

MAINE STATE LEGISLATURE

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Chapter 98.

Harbor Masters. Wharves and Fish Weirs.

Sections 1- 6. Harbor Masters.

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Harbor Masters.

Sec. 1. Appointment of harbor masters; compensation.—Selectmen of towns, on request by any person desiring mooring privileges or regulation of mooring privileges for boats or vessels, shall annually appoint a harbor master who shall be subject to all the duties and liabilities of said office as prescribed by law, and in case of the failure or refusal of said harbor master to perform said duties, he shall be subject to a fine of \$25, for the benefit of the town, for each willful neglect or refusal to attend the same. The selectmen may establish his compensation and may for cause by them declared in writing, after due notice to such officer and hearing thereon, if requested, remove him and appoint another in his stead. (R. S. c. 86, § 1.)

See c. 99, § 7, re appointment of port wardens.

Sec. 2. Rules for channel lines; enforcement.—The municipal authorities of all maritime towns and plantations shall make rules and regulations for the keeping open of convenient channels for the passage of vessels in the harbors and waterways of the towns for which they act, and shall establish the boundary lines of such channels, and assign suitable portions of their harbors for anchorages.

Such rules and regulations as may be made by such municipal authorities shall be enforced and carried out by the harbor master of said town, who may appoint a deputy to act in case of his absence or disability. (R. S. c. 86, § 2.)

Sec. 3. Location where vessels moored.—In all harbors wherein channel lines have been established by the municipal authorities, as provided in section 2, and in all other harbors where mooring rights of individuals are claimed to be invaded and protection is sought of the harbor master, he shall assign and indicate to the master or owner of boats and vessels the location which they may occupy with or for mooring purposes, the kind of mooring to be used and shall change the location of said moorings from time to time when the crowded condition of such harbor or other conditions render such change desirable; he shall assign mooring privileges in such waters in all cases where individuals who own the shore rights or have an interest in the same are complainants, and shall locate suitable mooring privileges therefor for boats and vessels, temporarily or permanently as the case may be, fronting their land, if so requested, but not thereby to encroach upon the natural channel or channels established by municipal authorities. The municipal officers shall fix the compensation of the harbor master for such services rendered. (R. S. c. 86, § 3.)

Sec. 4. Neglecting to remove or replace moorings.—In case of the neglect or refusal of the master or owner of any boat or vessel to remove his mooring or to replace it by one of different character, when so directed by the harbor master, said harbor master shall cause said mooring to be removed or shall make such change in the character thereof as required, and shall collect from the master or owner of such boat or vessel the sum of \$2 for either of such services rendered, and also the necessary expenses. (R. S. c. 86, § 4.)

Sec. 5. Vessels obstructing anchorage removed by harbor master; crew on board to move vessel.—A harbor master shall, upon complaint to him by the master, owner or agent of any vessel, cause any other vessel or vessels

obstructing the free movement or safe anchorage of such vessel to remove to a position to be designated by him, and to cause, without any complaint being made to him, any vessels anchoring within the channel lines as established by the municipal authorities as provided in section 2 to remove to such anchorage as he may designate. Whoever neglects or refuses to obey the orders of such harbor master shall be deemed guilty of a misdemeanor and, upon conviction, shall be punished by imprisonment for not more than 60 days or by a fine of not more than \$50, or by both such fine and imprisonment.

If such vessel has no crew on board, or if the master or other person in charge neglects or refuses to move such vessel as directed by the harbor master, then and in that case such harbor master may put a suitable crew on board and move such vessel to a suitable berth at a wharf or anchorage at the cost and risk of the owners thereof, and shall charge \$2, to be paid by the master or owner of such vessel, which charge together with the cost of the crew for removing such vessel the harbor master may collect by suit. (R. S. c. 86, § 5.)

Sec. 6. Harbor master may arrest for assault.—Harbor masters may arrest and deliver to the police authorities on shore any person committing an assault upon them or another person acting under their authority. (R. S. c. 86, § 6.)

