The Medieval Right of Navigation
and a Response to Mr David Hart QC

Part One

The Medieval Public Right of Navigation on Usable Natural Rivers

1.1 Summary

In this paper I show that there was a public right of navigation on all natural, physically usable rivers in England in the medieval period and that this right has not been extinguished.

Natural – not made usable at private expense.
Usable – Passable for a significant part of the year, in some places only between obstructions.
Medieval period – 1189 to c.1500.

1.2 Medieval evidence for the existence of the right.

a. Evidence of the medieval use of rivers.
b. Bracton wrote in about 1250 that perennial rivers are common to all persons.
c. The terms of reference of the Commissions appointed under the River Clearance Acts.
d. The medieval understanding of Magna Carta.
e. The meaning of the word 'navigable'.
f. The absence of a distinction between tidal and non-tidal waters.
g. Place name evidence.
h. The construction of canals.

1.3 Introduction

In 1789 Graham said in court that "few rivers other than the Thames and Severn" were used for transport in the medieval period.[1] Until 2011 the legal community did not dispute this statement.[2] Then in 2011 I published a thesis in which it was shown that more than 170 rivers were used for transport in the medieval period.[3] Many lawyers are finding it difficult to adjust to the new evidence. This paper is a clearer, more concise, corrected version of my dissertation for the University of Kent and also incorporates the findings in my thesis for the University of Sussex.[4]

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[1] 3 Term Rep 254, 255
[2] A thesis by J.F. Edwards, 'The Transport System of Medieval England and Wales.' The University of Salford, 1987 disputed this statement but it received very little publicity.
[3] Douglas Caffyn, 2004, 'The Right of Navigation on Non-tidal Rivers and the Common Law.' Available at caffynonrivers.co.uk, and at the British Library. (Abbreviated to STh.)
[4] Douglas Caffyn, 2011, 'River Transport 1189-1600.' Available at caffynonrivers.co.uk, and at the British Library. (Abbreviated to KD.)

1.4 The thesis and definitions

My thesis is that "There was a public right of navigation on all physically usable rivers in medieval times and this right has not been extinguished. Thus on sections of rivers which were physically usable in medieval times and are physically usable today, possibly only between obstructions,[5] there is now a public right of navigation for craft physically able to use the relevant section of the river."

I use the word 'usable' for a section of a river which is physically navigable for a significant part of the year by a boat, cobble, wherry, rowing boat, logboat, skiff, punt, trough, coracle, *navicula*, *batella* or *scafula.* A river which is usable by one size and type of vessel may not be usable by a larger vessel or a vessel of a different type. The upper limit of navigation depends on the form of the river and the flow at a given time. The river must be wide enough and deep enough.

In *Wills' Trustees* Lord Wilberforce considered another factor. He said that the fact that a river is passable by some acrobatic tour de force does not establish a public right of passage nor may use depend on exorbitant technology. However he also said "But the right or use is not for all time frozen in any one form: the law, of Scotland or of anywhere else, is adaptable to let in such other uses as change may bring about."[6] Similarly it seems likely that a rock climb which had regularly been climbed *nec vi, nec clam,* and *nec precario* would not be registerable as a right of way on land.

In *Yorkshire Trust v Brotherton* Vinelott J. referred to boats of 'some six or 10 tons'.[7] I assume that this was the size of boat which the Yorkshire Trust wished to use on the river.

The river needs to be physically usable for 'a significant part of the year' which would normally be about four or five months but could be just 'the period of the harvest' as on the river Pant/Backwater when the flow would have been at a minimum.[8]

In Part Two of the thesis for the University of Sussex I stated that "There is no section of a river which has been identified in the present study which can be used now but is known to have been unusable throughout the period 1189 – 1600 assuming that individual obstructions were portaged."[9] This statement has not been challenged. However I would now qualify the statement by limiting it to rivers which have not been modified to make them usable by barges.

There cannot be a public right of navigation on a section of a river which is not usable although a right can be restored if the channel is scoured.

1.5 Medieval evidence of the right to use rivers.

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[5] *Simpson* v *A-G*, [1904] AC 476
[6] *Wills' Trustees* v *Cairngorm Canoeing and Sailing School Limited* 1976 SLT 162, 191
[7] 59 P & CR 84
[8] STh. Appendix A. EA 17. 1586
[9] Chapter 2.8, page 93.

