

Boats on our rivers again



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Chapter 1 Introduction

In 1973 the Select Committee of the House of Lords on Sport and Leisure stated that ‘The legal question of rights of way over water must be settled. A number of different legal interpretations of this right of way have been referred to in evidence and it is time for these to be resolved.’¹ In this booklet the question is resolved by consideration of the law, river form and river use in a series of historical periods.

This booklet is based on texts submitted to the University of Kent for the degree of Master of Laws and to the University of Sussex for the degree of Doctor of Philosophy. These texts, with full references, are available on the internet at **caffynonrivers.co.uk**. I am grateful for the advice and encouragement given to me by the Professors and Lecturers of both universities but, needless to say, the ideas expressed in this booklet are my responsibility alone.

It is now known that the assumptions underlying the traditional understanding of the law concerning the right of passage on non-tidal rivers were wrong. It was thought that historically non-tidal rivers were private. It is now known that historically all usable rivers were public. It was thought that historically few rivers were used by boats. It is now known that most, if not all, rivers which are now usable were used during the medieval period.

The argument in this booklet is that on unregulated non-tidal rivers:-

1. From 1189 to 1600 there was a public right of navigation on all rivers which were physically usable.
2. Rivers were more navigable in the period 1189 to 1600 than they are now.
3. A right of navigation can only be extinguished by statute or because the section of river becomes physically un-navigable.

¹ Second Report from the Select Committee of the House of Lords on Sport and Leisure. 1973. HL 193, lxxiii.

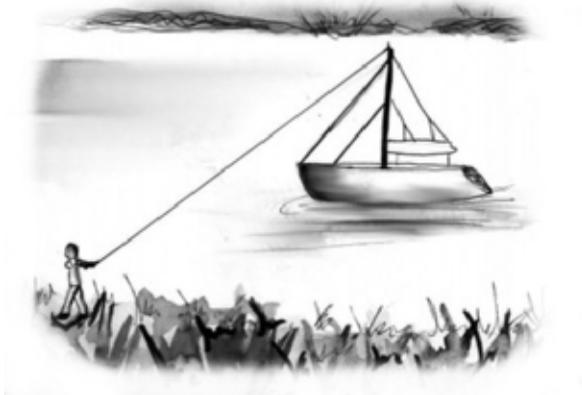
4. There is, therefore, a public right of navigation on all rivers which are physically usable.

The regulated rivers are those for which there is an active navigation authority. The law regarding the use of these rivers is contained in the relevant statutes and is outside the scope of this booklet.

The word *law* is used in this booklet in the sense that Professor Baker described it:

The law today is not what particular courts or parliaments in the past have said it is, but what lawyers at present think the relevant courts would do in a particular case. And the perceptive lawyer will now and again see that that may be at odds with what the books say.²

Both history and the law depend on probabilities not certainties. In this text the standard of proof used is ‘on the balance of probabilities’. This is the standard used in the courts for cases involving rights of passage.



² J.H. Baker, *The Law's Two Bodies*. Oxford: Oxford University Press. 2001, 4.

Chapter 2 The Start 1189

Law. By an Act of Edward I the start of legal memory is 3rd September 1189.³ This is the ‘date from which all matters of ownership, possession and usage are theoretically judged.’⁴ However earlier evidence of use may be considered where appropriate.

In c.1180 Roger de Hoveden wrote about the difference in the law between offences on the principal rivers and ‘the lesser rivers which carry vessels with the things that are necessary to boroughs and cities.’⁵ He specifically referred to the transport of wood and things of that nature on the lesser rivers. In c.1260 Bracton⁶ and in c.1291 Britton⁷ stated in their books on the Laws of England that usable non-tidal rivers were public places. Thus the contemporary authors considered that all the rivers which people might wish to use were public.

Form. The rivers were not in the same form as they are today nor were they in their ‘natural’ state. In Roman times the Itchin at Winchester was further west than it is now, at Cirencester the Churn was canalised before the Roman defences were created and at Chichester the Lavant seems to have been diverted by the Romans.⁸

If rivers are left alone they alter their form due to changes in the climate and land use in their catchment area. Even if all climatic and other factors affecting rivers were constant they would still be changing because they are adjusting after the most recent glacial phase.

Use. Written records of the use of rivers at this time are few. However it is known that in only five places did all the stone used in the

³ (1281) 3 Edward I c. 39.

