

Chapter 3. The River Navigation Acts.

Cosmographers do agree that this Island is incomparably furnished with pleasant Rivers, like Veins in the Natural Body, which convey the Blood into all the Parts, whereby the whole is nourished, and made useful; but the Poet tells us, he acts best, qui miscuit utile dulce. (who combines utility with beauty)

The Speaker of the Commons to the Lords, 2nd March 1665

Journal of the House of Lords xi, 675

3.1 Introduction

In this dissertation ‘River Navigation Act’ is used to refer to an Act which authorised physical work on one or more named rivers so that boats of ‘considerable burthen’¹ could pass along the river or rivers, or pass more easily. The Acts are examined here to determine what information can be obtained from their texts as to the Common Law rights of navigation on these rivers before the date of each of the Acts.² The conclusion is that on most, if not all, of the rivers for which Acts were passed, there was a pre-existing public right of navigation.

It is unfortunate that some commentators have misunderstood the purposes of the these Acts. The author of the relevant passage in *Halsbury’s Laws of England* wrote, ‘Numerous statutes have been passed concerning public rights of navigation on particular rivers.’³ When the Acts are studied it is found that very few, if any, concern ‘the public rights of navigation’. Bonyhady wrote, ‘Parliament enacted a succession of private and local Acts which empowered undertakers either to make navigable existing rivers which were impassable or to construct canals.’⁴ Very few, if any, of the rivers were impassable to

¹ (1766) 6 George III c 94

² A list of the Acts is given at Appendix A. One Act has not been examined:- (1570) 13 Elizabeth I c 13 River Welland. It is considered that the study of this Act would not result in any material change to the conclusions reached here.

Some of the Acts were for making navigable a river and its branches or tributaries, eg. River Ivel (1757) 30 George II c 62 or a river and ‘the rivers and brooks running into the same’, eg. Rivers Wye and Lugg 14 Charles II c 14. Again it is considered that a study of these variations would not alter the conclusions reached here.

³ Halsbury’s Laws of England, Fourth Edition, Reissue Volume 49 (2) (London: Butterworths, 1997), para 742, fn 6

⁴ Tim Bonyhady, *The Law of the Countryside, The Rights of the Public* (Abingdon: Professional Books, 1987), 44

small boats before the Acts were passed. The phrase ‘make navigable’ as used here by Bonyhady needs to be qualified by the type of boat for which the river was to be made navigable.

The phrase ‘made navigable’ which is used in many of the Acts seems to be best understood as meaning ‘make into a navigation’, that is, ‘to alter the physical characteristics of the river so that barges or lighters can pass along them.’ Very few of the Acts state the size of boats which would be able to pass along the rivers after the work was completed.⁵ However it appears that, in general, the intention was that barges and lighters of the order of 24 to 70 tons would be able to use them. Each river would have had different limits for the maximum length, width and draft. Previously the rivers may, or may not, have been used by punts, dugouts, rowing boats and other craft of similar size, either for recreation or for carrying the produce of the countryside. In addition the rivers may have been used for the floating of wood to the towns.⁶

Other Acts have the title, ‘An Act for the improvement of the Navigation of the River(s)’⁷ or similar wording.⁸ It would seem that there was an earlier common law public right of navigation on all these rivers. Another Act has in its title the words, ‘for making *more* navigable’⁹ which seems to show that navigability was not a quality existing or absent from a river but rather that navigability was a matter of degree and that improved navigability meant that larger boats could pass along the river possibly for more months of the year.

The work authorised was to ‘cleanse scoure open enlarge or straighten to dig or cutt the Banks to make such and soe many new Cuts Trenches or Passages for Water’¹⁰ or similar works. In return for the cost of the work carried out, in general, the proprietors, commissioners or navigation authority were authorised by the Acts to charge a toll for the

⁵ (1766) 6 George III c 94 River Soar. Boats not exceeding 24 tons.

(1767) 7 George III c 96 River Swale. A lock must be at least 60ft x 15ft 4in x 4ft, ie to take boats up to about 70 tons.

(1790) 30 George III c 52 Sussex Ouse. Boats of less than 10 tons need special permission to pass the locks in summer.

(1678) 30 Charles II c 20 River Fal. Provision for different tolls according to whether the boat was of more or less than fifty tons.

⁶ See section 2.2 above.

