and that, keeping in mind the difference in the facts, and the distinction between what was essential to the decision of the respective cases and what is mere *dictum*, this case is not overruled by Wilhelm v. Schmidt, 84 Ill. 187. We therefore conclude that the law of Illinois is that the taking of the debtor's promissory note for a pre-existing debt is *prima facie* payment,—that is, operates as payment and extinguishment of the original debt,—unless the parties have agreed to the contrary; while the law of this state is that it does not, unless the parties have agreed that it shall have that effect. Of course, we do not mean that the agreement to make the case exceptional must be express, for in either state such an agreement may be implied from circumstances; but what we do mean is that where, as in this case, there is no express agreement on the subject, and no circumstances from which an agreement can be implied,—nothing but the bare fact that the note was given and received,—then, in Illinois, the note extinguishes the debt, while in this state it would not, unless the note itself is paid.

The question, then, remains, which applies to this case,—the law of Illinois or the law of Minnesota? There is no controversy as to the general rule on the subject, the only difficulty being as to its application. In respect to all question as to forms or methods or conduct of process or remedy, including mere rules of evidence, the law of the forum governs; but the settled doctrine of public law is that personal contracts are to have the same validity, interpretation, and obligatory force in every other country (unless against its public policy) which they have in the country where they were made. 2 Kent, Comm. 257, 258. The *lex loci contractus* (referring to the place of the seat of the contract, as distinguished from the place where it may casually happen to have been signed, and which may govern in mere matters of form of solemnization) is *prima facie* that which the parties intended to apply, and therefore the law which, in the absence of circumstances indicating a different intention, ought to prevail in all matters pertaining to the right and merit of the contract, or what the civilians called "*naturalia contractus*." This doctrine is perhaps as clearly and tersely stated by TINDALL, C. J., as any one, as follows: "So much of the law as affects the rights and merit of the contract—all that relates *ad lites decisionem*—is adopted from the foreign country; and so much of the law as affects the remedy only—all that relates *ad lites ordinationem*—is taken from the *lex fori*, where the action is brought." Huber v. Steiner, 2 Scott, 304. Of course he was speaking of personal contracts. The law of the place of making the contract, if it is to be there performed, enters into and forms a part of the contract as to all questions touching its obligation and interpretation; as, for example, whom it binds, and to what extent; what is included and what is excluded. Whoever contracts in a country is presumed to know its law, and whatever he does not express plainly he refers to the interpretation of the law, and wills and intends that which the law itself wills and intends. This is included in the contract, without being expressly mentioned, by operation of law. Applying these principles to the case in hand, we are of opinion that the question whether the giving of these promissory notes operated as a payment and extinguishment of the antecedent debt is one which goes to the force and effect of the contract itself, and is not a mere rule of evidence, and therefore the law of Illinois applies. To hold otherwise would, it seems to us, be to make a contract for parties different from that which they made for themselves. Suppose, for example, as in this case, the contract is made in Illinois, and the party gives his note for an existing debt, without any express agreement as to its effect on the original debt, and in the absence of any circumstances from which any agreement to make the case exceptional can be implied. By the laws of that state, with reference to which he presumably contracts, it extinguishes the original debt, and thereafter his only liability is on his note. But if he is sued in this state on the original debt, if our law is to apply, he is liable notwithstanding his implied contract to the contrary. Suppose, on the other hand, the contract is made in Minnesota, and, the note not being paid, the creditor sues on the original debt in Illinois. If the law of that state applies, his action must fail, although he took the note in reliance on the laws of this state, without any intention thereby to discharge or release the original debt. It seems to us that this is more than a question of remedy, but goes to the right of the contract. So far as we can find, New Hampshire is the only state in which the question in this precise form has ever been passed on. It is there held that it is the law of the state where the note was given which applies. Ward v. Howe, 38 N. H. 35. See, also, Pecker v. Kennison, 46 N. H. 488, and Gilman v. Stevens, 63 N. H. 342, 1 Atl. Rep. 202. The doctrine of these cases is cited approvingly in Pars. Cont. 719. Ely v. James, 123 Mass. 36, although not an authority on the question, is suggestive, for the reason that some of the points raised would naturally have been otherwise disposed of had the court considered that they involved merely a rule of evidence, to be determined by the law of the forum. Counsel for plaintiff relies greatly on Hoadley v. Transportation Co., 115 Mass. 304, and at first sight it would seem more nearly an authority in his favor than any other case cited. But, without considering whether that case was rightly decided, we think it is clearly distinguishable from the present. The question there was merely one of evidence of plaintiff's assent to the terms of the bill of lading.

