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'. 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 evidence for the third right, that the banks of rivers are public, comes from Callis, who wrote in 1622

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.

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.' 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* 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 Countrey of Lincolnshire, which abounds in vast Fens and Marishes'. 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. 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 assent of the owners of the freehold.' The case cited *Inhabitants of Ipswich v Browne* 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.' 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*. 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'.

**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'. 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 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