

## Land Law Afloat

**Summer is a comin' in, and if the Met Office is to be believed then it may again be a hot one. At the first sign of sunny weather many – particularly around the north and east of the county – will be hoping for an early finish in court, or cancellation of that afternoon appointment, so that they can leave the office on an urgent, non-specific appointment and take to the water. With that in mind, and having recently been paddling a canoe around Barton Broad, I began pondering what the law has to say about the rights of those on the river.**

In this short article I have no time to discuss issues concerning boundaries with water, rights to the foreshore, to divert water, or the fascinating prospect of acquiring title by adverse possession to that piece of river bed on which, between tides, a barge rests at its mooring.<sup>1</sup> Instead I shall focus on just one matter relevant to those messing about in boats: rights of access.

A recent Early Day Motion<sup>2</sup> in the House of Commons by canoeing enthusiast John Grogan MP stated : this House notes ...that over 2.5 million paddlers in Britain only have access to 1,400 miles of inland water in England and Wales, which is less than four per cent of the total 41,000 miles of waterways over three metres wide; further notes that while the Countryside and Rights of Way Act 2002 only incorporates land, the Scottish Land Reform Act 2003 and its supporting Scottish Outdoor Access Code includes waterways, ensuring that paddlers have the same rights as walkers and access to all of Scotland's waterways.

At common law a distinction was made between public rights of navigation over tidal and those over non-tidal rivers. A tidal river is regarded as being public in every respect, the obstruction to any part of the river being considered an obstruction to navigation<sup>3</sup>. With non-tidal rivers, the riparian owner also enjoys property rights to the river bed, right up to the midline. The owner of both sides controls the whole stretch of river bed, and therefore access to and along it. If a river doesn't have a public right of navigation and consent has not been obtained from the riparian owner then it is a trespass to row, paddle or even wade in it.

Some rivers, or non-tidal parts of rivers, such as the Thames in England and the Spey in Scotland, have been subject to public rights of navigation since time immemorial. In the case of the latter a clash between canoeists and the owners of valuable fishing rights reached the House of Lords,<sup>4</sup> where Lords Wilberforce and Hailsham considered with some relish cases on the right to float logs downstream, from Quebec (based on its pre-revolutionary French civil code) and New York State (based on English common law). Lord Hailsham observing that "what I have now held to be the law of Scotland happens to coincide with what I believe to be the law of England", the court determined :

- that a public right of navigation in a non-tidal river depends not only upon the theoretical navigability of the river, but

also on proof of its regular, habitual use as a channel of communication or transportation from time immemorial (customarily<sup>5</sup> 40 years);

- that a right of navigation is not a servitude and cannot be lost by non-use;
- that use for mere recreation is as effective to prove navigability as use for transporting goods or other commercial use;
- that no question arises as to whether the use is of sufficient public benefit;
- that the establishment of a right of navigation in a river is not subject to the same requirements as the constitution of a right of way on land, and in particular that a right of navigation need not be established between two public places;
- that the public right of navigation in the River Spey would permit navigation by any vessel that could be reasonably described as a boat, including a canoe.

The Court of Appeal has more recently confirmed<sup>6</sup> that, where common law navigation rights over the Thames had been extended by statutory ones but their exercise over a particular stretch of water had long fallen into disuse, the Act<sup>7</sup> did not restrict public rights of navigation which existed before its coming into force and could not confer any new right on a riparian owner to exclude any person from exercising such rights. However, where the actions of the navigation authority had led purchasers of a riverside estate to believe the waters were private these were sufficient to give rise to a legitimate expectation (albeit more limited in scope than the right to continue to enjoy the stretch of river as private which they contended for), and such an expectation relating to property could be a "possession", the peaceful enjoyment of which was entitled to protection under article 1 of the First Protocol to the ECHR unless the interference by the authority with that possession was justified and proportionate.

<sup>1</sup>Port of London Authority v Ashmore [2009] EWHC 954 (Ch)

<sup>2</sup>EDM 1577, 2nd June 2009

<sup>3</sup>Williams v Wilcox (1838) 8 Ad & E 314

<sup>4</sup>Wills Trustees v Cairngorm Canoeing & Sailing School Ltd 1976 SC (HL) 30

<sup>5</sup>In Scotland only

<sup>6</sup>Rowland v Environment Agency [2003] EWCA Civ 1885; [2005] Ch. 1

<sup>7</sup>Thames Preservation Act 1885

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