FURTHER ADVICE

Regarding the law of navigation on non-tidal inland waters in England and Wales

1. I am asked to address a further paper of 11 April 2016 by Dr Caffyn in support of his contention that there is a universal public right of navigation (PRN) throughout England and Wales. In covering letters to the Angling Trust and to myself (of the same date), he invites its recipients to identify any "errors" in the paper before publication.
2. It is clear from the paper that Dr Caffyn has read my Advice of 28 September 2015, and he will know full well that I disagree fundamentally with his main thesis. I also note that he does not address the detail of my earlier Advice or the arguments I advance in it. However, it may be helpful to address the main elements of his latest paper, and identify its "errors", not least because it formulates part of his argument in a slightly different form to that set out in his 2004 thesis – the principal subject of my analysis in that Advice. I do this by reference to the headings in Dr Caffyn's paper. The numbered, underlined and italicised headings below are taken from Dr Caffyn's paper.

1. Magna Carta and the 1472 Act

3. On page 1 of the current paper, Dr Caffyn asserts that the combined effect of Magna Carta and the 1472 Act for Wears and Fishgarths is that the King and Parliament *"considered that there was in 1472 a universal public right of navigation on all usable rivers in England.*"
4. I assume from his previous work that Dr Caffyn means by "usable" a river which can carry a canoe, even though it may not be able to carry any larger vessel. In practical terms, therefore, any stretch of a river with a depth of a few inches of water over any distance would be capable of being "usable" by that definition.
5. I considered this argument at paragraphs 35 to 36 of my earlier Advice. However, given that greater emphasis is now placed upon the 1472 Act by Dr Caffyn, I will explain in rather more detail why those Acts, when read together, do not demonstrate a universal PRN on all usable rivers in England and Wales.
6. To this end, it is necessary to identify a number of Acts passed between Magna Carta (Cap.33 of 1215, Cap.23 of 1225) and the 1472 Act which make it clear that 'the mischief' which Magna Carta and these Acts generally intended to address was navigation in "great rivers", more particularly rivers which were in regular use for the passage of shipping. I shall also set out various cases decided by the Courts in which the effect of these 14th and 15th century Acts has been explained.

7. The "headline", however, is that no court has ever found that the effect of these Acts has been to confer an unconstrained PRN on all "usable" rivers. Indeed, as I will demonstrate, the opposite is the case.
8. In my last Advice, I referred to 25 Edw.3 Stat c.4 of 1350, headed "*New Wears shall be pulled down."* Its recital was "*Whereas the common Passage of Boats and ships in the great Rivers of England ["les grantz rivers"* in the original Norman French*] be oftentimes annoyed by the inhancing of Gorces, Mills, Wears Stanks, Stakes and Kiddles, in great damage of the People*". The enactment was that all such obstructions "*which be levied and set up in the time of Edward [1st] and after, whereby the said Ships and Boats be disturbed, that they cannot pass in such river as they were wont, shall be out* (sic) *and utterly pulled down.*" So the mischief intended to be addressed by the Act was identified to be in great rivers, and the remedy under the Act applied where the passage of ships and boats had been disturbed by the placing of new weirs or similar. As the 17th century lawyer Callis points out at p.205 of his work on Sewers, by reference to this provision, it only extends to "*Navigable Streams which have been Navigable by use and Custom*". This is inconsistent with Dr Caffyn's thesis, which is that any river capable of bearing any craft is subject to a PRN, whether or not it has actually done so.
9. 25 Edw.Stat c.4 of 1350 was confirmed by 45 Edw.Stat. c.1, of 1371, which set out the passages from 25 Edw. Stat. c.4 extracted above. The trigger for the enactment was "*grievous complaint of the Great Men and the Commons made in this present Parliament…that the Statute is not duly executed or kept*". One hundred marks fine was set as a penalty for breach.
10. In 1 Hen. 4 c.12 of 1399, both the 1350 and 1371 Acts were confirmed; additional text, at (7) of the translation, read: "*And now by Request of the said Commons, shewing by their petition, that the common Passages of Ships and Boats in the great Rivers of England, and also Meadows and Pastures, and Lands sowed adjoining to the said Rivers, be greatly drowned, wasted, and destroyed by outragious enhancing and striating of Wears, Mills, Stanks and Kidels….whereof great Damage and Loss have come to the People of the Realm, and daily will come if remedy be not thereof provided."* Commissions were directed to survey and keep the *"Waters and great rivers there, and correct and amend the Defaults…*", though there was to be a "*saving always a reasonable Substance of Wears [etc] so in old Times made and levied.*" Callis at p.206 summarised the effect of this saving, namely that if a given obstruction had "*stood and been time out of memory in Rivers or Streams, and so have Warrant from Custom and Prescription, these may not be cut up or pulled down by Commissioners of Sewers, because long use and Custom…hath established them.*" This demonstrates that as early as 1399 the legislature recognised some balance between public and private rights on rivers.

