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FERRY RIGHTS OF RIPARIAN PROPRIETORS.

SEC. 1. *Subject stated.*

We do not propose at this time to enter upon a general examination of the subject of Ferries and Ferry Rights. We are aware of no treatise which presents the existing state of the law on this subject, and we may hereafter discuss in the *Register* other branches of it. The present article is designed as a monograph upon the division of the subject stated in the title—*the ferry rights of riparian proprietors*.

The loose and inconsistent statements in some of the cases have tended to obscure the law relating to parts of this subject, and have led us to examine it with considerable care.

It will conduce to perspicuous treatment to consider—

1. *The common law rights of riparian proprietors in respect to ferries.*
2. *Their statutory rights in this respect.*
3. *How these rights may be extinguished or taken away—effect of location of public highway, &c.*

SEC. 2. *Ferry Rights of Riparian Proprietors at common law.*

Here it is essential to bear in mind the distinction between what may be called a *common* or *public* ferry, that is, a ferry for the transportation of the public generally for toll, and a *private*

ferry, that is, a ferry—if it may be so called—intended exclusively for the owner, or the owner and his family. Properly speaking, the latter is not a *ferry*.

The right to establish and keep a public ferry is a franchise, which is, in England, a royal privilege in the hands of a subject: 2 Bl. Com. 37; 3 Kent Com. 458.

The subject of public ferries is obviously one which requires governmental control. It is one of the usual and ordinary functions of the state to provide safe and convenient roads and bridges. Ferries are projections of the ordinary highway over streams. They have been aptly styled *floating bridges*.

The state, usually through designated local officers or tribunals, determines whether it will accommodate the public by means of ferries or bridges. When ferries are relied on, then to secure the requisite attention to the wants of the public, and to compensate the ferry-owner, he is authorized to levy ferriage, and has rights more or less exclusive conferred upon him. It is necessary, to prevent imposition upon the public, that the rates of ferriage be fixed by law. "For," says REESE, J., *arguendo*, in *The Nashville Bridge Co. vs. Shelby*, 10 Yerg. 280, 281 (A. D. 1837), "no greater evil could well be imagined than the unrestrained power on the part of individuals to exact from the traveller, who cannot brook delay or stipulate for terms, whatever cupidity might dictate."

For these reasons the franchise in England is in the Crown, and in this country in the State. The doctrine that a public ferry cannot be set up or exercised by any of the king's subjects without prescription, or a charter or grant from the king, is fundamental and undisputed. Thus, says the court (Willes's Rep. 512 (A. D. 1744), *Blisset vs. Hart*, note), "a ferry is *publici juris*. It is a franchise which no one can erect without a license from the Crown. * * * If a second be erected without license the Crown has a remedy by *quo warranto*, and the former grantee has a remedy by action." In further support and illustration of this point, consult 2 Rol. Abr. 140; 3 Jacob Law Dict. 40; 1 Comyn Dig., *Action on Case for Nuisance* (A), p. 428; 5 Id. tit. *Piscary*, 367; Woolrych on Waters 46; *Stark vs. McGowen*, 1 Nott & McCord 387, and authorities cited; *Benson vs. Mayor, &c., of New York*, 10 Barb. 223, 234, 245, per BARCULO, J.; *Nashville vs. Shelby*, 10 Yerg. (Tenn.) 280; *Young vs. Harrison*, 6 Georgia Rep. 131; s. c. 3 Kelly 31; s. c. again, 9 Georg. 359;

Id. 517; *Dyer vs. Bridge Co.*, 2 Port. (Ala.) 296; *Lansing vs. Smith*, 4 Wend. 21, per WALWORTH, Chan.; *Somerville vs. Wimbish*, 7 Gratt. (Va.) 205 (1850). And see also the authorities below cited.

