

THE LEGAL STATUS OF NAVIGATION ON THE RIVER WYE

Report by NRA Regional Solicitor - April 1992

The aim of this report is to outline the legal position as regards navigation rights on the River Wye and to answer the question:-

Is there a public right of navigation on the River Wye?

General

The public may acquire rights of navigation in one or more of the following ways:-

- (a) where Statute confers such rights on the public, or
- (b)(i) by express (or implied) grant by the riparian owners,
- (b)(ii) on proof of immemorial user.

Over tidal waters however, there is a presumption that the public has a right to navigate.

Already therefore it becomes clear that in considering the public's right to navigate the River Wye a distinction must be drawn between the tidal and the non-tidal Wye.

The Tidal Wye

It is generally accepted that the tidal limit of the Wye is found at Bigsweir, below Monmouth. It can therefore be said with certainty that upon this stretch of the Wye, that is from the mouth of the Wye to Bigsweir, that a public right of navigation exists. To my knowledge this right has not been subject to rebuttal it remains physically navigable and as such the public have navigated this stretch freely without dispute for many years.

It is on the River above this point, the non-tidal Wye where uncertainty arises.

The Non-Tidal Wye

The presumption on tidal rivers that a public right of navigation exists is based on the fact that it is the Crown that owns the bed of a river up to the limits of the tide. Above the flow of the tide land beneath a river is privately owned so that while the public can acquire navigational rights over such waters they cannot have them as of right. As outlined above the public can acquire such rights in one of three ways: by statute; by express grant or on proof of immemorial user.

a) The Statutory Position

Four Acts of Parliament have been identified as applying to the River Wye but only three of these have been considered relevant to this report namely:-

1. 14 Charles II Chap 14, Royal Assent 19 May 1662
2. 7 & 8 William III Chap 14, Royal Assent 7 March 1695
3. George III Chap 78, Royal Assent 20 May 1809

(1189), and under which user as of right will be presumed where there is proof of continuous user for a period of 20 years or more. However this doctrine has been suggested as inappropriate by John Bates, a Barrister in his work entitled "Water and Land Drainage Law" 1990, with supplements to date, since to base the right on this doctrine would be to hold that the public was granting itself the right as it arises from the fact that the river is owned by the public.

So after considering all the possibilities, as outlined above, and especially the implications of the decision in the case of : *Wills Trustees -v- Cairngorm Canoeing & Sailing School* ([1976] S.C.30, S.L.T. 162) it has been suggested that the basis of a public right of navigation in a non-tidal river should be treated as a legal class of its own. I refer to Lord Fraser's speech in the *Wills Trustee Case*:-

"I have reached the opinion that a public right of navigation in a non-tidal river depends not only upon the theoretical navigability of the river but also on the proof of its actual use for that purpose, although I think the word 'prescriptive' in this context is apt to mislead by suggesting that navigation is a servitude right, which it is not, or at least that it is closely analogous to a right of way of land."

If we then apply this to the present situation, the criteria to be applied to the non-tidal River Wye, as regards whether the public have a right to navigate exists, will be based on the physical characteristics of the river and whether it is suitable for use by the public. It will also rely on evidence of actual public user since time immemorial. For evidence of public user it will be necessary to show 'continuous user as of right' by the public as far as living testimony can go ie. 60-70 years.

A right will be exercised "as of right" if it is exercised in the following way:-

Nec vi - without force
Nec clam - without secrecy
nec precario - without permission.

To conclude the Common Law position as regards public navigation rights on the River Wye will depend on the following:-

1. Whether the River Wye is by its physical nature navigable by the public. The increasing use by the public of the Wye for recreational purposes, especially canoeing, may assist this argument.
2. That evidence can be deduced to prove continuous user as of right by the public on the River Wye since time immemorial. This evidence must show in the manner set out by Viscount Maugham, in the case of, *Wolstanton Ltd -v- Newcastle Borough Council* [1940] 3All ER 101, continuous user as of right, going as far back as living testimony can go, which would be about 60 to 70 years. The collection of such evidence would no doubt be assisted by the continued growth in recreational activities over recent years.

It is my opinion, based on the evidence presently available to me, that any claim that a public right of navigation exists over the whole of the River Wye based on the Common Law principles outlined above would not be difficult to sustain provided the necessary evidence could be produced.

To the best of my knowledge none of the above have been subject to repeal and therefore the laws created by them remain in force to date.

1. The first of these three, 14 Charles II is entitled:-

"An Act for the making navigable the Rivers Wye & Lugg and the Rivers and Brookes running into the same in the County of Hereford, Gloucester and Monmouth."

Brief Summary:-

This Act gave authority to the Sandys (Sir William, Windsor & Henry) as trustees, to "make navigable the Rivers Wye and Lugg... in the County of Hereford and other adjacent Countyes" with the view to improving trade on the River Wye by removing all "impediments to navigation" and setting up a system of locks and weirs along the river.

It is the Act which follows this one, ie. that of 7 & 8 William III 1695 (which is referred to, for the purposes of this report, as the 'main Act') on which most of my attention has been centred for it is this Act which expressly creates public rights of navigation on the River Wye. Hence, consideration is now given to this Act but references will also be made to the 1662 Act.

2. 7 & 8 William III Chap 14 - 1695

This Act was entitled:-

"An Act for making navigable the Rivers of the Wye & Lugg in the County of Hereford."

and is referred to as the 'main' Act.

This Act was introduced as a continuance of the former Act of 1662, the aim being to increase trade upon the said Rivers Wye and Lugg by making them 'free and common' for all.

Brief Summary

Under the previous Act, inter alia, powers, rights and privileges had been granted to the Sandys to undertake works laid out in the Statute with the aim of improving navigation on the said rivers. The Sandys received monies in order to undertake this work.

