Chapter 2. Before the Pound Locks. 1189 – 1618.

I truely treate that men may note and see
What blessings Navigable Rivers bee,
And how that thousands are debarr'd those blessings
By few mens avaritous hard oppressings.
John Taylor. Taylor's Last Voyage. 1610.

2.1 Introduction

The purpose of Chapter 2 is to establish the law relating to the right of navigation on rivers before the introduction of pound locks and to examine how the rivers were used. A pound lock has two gates and allows a boat to be raised or lowered with the waste of little water. Previously when a boat passed a flash lock much water was wasted. While there had been earlier pound locks built on the Exe Canal and the river Lea, the first patent for building pound locks was granted in 1618. The pound lock made possible the use of rivers by larger boats and also the construction of canals with the ends at different levels.

In the most recent treatise on the Law of Waters Bates wrote,

> It is suggested that in early medieval England, following Roman law, a permanently flowing non-tidal river was regarded as public property (*res publicae*) except so far as its banks were concerned. Thus, any member of the public who could navigate the river had the right to do so. By the time of Henry VI riparian owners had come to own the bed of the river but, it is submitted, those owners took their new property subject to the public right of navigation over it that had existed from time immemorial.[1]

The conclusion reached in this chapter is that Bates suggestion is correct not only for the early medieval period but also, at least, for the whole of the Middle Ages.

[1] J.H. Bates, *Water and Drainage Law* (London: Sweet & Maxwell, 1990), para 13.18 Footnotes omitted.

The Danes took their boats up the River Ouse to Willington.[2] There have been acrimonious arguments as to the extent to which the rivers of northern England were canalised so that supplies could be taken to the Roman soldiers manning the boundary with the Scots.[3] Such studies provide no evidence of a public right of navigation in the 21st century, except to the extent that they may show that some rivers were physically navigable at some time before the start of legal memory on 3rd September 1189.[4]

2.2 Roger de Hoveden

In *The annals of Roger de Hoveden*, written in about 1180, it is stated that the law at the end of the reign of Henry II provided that,

> Another (protection) that which the Four public Roads possess, Watlingstrete, Fosse, Ikenildestrete, [546*] and Ermingstrete; ….. Another is that which the waters of certain rivers possess, by the navigation of which provisions are carried from different places to cities or boroughs ….. in like manner a breach of the protection on the four public roads and the principal rivers is to be deemed equal to an assault.
>
> ……..
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> The lesser roads, however, leading from one city to another, and from borough to borough, and along which merchandise is carried and other business done, are to be subject to the laws of the county; ….. As to the lesser rivers which carry vessels with the things that are necessary to boroughs and cities, wood at least, and things of that nature, reparation of them is likewise to be made as prescribed by the law relative to the lesser roads.[5]

By the nature of historical records, there are few references to wood and 'things of that nature' being transported on the rivers. The records of these things being transported by cart are equally few, except when the roads became impassable. Yet such goods must have been transported into the towns by river or by road. It seems from this record that there

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[2] Dorothy Summers, *The Great Ouse* (Newton Abbot: David & Charles, 1973), 25
[3] Raymond Selkirk, *On The Trail of the Legions* (Ipswich: Anglia Publishing, 1995)
James D. Anderson, *Roman Military Supply in North-East England* (Oxford: BAR British Series 224, 1992)
[4] (1281) 3 Edward I c39
[5] Henry T. Riley, Translator, *The annals of Roger de Hoveden* (London, Bohn H.C., 1853), 545 - 547

was a well developed structure for the law relating to rivers at that time and that the rivers were considered as public as the public roads.

That boats provided an important method of transport is shown by the fact that Henry II made a trench from Torkesey to Lincoln, a distance of 11 miles, as a passage for shipping.[6] However it seems that only the great rivers were under the direct protection of the king. The administrative arrangements for maintaining the navigability of the lesser rivers seems to have fallen into disuse at some later date.[7]

In 1190 William Longchamp wrote,

> 'W. by the Grace of God, Bishop of Ely and Chancellor of the King, to the Sheriff of Essex; Know that we have given permission to the Abbot of Waltham to turn aside the course of the water of the Lee in the Town of Waltham as he wishes without harming anyone and for the advantage of navigation and therefore we order you to allow him to do this without impediment.'[8]

The document appears to be a writ of *Ad quod Damnum* which a land owner needed to obtain from the King before diverting a river or road on which there was a public right of passage. Again it shows that there was a well established structure to the law at that time. The river Lee at Waltham was a great river under the protection of the King and was at that time both physically and legally navigable.[9]

2.3 Glanvill

Glanvill wrote *De legibus et consuetudinibus Angliae* in about 1188. Hall translated the start of the section on 'Purprestures' as,

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[6] *ibid*, 216
[7] See 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*
[8] British Library, Harleian MSS, 391 f 103; quoted in John Boyes and Ronald Russell, *The Canals of Eastern England* (Newton Abbot: David & Charles, 1977), 14
[9] See section 3.2.2 below.

> The subject of purprestures now follows. There is a purpresture in the strict sense when there is unjustifiable encroachment on property of the lord king: for example, in the royal demesnes, or by obstructing public ways or diverting public watercourses, or when anyone has encroached on royal land in some city of the lord king by building something. To put it generally, whenever anything is done to the nuisance of a royal tenement or way or city, the resulting plea belongs to the crown of the lord king. (Book IX, 11)[10]

For the words 'or diverting public watercourses' the Latin text given by Hall is '*uel aquis publicis trestornatis a recto cursu*'. When Coke quoted Glanvill he has the text, '*vel in aquis publicis transversis a recto cursu.*'[11] This could be taken as meaning 'obstructing public watercourses'.

It seems that when someone was accused of either diverting or obstructing a public watercourse Glanvill considered that the case was to be heard in the King's Court.

From the start of the time of common law the waterways were required to be kept clear of any obstructions.

2.4 Bracton

Bracton wrote his *De Legibus et Consuetudinibus Angliae* in about 1260.[12] He followed Roman Law in describing 'The division of things' by stating that navigation and fishing in ports and perennial rivers are common to all persons but that temporary streams may be private.[13]

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

[11] Edwardo Coke, Milite, JC, *The Second Part of the Institutes of the Laws of England* (London: W. Clarke and Sons, Reprint, 1817), 38

[12] *Henrici de Bracton De Legibus et Consuetudinibus Angliae*

[13] 'All rivers and ports are public, and accordingly the right of fishing in a port and in rivers is common to all persons. The use of the banks is also public by the right of nations, as of the river itself. It is free to every person to moor ships there to the banks, to fasten ropes to the trees growing upon them, to land cargoes and other things upon them, just as to navigate the river itself, but the property of the banks is in those whose lands they adjoin, and for the same cause the trees growing upon them belong to the same persons, and this is to be understood of perennial rivers, because streams, which are temporary, may be property.' Sir Travers Twiss, Editor, *Henrici de Bracton de Legibus et Consuetudinibus Angliae* (London: Longman & Co etc., 1878), Volume 1, 57 - 59

Later in his treatise he corrected his earlier statement with regard to fishing and wrote that it may be private.[14] He made no correction with regard to the statement that there is a public right of navigation on all perennial rivers. Gould commented, 'The passage seems to show either that the rules of the common and civil law were the same at this early period, or that Bracton, finding the subject undefined in the law of England, supplied the deficiency, as he was wont to do, by borrowing from the Roman code.'[15] The quotations from Roger de Hoveden above[16] seem to show that with regard to the public right of navigation there was an established law and so there was no need for Bracton to borrow from the Roman code.