Wharves and Fish Weirs.

Sec. 7. Application for license to build or extend wharves and fish weirs.—Any person intending to build or extend any wharf, fish weir or trap in tidewaters, within the limits of any city or town, may apply in writing to the municipal officers thereof, stating the location, limits and boundaries, as nearly as may be, of such intended erection or extension, and asking license therefor. Upon receiving such application, said officers shall give at least 3 days' public notice thereof in a newspaper, published in the town, or, if there be no newspaper published in the town, in a newspaper published within the county, and shall therein designate a day and time on which they will meet on or near the premises described, to examine the same and hear all parties interested. If, upon such examination and hearing of all parties interested, said officers decide that such erection or extension would not be an obstruction to navigation or injury to the rights of others, and determine to allow the same, they shall issue a license under their hands to the applicant, authorizing him to make such an erection or extension, and to maintain the same within the limits mentioned in such license; the applicant for license to build or extend a fish weir or trap as aforesaid shall first give bond to the town, without sureties, in the sum of \$100, conditioned that upon the termination of such license he shall remove all stakes and brush from the location therein described. Said municipal officers shall, within 10 days after the date of hearing, give written notice by registered mail of their decision to all parties interested. Any person aggrieved by the decision of the municipal officers, in either granting or refusing to grant a license as hereinbefore provided, may appeal to any justice of the superior court within 10 days after the mailing of such written notice. On receiving such an appeal, said justice in term time or in vacation shall set a time and place for hearing and give notice thereof in the same manner as hereinbefore provided for a hearing, before the municipal officers. The decision of said justice shall be communicated within 10 days after the date of hearing to the appellant and to the municipal officers of the town in which the proposed wharf, weir or trap is to be located; and this decision shall be binding on said municipal officers, who shall issue a license, if so directed by the decision of said justice, within 3 days after said decision has been communicated to them. If said appeal is sustained by said justice in whole or in part, the appellant shall have his costs against the appellee. If the appeal is not so sustained, the appellee shall have his costs against the appellant. If any owner to whom a license has been issued, or his heirs or assigns, fails to remove all stakes and brush within a period of 1 year after the termination of the license, as provided in the following

section, any person can remove the same without charge against said owner, his heirs or assigns.

In the case of islands not within the jurisdiction of any town all powers of municipal officers to issue licenses to build weirs are conferred upon the owner or owners of such islands. If said owner or owners are unable to agree as to the issuance of a license they shall submit the question of such issuance to the commissioner of sea and shore fisheries, who shall, after a hearing at which all parties may be represented, decide as to the issuance of such license. (R. S. c. 86, § 7.)

The requirement of a license for the erection of a weir is a valid regulation for the control of fisheries beyond the low water mark. Hadlock, Petitioner, 142 Me. 116, 48 A. (2d) 628.

The legislature has the power to require a license for the erection of wharves on flats. Whitmore v. Brown, 102 Me. 47, 65 A. 516.

And unlicensed wharf is unlawful.—If the license required by this section is not obtained, the wharf erected without it is an unlawful structure even if it does not in fact obstruct navigation. Whitmore v. Brown, 102 Me. 47, 65 A. 516.

The license will not protect a wharf owner from complaints for infringement of private rights. Whitmore v. Brown, 102 Me. 47, 65 A. 516.

And it safeguards only tangible rights.—The rights intended to be safeguarded by the license requirement under this section are such tangible ones as unobstructed

navigation and fishing and not such intangible ones as unobstructed views or sightly prospects. Hadlock, Petitioner, 142 Me. 116, 48 A. (2d) 628.

Section does not abrogate prior legislative grants.—Where the legislature by special act granted to an individual the privilege to erect a weir in certain tide waters, and afterwards by a general act gave all others the same right under certain conditions precedent, it was held that the general act did not operate as a repeal or modification of the special act. State v. Cleland, 68 Me. 258; McLellan v. McFadden, 114 Me. 242, 95 A. 1025.

