Chapter 6. The Cases after 1830.

Property rights are, by nature, social rights; they embody how we, as a society, have chosen to reward the claims of some people to finite and critical goods, and to deny the claims to the same goods by others. Try as we might to separate this right from choice, conflict, and vexing social questions, it cannot be done.

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Property: A Special Right. (1996)

6.1 Introduction

In this chapter four of the significant reported cases since 1830 are considered. The judgement in the first case is strongly criticised and is considered to contribute nothing to the understanding of the law. The second case related to lock channels and locks on a river on which there was a public right of navigation. The third case was concerned with the question as to whether a person owning the right of fishing on a section of a river could sue a trespasser on that water. In the fourth case five preliminary questions relating to the river Derwent were considered.

6.2 *Bourke* v *Davis.*

The case of *Bourke* v *Davis*[1] involved the right of navigation on the river Mole. This is a non-tidal tributary of the Thames the flow of which was obstructed by a dam. Davis hired out rowing boats on the river above the dam. Bourke obstructed the navigation on the river with posts and chains. Davis removed this obstruction. Bourke brought an action to restrain any interference with his obstruction. Davis counter-claimed for an injunction to restrain any hindrance to the passage of his boats.

In giving judgement Kay J first described the river. He said, 'It is proved that if the sluices at these mills were drawn the river between *Esher* and *Cobham Bridges* could not be used

[1] *Bourke* v *Davis* [1889] Ch 110

for boating except in times of flood. It would be merely a string of pools united by a shallow stream.'[2] The distance from Esher to Cobham Bridge is about ten miles.[3]

Kay J then stated, 'This waterway has not been used for purposes of commerce.'[4] He then gave two examples of the river being used for commercial purposes.[5]

Having described the history of the use of the river 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. Now, in the case of such a claim, a very material consideration is, by whom has the roadway been metalled, repaired, and maintained in order.'[6] Later Kay J said, 'Another important fact is that the way claimed is not a way from one public place to another.'[7]

The fact that Kay J considered individual property rights more important than collective interests is shown by his statement that 'If the Defendant is right, he or any other person in *England* may launch a number of canoes, boats, barges, steam launches, or the like upon this river, fill it with a crowd of pleasure-seekers, and utterly destroy the privacy of those who have houses on the stream. ….. It is the interest of the public that such rights should not easily be acquired, otherwise landowners would be more chary of giving the public access to their property. I cannot overlook these considerations.'[8]

Kay J found for the plaintiff.

In stating that the river could not be used for boating Kay J appears to be incorrect. The evidence given in court seems to indicate that boats were regularly rowed ten miles up the river. Hale had written that there may be a public right of navigation on one part of a river

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[2] *ibid*, 117
[3] The British Canoe Union, *Guide to the Waterways of the British Isles* (Weybridge: British Canoe Union, 1980), 118
[4] *Bourke* v *Davis* [1889] Ch 110, 118
[5] 'Once when a railway bridge was being built some bricks were brought down over part of it, and on another occasion some poles cut by the side of the stream were floated down on a punt.' *Ibid*, 118
[6] *ibid*,120
[7] *ibid*, 121
[8] *ibid*, 124

but not on another.[9] It is recorded that before 1896 a gig had made its way from the Thames to Leatherhead, that is from five miles below Esher to nine miles above Cobham.[10]

However Kay J may have thought that it was the natural state of the river, without dams, which would need to be physically navigable for there to be a public right of navigation on the river. It is possible to consider the river before the dams were constructed and after they had been removed.

In 1213 it was claimed that there was an island in the river and that 'on the north side of the island there should be running water one foot deeper there than on the other side.'[11] The only likely reason for requiring a difference in depth for the two channels is to enable boats to pass. The major weirs have now been removed and canoeists can paddle the river throughout the winter.[12]

The statement by Kay J that the criteria for establishing a right of navigation are the same as for establishing a right of way on land was rejected by the House of Lords in 1991.[13]

At common law there was no requirement on the parish or any other local government organisation to maintain public navigable rivers.[14] In 1889 the statutory authority for flood defence and the maintenance of rivers was 'The Land Drainage Act, 1861'.[15] This Act makes no mention of different authorities being responsible for the maintenance of rivers depending on whether there is, or is not, a public right of navigation on the river. It would seem that this statement by Kay J was incorrect.

