

SUPREME COURT.

DECISIONS OF CASES FILED SATURDAY.

John J. Knox, appellant, vs. Elizabeth C. Randall, John H. Randall, E. D. K. Randall, Mary E. Bergman, heirs at law of William H. Randall, deceased, Joseph M. Marshall, William F. Davidson, H. R. Brill, administrator of the estate of Ira Bidwell, deceased; Lorenzo Allis and Mary C. Allis, his wife, Newton Bradley, Russell Blakely, John M. Armstrong, Lucy C. Booth, Routhen H. Booth, her husband, Edwin S. Beck, The City of St. Paul, Thomas McArdle, William Constans, Timothy Delaney, James G. Donnelly, John Donahue, William Eilers, John Egan, Louis Engles, Erasmus S. Edgerton, Sarah E. Flagg, James Flanagan, Thomas Fox, William Golcher, George B. Hunt, Charles S. Hunt, Mary Hunt, heirs at law of Charles Hunt, deceased; Harlan P. Hall, Jacob Heck, David Kent, Mary A. Kidder and Jefferson P. Kidder, her husband, John Kelley, Israel G. Lash, Edward Langevin, Robert P. Lewis, Samuel Mayall, James W. Mayall, John Mayall, Mary S. Mayall, Alphonse Martin, Lucien B. Martin, Ellen M. Mackubin, guardian of Ellen Mackubin, Mary Fay Mackubin, Catharine Mackubin, Florence Mackubin, and Charles Carroll Mackubin, heirs-at-law of Charles Mackubin, deceased; John Mitchell, Jerome Nichols, administrator of the estate of Munroe Nichols, deceased, Edward Nichols, Timothy Reardon, August Bolet, Frank Roberts, Casper Reinhardt, Louis Roberts, Christopher Richter, William Scholter, Casper Sauer, Anton Springer, Oswald Steinhelm, John A. Stees, John Schneider, Washington M. Stees, Orlando B. Turrell, trustees of Jackson street M. E. Church, John F. Vitt, Phamela S. Williams, John Wann, William Dawson, Ovid Finney, Bergie Dault, George M. Hunt, Elias A. Owens, Thomas H. Gilbert, James Farrell, Thomas McLahan, Jacob L. Starcher, John King, Arthur Connelly, John Sullivan, Patrick Bowland, Hugh McGarran, Archibald S. Crowley, Daniel A. Robertson, Finley McCormick, Jane A. Shelly, William H. Shelly, Caleb Morgan, Peter Berkey, Emery A. Wilder, Richard F. Stevens, John E. Warren, Morris Lamprey, Bridget C. Daly, Patrick Carroll, Charles A. Mann, D. A. J. Baker, Joel E. Whitney, U. L. Lamprey, John C. Baguet and A. J. Preston, partners as J. C. Baguet & Co.; David Mullen, Thomas Grace, Frederick Heckner, A. H. Wilder, Channing Seabury, Alfred B. R. & J. M. Warner, James G. Caldwell, John H. Morrison, Board of County Commissioners for Ramsey County, and Joseph M. Marshall, trustee, Respondents.

SYLLABUS.

Marshall vs. Kart, 4 Minn. 450, followed in holding a certain judgment (known as the Kart judgment) and the lien thereof to be valid. A judgment creditor may employ a new attorney to enforce his judgment without any formal substitution or notice. Under the practice prevailing in 1859, a district court in making an order directing the issue of an execution passed upon all questions, the determination of which was necessary to the proper disposition of the motion for such issuance, including the question of its own jurisdiction, to entertain the motion for such issuance, the question of the authority of the person making the motion to make it, and to give notice of it, and the question whether the judgment was paid or not. Though a formal levy was not necessary to a valid levy upon real estate, it was regularly proper as a step in the regular execution of a writ of execution under the law as it stood in the public statutes, it follows that a sheriff holding a writ of execution who had made such formal levy upon real estate, had commenced the execution of his writ. Having thus commenced the execution of the writ the sheriff was authorized to go on and complete it by a sale after the return day. The effect of an injunction of an execution sale, is to stop the proceedings upon the execution where they are. But such injunction does not operate to kill the execution, or to destroy or impair a levy made under it. It is, therefore, competent for the sheriff holding such writ of execution, to go on after the dissolution of injunction, and even after the expiration of his term of office, and complete the proceedings commenced by him. If being indebted to sundry persons made separate notes for the sum due each respectively. The notes ran to M. to whom as trustee, R. also executed a mortgage of real estate to secure said notes, M. turned over to each of R's said creditors a note corresponding in amount to the sum due such creditor. The mortgage property consisting of several parcels of land, was subject to the paramount lien of a judgment in satisfaction of which most of the mortgage property was sold upon execution. Four several holders of R's notes, aforesaid and *cestui qui trusts* of the mortgage purchased of the purchaser at the judgment sale his rights in sundry specified lots and parcels of the lands sold at the execution sale, and took assignments of such rights. No redemption having been made, said parcels so purchased were conveyed by sheriff's deeds to said four persons respectively or their assigns. These purchases were made and assignments taken by each of said four persons severally. In taking the assignments they did not act under or in pursuance of any mutual agreement, but each one bought as he himself thought proper, in order to secure his own interest in the notes and mortgage. The plaintiff, holder of some of the notes, and therefore a *cestui qui trust* in the mortgage, and those under whom he claims knew of the purchases aforesaid, at or shortly after the time when they were made, between March 1st and September 1st, 1861. Prior to the commencement of this action, neither the plaintiffs nor those through whom he claims ever made any claim to the purchasers (the four persons aforesaid), or to any other of them, that these said purchases were made to the benefit of all the owners of the notes aforesaid, or to the benefit of the plaintiff or those under whom he claims; nor did he or they claim any interest in the land embraced in said purchases, nor ever offer to contribute or refund his or their proportion or any proportion of the moneys expended in making such purchases or any part of the same, or ever made any demand of said purchasers or either of them, to be allowed to come in and share the benefits of said purchases upon making contribution or otherwise. This action, in which the plaintiff seeks to be permitted to come in and share the benefit of the purchases so made was commenced in July, 1870. It appeared that the trustee departed from the State in 1859, or 1860, and has since remained out of it and has during all the time since his departure wholly failed and neglected to look after or attend to his duties as trustee, or to enforce the payment of the notes aforesaid by foreclosure or otherwise or to protect the interests of his *cestui qui trusts*. Held, that at the time of the purchases by the four persons above named there was such a community of interest between them and their *co-cestui qui trusts*, that such purchases were made to the benefit of all the owners of the notes aforesaid, and that the plaintiff must also be held to have been duly and regularly issued, and its endorsement by Hollinshead as attorney for plaintiff must also be held to have been correct. The execution was delivered to the Sheriff of Ramsey County on September 29th, 1859, and by him served upon Randall and levied upon the Ramsey county real estate before

