Chapter 7. Conclusion.

Man propounds negotiations, Man accepts the compromise.
Very rarely will he squarely push the logic of a fact
To its ultimate conclusion in unmitigated act.
Rudyard Kipling. The Female of the Species.

The object of this dissertation is to discover where there is a public right of navigation on non-tidal waters. All rights can be created or terminated by statute. In this chapter this is taken as established and so not endlessly repeated.

Before summarising the evidence about public rights of navigation, other public rights over private land are considered, rights of way, rights of town or village green and the right to roam.

A public right of way is a right to proceed by a defined route, normally from one place at which there is public access to another such place.[1] A public right of way is created by dedication. This is true of rights created under the Section 1 of the Rights of Way Act 1932, as amended, and under common law.[2]

A right to a town or village green is created by custom or by use. Custom was the way of creating, or rather confirming, rights at common law and was confirmed by Section 22(1) of the Commons Registration Act 1965. Use was first introduced by the Act of 1965.[3]

The right to roam is the right to wander at will over an area of country. No commentary has been found which considers this right in the medieval period. However since the writ for trespass to land was called *quare clausum fregit*[4] it would appear that any person could move freely outside of any enclosure. The area over which the public could roam was defined by the type of land. There was a right to roam on unenclosed land. The same

[1] There can be a right of way on a cul-de-sac or on a path leading to a viewpoint or other place of public interest. See John Riddall and John Trevelyan, *Rights of Way 3rd Edition* (London: Open Spaces Society and Ramblers Association, 2001), 53
[2] *per* Lord Hoffmann, *R* v *Oxfordshire C C Ex p Sunningwell PC* [2000] 1 AC 335, 351H – 352A
[3] *Ibid*, 347G
[4] 'Why the enclosure was broken.' See J.H. Baker, *An Introduction to English Legal History, 3rd Edition* (London: Butterworths, 1990), 72

approach was used in Section 1 of the Countryside and Rights of Way Act 2000 which provided for access (normally) to unimproved mountain, moor, heath and down.

Argument by analogy from one right to another is often inappropriate.

These Acts have removed some of the difficulties experienced by those seeking to establish a public right and provided new ways of creating rights. The Prescription Act 1832 had similar provisions for private rights over both land and watercourses.

There is no statute concerning how public rights of navigation are created. To simplify the question as to where there is such a right, initially, only naturally physically navigable rivers are considered.

The earlier authors, Bracton,[5] Britton,[6] Coke,[7] Callis,[8] Hale,[9] possibly Lord Macclefield,[10] and also Kent in 1828[11] considered that there was a public right of navigation on all rivers which were physically navigable. Thus it seems to be not unreasonable to assume that this was the common law until 1830. It needs to be considered if the law has changed since 1830. Bates, in the most recent commentary on the subject implies, in one place, that the law has not changed.[12]

The idea that the common opinion of the commentators could have changed the law was rejected by Lord Denham:-

> When, in pursuit of truth, we are obliged to investigate the grounds of law, it is plain, and has often been proved by recent experience, that the mere statement and re-statement of a doctrine, - the mere repetition of the *cantilena* of lawyers, cannot make it law, unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle.[13]

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[5] See section 2.4 above.
[6] See section 2.4 above.
[7] See section 2.11.1 above.
[8] See section 2.11.2 above.
[9] See section 2.11.3 above.
[10] See section 2.11.4 above.
[11] See section 5.2 above.
[12] See section 5.8 above.
[13] *O'Connell* v *R* (1844) XI Clark & Finnelly 155, 373

However it may be claimed that the common law develops as a result of the decisions of the courts. In this dissertation it is considered that the reasoning in *Bourke* v *Davis* is so flawed that no authority can be derived from the case.[14]

The decision in *Simpson* v *A-G*[15] depended on the fact that the locks and associated channels did not form part of the river. In this case the river was only navigable in relatively short sections, yet the court held that there was a public right of navigation on it.

Favell J in the High Court, in a decision which was reversed, said that the right of public navigation depends on use and not the possibility of use. This opinion was followed by Vinelott J in *A-G ex re Yorkshire Derwent Trust Ltd* v *Brotherton.*[16] However Lord Macnaghten seems to have considered that the fact that a river was physically navigable implied that it was legally navigable. It seems that in both cases the question as to how a public right of navigation is created was not argued. Thus as Allen has written, 'mere assumptions *sub silentio* are not to be taken as authoritative, but, at the best, as merely persuasive.'[17] When the original statement was based on misinterpretation of the texts this persuasive authority must be very weak.

In *Rawson* v *Peters*[18] the question as to whether there was a public right of navigation on the river was not argued. The statement by Lord Denning as to how a right of navigation is created seems to carry little authority.

In the case *A-G ex re Yorkshire Derwent Trust Ltd* v *Brotherton*[19] the House of Lords decided that a public right of navigation could not be created on the River Derwent by reference to the Right of Way Act 1932, as amended.

