tiff. Counsel are right in this contention also. It is very clear that defendants did not have 60 days after the estimates had been made and payment tendered in which to deliver the lumber. If they had accepted plaintiff's tendered payment after the estimate had been made, the title to the lumber would have passed to plaintiff at once. The fact that plaintiff was required to ship the lumber after an accumulation of 500,000 feet has no bearing whatever upon the title to the lumber or time of delivery. It is certain by the terms of the contract that a delivery and passing of title was contemplated by the parties to take effect at the time of making the estimate and the payment by plaintiff. The provisions of the contract requiring shipment within 60 days amounts to nothing more than a permission to store the lumber until the quantity stated was in piles on the dock. The lumber should have been delivered at about the time defendants attempted to annul the contract,—July 13th. The estimates were delivered to plaintiff at about that time, and plaintiff's damages should have been determined as of about that date.

No other questions argued by counsel need be considered. The record presents no reason for doubting the right of plaintiff to a substantial verdict, and we regret that there must be a reversal. If the evidence was conclusive on the question as to the difference in value of the lumber at about the date as of which plaintiff's damages should be assessed we would order judgment for the proper amount, and thus avoid remitting the cause for a new trial; but there is conflicting evidence on that point, and a reversal is unavoidable. And, that there may be a speedy determination of the action, a reversal will be ordered, and the cause remanded, with directions to the court below to retry the question of damages only, and in accordance with the views herein expressed. Order reversed.

BAYLOR v. BUTTERFASS et al. (PIEPER, Garnishee. MINNEAPOLIS THRESHING-MACH. CO., Intervener).

(Supreme Court of Minnesota. Dec. 17, 1900.)

ORDER — ACCEPTANCE — EQUITABLE ASSIGNMENT—VALIDITY—GOOD FAITH—PAROL EVIDENCE.

1. An order on a debtor by his creditor directing him to pay his indebtedness to the person named therein, and an acceptance thereof by the debtor, operate as an equitable assignment of the debt.

2. Such an assignment is void, under chapter 268, Gen. Laws 1899, as to the creditors of the person making it, when not filed as therein provided, unless the good faith of the transaction be affirmatively shown. It is *held* in this case that such good faith is sufficiently shown by the evidence.

3. Such an order, and the acceptance thereof, being in writing, are not open to contradiction or explanation by evidence of a parol contemporaneous agreement.

4. Whether future earnings of a threshing-machine outfit, there being no existing contract under which they are to accrue, may be the subject of assignment or mortgage by the owner of the machine, quære?

(Syllabus by the Court.)

Appeal from district court, Carver county; Francis Cadwell, Judge.

Action by Joseph Baylor against Fred Butterfass. Julius Pieper was garnished, and the Minneapolis Threshing-Machine Company intervened. Petition was joined between plaintiff and intervener. Judgment for intervener, and from an order denying a new trial plaintiff appeals. Affirmed.

P. W. Morrison, for appellant. Brown, Reed, Merrill & Buffington and F. R. Allen, for respondents.

BROWN, J. After the commencement of this action and the service of the garnishee summons, claimant, Minneapolis Threshing-Machine Company, appeared, and made claim to the indebtedness due from the garnishee to defendant, and served and filed a complaint setting forth the grounds of its claim. Issue was joined between plaintiff and claimant, the cause was tried, and resulted in judgment for claimant, and plaintiff appeals from an order denying a new trial. The cause was tried before the court without a jury. The findings of the trial court are not found in the record, but, as the correctness of such findings is not challenged in any respect by appellant, their absence is not important. The decision having been in favor of claimant, we take it that the allegations of its complaint are found to be true. At any rate, there seems to be no question or controversy as to the facts. All the assignments of error are directed to rulings made on the trial, and present questions relative to the legal rights of the parties only. The facts are as follows: In 1898 claimant sold and delivered to defendant a threshing-machine separator for the agreed price of $800, which defendant paid by his promissory notes. To secure the payment of such notes, he executed and delivered to claimant a chattel mortgage upon and covering one-half of all earnings of the machine during the years 1897, 1898, 1899. The indebtedness due and owing from garnishee to defendant, the subject-matter of the controversy between the parties, represents earnings of the threshing machine for threshing his grain in the year 1899; and claimant's right thereto is based in part upon this mortgage. On September 21, 1899, defendant made and delivered to claimant an order on the debtor (garnishee) directing him to pay such indebtedness to claimant. Such order was presented to the debtor before the commencement of this action, and was duly accepted by him in writing. Claimant also bases its right to the indebtedness upon this order. The order was given to claimant to be applied in part payment of the mortgage debt. Plaintiff contends that the mortgage and order are both void,—the former because the future earnings of the machine, there being no evidence of an existing contract under which they were to accrue, could not be mortgaged; and the latter because founded upon the void mortgage, and given in compliance therewith. Plaintiff also complains of certain rulings made on the trial of the cause, which he urges are reversible error.