mentioned, by leaving and posting copies of the execution as provided in case of attachment of real property in ch. 60, sec. 148. Pub. St. sec. 88, ch. 61 Pub. St. declared that "all property liable to attachment is liable to execution, it must be levied on in the same way that similar property is attached, until a levy property is not affected by the execution." In *Tuller vs. Bramey*, 3 Minn., 277, this court is of opinion that the words "until levied" are not affected by the execution "applied only to personal property, and that no formal levy after execution upon real property was necessary. This opinion has been followed in several subsequent cases. *Folsome vs. Carti*, 5 Minn., 333; *Lochwood vs. Bigelow*, 11 Minn., 113; *Bidwell vs. Coleman*, 11 Minn., 78. But though a formal levy has thus been held not to be necessary to a valid levy upon real property it has not, so far as we are aware, been held that such levy was not entirely proper as a step in the regular execution of a writ of execution under the law as it stood in the public statutes. We think it was regularly proper, and that therefore the sheriff to whom the execution in the case at bar was delivered may justly be regarded as having commenced. The point that the sheriff had no authority to levy upon real property, unless he could find no personal property (which is not shown) is disposed of by the presumption that the sheriff did his duty. Having commenced the execution of his writ by a levy before the return day, the sheriff was authorized to go on and complete it by a sale after the return day. Barrett vs. Asbestine, Stone Co. Mg. April 1877. But it is contended that this rule cannot operate in this case, because the sale under the writ having been postponed to January 6th, 1860, an action was on the 3d day of January, 1860, commenced in the district court of Ramsey county, by Marshall against Hart, and the sheriff, in which on January 6th, 1860, an injunction was issued and served upon the sheriff, enjoining him and his deputies from further proceedings with the execution, and from making sale of any part of the premises levied upon, until the further order of the court. No further proceedings were had upon the notice of sale which had been given. On July 26th, 1860, the injunction was dissolved. The effect of the injunction was to stop the proceedings upon the execution where they were. But the injunction did not operate to kill the execution, or to destroy or impair the levy which had been made under it. It was therefore competent for the sheriff after its dissolution, even after the expiration of his term of office, to go on and complete the proceedings which he had commenced under the execution. This he did in this case by advertising a sale of the premises levied upon for September 8th, 1860, on which day a sale was had and the property levied upon (with the exception of three town lots and a half lot) struck off to Hart. For the reasons aforesaid the sale must be held valid. On September 15th, 1860 the sheriff executed and delivered to Hart a certificate of sale of the lots and parcels of land so struck off to him which was duly recorded. Subsequently and at various times prior to the expiration of the period of redemption, Hart sold and transferred his rights and interests under the certificate of sale to Bidwell, Burrall, Lash and Turrell, persons holding some of the notes secured by the Marshall mortgage. These sales and transfers were to each of such persons severally of the rights and interests in the specified lots and parcels of the whole tract, and were made off to him at the execution sale. There was no redemption from the execution sale and the property was afterwards conveyed by Sheriff's deeds in part to those who purchased from Hart and on part to their assigns. The court below finds the following facts, viz.: That in taking their respective assignments from Hart of his interests, in the certificate of sale, "Bidwell, Burrall, Lash and Turrell did not act under or in pursuance of any mutual agreement, but each one bought as he, himself, thought proper, in order to secure his own interest in the notes and mortgage." That the plaintiff knew of these purchases of Hart's interest by Bidwell, Burrall, Lash and Turrell, at or shortly after the time of said purchases, which were made at different times between March 1st and September 1st, 1861. That at the time of the execution and delivery of the Randall notes and mortgage, the firm of J. Jay Knox & Co. was composed of John J. Knox, Henry M. Knox, and John Jay Knox, that hereafter and about the month of May, 1860, John J. Knox withdrew from the firm, that thereafter and prior to the month of May, 1861, the three Randall notes, delivered to J. Jay Knox & Co., and secured by the Randall mortgage, on account of which the plaintiff, J. Jay Knox brings this action, were duly assigned and transferred to John J. Knox, who thereby became and continued to be the sole owner thereof until some time in the summer of 1870, when, for a reasonable consideration, he transferred the same to the plaintiff, J. Jay Knox, who has ever since been, and now is, the owner and holder thereof. The court below finds that neither the plaintiff John J. Knox ever made any claim to the purchasers of Hart's interest under his certificate, or to any one or either of them; that said purchases were to the benefit of all the owners of said Randall's notes, or of said plaintiff and John J. Knox or either of them, or claimed any interest in the land embraced in said certificate the interest of Hart in which was so purchased as aforesaid, or ever offered to contribute or refund their proportion, or any proportion, of the moneys expended by said purchasers, or any of them, in purchasing such interest, or ever made any demand of them, or either of them, to be allowed to come in and share the benefits of said purchases, upon making contribution, or otherwise. The present action appears to have been commenced in July, 1870. It is also found by the court below that Joseph M. Marshall departed from this State in 1859 or 1860 and has since remained out of it, and has during all the time since his departure wholly failed and neglected to look after or attend to his duties as trustee as aforesaid, or to enforce the payment of the Randall notes by foreclosure or otherwise, or to protect the interests of his *cestui qui trusts*. As conclusions of law, the court finds that at the time of the purchase from Hart by Bidwell, Burrall, Lash and Turrell of their respective interests in the certificate of sale "there was such a community of interest between them and the other owners of notes, secured by said Randall mortgage on the property embraced in said certificate, and in said mortgage, that such purchasers must in equity be held to have entered at the election of the other owners of said notes, within a reasonable time, upon proportionate contribution made to the mutual benefit of all the owners of said notes;" and further, "that the plaintiff and his assigns having allowed so long a time to elapse before attempting to make such election, must, upon the facts herein set forth," (the same being set forth in this opinion, so far as deemed material for the purposes thereof) "and in the absence of any excuse or proof of fraud on the part of said purchaser, or of want of notice on the part of the plaintiff and his grantor, be held in equity, to be guilty of laches and to have abandoned any claim to a division of said property, so purchased, or to subject it to

