

Appendix A

A list of rivers made navigable.

The purpose of this Appendix is to test the validity of the statement by counsel in the case *Ball v Herbert*, ‘Few of our rivers, besides the Thames and the Severn, were naturally navigable, but have been made so under different Acts of Parliament.’¹

This statement is important because Woolrych quotes it to infer that ‘all rivers are private’.² The current edition of *Halsbury* quotes ‘Woolrych on Waters c3’ as an authority for the statement, ‘there is no general common law right of public navigation either in non-tidal waters or lakes’.³

In the text of this appendix the word ‘navigable’ is used to mean physically navigable by small boats.

Every river for which a Navigation Act has been found is listed, the date of the first Act referring to each river is stated and one quotation or reason is given to show that the river was used for the transport of goods prior to the passing of the Act.

There are problems in finding evidence of the use of rivers. Unlike roads there are no marks left on the ground in the form of tracks or bridges. Small boats did not tie up to wharfs. They were just paddled into the vegetation on the side of the river and the boatman then waded ashore.⁴ Where wharfs were built they have often been destroyed by later river improvement schemes. Boats were made of wood and when no longer in use quickly rotted away. Historians of highways use records of journeys of Kings and Queens to discover which routes were used at different times.⁵ These are seldom of assistance in studying the use of rivers since the Royal Parties usually used roads which were quicker, except for the Thames in London. Overseas trade can often be studied using customs records but these do not exist for inland trade.

¹ *Ball v Herbert* (1789) 3 T R 253, 255

² H.W. Woolrych, *A Treatise on the Law of waters and of Sewers* (London: Saunders and Benning, 1830), 31

³ *Halsbury’s Laws of England, Volume 49(2), 4th Edition* (London: Butterworths, 1997), para 741

⁴ Pepys, *Diary, 18 September 1663*

⁵ For example:- Paul Hindle, *Medieval roads and tracks* (Princes Risborough: Shire Archaeology, 2002), 28

Watermen were of the lower classes and did not leave written records of their travels. The absence of any record of a river being used for the transport of goods does not mean that it was not so used.

Rivers for which an Act was passed but on which no work was carried out, or the work was not completed, are listed at the end. These are not included in the totals.

There are 73 rivers which were made navigable. Evidence has been found that 59 were used for the transport of goods before the relevant Navigation Act was passed.

It seems that the statement, 'Few of our rivers, besides the Thames and the Severn, were naturally navigable, but have been made so under different Acts of Parliament' was incorrect.

Rivers for which evidence of prior use has been found

Adur 1807⁶

An Improvement Act implying previous use.

Aire 1698⁷

Grant of pontage for things passing by that river between Cononlays and Conyston. 1384⁸

Alcholme 1767⁹

'To clear of obstructions the water of Ancolne from Bishop's Bridge to the Humbre, ... if this is done ships and boats ... might then go from Humbre to the parts of Lindeseye as they were wont to do.' 1290¹⁰

Arun 1785¹¹

The use of boats is recorded as having 'anciently began at a place in the River called

⁶ 47 George III c 117

⁷ 10 William III c 25

⁸ Calendar of Patent Rolls, 1381-85, 414

⁹ 7 George III c 98

¹⁰ Calendar of Patent Rolls, 1281-92, 400

¹¹ 25 George III c 100

Turningstream' where the Rivers Arun and Rother meet. 1663¹²

Avon (Hampshire) 1664¹³

The King ordered that a barge be made at Salisbury ... to resist the malice of his enemies of France. 1372¹⁴

Avon (Warkwick) 1751¹⁵

An Act for the better regulating the Navigation.

Avon (Glouc & Wilts) 1699¹⁶ 1711¹⁷

'To cause the banks of the water of Avene ... to be widened and opened by the view and testimony of two men of Bath and two of Bristol specially elected by the men of those parts, so that boats and ships may freely pass without hindrance or danger throughout the whole water in those parts.' 1276¹⁸

Axe 1802¹⁹

An Act to alter and improve implying previous use.

Beverley Beck 1726²⁰

Oats and peas taken down river from Beverley to Hull. 1298²¹

Blyth (Suffolk) 1757²²

Men of Blythburgh had 'ships, vessels and boats laded with fish and other merchandise.' 1390²³

Bourn Eau 1781²⁴

¹² J Fowler, Editor, *The High Stream of Arundel c 1636* (Hertford: Simpson & Co, 1929)

¹³ 16&17 Charles II c 22

¹⁴ Calendar of Patent Rolls, 1370-74, 219

¹⁵ 24 George II c 39

¹⁶ 11 & 12 William III c 23

¹⁷ 10 Anne c 2

¹⁸ Calendar of Close Rolls, 1272-79, 354

¹⁹ 42 George III c 58

²⁰ 13 George I c 4

²¹ Exchequer Accounts Miscellaneous, E101/597/3 quoted in:- Edwards, J.F. 'The Transport System of Medieval England and Wales.' A Thesis presented for the Degree of Doctor of Philosophy. University of Salford. 1987.

²² 30 George II c 47

²³ Calendar of Close Rolls, 1389-92, 228

²⁴ 21 George III c 22

Preamble to the Act, ‘An Act for improving the Navigation of the River called Bourn Eau.’

Brandon (Little Ouse) 1670²⁵

Thetford was a port in the medieval period.²⁶

Bure or North 1773²⁷

100 ½ quarters of barley were taken by water from Wroxham, 20 miles up-river to Great Yarmouth. 1437²⁸

Bury, Loughor and Llidi 1813²⁹

An Act to improve implying previous use.

