As to the supposed sinister purpose of those who brought the plaintiffs in, no evidence was given to prove it. That the plantiffs' land would be benefited has been found by the Circuit Court of Carroll County, Missouri, which made the order, and by the District Court below. We see no reason in the evidence for not accepting their findings. There is another objection to inquiring further. By the law of Missouri the decree of the Circuit Court is final with regard to the territorial extent of the district. The bill further states that the plantiffs have sought redress in the courts of the State without avail. The defendants plead that the plaintiffs sued in a State court to cancel the assessments upon them and to annul the judgment of the Circuit Court; that thereupon the defendants applied to the Supreme Court for a writ of prohibition, and that the court made the prohibition absolute, upholding the constitutionality of the law. *State, ex rel. Norborne Land Drainage District* v. *Hughes*, 294 Mo. 1. The defendants urge these facts to show that the plaintiffs had an adequate remedy at law by bringing either the judgment of the Circuit Court or that of the Supreme Court here. It is hard to see why these decisions do not make the question sought to be opened here *res judicata*, although not so pleaded. But in any event we see no ground for disturbing the decree below. The District Court rightly held that the plaintiffs Hellwig and Summers must fail for the additional reason that the assessments against them were less than the jurisdictional amount, but this is not very important as on the merits the bill must be dismissed.

*Decree affirmed.*



## UNITED STATES *v.* HOLT STATE BANK ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 47. Argued April 24, 27, 1925.—Decided February 1, 1926.

1. In general, lands underlying navigable waters within a State belong to the State in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in interstate and foreign commerce. P. 54.
2. Where the United States, after acquiring the territory and before the creation of the State, has granted rights in such lands, in carrying out public purposes appropriate to the objects for which the territory was held, such rights are not impaired by the subsequent creation of the State, and the rights which otherwise would then pass to the State in virtue of its admission into the Union are restricted and qualified accordingly. *Id.*
3. But disposals by the United States, during the territorial period, of lands under navigable water should not be regarded as intended unless the intention was made very plain by definite declaration or otherwise. P. 55.
4. Navigability, when asserted as the basis of a right arising under the Constitution, is a question of federal law, to be determined by the rule applied in the federal courts, and not by a local standard. *Id.*
5. By the federal rule, streams or lakes which are navigable in fact are navigable in law; they are navigable in fact when used, or susceptible of use, in their natural and ordinary condition, as highways of commerce over which trade and travel are or may be conducted in the customary modes on water; and navigability does not depend on the particular mode of such actual or possible use—whether by steamboats, sailing vessels or flatboats—nor on the absence of occasional difficulties in navigation, but upon whether the stream, in its natural and ordinary condition, affords a channel for useful commerce. P. 56.
6. The evidence requires a finding that Mud Lake, in Minnesota, now drained, was navigable when Minnesota was created a State in 1858. *Id.*
7. At the time of Minnesota's admission as a State, Mud Lake and other and much larger navigable waters within her limits were

included in the Red Lake Indian Reservation, which had resulted from a succession of treaties by which the Chippewas ceded to the United States their right of occupancy of the surrounding lands, leaving this remainder of the aboriginal territory, recognized as a reservation but never formally set apart as such. There had been no affirmative declaration of the Indians' rights in the reservation, nor any attempted exclusion of others from the use of the navigable waters therein. *Held* that the land under Mud Lake passed to the State, since there was nothing to evince a purpose of the General Government to depart from the established policy of holding such land for the benefit of the future State. P. 57.
294 Fed. 161, affirmed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a decree of the District Court dismissing on the merits, after final hearing, a bill brought by the United States to quiet title to the bed of a drained lake and to enjoin the defendants from asserting any claim to the land.

*Mr. W. W. Dyar,* Special Assistant to the Attorney General, with whom *Solicitor General Beck, Assistant Attorney General Wells* and *Mr. S. W. Williams,* Special Assistant to the Attorney General, were on the brief, for the United States.

Mud Lake was never a navigable body of water in fact, therefore the title to its bed did not vest in the State. *The Daniel Ball,* 10 Wall. 557; *The Montello,* 20 Wall. 430; *Leovy* v. *United States,* 177 U. S. 621; *Harrison* v. *Fite,* 148 Fed. 781; *Oklahoma* v. *Texas,* 258 U. S. 574; *Brewer-Elliott Oil & Gas Co.* v. *United States,* 260 U. S. 77.

Tested by the rules laid down in the cases cited, it will be readily seen that Mud Lake falls far short of being a navigable body of water. It may have had sufficient depth at times of floods for the use of boats of light draft, but there were seasons when the lake was practically dry land, and often in times of water the boats that were used upon the lake had to be poled or pulled across the shallow



places. Moreover, there was no commerce to be conducted on the lake, as the country was sparsely settled and there was little or no occasion for it.

To admit a multiplicity of rules defining navigability would be to violate the principle of equality among the States under pretense of observing it; and to permit the various States to define the rule for themselves would be in effect to make them the arbiters of their respective prerogatives under the Constitution and submit the property rights of the United States to State determination. 29 Op. A. G. 455.

The Government clearly had the right to limit its patents to lands above the meander line. *Oklahoma* v. *Texas,* 258 U. S. 574; 29 Op. A. G. 455; *Mitchell* v. *Smale,* 140 U. S. 406; *Chapman & Dewey Lumber Co.* v. *St. Francis Levee District,* 232 U. S. 186. The United States owned the lake bed in trust for the Indians and was under obligations to them to dispose of it for their benefit. *Minnesota* v. *Hitchcock,* 185 U. S. 373; *Shively* v. *Bowlby,* 152 U. S. 1; *United States* v. *Winans,* 198 U. S. 371. The United States was not bound by the proceedings had in the state court. *Stanley* v. *Schwalby,* 162 U. S. 255.

*Mr. A. N. Eckstrom,* with whom *Messrs. W. E. Rowe* and *Ole J. Vaule* were on the brief, for appellees.

MR. JUSTICE VAN DEVANTER delivered the opinion of the Court.

