan wrote, 'Originally, for the inference of dedication to be drawn, use had to be shown since 1189. Later, use since 1189 was presumed in the absence of evidence that use since 1189 could not have occurred, for example by the production of evidence that a building had earlier lain on the line of the way concerned. Later, again, the courts came to accept that proof of public use of a way for a sufficient period could constitute evidence of an intention by the landowner to dedicate the way as public, not withstanding that use of the way could not have been possible for the whole period since 1189.' John Riddall and John Trevelyan, *Rights of way, 3rd Edition* (London: Open Spaces and Ramblers' Association, 2001), 58 - 59
[61] Angela Sydenham, 'The Countryside and Rights of Way Act 2000 and Access to Non-tidal Waters' (2001) Water Law 12, 292
[62] *Stele* v *Newton* (1527) and *Case of the Borough of Dunster* (1525) Roger Yorke's Notebook, quoted in J.H. Baker, *Reports from the time of King Henry VIII Volume I* (London: Selden Society, 2003), 232
[63] *R (on the application of Beresford* v *Sunderland City Council* [2004] 1 All ER 160**,** 172

possible to make an statutory express grant by way of an irrevocable access agreement with the Local Authority.[64])

Since the author relies on the concept that, 'the existence of a right of navigation is established by evidence similar to that which is required to establish a right of way over land.' It seems he can not be correct in writing that a public right of navigation can be created by express grant.

The claim in clause (3) that a public right of navigation can be established by dedication has been questioned by Bates.[65]

The authors of *Halsbury's Laws of England* seek to provide an uncontentious exposition of the law. These criticisms of the text seem to indicate that the popular understanding of the law is flawed.

5.7 Telling

Telling produced two reports one with Foster[66] for the Severn-Trent Water Authority the second with Smith for the Sports Council.[67] Part One of the report for the Severn-Trent Water Authority was a 'General statement of the Law relating to the Public Right of Navigation'. With regard to 'Navigation in non-tidal rivers: how it arises' Telling and Foster made an apparent error at the start of their analysis. 'The bed of a non-tidal river is prima facie vested in the riparian owners. There is therefore no general right of public navigation.'[68]

Moore has listed over 500 places where there were several fisheries[69] on the coasts and rivers.[70] He states that, 'there is practically no doubt that the whole foreshore of

[64] National Parks and Access to the Countryside Act 1949, s 64 and Countryside and Rights of Way Act 2000, s 16
[65] See section 5.8 below
[66] A.E. Telling and Sheila E. Foster, *The Public Right of Navigation* (Severn-Trent Water Authority, Project PFA 12, 1978)
[67] Arthur Telling and Rosemary Smith, *The Public Right of Navigation* (London: Sports Council, 1985)
[68] A.E. Telling and Sheila E. Foster, *The Public Right of Navigation* (Severn-Trent Water Authority, Project PFA 12, 1978), 11
[69] A 'several fishery' is a private fishery.

the kingdom wherever it was fit for fishing by weirs was covered by several fisheries.'[71] Ownership of a several fishery on the foreshore raises a presumption against the Crown that the freehold of the soil of that part of the foreshore belongs to the owner of the fishery.[72] Thus much of the foreshore is owned by individuals. Yet there is a public right of navigation over all the foreshore.[73]

Since there is a public right of navigation over private land on the foreshore, there is no obvious reason why there should not be such a right over private land under rivers.

In Roman Law the bank of a river was *prima facie* vested in the riparian owners, but there was a general right for the public to use the banks.[74] This would seem to be comparable to private ownership of the bed of a river and a right for the public to use the river. This does not establish the public right. It does indicate that such a right may be possible.

It may be argued that rivers are unique objects and so the law relating to them will also be unique. Thus the fact that such an 'easement' equivalent to a public right of navigation is not found in other branches of the law, other than for the foreshore, does not necessarily mean that no such 'easement' can exist on rivers.

The maxim *cujis est solum ejus est usque ad coelum et ad infernos*[75] has been held to apply only to fixed structures and not to aircraft[76] and so presumably not to boats.[77]

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[70] Stuart A. Moore, *A History of the Foreshore and the Law Relating Thereto* (London: Stevens & Haynes, 1888), 908 - 915
[71] *ibid*, 909
[72] *A-G* v *Emerson* [1891] AC 649
[73] See sections 4.4 and 4.5 above.
[74] Institutes of Justinian 2.1.4. See section 1.7.1 above.
[75] 'He who is proprietor of land is proprietor also of everything above it to the heavens and below it to the underworld.'
[76] 'The plaintiff claims that as owner of the land he is also owner of the air space above the land, or at least has the right to exclude any entry into the air space above his land. He relies upon the old Latin maxim, cujis est solum ejus est usque ad coelum et ad inferos, a colourful phrase often upon the lips of lawyers since it was first coined by Accursius in Bologna in the 13th century. There are a number of cases in which the maxim has been used by English judges, but an examination of those cases shows that they have all been concerned with structures attached to the adjoining land, such as overhanging buildings, signs or telegraph wires, and for their solution it has not been necessary for the judge to cast his eyes towards the heavens; he has been concerned with the rights of the owner in the air space immediately adjacent to the surface of the land.' Griffiths J, *Bernstein of Leigh (Baron)* v *Skyviews & General Ltd* [1978] 1 QB 479, 485
[77] Balloons are also free to float over the land of another. *Pickering* v *Rudd* (1815) 4 Camp 219

The possibility of a right of navigation on all rivers does not prove that such a right exists. However it is suggested here that the mere statement that, 'There is therefore no general right of public navigation' does not establish the absence of such a right and so the remainder of the analysis lacks validity.