Cam 1702³⁰

An Act for making the River Cham, alias Grant, in the county of Cambridge, more navigable from Clayhythe Ferry to the Queen’s Mill, in the University and Town of Cambridge.³¹

Colne 1623³²

Lionel de Bradenham and others ‘made divers purprestures, stoppages and obstruction by raising weirs, ... in waters flowing down to the port of Colcestre’³³

Dee 1698³⁴

In the medieval period timber was sent down the river to Chester.³⁵

²⁵ 22 Charles II c 16

²⁶ H. Clarke, ‘The Archaeology, History and Architecture of the Medieval Ports of the East Coast of England with Special Reference to King’s Lynn, Norfolk.’ Being Chapter 9 of ‘The Archaeology of Medieval Ships and Harbours in Northern Europe’, National Maritime Museum, Greenwich, Archaeological Series No 5, BAR International Series 66, 1979 (Ed S. McGrail), 155-165 quoted in: Edwards, J.F. ‘The Transport System of Medieval England and Wales.’ A Thesis presented for the Degree of Doctor of Philosophy. University of Salford. 1987.

²⁷ 13 George III c 37

²⁸ J.E.T. Rogers, *A History of Agriculture and Prices in England Vol III* (Oxford: Clarendon Press, 1882)

²⁹ 53 George III c 183

³⁰ 1 Anne s 2 c 11

³¹ *ibid*

³² 21 James I c 34

³³ Calendar of Close Rolls, 1364 – 68, 156 - 157

³⁴ 11 William III c 24

Derwent (Derbyshire) 1720³⁶

King John's charter to the town of Derby includes, the right to use the Darent, navigable from ancient times. 1204.³⁷

Dun (Don) 1726³⁸

The Fabric Rolls of York Minster show that timber was sent by river from Aldwark, near Rotherham, to York Minster throughout the medieval period.³⁹

Eden 1721⁴⁰

Preface, 'Boats ... cannot pass up to a Place called Bank End in the said River, except it be in times of flood or high water.'

Exe 1539⁴¹

An inquisition ordered that an opening should be made in a weir built above Topsham to allow vessels to pass. 1290.⁴²

Frome 1699⁴³

Title of Act, 'For the better preserving the Navigation of the Rivers Avon and Frome.'

Humber 1531⁴⁴

A quay was ordered to be built at Hull. 1297.⁴⁵

Idle 1720⁴⁶

³⁵ H.J. Hewitt, *Medieval Cheshire* (Manchester: Chetham Society, 1929), 75 quoted in:- Edwards, J.F. 'The Transport System of Medieval England and Wales.' A Thesis presented for the Degree of Doctor of Philosophy. University of Salford. 1987.

³⁶ 6 George I c 27

³⁷ Charter held at the County Library, Derby

³⁸ 12 George I c 38

³⁹ M.W. Barley, 'Lincolnshire Rivers in the Middle Ages' Lincolnshire Architectural and Archaeological Society Reports and Papers New series 1, (1938), 4

⁴⁰ 8 George I c 14

⁴¹ 31 Henry VIII c 4

⁴² C Hadfield, *The Canals of South-West England* (Newton Abbot: David & Charles, 1967), 19

⁴³ 11 & 12 William III c23

⁴⁴ 23 Henry VIII c 18

⁴⁵ Calendar of Close Rolls, 1296-1302, 64

⁴⁶ 6 George I c 30

Various persons were instructed, 'to inquire who have placed kidels, bridges, nuisances and other obstructions in the river Edelle on the borders of the counties of York and Nottingham flowing into the water of the Bekerdyk and thence to the Trent, thereby hindering the common passage of ships and boats to Bautre and other towns on the said river.' 1396.⁴⁷

Irwell 1720⁴⁸

'There had been sent to Liverpool and from Liverpool 2,000 tons of Goods a year.' 1697⁴⁹

Itchin 1664⁵⁰

Gedfrey de Lucy restored the navigation about 1200 as far as Alresford.⁵¹

Kennet 1715⁵²

Prior use is stated in the Act.

Larke 1698⁵³

Adam the fisherman ... and others unknown, came on the Friday night before St. Bartholomew to the park of Edmund de Sardelowe in Middehal and carried away his hay in boats. 1253.⁵⁴

Lea 1425⁵⁵

34 tuns of wine were transported from Ware to Westminster by water. 1258.⁵⁶

Lune 1749⁵⁷

⁴⁷ Calendar of Patent Rolls, 1391 – 96, 730

⁴⁸ 7 George I s 1 c 15

⁴⁹ Letter from Thomas Patten to Richard Norris, 8 January 1697(8) Chethem Society 9(OS) 1846, Norris Papers, 37-9; quoted in Charles Hadfield and Gordon Biddle, *The Canals of North West England Vol 1* (Newton Abbot: David & Charles, 1970), 15

⁵⁰ 16 & 17 Charles II c 12

⁵¹ C.T. Flower, *Public Works in Mediaeval Law Vol II* (London: Selden Society, Vol 40, 1923), xxiii

⁵² 2 George I s 2 c 24

⁵³ 11 William III c 22

⁵⁴ Calendar of Inquisitions Miscellaneous, 1219-1307, 558

⁵⁵ 3 Henry VI c 5

⁵⁶ Calendar of Liberate Rolls, 1251-60, 444

⁵⁷ 23 George II c 12

An Act for improving the Navigation of the Rive Loyne, otherwise called the Lune, implying previous use.