11. Further commissions were empowered by 4 Hen. 4, c.11. of 1402 to inquire of wears, kidels etc. Here, the mischief identified by the Act is stated more widely, as my underlining makes clear: *"Because that by Wears, Stakes, and Kidels, being in the waters of Thames, and of other great Rivers through the Realm, the common Passage of Ships and Boats is disturbed, and <u>much People perished, and also the young Fry of Fish destroyed, and against Reason wasted and given to Swine to eat..."</u>* But the refrain about "great rivers" remains.
12. There were continuing complaints about lack of enforcement of these various statutes. 1 Hen.5, c.2 of 1413 amounts to a decision that they should be enforced, or in the words of the Act, "*the said Statutes and Ordinances be surely holden and kept and put in due Execution.*"
13. It is in this context that the 1472 Act comes to be interpreted. Its recital, much relied upon by canoeing interests, reads thus: *"Whereas by the laudable Statute of Magna Carta, amongst other things it is contained, that all Wears through Thames and the Medway, and through all the Realm of England, should be put down, except by the sea coasts; which statute was made for the great Weal of all this Land, in avoiding the straiteness of all Rivers, so that Ships and Boats might have in them their large and free Passage, and also in Safeguard of all the Fry of Fish spawned within the same."* The addition of "fry" picks up their addition to the mischief identified in the 1402 Act. The 1472 Act also records the making of "*divers statutes*" made since Magna Carta (which I have summarised above), and also set out the "*Recital and also the Enactment in Stat. 1 H.4 c.12 at length*" – i.e. the 1399 Act. Hence, the 1472 Act incorporates continued reference to the disturbance of passage in great rivers. The enactment (the active legislative element, as opposed to the recitals) within the 1472 Act requires enforcement of the Magna Carta "*and all other Statutes concerning the Premisses*" i.e. concerning this subject matter.
14. Dr Caffyn, and canoeing interests, argue that Magna Carta and the 1472 Act are applicable to all rivers, and the intent is to keep them clear of all obstructions. Ergo, it is said, there is a universal right of navigation in all rivers.
15. But it is unsustainable to argue that the 1472 Act can be interpreted simply by reference to Magna Carta, rather than as part of the latest of a sequence of Acts which went through Parliament between the 13th and late 15th centuries. This is because once you read all the Acts together, you realise that the intent, in terms of navigation, is to protect the passage of ships and boats in great rivers (whatever precisely "great rivers" may mean), and to do so where that passage of vessels has actually been impaired by some obstruction. This is the simple answer to the proposition that theoretical usability is enough to establish a PRN, as distinct from a PRN being established by <u>actual</u> long user by ships and boats (for which see my earlier Advice).
16. Now to case law and authority on these mediaeval laws. All the relevant statutes were considered by the Privy Council (Coke and Fleming LCJJ, and Tanfield CB) in the case of

Chester Mill on the River Dee 10.Co.Rep.137a, decided in 1610. It was concluded that (i) Magna Carta only applied to kidels, i.e. open fish weirs, and not all other obstructions; (ii) the generality of Magna Carta is restrained by the 1472 Act and the other intervening Acts. The 1472 Act is therefore not a restatement of Magna Carta as Dr Caffyn asserts.