Tindal CJ in 1843, when giving judgement in a case concerning percolating water, said, 'The Roman law forms no rule, in itself, upon the subjects of these realms; but, in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion at which we have arrived, if it proves to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages and the groundwork of the municipal law of most of the countries in Europe.[17]

Maitland wrote, 'That Bracton's book on the laws of England is a good and a great book very worthy of careful study, is no novel opinion, but rather an old tradition which has stood the test and received the sanction of modern scholarship.'[18]

It is generally accepted that a great part of the text of Britton, written in about 1291, was derived directly or indirectly from Bracton.[19] Britton agrees with Bracton on the ownership of a fishery in a river[20] and concerning nuisances to waterways.[21] However with regard to

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[14] Likewise a fishery in his own ground may be said to be the freehold of a person either by himself or in common, as if a person possesses the land on both sides of a river close to its banks, it will be allowable for him to fish over the whole as in his free tenement without impediment from anyone, …….. Likewise if he possesses the lands only on one side close to the edge, his tenement will extend to the mid-channel of the water, and it will be his fishery, and he will have the right of fishing without any other person, unless perchance it should happen that he imposes an easement on his own land, that a person may fish with him, ….. *ibid*, Volume III, 375

[15] John M. Gould, *A Treatise on the Law of Waters, 2nd Edition* (Chicago: Callaghen and Company, 1891), 112

[16] See section 2.2 above.

[17] *Acton* v *Blundell* (1843) 12 M & W 324, 353

[18] F.W. Maitland, *Bracton's Note Book, Volume 1* (London: C.J. Clay & Sons, 1887), 1

[19] Francis Morgan Nichols, *Britton Volume 1* (Oxford: Clarendon Press, 1865), xxiii

[20] *Ibid*, 279

things that are common Britton refers to 'the right of fishing in tidal waters and in the sea, and in common waters and rivers',[22] where Bracton had 'the right of fishing in a port and in rivers'. Britton also refers to a grantee of a right of fishery and his rights against a person with a subsequent grant.[23] It seems that the law relating to the ownership of fisheries was being developed at an early date. There is, however, no suggestion that the public right of navigation was limited to tidal rivers.

Many centuries passed before the opinions of Bracton and Britton about the public right of navigation were questioned in any text.

2.5 Magna Carta

The first statute to refer to rivers was Magna Carta sealed by King John in 1215. Thomson states that the charter was confirmed at least 44 times in the next 200 years.[24] She also claims that these confirmations were not just a way of reminding each king that he was under the law but were a confirmation of the permanence of each provision of the charter.[25]

The text of clause 16 of Magna Carta was,

> NO [Banks*] shall be defended from henceforth, but such as were in defence in the time of King Henry our Grandfather, by the same Places and the same Bounds, as they were wont to be in his time.[26]
>
> * Footnote:- Rivers

There are at least three interpretations of this clause. Hale considered that it stopped the king from putting 'in defence'[27] land which he wished to use for recreation.[28]

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[21] *Ibid*, 279, 399 - 402, See also Sir Travers Twiss, Editor, *Henrici de Bracton de Legibus et Consuetudinibus Angliae, Volume 3* (London: Longman & Co etc., 1878), 565
[22] *Ibid*, 213
[23] *Ibid*, 412
[24] Faith Thomson, *Magna Carta Its role in the making of the English Constitution 1300 – 1629* (Minneapolis: The University of Minnesota Press, 1948), 10 fn
[25] As is usual quotations in this paper are taken from the statute in the form in which it was confirmed by Edward I rather than the original text which was only the law for about nine weeks. Theodore F.T. Plucknett, *A concise History of the Common Law* (London: Butterworth & Co (Publishers) Ltd, 1956), 23
[26] Translation as in *Statutes at Large*

Coke considered that it stated that 'no owner of banks of rivers shall so appropriate, or keep the rivers severall to him, to defend or barre others, either to have passage, or fish there, otherwise than they were used in the raigne of king H.2.'[29] The editors of *Statutes at Large* and the Law Commissioners in *A Chronological Table of Statutes*[30] have given the clause the title 'Obstructing of Rivers' which seem to support Coke's interpretation.

Other authors have assumed that this clause prohibited the king from granting fishing rights on the foreshore.[31]

In this dissertation no reliance is placed on this clause of Magna Carta despite Coke's interpretation.

Clause 23 of Magna Carta is,

> All *kydells* from henceforth shall be utterly put down by Thames and Medway, and through all England, except only by the Sea-coasts.

Kydells were a type of fish trap like a fence built in a river. No definitive reference has been found as to why this clause was included in Magna Carta. Some writers on the Law relating to Fisheries have suggested that this clause was included for the purpose of preserving fish.[32] Others writing on the same topic disagreed; thus Moore wrote, 'The

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[27] Defence involves keeping all other people away.
[28] 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), 7
[29] Edwardo Coke, Milite, JC, *The Second Part of the Institutes of the Laws of England* (London: W. Clarke and Sons, Reprint, 1817), 30
[30] *Chronological Table of the Statutes, Part I, 25th Edition* (London: HMSO, 2003), 13
[31] William Howarth, *Freshwater Fishery Law* (London: Financial Training, 1987), 7
A.S. Wisdom, *The Law of Rivers and Watercourses* (London: Shaw & Sons Ltd, 1962), 174
See also:- *Malcomson* v *O'Dea* (1863) 10 HLC 593
Fitzhardinge (Lord) v *Purcell* [1908] 2 Ch 139
[32] See for example, 'The actual intention behind the decree, however, is not clear. Since no mention of fish is made in the sparsely worded edict, it may be that it was originally intended to bring about the protection of navigation rather than the protection of fish (see Hale (1787) Ch. 3 and Wrangles (1979) p.6.) Subsequent enactments make it explicit that the protection of fish *was* an intended, if incidental, consequence of the enactment.' William Howarth, *Freshwater Fishery Law* (London: Financial Training, 1987), 15

charter had no special reference to fish, and did not make any direct enactments for its preservation.'[33]

Mckechnie, in *Magna Carta,* referring to this clause, wrote,

> The object of this provision is not open to doubt; it was intended to remove from rivers all obstacles likely to interfere with navigation. … The water-ways were the great avenues of commerce; when these were blocked, townsmen and traders suffered loss, while those who depended on them for necessaries, comforts, and luxuries, shared in the general inconvenience.[34]

Mckechnie considered the assumption that the motive for removing the *kydells* was the same as the motive for constructing them to be mistaken. He points out that there would be, 'a manifest absurdity to allow monopolies of taking fish in the open seas, while insisting on freedom to fish in rivers, the banks of which were private property.'

McKechnie also pointed out that this clause was not a new provision for the Thames and Medway. The right to destroy *kydells* from the Thames had been purchased by the Corporation of London from Richard I, in 1197, for 1500 marks and a further sum had been paid to his successor John, in 1199, to have this charter confirmed and extended to the river Medway.[35]

It seems better to assume that the clause was included both to preserve fish and to allow the passage of boats as stated in the preface to an Act of 1472.

> Whereas, by the laudable Statute of Magna Carta, among other Things, it is contained That all Kedels by Thamise and Medway, and through out the Realm of England, should be taken away, saving by the Sea-banks, which Statute was made for the great Wealth of all this Land, in avoiding the Straitness of all Rivers, so that

[33] Stuart Archibald Moore, *The History and Law of Fisheries* (London: Stevens & Haynes, 1903), 171
[34] William Sharp McKechnie, *Magna Carta* (New York: Burt Franklin, 2nd Edition, 1958), 343
[35] *ibid*, 345

> Ships and Boats might have in them their large and free Passage, and also Safeguard of all the Fry of Fish, spawned within the same.[36]

In the 17th century there was a resurgence of interest in the Magna Carta due to the claims for the Divine Rights of Kings and the limitations put on such rights by the charter. At that time at least Coke,[37] Hale[38] and a West Country jury[39] considered that clause 23 referred to the protection of navigation. Lord Macclesfield wrote a note with the same assumption in 1719.[40]

The Courts seem not to have been consistent in their interpretation of this clause. Holt, CJ stated that 'to hinder the course of a navigable river is against Magna Charta, c23.'[41]