Medway 1664⁵⁸

‘From 1580 small boats could intermittently travel upstream from Maidstone for six miles to Yalding.’⁵⁹

Mersey 1720⁶⁰

On the petition of John Danyel, Knight, showing that he has three boats often loaded with ... goods, passing on the water of Merse between Lacheford and Weryngton. 1367.⁶¹

Narr 1751⁶²

‘If the great hithe of Secheth was completely cleansed of wreck.’ [A hythe is a wharf.] 1275.⁶³

Nene, Nyne, Nen 1714⁶⁴

‘The navigation passage and highways, in, upon (Northampton to Peterborough) and about all and every the navigable rivers within the limits of this commission, as namely, the river of Ouze, Grant, Nean, Welland and Glean, shall be likewise preserved... 1630.’⁶⁵

Ouse (Cambs) 1601⁶⁶

As the Nene

⁵⁸ 16 & 17 Charles II c 23

⁵⁹ C.W. Chalklin, ‘Navigation Schemes on the Upper Medway, 1600 – 1665’ (1961 – 1962) 5 *Journal of Transport History*, 107

⁶⁰ 7 George I s 1 c 15

⁶¹ Calendar of Patent Rolls, 1364-67, 379

⁶² 24 George II c 19

⁶³ Calendar of Inquisitions Miscellaneous, 1219-1307, 304

⁶⁴ 13 Anne c 19

⁶⁵ Lynn Law, 1630 Quoted in Samuel Wells, *A collection of the Laws which form the constitution of the Bedford Level Corporation* (London: R. Pheney, 1828), Being Volume II of Samuel Wells, *The History of the Drainage of the Great Level of the Fens, called Bedford Level*. (London: R. Pheney, 1830.), 98 at 105

⁶⁶ 43 Elizabeth I c 11

Ouse (Sussex) 1790⁶⁷

Act to improve part of the navigation

Ribble 1806⁶⁸

Act to improve implying previous use.

Rother (Western) 1791⁶⁹

At Fittleworth 'stood a Rough Wharf supported by timber piles'. 1615⁷⁰

Severn 1503⁷¹

The Sheriff of Shropshire was asked to go in his own person to the bridge of Shrewsbury, ... (to inspect)... 5 tuns of wine that are there in a ship that lately came from Worcester. 1228.⁷²

Salwerp 1662⁷³

Richard II granted to the bailiffs of Droitwich the right to levy tolls on the river. (1378)⁷⁴

Stour (Kent) 1514⁷⁵

Friars Minors of Canterbury were given permission to build a bridge over the water of Stoure, ... 'so that little ships may pass under it without impediment.' 1264.⁷⁶

Swale 1767⁷⁷

There was a boat at Morton. 1317.⁷⁸

Tees 1808⁷⁹

⁶⁷ 30 George III c 52

⁶⁸ 46 George III c 121

⁶⁹ 31 George III c 56

⁷⁰ Lady Maxse, *The Story of Fittleworth* (1935), 48 - 49

⁷¹ 19 Henry VII c 18

⁷² Calendar of Liberate Rolls, 1226-40, 99

⁷³ 14 Charles II c 13

⁷⁴ L.T.C. Rolt, *The Inland Waterways of England* (London: George Allen and Unwin Ltd, 1950), 32

⁷⁵ 6 Henry VIII c 17

⁷⁶ Calendar of Patent Rolls, 1258-66, 342

⁷⁷ 7 George III c 96

⁷⁸ Calendar of Close Rolls, 1313-18, 496

An Act to improve implying previous use.

Thames 1423⁸⁰

Twelve tuns of Gascony wine were taken in ships from Sandwich to Westminster and there transferred to a boat for transport to Windsor. 1227.⁸¹

Tone 1698⁸²

Richard de Acton had caused an obstruction by erecting a fulling mill such that the passage of boats and fish between Bridgewater and Taunton alike was prevented. Since the hearing it was reported the obstructions had been removed. 1384.⁸³

Trent 1698⁸⁴

Held to be an ancient navigable river. 1738⁸⁵

Ure and Ouse 1767⁸⁶

The abbot and convent of Fountains were allowed free transit in the water between Boroughbridge and York. 1312.⁸⁷

Waveney 1670⁸⁸

The Act required the commissioners to ascertain the damage done previously by the haling of vessels on the rivers. 1670.⁸⁹

Wear 1716⁹⁰

An Act for the Preservation and Improvement of the River Wear. 1716.

⁷⁹ 49 George III c 48

⁸⁰ 2 Henry VI c 9

⁸¹ Calendar of Liberate Rolls, 1226-40, 38-39

⁸² 10 William III c 8

⁸³ Calendar of Patent Rolls, 1381-85, 512

⁸⁴ 10 & 11 William III c 20

⁸⁵ *Nottingham Corporation v Lambert*, (1738) Willes, 111

⁸⁶ 2 Edward IV Charter, The Lord Protector 1657, 7 George III c 93

⁸⁷ Calendar of Patent Rolls, 1307-13, 434-35

⁸⁸ 22 Charles II c 16

⁸⁹ *ibid*

⁹⁰ 3 George I c 3

Weaver 1720⁹¹

The Act states that a section was previously a public navigation.

Welland 1570⁹²

‘The navigation passage and highways, in, upon and about all and every the navigable rivers within the limits of this commission, as namely, the river of Ouze, Grant, Nean, Welland and Glean, shall be likewise preserved...’ 1630.⁹³

Wey 1671⁹⁴

An Act for settling and preserving the Navigation of the river Wey. 1671.

