

THE ITCHEN NAVIGATION: A LAWYER'S VIEW OF THE LEGAL ISSUES

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The Itchen Navigation began with an Act of Parliament in the reign of Charles, II, 1665, fell into disuse in C19th, and one hopes may be restored in C20th. The history of the Itchen Navigation especially the legal history, is troubled and unclear.

The nature and extent of navigation on the river Itchen over the centuries is a matter of some doubt and speculation. There is no hard evidence either way. It seems highly likely that the river Itchen has been navigable and navigated for many centuries. It is unlikely that the Romans, from Clausentum, navigated up the river to Winchester, there was a perfectly good road. Apparently the first known reference to improvements to the river was made in the time of Edward the Confessor, C11th. Some stone for the rebuilding of Winchester Cathedral may have come by water. Godfrey de Lucy, Bishop of Winchester, had the authority and the intention to make the river fully navigable, from Northam to Alresford, about the end of C12th or beginning of C13th, allegedly by charter from King John; whether he did so or not is unknown. It has been suggested that the chalk pit on St Catherine's Hill arose because of the building of the embankment for Bishop de Lucy's canal (Hawkes *et al* 1930, 234; Tubbs 1978, 5, 7). In any event this navigation eventually declined. In the first part of the C17th representations were made to Parliament about 1620 and to Cromwell to render the river Itchen navigable. There is believed to have been a survey report in 1616 or 1617, by Captain Casey on behalf of Commissioners for Water Worke from Southampton to Winchester. It may be that the river has always been navigable; certainly there has been

pressure to make it or to keep it navigable.

The restoration of the monarchy in 1660 led to an upsurge in economic activity, including inland navigation. An Act of 1665 (16 and 17 Car II c. 12) granted powers to make 'divers rivers navigable or otherwise passable for boats, barges and other vessels', and one of these was the Itchen. The Act granted a monopoly of the right of navigation, 'and no other shall have use and employ Barges, Boats, Lighters, or any other Vessel or Vessels, upon the said . . . new Channels', and of the carriage of goods to the undertakers of the navigation works. Commissioners were empowered to authorise the cutting of new channels where the state of the river made this necessary, as was found to be the case with the Itchen. Existing rights were preserved: 'Provided always, that all such Boats of such Burthen in such manner and for such uses as have been used or accustomed to pass in or upon any of the said Rivers or any of them, before the Making, new Cleansing or Scouring thereof the said River, or Enlarging the Passages thereof and other the aforesaid Premises, and the making this Act, shall and may continue freely to go and pass in or upon the said Rivers and other the Premises, so far and in such a manner as was or is accustomed before the Deepening, Enlarging or Making thereof this Act, or anything herein contained to the contrary in anywise notwithstanding.' In pursuance of the Act of 1665, on 18 December 1701 Justices of the Peace at Winchester made appropriate orders to render the river Itchen navigable, approving and authorising a conveyance by the Dean and Chapter of Westminster, acting for Winchester Cathedral, to Sir William Heathcote of three acres of land at Compton for the purpose of perfecting the navigation of the river by way of leaving the old channel or watercourse and cutting a new channel. The plague of 1665 delayed many things, including the obtaining of the Act. The

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Itchen Navigation was finally opened and trading by 1710.

The Act of 1767 (7 Geo III c. 87) was concerned with the better regulation of the Navigation and its monopoly. The monopoly was broken, or rendered capable of being broken. The Act also dealt with Blackbridge wharf. It is said that prior to 1767 the proprietor abused his monopoly by refusing to carry goods, alleging shortage of carrying craft, and accordingly by the 1767 Act the Commissioners were given power to license other persons to carry goods on the navigation in vessels between 20 tons and 30 tons, on payment of specified dues to the proprietor. The monopoly related to the carriage of goods, not the right to navigate. Vessels were used only for commercial purposes, not for pleasure.