It was only in 2011 when I published my thesis for the University of Sussex that it became known that there is contemporary evidence of the use in the medieval period of more than 170 rivers. There is no recorded case in which there was a dispute as to whether a natural usable river was public or private. There are about 650 rivers in England which are potentially usable.[10] There was a case involving a dispute about a manmade watercourse.[11]

1.6 Bracton

Bracton wrote in about 1250

> Of natural right all these things are common: flowing water, air and sea, and the shores of the sea, … for the shores are by the right of nations common, like the sea.
>
> All rivers and ports are public, and accordingly the right of fishing in a port and in rivers is common to all persons. The use of the banks is also public by the right of nations, as of the river itself. It is free to every person to moor ships there to the banks, to fasten ropes to the trees growing upon them, to land cargoes and other things upon them, just as to navigate the river itself, but the property of the banks is in those whose lands they adjoin, and for the same cause the trees growing upon them belong to the same persons, and this is to be understood of perennial rivers, because streams, which are temporary, may be property.[12]

Later in his text he wrote

> Likewise a fishery in his own ground may be said to be the freehold of a person either by himself or in common, as if a person possesses the land on both sides of a river close to its banks, it will be allowable for him to fish over the whole as in his free tenement without impediment from anyone, …….. Likewise if he possesses the lands only on one side close to the edge, his tenement will extend to the mid-channel of the water, and it will be his fishery, and he will have the right of fishing without any other person, unless perchance it should happen that he imposes an easement on his own land, that a person may fish with him, …..[13]

The first quotation is a copy of the Roman Law stating what Bracton calls 'the natural right' and 'the right of nations'. There were four relevant rights: access to the shore, fishing in ports and rivers, passage on the banks of rivers and passage on the rivers. In the second quotation Bracton states that in England in his time the law relating to fishing has changed and that in rivers it may be private. The absence of any remark about the other three rights implies that they were rights under English law in his time.

Bracton's statement of the law was not challenged during the medieval period.

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[10] KD . 1.4.1
[11] STh. 2.10
[12] Sir Travers Twiss, Editor, *Henrici de Bracton de Legibus et Consuetudinibus Angliae* (London: Longman & Co etc., 1878), Volume 1, 57 - 59
[13] *ibid,* Volume III, 375

1.7 The Commissions

Between 1350 and 1531 Acts of Parliament were passed requiring that rivers be kept clear for the passage of boats and fish and for land drainage. Commissions were appointed to enforce the law. Some of the Acts and some of the orders relating to the appointment of commissioners are concerned only with the passage of boats. The responsibilities of these commissions covered the rivers in 32 counties and 35 individual rivers.

It is clear that commissions would not have been appointed for rivers which were private.

The counties for which no commission was appointed were the 'counties palatine', three northern counties for the reasons explained by Flower in his 'Public Works in Mediaeval Law',[14] Staffordshire and Rutland where there may have been no disputes and for no obvious reason Suffolk. There is no evidence that any river in any of these counties was private.

I suggested in my dissertation for the University of Kent that the 'great rivers' which were to be cleansed under the River Clearance Acts were those which Roger de Hoveden said were in the protection of the king. The protection of the other rivers would have been by local regulations.[15] This suggestion has not been challenged. This is supported by the findings of Professor Sir John H. Baker, the doyen of medieval historians, who has shown that plaintiffs tried to get cases relating to watercourses transferred from the local court to the King's justices where they thought they had a greater chance of success.[16] Parliament appears to have included the word 'greater' to ensure that obstruction of the lesser rivers was dealt with by the local courts as it had been in the past.

The work of the lesser courts was supervised by the Courts of Eyre which were required to make inquiry "concerning weirs raised in common waters, and concerning waters and highways stopped or straitened or in other manner appropriated"[17]

1.8 Magna Carta

Magna Carta required that 'kiddles' be removed *per totam Anglia.* The text does not make it clear whether this was so that boats or fish could pass along the rivers. However it is possible to know how Magna Carta was understood in the medieval period.

The recital of the Act 1472 12 Edward IV c 7 states

> Whereas by the laudable Statute of Magna Carta, amongst other things it is contained, that all Wears through Thames and the Medway, and through all the Realm of

[14] C.T. Flower, *Public Works in Mediaeval Law.* Selden Society Volume 32. 1915, xxix
[15] KD.2.6
[16] J.H. Baker, *An Introduction to English Legal History. 3rd Edition.* Butterworths: London. 1990.
[17] Francis Morgan Nichols, *Britton, Volume 1.* Oxford: Clarendon Press, 1865, 81

> England, should be put down, except by the sea coasts; which statute was made for the great Weal of all this Land, in avoiding the straiteness of all Rivers, so that Ships and Boats might have in them their large and free Passage, and also in Safeguard of all the Fry of Fish spawned within the same.

Those who wrote and approved this Act clearly thought that this statement was true. It implies that the law was the same in 1472 as the law was when Magna Carta was first approved. Parliament would not have quoted Magna Carta if it had thought that the law had changed.

Thus in 1472 parliament thought that all the rivers were public.