With reference to another trial, we may add that we are of opinion that sufficient foundation was laid for the introduction of secondary evidence of the contents of the letters from plaintiff to Thompson. Plaintiff had done all that it could do to procure the originals in Thompson's possession. He was beyond the jurisdiction of the court, and could not be reached by process. When his deposition was being taken in Kansas, on his cross-examination, plaintiff called for the production of the letters, which Thompson positively refused to do, and in such terms as to indicate clearly that he was acting in the interest of the defendant. It is not material that his deposition was being taken on motion of defendant, and not of plaintiff. Steph. Dig. Ev. art. 71*b*. Order affirmed.

(52 Minn. 157)

DAVIS v. HOW.

(Supreme Court of Minnesota. Jan. 6, 1893.)

PUBLICATION OF DELINQUENT TAX LIST—SUFFICIENCY OF DESCRIPTION.

Where, in a published tax list of delinquent lands, the descriptions in each township purported to be complete, and in one township certain land was described, under a general caption indicating township and range, as the

Lot Block

"S. W. ¼ of S. W. ¼ of 3, 40," *held* defective and insufficient, though in a preceding township the headings over similar columns of numerals were "Sec." and "Acres."

(Syllabus by the Court.)

Appeal from district court, Scott county; CADWELL, Judge.

Action by O. B. Davis against David L. How to determine the adverse claim of defendant to certain real property in the county of Scott, in possession of plaintiff. Defendant relied upon a tax title. The action was tried before the court without a jury, and judgment was ordered for plaintiff. Defendant appeals from the judgment. Affirmed.

Southworth & Coller, for appellant. *Little & Nunn*, for respondent.

VANDERBURG, J. This appeal involves the validity of a tax title, held by defendant, upon certain lands in Scott county. The question raised is in respect to the sufficiency of the description of the particular lands in the published delinquent list for the year 1879 and prior years. The list contained descriptions of farming lands, as well as town lots, in the various townships of the county. The lands in question here are situated in the town of Eagle Creek. Preceding the list of delinquent lands in that town, there appears the lists in the towns of Belle Plaine, Blakely, Cedar Lake, and Credit River. In the town of Eagle Creek lands claimed to be those in question were described as follows:

TOWN OF EAGLE CREEK.

Names of Owners and Years which Taxes are Due. Subdivisions of Section, Lot, or Block.	Lot.	Block.	Am't Taxes Delinquent & Accrued.		Interest.		Total Am't of Taxes, Principal & Interest Due.	
Township 115, range 22.			$	cts.	$	cts.	$	cts.
H. and J. Latz, 1871 to 1880 inc., S. W. ¼ of S. W. ¼	3	40	38	40	17	57	55	97
H. and J. Latz, 1871 to 1880 inc., S. ½ of S. E. ¼	4	80	94	94	43	08	138	02

In each of the first three towns in the list there appear, as in this instance, opposite the names of the owners and the government subdivisions of sections or quarter sections, figures under the heading of "Lot" and "Block," which correspond to the figures under the headings "Sec.," "Acres," over similar numerals in the lists of the towns of Cedar Lake and Credit River, which immediately precede that of Eagle Creek. There do not appear to be any general "headings" applicable alike to several of the towns, but the list for each town appears to be intended to be separate and independent of the others, and complete in itself; but unless we are permitted to refer to the description in the township immediately preceding, and import into this description the abbreviation "Sec.," there used in the place of the word "Lot," which is evidently intended to be placed over this column, though printed out of line, the description of the lands in question must be deemed unintelligible and incomplete, within the rule in Kipp v. Fernhold, 37 Minn. 133, 33 N. W. Rep. 697. But we do not think the landholder was called upon to so interpret the description, or to refer or connect it with that of the preceding town. The list was not sufficient to require the landowner to answer. He was not, therefore, in default, and the judgment was unauthorized, and the sale void. Judgment affirmed.

(52 Minn. 181)

LAMPREY et al. v. METCALF et al.,

(two cases.)

(Supreme Court of Minnesota. Jan. 10, 1893.)

PUBLIC LANDS—GRANTS—RIPARIAN RIGHTS.

1. When the United States has disposed of the lands bordering on a meandered lake, by patent, without reservation or restriction, it has nothing left to convey, and any patent thereafter issued for land forming the bed, or former bed, of the lake, is void and inoperative.

2. Where the United States has made grants, without reservation or restriction, of public lands bounded on streams or other waters, the question whether the lands forming the beds of the waters belong to the state, or to the owners of the riparian lands, is to be determined entirely by the law of the state in which the lands lie.

3. The same rules govern the rights of riparian owners on lakes or other still waters as govern the rights of riparian owners on streams. Hence, if a meandered lake is "non-navigable," in fact, the patentee of the riparian land takes the fee to the center of the lake; but, if the lake is "navigable" in fact, its waters and bed belong to the state, in its sovereign capacity, and the riparian patentee takes the fee only to the water line, but with all the rights incident to riparian ownership on navigable waters, including the right to accretions or relictions formed in front of his land by the action or recession of the water.