History of section.—See Hadlock, Petitioner, 142 Me. 116, 48 A. (2d) 628.

Applied in Robinson v. Fred B. Higgins Co., 126 Me. 55, 135 A. 901.

Cited in Dodge v. Hunter, 85 Me. 121, 26 A. 1055; Perry v. Dodge, 144 Me. 219, 67 A. (2d) 425.

Sec. 8. License void.—The license for the building or extension of a fish weir or trap issued under the provisions of the preceding section or any right or privilege granted by the legislature for the building or extension of any such fish weir or trap shall terminate and become void unless such weir or trap shall be built within 1 year from the date of the license or the granting of such right or privilege, and maintained and operated in good faith for some part of each year thereafter. (R. S. c. 86, § 8.)

Cited in Perry v. Dodge, 144 Me. 219, 67 A. (2d) 425.

Sec. 9. Waters lying between 2 towns.—In any river or tidewater lying between 2 towns or cities, no such wharf or fish weir described in sections 7 and 8 shall be erected without the consent of the municipal officers of both; and in no case shall any wharf be extended beyond any wharf lines heretofore legally established. (R. S. c. 86, § 9.)

Cited in Dodge v. Hunter, 85 Me. 121, 26 A. 1055; Whitmore v. Brown, 102 Me. 47, 65 A. 516; Perry v. Dodge, 144 Me. 219, 67 A. (2d) 425.

Sec. 10. Record; compensation to officers.—The application provided for in section 7, with the notice and proceedings thereon and the license granted, shall be recorded in said town. Reasonable compensation shall be paid by said applicant to the municipal officers for their services and expenses and to the clerk for recording, and if license is granted, \$5 additional shall be paid therefor by said applicant to said town. (R. S. c. 86, § 10.)

Cited in Dodge v. Hunter, 85 Me. 121, 26 A. 1055; Whitmore v. Brown, 102 Me. 47, 65 A. 516; Perry v. Dodge, 144 Me. 219, 67 A. (2d) 425.

Sec. 11. Extension of weirs and wharves; application to herring weirs and traps.—No fish weir, trap or wharf shall be extended, erected or maintained except in accordance with the provisions of sections 7 to 11; and no fish weir, trap or wharf shall be erected or maintained in tidewaters below low-water mark in front of the shore or flats of another without the owner's consent, under a penalty of \$50 for each offense, to be recovered in an action of debt by the owner of said shore or flats. This section and the 4 preceding sections apply to all herring weirs and traps; but do not apply to other weirs or traps, the materials of which are chiefly removed annually, provided that such weirs or traps do not obstruct navigation nor interfere with the rights of others. This section shall not affect any wharves so erected or maintained on the 21st day of April, 1901. (R. S. c. 86, § 11.)

The State has authority over the whole subject matter of this section so far as the public and common rights are concerned. *Donnell v. Joy*, 85 Me. 118, 26 A. 1017.

Scope of section.—This section applies to weirs or wharves not built in accordance with the provisions of this section and the next preceding 3 sections; to weirs erected below low water mark not removed annually; and to such as are removed annually when they obstruct navigation or interfere with the rights of others. *Perry v. Carleton*, 91 Me. 349, 40 A. 134.

It limits licensing authority.—The limitation on the licensing authority imposed by this section is a real one, and a license issued in defiance of it is no protection against the liability it imposes. *Hadlock*, Petitioner, 142 Me. 116, 48 A. (2d) 628.

This section seeks to protect the owner of flats in the full, practicable enjoyment of his proprietary rights. *Donnell v. Joy*, 85 Me. 118, 26 A. 1017.

And gives remedy for injury.—The purpose of this section is to extend to the shore owner additional protection in the enjoyment of his rights as such owner, and to give him a remedy for injury, where, prior to the statute, there was neither remedy nor injury in the legal sense. *Sawyer v. Beal*, 97 Me. 356, 54 A. 848; *Perry v. Dodge*, 144 Me. 219, 67 A. (2d) 425.

