

**Sustainability Committee
National Assembly for Wales.**

Examination of the current position for access to inland water in Wales.

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 Interest:- The Law relating to access along rivers in Wales and England.
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 Title:- **The Common Law and the Right of Navigation.**

Summary.

1. There was a public right of navigation on all rivers prior to 1750.
2. This right still exists.
3. It is shown how a misunderstanding arose.
4. It is shown that the rule written by Woolrych, but thought by others to be the law, was unclear, uncertain and biased.
5. The National Assembly of Wales is requested to confirm the original law.

The historic law relating to the right of navigation.

A riparian owner of a non-tidal river (the owner of the bank) owns the bed as far as the middle line. If he owns both banks he owns all the bed of the river.¹ He has the right to fish in his section of the river,² to take small amounts of water³ and to use the river to power his mills.⁴ It will be shown that if the river is physically navigable then there is a public right of navigation on the river.

In the most recent treatise on the Law of Waters Bates wrote:

It is suggested that in early medieval England, following Roman law, a permanently flowing non-tidal river was regarded as public property (*res publicae*) except so far as its banks were concerned. Thus, any member of the public who could navigate the river had the right to do so. By the time of Henry VI riparian owners had come to own the bed of the river but, it is submitted, those owners took their new property subject to the public right of navigation over it that had existed from time immemorial.⁵

Roger de Hoveden wrote in about 1180 that the lesser rivers which were used for transport were to be cared for in the same way as the roads.⁶ In 1190 a writ of *Ad quod Damnum* was issued for the river Lee which shows that there was by then a well established structure to the law relating to the use of rivers.⁷ In 1215 Magna Carta declared that all *kydells* were to be utterly put down on all rivers.⁸ This meant that boats always had, and always would have, the right to pass along rivers. In about 1260 Bracton wrote that navigation on perennial rivers is common to all people.⁹ In the 13th century the Court of Eyre visited each county in England every seven years and was required to ensure that all rivers were kept clear.¹⁰ From 1350 to 1531 numerous Acts were passed requiring that the rivers were to be kept clear for navigation. None of these Acts created a new right of navigation. They all referred to established rights.

Edwards studied the State Records for the period 1066 to 1400 and collected 650 records relating to 137 rivers in England and Wales for which there is documentary evidence of navigation.¹¹ Included among these is the use of the Usk to Usk,¹² Neath to Aberdulais,¹³ Teifi to Cenarth,¹⁴ Conwy to Llanrwst,¹⁵ Dee to Overton.¹⁶ The State records do not give a complete list of all the rivers which were used. They record the occasional dispute and the transport of goods for the king. Absent from them is the normal everyday traffic on the rivers transporting food, firewood and timber. Thus they do not record the stone wharf and slipway built at Skenfrith on the Monnow in about 1190 on the border of Wales and England where the river is relatively small.¹⁷

In England the use of the rivers was so common that between 1271 and 1286 twenty two people drowned in the county of Huntingdonshire who had fallen from boats or were in boats which overturned or sank. The Fenland, a mixture of land and water, has been described as the motorway of the medieval period.¹⁸

A fuller account is given in my book *The Right of Navigation on Non-tidal Rivers and the Common Law* printed in October 2004 which has, as yet, not been challenged.

Once a right of navigation, always a right of navigation.

All rivers were public during the medieval period.¹⁹ No court record and no book has been found, from before 1750, that gives any indication that passage on a river could be trespass. Thus on all rivers which were physically navigable there was a public right of navigation whether that right was exercised by the public or not.

The laws for highways and rivers are different. A highway did not exist unless people used it. A river existed whether people went on it or not. The right to pass and repass on some rivers has been challenged. But the courts have always held that public rights can only be extinguished by statute or statutory authority.²⁰ Mr Justice Williams said 'The public cannot release their rights and there is no extinctive presumption or prescription.'²¹ No case has been found where a court accepted that there used to be a public right of navigation on a river and that the right has been lost. Thus the medieval right of navigation on all physically navigable rivers still exists today. There cannot be a right of navigation on a river which is not physically usable.