Witham 1671⁹⁵

Sir Philip Marmeon and his men took two hundred and fourscore pieces of lead at Boston ... and took them by water to Lincoln. 1272.⁹⁶

Wye and Lugg 1662⁹⁷

Various persons were asked to survey the weirs, dykes and stakes in the water of Weye between Hereford and Monemuth, as it appears that ships and boats cannot pass as they were wont. 1301.⁹⁸

Yare and Wensum 1827⁹⁹

Taverham was listed as a maritime place. 1295.¹⁰⁰

Rivers on which evidence of prior use has not been found

⁹¹ 7 George I s 1 c 10

⁹² 13 Elizabeth I c 26

⁹³ Lynn Law, 1630 Quoted in Samuel Wells, *A collection of the Laws which form the constitution of the Bedford Level Corporation* (London: R. Phoney, 1828), Being Volume II of Samuel Wells, *The History of the Drainage of the Great Level of the Fens, called Bedford Level*. (London: R. Phoney, 1830), 98 at 105

⁹⁴ 22 & 23 Charles II c 32

⁹⁵ 22 & 23 Charles II c 25

⁹⁶ Calendar of Inquisitions Miscellaneous, 1219-1307, 163

⁹⁷ 14 Charles II c 14

⁹⁸ Calendar of Patent Rolls, 1292-1301, 627

⁹⁹ 7 & 8 George IV c 42

¹⁰⁰ Calendar of Patent Rolls, 1292-1301, 169

Calder	1698 ¹⁰¹
Chelmer & Blackwater	1766 ¹⁰²
Derwent (Yorks)	1702 ¹⁰³
Douglas (Asland)	1720 ¹⁰⁴
Gippen	1790 ¹⁰⁵
Hebble	1758 ¹⁰⁶
Ivel (Bedford)	1757 ¹⁰⁷
Rodon	1737 ¹⁰⁸
Soar	1766 ¹⁰⁹
Stort	1759 ¹¹⁰
Stour (Cambs etc)	1705 ¹¹¹
Stour (Worcester)	1662 ¹¹²
Wreak and Eye	1791 ¹¹³

Rivers on which work was not completed or no work was carried out

Codbeck Brook	1767 ¹¹⁴	Work not completed. ¹¹⁵
Dane	1720 ¹¹⁶	No work carried out. ¹¹⁷
Effra	1664 ¹¹⁸	No work carried out. ¹¹⁹
Fal	1678 ¹²⁰	No record of any work being carried out.

¹⁰¹ 10 William III c 25

¹⁰² 6 George III c 101

¹⁰³ 1 Anne c 14

¹⁰⁴ 6 George I c 28

¹⁰⁵ 30 George III c 57

¹⁰⁶ 31 George II c 72

¹⁰⁷ 30 George II c 62

¹⁰⁸ 10 George II c 33

¹⁰⁹ 6 George III c 94

¹¹⁰ 32 George II c 42

¹¹¹ 4 Anne c 15

¹¹² 14 Charles II c 13

¹¹³ 31 George III c 77

¹¹⁴ 7 George III c 95

¹¹⁵ Baron F. Duckham, *The Yorkshire Ouse* (Newton Abbott: David & Charles, 1967), 68

¹¹⁶ 7 George I c 17

¹¹⁷ Joseph Priestly, *Historical Account of the Navigable Rivers, Canals, and Railways of Great Britain* (London: Longman, Rees, Orme, Brown & Green: 1831), 183

¹¹⁸ 16&17 Charles II c 16

¹¹⁹ N.J. Barton, *The Lost Rivers of London* (London: Phoenix House Ltd, 1962), 79

¹²⁰ 30 Charles II c 11

Mole	1664 ¹²¹	No record of any work being carried out. ¹²²
Ravensbourne	1664 ¹²³	No record of any work being carried out
Worsley Brook	1737 ¹²⁴	No work carried out ¹²⁵

¹²¹ 16 & 17 Charles II c 12

¹²² The reference in T.S. Willan, *River Navigation in England 1600 – 1750* (London: Frank Cass & Co Ltd, 1964), 29 to the River Mole being improved refers not to work carried out but to the First Reading of the Bill to make the river navigable, *Seventh Report of the Royal Commission on Historical Manuscripts, Part 1*. (London: Her Majesty's Stationery Office, 1879), 179

¹²³ 16 & 17 Charles II c 12

¹²⁴ 10 George II c 22

¹²⁵ Preface to 32 George II c 2

Appendix B

A Treatise of the Law of Waters

Humphrey W. Woolrych

Second Edition. 1851

The Parts Relating to the Public Right of Navigation

CHAPTER I.

Of the various Rights of Water.

A RIGHT to use water may be either public or private. From some privileges of this kind none can be excluded; they are the common birth-right of her Majesty's subjects; but others are capable of being reduced into individual possession, and these are incorporeal hereditaments.

The Chapter now before the reader will contain a mere summary of the rights which may be thus exercised by the public, or by private persons. In subsequent pages, each privilege will be discussed upon its own merits.

Navigation. [Side headings in the text are shown here as sub-headings.]

But prior to our entering upon the proposed list, it is desirable to mention, that 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. Incidental considerations, such as the right to demand toll under certain circumstances, the making of ports and harbours, with others of a similar nature, will be occasionally touched upon, to illustrate individual rights upon these public waters; but, 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.

Fisheries.

Those important advantages, public rights of fishery, or, to speak more technically, public fisheries, deserve a very particular notice. Fisheries are either enjoyed in common with others, or they are confined to the exclusive enjoyment of an individual. [2*] As a general doctrine, fisheries in the sea and in public navigable rivers are open to all; but we shall find that particular rights may be successfully maintained even in these ordinarily public waters, by prescription, or by royal grant, beyond time of memory.

In rivers not navigable the fishing is usually a private right; but custom will vary the general rule. If, therefore, the public should be found upon any occasion to claim a right of piscary in rivers, which, *prima facie*, would be considered as private by the law, we must attribute the unusual privilege to the force of custom, which militates against common right, or the every-day usages of things. A private man may, consequently, be entitled to fish in streams which are in their nature public, while the people at large may by chance be discovered in possession of a river which the owner of the soil may, from time immemorial, have neglected, or which he may have dedicated to them.

Bathing.

Another valuable enjoyment of water is the privilege of bathing. This may exist by custom or prescription; but it has been decided that there is no common law right of bathing in the sea (a), and, by inference, there can be none such in a river.