Despite the fact that the clause in Magna Carta applies 'through all England', it has been held that it ordered the removal of fish weirs only on rivers which were navigable. This would seem to indicate that the judges considered the primary reason for clause 23 was the preservation of navigation.[42]

However in 1610, in the case of *Chester Mill upon the River Dee*, an appeal was made against an order of the Commissioners of Sewers which had required the removal of a section of a weir which provided water for the King's Mill at Chester. It was held that

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[36] (1472) 12 Edward IV, c 7

[37] 'This *pourpresture* was forbidden by the common law.' Coke, Edwardo. *Institutes of the laws of England. Revised and Corrected. 19th Edition .Part 2* (London: Clarke and Sons, 1817), 37 - 38

[38] 'And therefore all nuisances and impediments of passages of boats and vessels, though in the private soil of any person, may be punished by indictments, and removed; and this was the reason of the statue of *Magna Carta cap. 23'* Hale, Lord Chief-Justice. A Treatise in Three Parts (normally called *De Jure Maris*). Contained in Hargrave, Francis. Editor. *A Collection of Tracts relative to the Law of England.* (London: T. Wright, 1787), 9

[39] 'The [?] of the Jurie at the Sessions there held the third day of April Anno Dm 1649. Wee doo [?] that the Weares erected in & upon the Ryver Wye are contrarie to the Statute of Magna Carta, and the other good lawes in that behalf ….. by that meanes not havinge the benefit & advantage of Trafffique & comerce with Bristoll & other parts, & without the greate destruccon of the fry of ffishe occasioned for the private gain of some pticular men.' British Library Add MSS 11052 / 93

[40] 'Magna Carta chap 23 supposes that it was the common law before, that all public Rivers were the Kings Highways, & as such free for all his subject & therefore forbids Kidels or wears for fishing.' Lord Chancellor Macclesfield's notes on Making rivers navigable British Library manuscript. (About 1719) Stowe MSS818 f 86

[41] *R* v *Clark* (1702) 12 Mod 615

[42] *Rolle* v *Whyte* (1868) 3 QB 286
Leconfield v *Lonsdale* (1870) 5 CP 657
R v *Clark* (1702) 12 Mod 615

Magna Carta applied only to open weirs for taking fish and not to solid weirs made of stone used to raise the level of water in a river for the use of a mill.[43]

Britton records that the Court of Eyre to each county at its septennial visitation was required to, 'let inquiry be made concerning weirs raised in common waters, and concerning waters and highways stopped or straitened or in other manner appropriated, and concerning watercourses diverted.'[44] It appears that throughout the period when Courts of Eyre[45] visited the counties it was considered very important to keep rivers clear for navigation.

2.6 Statutes for removing Weirs and other obstructions

Magna Carta stated that all *kydells* were to be removed from throughout England except on the sea coast. During the next three hundred years further statutes were passed to authorise the retention of weirs built before the time of Edward I, to require the removal of new stone weirs and to forbid the enhancing of weirs. They also provided specific penalties of increasing severity for the breach of these laws.

These Acts were wider than Magna Carta in that they applied to a wider range of obstructions, but narrower in that they only applied to the great rivers of England. It has been suggested that the great rivers were the Thames, Severn, Trent and Ouse, (Great or Yorkshire).[46] However the preface to the Act for the conservation of the river Lee made it clear that these Acts applied to that river.[47] Later the Privy Council considered that the

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[43] *The case of Chester Mill upon the River of Dee* (1610) 10 Co Rep, 137b
[44] Francis Morgan Nichols, *Britton, Volume 1* (Oxford: Clarendon Press, 1865), 81
[45] About 1166 to 1327. J.H. Baker, *An Introduction to English Legal History. 3rd Edition* (London: Butterworths, 1990), 18 - 23
[46] C.T.Flower, *Public Works in Medieval Law, Volume I,I Selden Society Volume 40* (London: Bernard Quaritch, 1923), xxiii
[47] 'Whereas it was ordained by a Statute made in the Time of King Edward the Third the Twenty-fifth Year of his Reign, that all the Wears, Mills, Stanks, Stakes, Piles, and Kydels, which were set in the great Rivers of England in the Time of the Lord Edward sometime King of England, Son of King Henry, and after, whereby Ships and boats be disturbed, that they cannot pass as they were wont to pass, should be removed and pulled down; and afterward in the Parliament of King Henry, [Father] of our Sovereign Lord the King that it now is, holden the First Year of his Reign, It was ordained, that as well the said Statute made the said xxv. Year, as another Statute made in the Time of the said noble Kind Edward the Third, the xlv Year of his Reign, in all their Articles shall firmly holden and observed, joining to the same, Commissions shall be made to sufficient Persons to be Justices in every County of England, where it shall be needful, to survey and keep make all the Waters and great Rivers within the Realm, and to correct and amend the Defaults, and to make due Execution of the said Statutes according to their Effect, ….. there is so great Number of Shelfs within the River of Ley, ….. that Ships and Boats may not pass by the said Water of Ley, as they ought.' (1430-31) 9 Henry VI c 9

Acts applied to the river Dee.[48] It seems possible that the Acts referred to those rivers which Roger de Hoveden said were in the protection of the king.[49] The protection of the other rivers would have been by local regulations.

The first such statute was 25 Edward III s 4 c 4 (1350). This Act did not refer to the Magna Carta,

> Whereas the common Passage of Boats and Ships in the great Rivers of *England* be oftentimes annoyed by the inhansing of Gorces, Mills, Wears, Stanks, Stakes, and Kiddles, in great Damage of the People; 'it is accorded and established, That all such Gorces, Mills, Wears, Stanks, Stakes, and Kiddles, which be levied and set up in the Time of King Edward the King's Grandfather, and after, in such Rivers, whereby the said Ships and Boats be disturbed, that they cannot pass in such Rivers as they were wont, shall be out and utterly pulled down, without being renewed; and thereupon Writs shall be sent to the Sheriffs of the Places where Need shall be, to survey and inquire, and to do thereof Execution, and also the Justices shall be thereupon assigned at all Times that shall be needful.'

This Act has been held to apply to stone weirs as well as weirs designed to catch fish but it did not apply to weirs which were constructed before the time of Edward I.[50] It applied only to weirs which disturbed the passage of boats, not to small weirs set at the side of rivers to draw off water into a leat leading to a mill.[51]

The next Act was 45 Edward III c 2 (1371). It repeated the provisions of the previous Act and then stated that there had been great complaints that the statute had not been observed. It added the offence of 'enhancing a weir above its height since before the time of Edward I'. It also provided that anyone who should repair a weir which had been pulled down, or enhance a weir which had been reduced by due authority, would be liable to a fine of a hundred marks.

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[48] *The case of Chester Mill upon the River of Dee*, (1610) X Co Rep, 137b
[49] See Section 2.2 above
[50] *The case of Chester Mill upon the River of Dee*, (1610) X Co Rep, 137b
[51] *Rolle* v *Whyte* (1868) 3 QB 286
Leconfield v *Lonsdale* (1870) 5 CP 657
R v *Clark* (1702) 12 Mod 615

The next Act, 1 Henry IV cap 12 (1399), stated that not only had the passage of boats been disturbed 'but also Meadows and Pastures, and Lands sowed adjoining to the said Rivers, be greatly disturbed, drowned, wasted, and destroyed by outrageous enhancing and straiting of weirs, … .' So Commissions were appointed to survey the weirs, 'so often and when Need shall be.' When a weir was newly made or enhanced 'He that hath the freehold is to pull down the weir or the excess at his own expense within half a year upon Pain of a hundred marks.' Anyone grieved by such a notice was given the right of appeal.

The fourth Act, 4 Henry IV c 11, (1402) referred to the fact that many people had drowned due to weirs obstructing the passage of boats and again enacted that 'all former Statutes be holden, kept and put in execution.'

The Act 1 Henry V c 2, (1413) confirmed the former statutes touching Wears, Mills, Kidels &.