It is sometimes asserted that there is a right of ferry which at common law is appendant or appurtenant to riparian ownership upon navigable fresh-water rivers, such as the Hudson, Susquehanna, Ohio, Mississippi, &c. Thus, in speaking of riparian rights on the Ohio, the late Mr. Justice McLEAN, in *Bowman vs. Wathen*, 2 McLean Rep. 376, says: "He (the riparian owner) has the right of fishery, of ferry, and every other right which is properly appendant to the owner of the soil; and he holds every one of these rights by as sacred a tenure as he holds the land from which they emanate. The state cannot directly or indirectly divest him of any of these rights, except by the constitutional exercise of the right to appropriate private property for public purposes."

There is a sense in which it is true that the riparian owner has a "right of ferry," but this right of ferry, if it be so called, is simply the exclusive right to land upon and use his own soil. If he has a right of ferry at all, it is the right to a *private* ferry as above defined. The riparian owner as such has not the right to establish a *public* ferry. A ferry franchise is not an incident, either in England or this country, to the ownership of land on the margin of a stream. And Mr. Justice McLEAN, in the extract above given, is not to be understood as speaking of a ferry franchise as appendant to the soil, but of the "right of ferry" in the limited and subordinate sense above indicated.

The common law rights of riparian proprietors in respect to ferries are thus authoritatively and clearly stated by Sir MATTHEW HALE in *De Jure Maris*—a work whose varied and exhaustive learning well merits its distinguished and enduring reputation:—

In Chapter I., "*Concerning the interest of fresh rivers*," he lays down the rule that "Fresh rivers, of what kind soever, do, of common right, belong to the owners of the soil adjacent; so that the owners of the one side have, of common right, the property of the soil, and consequently the right of fishing, *usque flum aquæ*," &c. "Though fresh rivers are, in point of propriety, as before, *primâ facie* of *private* interest (*ownership*), yet as well *fresh* rivers as salt, or such as flow and reflow, may be under two servitudes, or affected by them, viz.: one of preroga-

tive belonging to the king, and another of public interest, or belonging to the people in general. Of these in the ensuing chapters."

Chapter II., concerning "*the right of prerogative in private or fresh rivers,*" thus lays down the respective rights of the Crown and riparian owner with reference to ferries:—

"The king," continues Sir Matthew, "by an ancient right of prerogative, hath had a certain interest in many fresh rivers, even where the sea doth not flow and reflow, as well as in salt or arms of the sea; and those are these which follow:

"1st. *A right of franchise or privilege* that no man may set up a common ferry for all passengers, without a prescription time out of mind, or a charter from the king. He [*the owner of the adjacent soil*] may make a ferry for *his own use or the use of his family*; but not for the common use of all of the king's subjects passing that way." And he proceeds to assign the reason thus: "Because it doth, in consequent, tend to a common charge; and is become a thing of public interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under a public regulation, viz.: that the keeper give attendancè at due times, keep a boat in due order, and take but reasonable toll; for if he (*the ferryman*) fail in these he is fineable." "And this that is said in reference to a fresh or private river, holds place much more in a public river or arm of the sea." "No man," (Id. cap. III.) "can take a *settled or constant toll even in his own private land*, for a common passage, without the king's license."

Vide 6 Cowen Rep. 536 note, where the first four chapters of De Jure Maris are reprinted.

While upon this subject we may observe that it is laid down in an old case in Savile's Reports (23 Eliz.), p. 11, "that he who has the privilege of a ferry ought to *own* the land on both sides of the river, for he cannot land upon the soil of another without his consent." But to this extent this is no longer law. This will appear by reference to the case of *Peter vs. Kendal*, 6 Barn. & Cres. 703 (1827), in which it was decided that while the owner of a ferry must have the right to use the land for the purpose of embarking and disembarking passengers, he need not necessarily *own* the soil. HOLROYD, J., there says: "I think what is laid down in Savile is not law to the extent to which it is there stated. The owner of a ferry must, as an incident to the ferry, have such

a right to use the land on both sides as to enable him to embark and disembark passengers, but he need not for that purpose have any property in the soil. It is sufficient if he has the right to use the land for all purposes of his ferry." And to the same effect is the opinion of BAILEY, J., in the same case. Recognised as correct, per BALDWIN, J., in *Patrick vs. Ruffners*, 2 Rob. (Va.) Rep. 209, 217 (1843).