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[9] 'Although part of a river may bee a common streame yet it is possible that another part of it may not bee so.' British Library, Additional Manuscripts. 11052, f 90

[10] F.R. Prothero and W.A. Clark, *Cruising Club Manual, A New Oarsman's Guide* (London: G. Philip & Son, 1896), 9

[11] C.T. Flower, *Introduction to the Curia Regis Rolls, 1199 – 1230 AD Selden Society Vol 62* (London: Bernard Quaritch, 1944), 328

[12] The British Canoe Union, *Guide to the Waterways of the British Isles, 3rd Edition* (Addlestone: British Canoe Union 1964, reprinted 1970), 118

[13] *A-G ex rel Yorkshire Derwent Trust* v *Brotherton* [1992] 1 AC 425

[14] 'On no one is any duty imposed by the common law to do that which would be analogous to the ordinary repair of a common highway to remove obstructions, namely, clear away sand banks and preserve any accustomed channel.' *Williams* v *Wilcox* (1838) 8 AD & E 314, 329

Quoted with approval *A – G* v *Simpson* [1901] 2 Ch 671, 687 and in *Yorkshire Derwent Trust* v *Brotherton* (1988) 59 P & CR 60, 96

'The law has made no provision for the clearing of such a highway.' *The Mayor of Colchester* v *Brooke* (1845) 7 QB 339, 374

[15] Land Drainage Act (1861) 24 & 25 Victoria c 133

Kay J stated that the way claimed did not lead from one public place to another. For a highway there is no need for it to do so.[16] It was held by the House of Lords in 1976 that, in Scotland, there was no requirement for a right of navigation to do so either.[17]

Kay J considered the case in accordance with his understanding of the Common Law. According to the report of his judgement he ignored the Statute Law. He made no mention of 'An Act for making various rivers navigable'. [18] The Act authorised the making navigable sections of several rivers including the section of the river Mole from the River Thames to Reigate. Counsel for the defence had claimed that, 'The Act of Car. 2 recognises the river as navigable; under that Act compensation was to be given for cuttings, &., but not for rights of way, water, or fishing.'[19] In the Act there is one provision which grants the proprietors a monopoly for the carriage of goods on the river 'having first given satisfaction' to those whose land had been taken for the improvement works. No record has been found that any works were carried out nor any record of 'satisfaction' being given.

In the Act there is provision for those who had been using the river to continue such use.[20] This part of the Act provides that the right of navigation which existed prior to the passing of the Act was not to be removed, but that this free use was limited to such boats as could use the river before the improvements were made.

If it is considered that the law in 1664 was that there was a public right of navigation on any river which was physically navigable then such a provision would seem to be natural. The public could continue to use the river to the extent that they had done before the improvement and so no public right was removed.

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[16] per Lord Wright, *Williams-Ellis* v *Cobb* [1935] CA 311, 320
[17] *Wills' Trustees* v *Cairngorm Canoeing and Sailing School* 1976 SLT 215
[18] (1664) 16 & 17 Charles II c 26
[19] *Bourke* v *Davis* [1889] Ch 110, 113
[20] 'Providing always that all such boates of such burthen in such manner, and for such uses as have beene used or accustomed to passe in or upon any of the said rivers or any of them before the making new cleansing or scowering the said Rivers or enlarging the passages wherof and other the aforesaid premises and the making this Act shall and may continue freely to goo and passe in or upon the said rivers and other the premises soo farr and in such manner as was or is accustomed before the deepening enlarging or making therof.' (1664) 16 & 17 Charles II c 26

If however, like Kay J, one considers that the use of the river was by permission of the riparian owners,[21] then the Statute would have changed those private agreements to a statutory right. It would seem to be most unusual for an Act to have such a provision.

Kay J failed to understand the physical nature of the river, made assumptions about the law which have been rejected by the House of Lords and ignored the Statute Law. It is considered here that the judgement cannot in any way be relied on as an authority.