The sixth Act, 12 Edward IV c 7, (1472) confirmed all the previous statutes but increased the list of prohibited obstructions to 'Weres, Fishgarths, Mills, Mildams, Locks, Hebbingweres, Stakes, Kiddels, Hecks or Floodgates'. It required the fault to be made good in three months and provided a penalty of a hundred marks for each month that the obstruction was maintained after it was declared defective.

The Act 23 Henry VIII c 5, (1531) provided for the appointment of Commissioners of Sewers whose responsibilities included reference to, 'the common passage of Ships, Balengers and Boats in the Rivers, Streams …… be letted or interrupted.'
It may be noted that none of these Acts created a new right of navigation. All of them assumed that there was a right to pass along the rivers and created, or strengthened, the penalty for the offence of obstructing the river. In this they were similar to the Acts which regulated purveyance and those which required correct weights and measures to be used. These seem to be three fundamental rights which all should be able to enjoy but which were frequently disregarded.

In these Acts there was no differentiation between the tidal and non-tidal sections of the rivers which in later times has been thought to be of great importance.

2.7 The State Records

Edwards, studying the State Records for the period 1066 to 1400, has collected 650 records relating to 137 rivers for which there is documentary evidence of navigation.[52] The great majority of these records were found in the various state calendars which have been published by the Public Record Office. He realised the two problems with these records. First, 'in general they record only *problems* with navigation; like law reports and the modern-day press they only rarely record times and places when all is well.'[53] Secondly, referring to the work of Flower,[54] he accepted that the bulk of the material dealt with six counties only – Essex, Middlesex, Surrey, Gloucestershire, Lincolnshire and Yorkshire – and this could well be because the Court normally met at Westminster, Gloucester, Lincoln and York.[55]

Langdon has criticised Edward's work by comparing it with the results which he obtained from studying the purveyance accounts which show fewer rivers, and shorter lengths of those rivers, as being used. However his work on the need to move large quantities of grain in a short time provides little additional information about legal rights of navigation which may include a right exercised by a few people to move their goods a short way. On the rivers which he lists there must have been a ready supply of boats and skilled boatmen available. He does however show that many rivers were only navigable by large boats on a seasonal basis.[56] This does not affect the right of navigation.

Jones has shown that some rights could only be exercised during the earlier part of the medieval period before the rivers became silted up or obstructed by mills.[57] This is of importance to Historical Geographers who are studying the movement of goods at various

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[52] James Frederick Edwards, *The Transport System of Medieval England and Wales – A Geographical Synthesis* (A Thesis presented for the Degree of Doctor of Philosophy, University of Salford, 1987, Unpublished)
[53] James Frederick Edwards and Brian Paul Hindle, 'Comment: inland water transportation in medieval England', (1993) 19, 1 *Journal of Historical Geography,* 12 - 14
[54] C.T. Flower *Public Works in Medieval Law* (London, Bernard Quaritich, Seldon Society 32 and 40, 1915 and 1923)
[55] James Frederick Edwards, *The Transport System of Medieval England and Wales – A Geographical Synthesis* (A Thesis presented for the Degree of Doctor of Philosophy, University of Salford, 1987, Unpublished), 11
[56] John Langdon, 'Inland water transportation in medieval England' (1993) 19, 1 *Journal of Historical Geography,* 1 - 11
[57] Evan T. Jones, 'River navigation in Medieval England', (2000) 26, 1 *Journal of Historical Geography,* 60 - 82

times. However the right of navigation is only suspended when a river becomes impassable due to siltation or other obstructions. If the obstructions are removed the original public right of navigation is restored.[58]

These records establish that many rivers from all parts of the country were used in the medieval period for the movement of goods.

2.8 The Use of Waterways in the Fens and other Wetlands

In this section the evidence of the regular use of the waterways of the fens and other wetlands is considered. It seems that the law for these waterways was the same as for waterways in the rest of the country.

Dugdale wrote in 1652,

> For in winter time, when the ice is strong enough to hinder the passage of boats (as hath been by some well observed) and yet not able to bear a man; the inhabitants upon the hards and the banks within the Fens, can have no help of food, nor comfort for body or soul; no woman aid in her travel, no means to baptize a child, or partake of the Communion, nor supply of any necessity, saving what those poor desolate places do afford.[59]

Before the forming of the ice the people travelled everywhere in Spring and Autumn by boat. There is no hint that their path was restricted to those ways where they had permission to pass. In summer they would have walked on the dry ground, in winter on the ice.

Pepys observed that there was no need for wharfs where they landed, 'over most sad fens, …. Sometimes rowing from one spot to another and then wading.'[60] There is no evidence here that the fensmen kept to fixed routes on which there was a public right of navigation.

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[58] see Sub-section 1.6.4 above
[59] William Dugdale, *The History of the Imbanking and Draining of the Divers Fens and Marshes* (London: Richard Guest, 2nd Edition, 1772), ix (1st Edition 1652)
[60] S. Pepys, *Diary*, (London: Macmillan, 1905), 18 September 1663,

Defoe wrote as late as 1724, 'As we descended Westward, we saw the *Fenn* Country on our Right, almost all cover'd with Water like a Sea, the *Michaelmas* Rains having been very great that Year.'[61] The only way of travelling across such country is by boat.

Darby notes that in the Domesday Survey the entries for Cambridgeshire indicate that one manor, the manor of Wisbech, produced over thirty thousand eels annually.[62] Other manors produced similar amounts. These eels could only have been transported within the fens by boat.

Lord Orford travelled round the Fens in 1774. There is no suggestion in the record of his journey that he obtained permission from anyone to make the journey.[63]

Camden records that John Morton, Bishop of Ely, (bishop 1479 – 86) 'drew as straight as a line in this fenny country a ditch, which they call the Newleame for better conveyance and carriage by water, that by this meanes the towne (of Wisbich) being well frequented might gaine the more and grow in wealth.'[64] This shows that the primary purpose of constructing some of the artificial waterways in the Fens was for the transport of goods.
Study of the court records for Huntingdonshire show that in the 15 years 1271 to 1286 there were 66 cases of misadventures which accounted for the death of 74 individuals. Seven people died from crushing accidents, fourteen from falls and three were killed by animals. However 40 people died from drowning. Of these 22 fell from boats or were in boats which overturned or sank. Of these four died in the river Ouse and two in the Nene.[65] From these figures it appears that in the 13th century there were a considerable number of boats being used on the rivers.

In 1334 a commission was set up, 'to survey divers lodes leading from the towns of Peterborough, Yakesle and Spaldying, in the great marsh of the county of Huntingdon, as

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[61] Daniel Defoe, *A Tour Thro' the whole Island of Great Britain, 9th edition* (London: Peter Davies, 1927), 78 - 79
[62] H.C. Darby, 'The Human Geography of the Fenland before the Drainage', (1932) Vol 80 no 5 Royal Geographical Society Journal , 428
[63] 'The Admiral's Journal of the Voyage round the Fens, in July 1774' contained in J.W. Childers *Lord Orford's Voyage round the Fens, etc.* [1868] (Doncaster: Edwin White, 1868)
[64] William Camden, translated by Philemon Holland, *Britain* (London: Joyce Norton and Richard Whitaker, 1637)
[65] Anne Reiber DeWindt and Edwin Brezette DeWindt, Editors, *Royal Justice and the Medieval English Countryside,* (Toronto: Pontifical Institute of Mediaeval Studies, 1981), 65 and text

far as the town of Lynn, whereby men, merchants, and others of the county and the counties of Norfolk, Cambridge and Northampton time out of mind have used to navigate their ships in winter.'[66]

Darby summarised the records when he wrote

> From the frequent mention of boats and boat-hire it would seem that the ordinary "sewers" were the highways from place to place. We read of "ships which came through the marsh", of journeyings to and from the fenland fairs, and of the water carriage of commodities like fish, timber, metal, and stone.[67]

As late as 1695 Fienes recorded that in winter there was no way into Ely but by boat.[68]

It seems that no one has suggested that the laws in the Fens, relating to a right of navigation, were different from those of the rest of the country. However there seems to have been general use of all the waterways, apart from one private ditch,[69] at least to the end of the 17th century.