That a party, even though he be a riparian proprietor and own the land on both sides of the stream, cannot, without the consent of the state, set up and operate a public ferry and levy ferrage or tolls, see the authorities above cited, and particularly, *Young vs. Harrison*, 6 Georgia 131 (1849), s. c. 9 Id. 359; *Nashville vs. Shelby*, 10 Yerg. (Tenn.) 280 (1837); *Allen vs. Farnsworth*, 5 Id. 189; *Sparks vs. White*, 7 Humph. (Tenn.) 86 (1846); *Trustees, &c., vs. Tatman*, 13 Ill. 27 (1851); *Pipkin vs. Wynns*, 2 Dev. (Law) North Car. 402 (1830), per HENDERSON, C. J.; *Cooper vs. Smith*, 9 Serg. & Raw. 26, 33 (1832); *Murray vs. Menefee*, 20 Ark. Rep. 560; Id. 573 (1859); *Milton vs. Hoden*, 32 Ala. 30 (1858); Dane Abr. ch. 67, p. 653; *Stark vs. McGowen*, 1 Nott & McCord (South Car.) 387 (1818) (well-considered case); *Mills County vs. St. Clair*, 2 Gillm. (Ill.) 197 (1845), affirmed by Supreme Court of United States, 8 How. 569; *Stark vs. Miller*, 3 Mo. Rep. 470 (1834); *Gales vs. Anderson*, 13 Ill. R. 413 (1851); *Bush vs. Bridge Co.*, 3 Porter (Ind.) 21 (1851); *The People vs. The Mayor, &c., of New York*, 32 Barb. 102; *Somerville vs. Wimbish*, 7 Gratt. (Va.) 205 (1850); *Norris vs. The Farmers, &c., Co.*, 6 Cal. 590 (1856); *Taylor vs. Railroad Co.*, 4 Jones (Law) North Car. 277 (1857); *Johnson vs. Erskine*, 9 Texas 1 (1852).

It may be confidently affirmed that in England the grant of the Crown to A. to keep a ferry, will not authorize him to enter upon or use the land of B. in order to operate the ferry.

The Crown in England may confer a ferry franchise upon a person other than the riparian proprietor, but this will be unavailing unless the right to use the land of such proprietor is obtained, or unless the ferry be operated from the lands of the Crown or of the public.

From this circumstance arises whatever superior claim the riparian proprietor has to other subjects to be invested with a ferry franchise: *Somerville vs. Wimbish*, above cited; *Cooper vs. Smith*, 9 Serg. & R. 33, and authorities, *supra*.

The authorities before referred to abundantly establish that in this country a ferry franchise must be conferred by the government; must be founded upon prescription or grant or license; that ownership of the soil will not give the right to set up or operate a public ferry for toll; that the most such riparian ownership can do is to authorize the proprietor to establish a *private* ferry for his own convenience, or at most to ferry, not for *tolls*, that is, for a fixed price independent of contract, but upon contract express or implied when not forbidden by statute, and when this does not interfere with or injuriously affect any established public ferry.

These, aside from statute, constitute the ferry rights of riparian proprietors.

SEC. 3. *Statutory Rights of Riparian Proprietors in respect to Ferries.*

It is not practicable to set forth in detail the provisions of the statutes of the several states on this subject. In general, in this country, the Legislature invests designated public officers or local tribunals, usually the county courts or county commissioners, with the jurisdiction or power to establish and regulate public ferries. And these statutes usually declare in substance, that in establishing a new ferry preference shall be given to the owner of the land, if he is a suitable or proper person.