This is a bill in equity by the United States to quiet in it the title to the bed of Mud Lake—now drained and uncovered—in Marshall County, Minnesota, and to enjoin the defendants from asserting any claim thereto. After answer and a hearing the District Court entered a decree dismissing the bill on the merits. The United States appealed to the Circuit Court of Appeals, where the decree was affirmed, 294 Fed. 161, and then by a further appeal brought the case here.

Mud Lake is within what formerly was known as the Red Lake Indian Reservation, which had an area exceeding 3,000,000 acres and was occupied by certain bands of the Chippewas of Minnesota. Most of the reservation, including the part in the vicinity of Mud Lake, was relinquished and ceded by the Chippewas conformably to the Act of January 14, 1889, c. 24, 25 Stat. 642, for the purposes and on the terms stated in that Act. It provided that the lands when ceded should be surveyed, classified as "pine lands" and "agricultural lands," and disposed of in designated modes; that such as were classified as agricultural should be disposed of under the homestead law at a price of $1.25 an acre; and that the net proceeds of all, whether classified as pine or agricultural, should be put into an interest-bearing trust fund for the Chippewas and ultimately disbursed for their benefit or distributed among them.

The cession became effective through the President's approval March 4, 1890. Thereafter the lands in the vicinity of Mud Lake were surveyed and platted in the usual way, the lake being meandered and represented on the plat as a lake. The tracts bordering on the lake were classified as agricultural, opened to homestead entry and disposed of to homestead settlers, patents being issued in due course. The defendants now own and hold these tracts under the patents. After the homestead entries were allowed, and after most of them were carried to patent, the lake was drained and its bed made bare by a public ditch constructed under the drainage laws of the State. The United States then surveyed the bed with the purpose of disposing of it for the benefit of the Indians under the Act of 1889, and later brought this suit to clear the way for such a disposal.

The lake in its natural condition covered an area of almost 5,000 acres and was traversed by Mud River, a tributary of Thief River, which was both navigable in



itself and directly connected with other navigable streams leading to the western boundary of the State and thence along that boundary to the British possessions on the north.

The ditch which drained the lake was established as a means of fitting for cultivation a large body of swamp lands in that general vicinity. It is as much as 30 miles long, and, like Mud River, passes through the lake and discharges into Thief River. Its depth exceeds that of the lake and its width and fall are such that it has drawn the water out of the lake. Its construction was begun in 1910 and was so far completed in 1912 that the lake was then effectively drained.

The swamp lands which the ditch was intended to reclaim were within the ceded portion of the Red Lake Reservation. Some had been disposed of under the Act of 1889 and thus had passed into private ownership; but the absence of necessary drainage was preventing or retarding the disposal of the others. Congress caused an examination to be made to determine whether drainage was physically and economically feasible, Acts of June 21, 1906, c. 3504, 34 Stat. 352, and March 1, 1907, c. 2285, 34 Stat. 1033; and a report of the examination was made, H. R. Doc. No. 607, 59th Cong. 2d Sess. Shortly thereafter Congress gave its assent to the drainage of the lands under the laws of the State by declaring that all lands not entered and all entered lands for which a final certificate had not issued should "be subject to all the provisions of the laws of said State relating to the drainage of swamp or overflowed lands for agricultural purposes to the same extent and in the same manner in which lands of a like character held in private ownership are or may be subject to said laws." Act May 20, 1908, c. 181, 35 Stat. 169.

The laws of the State, to the application of which assent was thus given, authorized the establishment of public drainage ditches by judicial proceedings and provided that

such ditches might be so established as to widen, deepen, change or drain any river or lake, even if navigable and whether meandered or not. Laws 1905, c. 230; Gen. Stat. 1913, §§ 5523, 5525, 5531, 5553, *et seq.* The ditch which drained Mud Lake was established by judicial proceedings begun under these laws after the congressional consent was given; and it is not questioned that those proceedings made it entirely lawful to construct the ditch through the lake and to drain it as an incident of the reclamation project in hand.

The defendants insist that the lake in its natural condition was navigable, that the State on being admitted into the Union became the owner of its bed, and that under the laws of the State the defendants as owners of the surrounding tracts have succeeded to the right of the State. On the other hand, the United States insists that the lake never was more than a mere marsh, that the State never acquired any right to it, that the surveyor should have extended the survey over it when he surveyed the adjacent lands, and that the United States is entitled and in duty bound to dispose of it under the Act of 1889 for the benefit of the Chippewas.

Both courts below resolved these contentions in favor of the defendants; and whether they erred in this is the matter for decision here.

It is settled law in this country that lands underlying navigable waters within a State belong to the State in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the States and with foreign nations, and subject to the qualification that where the United States, after acquiring the territory and before the creation of the State, has granted rights in such lands by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce



among the States and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the State, but remain unimpaired, and the rights which otherwise would pass to the State in virtue of its admission into the Union are restricted or qualified accordingly. *Barney* v. *Keokuk,* 94 U. S. 324, 338; *Shively* v. *Bowlby,* 152 U. S. 1, 47–48, 57–58; *Scott* v. *Lattig,* 227 U. S. 229, 242; *Port of Seattle* v. *Oregon & Washington R. R. Co.,* 255 U. S. 56, 63; *Brewer-Elliott Oil & Gas Co.* v. *United States,* 260 U. S. 77, 83–85. But, as was pointed out in *Shively* v. *Bowlby,* pp. 49, 57–58, the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future States, and so has refrained from making any disposal thereof, save in exceptional instances when impelled to particular disposals by some international duty or public exigency. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.

The State of Minnesota was admitted into the Union in 1858, c. 31, 11 Stat. 285, and under the constitutional principle of equality among the several States the title to the bed of Mud Lake then passed to the State, if the lake was navigable, and if the bed had not already been disposed of by the United States.

Both courts below found that the lake was navigable. But they treated the question of navigability as one of local law to be determined by applying the rule adopted in Minnesota. We think they applied a wrong standard. Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to

the general rule recognized and applied in the federal courts. *Brewer-Elliott Oil & Gas Co.* v. *United States, supra,* p. 87. To treat the question as turning on the varying local rules would give the Constitution a diversified operation where uniformity was intended. But notwithstanding the error below in accepting a wrong standard of navigability, the findings must stand if the record shows that according to the right standard the lake was navigable.