It seems that in the other wetlands rivers were used as freely as on the fens. On Romney Marsh a commission was set up in 1348 to investigate the building of a wall across the river, when it was said that,

> it will be to the great damage of the King …. Especially as by the passage of ships and boats with victuals from divers … manor … to manor of Echyngham will be hindered, as well to the destruction of market town of Salehurst.[70]

Etchingham is at the furthest corner of the marsh from the original outlet of the river Rother to the sea.

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[66] Calendar of Patent Rolls, 1334 – 38, 70
[67] H.C. Darby, *The Medieval Fenland* (Newton Abbot: David & Charles, 1940), 99 - 101
[68] Celia Fiennes, *Through England on a Side Saddle in the time of William and Mary being the diary of Celia Fiennes* (London: Field &Tuer, 1888), 127
[69] See section 2.10 below.
[70] Calendar of Patent Rolls, 1348 – 1350, 80, 177 - 178

In a charter for Pevensey Marsh of 1402 there is a reference to 'the common streams of the said marsh'.[71]

A more homely example comes from the Somerset Levels where in 1505 the Chapter of Wells wrote to their bishop,

> 'your said officers know right well that in all the somer season the water is so lowe and so many shelpes and bayes in the river betwene our myll and Taunton that it is not possible to convey eny bote that way; and in the winter season the medewes be so filled and replenysshed with water, that the bootes may go over at every place, so that they shal not be lett by the myll.[72]

Rackham has claimed that, 'About a quarter of the British Isles is, or has been, some kind of wetland.'[73] Hence it seems that the use of boats on natural waterways across about a quarter of the country was common in the medieval period. No record has been found which indicates that the law regarding the right of public navigation on rivers flowing in valleys was not the same as the law on rivers flowing though the wetlands.

When the Fenlands were drained there was vigorous opposition. The opposition of the rich[74] was overcome by ensuring that the river navigations on which they depended were maintained.[75] The rights of the poor who would also have used the narrower dykes and ditches, were, it seems, in general, ignored. Tracts were published in opposition to the draining.[76] When these failed to have any effect there was physical opposition. Darby

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[71] Pat. 3 Henry IV p.1.m.26. in dorso, quoted in William Dugdale, *The History of Imbanking and Draining of Divers Fens and Marshes* (London: Richard Guest, 2nd edition, 1772), 97

[72] Wells MSS Chapter Act Book, ff 115 et seq; quoted in P. Helm, 'The Somerset Levels in the Middle Ages' (1949) *Journal of the British Archaeological Association 12*, 47 - 48

[73] Oliver Rackham, *The History of the Countryside 2nd impression* (London: Phoenex Press, 2001), 375

[74] The Public Orator of the University of Cambridge wrote to Lord Chancellor Bacon, 'If our river had been taken away, by means of which we enjoy the wealth of the neighbouring country, ….. who would visit Alma Mater when robbed of all its supplies?'

See also C.H. Cooper *Annals of Cambridge*, vol iii (1845), p28 (1607), p62 (1614), p125 (1618), p131 (1619), p133 (1620), p 275 (1636)

Both the above quoted in H.C. Darby, *The Draining of the Fens* (Cambridge, University Press, 1940), 53

[75] The Lynn Law provided that, '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, and no prejudice, annoyance, hurt of hindrance done to them or any of them.' Samuel Wells, *The History of the Drainage of the Great Level of the Fens called Bedford Level, Volume II* (London: R. Phoney, 1830), 105

[76] Come, Brethren of the water, and let us all assemble,
To treat upon this matter, which makes us quake and tremble;

records, 'Their newly erected dykes were destroyed; their channels were filled in; their sluices were kept open at flood tide and closed during ebb. Restlessness was abroad throughout all the region.'[77] The Justices of the Peace were instructed, 'to suppress the tumults ….. and to imprison some of the offenders, and bind over others amongst the refactory.'[78] Sometimes their constables, who were instructed to take action, were met by physical resistance.[79]

Evidence of the use of rivers from the State records or other sources does not establish that there was a public right of navigation on a particular section of a river. It is today normally not possible to prove that a person did not have permission to make a particular journey. However the total lack of evidence for permission being granted does seem to indicate that, in general, the journeys were made as of right, that is *nec vi, ne clam, ne precario.*[80]

2.9 Tolls and Charters

In medieval times there were many tolls charged. Tolls for bringing goods to market, tolls for goods passing through a port, murage and pontage. Thus on the river Nene a toll of ships was granted by Henry III in 1227 to the monks of 'Radinges'.[81] Other charters were

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> For we shall rue it, if't be true, that Fens be undertaken,
> And where we feed in Fen and Reed, they'll feed both Beef and Bacon.
>
> They'll sow both beans and oats, where never man yet thought it,
> Where men did row in boats, ere undertakers bought it:
> But, Ceres, thou behold us now, let wild oats be their venture,
> Oh let the frogs and miry bogs destroy where they do enter.
>
> Away with boats and rudder, farewell both boots and skatches,
> No need of one nor th'other, men now make better matches; …..
>
> The feather'd fowls have wings, to fly to other nations;
> But we have no such things, to help our transportations;
> We must give place (oh grievous case) to horned beasts and cattle,
> Except that we can agree to drive them out by battle. …..

Quoted in William Dugdale, *The History of the Imbanking and Draining of Divers Fens and Marshes. 2nd Edition* (London: Richard Geast, 1772), 391

[77] H.C. Darby, *The Draining of the Fens* (Cambridge, University Press, 1940), 55

[78] *State Papers Domestic Charles I ccclvii*, 152 quoted in H.C. Darby, *The Draining of the Fens* (Cambridge, University Press, 1940), 56

[79] 'When the messengers approached him, he pushed at them with his pike. The people prepared to assist him, and the women got together to the heaps of stones to throw at the messengers, who were scoffed at and abused by the whole multitude.' *State Papers Domestic Charles I, ccclxxv, 46* (1637?) quoted in H.C. Darby, *The Draining of the Fens* (Cambridge, University Press, 1940), 56

[80] Without force, without secrecy, without permission.

[81] Calendar of Charter Rolls, 1226 – 57, 20

granted to religious foundations at Burgh in 1270,[82] at Peterborough in 1300[83] and in 1332 again at Burgh.[84] All these charters relate to the law as it was in feudal times. In this section the law relating to tolls and the collection of tolls are considered to see if there is evidence for the lack of a public right of navigation on any rivers.

Today the law is clear. A *toll thorough* may be charged for passage on a way which has been improved for the benefit of the public. The most common form of *toll thorough* is for a harbour where every boat entering must pay a charge despite the fact that some may not need the better provisions provided. Most, if not all, *tolls thorough* are now regulated by statute rather than by common law. Thus most harbour dues, all canal charges and British Waterways charges for the use of rivers are all regulated by statute. There is a statutory charge, equivalent to a *toll thorough,* for bridges across the major estuaries.

An early example of an apparently valid *toll thorough* is a grant in 1375 to Gilbert de Umfrmvyll to collect a toll on wool, wine, corn, herring, cattle and on 'ships carrying aught else' on the 'water called "le Ee" on the river Slea where he had agreed to 'cleasnse the said water and raise and keep in repair the banks for the common good.'[85]

A second type of toll which is legal today is a *toll traverse* which is paid for crossing the land of another where there is no public right of passage. This may be in the form of a licence for all the people passing to an adjoining property which is paid, say, annually, or it may be a charge for each person or boat passing across private land or a private river.

