

BANK OF MONTREAL *v.* THAYER.*Circuit Court, D. Iowa.*

May 11, 1881.

1. FRAUDULENT REPRESENTATIONS—PLEADING.

In an action for false and fraudulent representations, the allegation that such representations were wrongful, false, and fraudulent, is sufficient, where the said representations have been set out with due particularity.

2. SAME—PARTY TO SUIT.

In such action, if the party suing is not the party to whom the false representations were made, it must appear that they were made with the intent that they should be acted upon by the parties, and that they were so acted upon by the plaintiff.

3. SAME—SAME.

It need not appear that the fraudulent representations were made directly and individually to the plaintiff, but it is sufficient if it be shown that he was authorized to act, and did act, upon such representations.

4. SAME—RECEIVER'S
CERTIFICATES—PURCHASERS.

The receiver of a railroad executed and placed upon the market certain certificates payable to A., or bearer, which contained, upon their face, certain false representations, intended to deceive whoever might purchase the same. *Held*, that a *bona fide* purchaser, before maturity and without notice, relying upon such fraudulent representations, might recover in an action for damages, although such receiver had no purpose to defraud and deceive such specific purchaser when he executed the said certificates.

5. SAME—SAME—SAME.

Held, further, that the fact that the payee, A., participated in the fraud would not relieve the maker from liability, nor render it necessary that such payee should be joined in the action as a party defendant.

6. SAME—WARRANTIES.

Held, further, that the representations contained in such certificates were not warranties upon which an action could be maintained by the purchaser.—[ED.

Demurrer to petition.

This is an action to recover damages on the ground of alleged false and fraudulent representations made by the defendant, and the material facts alleged are the following:

(1) That the defendant was on the twenty-second of November, 1875, duly appointed receiver of the property and effects of the Chicago, Clinton & Western Railroad Company, by an order made by the district court of Clinton county, Iowa, in a cause therein pending.

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(2) That afterwards, on the twenty-seventh of July, 1876, said court made an order authorizing the defendant, as receiver, to construct and build all the unconstructed portion of the line of said railroad from Clinton to Iowa City, Iowa, and to repair other portions, for which purpose he was authorized and empowered to borrow, on certain terms, such sum or sums of money, and to make such indebtedness, as should be necessary, not to exceed \$8,000 per mile upon the whole line of said road completed and to be completed, and to make and issue to the persons of whom said money might be borrowed, and to whom such indebtedness might be due, but only such as might be incurred by him, his debentures or certificates, with interest expressed in their body, or in coupons or interest warrants thereto attached, signed by him as receiver, but not personally, which debentures were to be held as receiver's indebtedness, and as such decreed and adjudged to be a first lien for the principal and interest thereof upon the entire line of said railroad, etc. And in case of the default in the payment of such debentures or certificates, principal or interest, according to the terms thereof, any holder thereof might institute or prosecute a suit in his or their names to enforce the lien and compel payment thereof.

(3) That on or about the twentieth of January, 1877, the defendant made and delivered to the Joliet Iron & Steel Company five several certificates or debentures, all of like tenor, and one of which is as follows:

EXHIBIT B.

Receiver's Certificate Referred to in Above Petition.

No. 28.

\$5,000.

OFFICE OF THE RECEIVER OF THE
CHICAGO, CLINTON & WESTERN
RAILROAD.

CLINTON, IOWA, January 20, 1877.

This is to certify, that there is due on July 16, 1877, to the Joliet Iron & Steel Company, or bearer, from Edward H. Thayer, as receiver, (but not personally,) of the Chicago, Clinton & Western Railroad, appointed by the district court of the state of Iowa, in and for Clinton county, five thousand (5,000) dollars, with interest thereon from this date at the rate of 7 per cent per annum, on account of indebtedness incurred by said receiver. This obligation is issued under and by virtue of certain provisions of an order duly entered by the district court of Clinton county, Iowa, on July 27, 1876, and is one of the series of receiver's certificates authorized to be issued by such order, and by virtue thereof constitutes a first lien upon the said line of railroad, its appurtenances, franchises, and income, being for iron rails furnished for constructing said road.