OPINION.

On September 10, 1857, Wm. H. Randall being indebted to certain bankers of St. Paul in the sum of \$176,285.80, executed and delivered to each respectively and a mortgage upon real estate to secure the same. The notes and mortgage were made and run to Joseph M. Marshall, who at the same time transferred the notes to the creditors so as to give to each, respectively, notes for the amounts owing to him. Marshall at the same time executed and recorded a declaration of trust to the effect that he held the mortgage in trust for such creditors in proportion to their respective demands. The mortgage premises were encumbered by five judgment liens paramount to the mortgage. Upon four of the judgments execution sales were had of portions of the mortgaged premises. For the purpose of protecting their security the beneficiaries in the mortgage in proportion to their respective interests and upon Marshall's requisition advanced money, with which Marshall in March, 1858, purchased one of the five judgments, and under the same redeemed all the property sold upon the former execution, except the portion which was sold at one of the sales to one Oliver. No one having redeemed from Marshall, he received Sheriff's deeds of the unredeemed property. February 10th, 1858, Marshall executed and recorded a second declaration of trust reciting the facts aforesaid relative to the judgments and redemption titles and all right, title and interest acquired, or which he might acquire by virtue of such redemptions for the benefit of the parties for whose benefit the first declaration of trust was executed, and their representatives and assigns in accordance with their interests and equitable rights in the premises. The plaintiff is the owner and holder of three of the notes made to Marshall, as above stated, subject to the interest therein of R. B. Galusha as assignee of W. L. Banning & Co., all of the other notes made to Marshall all owned by defendants Allis and Davidson except one, which is owned by defendant Warner. It is found by the court below that certain alleged judgments in favor of Henry H. Hart against Wm. H. Randall was a prior lien upon the property embraced in the mortgage to Marshall. This judgment came in question in Marshall vs. Hart, 4 Minn. 450, upon substantially the same objections made to it in the case at bar and was held to be valid, as respects the question of the validity of the Hart judgment, the interests of all of the parties to the action at bar were represented in that action. The judgment in Marshall vs. Hart is therefore as respects the question of the validity of the Hart judgment, binding and conclusive upon the parties to this action, for they were all either parties to the judgment in Hart against Marshall, or the privies of those who were parties. It follows that upon the question of the validity of the Hart judgment in the present action, the judgment in Hart vs. Marshall might have been pleaded in estoppel. It was not so pleaded. Neither does it appear to have been introduced in evidence as it might have been, although not pleaded in estoppel, Stephens on evidence article 43. But, although the defendants have not availed themselves of it as they might have done, we think it ought to control in this case, upon the principle of *stare decisis*. It is a decision of this court upholding the validity of the identical judgment involved in the action at bar. Whether it is necessary to treat it as a decision of the general question of the validity of judgments like that here involved or not, it is a decision in favor of the validity of this particular judgment in an action between parties who represent all the parties to this action. We shall therefore follow it without question. In the same case (Marshall vs. Hart) it was further held that the Hart judgment was a valid lien upon the property covered by the mortgage to Marshall, lying in Ramsey county. For the reasons above given we follow this holding also. The judgment and its lien are therefore to be taken as valid. Several objections are taken to the execution issued upon the Hart judgment. The objection that there was no judgment upon which to base it is disposed of by what we have already said. It appears that Hollinshead, an attorney of the court in which the judgment was rendered, but who was not one of the attorneys of the plaintiff's attorneys of record in the action before judgment, caused a notice signed by himself as plaintiff's attorney to be served upon Randall, the judgment debtor, personally, to the effect that on March 28, 1859, a motion would be made before the proper judge for leave to issue execution upon the judgment, for the reason that the same was wholly due and unsatisfied, and that in support of the motion he would read the record in the action and his affidavit (a copy of which accompanied the notice) to the effect that the attorney at law and agent of plaintiff in the action, that the judgment had been duly rendered and docketed, and was wholly unsatisfied and due. Nothing except as above appears among the records of the action showing the appointment or substitution of Hollinshead as attorney for plaintiff in the action. It is found that an order signed by the judge of the court was duly filed on March 29th, 1859, directing execution to be issued upon the judgment for the amount thereof, with interest. Upon this state of facts the execution was issued March 29th, 1859, in usual form must be held to have been duly and regularly issued. It was not necessary that the application for its issue should be made by the attorneys in the action before judgment. Section 14, chapter 82, public statutes, (which is now section 13, chapter 88, general statutes), requiring notice of change of attorney and substitution of a new attorney to be given, has relation only to changes and substitutions made before, and not to changes or substitutions made after judgment. A judgment creditor may employ a new attorney to enforce a judgment without any formal substitution or notice, Pub. St. ch. 82, §10, Gen. St. ch. 88, §9. Hinkley vs. St. A. Falls, W. P. Co., 9 Minn. 55. Berthold vs. Fox, 21 Minn. 51. The order directing the issue of the execution was the adjudication of a court of general jurisdiction and therefore presumptively correct. In making it the court passed upon and settled the question of its own jurisdiction to entertain the motion including the question of the authority of Hollinshead to make it to give notice to Randall and to appear for Hart. It also passed upon the question whether the judgment was paid or not and all other questions the determination of which was necessary to the proper disposition of the motion for the issuance of an execution. Upon these grounds and upon the facts above stated the execution which was issued March 29th, 1859, in usual form must be held to have been duly and regularly issued, and its endorsement by Hollinshead as attorney for plaintiff must also be held to have been correct. The execution was delivered to the Sheriff of Ramsey County on September 29th, 1859, and by him served upon Randall and levied upon the Ramsey county real estate before