4. The division of waters into navigable and nonnavigable is merely a method of dividing them into public and private, which is the more natural classification; and the definition or test of navigability to be applied to our inland lakes must be sufficiently broad and liberal to include all the public uses, including boating for pleasure, for which such waters are adapted. So long as they continue capable of being put to any beneficial public use, they are public waters.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; OTIS, Judge.

Action by Uri L. Lamprey and another to determine the adverse claims of the state of Minnesota to certain vacant and unoccupied real estate, formerly the bed of a meandered lake, situate in the county of Ramsey. O. M. Metcalf, a tenant in common of the premises with plaintiff Lamprey, was joined as a defendant, and as to him partition was prayed. The action was tried before the court without a jury, and judgment ordered for plaintiffs. Defendant state of Minnesota appeals. Affirmed.

Moses E. Clapp, Atty. Gen., and *H. W. Childs*, Asst. Atty. Gen., (*Wm. M. Jones*, of counsel,) for the State. *Uri L. Lamprey*, for respondents. *Stryker & Moore*, *amici curiæ*.

MITCHELL, J. In 1853, at the time of making the United States survey of sections 4, 5, 8, and 9, township 28, range 22, there was in the center of these four sections a shallow, nonnavigable lake, comprising about 300 acres, which the government surveyor meandered, in accordance with the rules and instructions of the department, "to meander all lakes and deep ponds of the area of twenty-five acres and upwards," (1 Lester, Land Laws, 714,) and in doing so ran the meander lines substantially along the margin of the lake. The lake and the meanders thereof appear on the official plat of the survey, and are referred to in the field notes. By this survey the lands bordering on the lake were subdivided into fractional governmental subdivisions and lots, the lake forming the boundary thereof on one side. The survey and plat were approved by the secretary of the interior in 1854. Subsequently, and prior to 1856, the United States, by patents, conveyed, without reservation or restriction, to various parties, all of these lands, which were described in the patents by their governmental subdivision or lot, according to the plat and survey, which were referred to in, and made part of, the patents. By sundry mesne conveyances from the patentees, the plaintiffs and defendant Metcalf have become the owners of all these riparian lands. Since the survey in 1853 the lake has been, through natural causes, gradually and imperceptibly drying up, until now its former bed is all dry land. In 1860, after the lake had partially dried up, the United States land department caused a survey to be made of the land constituting that part of the former bed of the lake situate between the original meander line and the then existing margin of the lake, and in 1873 assumed to issue a patent therefor to one Gilmore, who subsequently conveyed to plaintiffs and Metcalf, who assert title to the former bed of the lake both as grantees of the riparian lands according to the original survey of 1853, and also, in part, under the Gilmore patent. The state, on the other hand, claims that the Gilmore patent is void, and that the patents, according to the original United States survey, only conveyed the land to the margin of the lake, as it then existed, and that the former bed of the lake belongs to the state, in its sovereign capacity. In the pleadings the state also asserted title under the "swamp-land grant" from the United States; but this claim was abandoned on the trial, and very properly so, because, for manifest reasons, it was entirely untenable.

It will be thus seen that the question presented is, what rights in or to the soil under water does the patentee of land bounded by a meandered inland lake acquire by his patent? The same question was suggested in Huntsman v. Hendricks, 44 Minn. 423, 46 N. W. Rep. 910, but not decided, in view of its great importance, and the fact that it was not fully argued by counsel. The importance of the question, both to the public and to riparian owners, is apparent, when we consider that there are many thousand of such lakes in this state, which, although most of them may not be adapted for navigation, in its ordinary, commercial sense, have been, from the earliest settlement of the state, resorted to and used by the people as places of public resort, for purposes of boating, fishing, fowling, cutting ice, etc., and the further fact that observation teaches that the waters of many of these lakes are, from natural causes, slowly but imperceptibly receding, so that a part of what was their bed, when surveyed, has, or in time will, become dry land. The right of the public to use these lakes for the purposes referred to, as well as the right of riparian owners to these relicted lands, and consequently their right of access to the water after such reliction occurs, are therefore all involved in the question presented. The question ought to be approached and considered from a practical, as well as legal, standpoint; and as the common law is a body of principles, and not of mere arbitrary rules, the effort should be to apply the spirit and reason of these principles to the state of facts presented.

There are certain matters which are so well settled that they may be summarily disposed of at the outset. Without troubling ourselves to consider what were the rights of the United States in these waters before they conveyed the lands bordering on them, it is well settled that, having disposed of lands bordering on a meandered lake by patent, without reservation or restriction, they have nothing left to convey, and consequently the land department was thereafter without jurisdiction, and the Gilmore patent, issued in 1873, was inoperative and void; also that a meander line is not a boundary, but that the water whose body is meandered is the true boundary, whether the meander line in fact coincides with the shore or not; also, that grants by the United States of its public lands bounded on streams or other waters, made without reservation or restriction, are to be construed according to the law of the state in which the lands lie; and, consequently, whether the land forming the beds of these lakes belongs to the state, or to the owners of the riparian lands, is a question to be determined entirely by the laws of Minnesota. In support of these propositions, we need only cite Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. Rep. 808, 838, and Mitchell v. Smale, 140 U. S. 406, 11 Sup. Ct. Rep. 819, 840.

