"The Removal of a Public Right of Navigation."

The Law of England is that Public Rights can only be extinguished by

1. Statute,
2. Statutory Authority,
3. Conditions changing so that the right can not be exercised,
4. By inquisition and writ of *ad quod damnum*. Now obsolete.

(*R v Montague* (1825) 4 B&C 598-605.)

The Public Right of Navigation is one of these rights. For rivers the normal reason that the right can not be exercised is that the river has silted up and is no longer passable by boats. Public rights are not extinguished by non-use for any period of time.

Where it has been established by one party that there was in the past a particular public right it is the responsibility of the other party to establish that the right has been extinguished. This must be so as no one can establish that an Act of Parliament has not been passed.

The general law was included in Magna Carta c 13 'The city of London shall have all its liberties and free customs, as well by land as by water; furthermore, we decree and grant that all other cities, boroughs, towns, and ports shall have all their liberties and free customs.' This clause has never been repealed.

More recently Mr Justice Lightman said 'PRN may only be extinguished by legislation or exercise of statutory powers or by destruction of the subject matter of PRN e.g. through silting up of the watercourse.' (*Josie Rowland v Environment Agency*. 2002. Case No: HC 0102371.)

This understanding of the law is supported by the opinion of Lord Lindley in the House of Lords who, dissenting from the majority on another matter, said 'the doctrine once a highway always a highway is, I believe, as applicable to rivers as to roads'. (*Simpson v A-G* [1904] AC 476, 510.)

Lord Hailsham said in the House of Lords in a case under Scottish Law 'I have now to say that I do not consider it [a public right of navigation] can be so lost at least from mere non-use. It would seem to be contrary to principle that a right inherent in the Crown as part of the *regalia majora* (as the public right of navigation is accounted in Scottish law) or as part of the *res publicae* (as it was accounted in Roman) should be lost in this way. No sufficient authority in respect of a waterway was produced before us, as I do not count *Bowie* v. *Marquis of Ailsa* which was cited to that effect, as conclusive of the matter. On the contrary, I prefer to regard that case a failure on the proponents of the right to establish an adequate user and capacity to found the navigation. … I am clear, however, that a right of navigation of this kind cannot be lost by mere disuse while the physical condition of the stream is unaltered.' (*Wills Trustees v Cairngorm Canoeing and Sailing School*. 1976. SC 30, 162-216, 204.)

In a case relating to the Channel Sea River, Essex, in 1819 Holroyd J said 'If the place in question was ever a public navigable river, I apprehend that its ceasing to be used as such for twenty years, and during that time, in a condition which is inconsistent with it being used as a public navigable river, would not extinguish the public rights, if they did exist previously to that time.' Bayley J. made a similar observation. (*Vooght v Winch* (1819) 2 B & Ald. 262.)

In a case concerning the River Witham Lord Campbell C.J. stated 'Now, a highway out of repair does not cease to be a highway. An indictment lies for non-repair.' (*R v Betts* (1850) 16 QB 1022.)

In the standard text *Rights of Way* John Riddall and John Trevelyan write (3rd edition, 2001, p 26)

> Failure to exercise a private right of way over a period of time may, if the disuse is held to constitute evidence of an intention to abandon the right, lead to the right being held to have become extinguished. This principle has no application in the case of a public right of way. Once such a right has come into existence, by whatever means, it continues indefinitely. It can only be brought to an end by use of statutory provision.
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> This is the meaning of the maxim 'Once a highway, always a highway'. In *Harvey v Truro Rural District Council* [1903] (2 Ch 638) Mr Justice Joyce said (at p 644) 'Mere disuse of a highway cannot deprive the public of their rights. Where here has once been a highway no length of time during which it may not have been used would preclude the public from resuming the exercise of the right to use it if and when they think proper.' And in *Dawes v Hawkins* (1860) (8CB (NS) 848; 141 ER 1399.) Mr Justice Williams said 'It is also an established maxim, once a highway always a highway: for, the public cannot release their rights, and there is no extinctive presumption or prescription.'

The law relating to Rights of Way on land, but not water, has been modified by the Countryside and Rights of way Act 2000, Ch 37, section 56.

It may be noted that if a navigable river changes its course the right of navigation is transferred to the new channel. (22 Edward III, Lib. Ass. 93, f 106a-106b; *Carlisle Corporation v Graham* (1869), L.R. 4 Ex. 361)

In 2000 Parliament resolved that public rights of way over footpaths and bridleways will be extinguished if they existed before 1949 and if they are not shown in a definitive map on 1st January 2026.[i] It would be extraordinary if anyone were to claim that rights of passage on rivers had been extinguished without a similar Act being passed with regard to historic rights of navigation.

[i] Cuntryside and Rights of Ways Act 2000. c. 37. Section 53.