1.9 The meaning of 'navigable'

In the medieval period there was no distinction in the use of the word 'navigable' between 'physically navigable' and 'legally navigable'. Thus it would seem that one implied the other. What was 'legally navigable' was 'physically navigable' and what was 'physically navigable' was 'legally navigable'. What was 'usable' was also legally navigable.

1.10 The distinction between tidal and non-tidal waters

The wording of Magna Carta, of Acts relating to Rivers[18] and of the Commissions appointed under the River Clearance Acts show that there was no distinction between the law relating to tidal rivers and non-tidal rivers in the medieval period. Since there was a public right of navigation on the tidal waters this implies that there was also a public right of navigation on the non-tidal waters.

About half of the foreshore[19] and the bed of the non-tidal rivers of England has been alienated by the crown. The right of navigation in the medieval period was the same as these for the other tidal waters.

1.11 Place name evidence

Ann Cole has studied the place name evidence for 'Water Transport in Early Medieval England'.[20] She summarizes her work by writing that "Place names cannot give a complete picture of medieval water routes, but they do emphasise the use of some of them."[21] The most notable point about her evidence is that boats went much further up some rivers in medieval times than is possible today, even in kayaks.

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[18] Eg: Lea, 1425 3 Henry VI c.5; Severn, 1430 9 Henry VI c.5; Thames, 1487 4 Henry VII c.15

[19] *R (On the application of Newhaven Port and Properties Limited) v East Sussex County Council and another.* [2015] UKSC 7, 26

[20] John Blair, *Waterways and Canal-Building in Medieval England.* 2007, 55-84

[21] *Ibid.* 84

1.12 Evidence from Canal Construction

James Bond has identified 34 navigation channels constructed between AD400 and AD1250. I wrote in my Sussex Thesis "The importance of these canals in terms of the use of the connecting rivers seems not to have been appreciated by most historians. Canals would only have been constructed where they could be connected to usable rivers at a time when use of the rivers was well established."[22] Since it was economically worthwhile to construct these canals the use of the natural rivers would have been much more economically worthwhile. The construction of these canals implies the widespread use of rivers.[23]

1.13 Evidence of private rivers

I have seen no contemporary evidence that any section of any usable, natural river was private in the medieval period.

1.14 The extinguishment of a public right of navigation

The Law of England is that Public Rights can only be extinguished by

1. Statute,
2. Statutory Authority,
3. Conditions changing so that the right cannot be exercised,
4. Inquisition and writ of *ad quod damnum*. Now obsolete.[24]

The public right of navigation is one of these rights. If a river has silted up so that a vessel cannot pass then there is no right of navigation for that vessel. However the right may be restored if the channel is scoured.

Public rights in England are not extinguished by desuetude.

Thus if there was a public right of navigation on all natural, usable rivers in the medieval period there is today a public right of navigation on all natural, usable rivers.

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[22] STh. 4.1.4

[23] See John Blair, *Waterways and Canal-Building in Medieval England.* 2007, 153-206

[24] *R v Montague* (1825) 4 B&C 598-605.

Part Two.

A response to Mr David Hart QC

2.1 Introduction

In 2004 I published a dissertation for the University of Kent and in 2011 a thesis for the University of Sussex. These established the thesis set out at the start of this paper. The Angling Trust did not agree with my conclusions and through Fish Legal asked David Hart QC for Advice on them. I asked Lisa Busch QC for Advice on the first two of David Hart's papers and the Angling Trust asked for Advice on her paper from David Hart.

David Hart's papers were funded by the Angling Trust. Lisa Busch's paper was funded by myself.

References

DHQC.1.paragraph number. David Hart QC, 'Advice'. 28 September 2015
DHQC.2.paragraph number. David Hart QC, 'Further Advice'. May 2016
DHQC.3.paragraph number. David Hart QC, 'Further Advice'. 7 January 2017
These papers are available at the Angling Trust website.

LBQC. paragraph number. Lisa Busch QC, 'Advice'. 26 August 2016
This paper is available at caffynonrivers.co.uk

My thesis is set out above. Mr Hart disagrees with it. The only material difference between us is whether there was a public right of navigation on all natural usable rivers in the medieval period. If there was such a right then we are agreed that the right still exists.[25] If there was not such a right then my thesis fails.

Mr Hart rightly claims that a public right of way over land can only be established be usage, custom, grant or prescription. I claim that the general right of navigation is established by usage. Mr Hart claims that this must be regular, habitual, of substantial practical value and must be established for each section of river. I claim that there is a general right for all usable rivers.

There is a general right of navigation on the sea. One does not need to prove that vessels have passed over a particular section of the sea to establish a right of navigation at that place. In the same way there is a general right of navigation over the foreshore when the tide is in. In the same way there is a general right to fly over any piece of land. In Scots law in a lake or loch the bed of the river belongs to the person who owns the nearest point on the shore. However anyone who owns any part of the shore may pass over any part of the lake or loch.