If, however, the inhabitants of particular vill or place, or a certain class of individuals, have from time immemorial participated in the enjoyment of an easement of this kind, it may well be questioned how far such a right can be disturbed, either by the building of houses contiguous to the spot, by claims of ownership of the soil, or any other circumstances. For objections which may be very successfully raised in derogation of a common law right to bathe will be deprived, for the most part, of their influence, when weighed against the important consideration of custom or prescription.

Navigable Rivers.

The same observations which have been made regarding these rights at sea are also applicable to navigable rivers. There exist the same rights of passage, and of fishing, and

the restriction as to bathing is confined within the same limit. And by prescription, a

(a) 5 B. & A. 268, *Blundell v Catterall*.

watercourse (an easement, concerning which much will hereafter be said) may be claimed in public rivers.

Other rivers.

In rivers, however, which are not navigable, and which may be said to be private, because the soil belongs most commonly to an individual, other rights prevail. There may be at least three kinds of fisheries in such a river, namely, a fishery enjoyed by the owner himself, as the territorial possessor; a right of [3*] fishery granted to him by another person; and a right enjoyed in common with others, either by virtue of a grant or by prescription.

That very important easement, a watercourse, is inseparable from the consideration of private rivers. We shall explain by and by, more fully than in this place, in a Chapter devoted to the subject, that the possessor of such a right cannot use it to the detriment of his neighbour, any more than that he, in turn, can be molested with impunity in the exercise of his own lawful user. Questions upon the use or misappropriation of these waters must frequently arise between the owners of mills, who occasionally interfere with each other's respective rights, either by taking too much water from the original channel, or throwing back too great a quantity upon the machinery of another mill by penning it improperly back.

Inhabitants, or particular persons residing in certain vills, may also have a right to water their cattle in rivers at spots where they have had an immemorial usage to do so; and there may be other customs and prescriptions to use water in various ways, which are, of course, too numerous and diversified to be contained in a general treatise.

[4*] CHAPTER II

*Of Rights in the Sea; the Ownership of the Soil therein,
Together with the Rights of Alluvion, &c.*

THAT the King's subjects have a right to use the ocean for the purposes of commerce; that upon paying certain duties for the use of ports and harbours, they become entitled to the shelter and conveniences of those works; that the sea, in a word, is open and common to all for the accomplishment of lawful and useful undertakings, is so familiar to every one, as to need no further confirmation nor authority.

[40*] CHAPTER III

Of Rivers; the Ownership of the Soil therein, and other matters.

A RIVER has been defined to be a running stream, pent in on either side with walls and banks, and it bears that name as well where the waters flow and reflow, as where they have their current one way (a).

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 (b). A mere enumeration of the public and private immunities enjoyed in rivers has already been attempted (c); but there are other important matters connected with the subject which it is desirable to introduce here, as, for instance, the nature of a public river; the ownership of the soil in rivers generally; the property in soil which had been created by alluvion, or *broken away from* its original position, &c.

What a public river

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 (d). 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. Thus, it has been said, that in the case of a river which flows and reflows, and is an arm of the sea, it is *prima facie*, common

(a) Callis, p. 77.

(b) See Schultes, 134.

(c) *Ante*, Chap I

(d) "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.

[41*] to all (a); and upon the strength of this position, it was urged upon one occasion, that an action on the case could not be sustained against the corporation of Lynn for the non-repair of a certain creek, because the tide of the sea had been accustomed to flow and reflow therein; consequently it was said, that this nonfeasance was punishable by indictment only, because the water must be deemed public. But this argument was treated by the Court as a fallacy; for they denied that the flowing and reflowing of the tide constituted a navigable river, there being many places where the tide flows which are not navigable rivers; and the place in question might be a creek in the private estate of the corporation (b).

The words of Mr. Justice Bayley also are very illustrative of this point, in a case where a public channel, once navigable, had been blocked up by mud, and the right extinguished. The flux and reflux of the tide had been relied upon in favour of the public right, "The strength of the *prima facie* evidence, arising from the flux and reflux of the tide," said the learned Judge, "must depend upon the situation and nature of the channel. If it is a broad and deep channel, calculated for the purposes of commerce, it would be natural to conclude that it had been a public navigation; but if it is a petty stream, navigable only at certain periods of the tide, and then only for a very short time, and for only small boats, it is difficult to suppose that it ever has been a public navigable channel" (c).

Still it ought not to be withheld, that, where there are no circumstances from whence an extinguishment of the public right can be presumed as in the last case, the flowing of the tide is strong *prima facie* evidence. It is not absolutely inconsistent with a right of private property in a creek, or other such water; but, unanswered, it would be difficult for a jury to resist such testimony. Thus, the plaintiff sued the defendant for obstructing his barges in a certain navigable river, called Rainham Creek, and he obtained a verdict. He proved that the place was a creek, running down from a bridge in Essex to the Thames, and that the tide flowed and reflowed in the creek as far as that bridge; and that boats and vessels came up the creek; also, that parties of pleasure had been known to sail up the creek; and that boats had come there with persons who had cut reeds along the banks of the creek. The defendant elicited, by cross examination, that nearly all the vessels alluded to came to load or discharge cargoes at a wharf of the defendant's on the side of [42*] the creek; and they

(a) 22 Ass pl 93, by Holt, C.J., 1 Mod. 105.

(b) Cowp. 86, *The Mayor of Lynn v Turner*. Lofft 556. Sembl. S.C.

