Chapter 4. Tidal Creeks and Rivers.

What are navigable waters? Will it be proper to adopt …. An etymological derivation from 'navis', and to designate, as navigable waters, those only on whose bosoms ships and navies can be floated? Shall it embrace waters of which sloops and shallops, or river craft, can swim; or shall it be extended to any water on which a bateau or a pirogue can be floated? These are all ….navigable in some sense.

Jackson v The Steamboat Magnolia 61 US (20 How) 2196, 320
Daniel J. dissenting.

4.1 Introduction

There are two reasons for considering tidal creeks and rivers. First, there are many rivers where the lower reaches would be tidal if the tide was not stopped artificially by a sluice or weir.[1] The present existence of a public right of navigation on the section of the river which was at one time tidal may depend on whether there was such a right before the obstruction was built.[2] Second, Woolrych in the first treatise explicitly on the law of waters[3] relied on the cases which had been decided concerning tidal creeks and rivers to develop his interpretation of the law relating to non-tidal rivers.[4]

In general there is a public right of navigation on tidal waters.[5] In this chapter consideration is given as to whether there are waters which are tidal and where a boat may pass but where there is no public right of navigation. It is convenient to consider the cases in reverse historical order.

4.2 Artificial Creeks.

If a person in his own land digs a clay-pit, gravel-pit or makes any other excavation, at his own expense, and then that pit becomes linked to tidal water, the pit will fill with water from the tidal river or the sea and the level of the water in the pit will rise and fall with the

[1] In general the water of a river flows over a weir and under or through a sluice.
[2] See section 4.6 below.
[3] Humphrey W. Woolrych, *A Treatise on the Law of Waters and of Sewers* (London: Saunders and Benning, 1830)
[4] See section 5.3 below.
[5] *Evans* v *Godber* [1974] 3 All ER 341, 349

tide. Thus the water in the area where the pit had been will be tidal. Provided the owner of the land excludes the public from this area, such water will not be subject to a public right of navigation.[6]

This proposition seems to be supported by only one reported case, an appeal to the Privy Council from the Court of the Appeal of the Straits Settlements. Lord Wenbury in giving judgement stated that an instance might be a boathouse or boat harbour.[7] The Sovereign Harbour Marina near Eastbourne was created in this way.[8]

4.3 Tidal Non-navigable Creeks

The foreshore[9] is owned by the Crown[10] except in those places where the ownership has passed to an individual by grant or adverse possession.[11] Where this has happened the grantee takes, in general, subject to the public right of navigation.[12] Where there was a tidal non-navigable creek the bed of which was owned by an individual and at his own expense he scoured the bed of the creek so that it became navigable, then it appears that, if he excluded the public from the creek, there might be no public right of navigation in that creek.[13]

Again there is only one reported case which has been found concerning this proposition. In the case of *Rose* v *Miles*[14] the defendant had obstructed the entrance to a creek with a barge and claimed that he was justified in doing so because the creek was private. The defendant failed partly because the creek had been used by boats cutting reeds and by pleasure-boats and partly, it seems, because it was not proved that the creek was private and/or not physically navigable before it was scoured.

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[6] *Sim E Bak* v *Ang Yong Huat* [1923] AC 429
[7] *ibid*, 433
[8] The harbour is now regulated under the Eastbourne Harbour Act 1980 c xxxix and Eastbourne Harbour Act 1988 c xxi
[9] The foreshore is the land lying between mean high tide mark and the mean low tide mark. In Scotland the boundaries are set, possibly more sensibly, by the mean spring tides.
[10] *Malcomson* v *O'Dea* (1863) 10 HLC 592
[11] *Bulstrode* v *Hall* (1663) 1 Sid 148, 149
[12] *Gann* v *Free Fishers of Whitstable* [1864-65] 11 HLC 192, 208
A-G v *Parmeter* (1811) 10 Price 378, 401
Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (London: J. Butterworth & Son, 1820), 143
[13] *Rose* v *Miles* (1814) 5 Taunt 705, (1815) 4 M&S 101 (Note: the names of the plaintiff and defendant are reversed in the second report.)
[14] *ibid*

4.4 Navigable Creeks and Tidal Rivers. Ownership.

Prior to 1774 the authorities held that creeks and arms of the sea were subject to a public right of navigation whether the soil of the land under the water was owned by the crown on behalf of the people or by an individual.[15]

In 1774 Lord Mansfield in giving judgement said, 'There are many places into which the tide flows that are not navigable rivers.'[16] This remark has been repeated in courts[17] and commentaries[18] but it is suggested here that the original remark was incorrect and probably not intended to be taken seriously.