Lord Cameron put it this way

> The demarcation and identification of a public right of way on land and the proof of the right of the public to use it depends on actual use of a particular line of travel or

[25] DHQC.1.96

> passage and use of a particular kind by members of the public asserted as of right for a particular, recognised and continuous period of time. It is therefore in itself a creature of human activity, as is the right of public use which arises consequentially. A river is the work of nature, as is its course, its character and its capacity for the carriage of traffic in persons or goods. Nor does a river disappear after a specified period of disuse for such purposes, though its course and capacity may be modified or even destroyed by human action. It is therefore not difficult to appreciate that in the one case the law will require evidence of use both to identify and to open a public right of way on land, while in the other identification and capacity and potential as a means of communication between already existing places of public access are ascertainable by instant examination. The public benefit to be gained by the use of the means made available by the work of nature needs in such a case no demonstration by reference to actual use.[26]

This is not a statement of Scots Law. It is a clear exposition of my understanding of English law.

In this Part I first clarify some misunderstandings which Mr Hart has of my work. Then I look at his response to the reasons why I think that such a right existed. Finally I look at the relationship between English law and Scots Law.

2.2 Misunderstandings

2.2.1 The type of river

Mr Hart wrote "Even if Dr Caffyn's conclusions lead to the general rights which he asserts (which they do not), they could not in any event apply to every river of every size, as Dr Caffyn suggests."[27] (Underlining Mr Hart's.) My thesis applies only to usable, natural rivers as defined above.

It is to be noted that Mr Hart's concept of the 'great rivers', on which it is agreed there is a public right of navigation, is at least as wide as my concept of 'usable' rivers. Mr Hart wrote "both statutes [relating to the great rivers] had in mind rivers of similar magnitude to the Thames and the Medway named in Magna Carta."[28]

Appendix A of my thesis for the University of Sussex lists all the known occasions when boats used the Medway in the medieval period.[29] This shows that while boats may have carried loads of up to 4 tonnes most of the loads were closer to one tonne. The medieval Medway is an excellent example of the type of river to which my thesis applies. Some sections usable at some times of year by vessels carrying 4 tonnes but most sections being used by vessels being loaded, unloaded and propelled by one man. The sections above Balls Green are often not passable now.

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[26] *Wills' Trustees v Cairngorm Canoeing and Sailing School Limited.* [1976] SLTR 162, 182-3
[27] DHQC.1.36
[28] *Ibid.*
[29] STh.Appendix A SE 1 Pages 377-379

In medieval times the Thames rose at 'The Source of the Thames' which is marked by a stone. Today normally the water first flows from 'Thames Head'. This is at the end of the blue line on the Ordnance Survey maps marking the Thames. The section 800 metres long between 'the Source' and 'the Head' is now normally a damp ditch. Historically this section may well have been used for the transport of reeds from the marshy area at the Source of the river to the villages downstream. We are agreed that there is a public right of navigation when the water is wide enough and deep enough for small vessels.

2.2.2 The origin of the right

Mr Hart wrote "This PRN is said by Dr Caffyn to have originated between 1189 and1500 in all usable rivers …"[30] My opinion is that there was a public right of navigation on all natural usable rivers in 1189 and this right still existed in 1500. The legal commentators and the legal community have been obsessed by the question as to how a right of navigation was created. They fail to realise that the right has existed since the rivers were created. Certainly the right existed during the Roman occupation.[31]

I understand that Mr Hart considers that there was a public right of navigation on all perennial rivers in the Roman period. I also understand that Mr Hart considers that this right was lost between c.450 and 1189. I have seen no evidence of this change nor have I seen any reason why the change should have been made.

'For anything to be created it must previously have not existed.' There is no evidence that at any time before 1189 the public right of navigation on usable rivers did not exist.

Mr Hart wrote "I have no difficulty with the general proposition that there was considerable use of many rivers for commerce in mediaeval times, and insofar as that could be shown to have occurred for a considerable period, then PRN could be established for the part of the rivers so used."[32] Mr Hart considers that these rivers were private before the 'considerable use' was established. Yet there is no record of any dispute between a landowner and a navigator about the right to passage on an unobstructed river.

Mr Hart wrote "A PRN can only be established …"[33] I consider the use of the word 'established' to be misleading. On the one hand it may be taken as meaning 'established historically', that is 'established at some time in history'. On the other hand it may be taken to mean 'established in a court', that is 'recognised by a court'. This the same as the difference between 'what happened' and 'recorded history.' The evidence which I collected for my thesis for the University of Sussex is clearly incomplete. Estate accounts have not been searched. The Historical Society archives have been searched for only two counties.

