

Permission for a Fishing Expedition

BY FRANK GIBBARD

The September 4, 1885 issue of *Science* magazine contained a letter from a “Mr. C. H. Murray of Denver” reporting a strange observation he had made in Colorado’s Gunnison Valley.¹ Mr. Murray wrote that one morning in June 1882 he was prospecting on the headwaters of Tomichi Creek.² At about 9:00 a.m. he sat in the shade of some willows and observed a swarm of mosquitoes circling a group of trout that had just hatched in the creek. As he watched, a baby fish occasionally swam to the water’s surface. When that happened, “a mosquito would alight, and immediately transfix the trout by inserting his proboscis . . . into the brain of the fish, which seemed incapable of escaping. The mosquito would hold his victim steady until he had extracted all of the life juices; and when

this was accomplished, and he flew away, the dead trout would turn over on his back, and float down the stream.”³ During the half hour he sat and watched, “over twenty trout were sucked dry, and their lifeless shells sent floating away with the current.”⁴

Evidently the mosquitoes had found some good fishing on the Tomichi Creek. They weren’t the only ones. When George Tresise arrived at Tomichi Creek a couple of decades later, the creek had been stocked with fish at public expense. Tresise decided to take advantage of this taxpayer-funded resource by engaging in a fishing expedition of his own.

Tresise’s Trespass

Along the bank of the stream in the location Tresise had chosen for that purpose, a land-

owner known as “A. Hartman” had patented some lands, enclosed them with a fence, and posted “no trespassing” signs there. Tresise was not deterred by Hartman’s assertion of private-property rights. He believed he had the right to fish in the Tomichi Creek, and to travel across Hartman’s land to get there, if necessary.

He could even point to some law to support his position. Article 16, section 5 of the Colorado Constitution states that “[t]he water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.”⁵ A 1903 Colorado statute took this public right a step further. It provided “the public shall have the right to fish in any stream in this state, stocked at public expense, subject to actions in trespass for any damage done property along the bank of any such stream.”⁶

The statute seemed to give Tresise the right to trespass on Hartman’s land without penalty, so long as he did no actual damage to the land. Tresise was careful not to damage the land as he made his way to the creek bed, where he began to fish. Granted, to get there, he’d had to “forcibly [break] and enter[]” the property, probably through Hartman’s fence.⁷ But there is no indication this caused actual, physical damage to the property.

Physical damage or no, Hartman did not want Tresise on his property. In addition to posting no-trespassing signs, he had personally warned Tresise “not to enter the same or fish in the natural stream which flowed therethrough.”⁸ Apparently, the alleged trespass happened more than once; Tresise “frequently fished therein” and “refused to desist” even after being “requested . . . to do so.”⁹

The Lawsuit

Finally, it appears, Hartman had had enough. He sued Tresise for trespass in the District Court of Gunnison County. The district court ruled for Tresise and dismissed Hartman’s action, reasoning that “citizens of this state have the constitutional and statutory right to fish in our natural streams against the wish and protest of the owner of the land through which the streams

flow when the waters thereof have been stocked with fish at public expense.”¹⁰

The Appeal

Hartman appealed to the Colorado Supreme Court. His appeal produced an interesting set of opinions from a divided Court.

Justice Campbell authored the majority opinion, with Chief Justice Gabbert and Justices Goddard and Maxwell concurring. The majority ruled for Hartman. It reversed the district court and remanded with instructions to enter judgment in his favor. The majority reasoned, first, that the right of appropriation in Article 16, section 5 of the Colorado Constitution merely recognizes a right to divert unappropriated waters of natural streams for beneficial use. Neither this section, nor any other provision of the Colorado Constitution, nor any act of Congress, had declared or recognized “the right of fishery in the natural streams of this state, or an easement over the public domain for its enjoyment.”¹¹ If such a right existed at all in Colorado, it was only by virtue of the 1903 state statute.

But the Court held that statute void, for two reasons. First, when the state of Colorado was formed from territorial lands, its founders had expressly disclaimed the right to public lands within the territory, and “recognized the exclusive right of Congress to dispose of the same.”¹² Hartman had received his land by patent from the U.S. government, after the Colorado Constitution was ratified. Although he held those lands subject to certain state laws, such as the right of appropriation, state tax laws, the law of eminent domain, and other statutory regulations applicable to owners of private property, the state could not take any part of his land from him without compensation and give it to another citizen. Nor did his patent or any federal law reserve a right to fish on his lands or an easement over his lands for fishing purposes.

In addition, the common law favored Hartman’s claim. At common law, “the owner of lands which border on a navigable river, above the ebb and flow of the tide, and the owner of lands along a non-navigable fresh water stream, as an incident to such ownership, owns the



bed of the stream, and the exclusive right of fishery therein to the middle thereof; and if he owns the land bordering upon both sides, he has the exclusive right of fishing in the entire stream, to the extent that it flows through his lands.”¹³