6.3 ***A-G* v *Simpson***

In *A-G* v *Simpson*[22] the Attorney General at the relation of the Huntingdonshire and Huntingdon County Council sought to establish that there was a public right of navigation on the river Ouse from a point above St Neots to a place below St Ives. There were six locks and a stanch on this section of the river and Simpson was the owner of the locks and staunch. The County Council wished to establish a liability on the part of Simpson to keep the locks and stanch in good order.

The case depended on the validity and meaning of three Letters Patent (or Charters) granted in the early 17th century and on whether the locks and the cuts leading to them formed part of the river. The majority of the House of Lords held that the locks were a lifting device not different in law from an inclined plane or a hydraulic lift[23] and so the owner was free to stop the use of them at any time.

Since there is now no river on which the right of navigation is controlled by Letters Patent only three points are considered here.

First, it was held by Farwell J, and confirmed by the House of Lords, that there was a public right of navigation on the relevant section of the river despite the fact that there were six weirs obstructing the navigation which, until the locks were constructed, required users of the river to either carry their boats, or the goods in the boats, over or round the

[21] 'I think the true inference from all the evidence is that the use made of the river has been permissive, and not of right.' *Ibid*, 124
[22] *Simpson* v *A-G* [1901] 2 Ch 671; [1904] AC 476
[23] *Simpson* v *A-G* [1904] AC 476, 492

obstructions. For only one weir was there evidence of a grant of a right to pass in these ways.[24]

Favell J said,

> Now, the question whether a non-tidal river is navigable or not depends, not on the question of possibility of navigation, but on the proof of the fact of navigation. If the fact be proved, then the channel of the river is the King's highway, and as such is open to the free passage of all the subjects of the Crown: see *Williams* v *Wilcox* (1), *Nottingham Corporation* v *Lambert* (2) and Hale, De Jure Maris (Stuart Moore's History of the Foreshore, p. 374)
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> (1) (1838) 8 Ad. & E. 314, 329; 47 R.R. 595
> (2) (1738) Willes, 111, 114

In *Williams* v *Wilcox* there was no discussion as to how the river Severn came to be a public navigable river. The Replication starts, 'That true it is that the river Severn was and is a public navigable river, as in the plea mentioned.'[25] The case involved the questions as to whether the public right of navigation extended to the whole channel or only part and as to whether a weir erected before the time of Edward I was an illegal obstruction.

In *Nottingham Corporation* v *Lambert* there was no discussion as to how a right of navigation was created. The plaintiffs pleaded that 'the river Trent in and throughout the said manor is and time out of mind hath been an ancient navigable river.'[26] The jury found this claim to be true. The case depended on whether a toll could be claimed for the use of the river.

In the reports of these two cases there was no mention as to whether it was use which created the public right of navigation or whether use provided the evidence that the river was physically navigable. Farwell J's deduction from these two cases seems to be not justified.

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[24] *Simpson* v *A-G* [1901] 2 Ch 671, 689
[25] *Williams* v *Wilcox* (1838) 8 Ad & E 314, 316
[26] *Mayor and Burgesses of the Town of Nottingham* v *Lambert* (1738) Willes 111, 112

Farwell J then quoted from Lord Hale,

> As the common highways on the land are for the common land passage, so these kind of rivers, whether fresh or salt, that bear boats or barges, are highways by water; and as the highways by land are called altae viae regiae, so these publick rivers for publick passage are called fluvii regales, and haut streames le Roy; not in reference to the propriety of the river, but to the publick use; all things of publick safety and convenience being in a special manner under the King's care, supervisions, and protection.[27]

Farwell J omitted the first five lines of the paragraph from which he quotes,

> And another part of the king's jurisdiction in reformation of nuisances, is to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage, not only for ships and greater vessels, but also for smaller, as barges or boats; to reform the obstructions or annoyances that are therein to such common passage: for as the common highways …..(then as above)

Hale here was not referring to how a right of navigation was created but to the king's jurisdiction in reforming nuisances. Again Farwell J's deduction from this case seems not to be justified.