⁷ (1813) 53 George III c 183 Rivers Bury Loughor and LLiede

⁸ See for example River Ivel (1757) 30 George II c 62

⁹ (1702) 1 Anne c 11 River Cham alias Granta

¹⁰ (1699) 11 William III c 22 River Larke.

use of the river. When a charge was made for the use of a river there was often also a duty to maintain the river.¹¹

There are about 73 rivers for which about 180 River Navigation Acts have been passed.¹² In general only the first Act for each section of a river can be expected to provide information about the common law rights of navigation on the river.¹³

3.2 The Statutes

After a River Navigation Act was passed there would have been a right of navigation on the river, normally for the general public. Balcombe LJ said with reference to the Act for the river Derwent,¹⁴ ‘It would stultify what we regard as the obvious scheme of the Act if the undertakers, having done the works at their own expense, could not reimburse themselves by levying tolls because riparian owners were free to deny merchants and carriers the right to use the river.’¹⁵ Assuming Balcombe LJ to have been correct, it follows that either the right of navigation existed before the River Navigation Act was passed or the right was created by the Act either explicitly or by implication. Examination of the text of the Act is likely to establish a right created explicitly. Implicit creation of the right is discussed below.¹⁶ Absence of either explicit or implicit creation implies a prior public right of navigation on the river.

In every River Navigation Act whenever something was taken or used compensation was payable except for the use of the river. In *Yorkshire Derwent Trust Ltd v Brotherton* Balcombe LJ said, ‘However warmly the riparian owners or some of them welcomed the Act, the fact is that the river was made navigable by statutory undertakers pursuant to

¹¹ *Blundy Clarke & Co Ltd v London and North Eastern Rly Co* [1931] 2 KB 334

¹² The section of a river to which an Act refers is ignored in this dissertation. For a few rivers a second Act was passed for a different section of a river eg. upstream, (1785) 25 George III c 100 River Arun, or downstream, (1727) 13 George I c 20 River Dun Navigation, (1791) 31 George III c 76 Sussex Ouse. However it appears that the study of the second Act provides no further relevant information about prior rights of navigation.

¹³ Later Acts might provide for higher tolls, (1744) 18 George II c 13 Beverley Beck; (1800) 40 George III c 54 Sussex Ouse; for appointing new commissioners (1751) 24 George II c 12 Great Ouse; or raising additional funds (1820) 1 George IV c 35 River Ure or similar matters.

There were also Letters Patent, or Charters, granted in the first half of the 17th century for improving navigation on certain rivers. It is considered that the study of these provides no information about the prior common law public rights of navigation.

¹⁴ (1702) 1 Anne c 14

¹⁵ *Yorkshire Derwent Trust Ltd v Brotherton* (1990) 61 P & C R 198, 208

¹⁶ See section 3.2.6 below

statutory powers and the riparian owners had (as we conclude below) no lawful choice but to acquiesce in the public use which followed.¹⁷ It seems that counsel never suggested to the court that the reason why no compensation was payable was because the right to use the river had existed from time immemorial on all rivers that were naturally physically navigable.

In *Halsbury's Laws of England* it is stated that,

Numerous statutes have been passed concerning public rights of navigation on particular rivers. An exhaustive classification of these statutes is impracticable, but very generally speaking they may be divided into:

- (1) statutes containing recitals of immemorial rights and prescribing penalties for interference with those rights;
- (2) statutes authorising works for the improvement of rivers subject to immemorial rights and authorising the charging of tolls;
- (3) statutes authorising works for the improvement of rivers not subject to immemorial rights and authorising the charging of tolls together with an express declaration of public rights of navigation;
- (4) statutes authorising works for the improvement of rivers not subject to immemorial rights and authorising the charging of tolls from which public rights of navigation may be inferred.¹⁸

To this list must be added:-

- (1a) statutes not containing recitals of immemorial rights but prescribing penalties for interference with those rights;
- (1b) statutes which authorised works for the improvement of rivers and which provided for the river to be used only by the proprietors. Two of these Acts also provided that the river could also be used by any person or persons in the same manner as previously.