The question as to the validity or invalidity of the mortgage need not be considered or determined. The judgment appealed from must be affirmed on grounds with respect to which the mortgage is not a controlling factor, and its validity or invalidity will not affect that result. The question is an important one, surrounded with serious doubts, and, as it is not necessary to determine it, we prefer to pass it for future consideration. Aside from the question as to the sufficiency of the description of the property mortgaged,—future earnings from persons not named nor in any way designated or described,—the case of Hogan v. Elevator Co., 66 Minn. 344, 69 N. W. 1, and similar cases in the earlier reports, would, on principle, seem to sustain the mortgage; while the case of Steinbach v. Brant (Minn.) 82 N. W. 651, points in the other direction. But, aside from this question, it is clear that claimant is entitled to the indebtedness by virtue of the order before referred to and its acceptance by the garnishee. Such order and acceptance operated as an equitable assignment of the debt. Williams v. Pomeroy, 27 Minn. 85, 6 N. W. 445; Lewis v. Bush, 30 Minn. 244, 15 N. W. 113; Conroy v. Ferree, 68 Minn. 325, 71 N. W. 383. It is true that there is no evidence that the order was filed with the proper town clerk, as it might have been under chapter 268, Gen. Laws 1899, but the good faith of the transaction was abundantly shown. The statute referred to provides that an order for the payment of money of the nature of that here under consideration shall be deemed void as to creditors unless filed as therein provided, unless the holder thereof establishes the fact that it was given for a valuable consideration, and in good faith. That the defendant was indebted to claimant there is no question; nor is it disputed but that such indebtedness was then in part due and unpaid. The order was given to be applied upon such indebtedness, and we find no evidence tending to show that either party had any intention of hindering, delaying, or defrauding the creditors of defendant. It was a business transaction of everyday occurrence bearing no earmarks of fraud. It follows that, as claimant was the owner of the debt in question, plaintiff acquired no rights thereto by the garnishment proceedings, and judgment was properly ordered accordingly.

The evidence offered by plaintiff tending to show a conditional acceptance of the order by the debtor was properly excluded. Such acceptance was not essential to a transfer of the debt to claimant, and, even if essential, it was in writing, and not subject to contradiction by parol contemporaneous agreements or conditions. Youngberg v. Nelson, 51 Minn. 172, 53 N. W. 629. For the same reason the evidence offered to show the conditions on which the order was given by defendant was also properly excluded. No fraud sufficient to invalidate the order was pleaded, nor did the proffered evidence show such fraud. If his contention with respect to the agreement under which the order was given be true, plaintiff has a cause of action against the company; at least the evidence offered tends in the direction of showing that, in part consideration of the order, the agent of claimant who procured it agreed to pay certain laborers to whom defendant was indebted, plaintiff being one of them. Such evidence shows a consideration for the order, rather than its fraudulent procurement.

The suggestion that the order is invalid because of the invalidity of the chattel mortgage in performance of the terms of which it was given is not sound. Even if the mortgage was invalid and unenforceable, we know of no rule of law that would render null and void a voluntary performance thereof. Order affirmed.

SANBORN v. PEOPLE'S ICE CO.[1]

(Supreme Court of Minnesota. Dec. 19, 1900.)

PUBLIC WATERS — PUBLIC USE — RIGHTS OF RIPARIAN OWNERS — CUTTING ICE—INJUNCTION—DAMAGES—EVIDENCE—PARTIES.

1. Under the general law, all persons have the common right to enjoy the use of public waters for the ordinary purposes of life, such as boating, fishing, recreation, and domestic or individual uses, including the right to take ice therefrom.

2. Such ordinary uses constitute a right held in common by the public and riparian owners.

3. The cutting and removing of ice in large quantities annually for shipment and sale for commercial purposes from public waters, whereby their natural level is materially reduced, is not such a common right.

4. Riparian owners, by virtue of their ownership and possession, have certain special interests in such waters not enjoyed by the public in general, the extent of which depends upon the nature of the shore land and the character and extent of the possession.

5. If such public waters are disturbed beyond their natural condition by the general public in the exercise of the right of common usage, neither a riparian owner nor other common user has a legal remedy to prevent the same.