⁴ Anthony Musson, *Medieval Law in Context*. Manchester: Manchester University Press. 2001, 24.

⁵ *The Annals of Roger de Hoveden. Volume 1 Part 2. A.D. 1155 to 1180*. Translator Henry T. Riley, Felinfach: Llanerch Publishers. Facsimile reprint 1996, 545-547.

⁶ *Henrici de Bracton De Legibus et Consuetudinibus Angliae*. Editor Sir Travers Twiss. London: Longman & Co and others. 1878, 57-59.

⁷ *Britton, Volume 1*. Editor Francis Morgan Nichols. Oxford: Clarendon Press. 1865, 81

⁸ John Wachter, *The Towns of Roman Britain*. London: Routledge. 1995, 291, 320, 264.

construction of the twenty one cathedrals built between 1080 and 1600 come from local quarries from which it could be transported by land. Some or all of the stone for the other sixteen cathedrals was transported by water.⁹

Place-name evidence for the use of rivers has recently been considered by Ann Cole.¹⁰ It seems that the presence of *ēa-tūn* (the place-name term for a river settlement) in a name implied that the settlement had a special responsibility for keeping the river open for navigation. The location of these sites provides additional confirmation that the network of rivers which were used was much more extensive in the medieval period than it is now.



⁹ D.J.M. Caffyn, 'River Transport 1189-1600.' Section 4.2.6 and Appendix C.

¹⁰ Ann Cole, 'The Place-Name Evidence for Water Transport in Early Medieval England.' In John Blair, Editor, *Waterways and Canal-Building in Medieval England*. Oxford: Oxford University Press. 2007, 55-84.

Chapter 3 The Medieval Age 1189 - 1350

Law. During this period there was no law against simple trespass providing that no damage was done and no building entered. There was no concept of ownership of land. People only had rights over land, to cultivate, to collect wood, to pasture cattle, sheep or pigs, to collect rent, but not the right to exclude trespassers. William Langland's story of *Piers the Plowman* written in the second half of the 14th century demonstrates this:

For if a merchant and a messenger meet together ...
 Although the messenger makes his way amidst the fair wheat
 No wise man will be wrathful and his money take
Necessitas non habet legem –
 Indeed no steward will call him to take his money.
 But if a merchant makes his way over men's corn
 And the steward happens to meet him,
 Either his hat or his hood or else his gloves
 The merchant must give him or money from his purse.¹¹

Thus the king's messenger could go where he liked. But if the merchant rode across standing corn the steward would take from him his hat, his hood, his gloves or a sum of money as satisfaction for any damage done. Outside of the standing corn the merchant was free to make his way by any route. This implies that the rivers were also public places, for boats do not even leave footprints.

In 1215 Magna Carta stated that all the rivers of England were to be kept free for use by vessels. The charter was confirmed at least 44 times in the next 200 years. This demonstrates the permanence of each section of the charter.

¹¹ William Langland, *The Vision of William concerning Piers The Plowman in three parallel Texts*. Editor Walter W. Skeat. Oxford: Oxford University Press. 1886, 454-456. Translation by the present author.

Form. During this period many bridges were built. Those constructed over the usable rivers were of such a height that boats could pass. Some bridges, like London Bridge, had a section which could be raised to allow vessels to pass. In 1442 a bridge was built at Snaith with a draw-leaf 4 feet in breadth ‘for the voiding thorough of the Mastes of the Shippes passinge under.’¹²

Use. In the period 1100 to 1300 at least fifteen canals were constructed to enable boats to travel from a usable river to an abbey or monastery.¹³ Canals were only constructed where they could be connected to a usable river when use of the river was well established. They indicate that sufficient goods were transported to the abbeys and monasteries to justify the considerable cost of digging these canals.

In the 13th century 17 out of 32 manors belonging to the See of Winchester sold more than half their grain and ‘the peasants of the episcopal manors put more produce on the market than came from the demesnes.’¹⁴ This indicates that there was a demand for transport. At rural markets no tolls were charged on goods bought or sold for household provisioning. The profit for the market owner came from stallage and tolls from traders who would transport the goods out of the area. In addition ‘thousands of lesser individuals crowded every major fair annually during the twelfth and thirteenth centuries, transforming the fairgrounds into mid-sized cities for several weeks.’¹⁵ A characteristic of all these great fairs was their location on rivers.

¹² *Rotuli Parliamentorum* V, 44.

