

Part 3 Legal and Customary Usability

Chapter 3.1 Theoretical Models of the Creation of Rights of Passage

3.1.1 Introduction

In Part 2 the topic was the physical form of the rivers and their physical usability. The topic in Part 3 is who was allowed to use those rivers which were physically usable. First in this chapter consideration is given to the theory as to how public rights of passage were created, that is rights of passage on land, 'highways', and on water, 'rights of navigation'.

Three models are considered. The first had only very limited application. Most lawyers and historians have assumed that the second model was correct. The third, it is claimed here, is the correct one. This third model implies that there is a public right of passage on all rivers. No previous work on this subject has been found.

The words 'public space' are used here to refer to a place to which the public have access, as of right, at all times, such as roads, town-squares, churchyards, the ocean and legally usable rivers and since 2000 designated 'mountain, moor, heath and down'. Tolls may be payable as on toll roads and bridges, in ports and on canals.

A 'private place' refers to a place to which only the occupants have access, as of right, at all times. It is a nested concept. A walled city was private compared with the forest outside for the gates were shut at night. A dwelling house is private compared with the street outside. A daughter's bedroom may be private compared with the other rooms of the family house. A park may contain a garden which contains a bower.

A 'quasi-public place' is one to which outsiders have access at some times and not at others. The time may be parts of the day or of the year. Thus at present shopping malls, railway stations, churches, gated London parks where access is allowed from sunrise to sunset are quasi-public places. In Chapter 3.2 consideration is given as to whether the open-fields were quasi-public places with access for the public allowed outside the time when crops were growing. In pastoral areas waterholes may be quasi-

public places with access not allowed for animals of one flock when another flock or herd is being watered.

Ownership does not determine whether a space is public or private. Changing patterns of ownership have been considered by other authors.¹ Ownership can often be traced through documentary records. Right of access is a much more elusive fact. The fact that a place is public does not allow people to make a profit without some form of prior agreement by hunting, fishing, taking turfs, wood or fruit, erecting stalls or trading. However the movement of people and goods by land or water is allowed although the types of vehicle or vessel may be restricted.

Consideration is given to three ways by which rights of passage could have been established:

1. Right of passage before people.
2. People before any right of passage.
3. Enclosure.

3.1.2 Right of passage before people

The first model implies a map of England on which is drawn a grid of highways and public rivers which were public places, mostly not rectangular. Then the land within the spaces was allocated to owners, some of whom received land on both sides of a highway or public river. This network was later augmented by the dedication of new paths.

Margary claims that some of the roads near Ripe were laid out by the Romans in this way.² This is the way in which the streets of the 'New Towns of the Middle Ages' were created by the owners of the lands³ but there is no evidence of it being used

¹ Eg. R.A. Dodgshon, 'The Changing Evaluation of Space 1500-1914.' In R.A. Dodgshon and R.A. Butlin, Eds. *An Historical Geography of England and Wales*. 2nd Edition. London: Academic Press. 1990, 255-259.

² Ivan Donald Margary, *Roman Ways in the Weald*. London: Phoenix House. 1949, 204-7.

³ Maurice Beresford, *New Towns of the Middle Ages*. London: Lutterworth Press. 1967.

outside of towns prior to the enclosure arrangements of the 16th to 19th centuries. No further consideration is given to this model.

3.1.3 People before any right of passage

Under this model originally people of each community were free to move only within the confines of their own area. Then slowly as time passed different owners dedicated rights of passage for the use of the public. Those who accept this theory never state when dedication took place. This is the model used by all lawyers. Riddall and Trevelyan in the standard work *Rights of Way* wrote:

Relatively few highways can be shown to have been expressly dedicated. The great majority have been accepted as being public since beyond memory. In order to explain the legal basis of such ways, the law presumes that at some time in the past the landowner dedicated the way to the public, either expressly, the evidence of the dedication having been lost, or impliedly, by making no objection to use of the way by the public.⁴

This is the model accepted by 19th century historians who assumed that the first inhabitants of England lived in small self-sufficient communities with little communication between them. Cunningham wrote in the 19th century of the 13th century estates which had very little communication with the outside world.⁵

One problem with this model is that it is anachronistic. There were no 'landowners' in the medieval period. Homans described one estate:

In 1279, Angareta de Beauchamp held the manor of Spelsbury as her dower of the inheritance of the Earl of Warenne and Surrey. At her death, the manor was to revert to the earl. [The Earl] held of the Bishop of Worcester, and the bishop held of the king. ... The rest of the land was in the hands of her tenants. These, ...

⁴ John Riddall and John Trevelyan, *Rights of Way*. 3rd Edition. Henley-on Thames: Open Spaces Society; London: Rambler's Association. 2001, 58.

⁵ W. Cunningham, 'Introduction'. In Elizabeth Lamond, *Walter of Henley's Husbandry*. London: Longmans, Green and Co. 1890, xiii-xiv.

were of three kinds: freeholders (*libere tenentes*), villains (*villain*), and cotters (*cottarii*).⁶

Thus none of the people named in this quotation were, in the modern sense of the word, ‘owners’ of the land. ‘What a tenant in chief acquired by the king’s grant was not the enjoyment of land so much as the enjoyment of rights over land and services due from peasants.’⁷ Baker found no instance of the use of the word ‘ownership’ relating to land before 1490.⁸ Johnson wrote ‘ownership had existed in the medieval landscape, but its definition was complex as we have seen; there was no necessary equation between ownership, access and use rights.’⁹

People were given the right to do things, plough, pasture their animals, build houses, gather wood, collect rent, etc. They were given the right to stop people from interfering with these rights. Thus prior to the Statute of Merton a lord could not enclose waste land if his tenants had the right to common in it.¹⁰ Even after the passing of the statute a lord could only enclose land if the tenants had enough common remaining for their use.

