

The medieval right of navigation

and a response to Mr David Hart QC

Douglas Caffyn, probably Britain's leading authority of river access legislation, presents the current information he has researched on the subject and responds to claims made by the anglers' legal adviser.

Part 1

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

- Evidence of the medieval use of rivers.
- Bracton wrote in about 1250 that perennial rivers are common to all persons.
- The terms of reference of the Commissions appointed under the River Clearance Acts.
- The medieval understanding of Magna Carta.
- The meaning of the word 'navigable'.
- The absence of a distinction between tidal and non-tidal waters.
- Place name evidence.
- 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. Until 2011 the legal community did not dispute this statement. 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. 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.

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, 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.' 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'. 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.

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.' 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

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. There was a case involving a dispute about a manmade watercourse.

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.

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, ...

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.

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', Staffordshire and Rutland where there may have been no disputes and for no obvious