¹³ James Bond, ‘Canal Construction in the early Middle Ages: An Introductory Review.’ In John Blair Editor, *Waterways and Canal-Building in Medieval England*. Oxford: Oxford University Press. 2007, 153-206.

¹⁴ E.A. Kosminsky, *Studies in the Agrarian History of England in the Thirteenth century*. Ed. R.H. Hilton, Trans. Ruth Kisch, Oxford: Basil Blackwell. 1956, 324-5.

¹⁵ Ellen Wedemeyer Moore, *The Fairs of Medieval England*. Toronto: Pontifical Institute of Mediaeval Studies. 1985, 1.

Langdon has listed the loads carried for the kings on some rivers from 1294 to 1348.¹⁶

River	From	To	Mean size in tonnes
Witham	Lincoln	Boston	20
Waveney	Beccles	Yarmouth	25
Cam	Cambridge	King's Lynn	14
Lea	Thele	London	38
Thames	Henley	London	40
Thames	Oxford	London	15

Some of these barges were large carrying a load as heavy as the largest lorry in England today. They were towed upstream by teams of men and floated downstream. A barge carried as much as 500 pack animals and a small boat as much as ten packhorses or one cart.

Edwards writing in 1987 found one record of use of the Thames upstream of Oxford. Writing in 1993 Langdon found no evidence of such use. Yet Blair wrote in 2007 that at *Kyndelwere* 'There must have been a great deal of coming and going around the mill with grain-laden boats, belonging both to tenants obliged to grind here and to other landowners who found it a convenient mill to patronize.'¹⁷ In addition Blair found evidence for the regular passage of ships from Faringdon to the sea.¹⁸

The following table shows the total length of non-tidal rivers for which evidence of historic use has been found by various authors and the increase in total length.

¹⁶ John Langdon, 'The Efficiency of Inland Water Transport in Medieval England.' In John Blair, Editor, *Waterways and Canal-Building in Medieval England*. Oxford: Oxford University Press. 2007, 130.

¹⁷ John Blair, 'Transport and Canal-Building on the Upper Thames, 1000-1300.' In John Blair, Editor, *Waterways and Canal-Building in Medieval England*. Oxford: Oxford University Press. 2007, 282.

¹⁸ *Ibid.* page 260.

	Date	Length Miles	Increase Miles
Graham ¹⁹	1789	200	
Flower ²⁰	1915	436	236
Edwards ²¹	1987	1199	763
Langdon ²²	1993	391	
Caffyn Category A evidence ²³	2010	2141	942
Caffyn Category B evidence	2010	3073	1857

It would be expected that as the records approach completeness there would be a steady approach to the actual total length of the rivers which were used. The table seems to indicate that this limit is not yet being approached. The length of the rivers for which there is evidence of historic use was 78% greater in 2010 than in the previous comparable thesis by Edwards written in 1987. For rivers other than the Trent, Great Ouse, Thames and Severn the increase was 108%.

No evidence has been found that any physically usable river was never used.



¹⁹ *per Graham. Ball v Herbert* (1789) 3 T.R. 254-265, 255.

²⁰ *Public Works in Mediaeval Law, Volume I.* Editor C.T. Flower. Selden Society, Vol. 32. 1915, xxvi.

²¹ J.F. Edwards, 'The Transport System of Medieval England and Wales.' Unpub. PhD thesis Univ. of Salford. 1987.

²² John Langdon, 'Inland water transport in medieval England.' *Journal of Historical Geography*, Vol. 19, 1. (1993), 1-11.

²³ See also D.J.M. Caffyn, 'River Transport 1189-1600.' Section 4.4.1.

Chapter 4 Plague and Anarchy 1350 - 1530

Law. Rivers can be used for driving mills as well as for transport. Historians have often written about rivers which were obstructed by weirs because they have the written evidence to study in the resulting court cases. There were no court cases relating to the use of rivers which were never obstructed so there are no comparable records for historians to study. It is well known that ‘the commonplace is not commented upon’.

In the 13th century commissions were appointed to ensure that the Thames was kept clear of obstructions.²⁴ However it seems that in the 14th century the obstruction of rivers became more common and from 1351 to 1472 there were a series of Acts requiring the removal of obstructions in rivers created since the reign of Edward I. These Acts provided for steadily increased penalties for their breach. This shows that there were many people who wished to build new weirs, or increase the height of old ones, and that there were also many people who wished to use the rivers who had the funds to petition the King for protection of the rivers. These Acts and Petitions make it clear that the law was that all the usable rivers were to be kept clear and that these laws were not always kept. There never has been a time when all the laws of the land were obeyed.

