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The Right of Fishing

Ralph W. Aigler

University of Michigan Law School

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THE RIGHT OF FISHING.—While the man engaged in fishing is ordinarily more concerned with the supply of fish and their susceptibility than with his right to be doing what he is, not infrequently the latter question is thrust upon his attention. Popular notions on this matter are not to be relied upon. "In country life a multitude of acts are habitually committed that are technically trespasses. Persons walk, catch fish, pick berries, and gather nuts *in alieno solo*, without strict right. Good natured owners tolerate these practices until they become annoying or injurious, and then put a stop to them," ADAMS, J., in *Albright v. Cortright*, 64 N. J. L. 330.

It would seem quite clear that a man has no right to fish where he has no right to be. So it is uniformly held that the public have no right to fish in a non-navigable, non-tidal body of water, the beds of such bodies being owned privately. *Albright v. Cortright*, *supra*; *Baylor v. Decker*, 133 Pa. St. 168; *State v. Theriault*, 70 Vt. 617, 41 Atl. 1030, 43 L. R. A. 290, 67 Am. St. Rep. 695; *Hargreaves v. Diddams*, L. R. 10, Q. B. 582. On the other hand it is equally clear that the public may fish in tidal waters. *Warren v. Mathews*, 6 Mod. 73; *Weston v. Sampson*, 8 Cush, 347. For this purpose the Great Lakes and the bays and arms thereof are treated as the sea. *Lincoln v. Davis*, 53 Mich. 375, 19 N. W. 103, 51 Am. Rep. 116; *Hogg v. Beerman*, 41 Oh. St. 81, 52 Am. Rep. 71. The beds of the sea and the Great Lakes, it should be noted, are not privately owned.

Difficulty is encountered when the body of water is non-tidal but navigable in fact. Confusion has been provoked by the use in cases and books of the expressions "navigable water" and "tidal waters" or the "sea" as interchangeable. So when it is said, as in *Warren v. Mathews*, *supra*, that "every subject of common right may fish with lawful nets, etc., in a *navigable river*, as well as in *the sea*," the extent of the right of the public to fish in a navigable body of water would seem quite clear. It has been held, however, in England, that there is no public right of fishing in water merely because it is capable of being navigated. The right of fishing in such waters is in the proprietor of the bed thereof. *Pearce v. Scotcher*, 9 Q. B. D. 162. In *Smith v. Andrews* [1891], 2 Ch. 678, where the action was for trespass by fishing in the Thames, the court said (p. 692): "The plaintiff's title having been thus challenged, she has thought it necessary or desirable to prove it from the earliest times. * * * It would certainly have been necessary if that portion of the Thames now in question had been affected by the ebb and flow of the tide, as well as being navigable, for then the bed or soil of the river would have been in the Crown, and the right of fishing in the public, unless the plaintiff could have made out a valid title to the fishery based upon some grant by the Crown antecedent to Magna Charta." Again, on page 695, it was said: "The idea is sometimes entertained that the right to pass along

a public navigable river carries with it the right to fish in it, but so far as regards non-tidal rivers this is not so. No lawyer could take that view. Persons using a navigable highway no more acquire thereby a right to fish there than persons passing along a public highway on land acquire a right to shoot upon it." See further *Hanbury v. Jenkins* [1901], 2 Ch. 401. The English law as to the ownership of the soil of inland lakes is not certain. At least the Crown does not have ownership therein, as in tidal waters, even though the lake is navigable. *Bristow v. Cormican*, 3 App. Cas. 641. And there is no public right of fishing in such lakes. *Bloomfield v. Johnston*, 8 I. R. C. L. 68; *O'Neill v. Johnston* [1909], 1 I. R. 237.

In *Lincoln v. Davis*, 53 Mich. 375, where the question involved was the right of fishing in Thunder Bay off Lake Huron, CAMPRELL, J., said (p. 391): "Such fishing as is done with lines from boats, even in narrow streams, cannot be complained of by riparian owners. The fish are like any other animals *ferae naturae*, and in this region have always been regarded as open to capture by those who have a right to be where they are captured." (Italics ours.) In the same case CHAMPLIN, J., said (p. 387): "If the position is correct that the owner of land bounding on Thunder Bay has the same riparian rights that the owner of land bounded by a river or other stream has, then there can be no question as to his exclusive right to fish in the waters where plaintiff had attempted to, in this case, and that plaintiff was a trespasser, * * * for the law is well settled that riparian proprietors upon fresh water streams have the exclusive right of fishing in the waters opposite their lands."

In accord with Judge CHAMPLIN's view are *Sterling v. Jackson*, 69 Mich. 488 (divided court), where the question arose over shooting ducks; *State v. Shannon*, 36 Oh. St. 423, same; *Winous Point Shooting Club v. Bodi*, 20 O. C. C. 637, 643, 57 Oh. St. 226; *Winous Point Shooting Club v. Slaughterbeck* (1917), 117 N. E. 162; *Hartman v. Tresise*, 36 Colo. 146 (*dictum*, for apparently the river involved was non-navigable); *Holyoke Co. v. Lyman*, 15 Wall. 500, 512 (same); *New England Trout & S. Club v. Mather*, 68 Vt. 338 (same); *Schulte v. Warren*, 218 Ill. 108. *Contra* is *Willow River Club v. Wade*, 100 Wis. 86. In *Carson v. Blazer*, 2 Binn. (Pa.) 475, the right of fishing was held to be public, the river being navigable, the court being of the opinion that there was no private ownership of the bed thereof. There is but very little real authority for the proposition that a person may lawfully fish in waters where for some other purpose, as navigation, he has a right to be.

In *Winans v. Willets, et al.*, 163 N. W. 993 (July 30, 1917), the Michigan court was called upon to determine the fishing rights in one of the numerous small inland lakes of that state. The majority of the court being of the opinion that the lake was not a "public, navigable body of water," but a "privately owned pond," it was held that the defendants merely by reason of being members of the public had no right to fish there. Two Justices, FELLOWS and KUHN, were of opinion that since a very small boat could be navigated from Lake Erie through a river and various lakes into Winans Lake, the body of water in question, and since the lake had been stocked with fish in the state, the statute, Sec. 7694, C. L. 1915, applied. That statute pro-

vides "That in any of the navigable or meandered waters of this state where fish have been or hereafter may be propagated, planted or spread at the expense of the people of this state or the United States, the people shall have the right to catch fish with hook and line during such seasons and in such waters as are not otherwise prohibited by the laws of this state."

It is familiar doctrine that the public are lawfully on one's land within the limits of a highway only when using the same *for highway purposes*. So it should be in the case of navigable waters, the soil of which is owned privately. This, as seen above, is the English law, which would seem to be wholly sound, and it is so recognized by American courts very generally. Obviously fishing is not in any sense a part of navigation. In the case then of bodies of water, the beds of which are privately owned, the fact of navigability, in the absence of some controlling statute, should be immaterial.

In the principal case there was a statute, as quoted above, on which the dissenting Justices relied. No question ever has been raised—in the reported cases—as to its constitutionality. If the right of navigation does not, at common law, include the right of fishing,—if it would be a trespass to be upon such navigable waters when not engaged in navigation, a very serious question, it is submitted, may be made as to the power of the legislature to invade in that way the property rights of the owner of the soil. Should the fact that the waters have been stocked with fish at the expense of the state or United States make any difference? See *Albright v. Cortright*, *supra*; *State v. Thierault*, *supra*; *Hartman v. Tresise*, *supra*.

R. W. A.