The Act of 1795 (35 Geo III c. 86 s. 27) stated that the Navigation or estate be vested in James D'Arcy and consist of or comprise 160 shares, which he could sell, or dispose of, or mortgage.

The Itchen Navigation is 10½ miles, from Woodmill in Southampton (the highest tidal point of the river Itchen) to Blackbridge wharf in Winchester, as stated in the Act of 1802 (42 Geo III c. 111). The statutory authority for the Itchen Navigation was in fact 12 miles, running on to Northam.

In 1800 George Hollis, who had been agent to D'Arcy, with the aid of Harry Baker, acquired all the shares. He obtained the Act of 1802 (42 Geo III c. 111). The Navigation was to be brought up to standard, the operation regulated, the powers of Commissioners confirmed and expanded, and tolls and carriage rates regulated. The Itchen Navigation was to be made a public navigable river (s. 1):

‘... all Persons whomsoever shall have, use, and lawfully enjoy the free Passage upon the said River, with and for Boats, Barges, and other Vessels not exceeding the Burthen of Forty-five Tons, nor less than Twenty Tons, and also have and use the towing or hauling Paths, Wharfs, Quays, and all other necessary Powers for navigating the same and carrying on the Commerce of the said River, for the Benefit of the Public, without any Let, Hindrance, or Obstruction

from any Person or Persons whomsoever, upon Payment to the said George Hollis and Harry Baker, their Heirs and Assigns, such Rates and Duties as shall be demanded by them ... not exceeding the Rates and Duties hereinafter given or granted, and subject nevertheless to the Provisions and Regulations of the said recited Acts and this present Act.’

The Acts of 1811 (51 Geo III c. 202) and 1820 (1 Geo IV c. 75) provided for increases in the tonnage rates.

In 1823 George Hollis, the proprietor of the Navigation, brought an action against one Goldfinch, the owner of adjoining land, at Compton (New Cut, Comter Ditch and Waners Mead) for cutting bushes on a bank of a cut made out of the river. It was held that a proprietor need not necessarily own the land in order to enjoy right of navigation; but the case went off on the basis of a new trial being ordered: *Hollis v. Goldfinch* (1823) 1 B. and C. 205; 2 Dow. and Ry. K.B. 316; 1 L.J.O.S.K.B. 91; 107 E.R. 76. The Act of 1665 did not vest the soil or title to the soil in the proprietors, only the monopoly right of navigable passage and carriage of goods.

Considerable parts of the soil or subsoil of the Itchen Navigation are owned, or are claimed to be owned, by private owners, e.g. Winchester College, ‘The Malms’ at Shawford, Eastleigh Borough Council, and others. But there is no legal incompatibility between private ownership of the land, and the soil and the subsoil, and public rights of way and navigation.

George Hollis became sole proprietor in 1804 (see address by George Hollis, proprietor of Itchen Navigation 1804–1839 to the Owners of Mills and Meadows 1809). He was a solicitor. In correspondence in 1838 with T. Hodding, Solicitor, acting for Sir William Heathcote, George Hollis strenuously maintained his legal title and ownership to the banks of the Itchen Navigation, the building of the railway raising problems. In 1839 he sold his shares to his three daughters and one of his sons in equal quarters. The son, Francis Joseph Hollis, also a solicitor, was manager until 1841. In 1841 a mortgagee William Whitear Bulpett became manager. He tried to carry out repairs. In 1862 Francis Joseph

Hollis, then owning three quarters of the shares (80 of his own, 40 as trustee for his sister Catherine, the other 40 being owned by his brother Rev. George Parry Hollis) sued William Whitear Bulpett in chancery, attempting to remove him, but lost, and Bulpett was confirmed as receiver, manager and mortgagee in possession: *Hollis v. Bulpett* (1865) 12 L.T. 293; (1865) 13 W.R. 492. Hollis, part owner of an equity of redemption, asked for an account but did not offer to pay the outstanding debt. At an earlier stage in the proceedings, in 1863, Kindersley VC is reported to have expressed the opinion that as the Navigation was created by statute, which made no provision for closing, it was scarcely to be supposed to be possible that the Navigation could be disposed of entire and that the only parts saleable would be the wharfs, stabling and isolated pieces of land purchased by the company; but the judgment is not reported in the law reports and the actual text and import of the remarks of the Vice-Chancellor are not absolutely clear. In the event the point did not fall for decision.