But much more serious most journeys were never recorded. Thus from other evidence it seems likely that stone for Winchester Castle, Winchester Cathedral, Wye College, and the marble for Salisbury Cathedral were transported by river but the accounts for these buildings are not available. The use of river transport cannot now be 'established at a court hearing'.

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[30] DHQC.3.1
[31] STh.1.7.1
[32] DHQC.3.
[33] DHQC.1.2

Roger de Hovenden wrote that "Protection of the lesser roads and lesser rivers which carried loads were subject to the laws of the county." Almost none of these journeys were recorded. Corn, chicken and firewood were taken by boat to many of the markets but the journeys were not recorded. The corn and chicken have been eaten, the firewood burnt, the boats have rotted and 'boats leave no footprints'. There is no archaeological evidence.

No court can now decide on which of these rivers there was in the medieval period 'regular, habitual and substantial use'. To give an example: at Fittleworth on the Western Rother in 1615 "stood a Rough Wharf supported by timber piles". Arthur Telling and Rosemary Smith, a barrister and a solicitor, concluded from this information that "there was a common law right of navigation up to Fittleworth."[34] But this evidence clearly falls far short of Mr Hart's requirement for 'regular, habitual and substantial use'.

In 1714 an Act[35] was passed requiring that the navigation passage on the Grant, Nean, Welland and Glean should be preserved. There is no record of substantial use of these rivers before that time.

On the Trent a commission held that there was a public right of navigation to Biddulph Moor, the source.[36] The limit of recorded historical use is Swerkeston 80 miles downstream.

There is a public right of navigation on Waller's Haven because it was tidal and the right of navigation has not been extinguished.[37] There is no record of substantial use of the river.

On sections of each of these rivers there was at one time a right to navigate, that right has not been extinguished, yet Mr Hart writes "in the absence of a PRN established by use, … canoeists will be trespassing when they paddle on the river." (DHQC.1.9)

We are told that there can be a right to use a river but a person who does so is trespassing. Someone has gone wrong somewhere.

2.3 Mr Hart's response to the evidence

2.3.1 Evidence of the medieval use of rivers

Mr Hart does not challenge the records in Appendix A of my thesis for the University of Sussex.

The problem of establishing the extent of the use of rivers during the medieval period is well illustrated by the rivers of Sussex. There is evidence of the use of the Eastern Rother from 1272 to 1600, the Brede from 1300 to 1574, the Reading Sewer in the 15th century, Combe Haven in the 13th and 14th centuries, Waller's Haven, the Ashbourne Stream in the 16th

[34] Arthur Telling and Rosemary Smith, *The Public Right of Navigation.* London: Sports Council. 1985
[35] 13 Anne c19
[36] See STh.Appendix A. Tr 1. Page 299
[37] The Rev Douglas J M Caffyn, 'Private creeks and the public right of navigation.' *The Journal of Water Law*. Volume 16 Issue 1, 2005, 23-26

century, Pevensey Haven in the 13th and 15th centuries, Middle Sewer in the 13th century, Cuckmere in the 15th century, Sussex Ouse in the 16th century, and the Adur and Arun.[38]

Yet in 1586 Camden wrote "It has many little rivers; but those that come from the north-side of the county, presently bend their course to the sea, and are therefore unable to carry vessels of burden."[39]

2.3.2 Bracton

Mr Hart wrote "Other than its appearance in Bracton, and Best J's 19th century observations in *Blundell* to which I will turn, what evidence is there that Bracton's views on the ubiquity of water rights represented the 13th century common law on the subject? In truth there is none."[40]

There were four Justinian rights which are included in the 'ubiquity of water rights' which Bracton wrote about:

1. That fishing in ports and rivers was public.
2. That the shore was public.
3. That the banks of rivers were public.
4. That the perennial rivers were public.

As stated above Bracton wrote that the first right, the right of fishing in rivers, had been extinguished in England before or during his time.

The fact that the other three rights were not challenged for over three hundred years is evidence that he correctly stated the law at his time and that any change, if there has been a change, occurred after his time.

The evidence for the second right, the shore is public, is that it still exists. It exists in the Law Courts. It exists on the beaches. Mr Hart claims that in *Blundell v Caterall*[41] 'Blundell alleged a right of access to the beach to bathe' and that this right was dismissed.[42] This is incorrect. As Lord Carnwath pointed out the right which was dismissed was 'the right to bring on to the beach bathing machines for the purpose of bathing'.[43] Thus, as Bracton wrote, the beach is a public place if you do not bring a bathing machine with you. The legal community has allowed itself to be misled for a very long time by an incorrect heading to the case in the *English Reports.*

The evidenced for the third right, that the banks of rivers are public, comes from Callis who wrote in 1622