mentioned, by leaving and posting copies of the execution as provided in case of attachment of real property in ch. 60, sec. 148. Pub. St. sec. 88, ch. 61 Pub. St. declared that "all property liable to attachment is liable to execution, it must be levied on in the same way that similar property is attached, until a levy property is not affected by the execution." In *Tuller vs. Bramey*, 3 Minn., 277, this court is of opinion that the words "until levied" are not affected by the execution "applied only to personal property, and that no formal levy after execution upon real property was necessary. This opinion has been followed in several subsequent cases. *Folsome vs. Carti*, 5 Minn., 333; *Lochwood vs. Bigelow*, 11 Minn., 113; *Bidwell vs. Coleman*, 11 Minn., 78. But though a formal levy has thus been held not to be necessary to a valid levy upon real property it has not, so far as we are aware, been held that such levy was not entirely proper as a step in the regular execution of a writ of execution under the law as it stood in the public statutes. We think it was regularly proper, and that therefore the sheriff to whom the execution in the case at bar was delivered may justly be regarded as having commenced. The point that the sheriff had no authority to levy upon real property, unless he could find no personal property (which is not shown) is disposed of by the presumption that the sheriff did his duty. Having commenced the execution of his writ by a levy before the return day, the sheriff was authorized to go on and complete it by a sale after the return day. Barrett vs. Asbestine, Stone Co. Mg. April 1877. But it is contended that this rule cannot operate in this case, because the sale under the writ having been postponed to January 6th, 1860, an action was on the 3d day of January, 1860, commenced in the district court of Ramsey county, by Marshall against Hart, and the sheriff, in which on January 6th, 1860, an injunction was issued and served upon the sheriff, enjoining him and his deputies from further proceedings with the execution, and from making sale of any part of the premises levied upon, until the further order of the court. No further proceedings were had upon the notice of sale which had been given. On July 26th, 1860, the injunction was dissolved. The effect of the injunction was to stop the proceedings upon the execution where they were. But the injunction did not operate to kill the execution, or to destroy or impair the levy which had been made under it. It was therefore competent for the sheriff after its dissolution, even after the expiration of his term of office, to go on and complete the proceedings which he had commenced under the execution. This he did in this case by advertising a sale of the premises levied upon for September 8th, 1860, on which day a sale was had and the property levied upon (with the exception of three town lots and a half lot) struck off to Hart. For the reasons aforesaid the sale must be held valid. On September 15th, 1860 the sheriff executed and delivered to Hart a certificate of sale of the lots and parcels of land so struck off to him which was duly recorded. Subsequently and at various times prior to the expiration of the period of redemption, Hart sold and transferred his rights and interests under the certificate of sale to Bidwell, Burrall, Lash and Turrell, persons holding some of the notes secured by the Marshall mortgage. These sales and transfers were to each of such persons severally of the rights and interests in the specified lots and parcels of the whole tract, and were made off to him at the execution sale. There was no redemption from the execution sale and the property was afterwards conveyed by Sheriff's deeds in part to those who purchased from Hart and on part to their assigns. The court below finds the following facts, viz.: That in taking their respective assignments from Hart of his interests, in the certificate of sale, "Bidwell, Burrall, Lash and Turrell did not act under or in pursuance of any mutual agreement, but each one bought as he, himself, thought proper, in order to secure his own interest in the notes and mortgage." That the plaintiff knew of these purchases of Hart's interest by Bidwell, Burrall, Lash and Turrell, at or shortly after the time of said purchases, which were made at different times between March 1st and September 1st, 1861. That at the time of the execution and delivery of the Randall notes and mortgage, the firm of J. Jay Knox & Co. was composed of John J. Knox, Henry M. Knox, and John Jay Knox, that hereafter and about the month of May, 1860, John J. Knox withdrew from the firm, that thereafter and prior to the month of May, 1861, the three Randall notes, delivered to J. Jay Knox & Co., and secured by the Randall mortgage, on account of which the plaintiff, J. Jay Knox brings this action, were duly assigned and transferred to John J. Knox, who thereby became and continued