¹⁷ *Ibid*, 207

¹⁸ *Halsbury's Laws of England, Fourth Edition, Reissue, Volume 49(2)* (London: Butterworths, 1997), para 742 fn 6

3.2.1 Statutes containing recitals of immemorial rights and no provision for tolls.

Category (1)

Category (1) includes Acts relating to the River Thames,¹⁹ Severn²⁰ and Exe²¹ and an Act of the Irish Parliament for the Rivers Sure, Nore, Barrow and Rye.²² On all these rivers there was an ancient public right of navigation. Since for the rivers in this category there is no provision for the payment of tolls, the number of rivers is, possibly not unexpectedly, small.

There are no rivers in this category which were either explicitly or implicitly made navigable by an Act of Parliament.

3.2.2 Statutes not containing recitals of immemorial rights and with no provision for tolls. Category (1a)

Acts for the Kentish Stour²³ and the Lee²⁴ may be placed in category (1a). The preface of the Act of 1514 relating to the Stour states that the city of Canterbury is impoverished and that conditions can not be improved without making the river physically navigable.²⁵ The Act authorised the carrying out of work from the ‘Town of great Chart’ to the common crane at Fordwich ‘whereby the concourse of the said Lighters and Boats should be letted.’ Finally the Act provides an indemnity for the persons authorised to carry out the work and for ‘every Person that shall be damnified’ to receive compensation.

The only relevant available law book readily available at the time was Bracton’s *De Legibus et Consuetudinibus Angliae*.²⁶ It is therefore not surprising that, even though part of the river was at the time not physically navigable, there is in the Act no statement as to who may use the river nor any provision that a public right of navigation was created by the

¹⁹ (1423) 2 Henry VI c 9

²⁰ (1503) 19 Henry VII c 18

²¹ (1539) 31 Henry VIII c 4

²² (1732) 5 George II c 11 (Ir)

²³ (1514) 6 Henry VIII c 17

²⁴ (1561) 13 Elizabeth I c 18

²⁵ ‘now of late in great ruin and decay, and the Inhabitants thereof impoverished, and many great Mansions in the same desolate; which ruin decay and desolation, of like cannot be reformed, ne emended, unless the River may be so deeped, enlarged and of Mills and Dams, and other Annoyances, be avoided, scowred, and taken away.’ (1514) 6 Henry VIII c 17

²⁶ *Henrici de Bracton de Legibus et Consuetudinibus Angliae*. See section 2.4 above.

Act. This right seems to have been assumed as was provided in *Bracton*. There is no provision in the Act for the payment of any tolls.

Two Acts were passed in the reign of Henry VI for cleansing and scouring the River Lee.²⁷ The second of these states that the Acts for maintaining the ‘great rivers’ relate to it.²⁸ Thus there was a prior public right of navigation on the river. There is ample evidence that the river had at times been obstructed.²⁹

In the reign of Elizabeth I an Act was passed for bringing the River Lee to the North-side of the City of London. In this Act there were the usual provisions for the work to be carried out and compensation to be paid. It is also provided, ‘That all the Queen’s Subjects, their Boats and Vessels, shall have free Passage through the said River, as well the new Cut as the old River, without Interruption or Molestation, by reason of or for his or their Passage, as in other common Rivers and Waters they lawfully may do.’ The Act provides that people using both the new cut and the old river should be free from molestation. These clauses almost replicate the clauses in the Digest on the same subject and may well be derived from Roman Law.³⁰

Thus there was a public right of navigation on the river Lea before the River Navigation Act relating to it was passed and there is no reason to assume that the Act relating to the river Stour implicitly created a public right of navigation.

3.2.3 Statutes providing for the proprietors to be sole users of the river. Category (1b)

The first Act for the River Wye and Lugg, passed in 1662, provided that the proprietors should be the only people to use the rivers.³¹ The Act also provides that people may use

²⁷ (1425) 3 Henry VI c 5, (1430) 9 Henry VI c 9

²⁸ (1352) 25 Edward III s 3 c 4; (1372) 45 Edward III c 2; (1399) 1 Henry IV c 12. See Section 2.6 above.