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[38] STh. Appendix A. SE 6 to SE 17
[39] William Camden, 'Camden's Britannia' London: Times Newspapers Limited, 1695, 167
[40] DHQC.3.8
[41] (1821) 5 B & Ald 268
[42] DHQC.1.33
[43] *R (On the application of Newhaven Port and Properties Limited) v East Sussex County Council and another.* [2015] UKSC 7, 109

> I cannot more aptly compare a Bank of the Sea, or of a navigable River, than to a High-way, for that the property thereof is to him whose ground is next adjoyning, and the use thereof is common to all men, and the power thereof the King hath by His Laws, *Proprietas Domino, usus populo, potestas Regi*: where-in for more clear Illustration of this matter.[44]

Mr Hart quotes Buller, J. to show that "Callis purely copied Bracton". In fact there is no evidence that Callis purely copied Bracton. Callis had travelled around Lincolnshire and knew what was happening on the banks of the rivers and there is no reason to think that he was not telling the truth.

Sir John Baker wrote that "The inns of court and chancery in their heyday constituted the 'third university of England'. One of the largest and most influential law schools in the history of the world."[45] A speaker in such a society does not say that river banks are public when everyone in the class or audience knows the statement to be false and only a quotation from Justinian law.

A more careful study is needed as to why Buller, J. thought Callis to be wrong.

In 1789 in *Ball v Herbert*[46] Herbert claimed that there was a common law right to tow from both banks of a navigable river. That right was not needed. A right to tow from one bank is all that is needed to move a vessel upstream.

Buller, J. in giving judgement said "Another authority cited is the passage in Bracton, and quoted by Callis: that plainly appears to have been taken from Justinian, and is only part of the civil law; and whether or not that has been adopted by the common law is to be seen by looking into our books; and there it is not to be found." Lord Kenyon, Ch.J. and Ashhurst, J. give the same emphasis as Buller, J. to "what is in the books". This was the approach taken by the late 18th century judges. The courts ignored the fact that "The commonplace is not commented upon." They ignored the fact that only disputes are recorded in the law books, not agreements.

Graham gave false evidence to the court when he said that "Few of our rivers, besides the Thames and the Severn, were naturally navigable." As shown above at least 170 rivers were naturally navigable. His statement was not challenged.

It was held that "The public are not entitled at common law to tow [with horses] on the banks of ancient navigable rivers." This case established that the banks of rivers are not equivalent to a bridleway. I am not aware of any case in which it was held that the bank of a navigable river is not a footpath, a public place.

One cannot understand this case without first understanding the background. Here I can only give a very brief, simplified description. Bracton was a judge in the West Country who travelled widely. Callis was "for many years a Commissioner of Sewers in his native

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[44] Robert Callis, *The Reading of the Famous and Learned Robert Callis, Esq; Upon the Statute of 23 H. 8. Cap 5. Of Sewers.* 2nd Edition. London: M Flesher. 1685, 74

[45] J.H. Baker, *Readers and Readings in the Inns of Court and Chancery.* London: Selden Society, 2000, v

[46] 3 T.R. 253

Countrey of Lincolnshire, which abounds in vast Fens and Marishes".[47] Both of them knew the country about which they were writing.

Each village had, usually, three fields divided into strips which were cultivated. There were houses and their gardens. The rest of the land was used for pasture, scrub, woodland or forest. This was common land over which different people had various rights and over which all had the right of passage. People walked or rode over this land as the ships sail over the ocean. The area of cultivation varied with time. Before the Black Death it increased, after it decreased. The area of land near the rivers was often flooded and normally damp so it was valuable for pasture but of little use for cultivation. People could therefore pass across it. On the rivers were troughs, punts and small rowing boats which took goods to the local market or brought firewood, reeds or hay to the village. For every voyage downstream there was a voyage upstream. The motive power upstream was punting, towing by one man or on slow flowing rivers rowing or paddling.

In the 167 years between when Callis gave his Reading and *Ball v Herbert* the enclosures took place under the authority of the Enclosure Acts. In each parish enclosure was achieved in about five years. Pound locks were introduced. The major rivers were modified to carry barges and lighters, the roads were improved reducing the need for river traffic and there was considerable urbanisation so the loads to be carried increased.

The right to walk or tow from the bank had been extinguished in many places by the Enclosure Acts and the much wider Acts for draining the Fens. This together with the judges' preference at that time for the rights of the landowners over those of the common people seems to have ended the right in many places.

Bracton's third right existed in his time and in the time of Callis. It had largely been extinguished by statute before the Buller, J. made his judgement.

To summarise Mr Hart's ubiquitous rights:

	Date	Reason Extinguished
1. Fishing.	Before 1250.	Unknown
2. Shore.	Still exists today.	
3. River banks.	17th, 18th C.	Mostly extinguished by statute.
4. Rivers.	Still exists today.	

