The phrase 'Amending and improving the Navigation' implies that there was before 1790 a public right of navigation from Lewes to Barcombe Mills whether this section of the river was tidal or non-tidal.

The remainder of this report considers the river upstream of Barcombe Mills.

The Non-tidal Section of the Ouse

Mr Hogg wrote:

Regarding the true legal position, we have Advice from a QC. While the Company and Navigation formed by the Upper Ouse Navigation Act 1790 Act both ceased to operate around 1860, the Act was not repealed. This is important because Section 47 of the Act states:

'all persons whomsoever shall have free liberty to use… the private roads and ways (except the towing path) to the river' and 'to navigate upon the river with any boats, barges or other vessels' in each case 'for the purpose of conveying such goods, wares, merchandises, commodities, matters and things aforesaid… on payment of such rates and duties as shall be demanded'

So, to quote directly from our QC's advice:

'Paddling, or indeed running a business involving the provision of canoes/kayaks, cannot by any stretch of interpretation be brought within the statutory purpose of conveying goods outlined in the 1790 Act.'

The 'things aforesaid' are listed in Section 47 of the 1790 Act as: 'Chalk, Soil, Dung, Stone, Gravel or any other Article whatsoever'. Section 19 provided for tolls to be charged on 'Chalk, Lime, Mould, Soil, Compost, or other Articles to be used for the manuring of Land, Timber, Planks, Firewood, Corn or Grain ground or unground, or any other Article or Commodity manufactured or to be manufactured at the said Mill called Barcombe Mill, Beach, Gravel, and all Materials to be used for the making or repairing of Roads'. The Act allows these articles to be carried in 'boats, barges or other vessels'.

If the advice of the anonymous QC is correct then the 1790 Act did not create a right for people to be carried on the river. So it is not unreasonable to ask 'How did the right to transport people, as provided for in Section 5 of the 1814 Act, arise?' The 1814 Act altered and enlarged the powers of the earlier Acts for improving the river and repealed the provisions concerning 'Tolls, Rates and Duties'. The 1814 Act did not alter the purposes for which the river could be used. This Act provided for a charge of one penny per mile for any person conveyed by boat except for 'the Person or Persons having the management or care' of the boat. If the right to transport people did not arise from the 1790 Act it must have been a common law right existing before 1790 which still exists today. There is no known case of there being a right to carry people on a river but no right for an individual to use a boat on the river.

Equally 'How did the right to float timber arise?' There was a right to float timber (see below) but that is not included in the strict interpretation of goods 'carried in boats, barges or other vessels'. If *'Paddling, or indeed running a business involving the provision of canoes/kayaks, cannot by any stretch of interpretation be brought within the statutory purpose of conveying goods outlined in the 1790 Act'* then the right to transport people and float timber could not have been brought within the provisions of the 1790 Act. Yet the 1790 and 1814 Acts show that these activities were permitted.

Secondly, in the *Brotherton* case Lord Justice Balcombe in the Appeal Court said: 'the public right to navigate the river with cargo-carrying vessels and for purposes incidental thereto must be taken to carry with it a right of public navigation subject to the payment of tolls by vessels laden with cargo'.[6] There was no appeal against this decision to the House of Lords. Thus the right of public navigation always includes both commercial and recreational use. The Appeal Court held that it was unnecessary for the draftsman of the Act to state this explicitly.

Thirdly, section 58 of the 1790 Act Clause 58 states:

'If any person or any persons shall float any Timber upon the said River, or any Cut or Canal to be made in pursuance of this Act, or load any boat… so as to obstruct the passage of any other Boat, Barge, or other vessel and shall not, immediately upon Notice given to the Owner or Owners, or Person or Persons having the Care of such Boat, Barge, or other Vessel so obstructing the Passage aforesaid, hale such Boat, Barge, or other Vessel, into such Place or Places as shall be proper, or made for Boats, Barges, or other Vessels to pass each other,… [details of the penalty to be paid].