In St. Paul, S. & T. F. R. Co. v. St. Paul & P. R. Co., 26 Minn. 31, 49 N. W. Rep. 303, this court was led, from certain *dicta* in Railway Co. v. Schurmeier, 7 Wall. 272, to suppose that the supreme court of the United States meant to hold otherwise as to patents of public lands bordering on navigable streams; but that no such doctrine has been adopted by that court is evident from Barney v. Keokuk, 94 U. S. 324, and subsequent cases. We therefore approach the question in this case untrammeled by the binding authority of any federal decisions, or even by any direct decisions in this state, in which this is still an open question. What the relative rights of the state and of riparian owners in the waters and beds of these lakes are, largely depends upon the question whether the rules of law as to the rights of grantees of lands bordering on running streams are applicable to grants of land bordering on lakes. The early English decisions, dealing, as they did, mainly with arms of the sea and rivers in which the tide ebbed and flowed, furnish but little light on this subject. In many of the states of the Union, this branch of the law is still somewhat unsettled, and, as said in Huntsman v. Hendricks, supra, the decisions are somewhat conflicting. The subject was recently very ably and exhaustively considered by that eminent jurist, the late Justice BRADLEY, in Hardin v. Jordan, supra, in which all the authorities—Roman, English, and American—are collected and reviewed; and we think we may fairly say of the decision in that case that the result and logic of it is that, at common law, the rules governing riparian rights on streams apply, *mutatis mutandis*, to grants of land bordering on lakes; consequently, if they are nonnavigable the grantees, if their grants are without reservation or restriction, take to the center of the lake, but that if they are navigable the grantees take the fee only to high water, but with all the riparian rights incident to the ownership of riparian land, including the right to accretions and relictions. It is true that case was controlled by the law of Illinois, and the only question was what the law of that state was; but, having determined that the courts of Illinois had adopted the common law on the subject, it became necessary to ascertain what the common law was; and in that point of view the conclusion arrived at on that question is pertinent here.

As has been already suggested, there are but few authorities on the question in England; for in England proper there are but few lakes, and in Scotland the civil law prevails. The case of Bristow v. Cormican, L. R. 3 App. Cas. 641, goes far towards sustaining the conclusion reached in Hardin v. Jordan, although it must be admitted that it is left in some doubt as to whether the presumption of ownership to the thread of the stream, which exists with regard to owners of land on the banks of nontidal streams of running water, exists also on inland lakes, navigable in fact, but nonnavigable in the common-law sense.

Coulson & Forbes, in their work on the Law of Waters, (page 98,) say that it does not appear that by the English law there is any difference as to the ownership of the soil between land covered with still and running water, except, perhaps, in the case of large inland lakes or seas, where the rule that the adjoining riparian owner is owner *ad medium filum aquæ* might cause inconvenience.

The decisions in Massachusetts, (of which Maine was a part,) and which have been followed in most of the New England states, are not particularly in point, for the reason that they have their foundation in the colonial ordinance of 1641-47, prohibiting towns from granting away ponds containing more than 10 acres, called "great ponds," and providing that such ponds should be free to the public for fishing and fowling.

In New Jersey, which adhered strictly to the old common-law definition of "navigable waters," it was held that a lake (which, according to the English common law, was nonnavigable) was the private property of the riparian owner; thus applying the same rule that would be applied in case of a nonnavigable stream. Cobb v. Davenport, 32 N. J. Law, 369.

Whatever doubt once existed as to the law in New York would seem to be fully set at rest by the recent decision of the court of appeals (second division) in Gouverneur v. Ice Co., 31 N. E. Rep. 865, in which, after reviewing all the decisions of the state on the subject, the court holds "that a deed of land bordering on a small, nonnavigable lake or pond is *prima facie* presumed to convey title to the center," saying there would seem to be no substantial reason for the application of a different rule in the legal construction of grants of land bounded on them than is applied to conveyances bounding premises on fresh-water streams, and that the difficulty in locating lines, under this rule, of different proprietors, is not an objection to its general application, as the same difficulties would be met with in the bays or bends of rivers.

Substantially the same views are expressed in Lembeck v. Nye, 47 Ohio St. 336, 24 N. E. Rep. 686; the court saying that no solid ground is readily perceived for limiting a grant of land bordering on a nonnavigable lake to the water's edge, when, in the case of a nonnavigable stream, its operation extends to the center.