Singer has identified three models of property: ‘ownership’, which ‘invites owners to use their property without regard to the needs of others’; ‘bundle of rights’ which recognises that property involves a collection of specific rights; and ‘entitlement’ which emphasises both the rights and obligations relating to property.¹¹ In general terms it may be said that the feudal system of land rights was one that could be described as a ‘bundle of rights’. This was followed by a system described as ‘ownership’, and now many people think that the ‘entitlement’ model is most suitable. There is no evidence that there was ever a time when people did not move outside of their own property and this model is based on an anachronistic concept of the ownership of land and so can not be the source of modern rights of passage.

⁶ George C. Homans, *English Villages of the Thirteenth Century*. (1st Edition 1941.) New York: Harper & Row. 1970, 224-225.

⁷ A.W.B. Simpson, *A History of the Land Law*. 2nd Edition. Oxford: Clarendon Press. 1986, 5.

⁸ J.H. Baker, *An Introduction to English Legal History*. 3rd Edition. London: Butterworths. 1990, 255, fn 2

⁹ Matthew Johnson, *An Archaeology of Capitalism*. Oxford: Blackwell Publishers Ltd. 1996, 75.

¹⁰ (1235) 20 Henry III c. 4.

¹¹ Joseph William Singer, *Entitlement*. New Haven: Yale University Press. 2000.

3.1.4 Enclosure

According to the third model the country was allocated to, or claimed by, different people. Everyone was free to go anywhere in the country. Soon people built houses and surrounded them with fences and these areas were then considered to be private. Into these only the owner of the land, or people granted his permission, could enter. People enclosed fields for arable or pasture. It seems that these areas were considered to be private from about the end of the 15th century. People also planted crops in unenclosed areas and while the crops were growing the areas could not be entered but after the harvest they could be crossed again. The nobles created parks with high fences to keep the deer in and to keep out people who had no permission to enter. These again were private.

Over the years, at different rates in different parts of the country, more and more land became private. At the same time people travelled: home to manor house or mill, manor to market, to the hundred or shire court or to Parliament, wherever it was meeting, merchants, tinkers, traders, bishops, friars, soldiers, messengers, judges, lawyers, sheriffs and whole households, including the king's household. Much of this movement was from town to town or village to village. The ways on land that were most frequently used came to be called highways, royal highways or the king's highway. By 1189 it seems that the law required that these highways be kept clear of obstructions. At this date part of the land was private, part highway and the remainder pasture, fallow, waste, moor or other land which people were allowed to pass over providing they caused no physical damage. The rivers had not been enclosed and so remained public places.

The law books of the 12th century refer to the special protection of people using Watling Street, Fosse Way, Icknield Way and Ermine Street and the principal rivers.¹² Wormald has referred to the obsession of the early 12th century legal treatises with 'roads and their peace'.¹³ However it seems that the point at issue in these texts was

¹² *The annals of Roger de Hoveden Volume 1. Parts 1 & 2.* Translator Henry T. Riley. (London, Bohn H.C., 1853), 545 – 547.

¹³ Patrick Wormald, *The Making of English law: King Alfred to the Twelfth Century.* Oxford: Blackwell Publishers. 1999, 140.

whether offences committed on these highways were against the Sheriff's Peace or the King's¹⁴ and so who had the benefit of the fines imposed on those breaking the peace.

No history of the royal highways has been found. Coss having studied medieval manuscripts has shown that in Coventry in the 13th century one or more roads were called the *regia strata*, *regali via* and *regia via*. The other roads were referred to as Potter's Row or Much Park St or by some similar name.¹⁵ But all were equally public places. On a map of the Isle of Thanet of c.1400 the red lines show, according to the cartographer, 'the king's highways of the island from one parish to another.' There are some parishes which have no highway leading to them.¹⁶ The number of highways which were titled 'king's highway' may have changed over time but it seems that the public had free access to all the highways at all times.¹⁷

This theory implies a right not dissimilar to the law of the Scandinavian countries where there has always been a right of *allmansratten*. Blackshaw has claimed that the law of Scotland never changed with regard to simple trespass.¹⁸ In England by the end of the period of the enclosures, c.1830, most of the land was enclosed except the highways, rivers and land over which there were local rights of common or village green.

If the second model correctly records the development of English Law then all land, including land covered by flowing water, was private and remains so except where made public by statute or dedication. No example has been found of a section of a river being dedicated under Common Law for public use. If the third model correctly records the development of English Law, as claimed in this thesis, then all rivers which were physically usable were public during the period 1189-1600 because they were never enclosed.

¹⁴ *Leges Henrici Primi*. Editor L.J. Downer. Oxford: Clarendon Press. 109.

¹⁵ *The Early Records of Medieval Coventry*. Editor Peter R. Coss. London: The British Academy. 1986, 82, 167, 102, 113.