Two notorious dams were long lasting. A dam was built across the Exe at Topsham in the early 14th century. Three hundred years later Camden stated that ‘Excester received not so great damage at these enemies hands [French invasions], as it did by certaine dames, which they call *Wears*, that Edward Courtney Earle of Denshire made in the river Ex.’²⁵ The Great Ouse was blocked downstream of Huntingdon in the second half of the 13th century by Grey who Speed in the early 17th century described as ‘a mynion of the time.’²⁶ In those days the powerful misused their power but people did not forget or forgive.

²⁴ Parliamentary Rolls of Medieval England. CD version. 2005. Edward I, 1302, Petition 3, para. 90, i - 474.

²⁵ William Camden, *Britain*. Trans. Philemon Holland. London: Ioyce Norton and Richard Whitaker. 1637, 205.

²⁶ John Speed, *Theatre of the Empire of Great Britaine, Parts III*. (1st Edition 1611.) Facsimile London: Phoenix House Limited. 1953-4, Fol. 53-54.

Form. The troubles may have reduced the amount of maintenance carried out on the rivers. In 1360 there was a presentment in the King's Bench that the River Ant in Norfolk 'was stopped by nobody's default because the river fell out of use at the time of the pestilence and nothing was carried on it so that weeds continually grew in it.'²⁷ Yet within ten years the seven villages which used the river complained to the King asking for a decision as to who should pay for its clearance.

Use. It is impossible to know how far upstream boats were used on each river. The smaller the river, the smaller the boat and probably the less frequent the use. Thus the probability of the use being recorded and of the records remaining today is reduced. Medieval maps show the source of many rivers as lakes or ponds. It seems likely that many rivers were used by boats to these ponds collecting sedges, reeds, turfs and wood for transport downstream.

There was famine in England at the start, and plague in the middle, of the 14th century which caused the population of England to fall by about 40%. It might be expected that these would have resulted in a reduction in the use of the rivers due to the lack of the supply and demand for goods. However it seems that no reduction in fact occurred.²⁸



²⁷ *Public Works in Medieval Law. Volume II.* Editor C.T. Flower. Selden Society. Vol. 40. 1923, 88-90.

²⁸ Christopher Dyer, 'The hidden trade of the Middle Ages: evidence from the West Midlands of England.' *Journal of Historical Geography*, Vol. 18, Part 2. (1992.), 153.

Chapter 5 The Statute of Sewers 1530 - 1620

Law. In the second half of the sixteenth century there was a rapid increase in the population. There were also fundamental changes in agriculture with a move to ‘freer, more mobile conditions of agriculture carried on the basis of money and markets, the exchange of goods rather than services.’²⁹ These changes resulted in an increased demand for transport.

In 1531 the Statute of Sewers was passed which required the removal of all the obstructions in rivers.³⁰ This was not universally popular. The Mayor and Citizens of Winchester wrote to Cromwell that ‘some of those who have executed the statute have been sore threatened by the great lords and their officers in these parts.’³¹

Those who operated the boats were, in general, from the merchant class or below but they supplied people of all classes. Those who built the mills and fish weirs were land owners. Yet it was considered to be for the benefit of the country that all the rivers should be kept clear. Thus in 1590 the Salisbury Quarter Sessions ordered that the River Avon was to be kept open for the free passage of boats.³²

Form. In c.1546 Leland stated that the Nene divided into three channels downstream of Peterborough which then reunited and that it flowed into the sea near Kings Lynn.³³ In 1587 Harrison wrote that downstream of Peterborough ‘it divideth it selfe into sundrie armes, and those into severall branches and draines, among the fennes and medowes, not possible almost to be numbred, before it meet with the sea on the one side of the countie, and fall into the Ouze on the other.’³⁴

²⁹ A.L. Rowse, *The England of Elizabeth*. (1st Edition 1950.) London: Sphere Books Ltd. 1973, 96.

³⁰ (1531) 23 Henry VIII, c. 5.

³¹ Letters and Papers Foreign and Domestic of the Reign of Henry VIII. Volume 10, 24.

³² Hampshire Record Office. 24M82/PZ3.