6. A riparian owner may, by virtue of his special interest as such, enjoin an interference with such waters which disturbs their natural condition, provided such owner is peculiarly and specially affected and damaged thereby.

7. Chapter 410, Sp. Laws 1881, is a general law in its application, and need not be specially pleaded.

8. By the terms of this law, the waters of White Bear Lake are declared to be public waters, and it is made unlawful to artificially remove any water from the same for any purpose whereby the level of such water is materially reduced.

9. Cutting and removing ice for the purpose of shipment and sale in distant markets for commercial purposes is such an artificial taking and removing of water from such lake.

10. A riparian owner upon the lake may, under

[1] Reargument denied January 3, 1901.

the provisions of this act, enjoin the taking of ice therefrom if such taking results in lowering the lake below its natural condition, provided such owner is damaged thereby, and such taking is artificial.

11. But neither a riparian owner nor a common user of the waters of such lake is entitled to invoke the benefit of such law in cases where the taking of such water is in the exercise of a common right.

12. It appearing from the complaint in this action that the lake in question was during 12 years lowered two feet below its natural outlet, and that the acts of defendant in cutting and removing ice therefrom were sufficient to reduce the volume of water one-quarter of an inch annually, and to cause a further decrease by evaporation, *held*, such taking was of substantial character, and entitles the shore owner to the right of injunction to restrain the continuance thereof, and that the complaint states a cause of action.

13. There is no defect of parties plaintiff in this action, for the reason that, as appears from the complaint, the other users of the waters were exercising the right of common usage, and that they were not specially damaged by the acts complained of.

14. There is no defect of parties defendant in this action for the same reason as above stated.

Lovely and Brown, JJ., dissenting.

(Syllabus by the Court.)

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

Action by John B. Sanborn against the People's Ice Company. Demurrer to the complaint was sustained, and plaintiff appeals. Reversed.

John B. & E. P. Sanborn and Ross Clarke, for appellant. Durment & Moore, for respondent.

LEWIS, J. The complaint in this action alleges, in substance, that the plaintiff now and for 12 years has been the owner of, and in possession of, certain real estate bordering on White Bear Lake, in the village of White Bear, Ramsey county, Minn.; that the shore line of said premises along the lake is 175 feet; that plaintiff has made certain improvements thereon, consisting of a dwelling house, a stable, outhouses, etc., of the value of $10,000, and that the value thereof consists mainly in the connection of the premises with the waters of the lake. It is further alleged that White Bear Lake is naturally a large body of pure, clear, spring water, covering an area of 2,400 acres of land, contiguous to the cities of St. Paul, Minneapolis, and Stillwater, has a reputation as a health resort, and is largely patronized in the summer season for the purposes of recreation, pleasure, and health, to accommodate which demand many cottages have been built on the lake shore; that the waters of the lake are used by such occupants, including plaintiff, for the purposes of boating, fishing, bathing, general recreation, and for domestic and household purposes. It is further charged that defendant corporation has for more than 12 years annually cut and removed therefrom more than 75,000 tons of ice, and shipped the same to St. Paul and distant markets, and disposed of the same for commercial purposes, is still engaged in the act of removing large quantities of ice for such commercial purposes, and that, by the opening of large areas of water to the action of the air, great quantities of water evaporated annually. It is further stated that the action of defendant in so removing the ice for the period of 12 years has had the effect of reducing the waters more than two feet, resulting in exposing shoals and bars, causing weeds to grow on the exposed shores, and rendering the beach and shore unsightly, and unfit for pleasure and health. It is alleged that, since defendant commenced to take out the ice as stated, there has been no overflow from the same through the natural outlet, and that the water level has been reduced below the natural outlet by the said acts of defendant. As special damages thereby caused to plaintiff, it is alleged that plaintiff had constructed a bath house and pier for the requirements of bathing and boating, and that when so constructed the water at such points was two feet in depth, and as a result of defendant's acts, in so lowering the lake, there has been exposed in front of plaintiff's premises an unsightly bar of sand, in width 150 feet, and that in order to reach the water it is necessary to extend the pier, and that such improvements are being rendered useless, to defendant's damage of $1,500. The action is brought to restrain defendant from further cutting and removing ice.

To this complaint defendant demurred upon four separate grounds: (1) That the complaint does not state facts sufficient to constitute a cause of action; (2) defect of parties defendant; (3) defect of parties plaintiff; (4) that plaintiff has no legal capacity to sue. The court below sustained the demurrer, and plaintiff appealed.