There was another problem with Tresise’s claim. Even if Tresise somehow had a right to fish in the stream that ran through Hartman’s

property, “he certainly ha[d] no easement over any portion of [Hartman’s] property, either in the beds of the streams or the adjacent soil, for the purpose of reaching the streams.”¹⁴ The Colorado legislature could give him such a right only by a lawfully authorized taking with just compensation to Hartman. The 1903 statutory provision that “if any damage is . . . done [by a trespass], a recovery therefore may be had,” did

not satisfy the just-compensation requirement of the law of eminent domain.¹⁵

Justice Gunter specially concurred. He thought the Court should avoid the issue of a landowner's riparian rights. He was concerned that similar issues were pending before the U.S. Supreme Court in a case in which the State of Colorado was a party.¹⁶ Gunter reasoned instead that the issue was governed by the Colorado game law of 1899.¹⁷ If the 1903 statute were invalidated as unconstitutional, as the majority contended, the more general 1899 game law would govern. One section of the 1899 statute provided that "[a]ll game and fish now or hereafter within this state not held by private ownership, legally acquired, [including all] fish mentioned in this act, are hereby declared to be the property of the state, and no right, title, interest or property can be acquired or transferred, or possession thereof had or maintained except as herein expressly provided."¹⁸ Another section stated that "[n]o person shall . . . fish . . . in any enclosure not public land, without the consent of the owner or persons in charge of the same."¹⁹ Justice Gunter agreed with the majority that by purporting to legalize a trespass under the 1903 law, the legislature had unconstitutionally taken private property for a fisherman's private use without just compensation. Thus, the 1899 law governed, and it prohibited fishing on private property without the owner's consent. Tresise had broken the law.

A Colorful Dissent

Justice Bailey's dissent, joined by Justice Steele, was by far the most colorful of the Court's three opinions. He began by citing with approval the practices of the ancient Angles, Saxons, and Jutes, "an energetic, freedom-loving people, excessively fond of outdoor sports, hunting, and fishing," who treated the waters in their English domains "as free as the air was free and as the birds which flew in the air were free" and recognized no "regulations concerning the right of fishery," but treated fish as "common property."²⁰ All this changed after the Norman Conquest, because "[t]he Normans were a different class of people" who "strove for individual power and dominion" and demanded "great landed estates" for their "great barons."²¹ Even

after the Conquest, however, the king reserved certain waters for the British crown, in which the public's right to fish was conceded because they were public waters.


In the United States, Justice Bailey continued, the public's right to fish was acquiesced in for many years, "until the landed proprietors, in imitation of their Norman ancestors, began to exclude the public from the streams running through private lands."²² But Justice Bailey cited many American authorities holding that "where the public has an easement in the water for the purpose of navigation, fishing goes with the easement as an incident thereto, for the reason that the waters are public."²³ This rule, he argued, should apply in Colorado because the Colorado Constitution made the waters of every natural stream public, and the Colorado legislature had passed various laws that recognized their public character.

Among these laws were appropriations for stocking public waters with fish. The legislature had spent for this purpose, in total, "the princely sum of \$311,500 which the people have paid [so] that they and their children and their guests might enjoy the privilege of a few months' recreation in the summer season, by fishing and the like."²⁴ If Hartman's position were correct, "how vain have been the acts of the people" in 30 years of hatching and stocking fish, when the people had no right to "profit or pleasure therefrom, but it all inures to the benefit of the adjacent proprietor."²⁵

Justice Bailey further concluded that Tresise's interference with Hartman's property right was *de minimis*. In any event, fishing rights should not be limited to those who were landowners along public streams. If the majority's approach were permitted to stand, he reasoned, "[t]he poor, to whom work is a necessity and recreation a blessing, will be deprived of a constitutional right, so that the pleasure of the clubmen and the landowners may be increased."²⁶

Present-Day Fishing on the Tomichi Creek

Today, according to one popular website, some private lands accessed through the Tomichi Creek State Wildlife Area may be fished without obtaining permission, while other private areas

require permission.²⁷ The prospective fisherman is advised to check with the landowner or other authorities on this point. But if George Tresise pursued his fishing expedition in the present day, he might have found different options from those he encountered over a hundred years ago. 



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NOTES

1. "Mosquitoes v. Trout," *Science*, vol. 6, iss. 135 at 197 (Sept. 4, 1885).
2. *Id.* Although Mr. Murray referred to "Tumiche" Creek, it seems likely he meant the Tomichi Creek. Some English speakers in Colorado's early days, including the Colorado Supreme Court in the case profiled in this article, spelled the name "Tumiche." "Tomichi" is the typical spelling of the Ute Indian name for the south branch of the Gunnison River. Today the term "Tomichi" applies to numerous natural and man-made features in Gunnison County.
3. *Id.*
4. *Id.*
5. Colo. Const. art. 16, § 5.
6. Session Laws 1903, p. 233, ch. 112.
7. *Hartman v. Tresise*, 84 P. 685 (Colo. 1905).
8. *Id.*
9. *Id.* at 687 (Gunter, J., specially concurring).
10. *Id.* at 685.
11. *Id.* at 686.
12. *Id.*
13. *Id.* at 687.
14. *Id.*
15. *Id.*
16. See *Kan. v. Colo.*, 206 U.S. 46 (1907).
17. Colo. Stat., ch. 98, p. 184 (1899).
18. *Hartman*, 84 P. at 688 (Gunter, J., specially concurring) (quoting Colo. Stat., Ch. 98, p. 188, Div. A, § 16 (1899)).
19. *Id.* (quoting Colo. Stat., p. 191, Div. B, § 2 (1899)).
20. *Id.* at 689 (Bailey, J., dissenting).
21. *Id.*
22. *Id.*
23. *Id.* at 690.
24. *Id.* at 692.
25. *Id.*
26. *Id.* at 693.
27. https://en.wikipedia.org/wiki/Tomichi_Creek.