(c) 4 B. & C. 602.

shewed, by evidence, that they had purchased their premises for a large price, which were conveyed to them by the description of Rainham Wharf and Creek; that the creek was not navigable until the predecessors of the defendants had, at a very considerable expense made it so, and erected a wharf; and that the defendant had received, not only wharfage but tolls also for navigating the creek; and that such supposed dues had even been paid by the plaintiff himself. The Court, after hearing a statement of these facts, declared, that the case of the defendants was extremely doubtful, upon their own shewing. They said, that the defendants might provoke another action, if they thought to produce stronger evidence in support of their right; for that the judgment, though strong, would not be conclusive against them. A rule to set aside the verdict was therefore refused (a). L.C.J. Gibbs considered the cutting of reeds as a very strong act; and with respect to the pleasure-boats, he said, that if a person wishes to protect his exclusive possession, he must keep up the evidence of his right, by guarding it against intruders (b). And Heath, J. adverted to the fact of the defendants having at some time scoured the channel, observing, that they might have done so for their own convenience (c).

The circumstance, therefore, of the flow and reflow of the tide is one of the strongest in support of a public right, but so far from being conclusive, we have mentioned a case, in which such a test has been found to be fallible. 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. And the mouth of a river comprehends the whole space between the lowest ebb and the highest flood-mark. Because the water is salt it is not the less a part of the river if the tide ebbs there, and because the fresh water above is much impregnated with salt, it is not the less a river. Therefore where the question was whether the defendants had illegally used their stake-nets, for the taking of salmon, and the distinction lay between “river and sea,” a direction, that the fact of the absence or prevalence of the fresh water was the point to be looked to, was held to be erroneous (d).

A river is a common highway, or, as Lord Coke expresses it, a common river is as a common street (e). And, by analogy to the [43*] case of highways, there may be dedication of a private right in a river to the public. But it seems that it must be absolutely (a) 5 Taunt. 705, *Miles v Rose*. S.C. 1 Marsh. 313.

(b) 5 Taunt. 706.

(c) *Ibid*

(d) 6 Cl. & Fin. 628, *Home v Mackenzie*.

(e) 13 Rep. 33. *Noy. Rep.* 103.

devoted to the general use, the evidences of which would be – works at the common expense, public authority, or some un-equivalent act of dedication; for Lord Hale says, that if a private person make a stream navigable by making locks, &c., he may pull them down again, and convert them to his private use, there being no proof of a public right (a). Other evidences are mentioned, namely, the stopping of some other public stream for his own convenience (b), or the purchase of a charter for the taking of reasonable toll (c).

(a) *De Jure Maris*, p. 9.

- (b) Id. 10. Abbot of St. Austin's case, Canterbury, cited there.
- (c) Id. Ibid.

Appendix C.

A Survey of the Public Right of Navigation on the non-tidal parts of the Sussex Rivers

In this appendix the evidence for the existence of a public right of navigation, in accordance with Woolrych's concept of the law, is examined to see if the general public can know if they have a legal right to paddle or row on the rivers. It is found that on every non-tidal river and the tidal section of the Cuckmere the existence of a public right of navigation is either unclear or in dispute.

The sections of the rivers considered are the non-tidal parts of the rivers listed in the British Canoe Union *Guide to the Waterways of the British Isles*¹²⁶ and Waller's Haven. The description of each river starts with a list of the approximate distances of the main places on the rivers measured in miles from the highest named place. Regulations relating to the harbour authorities have not been considered.

The Environment Agency have stated that they consider, 'that the tidal limit as indicated by the ordnance survey maps indicate the limit of the public right of navigation' except on the river Rother where there is a public right of navigation to Bodiam.¹²⁷ Thus adequate evidence for the existence of a public right of navigation on any of the other rivers, or above Bodiam on the Eastern Rother, would establish that the right is unclear or in dispute.

Western Rother

Rogate Bridge, 12m Midhurst, 13m Cowdray, 23m Fittleworth, 25m Junction with the river Arun. (All non-tidal.)

¹²⁶ The British Canoe Union. *Guide to the Waterways of the British Isles* (Weybridge: British Canoe Union. 1980.)

¹²⁷ Correspondence:- Alison Thorpe, Principle Officer – Recreation, Environment Agency, Sussex Area. 17 December 2003.

In 1615 there was a mill at Fittleworth with a wharf.¹²⁸ Telling and Smith considered that this was sufficient evidence to establish that ‘there is certainly a common law right from Fittleworth to the River Arun.’¹²⁹ In 1894 a few skiffs were kept for hire at the wharf at Midhurst.¹³⁰

In 1791 the Rother Navigation Act was passed authorising works to make navigable the river Rother from Midhurst to the River Arun.¹³¹ This work was carried out.¹³² In 1936 the Minister of Transport granted a warrant and order authorising the proprietors of the navigation to abandon the navigation.¹³³ Telling and Smith considered that there is ‘probably a statutory right of navigation from Midhurst to the River Arun.’¹³⁴ Bonyhady considered that such an abandonment order did not effect the public right of navigation.¹³⁵

Telling and Smith state that the common law right would be via the original course of the river in the vicinity of Stopham Bridge. However it might be considered that where a land owner makes a new channel on a river the public right of navigation is transferred to the new channel.¹³⁶

The major part of the river banks are owned by the Cowdray Estate and the Leconfield Estate. In 1935 there were discussions between the Trustees of the Cowdray Estate and the British Canoe Association concerning the public right of navigation on the river. The Trustees stated that they considered that the 1791 Act gave rights only to commercial traffic and not to canoes. In 2001 it was confirmed that ‘the position with regard to canoeing on the part of the River Rother which is

¹²⁸ Lady Maxse, *The story of Fittleworth* (London: National Review, 1935), 50

¹²⁹ Arthur Telling and Rosemary Smith, *The Public Right of Navigation* (London: The Sports Council, 1985), 25

¹³⁰ F.E. Prothero and W.A. Clark *Cruising Club Manual* (London: G. Philip & Son, 1896), 31