In respect to all bodies of public water, in common with riparian owners, the public have the ordinary rights of usage. These include the right of boating, fishing, and the use of the water or ice for the ordinary purposes. In these respects, a riparian owner has no exclusive or peculiar privileges. There are certain interests and rights vested in the shore owner which grow out of his special connection with such waters as an owner. These rights are common to all riparian owners on the same body of water, and they rest entirely upon the fact of title in the fee to the shore land. Among such may be mentioned the right of accretions and the right of access. Again, there may be certain special rights peculiar to each shore owner according to the nature of his possession, which includes the character and value of his improvements. It is elementary that the shore owner may prevent an injury to his land by the lowering or raising of the waters beyond the natural limits of low and high water mark, by artificial means, not in the exercise of rights common to all, unless such act be expressly authorized by law. The extent

of the injury depends upon the condition of the shore land and the nature of the possession. If there is a remedy for an injury caused by the artificial raising of the water above the natural line, thus flooding a meadow, there is also a remedy to prevent exposure of an unsightly and unhealthy marsh by artificially drawing off the water below the natural level. It is immaterial for what purpose the shore land is used, if it be a lawful use. There is no distinction in this respect between a farm and a summer residence. Employment of contiguous land for the purpose of pleasure, recreation, and health, constitutes such a use of adjacent bodies of public water as to command a remedy for an interference with its natural condition. Kimberly & Clark Co. v. Hewitt (Wis.) 48 N. W. 373.

But, even if plaintiff is in a position to call upon the courts to redress an injury caused in this manner, it is claimed by defendant that it is justified in what it has done, and in continuing so to do in the future, because it is only enjoying the common privilege open to the public. Defendant is mistaken in its view of the nature of the common or public privilege of taking water or ice from the lake. Such privileges are limited to those rights which are enjoyed by the public in common with riparian owners. This privilege is based upon the consideration of its personal nature; such a right as may be ordinarily used. Any man, woman, or child is accorded an equal opportunity in the use of such advantages. The door is shut to no one, if the means of access have been provided. But the very purpose which has caused the development of the law establishing the right would be destroyed if the principle were extended to protect an unlimited traffic by shipment to a distant market. The taking of ice for the purpose of shipment to a distant market, for the purposes of sale, without regard to its effect upon the common user, is not the exercise of a common right. It is true that public waters are free and open to all for commercial purposes to the extent that common rights are not encroached upon. The taking of water or ice by common right may result in destroying the source of supply, and no riparian owner or other common user can complain. But when use is made of such water for commercial purposes, not of common right, then the right to so use ceases at the point where the conflict of interest with the common user commences. It is true that the public itself may grant the right to do that which could not otherwise be lawfully done. Minneapolis Mill Co. v. Board of Water Com'rs of City of St. Paul, 56 Minn. 485, 58 N. W. 33. But the defendant does not claim the benefit of any such statute. On the contrary, appellant invoked to his aid chapter 410, Sp. Laws 1881, which declares that White Bear Lake shall forever remain free and open for the common and public use of all citizens of this state; and it is further provided that the waters of said lake shall never be lowered or diminished by any artificial means, and be connected with, used, or applied to any use or purpose, public or private, by any person, persons, or corporation, public or private. This is a public act, dealing with the interest of the general public, and it was not necessary to plead it.

While plaintiff has a remedy independently of this statute, he is nevertheless protected by its provisions. If there is any remedy under this act for the taking of the waters of the lake by the ordinary users by common right, the state is the only party which could enforce the remedy. But the law also prohibits the taking of water by artificial means, and if such taking by artificial means results in special injury to a riparian owner, as alleged in the complaint, then such owner may sue in his own name to enforce that which is declared unlawful by the statute. Within the meaning of this act, the taking of ice as a business, for shipment to a distant market for sale, is not an ordinary use of the waters by common right, but is an artificial taking.

After what has been written, it is evident that there is no defect of parties plaintiff in this action, since the plaintiff has shown himself specially affected by defendant's acts, on account of his peculiar relations to the water, not shared in common by other shore owners.

It is equally clear that there is no defect of parties defendant. So far as the complaint discloses, the use made of the waters by other persons is only such use as by common right they are entitled to.