to be the sole owner thereof until some time in the summer of 1870, when, for a reasonable consideration, he transferred the same to the plaintiff, J. Jay Knox, who has ever since been, and now is, the owner and holder thereof. The court below finds that neither the plaintiff John J. Knox ever made any claim to the purchasers of Hart's interest under his certificate, or to any one or either of them; that said purchases were to the benefit of all the owners of said Randall's notes, or of said plaintiff and John J. Knox or either of them, or claimed any interest in the land embraced in said certificate the interest of Hart in which was so purchased as aforesaid, or ever offered to contribute or refund their proportion, or any proportion, of the moneys expended by said purchasers, or any of them, in purchasing such interest, or ever made any demand of them, or either of them, to be allowed to come in and share the benefits of said purchases, upon making contribution, or otherwise. The present action appears to have been commenced in July, 1870. It is also found by the court below that Joseph M. Marshall departed from this State in 1859 or 1860 and has since remained out of it, and has during all the time since his departure wholly failed and neglected to look after or attend to his duties as trustee as aforesaid, or to enforce the payment of the Randall notes by foreclosure or otherwise, or to protect the interests of his *cestui qui trusts*. As conclusions of law, the court finds that at the time of the purchase from Hart by Bidwell, Burrall, Lash and Turrell of their respective interests in the certificate of sale "there was such a community of interest between them and the other owners of notes, secured by said Randall mortgage on the property embraced in said certificate, and in said mortgage, that such purchasers must in equity be held to have entered at the election of the other owners of said notes, within a reasonable time, upon proportionate contribution made to the mutual benefit of all the owners of said notes;" and further, "that the plaintiff and his assigns having allowed so long a time to elapse before attempting to make such election, must, upon the facts herein set forth," (the same being set forth in this opinion, so far as deemed material for the purposes thereof) "and in the absence of any excuse or proof of fraud on the part of said purchaser, or of want of notice on the part of the plaintiff and his grantor, be held in equity, to be guilty of laches and to have abandoned any claim to a division of said property, so purchased, or to subject it to

foreclosure." These conclusions of law are in our opinion, entirely sound, especially (among other considerations) in view of the changes in price and value to which real property is subject in a new country like this State. Snyder on Venders (14th ed., 263) and notes: Hanley vs. Ameer, 4 Cowen, 718; Campbell vs. Walker, 5 Vesey, p. 678. This disposes of the appeal taken by the plaintiff. A separate appeal was taken by defendant Nobles. His answer, which is claimed to be somewhat in the nature of a cross bill, alleged an arrangement by which certain parties interested in the Randall mortgage agreed to release all their right to certain parcels of the property covered by the mortgage to Nobles in consideration that the Randall note owned by Nobles "should be cancelled and eliminated from the operation of the mortgage." The answer alleged the execution of certain deeds under this arrangement to the delivery of which it claimed that Nobles was entitled to have the parcels of land above mentioned adjudged to be his in fee simple, and that he was further entitled to an account and payment over of certain rents of said parcels. The court found facts relating to the alleged arrangement, and to what was done under it otherwise than as alleged in the answer, and further as a conclusion of law, found that Nobles was not entitled to the specific property claimed in his answer nor to a delivery of the deeds referred to in his answer. Such was the issue raised by his answer and tried, and determined by the court below. This determination we see no reason for disturbing. The findings of fact cannot be questioned, as none of the evidence bearing upon them is before us, while the findings of law appear to us to be entirely correct. The claim made in this court with reference to the purchases made by Hart with Lash, Turrell, Bidwell and Burrall (being substantially that made by the plaintiff with regard to the same purchases) and the manner in which they should be treated was not within the issue made below by Nobles' answer, and as respects Nobles was not submitted to or tried, or passed upon by the court below. It follows that Nobles cannot be heard to make it here. We are not, however, to be understood as asserting that he or his successor in interest can now be heard to make it anywhere. The judgment is affirmed. BENNY, Judge.