In the medieval period some Boroughs purchased a charter from the King granting that they should be 'quit of toll throughout my whole realm, within fairs and without.' The town of Nottingham purchased such a charter from both Henry II and King John to be free from *Tholonea* throughout the land. These charters also provided that the Trent should be 'free to navigators as far as one perch extends on either side of the mid-stream.'[86] It seems that the amount to be kept free was the width that boats needed to pass along the river. There is an implication that fish nets and other obstructions could be placed at the sides of

[82] Calendar of Charter Rolls, 1257 – 1300, 142
[83] *ibid*, 485
[84] Calendar of Charter Rolls, 1327 – 41, 278
[85] Calendar of Patent Rolls, 1340 – 43, 576
[86] *Records of the Borough of Nottingham,1155 – 1760* (Published under the authority of the Corporation of Nottingham, 1947)

the rivers. In 1265 Gilbert de Preston was commissioned to enquire into certain weirs which had been erected which did not leave a clearance of 'the breadth of one perch on each side of the middle of that water'.[87] Complaints about the same obstructions were made in 1299,[88] 1300,[89] 1302[90] and 1303[91]

A similar charter granted to the burgesses of Derby in 1229 confirmed the grants by King Henry I, Henry II and John to 'toll and theam, and infangenthef and tolonea from Duvebruge as far as the bridge of Gordy and from the bridge of Cordy as far as the bridge of Bradeford'.[92] This shows that the burgesses were willing to pay for a charter relating to the Erewash, Dove and Bradford which are relatively small rivers.

In two cases involving the right to take a toll on an ancient navigable river it was held that there was no such right unless good consideration could be shown.[93]

Only two references have been found in the River Navigation Acts[94] to tolls on rivers before a river was made navigable. The Mayor, Aldermen and Burgesses of the Borough of Doncaster had received a toll 'of Four Pence per Ton, for all Goods coming up and going down to and from Doncaster aforesaid, and of Two Pence per Ton for Wheel Carriage of all Goods brought thither to be carried down the said river.'[95] This may have been a relict of a feudal custom or it may have been in exchange for the provision of a wharf or the land for the wharf. The Mayor and Burgesses received a lump sum in compensation for the loss of their toll.

In the River Idle Act[96] there is provision for Thomas Lister, who had received a toll by 'Right and Ancient Custom' to continue to receive a toll both from those boats which loaded at Bawtry and from those boats passing by. No reason has been found for the establishment of this toll. However these two examples show that, both on the river Idle

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[87] Calendar of Patent Rolls, 1258 – 66, 480
[88] Calendar of Patent Rolls, 1292 – 1301, 476 - 477
[89] *ibid*, 555
[90] Calendar of Patent Rolls, 1301 – 07, 94
[91] *ibid*, 269
[92] Charter kept at Derbyshire County Library
[93] *Haspurt* v *Wills* (1671) 1 Ventris 71
Mayor of Nottingham v *Lambert* (1738) Willes, 111
[94] See section 3.1 below.
[95] (1726) 12 George I c 38
[96] (1720) 6 George I c 30

and all other rivers which had previously been used for the transport of goods, there were few if any people entitled to a toll from boats passing through their private property.

If a river had been private it would have been legal to charge a toll for the use of it. If a river was public a toll would only have been valid if work had been carried out to maintain or improve the river. In this dissertation it is considered that the limited evidence available is not inconsistent with the concept that there was a public right of navigation on all rivers.

2.10 Opposition to the use of rivers

One way to determine if there was a common right of navigation on all rivers is to consider the cases when such a right was disputed by the riparian owner. Only three such cases have been found.

The first case was that, 'In 1192 the monks of Ramsey prevented the monks of Sawtrey from using channels which they had made in the Fens, with the sole exception of the channel from Whittlesey to Sawtrey which was specifically stated to be for the transport of building materials.'[97] This seems to be an example of the rule that channels, made by the riparian owner, along which there is no flow of water are not rivers and so are private.

The second case was that,

> In 1280 the burgesses of Bridgewater complained that, whereas they were used to tow their boats on the waterway of Peret, along the moor-lands between Brugewat and Langport, for the utility of the whole country of Brugewat, now one of the owners of Aller Moor (through which the Parrett passed) had prevented them towing their boats through, saying that a free passage depended on his goodwill. The jury's verdict was that both the burgesses and any others had had the right to tow boats from Bridgewater to Langport from time out of mind.[98]

[97] W.H. Hart and P.A. Lyons, Editors, *Cartularium Monasterii de Rameseia* (London: Longman & Co, Rolls Series lxxix, Vol 1, 1884), 166. Quoted in David Parsons, 'Stone', Chapter 1 of John Blair and Nigel Ramsey, Editors, *English Medieval Industries* (London and New York: The Hambledon Press, 2001), 22
[98] Somerset Record Society, xliv: *Somerset Pleas from the Roll of the Itinerant Justices* p199 quoted in P. Helm, The Somerset Levels in the Middle Ages, (1949) Journal of the British Archaeological Association 12

It seems that the juries verdict implies that there was a public right of navigation on this section of the river.

The third case occurred in 1385. Dugdale, in his report written in 1652, stated that John Strache and others made several complaints about the Abbott of Glastonbury, two of which related to the passage of boats. The first was that there were several trees overhanging the river Tone between the mills at Tobrigge and Bathepole so that boats could not pass. The Abbott replied that the pleck of osiers had been removed.

The second complaint related to a fulling mill built at Bathepole bridge on the river Tone which prevented the passage of boats with merchandize from Bridgewater to Taunton. It was claimed that the mills had been repaired and that the weirs were now six feet higher than before. The abbot replied that the mills had been rebuilt to the same height but that his predecessor of his own good will, and not of right, made a 'chest of boards' for the ease of the then bishop of Winchester by which the boats, in time of floods, might be drawn up into the said pool. Dugdale reported that the jury found for the abbot. However in the Calendar of Patent Rolls[99] there is an exemplification of the case where it is stated that the jury found against the abbot who claimed that the nuisances had been abated, and that it was held that the abbot, the person who built the weirs and their tenants should go free, except for certain fines.

No case prior to 1889[100] has been found in which a riparian owner successfully claimed that there was not a public right of navigation on a river which was physically navigable.

2.11 The Commentators

In this section the writings of commentators of the 17th century are considered in respect of their understanding of the public right of navigation on non-tidal rivers. Callis considered whether there would be a public right of navigation on a river made physically navigable at public expense and Hale considered the same question for those made navigable at private expense.

[99] Calendar of Patent Rolls 1381 – 85, 511
[100] See section 6.2

2.11.1 Coke

Coke wrote,

> [a] If a man hath 20 acres of land, and by deed granteth to another and his heirs *vestjuram terrae*, …. He shall have an action of trespasse *quare clausum fregit.* [b] The same law if he grant *herbagium terrae*, he hath a like particular right in the land, and shall have an action *quare clausum fregit*; …. [d] So if a man be seised of a river, and by deed do grant *separalem piscariam* …. [101]

For the river there is no reference to an action of 'trespasse *quare clausum fregit'*. The reason may be that the original owner did not have such a right himself and so could not transfer it. Thus it seems that if a riparian owner wished to stop a person going on a river adjacent to his bank Coke considered that he could not sue for trespass. This may indicate that he considered that there was a public right of navigation on all rivers which were physically navigable.