³³ This reference has not been found in Lucy Toulmin Smith’s edition but is quoted from Raphael Holinshed, William Harrison, and others, *The First and Second Volumes of the Chronicles*. 2nd Edition. London: J. Johnson *et al.* 1807, 172.

³⁴ Raphael Holinshed, William Harrison, and others, *The First and Second Volumes of the Chronicles*. 2nd Edition. London: J. Johnson *et al.* 1807, 172.

It would seem that during the second half of the 16th century the channel became blocked so that the water flowed over much of the country. Some of these obstructions, may have been caused by lack of maintenance after the dissolution of the monasteries.

In 1587 Harrison wrote of the Thames ‘For the more that this river is put by of hir right course, the more the water must of necessitie swell with the white waters which run downe from the land: because the passage cannot be so swift and readie in the winding as in the streight course.’³⁵ It is clear that the channel of the Thames was being straightened and cleared so that the water flowed faster to the sea. It may be no coincidence that the first reference to barges being grounded in the Thames occurred shortly after in 1641.³⁶

Use. The use of rivers was not limited to the transport of goods. They were also used for recreation. The three references to swimming in the epic *Beowulf* indicate that swimming was not unknown in the Anglo-Saxon era. In the 13th century at least three women died when swimming. In the 14th century Langland wrote appreciatively about swimming.³⁷ The first book on swimming was written in 1587 in the hope that it would reduce the number of young men at Cambridge who drowned.³⁸ It would seem likely that these young men fell into the water from boats rather than from the banks of the rivers.

Fitzstephen described water jousting on the Thames in the 12th century³⁹ as did Stowe at the end of the 16th century.⁴⁰ It seems likely that this sport was limited to those societies in which the use of boats was not

³⁵ Raphaell Holinshed, William Harrison, and others, *Holinshed's Chronicles*. (1st Edition 1586.) London: J. Johnson; F.C. and J. Rivington, *et al.* 1807, 81.

³⁶ John Taylor, *John Taylor's last Voyage*. London: John Taylor. 1641. Contained in *Works of John Taylor. Second Collection*. The Spencer Society 14. 1873. New York: Burt Franklin. 1967, 12.

³⁷ Compton Reeves, *Pleasures & Pastimes in Medieval England*. Stroud: Budding Books. 1997, 94-95.

³⁸ E. Digby, *De Arte Natandi*. 1595.

³⁹ William Fitzstephen, *Descriptio nobilissimae civitatis Londoniae*. Cited in John Marshall Carter, *Medieval Games*. London: Greenwood Press. 1992, 128.

⁴⁰ John Stow, *A Survey of London. Text of 1603. Volume 1*. Ed. Charles Lethbridge Kingsford. Oxford: Clarendon Press. 1908, 92, 94.

uncommon. Taking one's leisure on the water was portrayed in medieval manuscripts often with musicians in the boats. Where and when people took to the water is not recorded.

John Taylor, the water poet, recorded many of his journeys by boat in the early 17th century. In 1774 Lord Orford travelled round the Fens by boat.⁴¹ There is no suggestion that permission was obtained from any land owners.

At the end of the 16th century the rivers formed the skeleton of the country. Leland did not describe the ways along which he travelled. It was the rivers and their bridges which interested him. Camden described every county. In choosing his route he normally followed the rivers from source to the sea. He never described a county by following the roads. Most maps did not indicate any roads. It seems that most travel was either across country or by water.



⁴¹ '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.* Doncaster: Edwin White. 1868

Chapter 6 Pound Locks 1620 - 1830

Law. In the 17th century pound locks were introduced into England. Weirs were constructed which caused pools to be formed upstream and these pools were linked by pound locks. The story has been told elsewhere and is not repeated here. The effect was to modify the rivers so that they could be used to transport large quantities of heavy goods relatively cheaply.

These modifications could only be carried out under the powers granted by an Act of Parliament. These Acts allowed the proprietors to compulsory purchase land, to carry out works and to charge tolls for the use of the river once the works were completed. These Acts were normally described as “An Act for making the River N. navigable from A to B.” This is where a misunderstanding arose. The word *navigable* comes from the Latin *navis* a large vessel, in this booklet called a *barge*. This was correct. In general before the work was carried out a *barge* could not use the river and after the work was carried out they could. Of the 75 rivers which were *made navigable* under statutory powers at least 72 were used by *boats* before the modification were carried out.⁴² The effect of the modifications was to make the rivers *navigable* in the sense that *barges* could use the rivers.