¹⁶ F. Hull, 'Isle of Thanet, Kent, late 14th century x 1414.' In R.A. Skelton and P.D.A. Harvey, Eds. *Local Maps and Plans from Medieval England*. Oxford: Clarendon Press. 1986, 122, plate 8.

¹⁷ Sir Frederick Pollock, *Oxford Lectures and other discourses*. London: Macmillan and Co. 1890, 65-90.

¹⁸ Alan Blackshaw, 'An Historical Approach to the New Outdoor Access Legislation.' *Scottish Affairs*. Number 62. (2008), 1 - 46.

Chapter 3.2 The Law of Trespass

3.2.1 Introduction

Theory may not always be reflected in practice. The law may not be reflected in practice. The law relating to prescription whether common law, the doctrine of lost modern grant or the statute law in the Prescription Acts is concerned with the legalisation of previously wrongful acts. In this chapter the law relating to trespass is studied. It is shown that there was no offence of simple trespass in unenclosed places during the period 1189-1600 and so, because rivers were unenclosed, they were public places.

The contemporary lawyers Glanvill,¹⁹ Bracton,²⁰ Britton²¹ and Callis²² all stated that usable rivers were public places. Magna Carta, other legislation and the Parliamentary Rolls are all evidence that rivers were considered to be public in the period 1189-1600. However this evidence has not been universally accepted. The evidence has been considered in a previous thesis by the present author and is not repeated here.²³

The word 'law' in this chapter is used in the sense that Baker described it:

The law today is not what particular courts or parliaments in the past have said it is, but what lawyers at present think the relevant courts would do in a particular case. And the perceptive lawyer will now and again see that that may be at odds with what the books say.²⁴

¹⁹ *The Treatise on the Laws and Customs of the Realm of England Commonly called Glanvill*, Editor G.D.G. Hall. Oxford: Clarendon Press. 1965, 113 -114

²⁰ *Henrici de Bracton De Legibus et Consuetudinibus Angliae*. Editor Sir Travers Twiss. London: Longman & Co and others. 1878.

²¹ *Britton, Volume 1*. Editor Francis Morgan Nichols. Oxford: Clarendon Press. 1865, 81

²² 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, *Lectura Secunda*.

²³ Douglas Caffyn, 'The Right of Navigation on Non-tidal Rivers and the Common Law.' LLM Dissertation, Univ. of Kent. 2004.

²⁴ J.H. Baker, *The Law's Two Bodies*. Oxford: Oxford University Press. 2001, 4.

In the English Legal system ‘legislation is superior to everything ...’²⁵ and ‘It is a basic principle of the administration of justice that like cases should be decided alike.’²⁶ Yet the law has changed often quite apart from statute law. In particular the law relating to *the ownership of land* and *trespass to land* has changed since 1189 and it is necessary to consider the second of these in order to understand the law relating to access to water which applied from 1189 to 1600.

3.2.2 Types of Trespass

Feudal laws of tenure and private rights have been well described elsewhere and are not considered here.²⁷ However no text has been found which discusses the history of the public right of access over land or its converse trespass. These are discussed first in order to establish the corresponding rights over water. Private rights whether in the form of a licence or easement are not considered.

The word ‘trespass’ is used in this thesis only in the sense of ‘trespass to land’. It is useful at this stage to define three types of trespass:

‘Simple trespass’ is defined as ‘entering the unenclosed land of another, without licence, and without causing, or intending to cause, damage’.

‘Enclosure trespass’ is defined as ‘entering the enclosed land of another without licence.’

‘Composite trespass’ is defined as ‘entering the land of another, without licence, and causing, or intending to cause, some form of damage’.

²⁵ Michael Zander, *The Law-Making Process*. London: Butterworths. 1999, 1.

²⁶ Rupert Cross and J.W. Harris, *Precedent in English Law. 4th Edition*. Oxford: Clarendon Press. 1991, 3.

²⁷ A.W.B. Simpson, *A History of the Land Law. 2nd Edition*. Oxford: Clarendon Press. 1986.

3.2.3 The ancient law of trespass

‘William claimed to be king by lawful succession, and one of his first acts was to promise the English that they could keep their old laws.’²⁸ It is therefore justifiable to consider the law prior to his arrival, while noting that rights to any particular land may not be based on evidence from before 1189.²⁹

In 690 the laws of the Kingdom of Wessex provided that ‘If a man from afar, or a stranger, travels through a wood off the highway, and neither shouts, nor blows a horn, he shall be assumed a thief.’³⁰ In 695 there was the same provision in Kent for those who ‘quit the road’.³¹ It seems likely that the Danelaw, as applied in England, followed the law of Scandinavian countries. This allowed free access to unfenced land. Cooper having studied the Anglo-Saxon laws relating to the highways described them as being not a matter of physical construction and repair, of gravel and flagstones, but rather of a legal idea, and of conceptual and ideological space.³²

In 1189 much of the country, especially the Midlands and South East, was unfenced. In these regions it would have been easy to move from place to place without entering fenced areas of land and without doing any damage.³³ It would seem that a person could move over any unfenced land, providing no actual damage was caused, and that land could be fenced providing no established right of way was obstructed.³⁴ *Select Pleas in Manorial and other Seignorial Courts. Volume I. Henry III and Edward I*³⁵

²⁸ J.H. Baker, *An Introduction to English History. 3rd Edition*. London: Butterworths. 1990, 14.