In the House of Lords Lord Macnaghten giving the majority verdict, reversing the decision of Farwell J, said, 'In ancient times the river was probably a public stream, navigable throughout for such boats as were then used.'[28] This seems to state that that the river was navigable, before the weirs were built, because it was large enough to allow the passage of 'boats as were then used'. The House of Lords reversed the decision of Farwell J on another point. But it seems that on the question as to how a right of navigation is created his statement lacks any authority.

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[27] Reference given by Farwell J, 'Hale, De Jure Maris (Stuart Moore's History of the Foreshore, p. 374)'
[28] *Simpson* v *A-G* [1904] AC 476, 482

Second, it was held that there was no permanent public right navigation through the locks and the cuts leading to them.[29]

Third, it was held that a right of portage had been created between sections of the river on which there was a public right of navigation. It was not considered whether such a right always exists or by what means it would be created. It is possible that the right to portage is the equivalent to the public right to vary from the direct path on a way that has become flounderous or which has been obstructed by the owner of the land.[30]

6.4 ***Rawson* v *Peters***

Rawson v *Peters*[31] arose after Mr Peters canoed up the river Wharfe through an area where the plaintiffs had bought the 'sole and exclusive fishing rights and the fishery and fishing profits à prendre in so much of the moiety of the River Wharfe as flowed through the property of the vendor. They had no property in the bed of the river. It was an incorporeal hereditament.' At Otley County Court Ould J held that there had been no liability as no-one was fishing at the time and found for the defendants. The Court of Appeal, in a judgement given by Lord Denning, held that, 'the passing of canoes up and down the river must disturb the fish and interfere with the right of fishing.' The Appeal was allowed with damages of 50p. Counsel for the defendant did not claim that there was a public right of navigation on the section of the river over which the plaintiffs had fishing rights.

Lord Denning quoted two cases, one in which the water of a stream had been polluted for a considerable period of time by mud,[32] and the other where fish had been chased and disturbed by a person trying to catch them.[33] He then said, 'This case goes one step further: but, following the principle of these cases, it seems to me that, if the defendant, by taking

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[29] *Simpson* v *A-G* [1904] AC 476, 491
[30] *Absor* v *French* (1679) 2 Show KB 28
R v *Oldreeve* (1868) 32 JP 271, quoted with approval by Hallett J in *R on the application of Gloucester CC* v *Secretary of State for the Environment Transport and the Regions* (2001) 82 P&CR 15
[31] *The Times* 2 November 1972, 225 Estates Gazette, 89
[32] *Fitzgerald* v *Firbank* [1897] 2 Ch 96
[33] *Holford* v *Bailey* (1849) 13 QB 426, 444

canoes on the river, substantially interfered with the anglers in their right to fish, that is sufficient.'[34]

Clerk and Lindsell state that, 'The owner of a *profit à prendre* can bring trespass in respect of the interference with the subject-matter of his profit. So, the owner of an exclusive right of fishing can maintain trespass against anyone who fishes in his fishery or otherwise interferes with it.'[35] For an action to succeed it seems that the interference must be substantial as suggested by Lord Denning.

In this case Peters and his family had canoed up and down the river more than once and had had a picnic on an island. The Court held that this amounted to substantial interference. Lord Denning also said, 'No one can doubt that the passing of canoes up and down the river must disturb the fish for a considerable time, and this interferes with the right of fishing.'

It would seem that the simple passage of a canoe down a river would not normally create a substantial interference with the fish. The National Rivers Authority in its Guidance Notes for Bailiffs wrote, 'In respect of disturbance or hindrance to fish near obstructions, there is little direct evidence that canoes will cause any problems, though their presence in a relatively confined channel through which the fish must pass may act as a deterrent to their passage.'[36] If there is little evidence that canoes cause disturbance near an obstruction it would seem that there is even less evidence that they cause disturbance in an open river.