Payable at the Third National Bank, Chicago, Illinois.

{Signed}

EDWARD H. THAYER,

As receiver of the Chicago, Clinton & Western Railroad.

(4) That by the terms of said certificate or debentures the said defendant acknowledged and

certified that there was due the said Joliet Iron & Steel Company, or bearer, from Edward H. Thayer, as receiver, but not personally, the sums named therein, with interest, on account of indebtedness incurred by said receiver; that said obligation was issued under and by virtue of the provisions of the order of court above named, and was one of the series of certificates authorized to be issued by said order, and by virtue thereof constituted a first lien upon the said line of Railroad, etc., being for iron rails furnished for constructing said railroad.

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(5) That afterwards, and before the maturity of said certificates, the plaintiff, believing that said certificates were duly made and issued by said defendant under and by virtue of the provisions of said order of court, and that the same were of the series of receiver's certificates authorized to be issued by said order, and that the same were made and issued by said defendant for iron rails furnished for constructing said road, and relying thereon, and upon the said statements and representations contained and made in said certificate, purchased the said certificates from the payee in good faith and in the usual course of business, and without notice or knowledge that the said statements and representations were not true, and paid and advanced to said company therefor the sum of \$25,000, that being the amount expressed upon their face as due and payable thereon.

(6) That after maturity of said certificates plaintiff demanded payment, which was refused; and that afterwards plaintiff instituted proceedings to enforce the lien of said certificates upon said line of railroad, etc., in the district court of Clinton county, Iowa; and that said court, by its judgment, refused to enforce the said lien, or compel the payment of said certificates, which said judgment or decree was afterwards affirmed by the supreme court of the state of Iowa.

(7) It is further averred as follows: "And the plaintiff further says that said defendant wrongfully, fraudulently, and falsely certified and represented, in and by said certificates, that the same were issued by him in pursuance of said order heretofore referred to, and that they were each of a series of receiver's certificates authorized to be issued by such order, and constituted a first lien upon the said line of railroad, its appurtenances, franchises, and income, and that they were issued for iron rails furnished for constructing said road, whereas in truth and in fact the said certificates were not made and issued by said defendant under and in pursuance of said order; nor were they of the series of receiver's certificates authorized to be issued by such order; nor did they constitute a first lien upon the said line of railroad, its appurtenances, franchises, and income; nor were they issued for iron rails furnished for constructing said road; and the plaintiff further says that by reason of the premises it has sustained damage in the sum of \$30,000."

(8) The second count of the petition repeats the foregoing allegations, in substance, omitting the allegation as to fraudulent representation, and charges that the representations were untrue, and that because they were untrue the certificates were invalid, and the plaintiff sustained the damage for which the defendant is liable.

The grounds of demurrer are stated in the opinion.

E. S. Bailey, for plaintiff.

Geo. B. Young, for defendant.

MCCRARY, C. J. We will consider the grounds of demurrer to the first count in the order in which they are presented by counsel.

1. It is insisted that the facts alleged do not constitute 625 fraud. The allegation is that defendant wrongfully, fraudulently, and falsely certified and represented that the certificates were issued in

pursuance of the order of the district court of Clinton county, Iowa; that they constituted a first lien, and that they were given for iron rails furnished for constructing said road, whereas none of these things were true.

It is said that a fraudulent intent is not alleged; but it is difficult to see how representations as to a matter of fact can be wrongful, fraudulent, and false, without they are made with a fraudulent intent. It is certainly necessary to prove the intent, and of course it must be alleged, but no form of words is necessary. If the terms employed by the pleader, taken in their ordinary signification, necessarily include the idea of a fraudulent intent, that is enough. We must give to the term "fraudulently," as found in the petition, the meaning which the law gives it, and which attaches to it in common usage, to-wit, a deliberately-planned purpose and intent to deceive and thereby to gain an unlawful advantage. After stating what representations were made with sufficient particularity, it is enough to aver that they were wrongful, false, and fraudulent. It is not necessary in such a pleading to define the meaning of these terms; and to say that the representations were made with intent to deceive, would add nothing to the allegation that they were falsely and fraudulently made. *Langsdale v. Girton*, 51 Ind. *Thomas v. Beebe*, 25 N. Y. 244; *Bayard v. Malcolm*, 2 John. 550; *Norris v. Mile Dock Co.* 21 Wis. 131; *Watson v. Chesire*, 18 Iowa, 202.