²⁹ (1275) 3 Edward I c. 39. Statute of Westminster I.

³⁰ F.L. Attenborough, Ed. and Trans. *The Laws of the Earliest English Kings*. Cambridge: Cambridge University Press. 1922, 37.

³¹ *Ibid.* page 31.

³² Alan Cooper, ‘The Rise and Fall of the Anglo-Saxon Law of the Highway.’ *Haskins Society Journal*. Vol. 12. (2002), 46.

³³ Warren O. Ault, ‘Open-Field Husbandry and the Village Community.’ *Transactions of the American Philosophical Society*. New Series – Vol. 55, Part 7. (1965), 5.

³⁴ c1118. *Stretbreche. Leges Henrice Primi*. Editor L.J. Downer. Oxford: Clarendon Press. 1972, 115, 141 and 251.

³⁵ *Select Pleas in Manorial and Other Seignorial Courts*. Editor F.W. Maitland. Selden Society. Vol. 2. 1888.

The Court Baron: Precedents of pleading in Manorial and other Local Courts. Editor F.W. Maitland. Selden Society. Vol. 4. 1890.

and *Select Cases of Trespass in the King's Courts 1307-1399*³⁶ contain no report which contradicts this concept of the law.

In about 1260 Bracton wrote that trespass to land involved the intention of using the land and dispossessing the previous owner. He makes no mention of an offence similar to 'simple trespass'.³⁷

In the second half of the 14th century Langland wrote

For yf a marchant and [a] mesager metten togyderes ...
 Thogh the messenger make his way amydde the fayre whete
 Wol no wys man be wroth ne his wed take-
Nesessitas non habet legem-
 Ne non haiward is hote his wed for to taken.
 Ac if the marchaunt make his way ouer menne corne
 And the hayward happe with hym for to mete,
 Other his hatt or his hoed or elles his gloues
 The marchaunt mote forgo or moneye of his porse
 And zut be ylette, as y leus, for the lawe asketh
 Marchauntz for here marchaundyse in many place to tolle.³⁸

Thus the king's messenger could go where he liked. But if the merchant rode across standing corn, the Hayward, if he caught him, would take from him his hat, his hood, his gloves, or a sum of money, presumably as satisfaction for the damages.³⁹ Outside of the standing corn, and presumably the curtilage of the houses, the merchant was free to make his way by any route.

³⁶ *Select Cases of Trespass in the King's Courts, 1307-1399. Volumes 1 and 2.* Editor Morris S. Arnold. Selden Society. Vols. 100 and 103. 1984, 1987.

³⁷ Bracton's Notebook f. 216b. Quoted and translated in C.H.S. Fifoot, *History and Sources of the Common Law*. London: Stevens & Sons Limited. 1949, 57-58.

³⁸ William Langland, *The Vision of William concerning Piers The Plowman in three parallel Texts*. Editor Walter W. Skeat. Oxford: Oxford University Press. 1886, 454-456.

³⁹ George C. Homans, *English Villagers of the Thirteenth Century*. (1st Edition 1941.) London: Harper Torchbooks. 1970, 295.

3.2.4 Blackstone

The first reasonably comprehensive survey of English law after *Bracton* was written by Blackstone in 1766.⁴⁰ His concept of the law is stated first and then consideration is given as to how and when the law changed between 1260 and 1766.

Blackstone wrote that property is ‘that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.’⁴¹ His concept corresponded to the idea that ‘an Englishman’s house is his castle’. Taggart wrote ‘In the age before the modern textbook or treatise, William Blackstone’s *Commentaries on the Laws of England* ... was an easily accessible, readable, and manageable primer for lawyers ... on the laws of England as a whole. It became the lawyers’ bible.’⁴²

About the law of trespass Blackstone wrote:

Every unwarrantable entry on another’s soil the law entitles a trespass by *breaking his close*; the words of the writ of trespass commanding the defendant to shew cause, *quare clausum querentis fregit*. For every man’s land is in the eye of the law inclosed and set apart from his neighbours: and that either by a visible and material fence, as one field is divided from another by a hedge; or, by an ideal invisible boundary, [210] existing only in the contemplation of law, as when one man’s land adjoins to another’s in the same field. And every such entry or breach of a man’s close carries necessarily along with it some damage or other: for, if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, *viz.* the treading down and bruising his herbage.[fn. Cro. Eliz. 421.]⁴³

⁴⁰ Sir William Blackstone’s *Commentaries on the Laws of England* (1765-69).

⁴¹ Sir William Blackstone, *Commentaries on the law of England*. (1st Edition 1766.) Facsimile reprint edition, University of Chicago Press. 1979, 2. Cited in Joseph William Singer, *Entitlement*. New Haven: Yale University Press. 2000, 3.

⁴² Michael Taggart, *Private Property and Abuse of Rights in Victorian England*. Oxford: Oxford University Press. 2002, 109.

⁴³ Sir William Blackstone, *Commentaries on the Laws of England. Book the Third. Chapter 12*. 11th Edition. London: T. Dadell. 1791, 209-210.