In *Halsbury's Laws of England* it is stated that, 'Lord Denning MR added (although he was not reported on this point) that there are many cases in which a canoeist has a right to navigate; the right may be acquired by long user or by grant or reservation, and if the canoeist has the right, the owners of the fishing rights must allow the navigation and put up with the disturbance of the fishing.'[37]

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[34] 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), 97

[35] John Frederic Clerk, William Henry Barber, Reginald Walter Michael Dias, *Clerk & Lindsell on Torts, 18th Edition* (London: Sweet Y Maxwell, 2000), para 18-34

[36] National Rivers Authority Guidance For NRA Bailiffs, TE/RE/001, (October 1992), 1/2

[37] *Halsbury's Laws of England, 4th Edition, Reissue, Volume 49(2)* (London: Butterworths, 1997), para 743 fn 8

The House of Lords Select Committee on Sport and Leisure referred to *Rawson* v *Peters* as, 'one notorious case which has led to litigation.'[38] The case strengthened the anglers in their opinion that they had an exclusive right to most rivers in the country. For many canoeists the fact that a judge who was a keen fisherman gave the judgement of the Court of Appeal strengthened their opinion that the establishment was biased in favour of anglers.

6.5 ***A-G ex rel Yorkshire Derwent Trust Ltd* v *Brotherton***

6.5.1 Introduction

The case *A*-G *ex rel Yorkshire Derwent Trust Ltd* v *Brotherton*[39] was concerned with resolving the question as to whether there was a public right of navigation on the river Derwent. The Yorkshire Derwent Trust and the town Council of Malton wished to repair the locks and make the river once again navigable for motor boats and other pleasure craft. It seems to have been assumed that these boats would be of about 6 – 10 tons.[40]

In 1702 an Act was passed for making the River Derwent navigable from Malton to Sutton.[41] In 1935 an order was approved revoking the 1702 Act.[42] In 1986 the Yorkshire Derwent Trust Ltd and the Town Council of Malton wanted to restore the navigation, so they sought a declaration that a public right of navigation still existed over the relevant part of the river between Malton and Sutton. Millett J ordered the determination as a preliminary issue of five questions:- (1) Was there a right of navigation on the river before 1702. (2) and (3) What, if any, rights of navigation were created by the 1702 Act and how were they created. (4) Did the order revoking the Act extinguish all rights of navigation on the river. (5) Could a right of navigation be acquired by long user under section 1 of the Right of Way Act 1932.[43]

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[38] Second Report from the Select Committee of the House of Lords on Sport and Leisure (London: Her Majesty's Stationery Office, 1973), lxxii

[39] On question (5) only:- *Attorney-General ex rel Yorkshire Derwent Trust Ltd* v *Brotherton* [1990] 1 Ch 136, [1991] Ch 185, [1992] AC 425
On all questions:- *Yorkshire Derwent Trust Ltd and another* v *Brotherton and Others* (1988) 59 P&CR 60, (1990) 61 P & CR 198, (1991) 63 P&CR 411

[40] (1988) 59 P&CR 60, 84

[41] (1702) 1 Anne c 14

[42] The River Derwent Navigation Act Revocation Order 1935, SI 1935, 978

[43] Rights of Way Act 1932, s 1 (1) (8)

The 1702 Act contained no clause declaring that there was a public right of navigation on the river nor did it state who had the right to use it. The preface to the Act stated that it would be a 'Means of employing the Poor and encreasing the Number of Watermen and advancing the Trade of the said County.'

6.5.2 Questions (1) to (4)

Counsel for both sides seem to have argued the case within Woolrych's interpretation of the law. When considering question (1) Vinelott J considered the river in three sections, Sutton to Stamford Bridge, Stamford Bridge to Kirkham and Kirkham to New Malton. The judge held that there was no right of navigation on any of these sections prior to 1702. When the case came to the Appeal Court it was stated that it was agreed by the parties that there was a right of navigation from Sutton to Stamford Bridge.[44] No reasons were recorded.