We come now to the final position taken by respondent, and that is, conceding all other questions, still the complaint does not constitute a cause of action, because no substantial decrease in the water of the lake has been shown as a result of defendant's act in cutting ice. The learned trial judge seems to have disposed of the case upon this theory. Taking judicial notice that a cubic foot of water weighs, in round numbers, 62½ pounds, and that water expands one-eleventh in freezing, a computation shows that 75,000 tons of ice, when reduced to water, would amount to about one-quarter of an inch, when spread over the entire area of the lake. In the 12 years, this would amount to three inches. So small an amount of water was considered trifling, and not likely to affect plaintiff's property. This computation, however, does not take into account the amount of evaporation caused by removing the ice, and thus exposing the water to the air. It is further claimed that the constant falling of the water was due to other natural causes, such as the effect of drainage and tilling of the land. In thus considering the question, an important consideration has been overlooked. It is positively alleged in the complaint that during the 12 years there has been no water flowing out of the

lake, the water level always being below the natural outlet. If this be true, then all of the natural increase by rainfall, snow, and springs would tend to increase the volume, unless the increase were overbalanced by the natural decrease. To whatever extent the water was reduced by defendant, to that extent the level was reduced below the natural condition. In other words, if defendant had not removed the three inches of water, that much additional water, together with whatever, if any, was lost by the alleged artificial evaporation, would still be in the lake. It would be different in the case of a running stream, where the amount taken would be immediately supplied. Here plaintiff is entitled to the natural condition, and only asks that the result be not made worse by artificial means.

The amount of water taken up is not material. If the interference is persistent, and substantially reduces the natural level of the lake, it is sufficient. If there was a fall of two feet in 12 years, according to the mathematical demonstration submitted by respondent, defendant is charged with causing one-twelfth of that amount. While such amount averages small for each year, yet it is definite, persistent, and, if continued, will be serious. Such an interference is not trivial. It is substantial. The amount of damages in such cases is not material, if it be some definite amount. Potter v. Howe, 141 Mass. 357, 6 N. E. 233. The complaint complies with these requirements, and states a good cause of action.

LOVELY and BROWN, JJ. The decision in this case is so at variance with the law as we understand it that we are unable to concur with the majority of the court. The substantial facts in this case are that plaintiff is the owner of a summer residence on the shores of White Bear Lake, with extensive and valuable improvements thereon, and he seeks an injunction restraining defendant, a corporation engaged in storing ice for sale to the people of St. Paul and other distant points, from cutting or removing ice therefrom, upon the asserted equitable claim that its acts in that respect lower the lake one-fourth of an inch each year, and tend to render its shores unsightly and the lake unfit for pleasure. The court below held that the complaint presented no equities; that the damage resulting from a lowering of the lake one-fourth of an inch each year, if amounting to a damage or injury at all, was too trifling to warrant the serious consideration of a court of equity,—and sustained the general demurrer to the complaint. The majority of this court hold to the contrary, and reverse the learned district judge. We think our associates are in error, both upon principle and authority.

In those courts where the title to the bed of navigable lakes and rivers is held to be in the state, the waters thereof are also held to be public property, held by the state in its sovereign capacity, as trustee for public use (Lamprey v. State, 52 Minn. 198, 53 N. W. 1139, 18 L. R. A. 670); and the right to take ice for use or sale, or use of the waters for fishing, boating, and other lawful purposes, is common to all, and in such waters or ice the riparian owners have no special or superior right. As said in Ice Co. v. Davenport, 149 Mass. 324, 21 N. E. 386: "It is too well settled to be disputed that the property in the great ponds is in the commonwealth; that the public have the right to use them for fishing, boating, * * * cutting ice for use or sale, and other lawful purposes; and that the owners of the shore have no exclusive right in them." Such is the law in this state, unless changed by this decision. Lamphrey v. State, supra. In this case it was held, as a result of a carcful review of the judicial dicta in England and in this country upon this subject, that "meandered lakes are not adapted to, and never will 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; that 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," etc. 52 Minn. 199–200, 53 N. W. 1143, 18 L. R. A. 678. We heartily concur in this view, and seriously anticipate the result of the majority opinion, in giving to riparian owners the power, by reason of their construction of expensive improvements for private use upon their shore property, to interfere with the common right of the people in these waters, will, as expressed by the learned judge (Mitchell, J.), in the case last cited, result in "a great wrong to the public for all time, the extent of which cannot perhaps now be enumerated, or even anticipated." It was distinctly held in Minneapolis Mill Co. v. Board of Water Com'rs of City of St. Paul, 56 Minn. 485, 58 N. W. 33, that the "rights of riparian owners in and to public waters are subordinate and inferior to the public uses thereof." It was further held in that case (Collins, J.) "that the right to draw from public waters a supply of water for the ordinary use of cities in their vicinity is such a public use, and had always been so recognized." Such we believe to be the law everywhere, except in Wisconsin, and perhaps some other states, where the title to the bed of such waters is in the shore owners.