¹³¹ 31 George III c 56

¹³² Charles Hadfield, *The Canals of South and South East England* (Newton Abbot: David & Charles, 1969), 126 - 128

¹³³ ‘Abandonment of the Rother Navigation Order enacted under Section 45(1) of the Railway and Canal Traffic Act 1888’, dated 7th July 1936

¹³⁴ Arthur Telling and Rosemary Smith, *The Public Right of Navigation* (London: The Sports Council, 1985), 25

¹³⁵ Tim Bonyhady, *The Law of the Countryside, The Rights of the Public* (Abingdon: Professional Books, 1987), 98

¹³⁶ Lord Chief-Justice Hale, *A Treatise, in three parts, “Pars Prima. De Jure Maris et Brachiorum eiusdem.”* Contained in Francis Hargrave, Editor, *A Collection of Tracts relative to the Law of England* (London: T. Wright, 1787), 9

owned by the Cowdray Estate has not changed since 15th April 1936, which is the date of the warrant authorising the abandonment of the Rother Navigation.¹³⁷ This opinion seems to be at variance with the decision of the Appeal Court in 1990 which depended on the fact that there is only one type of right of navigation which, if it exists, applies to all vessels capable of using the waterway, subject to the payment of any tolls due.¹³⁸

The Leconfield Estate welcomes groups canoeing in the window of opportunity, 15th March to 2nd April, the close season for both coarse and game fishing. At present the river is paddled by canoists on one day a year by a Canoe Club and one day a year by some Scout groups.¹³⁹

River Arun

New Bridge, 6m Pallingham Lock (Tidal limit), 10m Pulborough, 18m Houghton, 23m Arundel, 28m Littlehampton.

In 1785 an Act was passed for extending the navigation of the river beyond Pallingham to Newbridge.¹⁴⁰ In 1813 an Act was passed for constructing a canal from Newbridge to link the Arun to the Wey.¹⁴¹ This navigation was abandoned in 1896.¹⁴² Telling and Smith considered that there was a common law right of navigation upstream to Houghton by virtue of the tide, and to Pallingham Quay by virtue of immemorial user and /or implied dedication. They also considered that there was a statutory right of navigation to Newbridge.¹⁴³

¹³⁷ Personal correspondence, 7th December 2001

¹³⁸ Yorkshire Derwent Trust Ltd and Another v Brotherton and Others (1990) 61 P & CR, 198

¹³⁹ Personal correspondence, The Estate Office, Petworth, 14 December 2001

¹⁴⁰ (1785) 25 George III c 100

¹⁴¹ (1813) 53 George III c 19

¹⁴² 23 September 1896. P.A.L. Vine, *London's Lost Route to the Sea*, 3rd Edition (Newton Abbot: David & Charles, 1973), 204

¹⁴³ Arthur Telling and Rosemary Smith, *The Public Right of Navigation* (London: The Sports Council, 1985), 24

It is understood that at present the river is regularly paddled by canoeists without objection. However since the legal position appears to be the same as for the Western Rother it seems that the right is not clearly established.

River Adur

The British Canoe Union Guidebook only refers to use of the tidal section of the river.

River Ouse

Hammer Bridge, Cuckfield, 16m (on a tributary) Maresfield, 22m Barcombe Mills (tidal limit), 26m Lewes, 33m Newhaven.

There is a map of 1724 which shows boats navigating to Maresfield Forge and a lock is marked where a tributary joins the river.¹⁴⁴ This may be considered to establish that there is a common law right of navigation to this point.

In 1790 an Act was passed, 'for improving, continuing and extending the Navigation of the River Ouse from Lewes Bridge to Hammer Bridge in the Parish of Cuckfield.'¹⁴⁵ This Act had special provisions for boats of under ten tons using the locks. As all the lock gates have been removed these clauses would seem to be redundant. This navigation has been abandoned. However there has been no Act, order or warrant to repeal, revoke or abandon the navigation. Thus it seems that the statutory right of navigation remains.

It is understood that there have been objections by a riparian owner, the owner of the Anchor Inn, to the presence of canoes on the river.

¹⁴⁴ Copied in Ernest Straker, *Wealden Iron* (London: G. Bell and Sons Ltd, 1931) 401

¹⁴⁵ (1790) 30 George III c 52

The Environment Agency and the Local Authorities combined in an Ouse Access Project in 1999. However it seems that no additional access has been obtained by the project.

River Cuckmere

Chilver Bridge, 2m Milton Weir (tidal limit), 3m Longbridge, Alfriston, 7m Exeat Bridge, 8m Sea Coast.

An Ordnance Survey map shows a lock between Chilver Bridge and Milton Weir.¹⁴⁶ However no other reference has been found of the use of the river above Milton Weir. The river was used by commercial craft to Alfriston until 1915.¹⁴⁷

The river is frequently used by canoeists between Alfriston and the sea and less often from Chilver Bridge in winter.

The Environment Agency booklet *Afloat on Sussex Rivers*¹⁴⁸ states that, ‘access north of the A259 (Exeat Bridge) is restricted because the area is a nature reserve. This leaves 2.4km of river south of the road that may be used.’ This is incorrect. There is no order or regulation relating to a Nature Reserve which restricts the use of the river by boats.

Waller’s Haven

Boreham Bridge, 6m Sluice at Norman’s Bay.