Edmund Rice et al., trustees, appellants, vs. The First Division of the St. Paul & Pacific Railroad company, respondent.

SYLLABUS.

This case presents substantially the same questions determined at this term in *Edmund Rice et al. vs. the St. Paul and Pacific railroad company et al.* The order denying the plaintiff's application for a receiver is affirmed for the reasons assigned in that case.

OPINION.

At common law, after a mortgage became forfeited by non-payment of the moneys secured thereby, the mortgagee was authorized to proceed immediately to obtain possession of the mortgaged premises in an action of ejectment. By our statute, "a mortgage of real property is not to be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure." The effect of this statute is expressly a common law right to maintain an action, for the possession before foreclosure. By special provision of its charter the St. Paul & Pacific Railroad company is empowered to confer upon its mortgagees, the right of possession of mortgaged property, upon the common law conditions, or upon any other conditions that may be agreed upon and expressed in the mortgage. The effect is that by these charter provisions it is made competent for the company, by the terms of a mortgage or trust deed, to confer upon the mortgagee or trustee a right to the possession of mortgaged property, upon default in the payment of moneys secured thereby, and such a right as will entitle the mortgagee or trustee to sustain an action under our practice, in the nature of ejectment to obtain possession, if it is withheld. Held, that under the ninth and twenty-first articles of the mortgage or trust deed involved in this action in case of default in the payment of interest according to the tenor of the coupon annexed to the bonds secured by said mortgage or trust deed, full power is expressly conferred upon all and singular the trustees by the mortgage or trust deed conveyed, or intended so to be, and each and every part thereof, and to be, hold and use the same to operate and conduct the business of the company's railway, and to collect and receive all tolls, freight incomes, rents, issues and profit of the same, and every part thereof. The result is that upon the default upon the part of the company, such as is alleged in this case, as one of the facts upon which the trustees or mortgagees rest their right to a foreclosure and to a receiver, the trustees are entitled to enter upon and take possession of the mortgaged property without legal proceedings, if they are permitted so to do; and if not so permitted, they are authorized to obtain possession by resorting to an action under our code, in the nature of an action of ejectment. Having acquired possession, whether with or without recourse to legal proceedings, the trustees are expressly authorized to collect and receive all tolls, freights, incomes, rents and issues of the same, and of every part thereof. This action is brought to foreclose the mortgage or trust deed aforesaid, made by the company, and to appoint a receiver in aid of the foreclosure a receiver is prayed for. The prayer is, that pending this suit the court forthwith appoint a receiver to take immediate possession, control and management of the line of railroad from St. Paul to Watab, and of all the appurtenances, rolling stock, lands and other property, belonging or appertaining to said line of road, and covered by said mortgage of \$1,200,000, and that full power and authority be given him to hold, use, manage, control and operate the same, with the usual powers of a receiver in such cases. Held, that upon the foregoing facts, the case is one in which the plaintiffs have a complete and adequate remedy at law in respect to the very matters on account of which the appointment of a receiver is sought, and that, therefore, the plaintiffs are not entitled to have such receiver appointed. The ninth article of the mortgage or trust deed authorizes the trustees upon the company's default to take possession of the mortgaged property, and to have, hold and use the same, "operating by their superintendents, managers, receivers, or servants, or other attorneys, or agents." Held, that the receivers, here mentioned, are not technical receivers to be appointed by a court, but the receivers of the trustees. The order denying the plaintiff's application for a receiver is affirmed. BENNY, J.

Edmond Megy, a leader of the party which assassinated Archbishop Darby during the Paris Commune in 1871, is now living in New York and working at his trade as a machinist. He is anxious to institute the principles of the Commune in this country, and jovially smoked a cigar the other day while he developed to a reporter his pleasant theories as to the prospects of a social revolution.

MINNESOTA NEWS.

Worthington streets are being furnished with lamps.

A teachers' institute is to be held in Pope county this month.

Mr. Gil Dahl, of St. Charles, lost his house by fire last Wednesday.

Forty-four teachers attended the institute held at Farmington last week.

The Moorhead postoffice has issued 500 postal orders in the last six months.

Hubbard, Wells & Co., have built a second grain warehouse at Zumbrota village.

A boy named Charlie Peterson has been sent to the reform school from Duluth.

