

right of possession to the goods to this court for the purpose of satisfying the said amount of \$1,667.49, with interest and costs. But, under the pleadings as they now stand, I think, after the satisfaction of this amount, any balance of proceeds arising from the sale of the goods should be turned over to the assignee under the state law. But, as the parties have a stipulation for further pleading upon the decision of the court upon the exceptions to the answer, leave will be given for further proceedings according to the terms of stipulation on file. The other exceptions to the answer have been considered and sustained upon a former hearing.

MacVEAGH et al. v. WILD et al.

(Circuit Court, D. Indiana. June 30, 1899.)

No. 9,726.

1. JUDGMENT—COLLATERAL ATTACK—SUIT BY PARTNERSHIP IN FIRM NAME.

Under the law of Indiana, a judgment rendered in favor of a partnership in its firm name, though reversible for error, is valid, and cannot be collaterally attacked.

2. CORPORATIONS—LIABILITY OF OFFICERS—FAILURE TO MAKE REPORTS.

The statute of Indiana (2 Burns' Rev. St. 1894, § 5073) making the officers of a corporation jointly and severally liable for "all damages" resulting from their failure to make the reports required by the statute, includes unliquidated as well as liquidated damages.

On Demurrer to Complaint.

Hamline, Scott & Lord, and Shirts & Fertig, for plaintiffs.
Gavin & Davis, for defendants.

BAKER, District Judge. This is an action brought by the above-named plaintiffs, composing the firm of Franklin MacVeagh & Co., against the above-named defendants, as president and directors of the Noblesville Canning Company, a corporation organized under the laws of this state, to charge said president and directors with the amount of damages sustained by the breach of a contract entered into by the corporation with the plaintiffs for the sale and delivery of certain goods. The company, on May 19, 1897, entered into a contract in writing with the plaintiffs, whereby the plaintiffs bought and the company sold and agreed to deliver to them in the fall of that year 5,000 cases, to wit, 10,000 dozen, three-pound cans of certain canned goods, for the price of 60 cents per dozen, delivered in the city of Chicago. It is alleged that the company failed and refused to deliver any of said goods pursuant to the contract. The plaintiffs, on October 30, 1897, brought suit against said canning company in the circuit court of Hamilton county, Ind., in their firm name of Franklin MacVeagh & Co., against the Noblesville Canning Company, and for cause of action set up the above contract, showing its breach, and claiming damages therefor. The company answered in general denial, and a trial was had on the issue so joined, resulting in a judgment for the plaintiff for \$2,750 and costs of suit, said judgment being in favor of

Franklin MacVeagh & Co., and against the Noblesville Canning Company. It is alleged that the defendants, at the time the contract was entered into, knew that the company was insolvent, and that the plaintiffs believed that it was solvent, and responsible for all contracts made by it. It is also alleged that the capital stock of the company was fixed at \$20,000, but that only \$9,000 was in fact subscribed, and only \$7,192 was ever paid into the treasury, and that the remainder of the stock subscriptions was uncollected, and was subscribed by insolvent and irresponsible persons. It is also alleged that the president and directors did not, nor did any of them, at any time make or sign any certificate stating the amount of capital stock as fixed and paid in, nor was any such certificate ever filed in the office of the clerk of the circuit court of Hamilton county or elsewhere; that on January 1, 1896, the company had been doing business for more than 12 months, and for more than 12 months prior to January 1, 1897, yet said company did not, nor did the defendants, nor did either of them, as such officers and directors or otherwise, within 20 days after January 1, 1896, nor within 20 days after January 1, 1897, nor at any other time, make or publish, or cause to be made or published, in any newspaper, or in any manner whatever, any report stating either the amount of capital stock of the company, the amount of assessments thereon made and actually paid in, or the amount of existing debts; nor was any such report ever signed or verified by the defendant Wild as president, nor by either of the defendants as directors, but they and each of them, at the times aforesaid and at all times wholly failed to give any such notice, and to make any such report. The plaintiffs allege that they were thereby misled and deceived into the belief that the said company was solvent, and responsible for all contracts entered into by it.

The defendants have demurred to the complaint for want of facts. Two grounds of insufficiency are pointed out in argument. It is first urged that the complaint is bad because it is shown that the claim for damages for breach of the contract is merged in a judgment in favor of some one else than the plaintiffs; that it appears that a judgment had been rendered by their procurement upon this claim in favor of Franklin MacVeagh & Co., and that this is not and cannot be regarded as a judgment in favor of the other plaintiffs to this action. It is then said to be well settled in this state that partners cannot sue and recover judgment in the partnership name, citing *Hays v. Lanier*, 3 Blackf. 322; *Livingston v. Harvey*, 10 Ind. 218; *Mackenzie v. Board*, 72 Ind. 193. These cases hold that a suit ought to be brought in the individual names of each member of the firm, and that, if a suit is brought in the firm name, it constitutes an error for which the judgment will be reversed. These cases do not decide that a judgment obtained in the name of a firm is invalid in any other sense than that it will be reversible on appeal or writ of error; nor do they lend any support to the contention that the judgment can be successfully assailed in a collateral proceeding. Indeed, it is firmly settled in this state that partners may sue and recover judgment in their firm name, and, where such a judgment has been rendered, that it is perfectly valid against a collateral attack. *Thatcher v. Coleman*, 5 Blackf.