2.11.2 Callis

Robert Callis gave his reading on 'The Statute of 23 Henry 8. cap. 5. of Sewers' in August 1622.[102] Callis intended his lectures to form a reference book for Commissioners of Sewers appointed under the Act. He claimed that his Reading was upon a Maiden-law which had not previously been the subject of a Reading in any of the Inns of Court and that 'our Law-books are exceeding scarce in the handling of matters of this kind and nature.'[103] Indeed no original writings have been found for the period between Britton and Callis.[104]

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[101] Sir Edward Coke, *The First Part of the Institutes of the laws of England, Volume 1* (London: J. & W.T. Clarke, 19th Edition, 1832), 4b

[102] *The Reading of the Famous and Learned Robert Callis, Esq; Upon the Statute of 23 H. 8. cap. 5. of Sewers* (London: Thomas Basset, 2nd Edition, 1685)

[103] *ibid*, 273

[104] Fleta followed Britton. 'By the law of nations the use of river banks is public just as is the use of the river itself.' H.G. Richardson and G.O. Sayles, *Fleta ,Volume III, Book III (London: The Selden Society, 1972), 1* The Mirror of Justice is here not considered reliable. 'We feel sure that in Paradise, or wherever else he (the author of the Mirror) may be, he was pleasantly surprised when Coke repeated his fictions as gospel truth.' Frederic William Maitland, An Introduction to William Joseph Whittaker, *The Mirror of Justices, Selden Society Volume 7* (London: Bernard Quartich, 1895), xlviii

Callis said that, 'A river is a running stream pent in on either side with Walls and Banks, and beareth that name as well where the Waters flow and reflow, as where the waters have their current one way.'[105] 'The Sewer is a fresh Water trench compassed in on both sides with a Bank, and is a small current or little River.'[106] 'A Gutter is of less size, and of a narrower passage and current than a Sewer is; and as I take it, a Gutter is the diminutive of a Sewer: and the difference between them is, That a Sewer is a common publick Stream, and a Gutter is a straight private running of Water; and the use of a Sewer is common, and a Gutter peculiar.'[107] It may be questioned whether here 'a common publick stream' refers to the use of the water by boats or whether a stream has water running from many properties and a gutter from only one property. This question was considered by Buller, J who said,

> 'Now what is a sewer? It is common and public in its nature; it is so considered in Callis's Readings, one the best performances on that subject, and which has always been admitted as good authority. But the statute (23 Henry 8 c 5) mentions several things which are not of a public nature, as drains, gutters, ponds &. which are private, and on which there can be no navigation; and yet these are expressly subject to the jurisdiction of the commissioners of sewers. The line to be drawn is this; if they be necessary or useful in navigation, the statute does extend to them; otherwise they are not within it.'[108]

Buller J, in 1788, said that the private things are those on which there can be no navigation. Thus, it seems to be his opinion that those things on which there can be navigation are public things.

In defining 'ditches' Callis said that those which have a current come under this law but that those with no current do not. He says of *Fosdike* (a trench not a natural stream) that it is 'at this day a current and passage for Boats of small burthen in Winter, but in Summer

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[105] *The Reading of the Famous and Learned Robert Callis, Esq; Upon the Statute of 23 H. 8. cap. 5. of Sewers* (London: Thomas Basset, 2nd Edition, 1685), 77
[106] *ibid*, 80
[107] *ibid*, 80
[108] *Dore* v *Gray* (1788) 2 TR 358, 365

none at all'.[109] Thus he thought that a waterway may be legally and physically navigable at one season of the year but not navigable at another.[110]

In stating his definitions Callis said, 'A Stream is properly a current of Water running over the Level at random, and be not kept in with Banks or Walls.'[111] However earlier in the same lecture he had said, 'A River therefore is a running Stream, pent in on either side with Walls and Banks.'[112] Normally in the text he uses the word stream to mean a small river.

In his first lecture Callis emphasised the importance of navigation in the 'inriching of the Nation' and stated that the law 'giveth redress and remedy for the removing of such lets and impediments as are either hinderances to Navigation, or stops whereby the abundant Waters cannot have their free passage to the Sea.'.[113] Later he said, 'it is manifest that fresh navigable Streams are within these Laws.'[114] For Callis the word 'navigable' did not mean 'tidal'.[115]

At the end of his fourth lecture Callis said that he had been asked, 'Can the Commissioners of Sewers make an unnavigable River or Stream to become or to be made navigable by these Laws of Sewers.' This question concerning rivers not naturally navigable but made navigable at public expense was not considered by Bracton. Callis replied that if it would be necessary to remove private mills, weirs, stanks or kiddels which had been in place 'time out of memory' then an Act of Parliament must be obtained. He continued, 'But if none of these inheritable Incumbrances stand in the way, but that by the cleansing or deeper casting of the Chanel the same may be made navigable, Then I am of opinion, the Commissioners of Sewers have power to doe the same.'[116]

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[109] *The Reading of the Famous and Learned Robert Callis, Esq; Upon the Statute of 23 H. 8. cap. 5. of Sewers* (London: Thomas Basset, 2nd Edition, 1685), 81
[110] See Sub-section 1.6 above
[111] *The Reading of the Famous and Learned Robert Callis, Esq; Upon the Statute of 23 H. 8. cap. 5. of Sewers* (London: Thomas Basset, 2nd Edition, 1685), 83
[112] *ibid*, 77
[113] *ibid*, 29
[114] *ibid*, 76
[115] See section 1.6.1 above
[116] *ibid*, 270

It seems that the word navigable here has the two meanings[117] 'physically navigable' and 'legally navigable' and that the first implies the second. It seems that a person would not ask if the Commissioners could widen or deepen a river so that it could be used by boats without the implication that when the work was completed the public would have the use of it.[118]

From his definitions of rivers and sewers and from his answer to this question, it would seem that for Callis the rivers on which there was no public right of navigation were those which were not physically navigable and that there was a public right of navigation on those which were physically navigable.

2.11.3 Hale

Sir Matthew Hale was Lord Chief Justice from 1671 to 1676, the year of his death.[119] In 1787 Hargrave published a Collection of Tracts which included *A Treatise in Three Parts* which he claimed was written by Hale.[120] It seems that the work was not prepared for publication. The work has been highly praised by some.[121] The treatise has often been

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[117] See sub-section 1.6.1 above

[118] Hale was clear that if the river was made public by the Commissioners then there would be a public right of navigation on the river. See section 2.11.3 below.

[119] Gilbert Burnett, *The Life of Sir Matthew Hale* (Oxford: Clarendon Press, 1806)

[120] 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), 1
The manuscript was not in the hand-writing of Hale. (page 1) A manuscript of a draft of the second part of the treatise in the hand-writing of Hale has been found and printed. (Stuart A. Moore, *A History of the Foreshore* (London: Stevens & Haynes, 1888), 318 ff) However the authorship and authority of the treatise has been questioned. (*Hall's Essay on the Rights of the Crown and the Privileges of the Subject in the Sea-shores of the Realm*, 3rd Edition, contained in Stuart A. Moore, *A History of the Foreshore* (London: Stevens & Haynes, 1888), 670) Gould draws attention to the facts that the work is posthumous, there is no evidence that it was revised or intended for publication nor of the period of the author's life when the work was written. (John M. Gould, *A Treatise on the Law of Waters* (Chigago: Callaghan and Company, 1891), 35) It appears that the first three chapters of the First Part fall outside the subject of the title and are not in Hale's normal style in that the topics are not introduced or categorized in his normal way. Thus in the second part of the treatise Hale uses the first chapter to state 'the method of the discourse'. In the third part the first chapter is 'the order and method of the whole discourse', whereas in the first part there is no listing of the topics to be considered. Burnett's biography includes a list of works by Hale. This lists the same topics as are in the printed treatise but in a different order. (Gilbert Burnett, *The Life of Sir Matthew Hale* (Oxford: Clarendon Press, 1806) In 1813 Hargrave 'went out of his mind'. D.E.C. Yale, Editor, *Sir Matthew Hale's 'The Prerogatives of the King' Selden Society Volume 92* (London: Selden Society, 1976)

[121] 'The treatise of sir *Mathew Hale, De Jure Maris* has been so often recognized in this country, (United States of America) and in *England*, that it has become the text book, from which, when properly understood, there seems to be no appeal either by sovereign or subject, upon any question relating to their respective rights, either in the sea, arms of the sea, or private streams of water ….. In *England*, even on rights of

quoted, without question as to authorship, in court as a good authority on points of law.[122] However it is now apparent that the law as set out in the treatise did not accurately reflect earlier decisions of the courts in at least two cases[123] and has not been followed in at least four subsequent decisions.[124]

It seems that Hale used the phrase 'navigable rivers' for 'tidal rivers'[125] and 'private rivers' for 'fresh rivers'.[126] With reference to rivers on which there is a public right of navigation he uses at least five phrases:- 'public streams',[127] rivers on which there is 'common passage',[128] rivers which are 'common or publick for carriage of boats and lighters',[129] 'publick rivers'[130] and rivers made '*juris publici*'.[131]

It seems that his statement that 'the rivers of Wey, of Severn, of Thames, and divers others, …. are publick rivers'[132] should be read in the same way as his statement in another work that 'Amongst the highways the two great highways that cross the kingdom, sometimes called *duae viae*, sometimes *tres viae*, sometimes *quatuor viae*, were in a special manner under the king's care.' (Watling Street, Ermine Street and le Fosse)[133] That is, that while there have been historically some roads and rivers which have been considered to be more

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prerogative, the courts scan his words with as much care as if they had been found in *Magna Carta*; and the meaning, once ascertained, they do not trouble themselves to search any farther.' J. Jerwood, *Ex parte Jennings* 6 Cow. 518, 536 n. (a) (N.Y. 1826)

'With a mind beaming the effulgence of noonday, he sat on the bench like a descended god!' J Jerwood, *A Dissertation on the Rights of the Sea Shore* (1850).