Some Navigation Acts provided for recreational use of the rivers, others were silent on the matter. Many of these Navigation Acts have been partially or totally repealed and others have fallen into disuse. In these cases the rights of the public today are the common law rights which existed before the Navigation Act was passed. The right to use the regulated rivers which have an active Navigation Authority are set out in the Laws and Bylaws regulating the rivers and are outside the scope of this booklet.

⁴² See D.J.M. Caffyn, ‘River Transport 1189-1600’.

Form. The modification of some rivers made them usable by larger vessels for more of the year. The other rivers became less usable with improved drainage resulting in the faster removal of rainwater and so a smaller volume of water in the rivers. In the 17th century a poet wrote:

They'll sow both beans and oats, where never man yet
thought it,
Where men did row in boats, ere undertakers bought it.⁴³

Ecologists have noted the disappearance of the wildfowl and other flora and fauna due to the drainage of the wetlands. Little notice has been taken of the disappearance of the boats.

Use. In 1695 Celia Fiennes wrote that at Ferrybridge the Aire was 'Large for Barges as was most of the Rivers I have mention'd'.⁴⁴ At Bedford she noted on the Great Ouse barges and 'many Little boates Chained to the sides belonging to y^e people of the town for there diversion.'⁴⁵ These 'little boats' did not suddenly appear on the rivers after they were modified. They had always been there.

Historically boats had been towed by gangs of men who were aided by the current when travelling downstream or by the wind when it blew from an appropriate direction. In the 18th and 19th century these men were replaced by horses. In the 19th century horses were replaced by tugs or engines in the barges.



⁴³ Cited in William Dugdale, *The History of the Imbanking and Draining of Divers Fens and Marshes*. 2nd Edition. London: Richard Geast. 1772, 391.

⁴⁴ Celia Fiennes, *Through England On a Side Saddle*. London: Field & Tuer. 1888, 58.

⁴⁵ *Ibid.* page 291

Chapter 7 Woolrych 1830

Those who have written about the law relating to the right of passage on non-tidal rivers have mostly based their work either directly or indirectly on a text written in 1830 by Humphrey Woolrych.⁴⁶ It is therefore necessary to consider the accuracy of the relevant parts of his text.

He wrote that “where there is a common right of navigation exercised, ... the soil is in the king.” This is wrong. On public non-tidal rivers the soil of the bed of the river belongs to the owners of the banks (unless it has been sold to another person).⁴⁷

He wrote that ‘the rights of fishery’ ‘accompany’ ‘public user for the purposes of commerce’. This is wrong. On public, non-tidal rivers the right of fishery belongs to the owners of the banks (unless it has been sold to another person).⁴⁸

He accepted as correct the statement that “Few of our rivers besides the Thames and Severn, were naturally navigable, but have been made so under different acts of parliament.”⁴⁹ This is wrong. Of the 75 rivers which were made navigable under statutory powers at least 72 were used by boats before they were modified. At least another 65 were used without being modified.⁵⁰

He also wrote “very many acts of parliament have been passed to constitute those navigable rivers which were not so before.” This is wrong. The Acts did not make the rivers public navigations. The Acts authorised the making of modifications which enabled barges to use the rivers. There was a public right of navigation for smaller boats on the rivers before the Acts were passed.⁵¹

⁴⁶ Humphry W. Woolrych, *A Treatise on the Law of Waters and Sewers*. London: Saunders and Benning. 1830. All quotations from chapters 1 and 3. See D.J.M. Caffyn. *The Right of Navigation on Non-tidal Rivers and the Common Law*.

⁴⁷ *R v Wharton* (1701) 12 Mod 510.

⁴⁸ *Tracey Elliott v Morley (Earl)*, (1907) 51 S.J. 625.

⁴⁹ Stated in *Ball v Herbert* (1789) 3 T.R. 254, 255.

⁵⁰ See D.J.M. Caffyn, *Inland Transport 1189-1600*. Appendix A.

⁵¹ *Ibid*.

On the other hand Woolrych wrote “A public navigable river frequently owes its title to be considered as such from time immemorial, by reason of its having been an ancient stream.” This is in accordance with the opinion expressed in this booklet for all rivers are ‘ancient streams’.

It seems clear that it is totally inappropriate to accept Woolrych as an authority on any matter relating to rights on rivers and that those texts which quote him should be disregarded.