The majority opinion gives faint recognition to this principle, but avoids its inevitable logical results on two theories, viz.: First, that the right to take ice from such waters is individual or personal, and must

be limited to quantities sufficient for personal or individual use; and, second, that the riparian owner has in fact special and exclusive rights in such waters, measured and fixed by the character of his improvements upon the shore property. We regard both theories as unsound, fallacious, inimical to the public good, and the latter theory as judicial class legislation of a very pronounced type. The majority say, in speaking with reference to the rights and privileges of the people to take water or ice from public waters: "This privilege is based upon the consideration of its personal nature. Any man, woman, or child is accorded an equal opportunity in the use of such advantages." The effect of the holding in this case is to limit the privilege to personal necessities. None of the authorities make any such distinction. They all hold that ice may be taken for use or sale, and we have found no case where the right has been confined to personal or individual uses. The principle of law applicable to fishing or fowling is applied in the water and ice cases, and no court ever has limited the right to fish or hunt game to personal necessities.

But it is held in the majority view that a necessary distinction exists as to the limit of the use by the public, and that ice cannot be taken by the public from these lakes for such use in unlimited quantities, although we are left entirely in the dark as to what would be a proper or limited use, as distinguished from an improper and unlimited use. The legislature has not regulated this subject, and, if this court can do so, its conclusions must rest wholly upon the facts as alleged in the complaint,—that the quantity taken by defendant,—"more than 75,000 tons annually,—after storing a large portion of the same in ice houses for the time being, it has shipped away to St. Paul and more distant marts of commerce, and disposed of the same for commercial purposes, at remote points from the shores of said lake, where no part or portion of the same can be returned to the shores of said White Bear Lake." And while other causes as set forth in the complaint, and conceded, have lowered the lake in question to the extent stated in the majority opinion, yet it was admitted by counsel on the hearing that the removal of ice therefrom by the defendant against whom the injunction is sought had only diminished the shore line, by its acts, one-quarter of an inch each year, which seems to us an insufficient basis to entirely destroy a valuable business by injunction, simply because it might be unreasonable in a case where no limit has been fixed upon the common right.

The easy solution that suggests itself, by reason of the capacity of one person to take more ice than another, where no limits are prescribed in the law, is not by injunction to restrain a right which is common, and the effort to do so in this case gives to the shore owner a special privilege, which depends entirely upon the extent of his improvements; and this is the contention of the appellant, for upon no other ground can the relief granted be sustained. And the majority opinion is an adoption of the doctrine, that the riparian owner, by reason of extensive improvements upon his property, placed there for comfort and pleasure during the summer season, has special rights and privileges superior to the public, and other, but less pretentious, shore owners, who have not made improvements of the same character.

We are unable to give weight to those considerations which control the majority of the court. We regard the public waters of this state as the common property of all the people to the extent of such natural and reasonable uses as the necessities of life require, and it seems to us that such uses by the common people are a reality rather than a legal myth, and paramount to the individual whims, caprices, and pleasures of those who adapt their own property to luxuries. Compared to the practical benefits which the use of ice affords to the inhabitants of the cities adjoining White Bear Lake, the advantages and pleasures of any shore owner are insignificant. And when a step is taken in the direction of destroying the rights of the many for the exclusive benefit of the few, by means of an injunction restraining the cutting of ice which will result in lowering the lake only one-fourth of an inch, it seems to us that there is a plain requirement for the application of the rule, "De minimus non curat lex." If the right to take ice is a public right, as conceded, this court has no authority to say how much or how little any person can take for public use. In the absence of legislative regulation, if any unreasonable use is made of public waters, and a public injury follows, the remedy belongs to the public, as in other cases of public wrongs and nuisances. Inhabitants of West Roxbury v. Stoddard, 7 Allen, 158–170. But to concede that ice may be taken from these lakes for common use by "every man, woman, and child," and to hold that such right is limited, or in this case denied, to the defendant, without fixing the limit, is, in effect, to give to the public a privilege which they cannot enjoy. But if the necessity for the use is the test,—and we apprehend that the legislature and the courts can make no other,—there is nothing in the complaint that charges any unreasonable usage beyond such necessity, or extends such appropriation further than the natural and ordinary uses to which the commodity is applied, and we do not suppose that any one will claim that an unnecessary or unreasonable use will be assumed where it is not alleged. If ice cannot be taken in the way adopted by defendant, as set forth in the complaint, for use by the residents of the large cities adjoining White Bear and other lakes in their vicinity, there would seem to be but one resource left,—to manufacture that commodity, as in south-

ern climates,—which would be very expensive, and a deprivation of its benefits to many; and, if the complaint which is upheld in this case furnishes the criterion of limitation to be applied, the means even of ice manufacture must not be taken from the lakes or streams, but the consumer must depend upon the beneficence of heaven, rather than the bounteous earth, to furnish rain for that purpose, before it has fallen into these waters and become a part thereof. This rather far-fetched conclusion seems to us but the logical reductio ad absurdum of the claim presented in the complaint.