These statutes, recognising the priority of right in the riparian owner to be invested with the franchise, if the public authorities shall see fit to establish a ferry, are founded upon the wise and salutary maxim or policy of the common law, which, to prevent confusion, assigns rights capable of being thus enjoyed, to a legal and determinate owner: *Cooper vs. Smith*, 9 Serg. & Raw. 33; *Pipkin vs. Wynns*, 2 Dev. (Law) 402, 404; *Stark vs. McGowen*, 1 Nott & McC. 387; *Young vs. Harrison*, 9 Geo. 359, s. c. 6 Id. 131; *Nashville vs. Shelby*, 10 Yerg. 280; *Gales vs. Anderson*, 13 Ill. 413.

While, as above observed, most of the states (*Cloys vs. Keats*, 18 Ark. 19, 20 Id. 561; *Memphis vs. Overton*, 3 Yerg. 387, 5 Id. 189, 10 Id. 280; *Sparks vs. White*, 7 Humph. 86; *Lawless vs. Rees*, 1 Bibb. (Ky.) 495, s. c. 4 Id. 309; *Trustees vs. Boon*, 2 J. J. Marsh. 224; *Trustees vs. Wagnon*, 2 A. K. Marsh. 379; *Harvie vs. Cammack*, 6 Dana 242; *Prosser vs. Wappello County*, 18 Iowa; Angell on Tide Waters 171-178, and cases above cited)

recognise the superior claim of the riparian owner to a ferry if one is established, yet the legislature may authorize the franchise to be conferred upon another than the owner of the soil.

But the grant of a ferry license does not authorize the holder thereof to use the land of another without his consent, or without making due compensation. The state may obtain the right to use the land of private individuals for ferry purposes, but this must be done under the right of eminent domain, and just compensation be made.

It is scarcely necessary to add that a riparian proprietor cannot be deprived of his common law ferry rights, though these, as we have seen, are quite limited, or of those conferred upon him by statute, without just compensation: *Somerville vs. Wimbish*, 7 Gratt. (Va.) 205. Compare, *Patrick vs. Ruffners*, 2 Rob. (Va.) Rep. 209 (1843); *Young vs. Harrison*, 9 Geo. 359, s. c. 6 Id. 131; *Cooper vs. Smith*, 9 Serg. & R. 33; *Pipkin vs. Wynns*, 2 Dev. (Law) 402; *Bowman vs. Wathen*, 2 McLean 376; *Prosser vs. Wappello County*, 18 Iowa Rep. (not yet published)

SEC. 4. *How the Ferry Rights of Riparian Owner may be extinguished—Effect of Location of Public Highway to the bank of the river, &c.*

It is doubtless competent to grant or convey the soil and except or reserve the right of ferry, or the right to use the land for the purpose of embarking and receiving passengers: *Peter vs. Kendal*, 6 B. & C. 703, per BAILEY, J.; *Bowman vs. Wathen*, 2 McLean 371, per McLEAN, J.

But the most interesting practical question under this head is one which has several times arisen for adjudication, and which may be stated thus: Does the location of a county road or of a public highway, or the dedication by the owner of land for this purpose (he retaining the fee), deprive, to the extent of its width on the bank of the river, the riparian owner of his rights of ferry as above defined? A kindred question is this: Can the state authorize a person other than such owner, without the owner's consent and without compensating him for the right, to use the *termini* of such road upon the bank of a river for the purpose of landing ferry-boats, receiving and discharging passengers, &c.

The state of the law on this subject can only be intelligibly ascertained by a brief reference to the authorities.

In the case of *Peter vs. Kendal*, before referred to, BAILEY, J.,

in commenting upon the case in Savile's Reports (*supra*, sec. 2), says: "I am of opinion that it is not necessary that the owner of a ferry should have the property in the soil on either side. He must have the right to land on both sides, but it is sufficient if the *landing-place be in a public highway*. This is perfectly consistent with the principle laid down in Savile."