Chapter 8 The Modern Era 1830 - 1987

Law. During this period Woolrych's understanding of the law seems not to have been challenged in the courts. It has certainly been disputed and often ignored. As Taunt wrote in 1878 [133 years ago]

On this part of the river [Warwickshire Avon], previous application should be made to A for permission to pass through the Park, and also to B. ... These claim the river, although it is a question whether the orders in council of March 9th, 1636, and other dates, do not make the river free to near Coventry. However, as courtesy and kindness are the order of the day at Warwick and at Charlecote, the question of right is not worth discussing, no respectable persons, we believe, ever having been denied.⁵²

133 years later the legal position is no clearer. Asking permission may seem simple. In fact often the date of a journey will depend on the discharge of the river. Often the names and addresses of the land owners are unobtainable. Where a river flows through a town permission, if required, might be required from a hundred different owners. If any one of them did not reply some people might claim that the journey should not be made.

What if permission is refused? Are boaters expected to stay off rivers to which they have a legal right of passage because land owners are not willing to give permission which is not required?

Form. By 1830 the work of modifying rivers to make them usable by barges had ended. In the middle of the century the commercial traffic reached its maximum and thereafter the railways, and later the roads, took an increasing proportion of the goods until the great freeze of 1963 finally ended the normal transport of goods by water. The history

⁵² Henry W. Taunt, *A new map of the river Thames from Thames Head to London*. 3rd Edition. Oxford: Hency Taunt & Co. 1878, 130.

of the modification of the rivers, the canals and the movement of goods on them has been told elsewhere.

On those rivers which continue to be maintained as navigations the width and depth remain much greater than prior to their modification. On those rivers which were modified but which are not maintained as navigations their condition now has, in general, returned to something nearer to their natural condition. Their present form depends on the requirements of abstraction, flood control and the angling interests.

Use. While commercial use declined recreational use increased. It seems that boating became more popular with the availability of rail transport which enabled people to move from the cities to the rivers. A guide to over 140 waterways of interest to an oarsman was published in 1896.⁵³ In 1936 the British Canoe Union published a guide which described sections of over 2,700 miles of rivers suitable for canoeing in England.⁵⁴ Since then use of many rivers has been held back by the lack of clear knowledge about the rights of use by boaters and swimmers.



⁵³ F.T.E. Prothero and W.A. Clark, *A new oarsman's guide to the rivers and canals of Great Britain and Ireland*. London: G. Philip and Son. 1896.

⁵⁴ The British Canoe Union, *The Guide to the Waterways of the British Isles*. Weybridge: British Canoe Union. 1936.

Chapter 9 The Recent Past 1987 - 2011

Law. In 1987 Edward's doctoral thesis was accepted by Salford University.⁵⁵ Since then, for those who made the link, Woolrych's concept of the historic law has been known to be wrong. Edwards showed that many rivers were used by boats in the medieval period. On all of these rivers there was a public right of navigation. Since then the historic use of many other rivers has been established.⁵⁶ If it is known that there was historic use of a section of a river the upper limit of that use is never known except where it was the source of the river.

Wollrych's concept of the law has been followed by several other authors. But the common opinion of the commentators does not change the law. Lord Denham said:-

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.⁵⁷

In 2003 Mr Justice Lightman relied on the doctrine that a public right of navigation may only be extinguished by legislation, exercise of statutory powers or by destruction of the subject matter e.g. through silting up of the watercourse when determining the case *Josie Rowland v The Environment Agency*.⁵⁸

A hundred years ago Lord Lindley said, 'the doctrine once a highway always a highway is, I believe, applicable to rivers as to roads.'⁵⁹ Thus

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)

⁵⁶ See D.J.M. Caffyn, 'River Trade 1189-1600'.

⁵⁷ *O'Connell v R* (1844) XI Clark & Finnely 155, 373

⁵⁸ *Josie Rowland v The Environment Agency* [2003] 1 All ER 625, para 50

⁵⁹ *Simpson v A-G* [1904] AC 476, 510

a public right of navigation cannot be lost by disuse. This is true even in Scotland with its laws of Negative Prescription.⁶⁰ Equally a right of navigation is not lost when the river is physically obstructed.⁶¹ It was stated in 1349 that when a river changes its course the right of navigation is continued on the new course of the river.⁶²

In 2000 Parliament resolved that public rights of way over footpaths and bridleways will be extinguished if they existed before 1949 and if they are not shown in a definitive map on 1st January 2026.⁶³ It would be extraordinary if anyone were to claim that rights of passage on rivers had been extinguished without a similar Act being passed with regard to historic rights of navigation.