Of this type of remark Allen wrote, 'Judges, if in their right minds, do not indulge in casual irrelevancies, and even if they do, such *dicta*, which are *obiter* in the most literal sense, do not find their way into reports.'[19]

Baker referred to Lord Mansfield as 'one of the boldest of judicial spirits'.[20] Fifoot wrote of him that 'No fiction was to be challenged in the exercise of its proper function.'[21] Allen wrote, 'A reformer he was, and sometimes his reforming zeal outran the restraints of time and circumstance.'[22] Lord Denman referred on one occasion to his 'uncalled-for remark'.[23]

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[15] 'Chescun ewe que flowe & reflowe est appell bras de mere cy tant anant que il flowe, *22. ass. 93. Da. Piscar. Ban. 56.* tiel river participate del nature del mere & est dit brache del mere tant avant que il flowe.' (Henry Rolle, *Un Abridgment des Plusieurs Cases et Resolutions del Common Ley* (London: A. Crooke and others, 1668), 2. 169, para 5) That is, 'Every tidal water which flows and reflows is called an arm of the sea as far as it flows, …such a river participates of the nature of the sea & is called branch of sea as far as it flows. …'

'That the people have a publick interest, a *jus publicum*, of passage and repassage with their goods by water, and must not be obstructed by nuisances or impeached by exactions, as shall be shewn when we come to consider of ports. For the *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the king's subjects; as the soil of an highway is, which though in point of property it may be a private man's freehold, yet is charged with a publick interest of the people, which may not be prejudiced or damnified.' Hale, Lord Chief-Justice. *De Jure Maris.* Contained in Hargrave, Francis. Editor. *A Collection of Tracts relative to the Law of England* (London: T. Wright, 1787), 36

See also *Sir Henry Constable's Case* where it was held that the Admiralty has jurisdiction of everything done on the water between the high water mark and the low water mark.

[16] *Mayor of Lynn* v *Turner* (1774) 1 Cowp 86, Lofft 556

[17] *R* v *Montague* (1825) 4 B&C 598, 601

Miles v *Rose* (1814) 5 Taunt 705

[18] William Howarth, *Wisdom's Law of Watercourses, 5th Edition* (Crayford: Shaw & Sons Limited, 1992), 133

Halsbury's Laws of England, Fourth Edition, Reissue (London: Butterworths, 1997), para 722 fn 6

[19] Sir Carleton Kemp Allen, *Law in the Making 6th Edition* (Oxford: Clarendon Press, 1958), 253

[20] J.H. Baker, *An Introduction to English Legal History, 3rd Edition* (London: Butterworths, 1990), 229

[21] C.H.S. Fifoot, *Lord Mansfield* (Oxford: Clarendon Press, 1936), 73

[22] Sir Carleton Kemp Allen, *Law in the making, 6th Edition* (Oxford: Clarendon Press, 1958), 207

Lord Mansfield said, 'The most desirable object in all judicial determinations, especially in mercantile ones, (which ought to be determined upon natural justice, and not upon the niceties of law,) is, to do substantial justice.'[24]

The facts of *The Mayor of Lynn* v *Turner*, in which Lord Mansfield made the remark, were essentially simple. Turner sued the Corporation of Lynn Regis in an action upon the case for not repairing and cleansing a certain creek, called Dowshill Fleet, into which the tide was accustomed to flow. It is known that Turner had granaries adjacent to the fleet.[25] It was established that the Corporation had in the past regularly scoured the river and it seems that the court accepted the allegation they were therefore bound by prescription to continue to repair it.