‘Cro. Eliz. 421’ is the case of *Welden v Bridgewater* in which it was stated that the ‘defendant entered and cut down the grass’.⁴⁴ The record appears to describe a case of ‘composite trespass’ not ‘simple trespass’.

3.2.5 How the law changed

Blackstone refers to two fictions in the writ for trespass which was worded *quare clausum fregit* [Why was the close broken.]. First unenclosed land was to be considered as enclosed by ‘an ideal invisible boundary’ and second that entry ‘carries necessarily along with it some damage or other’ because ‘the words of the writ require it’. Baker wrote of these and other fictions that ‘there is something inescapably exasperating about a logic which so effectively defeats the historian at every turn.’⁴⁵ They ‘rebuff the inquirer who chiefly wants from his report or his plea roll just a simple slice of life.’⁴⁶ One’s study is not helped by the fact that it is only the later commentators on the law who recognised that it is unnatural to say ‘that to walk peacefully across another man’s land is a forcible injury and a trespass.’⁴⁷

The reasons for some fictions are clear. It was early realised that when it was claimed that a man entered the property of another *cum vi et armis contra pacem* the claim was included in the writ, prior to the 1360s,⁴⁸ to enable the case to be heard in the king’s courts, not because it was true.⁴⁹ The presence of fictions in the law reports makes the study of violence and some other social actions in the medieval period almost impossible. ‘Today there is an elaborate body of law ... riddled ... with fiction and absurdity, but in the Middle Ages only the germs of the disease are apparent.’⁵⁰ Identifying and dating the origins of the fictions is a challenge.

⁴⁴ *Welden v Bridgewater*, (1592) Cro. Eliz. 421.

⁴⁵ J.H. Baker, *The Law’s Two Bodies*. Oxford: Oxford University Press. 2001, 50.

⁴⁶ S.F.C. Milsom, *Studies in the History of the Common law*. London: The Hambledon Press. 1985, 150.

⁴⁷ The late R.F.V Heuston and R.A. Buckley, *Salmond and Heuston on the Law of Torts*. 21st Edition. London: Sweet & Maxwell Ltd. 1996, 5.

⁴⁸ Anthony Musson, *Medieval Law in Context*. Manchester: Manchester University Press. 2001, 158.

⁴⁹ S.F.C. Milsom, *Historical Foundation of the Common Law*. 2nd Edition. London: Butterworths. 1981, 289.

⁵⁰ A.W.B. Simpson, *A History of the Land Law*. 2nd Edition. Oxford: Clarendon Press. 1986, 109.

At the end of the 16th century some judges thought that the law did not change. Popham C.J. stated ‘that the laws of England had continued as a rock without alteration in all the varieties of people that had possessed this land, namely, the Romans, Britons, Danes, Saxons, Normans, and English.’⁵¹

Lord Hobhouse said recently ‘The common law develops as circumstances change and the balance of legal, social and economic needs changes.’⁵² Allen more wisely wrote of customs, and it seems to be equally true of changes in the common law, ‘customs establish themselves not because they correspond with any conscious, widespread necessity, but because they fit the economic convenience of the most powerful caste.’⁵³

Baker considered that ‘The object of fictions is that they allow the operation of the law to change while avoiding any outward alteration in the rules.’⁵⁴ In this he was criticised by Skinner who considered that ‘Fiction involves manipulation, which does not *always* stem from a desire for justice; critical reflection on the aims and interests of the manipulators needs to accompany research into the evidence of their activities.’⁵⁵

There is the maxim *fictio legis inique operator alicui damnum vel injuriam* (a legal fiction operates unfairly when it causes damage or inflicts a wrong).⁵⁶ Lord Mansfield said in 1768 ‘The court would not endure that a mere form or fiction of law, introduced for the sake of justice, should work a wrong, contrary to the real truth and substance of the thing.’⁵⁷ Bayley J. said in 1824 ‘Wherever a fiction of law works injustice, and the facts, which by fiction are supposed to exist, are inconsistent with the real facts, a court of law ought to look to the real facts.’⁵⁸

Yet for all the pious words of the lawyers, fictions excluded the public from unenclosed land and produced a charge for damages for entering them. Two hundred and fifty

⁵¹ Cited in Spence, *Equitable Jurisdiction*, I. 125. Cited in Sir Carleton Kemp Allen, *Law in the Making*. 6th Edition. Oxford: Clarendon Press. 1958, 90, fn 1.

⁵² *R v Governor of Brockhill Prison, ex p. Evans (NO.2)* [2002] 2 A.C. 19 at 48.

⁵³ Sir Carleton Kemp Allen, *Law in the Making*. 6th Edition. Oxford: Clarendon Press. 1958, 88.

⁵⁴ J.H. Baker, *The Law's Two Bodies*. Oxford: Oxford University Press. 2001, 35.

⁵⁵ Stephen Skinner, ‘Book Review. *The Law's Two Bodies; Some Evidential Problems in English Legal History*.’ *Law Quarterly Review*. Vol. 118. (2002), 661.

⁵⁶ Lord Trayner, *Trayner's Latin Maxims*. 4th Edition. Edinburgh: W. Green. 1993, 224-225.

⁵⁷ *Johnson*, (1760) 2 Burr, 963.