With regard to the section from Sutton to Kirkham, Vinelott J said,

> The difficulty which confronts the plaintiff is that, although it was no doubt possible for boats of shallow draft up to some six or 10 tons to be taken up the river in this way, there is no evidence that they were. And, as Farwell J. observed in *Att.-Gen.* v. *Simpson**;
>
> > The question whether a non-tidal river is navigable or not depends not on the question of the possibility of navigation but on proof of the fact of navigation.
>
> *footnote:- [1901] 2 Ch. 671 at p. 676.

It seems that counsel had not drawn attention to the fact that the decision by Farwell J was reversed and that Lord Macnaghten in giving the majority verdict of the House of Lords had expressed a different opinion.

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[44] *Yorkshire Derwent Trust Ltd and another* v *Brotherton and Others* (1990) 61 P & CR 198, 201

Vinelott J also said, 'If the river was so used, it would have been more natural to have expressed the purpose of the 1702 Act as the improvement of the navigation rather than the creation of it.'[45] It might have been more natural to have expressed the purpose of the Act as an 'improvement' but it was not the practice at the time.[46]
Vinelott J came to the conclusion that there was no public right of navigation on the river from Stamford Bridge to Kirkham and from Kirkham to New Malton prior to 1702. There was no appeal against the decision on question (1).

In answering questions (2) and (3) Vinelott J held that the 1702 Act, by necessary implication, conferred on the public the right to navigate at least with vessels carrying cargo and upon payment of the appropriate toll and that it obliged the riparian owners to submit thereto. He held that the use of the Derwent by non-commercial craft did not imply an intention to dedicate by the riparian owners. In reply to question (4) he held that all rights of navigation were extinguished by the 1935 Order.

The plaintiffs appealed against his decision on questions (2), (3) and (4). These appeals were dismissed by the Court of Appeal.

In outlining the background to the case Balcombe LJ said,

> (In *Simpsom* v *A-G Lord Macnaghten* said) Obviously at the time that the locks were made pleasure-boats were not within the contemplation of the patent or the patentee.[47] It is possible the same is true here. ….. No significance can be attached to the fact that provisions found in statutes enacted during the golden age of canal development were not found half a century earlier in 1702.[48]

In fact a clause providing that 'it shall and may be lawfull for any Gentlemen or Persons of Quality to have and keepe on the said River a Boat or Boats for his or their Pleasure to row and saile up and down the said River …..' is included in the River Navigation Act for the

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[45] *Yorkshire Derwent Trust Ltd and another* v *Brotherton and Others* (1988) 59 P & CR 60, 60
[46] See section 3.2.6 above. Also for example:- 2 George I c 24, River Kennet, 7 George I c 10, River Weaver.
[47] *Simpson* v *A-G* [1904] AC 476, 492
[48] *Yorkshire Derwent Trust Ltd and another* v *Brotherton and Others* (1990) 61 P & CR 198, 209 - 210

river Larke passed three years before 1702.[49] Similar clauses were included in the Act for the river Stour of 1705[50] and the river Nine or Nen of 1713.[51]

In considering the answer to question (2) Balcombe LJ said, 'There is no suggestion that any riparian owner sought or received compensation for the passage of boats over the bed of the river adjoining riparian land, although riparian owners were compensated in respect of land which the undertakers entered and used for tow-paths and other authorised purposes.'[52] Later he said, 'The fact is that the river was made navigable by statutory undertakers pursuant to statutory powers and the riparian owners had …. no lawful choice but to acquiesce in the public use which followed.'[53] Again later he said, 'In our opinion, the only way in which a sensible meaning can be given to this Act is by implying at least a public right of navigation for cargo-carrying vessels moving up or down the river between Scarborough Mills and Sutton and for purposes incidental thereto.'[54]

Balcombe LJ then stated that he considered that there was also a public right of navigation for pleasure boats. The reasons he gave included the fact that at common law rivers are either publicly navigable or not navigable at all; that on land the classification of a public right of way by one type of user has always implied use by a less burdensome user, eg pedestrians may use a carriageway; dedication may be made for a less intense use but it is not possible to dedicate for use by a section of the public. His final reason was that the fact that some vessels paid tolls did not preclude free use by recreational craft since pedestrians were allowed to use turnpike roads without the payment of tolls.[55]

