

Ferries—Franchises — Tolls — County Commissioners — Transfers—Sales.

The state and not the federal government has power to establish ferries over navigable streams. A franchise may pass by sale but must be approved by the board having the power to grant.

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County Attorney,
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September 1, 1927.

My dear Mr. Marron:

You have submitted some questions relative to rights in connection with a ferry franchise. The facts are as follows:

Roosevelt county granted a franchise to one D. A. Martin to conduct a ferry across the Missouri river. This franchise grants the right to charge tolls for passengers and freight conveyed across the river. The Missouri river is under the jurisdiction of the war department of the United States government.

Your first question is whether the county commissioners have the right to grant a franchise with the right to charge tolls over a navigable stream. 25 Corpus Juris, 1055, states the following rule:

“The States and not the Federal Government have the authority to establish ferries upon waters forming a boundary between the States or between the State and a foreign country. * * * The franchise of either state may be made exclusive as to ferrying from its own shore but it cannot be made to exclude ferries operating under franchises granted by the State on the opposite shore, * * * where a stream separates two counties of the same State and Counties on either side may have concurrent jurisdiction or each may have exclusive jurisdiction on its own side to the center of the stream.” (Citing *State v. Olson*, N. D., 176 N. W., 833.)

Section 1766 R. C. M. 1921, however, provides that “when authority to erect and keep a ferry over waters is desired, application must be made to the board of commissioners of that county situated on the left bank descending such river, creek or slough.”

As to the right of states to maintain ferries over navigable streams, see the case of *County v. Taylor's Ex'r.* 1 Black 603; 17 Law Edition 191, and *Vallejo Ferry Co. v. Solano Aquatic Club*, 131 Pac. 864. In the United States case referred to, the court said:

“There has been now nearly three-fourths of a century of practical interpretation of the Constitution. During all that time, as before the constitution had its birth, the States have exercised the power to establish and regulate ferries; Congress never.

We have sought in vain for an Act of Congress which involves the exercise of this power. That the authority lies within the scope of that immense mass of undelegated powers which are reserved to the States respectively, we think too clear to admit of doubt."

The answer to your first question is therefore in the affirmative.

Second: Your second question is, "May the owner of such franchise transfer it to another with the approval of the board of county commissioners or must a new application be made to the board by the new owner of the ferry.' 26 Corpus Juris, 1037 states the following rule with respect to transfer of franchise:

"Franchises are proper subjects of sale and transfer and the title and enjoyment thereof may pass from one owner to another." (Citing cases.)

As to necessity for sovereign consent this treatise on the same page states the following:

"Franchises are not subject to sale and transfer, however, without authority of the State although there are statements to the contrary." (26 Corpus Juris, 1037.)

In answer to your second question, it is therefore my opinion that the commissioners have authority to consent to the transfer of the franchise, and it is further my opinion that any words of conveyance are sufficient to transfer the title.

Very truly yours,

L. A. FOOT,
Attorney General.