In Ridgway v. Ludlow, 58 Ind. 248, it was held that the owner of land bordering on a nonnavigable lake, lying within the congressional survey, is the owner of the bed of the lake to the thread thereof, or a line along the middle of the lake; the court adding that they could see no difference between nonnavigable lakes and nonnavigable rivers, although later, as will be seen, the court somewhat limited this common-law right.

In Rice v. Ruddiman, 10 Mich. 125, the rule of riparian ownership previously applied to the Detroit river was applied to Lake Muskegon; the court saying that

they were not able to discover any fact or circumstance sufficient to make a substantial difference in principle between the two cases, and that the general understanding and common usage of the country have as clearly recognized the principles of riparian ownership with reference to lakes as to rivers within the state, and repudiated any distinction as arbitrary, having no foundation in the nature of things. The same court, in Clute v. Fisher, 65 Mich. 48, 31 N. W. Rep. 614, (followed in Stoner v. Rice, 121 Ind. 51, 22 N. E. Rep. 968,) limited this common-law right by holding that the riparian owner of a fractional lot bounded by a nonnavigable lake could only take so much of the lake as is required to fill out the subdivision of the section which he owned. The court seemed to think that they were required to so hold, under the decision in Brown's Lessees v. Clements, 3 How. 650, but which, with due deference, does not seem to us to have the least application to the question of riparian rights under a grant of land bordering on water. But, having held that the bed of a nonnavigable lake belonged neither to the state nor the United States, the court was compelled to the somewhat peculiar position of holding that if the lake was so large that the lines of the granted lots or fractional subdivisions would not, when extended, embrace the whole of it, then the riparian ownership would extend to the center. We are compelled to the conclusion that this attempted limitation upon riparian ownership is illogical, purely arbitrary, and impracticable.

The same question has been before the courts of Wisconsin in several cases. Delaplaine v. Railway Co., 42 Wis. 214; Boorman v. Sunnuchs, Id. 233, and Diedrich v. Railway Co., Id. 248. The general result of these decisions is that, while the courts of that state hold that, whether a stream is navigable or nonnavigable in fact, the title of the bed to the center of the current is in the owner of the bank, but that as to lakes a different rule applies, and that the owner of the land bordering on any meandered lake, whether navigable in fact or not, takes the land only to the water's edge; but no special reason is given why a different rule should be applied. The courts of that state do, however, hold that the riparian proprietor has, as such, the exclusive right of access to and from the lake in front of his land, and of building his piers and wharves in aid of navigation, not interfering with the public easement where the lake is navigable; also, that he has the accretions formed upon or against his land, and those portions of the bed of the lake adjoining his land which may be uncovered by the recession of the water, there being no distinction, in respect to the rights of riparian owners, between accretions and relictions. With these rights conceded to the riparian owner, the question whether the fee of the bed of the lake, while it remains covered with water, is in him or in the state, is more speculative than practical. In most cases where a distinction has been made between riparian rights on streams and on lakes it seems to have been merely assumed, without much consideration, that the rules applicable to running water were not applicable to lakes or ponds. The only reasons we have ever seen suggested for a distinction are—*First*, the supposed difficulty of running the lines between adjoining riparian owners of lands bordering on lakes, and, *second*, the supposed injustice that might result, in some cases, in giving the owner of a very small estate on the shore of a lake a very large reliction in front of it. But it seems to us that neither of these are adequate reasons for departing from a well-settled principle. Both of them are more imaginary than real, and would occur only in exceptional or extreme cases, and are almost as likely to occur in the case of riparian ownership on a tortuous river, with an ill-defined or changeable channel, as in the case of such ownership on the borders of a lake. The owner of a mere "rim" on the bank of a river may sometimes acquire an accretion or reliction much larger than the parent estate, but that is an incident to all riparian ownership; and it was never suggested, in the case of a stream, that such a state of facts furnished any reason for making the case an exception to the general rule.

Courts and text writers sometimes give very inadequate reasons, born of a fancy or conceit, for very wise and beneficent principles of the common law; and we cannot help thinking this is somewhat so as to the right of a riparian owner to accretions and relictions in front of his land. The reasons usually given for the rule are either that it falls within the maxim, *de minimis lex non curat*, or that, because the riparian owner is liable to lose soil by the action or encroachment of the water, he should also have the benefit of any land gained by the same action. But it seems to us that the rule rests upon a much broader principle, and has a much more important purpose in view, viz. to preserve the fundamental riparian right—on which all others depend, and which often constitutes the principal value of the land—of access to the water. The incalculable mischiefs that would follow if a riparian owner is liable to be cut off from access to the water, and another owner sandwiched in between him and it, whenever the water line had been changed by accretions or relictions, are self-evident, and have been frequently animadverted on by the courts. These considerations certainly apply to riparian ownership on lakes as well as on streams. Take the case in hand, of our small inland lakes, the waters of many of which are slowly but gradually receding. The owners of lands bordering on them have often bought with reference to access to the water, which usually constitutes an important element in the value and desirability of the land. If the rule contended for by the appellants is to prevail, it would simply open the door for prowling speculators to step in and acquire title from the state to any relictions produced in the course of time by the recession of the water, and thus deprive the owner of the original shore estate of all