Waller’s Haven would be tidal to Boreham Bridge if the tide was not obstructed by the sluice. Near Boreham Bridge there is a farm called Puddle Dock which would seem to indicate that ships used to discharge cargo there. At Boreham there were

¹⁴⁶ Ordnance Survey Sussex East Sheet LXVIII SE, Revision of 1937-38, with additions in 1938

¹⁴⁷ Ann Botha, *The Cuckmere. A Sussex River* (Seaford: S.B. Publications, 2000), 50-51

¹⁴⁸ Environment Agency, *Afloat on Sussex Rivers* (Worthing: Environment Agency, 2001), 19

beside the river ‘solid oak timbers as hard as stone and black with age’¹⁴⁹ which would seem to indicate the existence of a wharf. The name, Waller’s Haven, seems to indicate that the river was regularly used by commercial vessels before the sluice was built.

Part of the river is used by Eastbourne College for rowing practice. Canoeists using the river outside of the close fishing season are frequently told by anglers that they are trespassing.

The Environment Agency when asked to help develop the Haven for recreation denied that there was an accepted public right of navigation on the river. They wrote, ‘To begin with, it is clear that at the very best the right to public navigation can only extend to the tidal limits. The important secondary point to note is that the right to navigation does not apply to every creek, riverlet or channel into which the tide flows. The watercourse has to be broad and deep enough to take shipping.’¹⁵⁰ It is, perhaps, surprising that a person working for the Legal and Estates Manager of the Environment Agency considers that there cannot be a public right of navigation on a non-tidal river. The Agency manages several such rivers. The second sentence appears to be a quotation from Bayley J in *R v Montague*. Later in the same speech Bayley J said, ‘If it is a broad and deep channel, calculated for the purposes of commerce, it would be natural to conclude that it has been a public navigation.’¹⁵¹ This would seem to apply to Waller’s Haven.

Eastern Rother

Etchingham, 7m Bodiam, 20m Scots Float Sluice, (Tidal limit) 24m Rye Harbour.

In 1348 a commission was set up to investigate the building of a wall across the river which it was said, ‘will be to the great damage of the King Especially as by the passage of ships and boats with victuals from divers manors to the manor

¹⁴⁹ L.F. Salzmann, ‘The Inning of Pevensy Levels’ (1910) *Sussex Archaeological Collection* 37, 146

¹⁵⁰ Personal correspondence, P.J. Bilbrough, Legal and Estates Department, Southern Region, Environment Agency, 24 November 2001

¹⁵¹ *R v Montague* (1825) 4 B & C, 598, 602

of Echyngam will be hindered, as well as to the destruction of Salehurst, situated on that water.¹⁵² This seems to show that there is an ancient right of navigation on the river to Etchingam.

The Environment Agency accept that there is an right of navigation to Bodiam.¹⁵³ This is the reverse of their opinion on Waller's Haven where similar conditions apply.

For at least 50 years the Eastern Rother has been regularly paddled by canoeists from Etchingam to Bodiam during the winter and has been used by both canoes and pleasure boats from Bodiam to the sea throughout the year with no objections.

While it appears that there is a legal right of navigation to Etchingam this could only be established by an application to the High Court.

Brede

Below Udimore, 3m Rye Harbour.

The river Brede would be tidal to Udimore if the tide were not stopped by a sluice. There are records of Iron being transported by boat from Brede which is upstream of Udimore.¹⁵⁴ The position with regard to the public right of navigation is the same as on Waller's Haven.

Summary

Camden wrote of Sussex in 1526, 'Many pretty rivers it hath, but such as springing out of the North-side of the shire forthwith take their course to the Ocean, and therefore not able to beare any vessel of burden.'¹⁵⁵ However there is evidence that

¹⁵² Calendar of Patent Rolls, 1348 – 50, 80, 177 - 178

¹⁵³ Environment Agency, *Afloat on Sussex Rivers* (Worthing: Environment Agency, 2001), 20

¹⁵⁴ Ernest Straker, *Wealden Iron* (London: G. Bell and Sons Ltd, 1931), 189

¹⁵⁵ William Camden, translated by Philemon Holland, *Britain*. (London: Ioyce Norton and Richard Whitaker, 1637), 306

the rivers Western Rother,¹⁵⁶ Arun,¹⁵⁷ Adur,¹⁵⁸ Ouse,¹⁵⁹ Cuckmere,¹⁶⁰ Ashburne,¹⁶¹ Brede,¹⁶² and Eastern Rother¹⁶³ have been used for the transport of goods.

Underestimating the use of rivers is not new.

The Sussex rivers illustrate well the problem, for those who wish to paddle or row, as to whether there is, or is not, is a public right of navigation on a river. Of the seven rivers considered there is not one where the limits of the public right of navigation are clearly established.

Atiyah wrote,

Laws may be bad because they are ‘technically’ bad; for instance, because they are obscure, ambiguous, internally inconsistent, difficult to discover, or hard to apply to a variety of circumstances. And secondly, laws may be substantively ‘bad’ simply in the sense that they produce unacceptable results – injustice or plain idiocy, or less extremely, because they are inefficient and expensive, or produce inconsistency or anomaly between like cases.¹⁶⁴

If Woolrych’s interpretation of the law relating to the public right of navigation had been correct, then Atiyah would have described it well.

¹⁵⁶ See Appendix A

¹⁵⁷ Calendar of Close Rolls, 1409 – 13, 183 - 185

¹⁵⁸ Calendar of Patent Rolls, 1301 – 07, 287

¹⁵⁹ See Appendix A

¹⁶⁰ Ann Botha, *The Cuckmere. A Sussex River* (Seaford: S.B. Publications, 2000), 50-51

¹⁶¹ Ernest Straker, *Wealden Iron* (London: G. Bell and Sons, Ltd, 1931), 190

¹⁶² Ernest Straker, *Wealden Iron* (London: G. Bell and Sons, Ltd, 1931), 189

¹⁶³ See Appendix A

¹⁶⁴ P.S. Atiyah, *Law & Modern Society, 2nd Edition* (Oxford: Oxford University Press, 1995), 203