But does not extend his ownership.—The purpose of this section is not to extend the ownership of the owner of the shore or to give him any new or additional rights, but simply to protect him in the enjoyment of those which he already has as owner of upland and shore or of shore alone. *Sawyer v. Beal*, 97 Me. 356, 54 A. 848.

Section applies to such weirs only as injure owner of shore.—This section does not apply to all fish weirs that may be erected by a person in front of the shore of another, but only to such as are so situated or are so near the shore of another as to injure or injuriously affect the latter in the enjoyment of his rights as such owner, as for instance by preventing, to

some extent at least, fish from coming to the weir of the shore owner, if he has one, or by injuring his weir privilege, or by obstructing access by sea to his land, or in some other way. *Sawyer v. Beal*, 97 Me. 356, 54 A. 848; *Dunton v. Parker*, 97 Me. 461, 54 A. 1115.

A fish weir maintained in front of another's shore, so near or so situated with reference to the shore as to render it less valuable for any purpose for which it is adapted, is within the meaning of this section, but otherwise it is not. *Sawyer v. Beal*, 97 Me. 356, 54 A. 848.

The owner of the shore cannot maintain an action under this section to recover the penalty provided, which is intended in a certain sense as compensation for the injuries suffered by him, unless he is able to show a legal injury. *Sawyer v. Beal*, 97 Me. 356, 54 A. 848.

And plaintiff must show infringement of private right.—It is not enough for the plaintiff to show that the structures on the defendants' flats are there without the required statutory license and that they lessen the enjoyment and market value of his land. He must go further and show that they infringe some individual right recognized by the law as a legal, private right of his. That they infringe the legal rights of others gives him no cause of action against them. *Whitmore v. Brown*, 102 Me. 47, 65 A. 516.

Bag-nets are not included within the terms "weir" or "trap," as used in this section. *Small v. Wallace*, 124 Me. 365, 129 A. 444.

The word "below" in this section is used synonymously with the word "beyond." *Donnell v. Joy*, 85 Me. 118, 26 A. 1017.

Meaning of "chiefly removed annually."—The materials of a weir are not "chiefly removed annually," within the meaning of this section, where only some of the brush is removed and the permanent structure, consisting of the posts driven close together down into the ground under the sea,

is allowed to remain. *Dunton v. Parker*, 97 Me. 461, 54 A. 1115.

Meaning of "in front of the shore" dependent upon injury caused.—The language of this section, "in front of the shore or flats of another," cannot be taken literally; this section must contain some limitation not therein expressed; and the criterion to be applied in determining whether or not a weir is in front of the shore of a plaintiff, within the meaning of the section, is whether or not it causes injury of some kind to the plaintiff in the enjoyment of his rights as shore owner. *Sawyer v. Beal*, 97 Me. 356, 54 A. 848; *Dunton v. Parker*, 97 Me. 461, 54 A. 1115.

Owner's consent prerequisite.—Besides the license, the consent of the owner of the land in front whereof a proposed structure would be is prerequisite to an extension of a wharf or weir. *Robinson v. Fred B. Higgins Co.*, 126 Me. 55, 135 A. 901.

If structure would injure owner.—Consent must be given by a shore owner whom a wharf extension, in consequence of its nearness or position, would injure, or injuriously affect, in the enjoyment of his rights, as such owner. *Robinson v. Fred B. Higgins Co.*, 126 Me. 55, 135 A. 901.

Whether injury real or menacing.—Injury, real or menacing, to rights incident to the ownership of property bordering on tidewaters, is the criterion in determining whether assent is essential. *Robinson v. Fred B. Higgins Co.*, 126 Me. 55, 135 A. 901.