The coming of the railways naturally created considerable competitive pressure for the rivers, navigations and canals. The London and Southampton railway was opened throughout in 1840. The local Act for making a Railway from London to Southampton (4 and 5 William IV c. lxxxviii, 25 July 1834, s. 22) required any crossing of the Itchen Navigation to be properly arched, and this was done, at Allbrook. The Eastleigh-Gosport line was opened in 1842, crossing the Navigation and the River, near what is now Chicken Hall Farm, and properly arched. The last barge, which was loaded with coal, to carry a cargo to Winchester, tied up at Blackbridge wharf in 1869. Bulpett was involved in negotiations in 1872. Proposals in 1873 to procure an Act of Parliament to authorise the abandonment of the Itchen Navigation and the sale of the property came to nothing. Further negotiations in 1881 also came to nothing. In 1904 Bulpett sold an option to purchase for £100 all his interest in the Itchen Navigation company to Inland Waterways, but the option fell through because Inland Waterways were unable to secure an Act of Parliament. In 1909 a Mr

O'Carroll obtained an option, a meeting was held in 1911, but the project came to nothing.

In 1907 there were complaints about obstruction of the path at Chicken Hall near Eastleigh and Bishopstoke at the railway arch, the erection of an 'unclimbable fence', and the obstruction was subsequently removed. It is believed that the sewage works were built about this time. Indeed, at the present time at this point the public footpath does run slightly to the east of the towpath, there is a diversion in fact. Apparently in 1907 local people could remember the path running from Bishopstoke to Woodmill, and indeed some could remember the path from the Winchester wharf to Northam bridge.

The arch carrying the Eastleigh-Fareham line over the Navigation was demolished in 1979. The replacement arch though visually unattractive gives adequate clearance. Such consideration was not shown by the road builders in respect of the by-pass and the motorway in C20th.

The Navigation quickly fell into disrepair, especially the locks. The line is still there, most of it visible to this day. Encroachments have been made, especially at the Winchester end. So far no permanent structures have been built on any part of the line. In some parts the bank has been moved, but a public right of navigation and towpath and a public footpath still exist, and it is still possible to walk all the way from Southampton (Cobden Bridge) to Winchester along the line, subject to the diversions at Chicken Hall, Shawford and Blackbridge, and the Hockley gap. The M27 will entail another diversion.

The shares appear still to belong to the heirs of Francis Joseph Hollis, whoever they now are. When he died in 1881 he bequeathed his interest in the Itchen Navigation to his nephew Richard Montague John Hollis then of Greenwich. R M J Hollis died intestate in 1912, his estate passed to M E Hollis who died in 1928. The mortgagee William Whitear Bulpett was never paid off and his heirs are still entitled to the mortgage, whoever they now are. When the question of repairs arose in the 1870's Bulpett, no doubt anxious about any liability that might fall upon him, asserted that he was not a mortgagee in pos-

session and was not under any liability. Bulpett bequeathed his interest to his nephew Charles William Lloyd Bulpett, who maintained control until 1925 when he emigrated to Kenya. It is believed that the company has never been wound up. The six Acts of Parliament remain on the statute book, they have never been repealed, they are still extant, and the public rights still obtain (Hansard, House of Commons, col. 783, 24 November 1978).

Is there a public right of navigation or passage and, if so, what is the nature and extent of it?