There was no question in the case about the right to use the public road for a ferry-landing against the consent of the owner of the fee, and the remark above italicised is purely *obiter*. (See this decision approvingly commented on by Kent, 3 Comm. 421, note.) No other English case has been met with by us. There are a number of American cases upon the subject.

In *Chambers vs. Furey*, 1 Yeates (Pa.) 167 (1792), it was decided that the dedication or laying out of ground as a public road gave no right to the defendants, the owners of a ferry, to land upon or receive freights from the plaintiff's freehold on the banks of a navigable river, without his consent. That the owner of a ferry has no right, without such consent, to land his boats, passengers, or freights upon a public highway, see, also, *Cooper vs. Smith*, 9 Serg. & Raw. 31 (1822), not even, it was held in a subsequent case in the same state, at the *terminus* of a highway, between high and low water mark: *Chess vs. Manoun*, 3 Watts 219 (1834).

In the thoroughly-considered case of *Pearsall vs. Post*, 20 Wend. 111, 131, the doctrine of the Pennsylvania cases, above cited, was *arguendo* approved by COWEN, J., who delivered the opinion of the Supreme Court; by the Supreme Court of Iowa in *Prosser vs. Wappello County*, *supra*; and by ALLEN, J., in *Patrick vs. Ruffners*, 2 Rob. (Va.) 209, 221; but see opinion by BALDWIN, J., Id. 214, 219; compare *Somerville vs. Wimbish*, 7 Gratt. 205.

In *Pipkin vs. Wynns*, 2 Dev. (Law) 402, overruling *Raynor vs. Dowdy*, 1 Murph. 279, it was similarly held that compensation must be made to the owner of the fee for the use of the soil as a landing-place for a ferry, although such landing-place be at the *terminus* of a public road leading to the river on both sides.¹

¹ Setting forth the grounds of this decision, HENDERSON, C. J., in the case cited from 2 Dev. 402, says: "For the uses and purposes of a highway it [the highway] is the sovereign's—the public's—for all other purposes it is the former proprietor's. The right of using it as a landing-place for a ferry has never been taken from him; and although there is scarcely a perceptible difference between

And such is the decision substantially in *Prosser vs. Wappello County*, 18 Iowa (not yet published).

Our conclusion, from the authorities as well as upon principle, is: 1st, That the dedication or taking of land for a highway does not, in cases in which the *owner retains the fee* and the public acquire *only an easement* of passage, deprive such owner of his

stepping from a boat on the land laid out as a public road, and stepping from land to land, yet that has never been taken from the former proprietor for such purposes, as he has never been compensated for the right [limited, we suppose, as stated in the text of this article] of transporting persons across the water-course, as that was not considered when the price of taking the land for a highway was fixed, and although it is of but little value without the franchise, yet his ownership of the land gives him the *preferable right* to call for the franchise when a ferry becomes necessary. This right is valuable, for unless there are good reasons to the contrary the sovereign must grant it to the *owner*, as sovereigns are bound to be just." * * * * "If it be asked what is to be done if the owner of land, where a ferry is necessary, refuses to receive the franchise, it is answered, pay him for the land and grant it to another." * * * * "Let it not be taken for a road and used as a ferry." As to the nature of the respective rights of the public in a highway and of the owner of the land through which it runs, see authorities cited at the conclusion of this article. The subject is further illustrated by the course of decision in Virginia.

There the county courts are authorized by the General Assembly (2 Rev. Code of Va., ch. 238) to establish ferries *on public roads through watercourses*. The 1st section applies to cases where the applicant is the owner of the land on both sides, and the 3d section of the act extends the authority to cases in which he is the owner on one side only. The statute contains no provision for condemning land on the opposite side, where the applicant is the owner but on one side.