Unlicensed wharves not outlaws or nuisances.—The mere fact that wharves are, or will be, erected and maintained without the required statutory license does not make them outlaws, to be lawfully assailed and destroyed by anyone, or abated at the private suit of any person. Indeed the statute does not declare them to be a nuisance in law. *Whitmore v. Brown*, 102 Me. 47, 65 A. 516.

And can be attacked only by public authority in absence of special injury.—Wharves constructed so as to infringe public rights can be dealt with only by the public, that is, by proceedings in the name of the state or some authorized person in behalf of the public. An individual affected has no separate right of action in his own name. It is only when the structures inflict upon him some special legal injury different in kind as well as degree from that suffered by others that he has an individual right of action against them. *Whitmore v. Brown*, 102 Me. 47, 65 A. 516.

Notwithstanding wharf reduces value of plaintiff's land.—An unlicensed wharf ob-

structing the navigation, or boating facilities, on the tidewater in front of an adjoining residence lot is an infringement of a public right only, and does not give the owner or tenant of such lot a right to an abatement even though the wharf thereby lessens the value of the lot. *Whitmore v. Brown*, 102 Me. 47, 65 A. 516.

Equity will not interfere with remedy given.—Whenever a legal right is wholly created by statute, and a legal remedy for its violation is also given by the same statute, such as provided in this section, a court of equity has no authority to interfere with its reliefs, even though the statutory remedy is difficult, uncertain, and incomplete. *Perry v. Dodge*, 144 Me. 219, 67 A. (2d) 425.

But may enjoin extension of wharf.—Where it was shown that a proposed extension of a wharf would impede unreasonably and unlawfully, the right of egress and ingress from and to their land over the deep waters, plaintiffs were granted an injunction. *Robinson v. Fred B. Higgins Co.*, 126 Me. 55, 135 A. 901.

Owner of flats has exclusive right to erect weir thereon.—Where a plaintiff owns his flats down to low water mark, as an incident of such ownership he has the exclusive right to erect a fish weir thereon. *Donnell v. Joy*, 85 Me. 118, 26 A. 1017.

And this section gives the landowner the first right to erect a removable weir abreast his land. When he does not wish to exercise such right, then any other person may. He must either use it, or let his neighbor do it. *Perry v. Carleton*, 91 Me. 349, 40 A. 134.

But it is the actual use and appropriation that gives the landowner the benefit of the section to protect his right of fishing in front of his shore, not an unexercised right to do so. *Perry v. Carleton*, 91 Me. 349, 40 A. 134.

The owner of the upland adjoining tide-water prima facie owns to low water mark; and does so in fact, unless the presumption is rebutted by proof to the contrary. *Dunton v. Parker*, 97 Me. 461, 54 A. 1115; *Sinford v. Watts*, 123 Me. 230, 122 A. 573.

And the rights of property incident to shore ownership under this section stop at low water mark. *Hadlock, Petitioner*, 142 Me. 116, 48 A. (2d) 628.

Fish in tidal water are property of first taker.—Fish swimming in tidal water as well above as below low water mark are the property of the first taker, regardless of the ownership of the soil under the water where they were taken. *Small v. Wallace*, 124 Me. 365, 129 A. 444.

And no accounting allowed notwithstanding the taking in violation of section.—A plaintiff is not entitled to an accounting for monies received from the sale of fish nor to have the proceeds thereof im-

pressed with a trust where fish were caught in a weir maintained by the defendants in violation of this section. *Perry v. Dodge*, 144 Me. 219, 67 A. (2d) 425.

Sec. 12. "Fish weir" defined.—The words "fish weir" mentioned in any of the 5 preceding sections are defined to be a fixed structure erected and maintained during any part of each fishing season in the tidewater, constructed of spiling or stakes, supporting poles or binders, brush, lath racks or netting, forming one or more pounds or enclosures into which fish are led or guided by one or more fixed leaders and from which they cannot readily escape. (1947, c. 257.)

Cited in *Perry v. Dodge*, 144 Me. 219, 67 A. (2d) 425.