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. 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. 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'

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 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 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 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'. 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.' 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.

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.' 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.

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.

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.

Part 2
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. 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 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