However there was a procedural problem. Where a public nuisance blocked a public port or public haven action must be taken by indictment.[26] However in 1774 a corporation could not be charged with nuisance and was not indictable for nuisance.[27]

Cowper reported that counsel for the Corporation claimed that 'the locus in quo is a navigable river …. If so the injury complained of is not the subject of an action but an indictment.'[28] Lofft reported counsel as saying,

> A river certainly is as the King's highway. And so it is laid down in Hawkins.
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> …. Every navigable river, so far as the sea flows, is a Royal river, and therefore common to all.
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> And vide Salkeld, [I suppose *Smith* v *Kemp*]

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[23] *O'Connell* v *R* (1844) 11 Clark & Finnelly 155, 373
[24] *Alderson* v *Temple* (1768) 4 Burr 2235, 2239
[25] William Richards, *The History of Lynn, Volume 2* (Lynn: Whittingham, 1812), 953
[26] 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, 84 – 88
Mayor of Colchester v *Brooke* (1845) 7 QB 339, 377
'The King is entrusted with the care of preventing and reforming public nuisances in ports and havens; the prosecutions of them are in his name.' Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (London: J. Butterworth & Son, 1820), 174
[27] 'Quaere, how this action was brought? For a corporation cannot be charged with a nusance: and indeed, probably, the ground of the judgment might be in part, that the corporation, as being such, was not indictable of nusance; and therefore the plaintiff must have his private remedy.' (1774) Lofft 558 fn
[28] 1 Cowp. 86

> The plaintiff, therefore, has no particular right, in preference to other subjects. If this is a public highway, the plaintiff ought to have shewn some particular damage to himself, to justify his action. And for a common nuisance a man shall not have a private action.[29]

Lofft reports Lord Mansfield as saying,

> How do you prove this a navigable river? The water runs here into many people's cellars, but is that a navigable river? I don't see it's any where stated to be a navigable river. *Ex facto oritur jus*. Shew me upon the pleading this is a navigable river.
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> They state, that from time immemorial they have been used to repair; which presumes an obligation to repair.
> This is corporation by prescription: and by the same prescription they are bound to do these things; and it might be the original condition of their existence. They must have had their existence as a corporation by charter; and prescription is evidence of what was in the charter, and does not now appear.[30]

There are several strange points in Lord Mansfield's words. The relevance of water running into people's cellars appears to be jocular. The fact that the absence from the pleading that the river was public was enough to establish that it was private differs from his opinion in *Carter* v *Murcott* where he said that 'the presumption is against him, unless he can prove such a prescriptive right.'[31] No earlier reported case has been found in which it was claimed that there could be a tidal creek over which there was no public right of navigation. Yet Lord Mansfield was willing to accept that the absence of a claim that the water was public was enough to establish that it was private.

Lord Mansfield's statement that the Corporation of Lynn was 'a corporation by prescription' was incorrect. The Corporation was governed by a charter or letters patent

[29] Lofft 556
[30] Lofft 557
[31] *Carter* v *Murcot* (1768) 4 Burr 2162, relating to private fishing rights in tidal waters.

granted by Henry VIII.[32] In the report of the case no mention is made of the fact that the Corporation could ' plead and be impleaded, answer and to be answered, defend and might be defended, before whatsoever Justices or Judges ….. and in all and singular actions, causes, matters, plaints, and demands, of what kind soever they should be, or nature, in the same manner as the other liege people of the said late King …'[33]

The responsibility for cleansing the fleet was not 'the original condition of their existence'.[34]

Dowshill Fleet lay at the mouth of the river Gaywood. Since the early 13th century it had been a part of the port of King's Lynn and canals were constructed off the fleet to enable seagoing boats to moor adjacent to traders' warehouses. There is no evidence that Dowshill Fleet was a private creek apart from the fact that it was not stated in the pleadings for *The Mayor of Lynn* v *Turner* that is was public.

It is suggested here that the fleet was in 1774, and always had been, public and that Lord Mansfield only stated that 'there are many places into which the tide flows that are not navigable rivers' so that he could give what he, and the other two judges, considered to be justice in one particular case.

In this case the court assumed that there might be no public right of navigation in the creek because it might be privately owned. No evidence has been found that anyone else has claimed to own a tidal creek which had been historically physically navigable but on which there was no public right of navigation.

4.5 Navigable Creeks and Tidal Rivers. Physical Characteristics.

In the case of *R* v *Montague*[35] Bayley J when considering whether there had been a public right of navigation in a tidal channel said,

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[32] *The Case of the Mayor and Burgesses of Lynne Regis* (1613) 10 Co Rep 119b, 120a and 122b
[33] *ibid*, 121b
[34] See Vanessa Parker, *The Making of Kings Lynn* (London and Chichester: Phillimore, 1971)
H.W.E. Davis, Editor, *Regesta regum Anglo-Normannorum, 1066-1154 Volume 2* (Oxford: Clarendon Press, 1913-69), 55
[35] *R* v *Montague* (1825) 4 B&C 598