The rule long since approved by this Court in applying the Constitution and laws of the United States is that streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used, or are susceptible of being used, in their natural and ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water; and further that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce. *The Montello,* 20 Wall. 430, 439; *United States* v. *Cress,* 243 U. S. 316, 323; *Economy Light & Power Co.* v. *United States,* 256 U. S. 113, 121; *Oklahoma* v. *Texas,* 258 U. S. 574, 586; *Brewer-Elliott Oil & Gas Co.* v. *United States, supra,* p. 86.

The evidence set forth in the record is voluminous and in some respects conflicting. When the conflicts are resolved according to familiar rules we think the facts shown are as follows: In its natural and ordinary condition the lake was from three to six feet deep. When meandered in 1892 and when first known by some of the witnesses it was an open body of clear water. Mud River traversed it in such way that it might well be characterized as an



enlarged section of that stream. Early visitors and settlers in that vicinity used the river and lake as a route of travel, employing the small boats of the period for the purpose. The country about had been part of the bed of the glacial Lake Agassiz and was still swampy, so that waterways were the only dependable routes for trade and travel. Mud River after passing through the lake connected at Thief River with a navigable route extending westward to the Red River of the North and thence northward into the British possessions. Merchants in the settlements at Liner and Grygla, which were several miles up Mud River from the lake, used the river and lake in sending for and bringing in their supplies. True, the navigation was limited, but this was because trade and travel in that vicinity were limited. In seasons of great drought there was difficulty in getting boats up the river and through the lake, but this was exceptional, the usual conditions being as just stated. Sand bars in some parts of the lake prevented boats from moving readily all over it, but the bars could be avoided by keeping the boats in the deeper parts or channels. Some years after the lake was meandered, vegetation such as grows in water got a footing in the lake and gradually came to impede the movement of boats at the end of each growing season, but offered little interference at other times. Gasoline motor boats were used in surveying and marking the line of the intended ditch through the lake and the ditch was excavated with floating dredges.

Our conclusion is that the evidence requires a finding that the lake was navigable within the approved rule before stated. From this it follows that no prejudice resulted from the recognition below of the local rule respecting navigability.

We come then to the question whether the lands under the lake were disposed of by the United States before Minnesota became a State. An affirmative disposal is

not asserted, but only that the lake, and therefore the lands under it, was within the limits of the Red Lake Reservation when the State was admitted. The existence of the reservation is conceded, but that it operated as a disposal of lands underlying navigable waters within its limits is disputed. We are of opinion that the reservation was not intended to effect such a disposal and that there was none. If the reservation operated as a disposal of the lands under a part of the navigable waters within its limits it equally worked a disposal of the lands under all. Besides Mud Lake, the reservation limits included Red Lake, having an area of 400 square miles, the greater part of the Lake of the Woods, having approximately the same area, and several navigable streams. The reservation came into being through a succession of treaties with the Chippewas whereby they ceded to the United States their aboriginal right of occupancy to the surrounding lands. The last treaties preceding the admission of the State were concluded September 30, 1854, 10 Stat. 1109, and February 22, 1855, 10 Stat. 1165. There was no formal setting apart of what was not ceded,* nor any affirmative declaration of the rights of the Indians therein, nor any attempted exclusion of others from the use of navigable waters. The effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory; and thus it came to be known and recognized as a reservation. *Minnesota* v. *Hitchcock,* 185 U. S. 373, 389. There was nothing in this which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy, before stated, of treating such lands as held for the

* Other reservations for particular bands were specially set apart, but those reservations and bands are not to be confused with the Red Lake Reservation and the bands occupying it. See Treaty concluded October 2, 1863, 13 Stat. 667.



benefit of the future State. Without doubt the Indians were to have access to the navigable waters and to be entitled to use them in accustomed ways; but these were common rights vouchsafed to all, whether white or Indian, by the early legislation reviewed in *Railroad Company* v. *Schurmeir,* 7 Wall. 272, 287–289, and *Economy Light & Power Co.* v. *United States, supra,* pp. 118–120, and emphasized in the Enabling Act under which Minnesota was admitted as a State, c. 60, 11 Stat. 166, which declared that the rivers and waters bounding the State "and the navigable waters leading into the same shall be common highways, and forever free, as well to the inhabitants of said State as to all other citizens of the United States."

We conclude that the State on its admission into the Union became the owner of the bed of the lake. It is conceded that, if the bed thus passed to the State, the defendants have succeeded to the State's right therein; and the decisions and statutes of the State brought to our attention show that the concession is rightly made.

*Decree affirmed.*

---

## MILLERS' INDEMNITY UNDERWRITERS *v.* NELLIE BOUDREAUX BRAUD AND ED. J. BRAUD.

ERROR TO THE SUPREME COURT OF THE STATE OF TEXAS.

No. 124. Argued January 13, 1926.—Decided February 1, 1926.

Plaintiff's intestate, while employed as a diver by a ship-building company, submerged himself from a floating barge anchored in a navigable river in Texas thirty-five feet from the bank, for the purpose of sawing off timbers of an abandoned set of ways, once used for launching ships, which had become an obstruction to navigation. While thus submerged he died of suffocation due to failure of the air supply. Damages for the death were recovered from the employer's insurer under the workmen's compensation law of Texas. *Held,*

that state, not as controlling but as an aid to the interpretation of our inheritance tax statutes on the issues here involved. The Washington statute provided that debts shall not be deducted unless the same are allowed or established within the time provided by law, unless otherwise ordered by the judge or court of the proper county. There was in that case a compromise agreement between creditors and heirs. For this reason there were no probate proceedings. However, deductions for funeral expenses and expenses of last illness were allowed by the superior court. That court was affirmed, based upon the following reason (112 Wash. 649, 192 P. 1020):

"* * * it is true that the provisions of [the statute] * * * do in terms provide that the 'debts shall not be deducted unless allowed or established within the time provided by law,' *which, if read entirely apart from the other provisions of the section, might seem to suggest that such debts must be established in a formal probate proceeding* * * *." (Italics supplied.)