The proponents of a public right of navigation argue that the river Itchen has been navigable for at least a thousand years, and the Act of 1665 conferred a general public right of navigation on the Itchen Navigation, and so far as the river Itchen itself is concerned there is and always has been a public right of navigation under the general law, which was exercised from 1710 until 1869. The company originally had the monopoly of carriage of goods on the Itchen Navigation, which is not necessarily the same as the public right of navigation, and in 1802 carriage of goods, in their own boats, was thrown open to the public, but the company obtained the right to charge tolls on vessels 20–45 tons: 1802 Act s. 1. It is argued that, on the basis of the 1802 Act s. 32, vessels under 20 tons could pass, either paying no toll (which seems very unlikely), or by permission, or paying a toll as for a 20 ton vessel, i.e. the minimum toll, i.e. the public right of navigation and carriage of goods existed, but was dependent upon the payment of toll. The 1767 Act gave the right to license others to use the navigation. The 1802 Act gave the right to navigate to the general public, i.e. the licensing by the Commissioners was abolished. In 1802 the public right of navigation was established, superseding the licence in 1767, the 1767 licence having been confined to vessels of 20 tons and over. The 1802 Act s. 32 simply extended the general public right of navigation to all vessels, i.e. those under 20 tons, provided that the minimum toll was paid. The general public right of navigation on the river and the Navigation remains to this day and cannot be stopped up or obstructed or disposed of except by proper legal process (observations of Kindersley V.C. in

Hollis v. Bulpett, November 1862, not reported in the law reports). From the legal point of view the Itchen Navigation remains as a public navigable highway, subject to the factual constraints of water and passage. The towpath is an integral part of the Itchen Navigation, as with all navigations and canals. Winchester College, and others, have rowed the navigation for many many years.

The opponents argue that the company had a navigation monopoly 1710–1802, i.e. the sole right to provide boats for the transport of goods, and there was no general public right of navigation in the Itchen Navigation; but in 1802 the monopoly was broken, to the limited extent that vessels 20–45 tons, neither smaller nor bigger, could use it subject to tolls. No other vessel or craft has any right of passage.

The general law on public right of navigation appears to be as follows: There is no common law right of navigation as such in a non-tidal river, but a public right of navigation may arise by immemorial usage, under statute, or by grant or dedication by the owner (*Bourke v. Davis* (1889) 44 Ch. D. 110, *Kay J. Orr-Ewing v. Colquhoun* (1877) 2 App. Cas. 839. *Simpson v. A.G.* [1904] A.C. 476).

The alleged right in the Itchen Navigation can only arise from the enabling statutes, the principal ground, or by immemorial usage.

If a river subject to a public right of navigation gradually changes course the public right changes too (*Foster v. Wright* (1878) 4 C.P.D. 438. *Carlisle Corporation v. Graham* (1869) L.R. 4 Ex. 361). If a river ceases to be navigable the public right of navigation is lost, though it may be restored if the channel is restored (*R. v. Betts* (1850) 16 Q.B. 1022). The river Itchen has remained in flow throughout many centuries, and is to this day navigable by very small craft, such as canoes, but the Itchen Navigation, where it does not form part of the river, has now largely dried up.

The public right of navigation does not necessarily carry a public right to tow along the towpath, although a public right to tow along the towpath may arise by statute or custom or grant or dedication. The land itself, or the right to use the surface, may vest in the owner of the river or

navigation, as appears to be the case with the Itchen Navigation (*Badger v. Yorkshire Railway* (1858) 7 W.R. 120. *Winch v. Thames Conservators* (1872) L.R. 7 C.P. 458. *Thames Conservators v. Kent* [1918] 2 K.B. 272).

The Itchen Navigation company could be sold, i.e. the right to take the tolls, and the assets could be sold, but the Itchen Navigation, and the associated public rights, cannot be terminated or disposed of except by Act of Parliament. Because of the difficulties, no purchaser was ever found.