⁵⁸ *Lyttleton v Cross*, (1824) 3 B. and C. 325.

years later the legislature largely rectified the injustice with regard to access to unenclosed land by the passing of the Countryside and Rights of Way Act 2000.⁵⁹

3.2.6 Statutes and Law Reports

Statute law gives very little help in establishing the historic scope of the law relating to trespass. The Statute of Westminster of 1275 indicates that at that time a close was a physical enclosure.⁶⁰ The only Act which expressly refers to the Action of *quare clausum fregit* is the 'Acte for lymytacon of Accons' of 1623-4⁶¹ which limits the time during which the action can be brought and the amount of damages which may be awarded.

'Composite trespass' is 'criminal damage committed on the land of the plaintiff' and has always been a civil wrong. Further examination is needed as to when 'simple trespass' and 'enclosure trespass' became offences. Maitland wrote that 'in old days a trespass that did no harm would have been no trespass.'⁶²

Fictions found their place early in English Law. Palmer places the introduction of the standardized writs to the king's courts to 1176.⁶³ Standardized writs would have encouraged fictions by tempting people to make statements to fit the writ rather than the facts. By 1265 *Les Encoupemez en Court Baron* provided a set of precedents for use in a seigniorial court. Most of these would have come from an earlier date for 'such literature is not made but grows.'⁶⁴ Fifoot states that it was in these courts that most cases were heard.⁶⁵ It might be expected that any case of 'simple trespass' would be dressed up to look like 'composite trespass' making it impossible to recognise.

There are now a large number of manor court rolls available each listing many cases of trespass.⁶⁶ At the Newton Manor Court, Buckinghamshire, held on Saturday, 1 July

⁵⁹ Countryside and Rights of Way Act 2000. Chapter 37.

⁶⁰ (1275) 3 Edward 1 c. 17.

⁶¹ 1623/4 21 James I c.16.

⁶² F.W. Maitland, *Domesday Book and Beyond*. (1st Edition 1897.) London: Collins. 1960, 405.

⁶³ Robert C. Palmer, *The Whilton Dispute, 1264-1380*. Princeton: Princeton University Press. 1984, 16.

⁶⁴ *The Court Baron: Precedents of Pleading in Manorial and Other Local Courts*. Editors F.W. Maitland and W. Paley Baildon. Selden Society Vol. 4. 1890, 5.

⁶⁵ (1278) 6 Edward I c. 8. Statute of Gloucester.

⁶⁶ *Select Cases in Manorial Courts*. Editor L. Bonfield. Selden Society. Vol. 114. 1997, xvi.

1290 there were 29 cases of trespass heard in one day.⁶⁷ But no case has been found which was an offence of ‘simple trespass’. Every intrusion was accompanied by one of a rich variety of aggravating incidents – destruction of corn, the theft of chattels or assault upon master or man.⁶⁸

There is one early case which might at first sight appear to be ‘simple trespass’. Milsom said of *Bracton’s Notebook Plea* 843 that ‘the defendant had done nothing but come onto the plaintiff’s land.’⁶⁹ However it is clear that the entry was repeated and that the defendant was seeking to establish possession of the land. He claimed that his father had right of possession which had passed to him.

The fiction relating to *vi et armis* was admitted early in the 14th century. In a case in 1304 Bereford CJ stated that the plaintiff should recover damages for trespass although the defendants ‘had not come with force and arms’.⁷⁰ Sometimes counsel admitted that the claim of *vi et armis* was fictitious:- ‘Willoughby. “Although we have made mention of a coming [with force and arms] these are but [formal] words etc. It is not force and arms that give cause of damages, but the trespass.”’⁷¹ By 1308 the words *quare clausum fregit* were also being used as a fiction.⁷²

In 1330 counsel for William de Thwing claimed that ‘as for the close, he says that he found gaps in the close and he entered by the gaps in the close with his beasts; without this, that he broke the close or did anything against the peace etc.’⁷³ Thus claiming that there could be no breaking of the close if nothing was broken.

⁶⁷ W.O. Ault, *Open-Field Farming in Medieval England*. London: George Allen and Unwin Ltd. 1972, 149.

See also Warren O. Ault, ‘Open-Field Husbandry and the Village Community.’ *Transactions of the American Philosophical Society*. New Series. Vol. 55, Part 7. (1965).

⁶⁸ C.H.S. Fifoot, *History and Sources of the Common Law*. London: Stevens & Sons Limited. 1949, 53. *Select Cases of Trespass in the King’s Courts, 1307-1399. Volumes I and II*. Editor Morris S. Arnold. Selden Society Vols. 100, 103. 1984, 1987.

⁶⁹ S.F.C. Milsom, *Studies in the History of Common Law*. London: The Hambledon Press. 1985, 3 and 11-12.

⁷⁰ Year Book 32 Edward I (Rolls Series), p. 259. Common Pleas. Cited in J.H. Baker, *The Law’s Two Bodies*. Oxford: Oxford University Press. 2001, 114.

⁷¹ *Petstede v Marreys* (1310) Year Book 3&4 Edwards II. Selden Society. Vol. 22. 1907, 29.

⁷² *eg. Anon.* 1 Edward II 1308. In *Year Books I & 2 Edward II (1307-1308 and 1308-1309)*. Volume I. Editor F.W. Maitland. Selden Society. Vol. 17, 1903, 36.