2. The next proposition of defendant's counsel is that the first count of the petition is bad, because there is no allegation of fraud practiced by defendant upon the Joliet Iron & Steel Company, the payee thereof, or upon any one else. The Petition does not state that the false and fraudulent representations were made with the intend to defraud any particular individual, but it does state in substance that they were contained in certain written instruments, payable to the Joliet Iron

ℰ Steel Company, or bearer, and that, relying upon 626 the statements and representations contained in said instruments, the plaintiff purchased them from the payee in good faith, in the usual course of business before they were due, and without knowledge or notice that said representations were false, and paid him full face value. Is this sufficient? To state the question as concisely as possible, it is this: Assuming that the representations contained in the certificates were false and fraudulent,—that is, made with intent to deceive,—are we to assume that they were made with intent to deceive whoever should purchase the paper? In the very nature of the case the defendant must have intended that his representations would or might be acted upon by any person or persons purchasing the certificates in the open market. He was placing paper upon the market where it was likely to be bought and sold.

The certificates were so drawn as to facilitate their negotiation; they were to pass from hand to hand without indorsement; they were to be payable to bearer. Why is it not a sound rule of law and of morals that makes the signer of such paper liable in damages to any one who may be deceived and injured by having relied upon statements of fact fraudulently inserted therein? To say that it is necessary for plaintiff to show that defendant had a particular individual in view as the person to be defrauded, would be in effect to release him from liability for his representations; for a person who places such paper upon the market cannot know into whose hands it will pass, and therefore cannot have in view the person or persons who may be injured. The matters of fact stated in the certificates gave them currency. If true, they made them amply secure, and very desirable as investments. The controlling question is, who had the right to act upon the representations, since the law will presume that they were addressed to all persons having such right?

Is there anything on the face of the paper to indicate that the representations were addressed to and intended for a particular individual and to no others? I think, on the contrary, the representations were manifestly intended to be considered and acted upon by purchasers of the paper in the market.

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In *Bruff v. Mali*, 36 N. Y. 200, 205, it was held that officers of a railroad corporation were liable to any person injured by their misconduct in issuing false certificates of stock, and inducing a party to purchase the same by false and fraudulent representations as to the affairs of the company; and see to same effect the following authorities: Bigelow on Fraud, 89–90; *Cazeau v. Mali*, 25 Barb. 578; *Bartholemew v. Beatty*, 15 Ohio, 660; *Railroad Co. v. Schuyler*, 34 N. Y. 30. There is nothing in the authorities cited by defendant's counsel which, rightly understood, is in conflict with this rule. It is very true that an innocent misrepresentation—an honest mistake—cannot be made the ground of an action for fraud. There must be an intent to defraud by false representations. This must be alleged and proved. We hold that it is sufficiently alleged by the plaintiff. If it is not true let the defendant join issue. We cannot give judgment in his favor while he stands here admitting the allegations of the petition.

We construe the allegations of the petition to mean that defendant executed and placed upon the market certain instruments payable to bearer, and containing on their face false representations intended to deceive the purchasers thereof, whoever they might be. This being so, if the plaintiff purchased them in good faith, before maturity, without notice, relying upon the representations, he may recover, although the defendant had no purpose to defraud and deceive the plaintiff in particular when he executed the instruments.

There is sufficient privity between the defendant and any purchaser of the certificates to support the action. Nor is it any answer to say that the Joliet Iron Steel Company, the payee of the certificates, must have participated in the fraud. The action is based upon defendant's written representations contained in the body of the certificates, and upon these alone. If we were at liberty to assume that similar false representations must have been made by the Iron & Steel Company to the plaintiff, this would not release the defendant from liability, nor would it be necessary to join the Iron & Steel Company as a party defendant.