We should long hesitate to accept a rule that would work such an injustice to the inherent rights of our people, and we do not see any particular force in the distinction between the right of the individual living in the cities adjoining the lake to take water or ice therefrom personally, and forbids him the same right when derived through the customary methods. It requires no stretch of fancy to recognize the well-known fact that but few take ice from the public waters, and place the same in receptacles for their consumption. The use of ice by the citizen, which is almost as necessary as water, depends upon the intervention of those who are engaged in the business of cutting and storing it for delivery to private persons. In a measure, such persons are the agents of all who need ice, and upon whom the people rely and depend to obtain that necessity. Such a course reduces the price of the commodity, and furnishes benefits much more advantageously than if each individual was required to do that which many are not able to do. And if the private individual has a right to take ice for his own use, and several cannot do the same thing through another, it is, in the way we live and move and have our being at the present day, a very barren right to each.

We do not think there is any weight in the suggestion that there is no outlet to White Bear Lake. It is conceded to be a public body of water, and the fact that it has no outlet is wholly irrelevant to the question. The truth undoubtedly is that this lake is fed by springs, and, like many others of the public waters of this state, by reason of the cultivation of the soil, evaporation, and other causes, has to some extent receded in the quantity of its waters, although by acts of defendant to no greater extent than three inches in 12 years, or one foot in 50 years.

The principles which we have stated above are not new, but are supported by an unbroken line of authorities of the most respectable courts in this country. Gould, Waters (3d Ed.) 191; Braston v. Ice Co., 77 Me. 100; Woodman v. Pitman, 79 Me. 456, 10 Atl. 321; McFadden v. Ice Co., 86 Me. 319, 29 Atl. 1068; Inhabitants of Roxbury v. Stoddard, 7 Allen, 158; Paine v. Woods, 108 Mass. 160; Hittinger v. Eames, 121 Mass. 539; Wood v. Fowler, 26 Kan. 682; Bosse v. Thomas, 3 Mo. App. 472; Brown v. Cunningham, 82 Iowa, 512, 48 N. W. 1042, 12 L. R. A. 583.

The majority opinion is based in part on chapter 410, Sp. Laws 1881, and it is urged that the taking of ice from this lake amounts to an artificial lowering thereof, within the meaning of that law. While it is true that all public waters belong to the state as trustees for the whole people, and that the legislature may regulate their use, yet, if the statute referred to gives the right to prohibit the common use in opposition to those natural rights of man which transcend even the constitutional right of the citizen, it is invalid. Upon this subject we adopt the very vigorous and appropriate language of Mr. Chief Justice Beck in Brown v. Cunningham, 82 Iowa, 516, 48 N. W. 1043, 12 L. R. A. 585: "The government has no more property in the water than a riparian owner or the public. The beneficent Creator opened the fountains which filled the streams for the benefit of His creatures, and has bestowed no power upon man or governments created by man to defeat His beneficence. Of course, the use of the water may be regulated by the state, but the state may not forbid its use to the people. As streams of water begin ex jure naturæ, they are subject, as to course and use, only to nature's law." But it seems to us perfectly absurd to attribute to the legislature, in enacting this statute, an intention to prohibit or guard against the minor results that follow the cutting of ice, as is charged in the complaint. The cases cited in the majority opinion in support of the views of the court do not, in our judgment, sustain its conclusions. In the cases so cited it is held that a direct injury or trespass to the riparian owner, caused by the interference with the natural course of the water, is the subject of legal remedy. The distinction between those cases and the one at bar seems to us apparent. It is the broad difference between the act of a trespasser interfering with the natural flow of the water and a person exercising a common and natural right. The order of the trial court should be affirmed.

J. I. CASE THRESHING-MACH. CO. v. McKINNON.

(Supreme Court of Minnesota. Dec. 20, 1900.)

SALE—WARRANTY—AUTHORITY OF AGENT.

1. No particular form of words is necessary to constitute a verbal warranty of personal property by the vendor on its sale, providing there be an assurance of a material fact affecting its quality upon which the purchaser could and did rely.

2. It is not essential that the purchaser of personal property on the trial testify that he relied upon the assurance by the vendor which constitutes the warranty, if the circumstances are such as to justify the inference that he did so.

3. A general agent who has power to sell property for his principal, in the absence of express restrictions upon his right to warrant the same and notice of such restrictions to the purchaser may be presumed to have authority to do so.