⁷³ *William de Thwing v Walter de Strickland*. Common Pleas 40/283, m. 253d (De Banco roll, Michaelmas 1330). Reported in *Select cases of Trespass in the King’s Courts, 1307-1399. Volume II*. Editor Morris S. Arnold. Selden Society. Vol. 103. 1987, 375.

In 1494 in *Bateman v Baron*⁷⁴ the defendant was accused of breaking a close and taking a horse. His defence was that he ‘went to the place where the trespass was supposed to have been committed and, finding the gate open, entered and peaceably took the horse in the name of a distress for levying the amercement’.

In response *Kebell* stated:

Everyone’s several close is enclosed with the law, and it is not the hedge or wall alone which constitutes the enclosure. A man is equally punishable by writ of trespass *quare clausum fregit* when (having no title) he entered my several close which lies open as he is when he breaks my hedge in entering.

This was agreed, because the writ is true in either case when it says *clausum fregit*, if he enters by wrong.

This is the first case which has been found in which enclosure trespass was held to be an offence.

From this it seems that from the end of the fifteenth century the writ of *quare clausum fregit* was extended to all places which were enclosed by a hedge or wall and that the plaintiff did not need to establish that the gates were closed when the entry occurred. However it seems that it was relevant whether the place was enclosed or not. There would have been no argument about gaps in hedges or gates being left open if the same law had have applied outside the close as inside it.

In 1466 there was the interesting Case of Thorns.⁷⁵ It appears that Richard Orynge cut a hedge and allowed the clippings to fall on his neighbour’s land. He collected them and was sued. The writ claimed that he

⁷⁴ Court of Common Pleas, Trinity Term 1494. Record: CP 40/929, M. 197. Reported in *Reports of cases by John Caryll: Volume I. 1485-1499*. Editor J.H. Baker. Selden Society. Vol. 115. 1998, 258.

⁷⁵ Common roll, Easter 5 Edward IV, P.R.O. ref. C.P. 40/815, m. 340, Devon. Cited in A.K.R. Kiralfy, *A Source Book of English Law*. London: Sweet & Maxwell Ltd. 1957, 128-132.
The Case of Thorns. (1466) B. & M. 327.

did with force and arms break the close of the said P. and cut down and carried off trees and under-growth to the value of £5, lately there growing, and trod down and consumed his grass, to the value of 5 marks, lately there growing, and inflicted other enormities on him, to the damage of the said P. and against the peace of our Lord the King.

The case was unusual in that it was heard before a full bench of seven judges whose very varied judgements have been recorded. The case was found for the plaintiff by four to three whereupon the plaintiff voluntarily remitted the damages. Clearly the case had little to do with the thorns and what it did involve we do not now know. But it does make clear that ‘simple trespass’ was not then an offence.

The earliest case, that has been found, in which ‘simple trespass’ was claimed to be a civil wrong started in 1519. Fitzherbert counsel for the plaintiff in *Harecourt v Spycer* said ‘It is not lawful for anyone to come onto my land without my leave, even if he just wants to speak to me.’⁷⁶ Newport counsel for the defendant replied ‘The law will never punish anyone, nor does it give an action of trespass, where there is neither wrong (*tort*) nor damage.’ As usual no decision of the court was recorded.

This first suggestion that ‘simple trespass’ is a civil wrong came three years after the publication of More’s *Utopia* in which he criticised the current agrarian changes.

In order that one insatiable glutton and accursed plague of his native land may join field to field and surround many thousand acres with one fence, tenants are evicted.... What remains for them but to steal and be hanged.⁷⁷

Two years later Wolsey’s Commission was set up to investigate the damaging effects of enclosure.⁷⁸

⁷⁶ *Harecourt v Spycer*. (1519-21) Reported in *The Year Books of 12-14 Henry VIII*. Editor J.H. Baker. Selden Society Vol. 119. 2002, 7-10, 81-85.

⁷⁷ St. Thomas More, ‘Utopia’. (1st Edition 1516.) In Edward Surtz and J.H. Hexter, Eds. *The Complete Works of St Thomas More. Volume 4*. New Haven: Yale University Press. 1965, 67.

⁷⁸ W.E. Tate, *The English Village Community and the Enclosure Movement*. London: Victor Gollancz Ltd. 1967, 45.

In 1522 it was claimed that a plea of *quare clausum suum fregit* could be made for a wood. However it seems that the Court of Common Pleas rejected the claim.⁷⁹ In general forests, the areas of land protected for hunting, were not enclosed and people could move through them freely. It was only the offences committed in the forests which were punished sharply.⁸⁰

In 1625 the by-laws of the Manor Court of Kirton in Lindsey, Lincolnshire, provided that people going to the mill or market should use only ‘those ways as be knowne to be high ways’ unless they had consent of the owner to pass through land which was gated. This by-law made ‘enclosure trespass’ an offence in Kirton in Lindsey. However it also implies that up to this date the ‘common people’ still passed through enclosed fields. These by-laws claimed to be the ‘ancient customs’ of the manor although they related to ‘lands lately inclosed’.⁸¹

In *Henns Case* in 1633 ‘The Judges agreed, that it hath been adjudged, that if a man do inclose, where he may by law, that he is bound to leave a good way, and also to keep it in continual repair at his own charge.’⁸² This seems to imply that before enclosure there was freedom to walk on all the land and that ‘simple trespass’ was not an offence. Nothing has been found which indicates that ‘simple trespass’ was an offence before 1600. It follows that the rivers would have been public places as they were not enclosed.