riparian rights, including that of access to the water. The endless litigation over the location of the original water lines, and the grievous practical injustice to the owner of the original riparian estate, that would follow, would, of themselves, be a sufficient reason for refusing to adopt any such doctrine. That the state would never derive any considerable pecuniary benefit,—certainly, none that would at all compensate for the attendant evils,—we may, in the light of experience, safely assume. Our conclusion, therefore, is that upon both principle and authority, as well as consideration of public policy, the common law is that the same rules as to riparian rights which apply to streams apply also to lakes, or ther bodies of still water. In this state, we have adopted the common law on the subject of waters, with certain modifications, suited to the difference in conditions between this country and England, the principal of which are that navigability in fact, and not the ebb and flow of the tide, is the test of navigability, and that we have repudiated the doctrine that the state has any private or proprietary right (as had the king) in navigable waters, but that it holds them in its sovereign capacity, as trustee for the people, for public use. In accordance with the rules of the common law, we therefore hold that where a meandered lake is nonnavigable in fact, the patentee of land bordering on it takes to the middle of the lake; that where the lake is navigable in fact, its waters and bed belong to the state, in its sovereign capacity, and that the riparian patentee takes the fee only to the water's edge, but with all the rights incident to riparian ownership on navigable waters, including the right to accretions or relictions formed or produced in front of his land by the action or recession of the water. Of course, it is a familiar principle that these riparian rights rest upon title to the bank or shore, and not upon title to the soil under the water. Comparing what was said in Schurmeier v. Railway Co., 10 Minn. 82, (Gil. 59,) with what is perhaps implied in St. Paul, S. & T. F. R. Co. v. St. Paul & P. R. Co., 26 Minn. 31, 49 N. W. Rep. 303, it may be not entirely clear whether the doctrine of this court is that a patentee of land on navigable water takes the fee to low water, or only to high water; but this is a matter of little practical importance in any case, and of none in the present one.

What has been already said is sufficient for the purposes of the present case; but, to avoid misconception, it is proper to consider what is the definition or test of "navigability," as applied to our inland lakes. The division of waters into navigable and nonnavigable is but a way of dividing them into public and private waters,—a classification which, in some form, every civilized nation has recognized; the line of division being largely determined by its conditions and habits. In early times, about the only use—except, perhaps, fishing—to which the people of England had occasion to put public waters, and about the only use to which such waters were adapted, was navigation, and the only waters suited to that purpose were those in which the tide ebbed and flowed. Hence, the common law very naturally divided waters into navigable and nonnavigable, and made the ebb and flow of the tide the test of navigability. In this country, while still retaining the common-law classification of navigable and nonnavigable, we have, in view of our changed conditions, rejected its test of navigability, and adopted in its place that of navigability in fact; and, while still adhering to navigability as the criterion whether waters are public or private, yet we have extended the meaning of that term so as to declare all waters public highways which afford a channel for any useful commerce, including small streams, merely floatable for logs at certain seasons of the year. Most of the definitions of "navigability" in the decided cases, while perhaps conceding that the size of the boats or vessels is not important, and, indeed, that it is not necessary that navigation should be by boats at all, yet seem to convey the idea that the water must be capable of some commerce of pecuniary value, as distinguished from boating for mere pleasure. But if, under present conditions of society, bodies of water are used for public uses other than mere commercial navigation, in its ordinary sense, we fail to see why they ought not to be held to be public waters, or navigable waters, if the old nomenclature is preferred. Certainly, we do not see why boating or sailing for pleasure should not be considered navigation, as well as boating for mere pecuniary profit. Many, if not the most, of the meandered lakes of this state, are not adapted to, and probably will never be used to any great extent for, commercial navigation; but they are used—and as population increases, and towns and cities are built up in their vicinity, will be still more used—by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated. To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated. When the colony of Massachusetts, 250 years ago, reserved to public use her "great ponds," probably only fishing and fowling were in mind; but, as is said in one case, "with the growth of the community, and its progress in the arts, these public reservations, at first set apart with reference to certain special uses only, became capable of many others, which are within the design and intent of the original appropriation. The devotion to public use is sufficiently broad to include them all, as they arise." West Roxbury v. Stoddard, 7 Allen, 158. If the term "navigable" is not capable of a sufficiently extended meaning to preserve and protect the rights of the people to all beneficial public uses of these inland lakes, to which they are capable of being put, we are not prepared to say that it would not be justifiable, within the principles of

the common law, to discard the old nomenclature, and adopt the classification of public waters and private waters. But, however that may be, we are satisfied that, so long as these lakes are capable of use for boating, even for pleasure, they are navigable, within the reason and spirit of the common-law rule. When the waters of any of them have so far receded or dried up as to be no longer capable of any beneficial use by the public, they are no longer public waters, and their former beds, under the principles already announced, would become the private property of the riparian owners.