Lord Lindley said, 'the doctrine once a highway always a highway is, I believe, applicable to rivers as to roads.'[20] It is considered here that the statements by Favell J and Vinelott J,

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[14] See section 6.2 above
[15] *Simpson* v *A-G* [1904] AC 476
[16] See section 6.5.2 above
[17] Sir Carleton Kemp Allen, *Law in the Making, 6th Edition* (Oxford: Clarendon Press, 1958), 318
[18] *Rawson* v *Peters* (1972) 225 Estates Gazette 89
[19] *A-G ex re Yorkshire Derwent Trust Ltd* v *Brotherton* [1992] 1 AC 425
[20] *Simpson* v *A-G* [1904] AC 476, 510

made *sub silentia*[21] are not of sufficient authority to have removed the public right of navigation from any river except a section of the river Derwent.

In giving judgement in a case decided under Scots Law Lord Hailsham said,

> I am further fortified in this opinion by the reflection that what I have now held to be the law of Scotland happens to coincide with what I believe to be the law of England which, without going into the authorities, I take it to be as stated in Jowitt's *Dictionary of English Law* at p. 1211: "The question whether a river is navigable or not seems to depend partly on its size and the formation of its bed, and partly on the use to which it has been put."

A statement by a judge in a case decided under Scots Law can not be taken as an authoritative statement of the law.

It might be claimed that *Communis error facit jus.*[22] However, 'Erroneous views of the law, however widely held and acted upon, and even when indorsed by decisions, are no answer to the enforcement of the law when the error has been discovered and clearly ascertained.'[23]

For an error to be maintained by the courts it appears that antiquity of the original decision and the practice of mankind might, on occasion, justify a court in continuing to support an error. Jessel MR said,

> Where a series of decisions of inferior Courts have put a construction on an Act of Parliament, and have thus made a law which men follow in their daily dealings, it has been held, even by the House of Lords, that it is better to adhere to the course of the decisions than to reverse them, because of the mischief which would result from such a proceeding. Of course, that requires two things, antiquity of decision, and the practice of mankind in conducting their affairs.[24]

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[21] 'Without argument by counsel.'
[22] 'Common error makes a rule of law.'
[23] Lord Traynor, *Traynor's Latin Maxims, 4th Edition* (Edinburgh: W. Green/Sweet and Maxwell, 1894), 86
[24] *Ex parte Willey. In re Wright* [1883] 23 Ch D 118, 127

Unless one accepts the authority of *Bourke* v *Davis*,[25] the only cases which might be considered to be an authority for the opinion that there is no general public right of navigation on a river are the decisions of Favell J and Vinelott J in the High Court and the statement of Lord Denning in the Appeal Court. These cases seem not to form an adequate series of decisions to establish a loss of public rights.

As regards 'the practice of mankind in conducting their affairs', people have been regularly buying and selling rights to rivers, both the ownership of the soil and the fishing rights, on which there were well established public rights of navigation. It is not impossible that some people have purchased a section of a river under the misapprehension that there was no public right of navigation on the river, when it fact there was such a right. Such an error by the purchasers is not one of the ways in which a public right of navigation on a river may be terminated.

In this dissertation it is suggested that there are approximately 550 rivers on which there was a common law public right of navigation from 1189 to 1830. This right may have been lost by statute, by statutory authority or because the river is no longer physically navigable. If the right has not been lost in one of these ways it is claimed the right remains. A public right can only be lost by the clear words of a statute.[26] There has been no Act relating to the public right of navigation which has removed this right.

It may be objected that there is now no way of knowing if a river is naturally physically navigable. This problem was observed by Lord Macclesfield in 1719.[27] The House of Lords Select Committee stated that, 'At a time when navigation for pleasure on inland waterways has overtaken commercial carriage the rights of navigation cannot be allowed to rest on an antiquated basis which is becoming increasingly irrelevant.'[28] These are matters for action by the Legislature.

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[25] *Bourke* v *Davis* (1889) 44 Ch D 110

[26] 'If you want to alter the law which has lasted for centuries and which is almost ingrained in the English Constitution, ….. to suggest that that is to be dealt with by inference, and that you should introduce a new system of law without any specific enactment of it, seems to me to be perfectly monstrous.' Per Earl of Halsbury. *Leach* v *R* [1912] AC 305, 311

[27] See section 2.11.4 above

[28] See section 1.3.1 above

With regard to rivers made physically navigable by the works of people, if the writings of Callis and Hale are accepted, in general, on a river made navigable at public expense there would be a public right of navigation. On a river made navigable at private expense there would be no such right unless one has been created
by dedication or use.

The opinions of other commentators are not in accordance with this thesis. These works were examined above and their conclusions are not repeated here.[29]

It is claimed in this dissertation that, 'In common law there is a public right of navigation on all non-tidal rivers which are naturally physically navigable by small boats and on those rivers which have been made physically navigable at public expense.'

[29] See chapter 5 above