"The ownership of the land and the existence of the public road are, under this law, essential to the jurisdiction of the county court:" per BALDWIN, J., *Somerville vs. Wimbish*, 7 Gratt. (Va.) 228.

And it is held in this case that the establishment of a ferry confers upon the grantee of the right no title to any portion of the soil on the other side of the stream. On this point the court (Id. 230) observes: "The Commonwealth confers, by her grant of the franchise, such right in regard to the landing on the opposite shore, as she may lawfully impart, and no more. The very object of the grant carries with it whatever privilege the public then has or may thereafter acquire to the use of the highway there for that purpose; and if the grantee claims anything more he must show a title to it by private contract. It is not to be supposed for a moment that the Commonwealth contemplates, by the creation of the franchise, what it is beyond her power to grant, the invasion of the property of others without compensation." * * * * "Whether it will carry the *privilege of using any of the public road on the opposite land, for the purpose of landing or taking passengers, &c.*, is a question which we deem it unnecessary to determine." Id. 232. As to this latter question the judges differed in opinion in the prior case of *Patrick vs. Ruffners*, 2 Rob. (Va.) 209, vide opinions by ALLEN and BALDWIN, JJ.

preferable right to a ferry, if one is established. (*Memphis vs. Overton*, 3 Yerg. 387, and authorities above.)

2. That a ferry license to a stranger (that is, to one other than the riparian owner) will not authorize him, against the consent of the owner, or without compensating him for this specific right, to use the *termini* of such highway for the purpose of fastening boats and of receiving and discharging freights and passengers.

Such a use is not, properly speaking, a *public* use; but rather a use by the licensee for his own advantage and private gain.¹

Like the use of an ordinary road for railroad purposes, such a use for ferry purposes (and the cases are strikingly analogous) would be an additional and different burden or servitude, for which compensation must be made to the owner. See on this point the following recent cases: *Mahon vs. The New York, &c., Railroad Co.*, 24 N. Y. 658 (1860), Id. 655; *Bissell vs. The New York, &c., Railroad Co.*, 23 N. Y. 61 (1861); *Wager vs. Troy, &c., Railroad Co.*, 25 N. Y. 526 (1862); *Williams vs. New York Central Railroad Co.*, 16 N. Y. 97 (1857), where the case of *The Philadelphia and Trenton Railroad Co.*, 6 Whart. 25, *contra*, is reviewed, and the reasoning of GIBSON, C. J., questioned and denied.

A different rule applies, it seems, where the owner of the soil does not retain the fee: *The Ohio, &c., Railroad Co. vs. Applegate*, 8 Dana (Ky.) 289; *Williams vs. New York Central Railroad Co.*, *supra*, *arguendo*; *Wager vs. Troy, &c., Railroad Co.*, *supra*, p. 533; *Milburn vs. Cedar Rapids, &c.*, 12 Iowa 246, 259. And generally as to nature of the public easement in highway, see, in addition, *The Presbyterian Society, &c., vs. Railroad Co.*, 3 Hill N. Y. 567; *Sir John Lade's Case*, 2 Str. 1004; *Inhab. of Springfield vs. Railroad Co.*, 4 Cush. 63; *Williams vs. Plank-Road Co.*, 21 Mo. 580, holding the locating of a plank-road upon a county road to be an additional burden; Redfield on Railways 158, author's opinion in text, and his valuable notes to Sec. XIV. to Chap. XI., concerning "Eminent Domain," and cases there collected and reviewed.

J. F. D.

¹ On this thought, ALLEN, J., in *Patrick vs. Ruffners*, 2 Rob. (Va.) Rep. 222, holds the following language:—

"Ferries are usually found on public roads; and the public having the right of passage, there can be no question that any individual, in the exercise of this right, may transport himself and property across the stream, and use the road as a landing, and that the owner cannot obstruct him. But it does not follow that he can convert this personal right into a source of emolument, and at his own pleasure use the road as a landing for a ferry."