17. So, testing conclusion (i) against Dr Caffyn's proposition, *Chester Mill* ruled that Magna Carta did not set out some countrywide right to navigation, it just outlawed a particular form of obstruction (kidels or fish weirs) of ships and boats in great rivers. Magna Carta did not therefore enact a universal PRN.
18. Interpreted in the light of the whole sequence of statutes up to and including the 1472 Act (as conclusion (ii) in *The Chester Mill* case tells us we must do), it is also very difficult to see how the 1472 Act could possibly take matters further. The 1472 enactment says nothing of relevance on the issue of navigation. All that is relied on are its recitals, which themselves have to be read in the light of the statute as a whole (and which, as I have pointed out above, included reference to the 1399 Act and its reference to the obstruction to the common passage of ships in great rivers).
19. There are then a cluster of 19th cases which follow the *Chester Mill on the Dee* ruling, including *Williams v. Wilcox* (1838) 8 A & E 314 (discussed in paragraphs 35 and 36 of my earlier Advice), *Rolle v. Whyte* (1868) LR 3 QB 286 and *Leconfield v. Lonsdale* (1870) LR 5 CP 657, and all of which interpret the whole sequence of 13th to 16th century Acts. The last two cases are of importance given the emphasis now placed on the 1472 Act. It is plain from the reports of both cases that they were both elaborately argued. *Rolle* is an emphatic decision that the 1472 Act is only applicable to navigable rivers: see p.300-301. In so determining, the Court pointed out that the sorts of obstruction prohibited by these Acts would not be of any public detriment except in navigable rivers. *Rolle* concerned weirs near Umberleigh Bridge on the Taw, where the river was not navigable, and only became so some 3 miles downstream, as the Court explained. I do not know whether the reaches of the Taw above Umberleigh Bridge are currently disputed, but this is a direct decision that such reaches are not within the scope of either Magna Carta or the 1472 Act. By contrast, I suspect that using Dr Caffyn's terminology, they would have always been *physically* usable by canoes (had canoes been extant in earlier times). If so, this is a good example of why Dr Caffyn's hypothesis about Magna Carta and the 1472 Act does not represent current law.
20. *Leconfield* (concerning the Cumberland Derwent) agreed with the conclusion in *Rolle* that Magna Carta and the 1472 Act were only applied to navigable rivers: see p.724. Hence, an 18th century mill-dam on a non-navigable river was found to be not unlawful. In doing so, the Court rejected a fully reasoned judgment of the Special Commissioners of Fisheries – so it cannot possibly be argued that the current point was not considered. The terms in which this conclusion is expressed at p.724 are important; authorities, including Callis, Coke and

Glanville showed "*that the enactment of Magna Charta only applied to public rivers. If it were otherwise, there would have been a prohibition against erecting weirs in all private rivers, even where a person was the owner of the entire river and of the land on both banks, which, we think, could not have been contended*."

21. Now there may be a certain amount of argument about whether a given river is a "great" river (I touch on this below), but I consider the intent of the statutes and cases is clear. If a given stretch of river has a sufficiently long history of navigation, even though it is non-tidal, then there are grounds for establishing PRN. But if an upper stretch of a river has no history of navigation, then it is very difficult to see why the law should override private rights because of the *possibility* that someone *might* in future use a smaller craft which can physically navigate that stretch which has not been previously navigated.
22. I appreciate that Dr Caffyn is seeking shortly to summarise his current opinions in his paper, but it has to be said that the paper is not a complete account of the material statutes and cases on this issue. If he were to publish his paper in existing form, it would be unwise for canoeing interests to rely upon his opinion as a full and accurate statement of the current law on PRN.

2. Statutes and Commissions/ 4. & 5. Evidence of the medieval use of rivers and Medieval Authors

23. Dr Caffyn asserts that it is possible to understand the scope of the mediaeval Statutes from the list of rivers for which Commissions were appointed; those Commissions are set out at page 7 of a River Access for All document of January 2015, entitled the Protection of PRN, unsigned, but I infer, prepared or informed by Dr Caffyn. He also says that Commissions were appointed for the majority of usable rivers in Southern England, and that there was no distinction between the use of tidal and non-tidal rivers at that time.
24. As a matter of legal principle, the courts do not generally construe the meaning of a statute from the way in which the statute was used subsequent to the enactment. So the terms of a subsequent Commission (or indeed a subsequent expression of governmental opinion) cannot tell us what the words used in the enabling Act mean. The interpretative exercise for the courts must relate to the sources and materials already present at the time of enactment, and which may bear on the meaning of the words used. That is not to say that the documents relating to the Commissions may not be evidence going to the fact as to whether certain rivers were then used for navigation. To give one example at random, 1290 May 20 (p.8 of the River Access document), concerning the River Ancholme draining into the Humber, this is *some* evidence that people were contemporaneously saying that ships and boats laden with corn had previously (i.e. prior to 1290) travelled from the Humber to (unspecified) parts of Lindsey – an area of North Lincolnshire – until the 1970s.