How the misunderstanding of the law arose.

In 1789 there was a case relating to the use of the bank of the Great Ouse. Counsel for the plaintiff said 'Few of our rivers beside the Thames and Severn were naturally navigable'.²² This statement was wrong.

In 1830 Woolrych wrote the first text about the 'Law of Waters'.²³ This was an era when the rights of landowners were considered to be paramount. Woolrych based his text on the contents of the Law Books, not the History Books. By that date many rivers had been modified for use by barges and people had forgotten that before modification the rivers had been used by smaller boats. In his book Woolrych wrote 'In general the public have no right at common law to navigate on rivers but a right to do so may be acquired by immemorial usage by the public or dedication by riparian owners.'

Woolrych made several mistakes. He did not realise that the word 'navigable' had two different meanings in the books from which he quoted - 'tidal' and 'where there is a public right of navigation'. Secondly he assumed that 'Few of our rivers were naturally navigable'. In fact there is evidence that over a hundred and fifty rivers and tributaries in England and Wales were used by boats between 1189 and 1600.²⁴ Thirdly Woolrych claimed that attempts had been made to find other reasons for rivers being legally navigable but that attempts had failed. He gives no references and none have been found. Fourthly he accepted without question the statement of Bayley J that there is no right of navigation on tidal channels which are navigable only by small boats for a very short time.²⁵ This statement has subsequently been rejected in at least eleven cases.²⁶ Finally Woolrych considered that a river is a common highway. The House of Lords has decided that this is not so.²⁷ It is not surprising that the 'Woolrych Rule' was wrong. It is surprising that it was not challenged for 161 years.

The authors of subsequent books on the 'Law of Waters' read Woolrych's book and copied his errors.²⁸

In 1991 the House of Lords was asked to decide whether the Rights of Way Act 1932 applied to rivers.²⁹ They decided that it did not because:

1. The words of the Act did not imply that the Act applied to rivers. This reason is binding on all other courts.
2. The law relating to highways, rights of way over land, is different from the law relating to navigation, rights of way over water. This reason was expressed so clearly, and at such length, that it seems that all other courts will reject any argument based on the equivalence of the two laws. This has the effect of nullifying previous cases based on the equivalence of the two sets of laws, eg. *Bourke v Davis*.³⁰

This decision of the House of Lords denies the validity of the commentaries on the Law relating to the public right of navigation along rivers.

The working of the 'Woolrych Rule'.

Since the 'Woolrych Rule' was assumed to be the law for 161 years it may be asked whether it was good law:- clear, certain and unbiased.

In Wales it was known from statute that there was a public right of navigation on the Wye and its tributaries.³¹ On no other river was it generally agreed that there was access for boaters. Some said that barges were only used on the Lower Wye. Others said that all the rivers were used by coracles and for floating timber and that there was a public right on all rivers which were physically usable. Thus Lord Fraser said of Scottish rivers 'It seems most unlikely that any river ... would not have been used by now.'³² No one knew what amount of historic use was needed to establish that a public right of navigation existed on a particular river. The 'Woolrych rule' did not provide law which was clear.

Between 1830 and 1991 there were three cases in England relating to access on non-tidal rivers where appeals were made.³³ In every case and at every stage the decision of the lower court was either reversed or varied. The ‘Woolrych Rule’ did not provide a law which was certain.

Between 1830 and 1991 many people assumed that a land-owner could sue a person found on his river for trespass. A person who found a river obstructed by a land-owner could not sue the land-owner without first getting permission from the law-officers. They would only grant permission if they thought it was in the public interest. The ‘Woolrych Rule’ did not provide a law which was unbiased.

Confirming the Law.

It might be thought that after 161 years the law, despite its lack of clarity and certainty and its bias, should be considered to be fixed. However Lord Denman when Lord Chancellor said ‘When, in pursuit of truth, we are obliged to investigate the grounds of law, it is plain, and has often been proved by recent experience, that the mere statement and re-statement of a doctrine, - the mere repetition of the *cantilena* of lawyers, cannot make it law, unless it can be traced to some competent authority.’³⁴ The authors of the commentaries do not make the law.