²⁹ See for example *Calendar of Patent Rolls*, 1292 – 1301, 547; 1354 – 58, 234; 1358 – 61, 409; 1361 – 64, 532, 547; 1364 – 67, 282; 1367 – 70, 345-346; 1377- 81, 474; 1381 – 85, 144; 1385 – 89, 472-473

³⁰ Digest 43. 14. 1, and 43. 14. 1. 1 As translated in Eugene F. Ware, *Roman Water Law* (St Paul Minnesota: West Publishing Co, 1905), 41, 42

³¹ ‘And be it further enacted and ordained by the Authority aforesaid That they the said Sir William Sandys, heires and Assignes for ever and no other shall have use and imploy Barges, Boates, Leighters or other vessels upon the said Rivers, Rivuletts, watercourses and new Channells and other the premises and every part of them, having first given satisfaction as aforesaid, and shall have, hold and peacable and quietly

the river as they had previously.³² It seems to be impossible to reconcile these two provisions in the Act. There was no provision for a toll to be paid. Nevertheless the wording of the Act implies that the river had previously been used for the transport of goods.

The Acts ‘for making navigable the rivers Stour and Salwerp’,³³ ‘for making divers rivers navigable’³⁴ and ‘for making the river Medway navigable’³⁵ all make provision for the proprietors to have a monopoly of the use of the rivers.

These four Acts were all passed in 1662 or 1664 just after the Restoration of the Monarchy in 1660.

The Act for the Wye was ineffectual.³⁶ The work on the Stour and Salwerp was soon destroyed by floods.³⁷ The only one of the ‘diverse rivers’ on which it appears that work was carried out was the river Itchin. This river had previously been made navigable by Godfrey de Lucy, Bishop of Winchester between 1189 and 1204. For this he was given the right to levy tolls.³⁸ So the river should perhaps be placed in category (2) or (3). No work was undertaken on the river Medway under the authority of the Act.³⁹

These Acts were all passed within four years of the Restoration and all but one were ineffectual. It is considered here that no reliable information can be gained from them about the general public right of navigation on rivers and that it would be wrong to

receive, demand, take and enjoy all and every the profits, Comodityes, benefits and advantages whatsoever, which shall or may from tyme to tyme or at all tymes hereafter bee made, arise grow or become due or payable for the carriage of Coles, Salt, Iron or any other Comodityes..... up or down the said rivers Any Law, Statute, usage or Custome to the contrary in any wise notwithstanding.’ (1662) 14 Charles II c 14

³² Provided also that it shall and may bee lawfull to and for any person or persons to use, occupy or employ any boate, barge, Leighter or other vessel upon the said River of Wye for the carrying, transporting or conveying of any passengers, goods or any other things whatsoever, as freely to all intents and purposes as is or hath beene used or accustomed. *ibid*

³³ (1662) 14 Charles II c 13

³⁴ (1664) 16 & 17 Charles II c 12

³⁵ (1664) 17 Charles II c 6

³⁶ See the preface to (1695) 7 & 8 William III c 14

³⁷ Joseph Priestley, *Historical Account of the Navigable Rivers, Canals and Railways of Great Britain* (London: Longman, Rees, Orme, Brown & Green, 1831), 596

³⁸ Charles Hadfield, *The Canals of South and South East England* (Newton Abbot: David & Charles, 1969), 160

³⁹ *Ibid*, 61

conclude that any of the Acts created a public right of navigation where none existed previously.

3.2.4 Immemorial rights and provision for tolls. Category 2.

Category (2) includes Acts for rivers in the form, ‘An Act for improving the navigation of the River’ This includes the rivers Witham,⁴⁰ Bourn Eau⁴¹ and Arun.⁴² This category also includes Acts for many rivers where the title of the first Act was in the form, ‘An Act for making navigable the River’ but where there were public rights of navigation on the rivers before the Act was passed. These Acts provide no problem concerning the authority to use the river. Parliament provided that the ancient public right of navigation would be retained but that, in return for the costs of making the improvements, a toll could be charged.

On none of the rivers in this category was a public right of navigation created.

3.2.5 No immemorial rights but an express declaration of public rights. Category (3)

Category (3) contains those Acts which contained ‘an express declaration of public rights of navigation’ but where there were no ‘immemorial rights’ on the river. All the rivers for which an express declaration was made are considered in this section.