For evidence of the fourth right, the right of passage on usable rivers, one need only read Part One of this paper. This right has not been extinguished by statute. It has been forgotten by some members of the legal community.

Mr Hart wrote "By the 16th century, it is plain that English common law is recognising the balance between land ownership and public rights or interests, in a way inconsistent with Bracton," referring to Woolrych.[48] Woolrych had written "an old dictum may be cited, in which it was said, that if one have a piscary in any water, he has no power to land without the

[47] Robert Callis, *The Reading of the Famous and Learned Robert Callis, Esq; Upon the Statute of 23 H. 8. Cap 5. Of Sewers*. 2nd Edition. London: M Flesher. 1685, Preface
[48] DHQC.1.37

assent of the owners of the freehold."[49] The case cited *Inhabitants of Ipswich v Browne* [50] refers to an occasion when fishermen inconvenienced the users of a ferry. It was the inconvenience due to the constant passing and repassing of the fishermen which was not allowed, not any trespass. Mr Hart does not comment on another case mentioned by Woolrych in the same paragraph. "The owner of a ferry had a right to embark and disembark passengers, as an incident to the ferry, without having any property in the soil, and that it would be sufficient for him to use the land for all the purposes of his ferry."[51] This is in agreement with the bank being a public place.

The only case in which a court has considered that a usable river was private is *Rawson v Peters*.[52] The question as to whether the river was private was not argued so the case is not binding. The question before the court was whether the passing of canoes up and down the river would disturb the fish at a time when no-one was fishing. The Secretary of the Canoe Club said that it would not. The Secretary of the Angling Club said that it would. In the County Court Ould J. held that there had been no liability as no-one was fishing. Lord Denning giving the judgement said that the passage of canoes must disturb the fish and interfere with the right of fishing. Lord Denning was a keen angler and owner of a significant fishery. The House of Lords Select Committee on Sport and Leisure called this a 'notorious' case. A later study for the Environment Agency of 'The Effects of Canoeing on Fish Stocks and Angling' found that 'canoeing is not harmful to fish populations'.[53]

2.3.3 Commissions under the River Clearance Acts

I wrote that the Commissions to preserve the navigations would not have been appointed if the rivers were private. Lisa Busch wrote "I agree with these remarks [this remark], which, in my opinion, are self-evidently correct."

I find it very difficult to understand what Mr Hart is trying to say about these commissions in DHQC.2.23-34. There is no difficulty in 'construe[ing] the meaning of the statutes' apart from knowing to which rivers they apply.

The problem with Mr Hart's analysis is that he does not identify any natural, usable, 'non-tidal non-navigated/non-navigable rivers'. There is no evidence that any such river existed.

Mr Hart accepts that "there was considerable use of many rivers for commerce in mediaeval times".[54] This implies that he considers that there were many other rivers which were usable but not used. It is these that need to be studied but he fails to identify any of them.

These Acts were for the preservation of fish, the passage of vessels and to prevent flooding. Some Acts were for one purpose, others for two and others for all three. If I understand him correctly Mr Hart considers that the passage of vessels was only to be preserved on the great

[49] Woolrych 133.
[50] (1581) 123 E.R. 986
[51] *Peter v Kendal,* 6 B. & C. 783
[52] 225 Estates Gazette, 89
[53] Environment Agency, R&D Technical Summary WS252, 2000
[54] DHQC.3.23

rivers. Does this imply that fish were only to be preserved on the great rivers? Does this imply that flooding was only to be prevented if it was caused by the great rivers? One only needs to ask the questions to know that Mr Hart's interpretation is wrong.

2.3.4 The medieval understanding of Magna Carta.

The paragraphs DHQC.2.3-22 are in my opinion pure obfuscation. I agree that the intent of the River Clearance Acts was to "protect the passage of ships and boats in great rivers (whatever precisely "great rivers" may mean)".[55] But that does not prohibit Parliament from making a statement about the lesser rivers in the Preface to one of the Acts.

In twenty paragraphs nowhere does Mr Hart explain what he understands to be the meaning of the Preface to the 1472 Act. The Preface states that there was the right and this implies that the right still existed. What else could the Preface mean?

2.3.5 The meaning of the word 'navigable'

Mr Hart ignores this evidence.

2.3.6 The absence of a distinction between tidal and non-tidal waters

Mr Hart wrote

> It is plain from this discussion that by Henry VII's reign (if not before), [c.1500] the common law was drawing a distinction between tidal waters carrying (in most circumstances – see below for the caveat) the right to PRN, and non-tidal waters not generally carrying a PRN.[56]

and

> By the time of *Blundell*, [1821] the difference in status between tidal and non-tidal rivers had been established for some time, notably in Hale speaking judicially.[57]

Thus from 1189 to c.1500 the law did not draw a distinction between tidal and non-tidal waters. Since on the tidal waters, in general, there was a public right of navigation it is difficult to understand how Mr Hart can claim that the non-tidal waters differed.