The court reached the conclusion that the words "unless otherwise ordered by the judge or court of the proper county" indicated formal proceedings were unnecessary.

The Supreme Court of Illinois in People v. Tatge, 267 Ill. 634, 636, 108 N.E. 748, dealt with a situation where there were no probate proceedings. A deduction for inheritance tax purposes was claimed. The Illinois court allowed the deduction saying:

"* * * It is not material that the claim was not presented to and allowed by the probate court. If the claim was an actual indebtedness of the estate and the beneficiaries of the estate actually paid it, then the amount of the estate to which the beneficiaries actually succeeded was reduced [by] the amount paid." [6]

The Washington statute differs somewhat in language from our statute, § 291.07. The State of Illinois had no statute at the time the aforesaid opinion was rendered specifically allowing deductions. However, the aforesaid decisions indicate how other jurisdictions have resolved the problem regarding the necessity of probate proceedings.

The state cites In re Estate of Marshall, 179 Minn. 233, 228 N.W. 920, and In re Estate of Walker, 184 Minn. 164, 238 N.W. 58, in support of their contention that deductions must in all cases first be allowed by the probate court. There were probate proceedings in both of those cases and the property in question was subject to the jurisdiction of the probate court. Those cases are not determinative of the issues here.

The state also cites In re Estate of Siljan, 233 Wis. 54, 288 N.W. 775, as a case being directly in point in support of its contention that the clear purport of § 291.07 must be that funeral expenses, expenses of last illness, and allowances to a surviving spouse cannot be allowed as deductions without such items having been submitted to and allowed by the probate court having jurisdiction; that they are only deductible if properly filed and allowed by the probate court. The Wisconsin court disallowed the deductions, but in that case the beneficiaries had not paid the claims involved and the court reasoned that (233 Wis. 60, 288 N.W. 777) "What is taxed is the amount that the beneficiary receives." We do not have that situation here. Furthermore, the estate under the Minnesota Inheritance Tax Law is not taxed as such but the statute imposes a tax upon the succession and upon what in fact is received by the beneficiary.

In the instant case the respondent paid the funeral expenses and expenses of last illness out of the property she and her husband had set aside for those purposes out of an estate consisting of jointly owned property, an estate which the Inheritance Tax Law recognizes as a legal form of estate subject to a succession tax, a tax in fact imposed upon what the beneficiary receives.

The relator relies upon In re Jones' Estate, 99 Utah 373, 104 P.2d 210, and In re Estate of Beckman, 91 Ohio App. 42, 107 N.E.2d 538, in support of its contention that the deductible items here involved must first be allowed by the probate court. We view these cases as not persuasive for the reason that our statutory provisions are not the same as those of the states of Utah and Ohio, and since in both of those cases there were probate proceedings.

Several New York cases have been cited by relator in support of the views which he urges upon the court. These cases, however, largely involve an interpretation of what is known as the New York Estate Tax Law, which specifically provides that deductions are limited to the value of the property included in the estate which is subject to the claims of creditors. New York Tax Law, § 249–s. The factors involved in the New York decisions are quite immaterial to an intepretation of the distinctly different provisions in Minnesota.

In In re Estate of Bowlin, supra, a situation was presented where the assets of the estate had decreased in value during the administration and where the legatees contended that the decrease should be deducted as an expense of administration. The solution of that problem involved a construction of the Minnesota Inheritance Tax Law. The state argued for an assessment of the inheritance tax against the original value at date of death of the assets. This court allowed the deduction saying in part, as hereinbefore noted (189 Minn. 198, 248 N.W. 742):

"* * * Our inheritance tax is a tax upon the succession * * * a tax upon what in fact is received by the beneficiary."

No justification exists in the language of our state Inheritance Tax Law when construed as a whole for ignoring the fundamental principle that the inheritance tax is in this state a succession tax on the amount that is in fact received by the beneficiary.

It is our view that the legislature must have intended, as the Board of Tax Appeals found, that the class of deductions involved in the case at bar should be granted as allowable whether the gross estate consists solely of probate assets or nonprobate assets, or a mixture of the two. We therefore conclude that the findings and decision of the Board of Tax Appeals have a reasonable basis in the law and should not be disturbed.

Affirmed.

6. Also see, People v. Beckers, 413 Ill. 102, 105, 108 N.E.2d 5, 6.






**Perry N. JOHNSON, Appellant,**

**v.**

**Frank L. SEIFERT and R. Gail Seifert, Respondents.**

**No. 37692.**

Supreme Court of Minnesota.

Jan. 8, 1960.

Rehearing Denied Feb. 3, 1960.

Action between plaintiff and defendants, riparian owners of lake shore, to enjoin defendants from restricting plaintiff's use of lake surface and from withdrawing irrigation water. The District Court, Washington County, Rollin G. Johnson, J., rendered judgment for defendants, and plaintiff appealed. The Supreme Court, Matson, J., held that where lake was suitable for uses to which lakes are ordinarily

put, in common among abutting owners, owner of portion of shore was, as a riparian right, entitled to use of entire surface, in common with other abutting owners and regardless of navigability of lake or ownership of lakebed, and was entitled to injunction against fence erected through lake on property line of defendants who owned most of shore line.

Reversed in part and affirmed in part.

**1. Navigable Waters ⇐1(3)**

The Federal test of navigability is designed for the narrow purpose of determining ownership of lakebeds and for additional purpose of identifying waters over which Federal government has paramount authority in regulation of navigation, and test does not determine riparian rights to water.

**2. Navigable Waters ⇐39(2)**

Riparian rights arise from ownership of the shore, rather than ownership of the lakebed and do not depend upon navigability of the waters.

**3. Navigable Waters ⇐39(2)**

Riparian rights are subject to state regulation for public purposes, such as the regulation of navigation.

**4. Navigable Waters ⇐40**

If a lake is navigable, a riparian owner has the right to use the entire surface for all suitable purposes in common with all riparian owners, both as a member of the public and as a riparian owner.

