

Cause tried before the court without a jury.

H. Emmons and John B. Sanborn, for plaintiff.

H. J. Horn, for defendant.

NELSON, J. The defendant company was organized after foreclosure and sale by the purchasers under an act of the legislature of the state of Minnesota, approved March 6, 1876.

This act contained the following proviso: "*Provided however, that such court (the court granting decree) shall provide in such foreclosure decree, or otherwise, that such purchaser or purchasers, shall fully pay all sums due and owing by such defaulting and foreclosed railroad company to any servant or employe of such company.*"

In 1872 a suit was commenced to foreclose the Southern Minnesota Railroad Company, as to part of its line, by the trustees, under certain mortgages given to secure the bonds issued by the company. On November 23, 1873, a receiver was appointed, who took possession of the mortgaged property. A decree of foreclosure was entered May 27, 1874, and on December 27, 1876, the decree was modified so as to allow a sale in the interest of second lien holders, subject to the lien of the first mortgage bondholders, and on sale being made, February 10, 1877, the defendant company was organized by the purchasers.

The plaintiff brings this suit to recover compensation at the rate of \$2,500 per annum, as secretary of the old company from June 1, 1874, at which time he claims he was elected, until June 19, 1876. At the time of his election the mortgaged property, including 167 miles of completed railroad, was in possession of the receiver, and the stockholders had no right to select their own agents for the management of the corporation; at least, the mortgaged property.

It is urged by the defendant that the act of March 6, 1876, which also contains this proviso, "that nothing herein contained shall be construed to change or impair the force of any decree of foreclosure heretofore made, or any of the terms or provisions thereof," relieves this defendant from the operation of this statute. It is unnecessary to decide this point,

as, from the view entertained, another objection is fatal to a recovery by the plaintiff.

The secretary, under the by-laws, is an officer of the company, and salaries due officers are not the "sums due and owing any servant or employe," which the new organization are required to fully pay.

The legislature intended to provide for the unpaid wages due servants or employes; that is, operatives of the grade of servants "who have not a different, proper and distinctive appellation, such as officers and agents of the company." See 37 N. Y. R. and cases cited.

The charter of the old company, and the various acts amendatory and relating thereto, as well as the act of March 6, 1876, recognize the distinction between officers and employes, and the latter act refers to the secretary as an officer in the same section which contains the proviso; and it is apparent that when certain persons are in the act designated officers, and are not expressly named in the proviso which requires the payment of sums owing "servants or employes," they are excluded from its operation. The word "employe" following "servant," is descriptive of the persons intended to be paid, and excludes officials to whom are entrusted the management of the corporation business.

The officers of the company are its representatives, and, it may be said, are the official masters who direct and control the servants and employes. The former are appointed or elected, and are trustees, (see 21 Wall. 624;) the latter are hired, and are the subordinates of the former.

Judgment ordered for defendant.

BRECHER, Assignee, v. Fox and another.*(Circuit Court, D. Minnesota. February, 1880.)***BANKRUPTCY—PARTNERSHIP—MISAPPROPRIATION BY MEMBER OF INSOLVENT FIRM OF PARTNERSHIP ASSETS.**

Final hearing upon pleadings and proofs in suit in equity.

Rogers & Rogers, for complainant.

Amos Cogswell, for defendant Emeline Fox.

NELSON, J. The complainant, who is assignee in bankruptcy of Melvin & Fox, brought this suit against J. R. Fox, one of the bankrupts, and Emeline Fox, his wife. The prayer of the bill is, in substance, that the sum of \$624 be declared to be a specific lien and charge upon certain property, to-wit, lot seventeen, (17,) in block number seventeen, (17,) in the city of Owatonna, in this district, and that the same be sold under the directions of this court, and out of the proceeds the said sum be paid to the assignee, and for general relief. J. R. Fox and William S. Melvin were adjudged bankrupts on February 20, 1878, and the complainant was appointed assignee April 1, 1878, and duly qualified. It is clearly proved or admitted that on January 22, 1878, J. R. Fox, being at that time insolvent, paid out of his estate, or his interest in the assets of the firm of Melvin & Fox, which had come to him from the sale of firm property, without liquidating the firm indebtedness, a debt secured by mortgage upon the property above described, owned by his wife, the defendant Emeline Fox, and the mortgage was then canceled of record, and the title to the property now remains in her.

The answer avers that the mortgage debt was paid by Fox in good faith.

The only point in controversy is, could J. R. Fox rightfully use the proceeds of the firm property which had been assigned to him on a division, with the consent of his partner, for the purpose of paying this debt and discharging the lien upon his wife's property, while firm indebtedness to a large amount existed at the time, and the firm, and the individual members thereof, were insolvent? The facts bring this fairly

within the adjudicated cases, and the assignee is entitled to the sum claimed, as misappropriated. 16 B. R. 425; Id. 181; 5 Otto, 3; 7 Otto, 304.

A decree will be entered as prayed for, unless within 30 days the defendants, or either of them, pay over \$624 to assignee. The costs will be divided.

CHAPMAN, Executor, etc., v. BOREB, Administrator, etc., and others.*

(Circuit Court, D. Minnesota. February, 1880.)

JURISDICTION—CONCURRENT JURISDICTION OF THE CIRCUIT AND PROBATE COURTS—PAYNE V. HOOK, 7 WALL. 426, FOLLOWED.—In a suit against the administrator of an executor, by the citizens of another state, to enforce the payment of a judgment obtained against the decedent in such state, during his lifetime, and subsequently sued upon in the circuit court for the district of Minnesota, and judgment obtained thereon against the executor of the decedent, such circuit court has concurrent jurisdiction with the probate court of the state of Minnesota in which the wills of the decedent and the deceased executor have both been probated.

Demurrer to bill of complaint.

H. J. Horn and I. V. D. Heard, for complainant.

Gilman & Clough, for defendants.

NELSON, J. This is a demurrer to a bill in equity filed by the complainant George M. Chapman, executor, etc., a citizen of the state of New York, against the defendants Felix A. Borer, administrator of the estate of John Gordon, deceased, Edson R. Smith, executor of the estate of George D. Snow, deceased, and others, citizens of the state of Minnesota.

The bill seeks to enforce the payment of a judgment obtained against John Gordon, in the state of New York, during his life-time, subsequently sued upon in this court, and a judgment obtained against George D. Snow, his executor, now deceased, to be paid out of assets in his hands. Legatees, residuary and otherwise, are made parties defendant.

*See *Levi v. Columbia Ins. Co.*, ante, 206.