

rivers' may mean)'. 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.

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.

Thus from 1189 to c1500 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

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.

Lord Neuberger, Lord Hodge, Lady Hale and Lord Sumption agree that the English and Scottish laws relating to access to the beach differ. 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. 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.'

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.' 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. 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 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.

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'. 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.

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.

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The 64 references in this paper have been omitted for a general readership. The full paper with its references can be found at caffynonrivers.co.uk.