Mr. A. S. Lindsay, of Sibley has become part owner of the Worthington Journal.

Albert Lea voted, 250 the 176, to be a city—have city officers, city style and city taxes.

Billy Marble and company are playing "Divorce" in villages of the southeast counties.

The house of Wm. Bender in Kalmar, Olmsted county, was robbed by tramps last week.

One hundred and twenty-three women voted at the school election in Mankato last week.

Fifty-five school teachers attended a teachers' institution held at Cannon Falls this week.

Five year old trees on the farm of E. Lee, Yellow Medicine county, average 20 feet in height.

The Renville Times complains that the paper mails from St. Paul come there irregularly.

Farmer Paulson hauled into Rush City one day last week, 70 bushels of wheat in one load.

Cyrus A. Cook has retired from the Cannon Falls Beacon, leaving O. T. Jones its conductor.

The Austin dramatic club is preparing to play "The Ticket-of-Leave Man" in that city this month.

Lots of babies and lots of new settlers—That's this weeks news with about all of our State exchanges.

Claim jumping is frequent in the vicinity of Morris and is liable to result in promiscuous shooting.

The St. Cloud bridge (wooden) is to be closed to travel to-day, having been in use for just ten years.

Ex-Sheriff Box, of Wabashaw county, is about to remove with his family to Crookston, Polk county.

Benj. Randall, one of the early settlers of Le Sueur county, died at his home in Sharon township the 25th ult.

A tannery and manufactory of heavy mittens and gloves is to be established at Alexandria, Fillmore county.

The dwelling house of J. H. Devine, at Sauk Centre, was burned last Thursday. Insured in Farmers' Mutual.

A well-to-do farmer brought his crippled son into Carver the other day, wanting the town to take care of the boy.

Mr. Douglas, of Moorhead, has the contract for building a new steamer and three barges for Winnipeg shippers.

The drives are coming slowly down the rivers in Mille Lacs county, but the lumbermen are persevering and hopeful.

The monthly cattle fairs at Shakopee continue successful, bringing an increasing number of both buyers and sellers.

F. C. Stowe, of Preston, is about to begin the publication of a weekly paper at Wykoff, the sixth paper in Fillmore county.

Hon. R. A. Jones says the contract is let for building the Rochester & Northern railroad from Rochester to Pine Island.

Shakopee voted by 271 majority (only 22 negatives) to issue \$20,000 of city bonds, for building a free bridge over the Minnesota.

The Minneapolis steamer went through to Clearwater on her third trip last week, though the water is quite thin on the rapids.

Part of the full cargo taken out by the first boat of the season, from Duluth was 2,000 barrels of flour, and 123 head of cattle.

Arthur, eldest son of C. B. Lovell of Hastings, was severely injured internally last Thursday by a part of a load of wood falling on him.

Casper Pick, of Luxemburg, Stevens county, was well pounded by Sheriff Mickle a few days ago, for slandering the sheriff's wife.

Liberty Hall's *Glencoe Register* says Budd Reeve "exhibits wonderful ability in his original and quiet way of dressing up old thoughts."

The gravel train men at Morris, struck a few days ago against their pay being reduced from \$1.50 to \$1.25 a day, and were paid and discharged.

A public meeting is to be held at Currie, Murray county, the 13th, to devise measures for stopping the jumping of claims of grass-hopper refugees.

A. W. Elliott, formerly of Faribault, has disappeared from Pine county, leaving several creditors in Rush City fearing that he has absconded.

The city council, of Mankato, has presented \$100 to the city recorder and \$60 to the city physician, in addition to their salaries for the last year.

The Red Wing Scandinavian colonists have selected nine sections of land lying in Nobles, Jackson and Murray counties, where these counties corner.

As to free bridges Jennison says: "No city should be without one," and advises all cities to follow the examples set by Red Wing, St. Paul and Winona.

John Williams, who stole a harness recently in the town of Wolcott, Rice county, was traced to Sleepy Eye, arrested and brought back to Rice county for trial.

Recently Peter Johnson, an apparently healthy farmer of Moe, Douglas county, came into his house, sat down and died, without previous illness or known cause.

A deck hand who fell overboard from the steamer Josie, opposite Waconda last Thursday night, was drowned in less than five feet of water. He swam for some time, but never thought to try the depth.

Thomas Curtin, of Jessenland, Sibley

county, died on the road last Tuesday from an attack of heart disease, brought on by excitement caused by his team running away.

It is reported at Glencoe that stations for the Hastings & Dakota railroad will be established at Lake Addie and about four and a half miles west of Round Grove, just south of Buffalo Lake, in Renville county.

The 30th ult., a son of Frank Rivers of Eden Prairie, Scott county, accidentally shot himself. The charge raked his right side and entered his face, destroying one eye and inflicting serious but not fatal wounds on his body.

The Red Wing *Argus* bears rumors that Judge Crosby contemplates resigning and that Senator J. C. McClure is proposed for his successor. The Senator's father was Judge of that district next preceding Judge Crosby.

The Hon. Joseph F. Potter, of La Crescent lectured on temperance at Plainview two evenings week before last. The *News* says: "He is not a very eloquent speaker, but seems to be thoroughly in earnest in the temperance work."