In their report Telling and Foster follow Coulson and Forbes but the text of the section on a 'General Statement of Law relating to the Public Right of Navigation' runs to 82 pages. It may seem remarkable that they give no example of a river on which a public right of navigation has been created by either explicit dedication or implied dedication.

5.8 Bates.

Bates in his text[78] cites decisions of the courts of the Commonwealth, United States and Scotland without distinction despite the fact that the law relating to public rights of navigation are different in those jurisdictions. So care is needed in using his text when seeking to determine the law relating to England and Wales.[79]

With regard to navigation on non-tidal waters Bates starts by claiming that the difference between the rights on tidal and non-tidal waters rests on the ownership of the bed of the waters. He writes that 'The public right of navigation in non-tidal waters can only be created by immemorial user, express grant or under statutory powers.'[80]

He then observes that,

> It has been suggested in a number of works[a] and in some decisions[b] that a public right of navigation can arise by express or implied dedication of such a

[78] J.H. Bates, *Water and Drainage Law* (London: Sweet & Maxwell, 1990 Loose leaf with amendments)
[79] *ibid*, para 13.02
[80] *Ibid*, para 13.15

> right to the public by all riparian owners over whose river bed that right is exercised. ….. The basis of this contention must be extremely doubtful.'[81]
>
> [a] Coulson & Forbes, *Waters and Land Drainage* (6th ed.) pp 122 and 546
> [b] *Bourke* v *Davis* (1889) 44 Ch. D. 110 at 120

Lord Fraser of Tulleybelton said, 'According to the law of Scotland, the constitution [of a right of way] does not depend upon any legal fiction, [that is implied dedication,] but upon the fact of user by the public, as matter of right, continuously and without interruption, for the full period of long prescription'[82] [Words in square brackets not in the original.]

Lord Jauncey said, 'In the case of a river the physical feature which makes navigation possible is the flowing water which is incapable of ownership and hence dedication.'[83]

Bates objection to the idea that a right of navigation can be created by dedication is noted but it is not examined in this dissertation. Dedication of a public right of navigation on a river would only be relevant on those few rivers, if there are any, which have been made navigable at private expense.

Bates also writes,

> It is suggested that in early medieval England, following Roman law, a permanently flowing non-tidal river was regarded as public property (*res publica)* except so far as the banks were concerned. Thus, any member of the public who could navigate the river had the right to do so.* By the time of Henry VII riparian owners had come to own the bed of the river but, it is

[81] *ibid*, para 13.17
[82] *Wills' Trustees* v *Cairngorm Canoeing and Sailing School* 1976 SLT 162, 215
[83] *A-G ex rel Yorkshire Trust* v *Brotherton* [1992] 1 AC 425, 446A

> submitted, in such cases, as the right of navigation existed prior to the rights of the riparian owner, there can be no question of dedication by the owner.[84]
> * footnote:- Bracton *De Legibus* (1256) ed. Thorne, Vol. 2 p 40 and Statute Ed III (Cap IV)]

Bates does not seem to have recognised the significance of this statement. If it is correct, and if he is also correct in writing that a public right of navigation can only become extinct by statute, statutory authority or by the channel becoming impassable, then the public right of navigation still exists.

In this dissertation it is claimed that this is the correct statement of the law.

Bates continues by considering immemorial user. He writes, 'Any acquisition of a right arising from long continued user must normally be founded upon either custom, prescription or lost grant.'[85] Custom is limited to a specific class of persons and prescription requires express or implied dedication which he has already rejected. He continues, 'All that would seem to remain is the doctrine of lost grant but to base the right on that doctrine would be to hold that the public had granted themselves the right as it springs from a river being *res publica*.'

Bates then writes, 'Rather, it is submitted, that in the light of the decision in *Wills' Trustees*, the basis of a public right of navigation in a non-tidal river should be treated as being in a legal class of its own.'[86] Relying on this case, decided under Scots Law, he reasons that the only way in which a public right of navigation can be created on a non-tidal river is immemorial user which requires evidence of use as far back as living testimony can go, that is for about 60 to 70 years.

Bates suggestion that in early medieval England a permanently flowing non-tidal river was regarded as public property and that subsequent owners of the bed of the river took subject to the public right of navigation seems to support the thesis of this dissertation.

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[84] J.H. Bates, *Water and Drainage Law* (London: Sweet & Maxwell, 1990 Loose leaf with amendments), para 13.18
[85] *ibid*, para 13.20
[86] *ibid*, para 13.21