4. Evidence in this case considered, and *held* sufficient to support the verdict.

(Syllabus by the Court.)

Appeal from district court, Polk county; William Watts, Judge.

Action by the J. I. Case Threshing-Machine Company against John R. McKinnon. Verdict for defendant. From an order denying a new trial, plaintiff appeals. Affirmed.

H. Steenerson, for appellant. A. A. Miller, for respondent.

LOVELY, J. Defendant was the local sales agent for plaintiff's threshing outfits at Crookston. At the close of the year's agency he was indebted to plaintiff for extras and supplies, but asserted the right to offset on the settlement damages sustained by him for an alleged breach of warranty in the sale of a traction engine which he claims to have purchased of his principal. At the trial, defendant had a verdict on his counterclaim for $145. Upon a settled case plaintiff moved for a new trial, which was denied, from which order the whole evidence is brought here on appeal.

We have carefully reviewed the whole record, and find that the only issue raised by this appeal involves the sufficiency of the evidence to fairly support the verdict. It appears from the evidence that defendant, as local agent of the plaintiff, had received an order from third parties (William, Fred, and W. A. Reitmier) for an engine and separator of a certain grade and character, which order was declined by the plaintiff, who refused to sell the same to the Reitmiers upon the ground that it was not satisfied of their responsibility. Defendant then went to Grand Forks, and had an interview with the general agent of the plaintiff at that place, and urged him to accept the order for the machine, stating that he was perfectly satisfied of the responsibility of the Reitmiers, and would be willing himself to sell the machine to them. According to defendant's testimony, the general agent (Cleary) then offered to sell the machine to defendant, to which defendant agreed, and then inquired of the general agent if the engine had power sufficient to run the separator, when Cleary assured him that it had ample power. Defendant claims that upon this assurance he concluded the sale, and purchased the outfit himself, and that it was afterwards shipped to him; that he sold it to the Reitmiers, and paid plaintiff for it, but that it turned out that the engine was not capable of running the separator; that it lacked steaming capacity for that purpose, and in that respect there was a failure of the warranty made to him through Cleary, which diminished the value of the engine to the extent of $410. Cleary, on the trial, denied that the sale was made to defendant, or that he made any assurance, in the nature of a warranty or otherwise, as to the capacity of the engine. In this respect there was a clean-cut issue of fact between the general agent and defendant. It is claimed on behalf of the plaintiff that defendant had notice, by reason of the contract being between himself as local sales agent and plaintiff, that agents had no right to warrant plaintiff's machinery, except in writing; but Cleary was a general agent, and there is no evidence that defendant had any knowledge of the relations that existed between him and the plaintiff, and there is nothing in the local agency contract that required defendant to assume that the same restrictions were placed upon the general agent as upon himself in the limited capacity in which he acted, and the general rule of presumptions as to authority in an agent authorized to make a sale would apply in this case. Tice v. Russell, 43 Minn. 66, 44 N. W. 886; American Graphic Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 44 Minn. 93, 46 N. W. 143; Oster v. Mickley, 35 Minn. 245, 28 N. W. 710. After the alleged sale to defendant he took an assignment of the plaintiff's rights against the Reitmiers, and afterwards commenced suit against the latter upon their default to pay for the outfit. In his verified complaint in that suit, which was drawn by defendant's attorney, there is a statement that the machine had been sold by plaintiff to the Reitmiers, and that the claim against the Reitmiers had been assigned to defendant. This suit was afterwards discontinued, but the complaint therein was offered and received in evidence as tending to contradict the defendant's statement that he had purchased it himself. While this evidence is quite inconsistent with the claim that there was a sale from plaintiff to defendant, yet it does not conclude the latter from showing the real facts as they actually existed. This fact was for the jury, and we cannot see, in reviewing the whole record, that defendant's conduct in regard to the seeming inconsistency between his acts in the effort to collect pay from the Reitmiers and his alleged previous purchase from the plaintiff is so absolutely irreconcilable with the alleged sale and warranty of the machine to him, as shown by his positive evidence, that we must, as a matter of law, set aside the verdict on that account. Even if plaintiff's statements were inconsistent and contradictory to each other, it was for the jury to weigh his testimony, and say at which time he told the truth. In re Hess' Estate, 57 Minn. 282, 59 N. W. 193. The assurance of the general agent that the engine was ample to run the separator was in response to an inquiry made at the time of the alleged purchase, when the outfit was in Wisconsin, and defendant might reasonably have relied upon it; and it is not improbable that such assurance was acted upon by him. It is well settled that no particular form of