> If it is a broad and deep channel, calculated for the purposes of commerce, it would be natural to conclude that it has been a public navigation; but if it is a petty stream, navigable only at certain periods of the tide, and then only for a very short time, and by very small boats, it is difficult to suppose that it ever has been a public navigable channel.[36]

The case had arisen because the Corporation of London had instructed Montague to cut down an embankment across Yantlet Creek. Many years before a road had been built on the embankment but when the embankment was cut down it was found that there had been a bridge large enough for boats to pass through. There was no evidence adduced as to the time when the bridge was erected nor when it fell into decay. In giving judgement Holroyd J and Littledale J both doubted whether there had ever been a public right of navigation in Yantlet Creek, but for the purposes of the case were willing to accept that there had previously been such a right. However they both held that the passage of boats had been stopped by natural causes and so the public right of navigation was legally determined. Bayley J also stated that, 'if the case was sent down for trial again, the jury would be bound to find either that there never was a public navigation through the *locus in quo*, or that it had been determined by some lawful means.' His statement quoted above was thus *obiter dicta*.

The *dicta* of Bayley J was rejected by Lord Widgery CJ when he quoted with approval, 'The public right of navigation in tidal waters is a right given by the common law which extends to the whole space over which the tide flows and is not suspended when the tide is too low for vessels to float.'[37] The *dicta* was also rejected by Sir James Hannen, 'The rights of all vessels are not co-extensive. It may be reasonable and right that a small vessel should go up to the farthest point she can reach in order to give the public the benefit of the public way.'[38] The *dicta* was also rejected by Lord Denning, 'There are many cases where people with canoes have a right to take their canoes up and down a river. They certainly have such a right in tidal waters.'[39] Lord Denman said, 'The right of soil in arms of the sea and public rivers, ….. must in all cases be considered as subject to the public right of

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[36] *ibid*, 602
[37] *Evans* v *Godber* [1974] 3 All ER 341, 349 quoting *Halsbury's Laws of England 3rd Edition Vol 39 p 534, para 719*
[38] *Octavia Stella* (1887) 6 Asp MLC 182
[39] *Rawson* v *Peters* (1972) Transcript of the Shorthand Notes. A.E. Telling and Sheila Foster, *The Public Right of Navigation* (Severn-Trent Water Authority, Project PFA 12, 1978), 96, 99

passage, however acquired: and any grantee of the Crown must of course take subject to such right.'[40] More recently Park J said, 'There is a right to navigation over all tidal waters, even where at certain states of the tide the water may disappear from the particular place where the navigation is taking place.'[41,42]

It is suggested here that the statement by Bayley J quoted above did not correctly state the law. Bayley J had quoted only Lord Mansfield's statement that there is not a public right of navigation on all tidal rivers. Lord Mansfield had denied the existence of the right because the river might be private. Bayley J denied its existence because of the physical state of the creek. It is submitted that the public right of navigation which had existed on all tidal waters can not be extinguished by the statement of one judge, especially when it has so often been rejected. As Allen wrote, 'It is remarkable how sometimes a *dictum* which is really based on no authority, or perhaps on a fallacious interpretation of authority, acquires a spurious importance and becomes inveterate by sheer repetition in judgements

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[40] *The Mayor of Colchester* v *Brooke* (1845) 7 QB 339, 374

[41] *Iveagh* v *Martin* [1960] 2 All ER 668, 683

[42] See also:- 'The doctrine laid down by Heineccius is that now generally received by the best writers. He maintains that the ocean is incapable of appropriation, but that parts of the ocean and narrow seas may be appropriated, subject to the right of navigation.' *Gammell* v *H.M. Commissioners of Woods and Forests* (1859) 3 Macqueen 419, quoted in Geoffrey Marston, *The Marginal Seabed* (Oxford: Clarendon Press, 1981), 70

'It may, we think, be admitted that there is paramount right of navigation in the sea, in arms of the sea, and in navigable rivers, and that any grant by the crown of any portion of the bed of the sea, or of the soil of arms of the sea or of navigable rivers, must be subject to this paramount right (of navigation).' Mellor J. *Free Fishers of Whitstable* v *Gann* (1863) 13 CB (NS) 853, 857 Reversed on appeal on another matter.