Distortions of the understanding of the law have come in other ways. Isaac Walton wrote in an appendix to *The Compleat Angler*: ‘If I [an angler] come upon another man’s ground without his licence, or the licence of the law, I am a trespasser, for which the other may have an Action of Trespass against me.’⁸³ Walton wrote that a poacher is a trespasser.

⁷⁹ *Bishop of London v Nevell and Bowers*. (1521/2). Reported in *The Year Books of 12-14 Henry VIII*. Editor J.H. Baker, Selden Society Vol. 119. 2002, 91.

⁸⁰ John Manwood, *A Treatise of the Lawes of the Forest*. London: Societie of Stationers. 1615, Preface, pages unnumbered.

⁸¹ H.W. Atkinson, ‘Manor Court Ordinances.’ *Genealogists’ Magazine*. Vol. 4, (1928), 38, fn. 458.

⁸² *Henn’s Case*. (1633) Jones W. 296-297.

⁸³ Isaac Walton and Charles Cotton, *The Compleat Angler*. 3rd Edition. London: 1664. Appendix. Pages unnumbered.

Samuel Johnson under his definition of trespass wrote: ‘One who enters unlawfully on another’s ground. If I come upon another’s ground without his licence, or the licence of the law, I am a trespasser, for which the owner may have an action of trespass against me. Walton.’⁸⁴ Thus giving the spurious authority of Walton to his definition.

The *Oxford English Dictionary* under its definition of trespass, as a verb, quotes Johnson without qualification. ‘1755 Johnson, Trespass, 2. to enter unlawfully on another’s ground.’⁸⁵ Somewhere along the line Walton’s ‘poacher’ has turned into the OED’s ‘simple trespasser’.

‘Trespass’ used to mean ‘to commit an offence’. It may now mean ‘one who enters the ground of another without lawful authority’. This new meaning seems to have come after 1600. All the pre-1600 quotations in the *Oxford English Dictionary* relating to ‘trespass’ appear to refer to ‘composite trespass’ not ‘simple trespass’.

3.2.7 Legislation and Commissions

All relevant legislation, Parliamentary Petitions and Commissions for the period 1189-1600 are listed in Appendix E. These imply that the public use of rivers was a natural right. Magna Carta and the succeeding statutes stated that all the rivers of England were to be kept free for use by vessels. In times of unrest, and at other times, this law was not always and everywhere observed. Very few laws are always and everywhere observed. The weirs were built by the land-owners. Those who challenged their right to obstruct the rivers were sometimes other land-owners from upstream but sometimes it was merchants from the towns or common carriers who used the rivers. These people did not have equal political power. However if someone wished to use a river then the law required that obstructions created since the time of Edward I had to be removed. Nothing has been found in the Parliamentary records which supports the view that in the period 1189-1600 some usable rivers were considered to be private. The quotations in Appendix E concerning the River Brant, the rivers of Somerset, rivers in Wales, the water of Witham in the county of Nottingham and the Middlesex Colne all with

⁸⁴ Samuel Johnson, *A Dictionary of the English Language*. 2nd Edition. London: J. & P. Knapton. 1755. Facsim. London: Times. 1983. Pages unnumbered.

⁸⁵ ‘Trespass.’ *The Oxford English Dictionary*. Volume VIII. 2nd Edition. Editors J.A. Simpson & E.S.C. Weiner. Oxford: Clarendon Press. 1989, 488.

reference to the statutes of 25 and 45 Edward III show that the legislation which referred to the great rivers applied to all usable rivers and was not limited to the Thames, Severn, Trent and Ouse.

This opinion is supported by Callis who in the first Reading on ‘The Statute of Sewers’ in 1622 said that those who regularly use rivers should contribute towards the maintenance of the rivers as provided in 37 Lib. Assiz. Pl. 10. [1346] but that no charge should be made against ‘poor Boatmen which come thereon with their Boats accidentally, by the general Custome of the Realm.’⁸⁶ Thus it is concluded that from 1189 to 1600 there was a public right to use all the rivers which were physically usable.

3.2.8 Rights in principio

It may be considered unusual to suggest that there was a right for the public to pass over what would now be considered to be private land other than along highways. However there were, it is claimed here, one type of passage and six types of land over which the public could pass in the period 1189 to 1600. These are listed here and discussed more fully in Appendix P.

- | | | |
|--|---|-----------|
| 1. By air. | Never lost. | |
| 2. Tidal waters. | Never lost. | |
| 3. The foreshore. | Restored. Marine Act 2009 (c.23). | 296 - 309 |
| 4. River Banks. | Apparently lost 1789 due to impossibility of use. ⁸⁷ | |
| 5. Lakes. | Apparently never lost. | |
| 6. Non-tidal rivers. | Disputed. | |
| 7. The Right to Roam on unenclosed land. | Restored. Countryside and Rights of Way Act 2000 (c.37). | |

⁸⁶ Robert Callis, *The Reading of the Famous and Learned Robert Callis, Esq; Upon the Statute of 23 H.8. cap. 5. of Sewers. 2nd Edition.* London: M. Flesher. 1685, 137.

⁸⁷ *Ball v Herbert* (1789) 3 TR 253.