The four year old son of Mr. and Mrs. Robert Pollock, of East Rochester, was playing with other children around a bonfire Tuesday last, when his clothes catching fire, he was so badly burned that he died next morning.

Dr. Otis Ayer, of Le Sueur is about starting for Boston to have a surgical operation performed on himself. Two years ago he came near dying from a blinding operation. He suffers from a painful internal disease of long standing.

The log driving on Rum River was thought to be made a sure thing by a dam which had raised the Mille Lacs lake—thirty miles long, 15 miles wide—four feet, but the water had to be partly drawn to get the logs over the bars at the mouth of brooks into the main river.

John Miracle, of Fairmont, Martin county, went to his barn a few nights ago, in the evening, without a lantern, and encountered two horse thieves, with whom he had a round at fistfights before they fled. His face was badly bruised, but he thinks he gave the villains as good as they sent.

Henry Cobb, of Spring Valley, who went to the Hot Springs after the body of Eugene Hartman and to learn the particulars of his death, writes back that while the residents, hotel-keepers, &c., all profess to think that Hartman committed suicide, the visitors from the North think he was murdered.

Minneola and Zumbrota townships, Goodhue county, are to vote next month on the proposition to give town bonds (\$10,000 each town) in aid of the Rochester & Northern railroad, conditions on the road's being completed from Rochester to Zumbrota village during the present year.

At Washington Lake, Sibley county, the 31st ult., the seven year old son of Mr. Early, undertook to carry a loaded gun out of doors, but dropped it on the floor, causing it to be discharged, and the charge penetrated the head of his grandmother, Mrs. Early, killing her instantly.

Daniel D'unn, 75 years old, living with Garret Joyce, of Washington Lake, was burning brush, the 28th ult., when his clothes caught fire and he was so badly burned that he died soon after being helped to the house by Mr. Joyce's daughter, who witnessed the accident.

Mr. and Mrs. Halverson, of Lake City, were expecting their young daughter home from Chicago, where she had lived for years, and Mr. Halverson returned nightly from the depot with increasing disappointment. At last, a few days ago, he received a letter announcing that she had been taken with typhoid fever about the time she was to have started for home, and died after a few days sickness.

Detroit, Audubon, Hawley and vicinity have been honored by a visit from a well-dressed tramp, gifted in the art of lying, who called himself Frank O'Donnell, said he belonged to a wealthy family of Kentucky stock raisers about to remove to that section. He rode over the country, bargained for land, and hired men to work for him, paid no bills, and in due time vanished, leaving his victims to mourn.

The Question of Pardon.
[Le Sueur Sentinel.]
The St. Cloud *Journal-Press* commenting on the pardon by the President of Geo. H. Lewis, of St. Paul, who was convicted last October of robbing the mails while acting as road agent on the St. Paul & Duluth railroad, says: "This thing is getting exceedingly monotonous. It might be about as well to close our courts. Criminals are caught, tried and convicted, only that they may be pardoned." Too true. This is the third Presidential pardon of mail robbers in this State within the past year, not to detail the numerous pardons of other criminals throughout the country. And Governor Pillsbury is following Austin in the wholesale pardoning of felons in this State. As the vicious and dishonest find that convictions for high crimes are speedily followed with pardons, crime must necessarily increase. The lax execution of our laws, and the frequent exercise of the pardoning power, is rapidly making this a nation of crime.

A New Paper.
[Worthington Journal.]
The press on which the *Journal* has been printed during the past two years, will be shipped to St. James in a few days, and a new Republican paper, called the *St. James Journal*, will be established by Mr. W. A. Chapman, of the late Sibley Postman. Mr. Chapman will give the Watonwan county a paper of which they may well be proud, and one that will be a credit to the entire county. The new paper will appear in about two weeks.

Joaquin Miller has written another American drama, which is not named as yet. It is rumored that Mr. Miller is going abroad, never to return again; but it is not stated whether these two facts bear any relation to each other.

Sheriff's Sale of Real Estate Under Judgment of Foreclosure.
STATE OF MINNESOTA—COUNTY OF RAMSEY—ss.—District Court—2d Judicial District. The Homestead Building Society of Saint Paul, Minnesota, plaintiff, against G. A. B. Shaws and Antoinette M. Shaws, defendants.
Notice is hereby given that under and by virtue of a judgment and decree entered in the above entitled action on the 6th day of April, A. D. 1878, a certified copy of which has been filed for record in the undersigned sheriff of said Ramsey county, will sell at public auction, to the highest bidder for cash, on the 28th day of May, A. D. 1878, at 10 o'clock in the forenoon, at the front door of said sheriff's office, in the city of Saint Paul, in said county, in one parcel, the premises and real estate described in said judgment and decree, as follows, viz.: Lot seven (7) in "Cottage Homes," near the city of Saint Paul, in the county of Ramsey and State of Minnesota, said lot being numbered on the recorded plat of said Cottage Homes number seven, and containing five acres of land.
Dated Saint Paul, Minn., April 6, 1878.
JOHN G. BECHT, Sheriff of Ramsey County, Minn.
FR. F. WILDE, Plaintiff's Attorney.