25. This general distinction between legal principle and evidence is important. Insofar that all Dr Caffyn is saying is that these Commissions assist in providing some evidence that specific stretches of specific rivers had or may have had commercial traffic on them in the 13th century and 14th century, there is no or no fundamental disagreement between us that this may be relevant to the issue of PRN on those stretches.
26. The contents of the Commissions are not conclusive of long user, as one example demonstrates. A Commission (1332 March 28) was issued in respect of the Yorkshire Derwent "*touching complaints that whereas in times past ships and boats could pass along the River Derwent as far as* [Stamford Bridge]". The claimed upper point of this stretch of river (Stamford Bridge) in mediaeval times was minutely examined in the *Brotherton* case, (1990) P&CR 60. Vinelott J ruled at p.84 that PRN was not made out as far as Stamford Bridge. He considered that "*while the river was probably tidal upstream from Sutton, it was not tidal or if it was tidal it was not navigable, except by small boats at rare states of the tide, as far as Stamford Bridge*". This is an illustration of the more general point that these Commissions evidence a clash of interests between merchants keen to retain or expand their river trade routes on the one hand, and fishing interests keen to retain their weirs or similar, on the other. The job of those entrusted with the Commission was to inquire into the "*complaints*" about navigation, and whether it was affected, and doubtless to decide whether they agreed or disagreed. In this instance, from the judgment of Vinelott J, subsequent enquiry showed that the weirs etc in dispute lay in or downstream of Sutton, so the real issue did not concern the upstream stretch between Sutton and Stamford Bridge: p.81. Hence, the Commission's terms of reference (which Dr Caffyn relies upon) did not translate into findings of actual use capable of establishing PRN in this case.
27. More generally, I do not know whether the *stretches* of rivers listed in the Commissions (or indeed in Dr Caffyn's review of other evidence: points 4 and 5 at his p.3) are now disputed between canoeing and fishing interests. I emphasise the word "stretches" because PRN does not attach to the entirety of a river but to the various distinct stretches of it subjected to long user. I pointed out in paragraph 15 of my earlier Advice that the exercise of identifying a PRN has to be carried out on that basis. One would also need to look at subsequent navigation statutes to see whether they bear on the question; they may be evidence that the stretch has previously been un-navigable or by contrast they may suggest that it had already been navigated.
28. But my strong disagreement is with Dr Caffyn's shift from the identification of potential evidence on specific rivers towards making a much wider claim, namely that there was universal PRN on all usable rivers (as he would define usable). The claim, insofar as it is one of *law*, is wrong. Insofar as it is one of *fact*, one cannot so generalise without looking at the stretches in dispute and deciding whether long user is made out on the facts.

29. Long-standing past commercial traffic ("since time immemorial") may establish a PRN which canoeists may exercise even after that commercial use has stopped, as the *Wills Trustees* case exemplifies. But it does not follow that just because canoes can now physically use a stretch of a certain river, they have a PRN, even though there is no evidence that commercial or indeed other traffic ever used that stretch in the past.
30. Returning to the legal point, and insofar as the Commissions may be used to construe the mediaeval statutes in question, then the picture they give does not actually support Dr Caffyn's ultimate hypothesis. Many of them contain, as the Ancholme example shows, phrases such as where ships "*were wont*" to go, which illustrates two closely connected points. First, this Commission picks up the references in the 1350, 1371, 1399 and 1402 Acts to actual disturbance of navigation being part of the mischief to which the series of Acts was addressed. This would suggest that Dr Caffyn is in error (as I say he is) in not construing this series of Acts as a whole, rather than (as he does) selecting Magna Carta and the recital to the 1472 Act, and ignoring the others. Indeed in other Commissions listed by him, there are express references to the 1350, 1371 and 1399 Acts (e.g. 1404 Feb 28, 1408 March 5, and many thereafter), all of which Acts refer to passage in great rivers. Secondly, and more fundamentally, it would tend to expose the error of asserting that PRN can be established by the *possibility* of navigation, as distinct from *evidence of* actual past user.
31. Dr Caffyn suggests that the Commissions did not draw a distinction between tidal and non-tidal rivers. Albeit without a minute examination of all the Commissions, I agree. They do appear to relate to tidal and non-tidal stretches of rivers alike. Those rivers mentioned in the Commissions also extend beyond what are often regarded as the four "great rivers", namely the Thames, Trent, Great Ouse, and Severn, but there is no sign that they extend beyond rivers with established rights of navigation (which is the critical point on which we disagree).
32. Even if this point were to justify re-interpretation of the underlying statutes, it would not justify the next stage in Dr Caffyn's argument, namely that certain Commissions relating to specific rivers and stretches on rivers constitute evidence of a general PRN extending to all stretches of all rivers (the "universal PRN" claim). It is that leap which is inconsistent with the whole body of law which I considered in my earlier Advice.
33. I would add that, as I explained in that Advice, the tidal/non-tidal dichotomy is not determinative of whether there is a PRN. There is a *prima facie* rule that tidal waters carry a PRN, though there may be exceptions to this: see my paragraph 60. The justification for this appears to be that those waters (whoever may own the soil, prima facie[1] the Crown) are for the benefit of the public, exercised via PRN or the public right of fishery[2]. By contrast, in

[1] "Prima facie" because in fact the soil of many tidal estuaries vests in private owners.