'The right to the soil of the *fundus maris* within three miles below low-water mark, and to the fishery in it, though granted before Magna Carta, is undoubtedly subject to the rights of all subjects to pass in their vessels in the ordinary and usual course of navigation, and to take the ground there, or to anchor there at their pleasure, free from toll, unless the toll is imposed in respect of some other advantage conferred upon them, or at least on the public.' Per Lord Wensleydale. *Gann* v *Free Fishers of Whitstable* (1865) 11 H L Cas 192, 213 – 214

' ….. we have here at issue, I think, in the first place, that the *solum* or *fundus* of the deep sea – that is, not only the part between high-water and low-water mark, but the sea within such a line as may be reasonably drawn in connection with the shores – belongs in property to the Crown, at least within narrow limits near the shore, ….... There are rights held by the public that are burdens upon it so far. There is the right of navigation.' Per Lord Neaves. *Duchess of Sutherland* v *Watson* (1868) 6 M 199, quoted in Geoffrey Marston, *The Marginal Seabed* (Oxford: Clarendon Press, 1981), 72 - 73

'Clearly the bed of the sea, at any rate for some distance below low-water mark, and the beds of tidal navigable rivers, are prima facie vested in the Crown, ….. The bed of the sea, as far as it is vested in the Crown, and a fortiori the beds of tidal navigable rivers, can be granted by the Crown to the subject ….. It is true that no grant by the Crown of part of the bed of the sea or the bed of a tidal navigable river can or ever could operate to extinguish or curtail the public right of navigation and rights ancillary thereto, except possibly in connection with such rights as anchorage when there is some consideration moving from the grantee to the public.' Per Parker J. *Fitzhardinge (Lord)* v *Purcell* [1908] 2 Ch 139, 166 - 167

'I am satisfied that the right of the Crown to the seabed in Fairlie Bay is a right of property, although that right is subject to certain public rights of use, such as the right of navigation. ….. provided that no grant by the Crown is inconsistent with the exercise by the public of their right of navigation.' Per Lord Dunpark. *Crown Estate Commissioners* v *Fairlie Yacht Slip Ltd* [1976] SC 156, 159 and 160

and textbooks.'[43] The statement by Bayley J is still accepted as correct by the Environment Agency.[44]

In *Yorkshire Derwent Trust Ltd* v *Brotherton*[45] Vinelott J held that on a section of the river Derwent which was probably tidal there was no public right of navigation. This part of his judgement was effectively reversed by the parties to the action who, when the case came to the Appeal Court, stated that it was agreed by the parties that there was a right of navigation from Sutton to Stamford Bridge.[46] No reasons were recorded. This would seem to mean that the decision of Vinelott J on this matter is void of any authority. No other case has been found which disputed the existence of a public right of navigation on tidal waters.

4.6 Rivers tidal but for a sluice or weir.

The above discussion may be considered somewhat academic as far as the open seas are concerned. Motor boats, sailing boats and canoes have been exploring the coasts for at least the last sixty years with no objection. However where a river would have been tidal had not the flow of the tide been obstructed by a sluice or weir the public right of navigation may be disputed.[47]

A sluice or weir may have been erected under statutory authority in which case the legislation may have provided for the extinguishment of a public right of navigation. In all other cases it is suggested the public right of navigation remains.

It was held in *Williams* v *Wilcox* [48] that weirs erected before the time of Edward I may have been subsequently authorised by an Act of Edward III.[49] However there was no mention in that case of the right of navigation upstream of the weir being extinguished. Such a right

[43] Sir Carleton Kemp Allen, *Law in the making, 6th Edition* (Oxford: Clarendon Press, 1958), 250
[44] See Appendix C Waller's Haven
[45] *Yorkshire Derwent Trust Ltd and another* v *Brotherton and Others* (1988) 59 P & CR 60, 84
[46] *Yorkshire Derwent Trust Ltd and another* v *Brotherton and Others* (1990) 61 P & CR, 201
[47] eg:- Waller's Haven, Glynde Reach, the river Wantsum, the Eastern Rother.
[48] *William* v *Wilcox* (1838) 8 Ad & E 314
[49] (1372) 45 Edward III c2

can only be lost by statute, statutory authority or by the silting up of the channel by natural causes.[50]

It is therefore suggested that there is a public right of navigation on all physically navigable rivers which would be tidal except for the obstruction of the tide by a sluice or weir, unless the right has been extinguished by statute or statutory authority.

[50] See section 1.6.4 above