There are two enactments in the Act relating to the river Kennet relating to the use of the river.⁴³

A

It is also hereby further Enacted and declared by the Authority aforesaid that the said River Kennett is and forever hereafter shall be esteemed and taken to be Navigable from the said Wharfe or Common Landing place at Reading aforesaid to the Town of Newbury aforesaid and that all the Kings Leige people whatsoever may have and Lawfully enjoy their free passage in along through and upon the said

⁴⁰ (1671) 22 & 23 Charles II c 25

⁴¹ (1781) 21 George III c 22

⁴² (1785) 25 George III c 100

⁴³ (1715) 2 George I s 2 c 24

River Kennett from the River of Thames to the town of Newbury with Boats Barges Lighters and other vessels and have and enjoy all necessary and convenient Libertys for Navigating the same without any obstruction whatsoever paying such Rates and Dutys as have been usually paid to the Owners of Occupyers of any Locks Turnpikes or other Engines

B

And be it further Enacted by the Authority aforesaid that it shall and may be lawfull to and for any person and persons whatsoever to carry and convey any Goods Wares Merchandizes and Commoditys in any Boat Barge or Vessell up the said River Kennett

In this dissertation the first enactment, A, and similar enactments, are considered to be a declaration that the river is a public navigable river, since the enactment refers to the river. The subject is the river. The clause is taken to be an ‘express declaration of public rights’ relating to the right of navigation. The second enactment, B, is considered to be a user enactment regulating who may use the river. This is not considered to be an ‘express declaration of public rights’ relating to the public right of navigation on the river.⁴⁴

Rivers Wye and Lugg

The Act of 1662 concerning the rivers Wye and Lugg was considered above.⁴⁵ The Act provided both that the use of the river was limited to the proprietors and their heirs and assignees and also provided that the river could be used as previously. In 1696 an Act was passed, ‘for making Navigable the Rivers Wye and Lugg in the County of Hereford’.⁴⁶ This contains an express declaration of public rights.⁴⁷

The preface to the 1696 Act stated that the 1662 Act provided that only the proprietors of the improvement Act should have the right to use vessels on the river. It seems that the express declaration was included to restore the previous rights of the public to use the river. Thus this river can be placed in Category (2).

⁴⁴ There are two similar clauses in (1720) 7 George I s1 c 10 relating to the river Weaver.

⁴⁵ See sub-section 3.2.3 above.

⁴⁶ (1696) 7 & 8 William III c 14

⁴⁷ That the said Rivers of Wye and Lugg be, and from henceforth be accounted, deemed and taken to be free and common rivers and streams, to and for all His Majesty’s subjects freely to make use of for the carrying and conveying of all passengers, goods wares and commodities, by boats barges lighters and other vessels whatsoever.

River Trent

In the Appeal court, in a case relating to the River Derwent, Balcombe LJ referred to the ‘River Trent Navigation Act 1699,⁴⁸ which conferred rights of free passage on “all the King’s Leige people whatsoever”’.⁴⁹ Bates wrote in his book *Water and Drainage Law*,

If the statute would make a river navigable that previously had been impassable
 . (It) might declare the public right, for example by providing that, “The said River Trent is and hereafter shall be esteemed and taken to be navigable from Gainsborough in the county of Lincoln up to the place called Wilden Ferry; and that all the King’s [subjects] might have and lawfully and rightfully enjoy their free passage in, along and through and upon the said river.....”⁵⁰

Both Balcombe LJ and Bates seem to have been misled. Some of the places on the River Trent going upstream are the River Humber, Gainsborough, (a main port at that time,) Nottingham, Wilden Ferry, Burton upon Trent. The 1699 Act authorised the making navigable of the section from Wilden Ferry to Burton upon Trent. The quoted clause referred to the section of the river from Gainsborough to Wilden Ferry. It seems that the clause was included to confirm that there was a public right of navigation on the river below the part made navigable. The fact that this was an ancient right was confirmed in a case heard in 1738 relating to a claim for payment of tolls.⁵¹

Rivers Kennet and Weaver

The Acts for making the River Kennet navigable⁵² and for making the River Weaver navigable⁵³ both contained express declarations of public use and also statements that there had previously been a public right of navigation on, at least sections of, the rivers.⁵⁴ These rivers are therefore in Category (2)

⁴⁸ (1699) 10 & 11 William III c 20

⁴⁹ *Yorkshire Derwent Trust Ltd and another v Brotherton and Others*, (1990) 61 P & CR, 208

⁵⁰ J. H. Bates, *Water and Drainage Law* (London: Sweet & Maxwell, 1990 revised to 1997) para 13.29

⁵¹ *Nottingham Corporation v Lambert* (1738) 1 Burr 292

⁵² (1715) 2 George I s 2 c 24

⁵³ (1720) 7 George I s 1 c 10

⁵⁴ River Kennet, ‘paying such Rates and Dutys as have been usually paid to the Owners or Occupiers of any Locks Turnpikes or other Engines in upon and adjoining to the said River Kennett’

River Weaver, ‘And whereas the River Weaver, at certain Tides and Seasons, hath been heretofore, and is Navigable from Frodsham-Bridge to a Place called Pickerens-Boat.’