**5. Navigable Waters ⇐40**

An abutting or riparian owner of a lake, suitable for fishing, boating, hunting, swimming, and other uses, domestic or recreational, to which our lakes are ordinarily put in common with other abutting owners, has a right to make such use of the lake over its entire surface, in common with all other abutting owners, provided such use is reasonable and does not unduly interfere with exercise of similar rights on part of other abutting owners, regardless of navigable or public character of the lake and regardless of ownership of bed thereof, but same rule does not apply to minor bodies of water which have no over-all utility. (Overruling Lamprey v. Danz, 86 Minn. 317, 90 N.W. 578.)

**6. Navigable Waters ⇐40**

Where lake was suitable for uses to which lakes are ordinarily put in common among abutting owners, owner of portion of shore was, as a riparian right, entitled to use of entire surface, in common with other abutting owners and regardless of navigability of lake or ownership of lakebed, and was entitled to injunction against fence erected through lake on property line of defendants who owned most of shore line. (Overruling Lamprey v. Danz, 86 Minn. 317, 90 N.W. 578.)

**7. Navigable Waters ⇐40**

Riparian owner has obligation to do nothing to affect water level of lake so as to do substantial harm to another riparian owner.

**8. Navigable Waters ⇐40**

Each riparian lake owner has privilege to use water for beneficial purposes, such as irrigation, provided such use is reasonable in respect to other riparian owners and does not unreasonably interfere with their beneficial use.

**9. Navigable Waters ⇐40**

In action between plaintiff and defendants, riparian owners of lake shore, to enjoin defendants from removing water for irrigation, evidence supported finding that irrigation was a reasonable use of the riparian waters.

**10. Navigable Waters ⇐40**

Under circumstances presented in action by one riparian owner to enjoin another from interfering with use of surface and from withdrawing irrigation water from lakes, plaintiff-owner had acquired no prescriptive rights in the use of lakes or their beds.

*Syllabus by the Court*

1. Riparian rights are an incident, not of ownership of the bed of the lake, but of the ownership of the shore.

2. An abutting or riparian owner of a lake, suitable for fishing, boating, hunting, swimming, and other domestic or recreational uses to which our lakes are ordinarily put in common with other abutting owners, has a right to make such use of the lake over its entire surface, in common with all other abutting owners, provided such use is reasonable and does not unduly interfere with the exercise of similar rights on the part of other abutting owners, regardless of the navigable or public character of the lake and regardless also of the ownership of the bed thereof.

3. A minor body of water which by its nature and character reasonably has no overall utility common to two or more abutting owners would fall outside the foregoing rule.

4. Each riparian owner has the privilege to use the water for any beneficial purpose, such as irrigation, provided such use is reasonable in respect to other riparian owners and does not unreasonably interfere with their beneficial use.

5. Taking of water for irrigation purposes under the facts found here was a reasonable use.

---

Thoreen, Thoreen & Lawson and Chester S. Wilson, Stillwater, for appellant.

Raymond A. Haik and Erickson, Popham & Haik, Minneapolis, amici curiae.

Karl G. Neumeier, Neumeier, Rheinberger & Eckberg, Stillwater, for respondents.



MATSON, Justice.

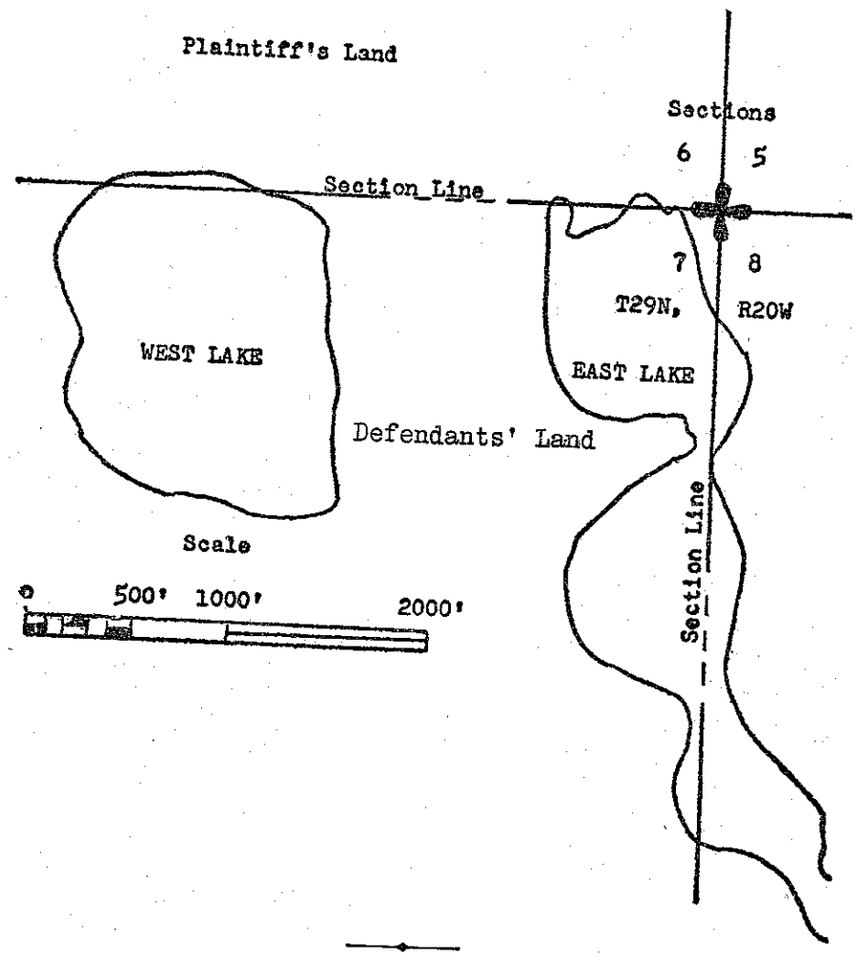
Appeal from a judgment determining rights of riparian owners to use of waters of intertract lakes.

The principal question raised by this appeal is whether the owner of a tract abutting on a lake, suitable for fishing, boating, hunting, swimming, and other domestic or recreational uses to which our lakes are ordinarily put in common with other abutting owners, has a right to make use of the lake over its entire surface, irrespective of whether the lake is navigable and irrespective of the ownership of the lakebed.