The National Assembly of Wales is requested to confirm the traditional rights of public of access along all rivers rather than allowing the present state of confusion to continue.

¹ *Blount v Layard* [1891] 2 Ch 681, 689; Reported under *Smith v Andrews* [1891] 2 Ch 678.

² *Hanbury v Jenkins*. [1901] 2 Ch. 401.

³ *Bailey & Co. v Clark Son & Morland* [1902] 1 Ch. 649.

⁴ *Belfast Ropeworks Co. Ltd. v Boyd* (1888) 21 I.R.Ir. 560.

Loud v Murray (1851) 17 L.T.O.S. 248.

Palme v Persse (1877) 11 I.R.Eq. 616.

⁵ J.H. Bates, *Water and Drainage Law*. London: Sweet & Maxwell. 1990, para 13.18.

⁶ Henry T. Riley, Translator, *The annals of Roger de Hoveden*. London: Bohn H.C., 1853, 545 - 547

⁷ British Library, Harleian MSS, 391 f 103; quoted in John Boyes and Ronald Russell, *The Canals of Eastern England*. Newton Abbot: David & Charles. 1977, 14.

⁸ 1279 25 Edward I c 23.

⁹ ‘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.’ Sir Travers Twiss, Editor, *Henrici de Bracton de Legibus et Consuetudinibus Angliae* London: Longman & Co etc. 1878, Volume 1, 57 - 59.

¹⁰ Francis Morgan Nichols, *Britton, Volume I*. Oxford: Clarendon Press. 1865, 81.

¹¹ James Frederick Edwards, ‘The Transport System of Medieval England and Wales – A Geographical Synthesis.’ A Thesis presented for the Degree of Doctor of Philosophy, University of Salford. 1987. Unpublished.

¹² Calendar of Close Rolls, 1296-1302, 81-83, 100-102.

Calendar of Close Rolls, 1323-27, 183-184.

Calendar of Close Rolls, 1341-43, 485-88.

¹³ Charles Hadfield, *The Canals of South Wales and the Border*. Newton Abbot: David & Charles. 1960, 15.

¹⁴ Calendar of Patent Rolls, 1313-17, 99.

¹⁵ Calendar of Patent Rolls, 1330-34, 367.