Encroachment and occupation and trespass can confer no legal rights, squatters' rights cannot arise in the case of land regulated by Act of Parliament. The Eastleigh Borough Council have purchased a substantial part of the land to the east of the airport, 350 acres in the Itchen Valley, through which the Itchen Navigation runs, but the purchase is subject to all statutory rights. The Company may have owned or enjoyed the fishing rights, but there is no evidence of this. In fact riparian owners are believed to have sold or leased fishing rights. In the absence of anything to the contrary, fishing rights in rivers are vested in the riparian owners. Fishing rights in canals and navigations would appear to be vested in the owners of the canals and navigations. It is believed that in the 18th century the Itchen Navigation was fenced along both sides 15 ft from the water.

It is believed that the Itchen Navigation made more money in selling water than in collecting tolls, certainly in the mid-nineteenth century.

The 1915 Shawford diversion

In 1915 an order under the Local Government Act 1894 s. 13(1) (see letter and accompanying memorandum and plans from Alfred Bowker to Clerk to Winchester Rural Council 10 November 1914) was made at Quarter Sessions in favour of Alfred Bowker of 'The Malms', Shawford, to divert part of the footpath along the line of the Itchen Navigation at Shawford. A similar application in 1911 had been unsuccessful (*Hampshire Observer*, 23 September 1911 and 21 October 1911). Certainly a public footpath may be diverted by legal process, but it is not known what authority, if any, exists, apart from Act of Parliament, for diverting a towpath. What

title, if any, did Alfred Bowker have to the land under the footpath which he persuaded the court to divert?

It has been alleged that landowners along the line of the Itchen Navigation have removed sections of the towpath, removed the locks or part of them, and placed barbed wire across the water. The diversion of a public footpath, even if lawful, cannot affect a public right of navigation and its accompanying towpath.

The 1969 Wharf Hill or Blackbridge diversion

On 1 October 1969 the public right of way through Blackbridge wharf at Wharf Hill Winchester was diverted under the then Highways Act 1959 s. 108 by order of the Winchester City Council in favour of Winchester College. It has been strongly argued that the public right of navigation, the towpath and public access to the wharf cannot be diverted or extinguished except by Act of Parliament. It is unclear what title, if any, Winchester College have to the land under the footpath which they persuaded the local authority to divert.

Winchester College also apparently claim ownership of the land over which the Navigation runs because they have paid money to the Southern Water Authority for clearance of the water. In terms of a legal argument this is a non sequitur, it does not follow.

Winchester by-pass and the M3

The Winchester by-pass was constructed by the 1930's. Apparently the land, including part of the land on which the Itchen Navigation lay, needed for the by-pass was purchased by the Hampshire County Council from three landowners and then conveyed to the Ministry of Transport. The by-pass severed the Itchen Navigation at Hockley crossroads, though naturally a tunnel was constructed underneath the carriage-way to carry the flow of the river. No footpath was constructed in the tunnel or at its approaches.

The public footpath along the line of the towpath was most unfortunately lost sight of, and does not appear on the county footpath map. The Hampshire County Council is legally responsible for the public footpaths, and these are

shown on the county definitive map. A continuous public footpath is shown along the Itchen Valley, largely following the line of the Itchen Navigation, accepting the Chicken Hall diversion and the 1915 and 1969 diversions at Shawford and Blackbridge or Wharf Hill, from Mansbridge in Southampton to Winchester, but the gap at Hockley crossroads means that the footpath does not follow the line of the Navigation where it is crossed by the by-pass. The County Council could and should restore the footpath link.

At the M3 public inquiry in 1977 on 1 June 1977 counsel for the Department of the Environment, Mr Blennerhassett QC, stated that in the view of the Department public rights of navigation still existed or subsisted in the Itchen Navigation, those rights had not ceased by reason of natural causes, i.e. no water and disuse, and the Department's proposals involved preserving the possibility of navigability by way of diversion and tunnelling, using the Highways Act 1971 s. 10 procedure. In the event the Inspector and Minister of Transport decided against the proposals for the stretch of the M3 from Bar End to Compton, so the matter is still open for the future. Either the by-pass will be improved or the M3 will be built somewhere in the vicinity, preferably only the former. Road improvements are being made at the Hockley crossroads in 1982.