However, it is said that the Sandys "did nothing towards the making of the said River of Lugg navigable, and what they did towards the said work upon the said River of Wye was performed so slightly, that most of the locks and passages by them made, did in a very few years fall utterly to decay and ruin."

The purpose of the "main" Act then was to create a number of trustees to whom the task of completing these works and making the rivers navigable was given. Thus all powers, vested in the Sandys and all rights and privileges enjoyed by them (plus additional powers) were transferred to the trustees named in the main Act to hold on trust "for the good and benefit of the people of Hereford".

There is no doubt that this Act expressly creates a public right of navigation over the Rivers Wye and Lugg and their tributaries but some doubt has been expressed as to whether these rights extend along the whole length of the Rivers Wye & Lugg or are limited to within the County of Hereford.

This Act provides for the creation of a company whose purpose was to build a towing path along the banks of the River Wye. The aim was to aid free navigation of vessels upon the River Wye and thus render the main Act more effectual.

Whilst it is recognised that the main title of this Act makes reference again to the County of Hereford it is suggested that since this Act was introduced to make "the main Act" more effectual it cannot intend to confine any public right of navigation conferred to the County of Hereford, if we take the view that this was not the purpose of the main Act.

It is my opinion that on the basis of the evidence studied and which is presented above that when the Act of 1695 was drafted it was not the draftsman's intention to limit the public right of navigation, which it expressly creates, to the County of Hereford but that the right should extend along the whole length of the non-tidal Wye.

However, I must stress that the position is far from certain and I suggest that the only way that a definite answer could be given would be by way of a Court ruling.

b) THE COMMON LAW POSITION

Where a statute does not expressly grant a public right of navigation attention must be turned towards the Common Law to infer that such a right exists.

As has been stated in the previous section a public right of navigation certainly exists on the River Wye within the County of Hereford but it remains uncertain as to whether these rights extend to the Upper Wye, above Hay-on-Wye and into Wales. In the absence of a definite ruling I have turned to the Common Law.

As was noted at the beginning of this report public rights of navigation over a watercourse may be acquired in one of three ways, the second and third are now considered:-

i) By express (or implied) grant by the riparian owners

Public rights of navigation can arise through express or implied dedication the right to navigate by all riparian owners.

It is suggested that to rely on this method of acquiring a public right of navigation is doubtful and unlikely to succeed and should therefore be discarded from consideration.

ii) On proof of immemorial user

The acquisition of a right arising from long user must be founded on custom, prescription or the doctrine of lost grant.

However, the public cannot acquire rights by custom as customary rights are confined to specific classes of people rather than the public at large. Nor can the public acquire rights by prescription without evidence of express or implied dedication (refer to the case of : AG -v- Esher Lindleum Co Ltd [1901] 2 Ch. 647) which, as is suggested above, in the light of the recent decision in the Derwent Case cannot be considered an option in these circumstances ie. when considering public rights of navigation. This would appear to leave only the option of the doctrine of lost grant, a doctrine adopted by the Courts, as a result of the difficulties in proving continuous user since time immemorial

AN OUTLINE OF THE LEGAL STATUS OF NAVIGATION ON THE RIVER WYE

SOURCE

PLYNLIMON - 'THE UPPER WYE'

STATUTE:-

UNCLEAR WHETHER PUBLIC RIGHT EXPRESSLY GRANTED UNDER 1695 ACT EXTENDS TO THE 'UPPER WYE' (COURT RULING NEEDED)

COMMON LAW -

WHERE THE RIVER IS SHOWN TO BE PHYSICALLY NAVIGABLE BY THE PUBLIC AND THERE HAS BEEN CONTINUOUS USER AS OF RIGHT BY THE PUBLIC AS FAR AS LIVING TESTIMONY (IE. 60-70 YEARS) A PUBLIC RIGHT OF NAVIGATION MAY BE ESTABLISHED AT COMMON LAW

HAY-ON-WYE - HEREFORD COUNTY BOUNDARY UPPER LIMIT

A PUBLIC RIGHT OF NAVIGATION GRANTED EXPRESSLY BY VIRTUE OF STATUTE [7 & 8 WILLIAM III 1695]

- HEREFORD COUNTY BOUNDARY LOWER LIMIT

BIGSWEIR - TIDAL LIMIT OF WYE

PUBLIC RIGHT OF NAVIGATION EXISTS

MOUTH
SEVERN ESTUARY

CONCLUSION

(Please refer to the attached diagram headed "An Outline of the Legal Status of Navigation on the River Wye".)

There is no doubt that a public right of navigation exists over the tidal Wye to the point of Bigsweir which marks the tidal limit of the Wye.

Furthermore, there is no doubt that the Statute of 1695 (7 & 8 William III) expressly grants a public right of navigation over the non tidal Wye which lies within the County of Hereford, as shown on the diagram. There is however, a considerable amount of conflicting opinion as to whether this right of navigation extends along the length of the River Wye.

It is my opinion, based on the evidence available, that it was the intention of the draftsman when they expressly granted a public right of navigation by the 1695 Act that this right was to extend to the whole length of the river and not be limited to that part of the Wye which lies within the County of Hereford. However, I can give no enforceable ruling on the matter, as this would require a court ruling. However, in the absence of such a Court ruling the common law position has been considered as regards the Upper Wye. The conclusion reached is that at common law a public right of navigation will be established if evidence can be deduced to prove:

1. That the River is physically capable of navigation.
2. That there has been a continuous user as of right by the public since living memory ie. over the last 60-70 years.

The increasing use of the Wye in recent years for recreational pursuits such as canoeing may be of some assistance in this regard.

Having considered both the Statutory and Common Law positions there appears to be an arguable case to support the view that a public right of navigation extends along the length of the River Wye.