[2] Again subject to any private right of several fishery which the Crown may have validly granted.

non-tidal waters, the private rights of riparian owners are only overridden if actual navigation has been established at some stage since "time immemorial".

34. So there are three categories with different applicable law: (1) tidal rivers, (2) non-tidal navigable (by which I mean historically navigated) rivers, and (3) non-tidal non-navigated/non-navigable rivers.

3. Decisions of the courts

35. Dr Caffyn asserts that, in all reported cases about a disputed PRN in which physical usability was established, a PRN was found to exist. He cites five cases and a 19th century Royal Commission. He distinguishes *Rawson v. Peters* (paragraph 25 of my earlier Advice) because PRN was not there in issue.
36. In fact, in none of the cases he cites was physical usability an issue in the case. Nor does he set out any statements from the judges in any of the cases he cites to support his assertion. So I need to set out what the cases were actually about to explain why the cases give no support to his proposition.
37. The first case, *Rowlands*, concerned a stretch of the Thames. The main issue was whether an admitted PRN subsisting in 1885 was extinguished by the terms of the Thames Preservation Act 1885. The judge answered that question "No" as a matter of statutory construction of the 1885 Act. In the course of so answering, he summarised the general law of PRN, as part of the context of the case, and I relied in part on that summary at paragraph 24 of my earlier Advice: in non-tidal rivers, a "prescriptive use" has to be established. There is nothing in the case to the effect that physical usability is enough, and the statements of the judges I quoted at paragraph 24 of my earlier Advice are to the contrary.

38. The second case, *Simpson,* I also cited as firmly in support of my conclusion, at paragraph 70 of my earlier Advice. Farwell J at p.687 had concluded that the *"question whether a non-tidal river is navigable or not depends, not on the question of possibility of navigation, but on the proof of fact of navigation."* This could not be a clearer statement as to why Dr Caffyn's directly contrary proposition is wrong. In *Simpson*, there appears to have been no dispute that there was in fact public navigation from 1625 onwards for specified sections of the Great Ouse (so it was both usable and used). This PRN could be inferred from the construction of sluices by that date. Lord Davey confirmed this in the House of Lords: [1904] AC 476 at 498. Again, I fail to see anything in the decision which establishes that a PRN was established on the basis of physical usability in the absence of actual use.

39. The third case cited by Dr Caffyn, *Micklethwait,* was a claim by the owner of Hickling Broad to exclude a neighbour from shooting or fishing over the Broad, or from boating otherwise than via a defined channel across the Broad. The judge found that the Broad was non-tidal:

p.228. An injunction was granted in respect of the shooting and fishing, but not to limit the boating to the channel as defined in the claim. The fact of PRN over that channel was not in dispute. There appears to have been little argument or consideration in the judgment as to why the defendant was not limited to the defined channel, Romer J simply observing at p.230 that the right of way was not so restricted and that it was not necessary for him to decide how far the right of way extended beyond the channel. It, as with the other cases, gives no assistance on the issue of physical usability versus actual history of navigation. It certainly does not decide that there was PRN over all of the Broad, which is how Dr Caffyn purports to summarise the case.

40. *Mayor of Nottingham v. Lambert* concerns the Trent either side of Nottingham, both upstream (to Wilden) and downstream (to Gainsborough). There was no issue in the case that there was PRN over both lengths of river. The only issue was whether the town of Nottingham could charge tolls on vessels passing through Nottingham. The Court held it could not, because of the established PRN. If PRN was not in issue, it can hardly be said that the question of usability was in issue – the whole point of the case was the lengths of river involved were in fact used by vessels, hence the claim for tolls.

41. The fifth case, very shortly reported as *Haspurt v. Wills,* is a similar case about the lawfulness of tolls sought to be charged by warehouse interests in Norwich. Again, the report carries no hint that PRN was in issue over the lengths of river considered by the court.