River Shannon

The River Shannon has been used by boats since ancient times. Turgeis maintained a battle fleet on Lough Ree and a great naval battle took place there in AD 968.⁵⁵ An Act for the Improvement of the Navigation of the River Shannon⁵⁶ contains an express declaration of public rights of navigation. This is a copy of a provision of an Act of the Irish Parliament partly being, ‘for easing and dispatching the Inland Carriage and Conveyance of Goods from one Part to another within this Kingdom.’⁵⁷ There had been an ancient right of navigation on this river and so the Act did not create a new public right of navigation. This river was therefore in Category (2).

River Wey

An Act of the Parliament of the Interregnum authorised the ‘making navigable of the River of Wye’.⁵⁸ The validity of all the Acts of the Interregnum were questioned after the Restoration. An ‘Act for settling and preserving the Navigation of the River Wey’⁵⁹ was passed in 1670 to settle this question. This act provides for the proprietors and other people who have their licence to use the river and declares that the river is ‘declared to be to all intents and purposes a Navigable River.’ This was not a new right. Again, this river is in Category (2).

River Idle

As stated above⁶⁰ there was public right of navigation on the river Idle prior to the passing of the 1720 Act subject to payment of a toll to Thomas Lister. Again this river is in Category (2).

⁵⁵ V.T.H. & D.R. Delany, *The Canals of the South of Ireland* (Newton Abbot: David & Charles, 1966), 14

⁵⁶ (1816) 2 & 3 Victoria c 61

⁵⁷ 2 George I c 14 (Ir)

⁵⁸ C.H. Firth and R.S. Rait, *Acts and Ordinances of the Interregnum 1642-1660 Vol II* (London: His Majesty’s Stationery Office, 1911), 514

⁵⁹ (1671) 22 & 23 Charles II c 26

⁶⁰ See section 2.10 above.

Rivers Don,⁶¹ Dane,⁶² Worsley Brook⁶³ and Soar.⁶⁴

The Acts for these rivers provide for an ‘express declaration of public rights’ on each of the rivers. No evidence has been found that they were used for the transport of goods before the passing of each Act.

River Douglas

The Act for making the River Douglas navigable⁶⁵ appears to be in a unique form. It provided that the river was to be made navigable and that if it was not made navigable within the space of eleven years then the Commissioners could appoint another person or persons to make the river navigable. It is also provided that ‘the river is and shall always be taken to be navigable’.⁶⁶ It seems that the word ‘is’ is in the present continuous tense and that the word ‘navigable’ means ‘is subject to a public right of navigation.’ Thus the clause appears to have been included *ex abundanti cautela*.⁶⁷ It confirms that there had previously been a public right of navigation on the river and that the right remained.

The Summary show that there five rivers in Lancashire and Cheshire for which Acts were passed in 1720 or 1723 which contain an express declaration of public rights. It seems likely that one parliamentary draughtsman thought it convenient to include the clause, whereas most other draughtsmen have thought it not necessary.

Summary of all Acts containing an express declaration of public rights.

1662	Wye and Lugg	Returned previous right
1670	Wey	‘Settling and preserving the navigation’
1699	Trent	Different section of river

⁶¹ (1726) 12 George I c 38

⁶² (1720) 7 George I c 17

⁶³ (1723) 10 George II c 9

⁶⁴ (1766) 6 George III c 94

⁶⁵ (1720) 6 George I c 28

⁶⁶ ‘is, and for ever hereafter shall be esteemed and taken to be Navigable from to And that all the Kings Leige People whatsoever may have and lawfully enjoy their free Passage in, along through, and upon the said River Douglas With Boats, Barges, Lighters and other Vessels, and also all necessary and convenient Liberties for Navigation the same without any Let, Hinderance or Obstruction from any Person or Persons whatsoever, paying such Rate and Duty’

⁶⁷ ‘From an abundance of caution.’