The 1980 Swaythling or Mansbridge diversion

By decision 19 June 1980 (Decision letter of Secretary of State for the Environment and the Minister of Transport M27 Chilworth-Windhover, 19 June 1980, paras. 31-37. Inspector's Report 11.1.1-11.4.3 and 11.7.1, and 11.5-11.5.21 and 11.8.1-11.8.4. See also proofs of evidence submitted at the inquiry by Mr W. Furness, chairman of Itchen Navigation and Valley Preservation Society and Mr P. J. Oates, chairman of Itchen Navigation Society.) the Secretary of State for the Environment and the Minister of Transport ordered a substantial diversion of the Itchen Navigation, in the form of a substantial loop, round and under the M27. This solution was said to be practical and acceptable. It was not possible, the Department had

argued, to keep the Navigation on its existing line and take the motorway over it because of the lower level of the carriageway (airport runway immediately adjoining to the north), the water table, and drainage problems, and the need for a complicated and expensive new locks and pumping arrangement. Some objectors (notably the Southampton Commons, Parks and Open Spaces Protection Society) argued that the difficulty and expense of maintaining the existing line were much exaggerated and on principle a motorway ought not to interfere with existing public rights where the interference could be avoided.

The decision letter stated that the cost of excavating the new channel will not be undertaken before it is required, i.e. before restoration of adjoining lengths of the canal, but the position will be kept under review (para. 36).

The order will make it difficult for effective navigation to be restored. The Highways Act 1971 s. 12(3) requires the provision of a diversion which will be navigable 'in a reasonably convenient manner by vessels of a kind which immediately before the date of the coming into operation of the order were accustomed to use that part of the watercourse which is to be replaced by the new length'. The diversion will necessitate four sharp bends. The intention is to provide a minimum width of 10.5 m at water level, 4.2 m at bridges and obstructions, and a 5.0 m span for the bridge under the motorway (vessels having to turn round the bend through 180°) with 2 m headroom, and 2 m towpath. Whether such a facility would carry a vessel 70' × 12' and 40 tons, the requirements of the 1665 Act, is a matter of some dispute. The Act of 1802 speaks of 73' and 13' and 45 tons.

The future

There is today a great public interest in the restoration of waterways, canals and navigations, for commerce and for recreation. Parts of the Basingstoke canal have been superbly restored by the Hampshire County Council and the Surrey County Council. The Act of 1665 provides for the Itchen being made navigable as far as Alresford. In 1795 it was mooted by the proprietors to link the Itchen Navigation with

the Basingstoke canal. A national network of sorts is already in being and is being gradually improved and extended. The restoration of the Itchen Navigation would be a great joy for the people of Hampshire. Amenity societies, the County Council, the District Councils, the Southern Water Authority, and some private landowners, have carried out work of clearance, restoration and maintenance, all most commendable. Those parts of the river and the navigation still containing water could and should be used for a variety of lawful and acceptable and compatible uses; abstraction, irrigation, fishing, navigation (e.g. canocing), the towpaths for walking and riding. Mutual tolerance and accommodation will be essential. Meanwhile the line of the Navigation and the associated public rights of navigation and way must be clarified, recorded, restored, maintained and used, otherwise the possibility of physical restoration will be lost. In view of the

manifold uncertainties and disputes, judicial decision and declaration regarding the legal position along the whole line of the river and the navigation is highly desirable. A local Act, promoted by the Hampshire County Council, clarifying the legal situation throughout the whole length of the Itchen Navigation, would be the best solution of all.

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Relevant statutes include:

Public Rights of Way Act 1932

National Parks and Access to the Countryside Act 1949

Highways Acts 1959, 1971 and 1980

Water Act 1973 s. 20

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