- ¹⁶ R. Stewart-Brown, Editor, *Accounts of the Chamberlains and other Officers of the County of Chester, 1301-1360*. Record Society of Lancashire and Cheshire, Volume 59, 1910, 42.
Also see:- (1558) 1 Elizabeth I. c. 15.
- ¹⁷ Phil Evans and Kevin Trott, 'Excavations at Skenfrith Castle, 2003.' Report of a CADW sponsored excavation. Paper unpublished at July 2008.
- ¹⁸ Paul Spoerry, 'Town and Country in the Medieval Fenland.' In Kate Giles and Christopher Dyer, Editors, *Town and country in the Middle Ages*. Leeds: Maney. 2007, 85-110, 101.
- ¹⁹ David Wilkinson, 'Public Access to Inland Waterways: Recreation, Conservation and the need for Reform.' *Journal of Planning & Environmental Law*. (1992), 525-535, 527.
J.H. Bates, *Water and Drainage Law*. London: Sweet & Maxwell. 1990, para 13.18.
Sidney and Beatrice Webb, *English Local Government: The Story of the King's Highway*. London: Longmans, Green and Co. 1913, 8.
Albert C Leighton, *Transport & Communication in Early Medieval Europe. AD 500-1100*. Newton Abbot: David & Charles. 1972, 125.
- ²⁰ *The Queen v Betts and Others* (1850) 16 Q.B. 1022-1039.
per The Honourable Mr Justice Lightman. *Josie Rowland v Environment Agency* [2002] EWHC 2785.
- ²¹ *per* Mr Justice Willims, *Dawes v Hawkins*. (1860) 8 CB (NS) 848, 141 ER 1399.
- ²² *per* Graham. *Ball v Herbert* (1789) 3 T.R. 254-265, 255.
- ²³ Humphrey W. Woolrych, *A Treatise on the Law of Waters and of Sewers*. 2nd Edition. London: Saunders and Benning. 1851, 40 footnote.
- ²⁴ Forthcoming thesis at University of Sussex Rev'd D.J.M. Caffyn.
- ²⁵ *R v Montague* (1825) 4 B&C 598.
- ²⁶ *Evans v Godber* [1974] 3 All ER 341, 349.
Octavia Stella (1887) 6 Asp MLC 182.
Rawson v Peters (1972) Transcript of the Shorthand Notes. A.E. Telling and Sheila Foster, *The Public Right of Navigation Severn-Trent Water Authority*, Project PFA 12, 1978, 96, 99.
The Mayor of Colchester v Brooke (1845) 7 QB 339, 374.
Iveagh v Martin [1960] 2 All ER 668, 683.
Gammell v H.M. Commissioners of Woods and Forests (1859) 3 Macqueen 419, quoted in Geoffrey Marston, *The Marginal Seabed* Oxford: Clarendon Press, 1981, 70.
per Mellor J. *Free Fishers of Whitstable v Gann* (1863) 13 CB (NS) 853, 857 Reversed on appeal on another matter.
per Lord Wensleydale. *Gann v Free Fishers of Whitstable* (1865) 11 H L Cas 192, 213 – 214.
per Lord Neaves. *Duchess of Sutherland v Watson* (1868) 6 M 199, quoted in Geoffrey Marston, *The Marginal Seabed* (Oxford: Clarendon Press, 1981), 72 - 73.
per Parker J. *Fitzhardinge (Lord) v Purcell* [1908] 2 Ch 139, 166 - 167.
per Lord Dunpark. *Crown Estate Commissioners v Fairlie Yacht Slip Ltd* [1976] SC 156, 159 and 160.
- ²⁷ *A-G ex rel. Yorkshire Derwent Trust Ltd and Another v Brotherton and others* [1991] 1 A.C. 425-447, 438.
- ²⁸ H.J.W. Coulson and U.A. Forbes, *The Law of Waters*. London: Sweet and Maxwell, 1st Ed, 1880; 2nd Ed, 1902; 3rd Ed, 1910; 4th Ed by Stuart Moore, 1924; 5th Ed, 1933; 6th Ed by S. Reginald Hobday, 1952 titled *Coulson and Forbes on Waters and Land Drainage*.
A.S. Wisdom, *Law of Waters and Watercourses*. London: Shaw & Sons Ltd, 1st Ed, 1962; 2nd Ed, 1970; 3rd Ed, 1976; 4th Ed, 1979; 5th Ed by William Howarth, 1992 titled *Wisdom's Law of Watercourses*.
Halsbury's Laws of England, 4th Edition, Reissue, Volume 49 (2) (London: Butterworths, 1997)
- ²⁹ *A-G ex rel. Yorkshire Derwent Trust Ltd and Another v Brotherton and others* [1991] 1 A.C. 425-447.
- ³⁰ *Bourke v Davis* [1889] Ch 110.
- ³¹ 14 Charles II, c 14, Rivers Wye and Lugg Navigation Act.
- ³² *Wills' Trustees v Cairngorm Canoeing and Sailing School Limited* [1976] S.L.T. 162, 213.
- ³³ *Simpson v A - G* [1901] 2 Ch 671; [1904] AC 476.
Rawson v Peters The Times, 2 November 1972. 225 Estates Gazette, 89.
A-G ex rel. Yorkshire Derwent Trust Ltd and Another v Brotherton and others [1990] 1 Ch 136, [1991] Ch 185, [1991] 1 A.C. 425.
- ³⁴ *O'Connell and others v Reg* [1844] XI Clarke & Finnelly, 155, 373.