Thus from 1189 to 1500 the public had a right of passage on all usable rivers. Such a right can only be extinguished by statute or by becoming impossible to exercise.

2.3.7 Place name evidence

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[55] DHQC.2.15
[56] DHQC.1.44
[57] DHQC.3.15

2.3.8 The construction of canals

Mr Hart ignores these two types of evidence.

2.4 Scots Law

Mr Hart considers that the common law of PRN in England and Wales does not differ from the common law of Scotland as it was before 2003. He said that it would be fanciful to think that they might differ.[58]

Lord Neuberger, Lord Hodge, Lady Hale and Lord Sumption agree that the English and Scottish laws relating to access to the beach differ.[59] So it seems not unreasonable to consider if the laws relating to the private right of navigation also differ.

In cases relating to the Spey under Scots Law there were judgements of the courts that at one place cruives which blocked navigation were legal and that there was a public right of navigation. A third court decided that navigation could take place between 26 August and 15 March and a fourth court extended that period to 26 August to 15 May providing certain notices were given.[60] Such decisions are unknown in English courts.

Lord Fraser also said "As late as 1931 Lord President Clyde said … that he doubted : "if it has ever been settled whether the public character of the non-tidal part of a navigable river depends (1) on the fact of navigability, or (2) on prescriptive possession by the public." There are judicial dicta in favour of both views especially in … where Lord President Inglis and Lord Deas considered that use was necessary to establish the navigable character of a river while Lord Shand thought it was not."[61]

Mr Hart wrote "Consistent case law since 1877 has endorsed the textbook view expressed in 1830 that user is a fundamental element of establishing a PRN."[62] Certainly Lord Fraser, Lord President Clyde and Lord Shand would not agree. Mr Hart's statement that two cases at Scots law and one relating to an unusable river can fix the law relating to usable rivers seems to be unacceptable.[63] It is unfortunate that Mr Hart does not give examples of rivers found by the courts to be usable but not legally navigable.

Lord Fraser also said

> In all the Scottish cases that were brought to our attention where a public right of navigation was involved, the river had evidently been used for navigation (or at least for floating), for many years and there was no question of setting up a new right. That is what is to be expected in a country like Scotland which has been inhabited and relatively settled for centuries. It seems most unlikely that any river in Scotland which

[58] DHQC.1.99
[59] *R (On the application of Newhaven Port and Properties Limited) v East Sussex County Council and another.* [2015] UKSC 7, 44
[60] *Wills' Trustees v Cairngorm Canoeing and Sailing School Limited.* [1976] SLTR 162, 187-189
[61] *Ibid.* 213
[62] DHQC.1.98
[63] *Ibid.*

> is capable of providing a useful channel of communication or transport would not have been used by now, especially in the days before 1781 when there was no competition from railways and motor lorries.[64]

Lisa Busch wrote

> In my view, these remarks support the proposition that it may be assumed that a river which is "*capable of providing a useful channel of communication or transport*" was indeed used for those purposes in the "*days before 1781 when there was no competition from railways and motor lorries*", unless the contrary is proven. I also consider that that proposition holds good under English law. In my further opinion, at least arguably, that reasonable assumption, coupled with the evidence as to use described in Dr Caffyn's research, is sufficient to show, on the balance of probabilities, that those rivers in England which fall under the latter descriptor were subject to PRN. In short, there is, at least arguably, a basis for a common law presumption that rivers which are capable of being navigated were – and are – subject to PRN unless the contrary is proven. (LBQC.40)

The authorities quoted in *Wills' Trustees* are totally different from those which would be quoted in an English court. In art One of this paper I listed seven types of medieval evidence which show that there was a general right of navigation in England in medieval times. None of these were mentioned at the hearing of *Wills' Trustees.*

Soon after the judiciary established that prior use was a requirement for establishing a right of navigation in Scotland the government extinguished that requirement.

Mr Hart writes that in England the need to show user "emerges from cases in England and Scotland over the last 125 years".[65] This is scarcely a help in establishing the law in the medieval period. Mr Hart agrees that the rights of the navigators in the medieval period still exist today.[66]

2.5 Conclusion

I consider that the above is ample evidence to show that on the balance of probabilities there was a medieval universal public right of navigation on the non-tidal usable rivers of England and that this right still exists.

D.J.M. Caffyn.
255 Kings Drive
Eastbourne
East Sussex BN21 2UR

caffyn@tiscali.co.uk

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[64] *Wills' Trustees* v *Cairngorm Canoeing and Sailing School Limited* 1976 SLT 162, 213
[65] DHQC.1.13
[66] DHQC.1.96