



## Pollution, Police Power, and the Hupp Hotel

BY FRANK GIBBARD

Josephine Hupp, also known as Josie Hupp, is today celebrated as a pioneering businesswoman in Estes Park.<sup>1</sup> Born in 1857 in Michigan, she came to Colorado in 1878. After her first husband died, she married Henry Hupp in 1893. In 1906, the Hupps built the first hotel in downtown Estes Park, the Hupp Hotel, at the corner of Elkhorn and Moraine streets. Near the centrally located Hupp Hotel they built another hotel building, the Hupp Annex. Their hotel empire eventually expanded to include four Estes Park hotels. In addition to managing these hotels and a café,

Ms. Hupp found time to serve as Estes Park’s postmistress.

### A Water Pollution Complaint

Unfortunately for the Hupps, in 1910 they found themselves in trouble with the law over the effluent discharged from the Hupp Hotel and Annex. The City of Loveland’s health officer, Dr. S.A. Joslin, had complained that the Hupp hotels were polluting the Big Thompson River, from which Loveland drew its water supply.<sup>2</sup>

On July 14, 1910, the Eighth Judicial District Attorney filed an information in Larimer County

Court charging Henry and Josephine Hupp, as “owners, proprietors, managers and agents” of the Hupp Hotel and Hupp Annex, with polluting a tributary of the Big Thompson River with “obnoxious, fleshy, and vegetable matter and sewage, subject to decay, such as refuse from privies, closets and slops from eating houses.”<sup>3</sup> This criminal offense carried a fine of between \$100 and \$500.

The case went to jury trial. The statute under which the Hupps were charged criminalized “discharg[ing] into any stream of running water, or into any ditch or flume in this state, any obnoxious substance, such as refuse matter from slaughterhouse or privy, or slops from eating houses or saloons, or any other fleshy or vegetable matter which is subject to decay in the water.”<sup>4</sup>

The People’s evidence showed that (1) the Big Thompson tributary ran through Estes Park, where the hotels were situated; (2) the Hupps ran the hotels; (3) slops from the kitchen and overflow from the cesspool were being discharged into the tributary; and (4) a pipe connected to the hotels ran to a drain that discharged sewage from the privy vaults into the tributary.

The Hupps’ liability thus seemed rather clear, factually speaking. But at the close of the People’s case, they moved to dismiss the charge. Their attorney argued that it was an overbroad use of the statute to charge the Hupps because “if an offense was committed, then any city or individual using a stream for drainage above any other city using the water was guilty of an offense.”<sup>5</sup> Thus, even cities that discharged sewage into a river would be in violation of the law if their discharge adversely affected downstream users.

The trial court agreed this was an overbroad use of the statute, and it granted the motion to dismiss. The court stated,

I do not believe this statute was ever meant to reach as far as it is being attempted to be brought at this time. . . . [The pollution] should certainly be stopped, but as to bringing this as a criminal action and placing defendants in such a position as they might be convicted on a mere technical violation of the statute, does not seem to be embraced within the statute.<sup>6</sup>



## The City of Loveland's health officer, Dr. S.A. Joslin, had complained that the Hupp hotels were polluting the Big Thompson River, from which Loveland drew its water supply.

The People filed a writ of error from the dismissal with the Colorado Supreme Court.

### Colorado Supreme Court's Decision

On appeal, the Colorado Supreme Court rejected the trial court's construction of the statute, finding it "made [the statute] inoperative and inapplicable to the case at bar and similar cases."<sup>7</sup> The Court explained that the statute had been passed under the authority of the state's police power and could be invalidated only if it bore no relationship to public health, morality, or safety, or infringed on constitutional rights. Other than that, it was not a court's function to inquire into the wisdom of the statute—that was the legislature's job.<sup>8</sup>


The Court stated it was unable to determine "upon what theory the trial court held the statute inapplicable to a case such as is presented by the information."<sup>9</sup> It declared that the statute was within the power of the legislature to enact and its meaning was plain; thus, the trial court "simply disregarded a legislative command" that the legislature had rightfully given.<sup>10</sup>

Further addressing the Hupps' arguments, the Court concluded that the legislature's power to control water pollution was broad, and extended even to situations where it could not be shown that there was actual injury to the downstream user. The state had broad powers to restrain the use of private property in the interest of public health. The Court relied on a prior case in which it had upheld a municipal prohibition on the construction of pigsties whose drainage was capable of contaminating water supplies.<sup>11</sup> Such enactments were valid, the Court had said, even for pigsties located outside the city limits, if they could affect the city's water supply.

The Court concluded that the trial court had erred in dismissing the case against the Hupps. Pronouncing itself "satisfied that the law is one which the Legislature was authorized to pass, and the courts should enforce," and finding that the trial court "practically held the statute inoperative and in effect nullified it," the Court reversed the dismissal and remanded for further proceedings.<sup>12</sup>

### Aftermath

It is not clear what happened to the *Hupp* case after the remand. Notably, even before the Colorado Supreme Court's reversal, the authorities had continued to try to hold the Hupps liable for polluting the Big Thompson River. In the fall of 1910, a separate pollution-related criminal complaint was filed against them in district court.<sup>13</sup> The fate of that complaint is also unclear.<sup>14</sup>

Today, of course, water pollution is regulated by statutes such as the Clean Water Act. But pollution from recreational industries continues to be a serious concern. For example, a cruise ship containing 3,000 passengers and crew is estimated to generate 210,000 gallons of sewage per week.<sup>15</sup> While discharge of such wastes is regulated within a three-mile limit from the shore, outside that limit ships are technically permitted to dump raw sewage into open waters.<sup>16</sup> Fortunately, most modern cruise ships treat sewage thoroughly before dumping it at sea. 



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### NOTES

1. [https://www.estesparknews.com/featured\\_articles/article\\_bd06a824-42c3-11ea-9d03-f71f700d53a9.html](https://www.estesparknews.com/featured_articles/article_bd06a824-42c3-11ea-9d03-f71f700d53a9.html).
2. "Loveland Files Formal Complaint," *Weekly Courier (Fort Collins)* at p.3, col. 2 (July 21, 1910).
3. *People v. Hupp*, 123 P. 651, 652 (Colo. 1912) (internal quotation marks omitted).
4. *Id.* (internal quotation marks omitted).
5. "Hotel at Estes Park Can Throw Out Slops," *Boulder Daily Camera* at p.1, col. 2 (July 28, 1910).
6. *Hupp*, 123 P. at 652 (internal quotation marks omitted).
7. *Id.*
8. *See id.* at 653.
9. *Id.* at 654.
10. *Id.*
11. *Id.* at 654-55 (citing *City of Durango v. Chapman*, 60 P. 635 (Colo. 1900)).
12. *Id.* at 655.
13. "Hupps Again Charged with Water Pollution," *Weekly Courier (Fort Collins)* at p.6, col. 2 (Oct. 6, 1910).
14. As to the fate of the Hupps themselves, Henry Hupp died in May 1931, and Josephine Hupp died less than two years later, on November 12, 1932. The Hupp Hotel and Annex passed into other hands, and the hotel building later served as the iconic Indian Village Trading Post. "Hupp Hotel History," *Estes Park Trail-Gazette* at p.5, col. 1 (Nov. 10, 1982).
15. [https://en.wikipedia.org/wiki/Cruise\\_ship\\_pollution\\_in\\_the\\_United\\_States](https://en.wikipedia.org/wiki/Cruise_ship_pollution_in_the_United_States).
16. *See id.*