42. The last reference by Dr Caffyn (footnote 13) to a "relevant court" decision is not to a court decision at all, but an 1882 Royal Commission report concerning obstructions of the course of the Trent at Colwick. I have not seen the report referred to, but I note that Colwick is well downstream of Nottingham. It is plain from the *Nottingham v. Lambert* report that there was a long-established PRN over this section. So it is again difficult to see how this can be relevant to the present issue.

43. As to the remaining cases referred to by Dr Caffyn, the dictum of Lord Denning in *Rawson v. Peters* is firmly in support of my views, albeit that it is obiter, as are the cases concerning the Derwent (*Brotherton)* and the Mole (*Bourke*).

44. So I cannot see any statement in any of the cases Dr Caffyn cites which supports his general proposition. As will be seen from the above, dicta in five of them support my analysis (leaving aside, critically, cases such as *Wills Trustee* considered elsewhere in my earlier Advice to the same effect).

6 Mediaeval law relating to trespass on land

45. Dr Caffyn suggests that mediaeval law allowed free passage on all unenclosed land not planted with crops, that the only warrant for trespass on land was *quare clausum fregit*, and

that it was only an "offence" to enter enclosed land or land where crops were growing. Rivers were neither, so the public were allowed to travel on them.

46. For clarity, this debate should not be about demonstrating that an "offence" has been committed against the criminal law, but whether a remedy in a civil action was available in respect of a wrong affecting rights (including fishing rights) in watercourses in former times.
47. Contrary to Dr Caffyn's contention, there were remedies open to riparian owners where some sort of incursion affected a watercourse.
48. If the incursion was to the soil underneath the river, then this would be a straightforward case in which a writ of trespass was available; the ancient rule (derived from Roman law and adopted into English law via Hale) was that the ownership of the soil was vested in the riparian owner up to the centre line of the river – *usque medium filum aquae,* in Latin.
49. If the interference was with the right of fishery (whether vested in the owner of the soil or indeed in a third party), then similarly a writ of trespass was available. The latter is clear from the leading case of *Holford v. Bailey* (1850) 13 QB 426 in which the Exchequer Chamber (an appellate court) decided that the owner of a several fishery (not <u>just</u> the owner of the soil) could sue in trespass for the disturbance of the fishery, even if no fish were taken. It cited with approval a case recorded in the Yearbook for Trinity 20 Hen 6 (i.e. 1442) to this effect, as well as the 18th century Comyns Digest, in which the particular writ is described as "*quod separalem vel liberam piscariam suam fregit, est piscatus est*" – i.e. the trespass was to the fishery (piscariam) rather than the land (clausum), but it was still a trespass. None of this is particularly obscure in fishing law terms. *Holford*'s case is set out and followed in *Rawson v. Peters* (where it was necessary to the decision) and the learning is summarised in Wisdom on Watercourses, 2011, 6th edition, at 8.52. Yet Dr Caffyn acknowledges none of it in his assertion about the applicability of the writ of trespass.

<u>*Part Two*</u>

50. I have dealt with Magna Carta above. I have also addressed in my earlier Advice Dr Caffyn's argument that there was an all-encompassing right of PRN pre-dating Magna Carta. I observed (in paragraph 33) that Bracton's dictum that navigation and fishing in "*perennial rivers are common to all persons, but that temporary streams may be private*" was taken from Justinian and does not reflect the common law tradition in England and Wales.

51. On p. 4 of his paper, Dr Caffyn cites a passage from the well-regarded work by Getzler, *The History of Water Rights at Common Law*, on the lasting impact of Bracton on English law. The context of Dr Caffyn's citation from p.67 of Getzler is critical. Getzler's work concerned the use of water resources, not PRN, and the way in which the law has evolved in a measured way to allow riparian and other owners to abstract water from rivers without offending the

rights of others to use that water. Getzler considers only in passing the issue of PRN: see p.21 and his summary of Hale at pp.178-180. Bracton has indeed played a part (as one of many influences) in the very different story of abstraction rights, as Chapter 6 of Getzler's work makes clear. But this has little relevance to the current issue.

Conclusion

52. The last paragraph of Dr Caffyn's paper (at paragraph 8) contends that PRN has existed since the dawn of legal history. That simply is not made out on the statute and case law which I consider here and in my earlier Advice. This is also why the many commentators and lawyers he refers to are right to concentrate on how a PRN could be created.

53. To summarise, there is no universal right of PRN. It has to be established, river by river, stretch by stretch, on the basis of evidence of past long-standing user.

May 2016 **DAVID HART Q.C.**