76; *Jones v. Martin*, Id. 351; *Downard v. Sluder*, Id. 559; *Bridges v. Layman*, 31 Ind. 384; *Hopper v. Lucas*, 86 Ind. 43; *McGaughey v. Woods*, 106 Ind. 380, 7 N. E. 7. It is alleged in the complaint, and confessed by the demurrer, that the plaintiffs brought suit and recovered judgment in their firm name of Franklin MacVeagh & Co. against the Noblesville Canning Company. The cases above cited, and especially *Jones v. Martin*, show that the judgment is valid and that oral proof is competent to show who the real plaintiffs were, and that, when shown, such judgment is enforceable by and in favor of all the partners.

It is next contended that the damage arising from the breach of an executory contract, where the plaintiffs have parted with nothing, is not within the purview of the statute which charges directors for defaults in the performance of official duty. It is insisted that the liability for breach of the contract is one for the recovery of unliquidated damages representing profits only, and is not such a corporate liability as can be enforced against the defendants under the statute of this state. The only authority cited and relied on by counsel to support their contention is 3 *Thomp. Corp.* p. 3081, § 4193, which reads: "Unliquidated Damages for Breach of Contract. It seems that such statutes do not include unliquidated damages for breach of contract." The only case cited in support of the text is *Manufacturing Co. v. Beecher*, 26 Hun, 48. This case arose under the statute of the state of New York, which requires the directors to make annual reports, and for failure to do so enacts that they shall be liable for all "existing debts" of the corporation. The statute of this state provides that for failure to make reports, or for making false reports, the officers of the corporation shall be jointly and severally liable for "all damages" resulting from such failure. 2 *Burns' Rev. St.* 1894, § 5073. The distinction between a statute which provides that the liability shall be for all "existing debts" and one which provides that the liability shall be for "all damages" is so clear and marked that a decision under the former can have no controlling force in a case arising under the latter. The legislature of this state has enacted that the liability shall be for all damages resulting from a failure to make reports as provided by the statute. Manifestly, the words of the statute embrace unliquidated damages just as certainly as they do liquidated damages. Conceding, without deciding, that the present action is one to recover unliquidated damages for breach of a contract, it plainly falls within the very words of the statute. The demurrer is overruled, to which defendants except.

NATIONAL BANK OF OSHKOSH v. MUNGER.

(Circuit Court of Appeals, Seventh Circuit. June 6, 1899.)

No. 497.

1. AGENCY—RESPONSIBILITY OF PRINCIPAL FOR ACTS OF AGENT—AGENT ACTING FOR DIFFERENT PRINCIPALS.

A depositor in a bank authorized the teller to act as her agent in making and collecting loans, but he was not authorized to draw money from her account, except on checks procured from her. The arrangement was continued for a number of years, during which she gave several hundred checks, aggregating over \$90,000. During the same time, without the authority or knowledge of the depositor, the bank permitted the teller from time to time to withdraw money from her account on a "teller's memorandum," which was merely a direction to the bookkeeper to charge her account with a stated sum, and such sums he appropriated to his own use. *Held.* that in such transactions the teller acted in his capacity as an officer of the bank, and not, so far as the bank was concerned, within the apparent scope of his agency for the depositor, and that the bank was liable to her for the amounts so withdrawn.

2. SAME—RATIFICATION.

The making of a note by the teller in favor of the depositor, which he placed with her securities in the bank, without her knowledge, and upon her merely expressing her willingness to make him a loan on security, when in fact no loan was made and no check was given by her, but the money had previously been wrongfully taken from her account, could not operate to bind her, as a ratification of such withdrawal, nor relieve the bank from liability to her therefor.

3. SAME—UNAUTHORIZED PAYMENT TO AGENT.

A bank which permits an agent of a depositor to have money transferred from the depositor's account to the credit of a concern which it knows the agent to be chiefly interested in is chargeable with knowledge that he cannot bind his principal in such a transaction, and acts at its peril.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

This suit is brought by Harriet E. Munger, the defendant in error, to recover of the National Bank of Oshkosh, the plaintiff in error, a claimed balance of \$14,435.06 of moneys deposited to her account in that bank. Prior to the 1st day of March, 1891, she had a deposit account with the bank, and on that day had a balance to her credit of \$822.35. She is the daughter and sole heir at law of Jefferson Bray, deceased, and on April 8, 1891, his executors deposited in the bank to her credit the sum of \$23,439.49, and delivered to Frank Heilig, who was, and for 20 years had been, the paying and receiving teller of the bank, a box containing the securities of the estate, and which then belonged to the defendant in error. This was done at her request, she having engaged Heilig as her agent to attend to her estate and to make loans for her. At about that date the cashier of the bank asked her who was going to do her business, and she said Mr. Heilig, that her father had confidence in him, and that she intended to intrust him with her affairs. Heilig kept the box in the vault of the bank, no one but himself having access to it. The defendant in error resided at Oshkosh, in which city the bank was located, until the autumn of 1894, when she removed to the city of Chicago. The custom in the transaction of this business was that Heilig, when he made a loan for her, obtained her check upon the bank for the amount of the loan; and several hundred checks so procured, and signed by her, and aggregating in amount over \$92,000, are produced in evidence. He had no authority from Mrs. Munger to draw upon her bank account, except upon checks signed by her. Soon after his agency commenced, and from time to time during the six succeeding years, he drew moneys from the bank, delivering to the bookkeeper of the bank memoranda called "teller's memoranda," which were directions to the book-