Judgment affirmed.

(52 Minn. 201)

HAWKES v. FRASER.

(Supreme Court of Minnesota. Jan. 11, 1893.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—UNLAWFUL PREFERENCE—EVIDENCE.

Upon an examination of the evidence on the trial of this action, which was brought by an assignee in insolvency against a creditor alleged to have obtained an unlawful preference, it is *held* that certain findings of fact were justified by such evidence.

(Syllabus by the Court.)

Appeal from district court, St. Louis county; START, Judge.

Action by Thomas B. Hawkes, assignee, against Alexander Fraser. Plaintiff had judgment, and defendant appeals. Affirmed.

Mann & McLennan and *Cash, Williams & Chester*, for appellant. *Henry S. Mahon*, for respondent.

COLLINS, J. From an examination of the record in this case we are of the opinion that the evidence fully justified the findings of the trial court, in substance, that the insolvents delivered the chattels in question to defendant with intent that he should secure a preference over other creditors, and that he took possession and at once removed the same to the state of Wisconsin, without right, and with intent to thereby obtain a preference over other creditors of the insolvents, and for the express purpose of evading the insolvency laws of this state. The defendant resided in Minnesota, he knew of the insolvency of plaintiff's assignors; he was their creditor in quite an amount. With this condition of affairs they acquiesced in his taking possession of the property in this state upon a claim which, so far as was shown upon the trial, was without the slightest foundation, and thereupon he hastily removed it to the state of Wisconsin, where it was seized upon a writ of attachment issued in an action, as for debt, brought by him against the insolvents. Conceding the facts in respect to defendant's chattel mortgage on which Clark, the insolvent who actually turned over the property, states that he acted, to have been just as he supposed, he knew or ought to have known that defendant was not entitled to possession. The inevitable conclusion to be drawn from the undisputed testimony is that, in surrendering the property to defendant under a mere pretense of right, both parties intended that he should obtain an unlawful preference. Order affirmed.

(52 Minn. 203)

COMBINATION STEEL & IRON CO. v. ST. PAUL CITY RY. CO.

(Supreme Court of Minnesota. Jan. 11, 1893.)

PAYMENT—PLEADINGS—FINDINGS—EVIDENCE.

1. An allegation in a complaint that the contract price of certain goods therein mentioned had not, nor had any part thereof, been paid, having been put in issue by the answer, a general finding made by the court that all of the allegations of the complaint are true necessarily includes a finding on the question of payment.

2. Upon an examination of the evidence herein, it is *held* that certain findings of fact made by the trial court were supported by the evidence.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; KELLEY, Judge.

Action by the Combination Steel & Iron Company against the St. Paul City Railway Company and others to enforce a lien for materials. Plaintiff had judgment, and defendant railway company appeals. Affirmed.

For report on prior appeal, see 49 N. W. Rep. 744.

H. J. Horn, for appellant. *Eller & How*, for respondent.

COLLINS, J. The nature of this action has been stated in the decision upon a former appeal, found reported in 47 Minn. 207, 49 N. W. Rep. 744, whereby an order refusing a new trial to plaintiff was reversed on the ground that the evidence did not warrant a finding of the trial court that certain promissory notes were received and accepted by plaintiff in absolute payment and discharge of the original indebtedness. The second trial resulted in plaintiff's favor, and this appeal is from an order denying a motion for a third made by defendant railway company.

1. It was alleged in the complaint, among other things, that the contract price for the material furnished by plaintiff for use in the construction and building of a portion of defendant's line of road was due on a day named, and that the same had not, nor had any part thereof, been paid. By the answer an issue was tendered on this matter of payment, and appellant's counsel, under one of his assignments of error, argues that there was no finding upon this question. The court below found, generally, that all of the allegations of the complaint were true, with an exception to be spoken of later. This was sufficient. Moody v. Tschabold, 53 N. W. Rep. 1023, (this term.) And, had it not been, application should have been made to the trial court for the specific finding on the issue of payment, which counsel now insists was not only warranted, but absolutely required, by the proofs. Cummings v. Rogers, 36 Minn. 317, 30 N. W. Rep. 892, and cases cited; Reynolds v. Reynolds, 44 Minn. 132, 46 N. W. Rep. 236.