This was an action by plaintiff—appellant—to enjoin defendants from constructing and maintaining a fence through and across two lakes and from taking water from one of the lakes for irrigation purposes. The trial court found that the waters of each lake border partly on the land of plaintiff and partly on the land of defendants. Both lakes are unmeandered. Each lake is approximately 35 acres in area and neither has an inlet or outlet. The depth of one of the lakes, referred to in the record as the west lake, is approximately 32 feet at its deepest part. The depth of the other lake, referred to as the east lake, is not shown. The west lake contains several species of fish, and the east lake is used for duck hunting. The section line dividing the property of plaintiff from that of defendants runs near the northern shoreline of each lake, so that approximately 5 percent of the water area of each lake is on plaintiff's side of the section line. Defendants own all the land surrounding the west lake, except as noted above, and own much of the land surrounding the east lake, although there are several parcels of land owned by others also abutting on that lake. There is no public access to either lake. Defendants have constructed a fence along the section line common to them and plaintiff through the bodies of both lakes so as to prevent plaintiff from having free access to the main body of either lake. The rela-

tive location of plaintiff's and defendants' land with respect to the two lakes is illustrated by the outline map herein reproduced as figure 1.

Figure 1




The trial court found that both lakes are and were in 1858 nonnavigable and that the beds thereof are privately owned. It decreed that the waters overlying each party's portion of the bed are the private property of the owner of the bed and subject to his complete and exclusive control, and that plaintiff had no right to fish, hunt, swim, water cattle, or otherwise trespass on the waters overlying that part of the beds belonging to defendants. It further found that defendants' sole obligation to plaintiff in connection with the lakes was not to lower or raise the level thereof so as to materially harm plaintiff's use thereof. It found that defendants' use of lake water for irrigation was reasonable. It further found that plaintiff had not established any right to use the lakes by reason of prescriptive easement.

Plaintiff contends that he has a right to use the entire surface of both lakes for such purposes as watering cattle, boating, swimming, fishing and hunting. With commendable foresight and prudence, plaintiff throughout this litigation has based his contention on more than one theory. His claim is based on the assertion, first, that the lakes are navigable and the beds thereof are owned by the state; second, that if the lakes are not navigable under the Federal test, the state test should be applied; third, that regardless of ownership of the bed, he has a riparian right to use the entire surface of the lakes for such purposes in common with other riparian owners; and fourth, that he has acquired a right to use the lakes for such purposes by reason of prescriptive use.

In view of our conclusion as to the applicability and the nature of the intertract riparian rights involved herein, it does not matter whether the beds of these lakes are privately owned, and therefore it does not matter whether the Federal or the state test of navigability should be applied to determine such ownership and the incidents thereof.

1. The principal question relates therefore to the nature of the rights of one owner of land abutting on a portion of an unmeandered, intertract lake to the use and enjoyment of the water and entire surface of such lake as against the rights of another such owner. No public rights are involved. The trial court cited as authority for its decision Lamprey v. Danz, 86 Minn. 317, 90 N.W. 578, and State, by Burnquist, v. Bollenbach, 241 Minn. 103, 63 N.W.2d 278. Lamprey v. Danz, supra, was a suit to enjoin the defendant from shooting ducks over that part of a large but relatively shallow lake overlying lands owned by plaintiff, and from operating a boat on the surface thereof for the purpose of picking up ducks shot. In upholding the injunction order, this court stated that (86 Minn. 321, 90 N.W. 580):

> "It is elementary that every person has exclusive dominion over the soil which he absolutely owns; hence such an owner of land has the exclusive right of hunting and fishing on his land, and the waters covering it."

During the nearly 60 years intervening since the Lamprey decision this question has not again arisen until the present case. The Lamprey case has been cited in only one subsequent Minnesota case involving lakes, that case being State, by Burnquist, v. Bollenbach, supra, which involved the right of the state, under a condemnation statute, to condemn a public access to a lake completely surrounded by the land of one owner. This court there held that the lake was nonnavigable and that the bed was owned by the abutting landowner. From this it was concluded, following the Lamprey case, that the waters thereof were also private property, and that the lake was not a public lake to which the state had power to condemn such an access. No question of riparian rights was involved since there was but one owner. This is clear from the statement of the issue in that case (241 Minn. 118, 63 N.W.2d 288):

> "Thus the issue in its simplest terms is whether, under the federal test, the evidence sufficiently established Five Lake to be navigable in fact in 1858, for, if it was not navigable in fact at that time, it conclusively and correctly follows that Five Lake is not navigable at law; that respondent Bollenbach is the owner of the fee to the bed of Five Lake; *and that those waters are private waters upon which the public has no right to hunt and fish.*" (Italics supplied.)

The citation of the Lamprey case in the Bollenbach case was solely for the proposition that the right to hunt and fish is an incident of ownership of the soil. The quotation from that case was particularly apt because it also involved the question of rights in waters overlying privately owned lakebed land, and thus was in point as authority for the proposition that the waters, as well as the land, were privately owned. But there was no question in the

Bollenbach case as to the respective *private* hunting and fishing rights of two or more shore owners in an intertract lake since all the land surrounding and underlying the lake was owned by one person.

In view of the pronouncements of this court in other decisions,[1] as well as in view of the ever-increasing significance of the customary use of lake waters of this state (irrespective of whether the lakes are meandered or unmeandered[2] and irrespective of whether they be navigable or nonnavigable), it becomes desirable to reexamine the theory upon which Lamprey v. Danz, supra, was decided in 1902. That case involved the right of use of an unmeandered and shallow 500-acre body of water known as Howard Lake. Danz, as lessee, was in possession of 6 acres which included a part of the lake. Lamprey's lands embraced the remainder of the lake. According to unchallenged findings of fact, it appears that it was always possible to pole or row a small boat on the lake, but owing to the character of the shores and the bottom, and because of the heavy growth of wild rice therein, it was impracticable if not impossible for the public to use the lake for boating, sailing, bathing, or skating, and it had never been used by the public except for the purpose of hunting ducks. Despite the fact that the sole issue involved the respective rights of two abutting landowners to the use of the entire waters of the lake, this court held that *no riparian rights were involved*, and then concluded that Lamprey as owner of the soil beneath the lake waters had absolute supremacy and control of the waters as if they were solid land and that he had therefore the exclusive right of hunting and fishing in and on said waters. The basic error of the Lamprey case—irrespective of whatever other errors are embraced therein—is that no riparian rights were involved.