This implies that there was after the passing of the Act a right to float timber on the river.

In the *Wills' Trustees*[7] case having established that timber was floated down the river Spey Lord Wilberforce said:

As a matter of principle, it is my opinion clear that this public right [the right to float timber] can include and accommodate a right of passage by canoe: the canoe draws only six inches of water and the use made of the stream – ie of passing down the stream – is similar in character. A distinction was sought to be introduced from the fact that the use for floating was commercial and that for canoeing recreation and that the admission of the former did not therefore admit the latter. But, even if one puts aside the mixed quality of the use in this case (since the respondents at least are a commercial organization) it is in my opinion clear that once a public right of passage is established, there is no warrant for making any distinction, or even for making any enquiry, as to the purpose for which the right is exercised. One cannot stop a canoe, any more than one can stop a pedestrian on a highway, and ask him what is the nature of his use.

In the same case Lord Hailsham said:

A second contention of the appellants which I equally find it necessary to reject was that, assuming that a public right of navigation is found to have existed in the Spey, it was limited to use for serious transportation or commerce and could not extend to canoeing purely or mainly for recreation. I find this wholly unacceptable. Canoeing as such is well within the use I have found to be established on the Spey. Except in shape a canoe is not distinguishable in principle from a curragh, any more than a mule would be distinguishable from a horse where what is in question is the use of a bridleway. I can find no authority for saying that the use of a right of way on land or water can be made to depend on purpose for which, as distinct from, the manner in which or the vehicle on which it is used, and in principle I find the suggestion that it can be so limited most unattractive. Once a right of way is established for horses, carts or foot passengers on land, or for rafts or canoes on water, I cannot see that it can possibly matter whether the use is for recreation, business or the commercial carriage of goods or persons.[8]

Lord Salmon said:

But once a river is found to be a navigable public river and to have been so used for a very long time I do not think that the public's right to navigate can be restricted to navigation for any particular purpose or by any particular type of curragh or raft; certainly, in the present case, canoes cannot be excluded. There is no authority which suggests that a public navigable river may not be used by the public for purposes of exercise and recreation as well as transport and commerce so long as it is not used emulously.[9]

Lord Fraser said:

It was proved that the Spey had been used on an extensive scale for floating large rafts which must have drawn at least several inches of water, and in my opinion there can be no doubt that the right to pass such rafts down the river is amply wide enough to include the right to pass canoes, which are much smaller, and draw less water, than the rafts.[10]

The *Wills' Trustees* case determined the law relating to the recreational use of rivers under Scots Law. However, in the arguments used to determine this law no distinction can be made between Scots and English Law.

It would be necessary to examine the full text of the anonymous QC's opinion to understand the full meaning of Mr Hogg's brief quotation from it.

Mr Hogg also wrote:

Your letter refers to *'strength of evidence for common law historic usage of the site'*… You have supplied no evidence to support such a claim for PRN and none is believed to exist. OAPS has searched extensively, but found none.

The river upstream of Barcombe Mills was certainly used before the passing of the 1790 Act.[11] One map of 1724[12] and another of c1740[13] show that the 'limit of navigability' was at Isfield. This is good evidence that there was a common law right of navigation on the river to Isfield at that time. It would appear that the river had become physically unusable by 1790.

Mr Hogg also wrote:

Your letter also refers to Rev Dr Caffyn and his assertion of a general PRN throughout England and Wales. This simply does not create the rights to paddle or change the law as you would like. We do not write at length about this here, and do not intend to debate Rev Dr Caffyn's theories which have been dealt with previously and in detail, including at: QC's advice proves there is no general right to navigate non-tidal rivers in England and Wales.

My assertion is that (1) there was a public right of navigation on all usable rivers in the medieval period and (2) that this right has not been extinguished. This thesis is based on eight types of evidence.

a. Evidence of the medieval use of rivers.