1715	Kennet		Previously navigable
1720	Weaver	N/W	Previously navigable in part
1720	Dane	N/W	
1720	Douglas	N/W	
1720	Mercy and Irwell	N/W	Previously navigable in part
1720	Idle		Previously navigable
1723	Worsley Brook	N/W	
1726	Don		Canalised
1766	Soar		Canalised
1816	Shannon		Previously navigable

3.2.6 No immemorial rights but right implied by an Act. Category (4).

Lord Oliver stated, 'There is, however, a presumption that except in so far as they are clearly and unambiguously intended to do so, statutes should not be construed so as to make alterations in the common law.'⁶⁸ Thus, in general, if a statute does not state unambiguously that it changes the common law, the law is the same after the statute was passed as it was before. It follows that, if a statute does not state unambiguously that it changes the common law, the law relating to a particular river would be the same before the statute was passed as it was after.

⁶⁸ Quoting *Leach v Rex* [1912] AC 305, 310 in *A-G ex rel Yorkshire Derwent Trust Ltd v Brotherton* [1992] AC 425, 439

Thus, in general, if there was no common law public right of navigation on a river before a Navigation Act was passed and the Act did not unambiguously create such a right, then there would be no such right after the Act was passed.

Appendix A shows that for most ‘rivers made navigable’ there is evidence that the river was used for the transport of goods before the Act was passed. It is often now impossible to say whether the right of navigation was a public or a private right.

The position with regard to other rivers is well expressed by Boyes and Russell when they wrote about the River Stour, ‘As with other rivers it may well have carried in earlier times a certain amount of local traffic without there being any formal or legal arrangements but in the absence of known records it is impossible to determine its extent.’⁶⁹

Even within the text of the Acts there can be confusion as to whether the river was physically navigable before the passing of the Act. The preface to the ‘Act for makeing the River Larke alias Burn Navigable’⁷⁰ states that the river is ‘utterly impassable for Boats Lighters or other Vessells’. Yet later in the Act it is stated that William Gage and others have ‘heretofore when there was Occasion carried and conveyed the Hay and other Product of the their said Grounds out of the same by Boat upon the said river.’⁷¹

In a case relating to the River Derwent it was held in the Chancery Division that there had been no public right of navigation on the river prior to 1702.⁷² Thus the ‘Act for making the River Derwent Navigable’⁷³ comes into Category (4). Balcombe LJ said, We readily acknowledge the need for extreme caution in interpreting, and even more implying terms into, an early eighteenth century statute.’⁷⁴ This Act consisted of four pages of printed text. Such an implication, against the standard rules for Statutory Interpretation, would normally seem to be inappropriate in the longer Acts.

⁶⁹ John Boyes and Ronald Russell, *The Canals of Eastern England* (Newton Abbott: David & Charles, 1977), 78

⁷⁰ (1700) 11 & 12 William III c 22

⁷¹ *ibid*, s 16

⁷² *Yorkshire Derwent Trust Ltd and Another v Brotherton and Others* (1988) 59 P & CR 60

⁷³ (1702) 1 Anne c 20

⁷⁴ *Yorkshire Derwent Trust Ltd and Another v Brotherton and Others* (1988) 59 P & CR 60, 207

Thus it appears to be impossible to demonstrate that a public right of navigation has been created by implication on any river, except on the river Derwent where Vinelott J determined that it had been created in this way.

3.3. Comparison with the Turnpike Acts

The River Navigation Acts may be compared with the Turnpike Acts. In almost every one of these Acts there was a clause clearly and unambiguously stating that any land which was to become a part of the highway was to be ‘henceforth deemed and taken to be part of the publick and common highway’. This difference between the Turnpike Acts and the River Navigation Acts is briefly considered in this section.