[1-3] Any assumption that a lake—whether it be meandered or not—whose shore is owned by more than one tract owner does not involve riparian rights unless it is navigable under the Federal test of navigability is wholly untenable and must be rejected. It is not to be overlooked that the Federal test of navigability is designed for the narrow purpose of determining the ownership of lakebeds,[3] and for the additional purpose of identifying waters over which the Federal government is the paramount authority in the regulation of navigation.[4] Whether waters are navigable has no material bearing on riparian rights[5] since such rights do not arise from the ownership of the lakebed but as an incident of the ownership of the shore.[6]

That riparian rights do not stem from the ownership of the lakebed but from shore ownership, and that the ownership of the lakebed does not carry with it a right of control over the overlying waters, has been clearly indicated by our more recent decisions. In Petraborg v. Zontelli, 217 Minn. 536, 547, 15 N.W.2d 174, 180, which involved a navigable lake, we said:

"As to a public lake, a mutual right of enjoyment exists between and is shared by riparian owners and the public generally. Insofar as such recreational benefits as boating, hunting, and fishing therein, the riparian proprietor has no exclusive privileges. Sanborn v. People's Ice Co., 82 Minn. 43, 50, 84 N.W. 641, 642, 51 L.R.A. 829, 83 Am.St.Rep. 401, where we said, however, with reference to the vested interests of the shore owners:

"'* * * 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.*'

"To say that a shore owner does not have additional private rights and interests distinct from the public is to ignore completely those rights which attach by reason of his shore ownership." (Italics supplied.)

In discussing the Petraborg case in State v. Adams, supra, this court speaking through Mr. Commissioner Magney stated (251 Minn. 546, 89 N.W.2d 678):

"* * * The decision was based exclusively upon the ground that riparian owners had the right to the maintenance of the waters in their natural condition. *That right must exist whether a body of water be navigable or nonnavigable.* * * * *The ownership of beds of streams and lakes is quite a different matter from the right to control waters.*" (Italics supplied.)

Upon petition for rehearing in the Adams case, Mr. Justice Thomas Gallagher made it clear again (251 Minn. 560, 89 N.W.2d 687) that a determination of the ownership of the lakebed did not involve a determination of the right of control of the overlying waters.

[4] Under our decisions there could be no dispute that if the lakes involved herein were navigable or public lakes plaintiff would have the right to use the entire surface of the lake for all suitable purposes in common with all other riparian owners. This right would not be his merely as a member of the public but as a riparian owner of the shoreland. We can see little logic in a rule of law which would restrict such riparian rights because the riparian owner happens to own not only shoreland but also a part of the bed of the lake. Illogical as the rule may be, it must be conceded that a few states have taken the position that ownership of the bed of a nonnavigable or private lake carries with it complete and exclusive control and ownership of the overlying waters, but for the most part these states have few lakes or rivers of any value either to the public or to riparian owners. Significantly, however, states which like Minnesota have extensive waters of recreational or commercial value hold that an abutting or riparian owner has a right of reasonable use of the entire overlying water, and no distinction is made between navigable and nonnavigable, meandered or unmeandered, or public or private lakes.

The Supreme Court of Michigan in Beach v. Hayner, 207 Mich. 93, 95, 173 N. W. 487, 488, 5 A.L.R. 1052, which involved an injunction to prevent trespass, stated the issue as follows:

"The important legal question involved in the case is whether or not, where more than one person owns the bed of an inland pond with neither outlet nor inlet, can one owner exclusively use and control his property against the trespass of the public who claim to have a license from the other

1. See, Petraborg v. Zontelli, 217 Minn. 536, 15 N.W.2d 174; State v. Adams, 251 Minn. 521, 546, 560, 89 N.W.2d 661, 678, 687, certiorari denied, 358 U.S. 826, 79 S.Ct. 45, 3 L.Ed.2d 67.

2. The existence or nonexistence of meander lines has no bearing upon the issue of navigability. As to the true purpose of meander lines, see State v. Adams, 251 Minn. 521, 560, 89 N.W.2d 661, 687, certiorari denied, 358 U.S. 826, 79 S.Ct. 45, 3 L.Ed.2d 67; Lamprey v. State, 52 Minn. 181, 192, 53 N.W. 1139, 1140, 18 L.R.A. 670; Poch v. Urlaub, 357 Mich. 261, 98 N.W.2d 509; 24 Minn.L. Rev. 305, 306.

3. See, State v. Adams, supra.

4. See, Nelson v. DeLong, 213 Minn. 425, 433, 7 N.W.2d 342, 347.

5. Riparian rights are of course subject to state regulation for public purposes such as the regulation of navigation. Nelson v. DeLong, 213 Minn. 425, 7 N.W. 2d 342; State v. Korrer, 127 Minn. 60, 148 N.W. 617, 1095, L.R.A.1916C, 139; Meyers v. Lafayette Club, Inc., 197 Minn. 241, 266 N.W. 861; Petraborg v. Zontelli, 217 Minn. 536, 15 N.W.2d 174; 56 Am.Jur., Waters, § 289.

6. State v. Korrer, supra; Collins v. Gerhardt, 237 Mich. 38, 211 N.W. 115; 56 Am.Jur., Waters, §§ 273, 274.

owners of land in the lake, to go thereon?"

The Michigan court then quoted with approval from a dissenting opinion in a prior Michigan case, Sterling v. Jackson, 69 Mich. 488, 508, 37 N.W. 845, 856, as follows:

"It is the law of this state that the riparian owner on any kind of water has presumptively the right to such uses in the shores and bed of the stream as are compatible with the public rights, if any exist, or with private rights, connected with the same waters. * * * if, which does not often happen, there is any occasion for making partition of the surface, it can only be reached by some measure of proportion requiring judicial or similar ascertainment, and not by running lines from the shore. Small and entirely private lakes are sometimes divided up for such purposes as require separate use; but for uses like boating, and similar surface privileges, *the enjoyment is almost universally held to be in common.* This was held by the house of lords in Menzies v. Macdonald, 36 Eng. Law & Eq. 20. It was there held that for all purposes of boating and fishing, the whole lake was open to every riparian owner; while for such fishing as required the use of the shore, each was confined to his own land for drawing seines ashore, and the like uses." (Italics supplied.)

