

broker for the defendants at the best price he could get. If the proceeds were insufficient to pay advances and expenses of sale, then defendants are liable for the balance.

It is not, perhaps, necessary to pass upon the question as to plaintiff's obligation to accept and pay the drafts in case the goods did not answer the contract, although I incline to the opinion that under this contract it was his duty to do so. He certainly had the right to accept and pay defendants' drafts drawn upon him, and on which drafts defendants had obtained the money, upon the faith that they would be so accepted and paid; and his refusal to do so might have worked most serious injury to defendants' credit, by dishonoring their paper in a market where it was of the utmost importance to them to keep their credit good.

I am, therefore, of opinion that plaintiff has made a clear case of right to recover, and should have judgment for the amount due; being the difference between the price paid for the goods under the contract and the net proceeds of the sale. Judgment for plaintiff.

SHIPPEN v. BOWEN.

(Circuit Court, D. Colorado. February, 1882.)

DECEIT—PLEADING AND PROOF—SCIENTER.

Under a declaration *ex delicto*, charging that defendant, to induce plaintiff to purchase certain bonds, represented them to be genuine and valid, whereas they were in fact worthless forgeries, there can be no recovery except upon proof that defendant knew them to be forgeries, or that he expressly represented them to be genuine.

At Law. Action of deceit.

McCARY, J. Although this case was tried before the district judge, at his request, and with the consent of the parties, the motion for a new trial has been submitted to me. It is an action *ex delicto* in the usual form of a declaration for deceit. The complaint charges that, to induce plaintiff to purchase certain bonds, the defendant represented that they were genuine and valid bonds, whereas, in truth and in fact, they were worthless forgeries. The court charged the jury that it was necessary for plaintiff to show that the defendant, at the time of the sale of the bonds to plaintiff, misrepresented the facts concerning their genuineness. In other words, the court was of the opinion, and so charged the jury, that plaintiff could not recover in this action by merely proving a sale of the bonds to him by defendant, and that the bonds were forgeries. It was held to be necessary to prove knowledge on the part of the defendant of the forged character of the bonds, or an express misrepresentation concerning the fact of their genuineness. The counsel for plaintiff insists that in such a case as this no *scienter* need be alleged, nor, if alleged, need be proved. I am unable to concur in the soundness of this

proposition. The contention of the plaintiff's counsel is that, because the mere sale of the bonds rendered the seller liable upon an implied warranty of their genuineness, he is equally liable for an implied tort. But this argument fails to note the distinction between an action upon an implied contract of warranty of the genuineness of the bonds sold and an action for deceit or misrepresentation sounding in tort. It is impossible to conceive the idea of a tort as separate and apart from an intentional wrong and injury, or such negligence or other misconduct as necessarily to imply such wrong or injury. A *scienter* is the very gist of a tort. To say that one may recover in tort without proving a *scienter*, is to say that he may omit from his proof the chief element of his case. No doubt there may be cases of express warranty upon which an action of tort may be founded. Of such a character was the case of *Schuchardt v. Allen*, cited by the plaintiff's counsel, reported in 1 Wall. at page 359. That was an action for false warranty of the quality of personal property sold by the defendant to the plaintiff; and it was held to be enough for the plaintiff to prove the warranty, and that it was false, without proof of a *scienter*. There are doubtless numerous cases to be found in the books in which it is asserted that the holder of negotiable paper, by the mere fact of offering it for sale, confirms its genuineness, and represents that it is duly executed, as it purports to be. But this is not the sort of confirmation or misrepresentation that amounts to a tort. It is a misrepresentation within the meaning of the law of contracts; and in the purview of that law it is immaterial whether it be true or false, because there is an implied contract. It is not, however, a false representation, within the meaning of the law of torts, upon which an action *ex delicto* can be maintained. I do not think that any of the cases cited by plaintiff's counsel support the proposition that it is not necessary to prove intent to injure or defraud in such a case as the one now under consideration. A party cannot be guilty of a tort, within the proper signification of that term, who is innocent of all intent to injure or defraud. If the present plaintiff, after his purchase of the bonds in question from defendant, and in perfect ignorance of their fraudulent character, believing them to be valid and genuine, had in good faith sold them to a third party, he would have been liable upon the contract because of the warranty of genuineness which the law implies, but not, in my judgment, in tort, for having knowingly, intentionally, and willfully injured and defrauded the party to whom he sold. Such being my view of the law, the motion for a new trial must be overruled, and it is so ordered.

CITY OF LE MARS v. IOWA FALLS & S. C. R. Co. *et al.*, (three cases.)

(Circuit Court, D. Iowa. May, 1882.)

REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—CONDEMNATION PROCEEDINGS.

A proceeding by a city to condemn certain lands, in which a citizen of the same state with plaintiff owns the fee, while a citizen of a different state holds a perpetual lease, is not a separable controversy when the main question is as to the right to condemn; and the non-resident defendant cannot remove his part of the controversy from the state to a federal court.

At Law. Proceeding to condemn lands. On motion to remand the cause to the state court.

Barcroft & Gatch and *G. W. Ayer*, for plaintiff.

John F. Duncombe, for Illinois Cent. R. Co.

McCrary, J. This proceeding was instituted by the city of Le Mars in the state court for the purpose of condemning certain real estate within the corporate limits of the city for street purposes. The defendant the Iowa Falls & Sioux City Railroad Company is the owner of the fee of said real estate, and is, with the plaintiff, a citizen of Iowa. The defendant the Illinois Central Railroad Company is the owner of a perpetual lease upon said real estate, and, being a citizen of Illinois, has removed the case to this court, claiming that there is a controversy wholly between it and the plaintiff, which can be fully determined as between them. The record shows that the principal controversy is as to the right of the city to condemn and take this particular real estate for street purposes. A secondary controversy will arise, if the right of condemnation is upheld, as to the amount of damages to be awarded. It is plain that the city has a right to proceed to condemn land for street purposes against all who have an interest in it, and especially against the owner of the fee. If it were conceded that two separate suits could be maintained, the one against the owner of the fee, and the other against the lessee, it will scarcely be contended that the city could be obliged to divide its action in that way. The law looks with great disfavor upon any rule that will increase litigation by multiplying suits. It is now settled that so much of the act of 1866 (Rev. St. § 639) as expressly authorizes the splitting of a case, and the removal of a part of it to a federal court for trial, leaving another part in the state court, is repealed by the subsequent act of March, 1875. If any part of a suit is removed, the whole must be removed. The question remains to be determined, in what class of cases, if in any, can a cause be removed, where some of the parties litigant on opposite sides are citizens of the same state, and others are citizens of different states? The rules by which we are to be governed, so far as they have been settled by the supreme court of the United States, may be stated as follows:

1. If the parties to the suit can be placed on opposite sides of the real controversy, disregarding the mere form of the pleadings, so that all on one side are found to be citizens of different states from all on the other,