⁶⁰ That is the extinguishment of a right if it is not exercised for a given period of time. *Wills' Trustees v Cairngorm Canoeing and Sailing School Limited* 1976 SLTR 162

⁶¹ *Voight v Winch* (1819) 2 B & Ald 662

⁶² (1349) 22 Ass 93

⁶³ Countryside and Rights of Ways Act 2000, c. 37, Section 53.

Chapter 10 The Future

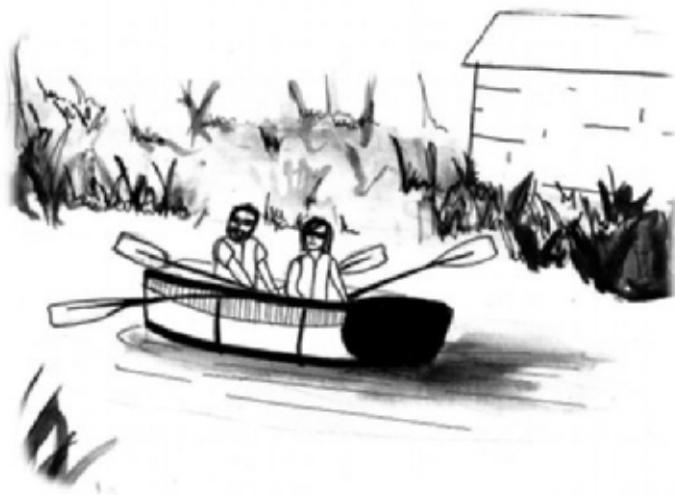
Law. It has been shown that there is a public right of passage on all rivers which are physically usable. However for a hundred and seventy years the legal texts stated that the public right was limited to an unspecified number of rivers. Not surprisingly some people continue to think that the river which flows through their property is private. As a result people exercising their right of passage on some rivers are challenged by people on the bank. This can result in physical attacks. I have taken a group of young people on a tidal river on which there is a statutory right of navigation, the Sussex Ouse downstream of Barcombe Mills. At one point a man ran along the bank of the river throwing stones and pieces of wood at our canoes. The young ladies in their canoes were worried. Such action is unfortunately not unusual.

The Government policy is that there should be improved access to the countryside for people from all backgrounds. The Minister for Natural Environment and Fisheries, Mr Benyon MP, is committed “to using locally agreed, voluntary access agreements as the means of increasing river access for canoeists”.

The Brighton Consortium in 2008 negotiated access agreements for 72 km of the Waveney and Mersey. They failed to negotiate agreements for sections of the Wear and Teme. Voluntary Access Agreements do not guarantee that access will be permanent and they can not ensure that suitable agreements are made for all rivers.

The research described in this booklet shows that expenditure on negotiating access agreements, and the resulting delay in implementing the policy, is not required. Access agreements are based on the misunderstanding that the relevant sections of the rivers are private. It has been shown that there is already public right of passage on all usable rivers. What is required is confirmation by the government of the right of passage on rivers so that the unfortunate incident described at the start of this section will not be repeated.

Discussions concerning access on rivers have taken place in various committees for forty years with little or no result. I hope that the ideas expressed in this booklet will provide a framework on which appropriate shared use of the rivers can be agreed bearing in mind the preservation of the natural environment.





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In a radical work of this type, in a field which has not previously been studied, there are no doubt unintentional errors and omissions. The author would be grateful if any reader finding such errors or omissions could inform him so that corrections can be made to any future editions.

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Boats on our rivers again

It is shown in this booklet that:-

1. From 1189 to 1600 there was a public right of navigation on all rivers which were physically usable.
2. Rivers were more navigable in the period 1189 to 1600 than they are now.
3. A right of navigation can only be extinguished by statute, statutory authority or the section of river becoming un-navigable.
4. There is, therefore, a public right of navigation on all unregulated rivers which are physically usable.

The material in this booklet is based on theses which were submitted to the University of Kent for the degree of Master of Laws and to the University of Sussex for the degree of Doctor of Philosophy. These theses are available at caffynonrivers.co.uk

Note:- A licence may be required for boats using the regulated rivers.

If you wish to challenge any of the above four statements please send details of your challenge to the author. The address is on the inside of the back cover.