The court went on to say (207 Mich. 98, 173 N.W. 489):

"* * * we are of the opinion that the judge was right in holding that, where there are several riparian owners to an inland lake, such proprietors and their lessees and licensees may use the surface of the whole lake for boating and fishing, so far as they do not interfere with the reasonable use of the waters by the other riparian owners."

A recent Florida decision, Duval v. Thomas, Fla.App., 107 So.2d 148, affirmed, Fla., 114 So.2d 791, involved, as in the instant case, the issue of whether the owner of a portion of the bed of a nonnavigable, landlocked lake has the right to exercise *exclusive* dominion and control of the overlying waters. One of the defendants had built a fence through the lake along the boundary line of plaintiffs' property and the other defendant had built an obstruction along the other boundary line in the lake so as to effectively prevent the plaintiffs from gaining access to that part of the lake overlying the lands of the defendants. In holding that the plaintiffs had the right to use the entire lake for boating and fishing, the court stressed the practical necessity and desirability of reasonable common use among riparian owners in a state which has over 30,000 lakes.[7]

Other jurisdictions likewise hold that an abutting owner on a nonnavigable lake has the right to use the entire surface of the lake for all suitable and reasonable purposes in common with all other riparian owners.[8]

[5, 6] 2–3. In the light of the foregoing we expressly overrule Lamprey v. Danz, 86 Minn. 317, 90 N.W. 578,[9] and hold that an abutting or riparian owner of a lake, suitable for fishing, boating, hunting, swimming, and other uses, domestic or recrea-

7. See 5 U. of Fla.L.Rev. 166 for excellent note on extent of private rights in nonnavigable lakes.

8. Other decisions so holding are: Snively v. Jaber, 48 Wash.2d 815, 296 P.2d 1015, 57 A.L.R.2d 560; Greisinger v. Klinhardt, 321 Mo. 186, 9 S.W.2d 978; Improved Realty Corp. v. Sowers, 195 Va. 317, 78 S.E.2d 588; State Game and Fish Commission v. Louis Fritz Co., 187 Miss. 539, 193 So. 9; Harris v. Brooks, 225 Ark. 436, 283 S.W.2d 129, 54 A.L.R.2d 1440; Burt v. Munger, 314 Mich. 659, 23 N.W.2d 117; Kerley v. Wolfe, 349 Mich. 350, 84 N.W.2d 748; Taylor v. Tampa Coal Co., Fla., 46 So.2d 392.

9. State, by Burnquist, v. Bollenbach, supra, was not decided on any theory involving riparian rights.



tional, to which our lakes are ordinarily put in common with other abutting owners, has a right to make such use of the lake over its entire surface, in common with all other abutting owners, provided such use is reasonable and does not unduly interfere with the exercise of similar rights on the part of other abutting owners, regardless of the navigable or public character of the lake and regardless of the ownership of the bed thereof.[10] It does not follow that the foregoing riparian-rights rule applies to every pothole or swamp frequented by wild fowl and over which a small boat might be poled to retrieve game, but which as a practical matter does not lend itself in any substantial degree to the customary propulsion of boats by outboard motors or oars. A minor body of water which by its nature and character reasonably has no overall utility common to two or more abutting owners would fall outside the rule. No hard-and-fast line can be drawn and each case must be determined according to its own peculiar facts.[11]

[7–9] 4–5. The trial court found that there was a duty to maintain the water level of the west lake and not to unreasonably lower such water level by irrigation use. The court stated that this was not a riparian right but rather something akin to the right of lateral support. While we cannot agree with the trial court's basis for this duty, we do agree that such a duty exists as a riparian obligation. One of the incidents of riparian ownership is the obligation to do nothing which affects the water level of the lake so as to do substantial harm to another riparian owner. See, Petraborg v. Zontelli, supra. Each riparian owner has the privilege to use the water for any beneficial purpose, such as irrigation, provided such use is reasonable in respect to other riparian owners and does not unreasonably interfere with their beneficial use.[12] We hold that the evidence supports the trial court's conclusion that the use made here for irrigation was in all respects a reasonable use of riparian waters.

[10] We also affirm that part of the trial court's determination excluding any prescriptive rights in the use of the lakes or their beds for any purpose under the facts presented. Although this question is largely immaterial under our disposition of the case, it might become significant if the lakes in question should at some time in the future recede beyond plaintiff's land so that his riparian rights would be eliminated or suspended.[13]

The judgment of the trial court is reversed in so far as it denies plaintiff the right to use the entire surface of both lakes for purposes such as fishing, boating, hunting, swimming, and other similar domestic or recreational uses. The decision is affirmed, however, in so far as it permits defendants to use the lake waters for irrigation subject to the proviso that such right of use must be exercised reasonably so as not to lower the water levels to the plaintiff's detriment.

Reversed in part and affirmed in part.

10. See, 3 S.D.L.Rev. 109.

11. As to riparian rights in an artificially created body of water, see Greisinger v. Klinhardt, 321 Mo. 186, 9 S.W.2d 978; 3 Farnham, Waters and Water Rights, § 820.

12. Red River Roller Mills v. Wright, 30 Minn. 249, 15 N.W. 167; Pinney v. Luce, 44 Minn. 367, 46 N.W. 561; St. Anthony Falls Water-Power Co. v. City of Minneapolis, 41 Minn. 270, 43 N.W. 56; 21 Minn.L.Rev. 512, 522; Meyers v. Lafayette Club, Inc., 197 Minn. 241, 266 N.W. 861.

13. There may be a distinction between a riparian owner's right to accretions and relictions when the lakebed is privately owned and when the lakebed is owned by the sovereign. See, Lamprey v. State, 52 Minn. 181, 198, 53 N.W. 1139, 1143; 56 Am.Jur., Waters, § 490.

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 careful 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