Balcombe LJ also said,

> If there were shown to have been any clear and settled practice of draftsmanship at about the time the 1702 Act was passed, it might be right to attach significance to the lack of any reference to all the Queen's liege subjects or to pleasure-boats in this Act. A number of Acts have, however, been copied or summarised for our

[49] (1699) 11 William III c 22 s 23
[50] (1705) 4 Anne c 15
[51] (1713) 13 Anne c 19 s 16. See also section 1.5.6 above.
[52] *Yorkshire Derwent Trust Ltd and another* v *Brotherton and Others* (1990) 61 P & CR 198, 206 – 207
[53] *ibid*, 207
[54] *ibid*, 208
[55] *ibid*, 208 - 209

> consideration and these do not suggest any consistent usage. One can speculate why some Acts contained certain provisions and others did not, but it may simply be that different authors had different styles. No significance can be attached to the fact that provisions found in statutes enacted during the golden age of canal development were not found half a century earlier in 1702.[56]

It seems that not a large enough number of Acts were examined carefully for the court to see that very few, if any, expressly created a new public right of navigation.[57]

The Appeal Court agreed with Vinelott J that the 1935 Order revoked and extinguished all rights of navigation which had been created, or which were implied to have been created, by the 1702 Act.

6.5.3 Question (5)

The fifth question depended on the interpretation of section 1(1) of the Rights of Way Act 1932, as amended, which provided that,

> 'Where a way, ….. upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, such way shall be deemed to have been dedicated as a highway unless …'

This is qualified by subsection (8), 'For the purposes of this section the expression 'land' includes 'land covered with water'.

This section removed the difficulty which had previously been experienced when the land over which the way passed had been held in trust and there was no person who had the power to dedicate.

One may précis the judgements of the three courts by saying that Vinelott J considered that 'land covered by water' referred to fords and causeways and held that the clause did not refer to navigation on rivers. The Appeal Court considered the key word in the subsection

[56] *ibid*, 210
[57] See section 3.2.5 above

to be 'highway', having considered many cases where rivers were referred to as highways, they reversed his decision. The House of Lords considered the key word to be 'way', having found no justification for referring to a river as a way and having considered in depth the Memorandum which accompanied the Bill, reversed the decision of the Appeal Court.

Lord Jauncey said, 'For the foregoing reasons I am satisfied that section 1 of the Act of 1932 is not applicable to the relevant stretches of the River Derwent and the appeal should be allowed.' Thus it seems that on no other river can a public right of navigation be created by reference to the 1932 Act.

Hale wrote, 'If any person at his own charge makes his own private stream to be passable for boats or barges, ….. it is not hereby made to be *juris publici,* unless it were done at a common charge, or by publick authority, or that by long continuance of time it hath been freely devoted to a publick use.'[58]

If a public right of navigation can be created by implied dedication or use there seems to be no guidance as to the amount of use which would create such a right. With regard to rights of way on land at Scots Law the Lord President (Normand) said, 'having regard to the sparseness or density of the population, the user over the prescriptive period was in degree and quality such as might have been expected of an undisputed right of way.'[59] On the other hand the Lord President (Hope) said, 'the occasional or irregular use of a path by hill walkers or by others who resort to the countryside can readily be distinguished from the continuous use of it by members of the public as a route from one place to another.'[60]

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[58] Francis Hargrave, Lord Chief-Justice Hale, *A Treatise in Three Parts, Pars Prima, De Jure Maris;* contained in Francis Hargrave, Editor, *A Collection of Tracts relative to the Law of England* (London: T. Wright, 1787), 9

[59] *Marquis of Bute* v *M'Kirdy & M'Millan Ld 1937 SC 93* quoted by Lord Rodger of Earlsferry in *R (On the applicaton of Beresford)* v *Sunderland City Council* [2004] 1 All ER 160, 178

[60] *Cumbernauld and Kilsyth DC* v *Dollar Land (Cumbernauld) Ltd* 1992 SC 357 quoted by Lord Rodger of Earlsferry in *R (On the applicaton of Beresford)* v *Sunderland City Council* [2004] 1 All ER 160, 179