Until about 1650 the maintenance of the roads was the responsibility of the parishes. Subsequently, a few Acts were passed making the Justices of a whole County in Quarter Sessions responsible for certain roads. However from 1706 onwards 4,491 separate Acts of Parliament were passed creating or continuing Trusts for the making, improvement and maintenance of roads.⁷⁵ These improved roads were composed of three parts, the original road, strips of land on one or both sides of the road, which were purchased so that the road could be widened, and land purchased so that the road could take a new line to eliminate corners or to ease the gradient.⁷⁶ Also Acts were passed for building bridges. Almost invariably these Acts contained a clause which was an express declaration of public rights. It might be in the form, ‘and the same shall to all Intents and Purposes whatsoever become and be, and be deemed and taken to be, a publick and common highway’.⁷⁷ Or it might be in the form, ‘shall be deemed and taken to be Part of the Road by this Act intended to be made and repaired, and shall be used as, and for a public Road or Highway’.⁷⁸ The exact wording differs slightly from Act to Act but the public right of passage is almost always clearly stated.⁷⁹

⁷⁵ W.T. Jackman, *The Development of Transportation in Modern England, Third Edition* (London: Frank Cass & Co Ltd, 1966), 743

⁷⁶ Sidney and Beatrice Webb, *English Local Government, The story of the King’s Highway* (London: Longmans, Green and Co, 1913), 114 - 116

⁷⁷ (1791) 31 George III c 94, s 9

⁷⁸ (1792) 32 George III c 117, s 25

⁷⁹ Similarly in the Oxford Mileways Act, which gave authority for building temporary bridges, it is provided that they were, ‘to be made use of by all Passengers with Carriages and Cattle, as a publick Highway until the same is completed.’ (1728) 2 George III c 19 In an Act for building permanent bridges it is stated,

These Turnpike Acts may be compared with the River Navigation Acts where there are few, if any, Acts, which have been found, which may have expressly created a new public right of navigation, on a river previously physically navigable, for the whole of the section of the river which was to be improved.

In all the Turnpike Acts which have been studied, the land which had previously been part of the highway was taken without payment. Compensation was paid for the new land. In the Navigation Acts compensation was paid for new land which was required for cuts, locks, tow paths and other works. No compensation was paid for the river. It seems that the river was like the original highway, that is, previously available for public use.

It is suggested that the difference between the Turnpike Acts and the River Navigation Acts implies that there was a prior public right of navigation on all the rivers which were physically navigable, which made it unnecessary to declare a new public right of navigation or for payment to be made for the use of them.

3.4 Summary

The standard of proof required in a case concerning the existence of a public right of navigation is the civil standard that on the balance of probabilities there is more likely to be such a right as opposed to there not being such a right.

It has been shown that there are few, if any, rivers on which there may have been a public right of navigation expressly created. All the explicit statements may have been included for the avoidance of doubt, as was certainly the case in some Acts. No evidence has been found which would indicate that there was no prior public right of navigation on any river where the river was previously physically navigable.

However in the Act for the River Swale there is a very significant proviso,

‘Cardiffe Bridge shall henceforth be reputed and adjudged to be a common and publick Bridge.’ (1702) 1 Anne s 1 c 18

Provided also, and it is hereby enacted and declared, That nothing in this Act contained shall prejudice or impede the Navigation up any River or Brook running into the River Swale, between its Junction with the River Ure and Morton Bridge, (the section made navigable) so as the same be no Obstruction to the Navigation of the said River Swale.⁸⁰

The river Swale was one of the last rivers to be made navigable. Duckham describes it as a narrow, swift flowing river.⁸¹ If Parliament saw fit to protect the navigation on the tributaries of the river Swale it seems it would be very unwise to assume that there was any other river which was never used for navigation.⁸²

The Act relating to the river Swale is printed on 60 pages. The Act relating to the river Derwent⁸³ was printed on three and a half rather larger pages. The difference in the length of the Acts may be considered relevant in considering why certain clauses were contained in some Acts and not others.

In no Act is there provision for payment to the riparian owners of compensation for the entry of the public onto property which was previously private.

It seems that there is no evidence from the wording of these Acts, combined with the evidence of use, that there was no general public right of navigation on all non-tidal rivers which were previously physically navigable. Rather, it is submitted, the evidence shows, on the balance of probabilities, that there was a public right on all such rivers before the date of the passing of the relevant Acts. Thus the provisions relating to a public right of navigation are considered to be confirmatory and not creative of a new right.

⁸⁰ (1767) 7 George III c 96

⁸¹ Baron F. Duckham, *The Yorkshire Ouse* (Newton Abbot: David & Charles, 1967), 67

⁸² The proviso does not indicate whether the right of navigation on the tributaries was public or private.

⁸³ (1702) 1 Anne c 14. See section 6.5 below