Both quotations from:- Glenn J MacGrady, 'The Navigability Concept in the Civil and Common Law.' (1975) 3 FSULR, 511, 551

[122] 17 cases from English and American courts are listed in John M. Gould, *A Treatise on the Law of Waters* (Chicago: Callaghan and Company, 1891), 37, fn2.

[123] *Re* Scope of *Magna Carta c. 23*, page 9, *contra Chester Mill Case* (1610) 10 Co Rep 137b
Highway one inland town to another, page 9, *contra* Patent 3 Charles I, (3 January 1628)

[124] *Re* The extent of the realm, page 10, *contra R* v *Keyn* (1876) 2 Ex D 63
Right of fishing in the sea by grant, page 17, *contra Malcomson* v *O'Dea* [1863] X HLC 591
Towing up or down a river, page 85, *contra Ball* v *Herbert* (1789) 3 Term Rep 253
Land gained by accretion, page 28, *contra Gifford* v *Lord Yarborough* (1828) 5 Bing 163

[125] 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), 11

[126] *ibid*, 6

[127] *ibid*, 8

[128] *ibid, 8*

[129] *ibid*, 8 - 9

[130] *ibid*, 9

[131] *ibid, 9*

[132] *ibid, 9*

[133] D.E.C. Yale, Editor, *Sir Matthew Hale's The Prerogatives of the King* (London: Selden Society, 1976), 309 - 310

important than others and 'in a special manner under the king's care', there are a great number of other roads and rivers which are also subject to a public right of way or navigation.

Hale wrote in *De Jure Maris*, 'There be some streams or rivers, that are private not only in propriety or ownership, but also in use, as little streams and rivers that are not a common passage for the king's people.'[134] It is not clear whether he meant that the private rivers are not used by the king's people or whether they could not be used by the king's people because they were too small.
In a note to the navigability of the river Wye Hale wrote,

> (3) If a river bee not passable by boats or vessels of burthen, yet if it bee commonly passed by small boats or troughs, it is as to that purpose a common river as a foote way may be a common way as well as a Cartway. (4) The question whither a river bee a common or high streame or river is a question of fact and tryable by jury: and if any have commonly passed there ni (*sic*) those small boats, is an evidence of a common streame or river.'[135]

In this text the passage of boats is evidence of a common stream not a necessary requirement for the creation of a public right of navigation.

Hale also wrote,

> But if a person at his own charge makes his own private stream to be passable for boats or barges, either by making of locks or cutts, or drawing together other streams; and hereby that river, which was his own in point of propriety, become now capable of carriage of vessels; yet this seems not to make it *juris publicii*, and he may pull it down again, or apply it to his own private use. For it is not hereby made to be *juris publici*, unless it were done at a common charge, or by a publick

[134] 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), 8
[135] British Library, Additional Manuscripts 11052, ff 90

> authority, or that by long continuance of time it hath been freely devoted to publick use.[136]

Hale stated that if a riparian owner made a river physically navigable at his own expense, and it has not been dedicated to public use, then he could obstruct the river. This seems to imply that if the river was naturally navigable then he could not obstruct it because there was a public right of navigation on it.

Under the heading 'When a Watercourse is a Public Highway' Angell wrote in 1824, 'The excellent treatise of Sir Matthew Hale, …., has been universally regarded as of high authority on this subject. It also defines, with much precision, what constitutes a public river, and illustrates, with uncommon perspicuity, the distinction between such rivers as are exclusively private and those in which the community have an interest. ….. It appears then, that a river may be regarded in the three following points of view: - First, where it is altogether private, as in the case of shallow streams; secondly, where it is private property, but subject to public use; and thirdly, where the use and property are both public.'[137]

This seems to sum up the opinion of Hale. Shallow streams, physically not passable, are private. Larger streams and non-tidal rivers are private property but subject to public use unless they were made navigable at private expense and have not been dedicated for use by the public. On tidal rivers the use, and property of the soil, are both, in general, owned by the crown on behalf of the public. Hale's concept of the law was the same as that of Bracton except that he introduced the complication of rivers made navigable at private expense.

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[136] 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

[137] Joseph K. Angell, *A Treatise on the law of Watercourses* (Boston: Charles C. Little and James Brown, 2nd Edition, 1840), 199, 204

2.11.4 Lord Macclesfield

In the British Library there is a manuscript headed, 'Lord Chancellor Macclesfield's Notes concerning Rivers Navigation's &[138]. [139] This appears to be a draft of a reply to a letter from the Mayor of Derby asking if a Charter of King John provided evidence to establish that there was a public right of navigation on the river Derwent.[140] The document was probably written in 1719, but it refers to the law of earlier times.

Lord Macclesfield starts by stating,

> Magna Carta chap 23 supposes that it was the common law before that all public rivers were the King's Highways, and as such free for all his subjects. …. (the statute) is not introductive of a new law but declative of the old. ….. But private rivers belong'd intirely to the respective Owners, who might use them as they pleas'd & no strangers could come there without their consent.

In this Lord Macclesfield seems to differ from the Magna Carta, for it requires the removal of *kiddels* from the whole of England, not just from some rivers, the public rivers.

Lord Macclesfield after writing about the grant of rights by the king continues,

> It is impossible at this day except in cases of the very great and remarkable rivers to prove directly which were Publick rivers in Edward the first's time, but since Statutes have been made for pulling down Mills and other nuisances erected in such Rivers since; it is a strong evidence of a River being a publick River then, if it be capable of being navigated, and have on occasion been actually navigated, & have been kept free – from those nuisances which the Statutes[141] prohibited in such rivers. And such proof has been allowed in other cases.

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[138] Abbreviation for *etc*.
[139] British Library, Stowe MSS 818, ff 86-87
[140] See section 2.9 above
[141] Mentioned earlier but not in this extract, 'Stat de Lannis Chap 4, 1 Hen 4 chap 12, 12 Ed 4 chap 7'

It seems that Lord Macclesfield's interpretation of the law was that the quality of being a public river was established in Edward I's time.[142] Whether that quality depended on the use or the physical character of the river is not clear. Thereafter the only question for the courts to decide was which rivers had been public at that time. The evidence which would be considered would seem to be:- no obstructions, that the river was physically navigable and that the river has on occasion been actually used by boats.

2.12 Summary

The evidence relating to the time before the invention of the pound lock seems to indicate that Bracton and Britton correctly stated the law relating to the public right of navigation with regard to rivers that are naturally physically navigable. Callis and Hale provided the first opinions, which have been found, concerning rivers made navigable by man at public or private expense. If the river was made navigable at public expense then it would be a public navigable river, whereas if made navigable at private expense it would not become public.

It will be shown that the next major commentator, Kent, writing in 1828, adopted the same interpretation of the law.[143]

[142] The start of legal memory.
[143] See section 5.2 below.