2. Referring to the contention of counsel just mentioned, in respect to the testimony on the issue of payment, that the trial court could not properly find otherwise than that the notes were taken in absolute payment of the original indebtedness, it must be said that, while the testimony on this point in defendant's behalf was increased in quantity, we do not think its probative effect to have been materially different from, or greater than, that produced upon the former trial, and which was held to be insufficient to support a finding that the debt was paid by acceptance of the notes. If this be our conclusion from a careful examination and comparison of this record with that presented on the first appeal, it cannot be expected that we should hold the trial court in error on its finding as to payment. In addition to this, it may be stated that other and further testimony on this point was introduced by plaintiff, including proof (Iron Co. v. Walker, 76 N. Y. 521) of the law of the state in which the notes were executed and delivered as to the effect of taking a debtor's note, and as to the effect of indorsing the same to a third party. The finding that plaintiff's claim had not been paid was sustained by the evidence.

3. The exception in the findings mentioned in the first subdivision hereof was that out of the total number of rails furnished by plaintiff for use in the building and construction of appellant's road, a part, not less than 50 nor more than 100—the exact number not being ascertainable—were not used for that purpose by the construction company. On this point the findings are characterized as imperfect and uncertain, to the extent that no proper judgment in plaintiff's favor can be based thereon; the specific complaint being that the value of these unused rails was not found, nor were they identified. We may not fully comprehend the force of this assignment of error, but it is not material that a portion of the rails furnished or the purpose of building and constructing appellant's line of railway were not actually used upon the same. Burns v. Sewell, (Minn.) 51 N. W. Rep. 224.

4. It is claimed that the evidence was insufficient to support the finding that the rails, or any thereof, mentioned in the complaint and lien statement, were ever shipped or delivered by plaintiff, or the further finding that they were furnished by plaintiff for the purpose of building and constructing the line of road on which a lien is claimed, or on the credit of the same. We do not consider it of importance that we should detail and discuss the testimony on which both of these findings must have been based. We are of the opinion that the conclusions of the trial court on the issues of fact thereby disposed of were justified by the evidence before it.

Order affirmed.

(52 Minn. 208)

THOMPSON v. CONANT et al.

(Supreme Court of Minnesota. Jan. 11, 1893.)

TRUST DEED—CONSTRUCTION—POWER OF TRUSTEE.

Under the statute of uses and trusts, (Gen. St. 1878, c. 43,) a conveyance of land from one person to another to the use of or in trust for a third, the trustee having no active duty to perform, constitutes a passive trust, and the trustee takes no title, but the same vests immediately and absolutely in the beneficiary to the extent of the estate granted.

(Syllabus by the Court.)

Appeal from district court, Ramsey county; WILLIAM L. KELLY, Judge.

Ejectment by William Thompson against Sarah W. Conant and others. Defendants had judgment, and plaintiff appeals. Affirmed.

A. R. Capehart, for appellant. *A. G. Briggs*, for respondents.

COLLINS, J. It stood admitted upon the trial of this action—which was in ejectment—that one Rogers was the owner of the premises in dispute on July 22, 1884, on which day he duly executed and delivered a warranty deed thereof, wherein William B. Conant, "as trustee to the minor children, sons of William B. Conant, Jr.," was named as party of the second part. This plaintiff, asserting that he was entitled to possession as the owner in fee of the property, then offered in evidence certain proceedings had in one of our probate courts in the matter of the estate of the first-mentioned Conant, who died in 1886, which proceedings terminated in a sale of this property to one Dixon, and the execution and delivery of an administrator's deed to Dixon of the same; and also offered to show that said Dixon had subsequently sold and conveyed the premises to him. All of this testimony was excluded by the court, on the ground that under the Rogers deed the William B. Conant who thereafter died acquired no title or interest in the real property conveyed, and consequently had no estate which would pass by the sale and conveyance to Dixon. Nothing further was attempted by plaintiff in the way of establishing his right to possession, and on findings of fact judgment was ordered and entered in favor of defendants. As stated by appellant's counsel, the question presented for determination is the effect of the conveyance executed and delivered by Mr. Rogers. By it the parties probably intended to create a trust estate for the benefit of two minor sons of William B. Conant, Jr., but in this they signally failed. Uses and trusts, with certain exceptions, of no materiality here, have been abolished by the provisions of Gen. St. 1878, c. 43. It is expressly provided by section 5 that every disposition of lands, whether by deed or devise, except as otherwise specified in said chapter, shall be made directly to the person in whom the right to the possession and profits is intended to be vested, and not to another to the use of, or in trust for, such person; and, if made to one or more persons in trust for, or to the use of, another, no estate or interest, legal or equitable, shall vest in the trustee; while by section 3 it is enacted that every person who, by virtue of any grant, assignment, or devise, is entitled to the actual possession of lands and the receipt of the rents and profits thereof in law or equity, shall be deemed to have a legal estate therein, of the same quality and duration, and subject to the same condition, as his benefi-