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The liability of this defendant depends upon the question whether he committed any fraud by his own conduct and representations, and it is not to be defeated by showing that others have, or have not, committed like frauds. If, for example, the paper in question had passed through the hands of a number of persons after it left those of defendant, each in turn making the same false and fraudulent representations as to its validity, would it be insisted that the last purchaser would be obliged to join all the previous holders in one suit? How could he know who had held and transferred by delivery the paper, except in the case of the person from whom he obtained it? He might sue that person, but, in order to recover, it would be necessary for him to allege and prove that he relied upon his representations, and not upon those embodied in the instrument. If he relied upon the latter, and acted in good faith upon them, his right of action would be against the maker of the paper—the party who, by signing it and placing it upon the market, certified to the truth of the statements it contained, and gave it currency. In all such cases it is, of course, necessary for the plaintiff to show that he acted upon the false representations, and that he had a right to act

upon them. If the party suing is not the party to whom the false representations were made, it must appear that they were made with the intent that they should be acted upon by these parties, and that they were acted upon by him.

The English cases cited by counsel for defendant illustrate and enforce this doctrine, and show that all that is required of the plaintiff here is to show some direct connection between the defendant and himself in the communication of the certificates and its influence upon plaintiff's conduct in becoming a purchaser thereof. *Barry v. Croskey*, 2 J. & H. 117; *Peek v. Gurney*, Law Rep., 6 House of Lords, 377; and *Thompson on Liability of Officers*, etc., 309. We have seen no case which holds that it must be made to appear that the fraudulent representations were made directly and individually to the plaintiff. It is enough if he was authorized to act upon them and did so. If it be true that the defendant 629 issued the certificates honestly and in good faith, believing he had the right to do so, this is a perfect defence, but must be pleaded by way of answer. The petition, being taken as true, does not show such a state of facts.

3. The second count omits the charge of fraud contained in the first, and is founded upon the theory that the representations contained in the certificates were warranties upon which the plaintiff has the right to sue and recover. In order to sustain the sufficiency of this count it would be necessary to hold (1) that the representations contained in the certificates were warranties upon which the payee, the Joliet Iron & Steel Company, could have maintained an action; and (2) that the plaintiff, as a subsequent purchaser of the paper without an assignment, became entitled to maintain an action upon the warranty. As to the first proposition, it is not averred that the Joliet Iron & Steel Company relied upon the representations, or were in anywise deceived or defrauded thereby. On

the contrary, it would seem that that company must have known all the facts known to the defendant, as it is fairly to be inferred from the face of the certificates that they were given to said company in payment for iron rails furnished by it. Such being the fact, it is manifest that the company could not have maintained an action upon the warranty.

A right of action upon a warranty, if it be assignable, is certainly not negotiable in the sense that the assignee may take a better right than the assignor possessed; and it follows from this that the plaintiff, even if regarded as the assignee of the right of action upon the warranty, can have no better right than its assignor; and since the petition does not show that the assignor had any right of action upon the warranty, it does not show any right of action in the plaintiff.

As to the second proposition, we know of no authority in its support. A warranty is addressed to some particular person, and ordinarily that person alone can sue upon it. Under the very broad statute of Iowa on the subject of the assignment of causes of action it may be assignable, but that it goes without assignment in a case like the present we think cannot 630 be maintained. There is a clear distinction between a warranty and a fraudulent misrepresentation. The former is a contract, and the action upon it is an action on contract. It is an action which can be maintained only by a party to the contract. The latter is a fraud, a wrong, for which an action *ex delicto* lies in favor of the person injured.

We conclude that the plaintiff can recover upon the facts stated in the first count upon proving the intent to defraud by executing the certificates and placing them upon the market, but he cannot recover alone upon the facts stated in the second count. The demurrer is overruled as to the first count and sustained as to the second.

LOVE, D. J., concurs.

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