

the devices and processes specified in his patents in consideration of the payment to him of a certain yearly royalty for the use of each patent. This agreement was carried out until the dissolution of the Pennsylvania Tack Works in 1886. In 1891 the defendant company came into possession of the former plant of the Pennsylvania Tack Works, which at that time contained various devices, built in accordance with the specifications of the three patents belonging to the plaintiff. The plaintiff informed the defendant of his rights concerning the same and gave the defendant notice that if it employed these devices the plaintiff would consider that it accepted the same terms as those which had existed between him and the Pennsylvania Tack Works prior to its dissolution. The defendant continued to employ the devices and processes referred to, and the plaintiff brought suit to recover \$3,218.02, being a sum equal to the amount of the royalties which the plaintiff would have been entitled to receive for the use of the three patents under the agreement previously existing between him and the Pennsylvania Tack Works.

To this statement a demurrer was taken by the defendant on the ground that:

(1) The statement did not aver that there was any contract actually entered into between the parties nor any facts from which such a contract might be implied; (2) it did not disclose any facts tending to show any liability on the part of the defendant for the alleged contract or engagement of the Pennsylvania Tack Works; and (3) since it appeared from the statement that each of the three distinct causes of action involved an amount of less than \$2,000 in value this court had no jurisdiction of the subject-matter.

Ingham & Newitt, for plaintiff.

Hector T. Fenton, for defendant.

BUTLER, District Judge. As the court understands the plaintiff's statement the demurrer cannot be sustained. The suit is founded on an alleged implied contract for the use of several machines covered by distinct patents. The defendant was not a licensee; but having purchased the machines from one who was, he proceeded to use them with knowledge of the facts and after expressed notice, that if he did so he would be held liable to make compensation for such use. The reference in the statement to contracts with the former licensee and to the notice, is made by way of inducement, and to strengthen, the implication in favor of the contract sued upon. This latter contract is similar in all respects to such as arise where one uses a patented machine without authority and with knowledge of the facts. I do not think the statement is liable to any other construction than that just stated. That the plaintiff so understands it, is made plain by the following language taken from his brief:

"The contracts between the plaintiff and the Pennsylvania Tack Works are not the foundation of the claim against the defendant but are set up as inducement only."

In the defendant's brief it is said:

"If the defendant used the machine and if the patents are valid the plaintiff may have a right of action for the infringement in which the measure of damages would perhaps be the license price paid by the Pennsylvania Tack Works or other licensees if there are any, but it is obvious on reading the statement that no facts are alleged from which a contract can be implied."

We think the cause of action set out is substantially the one just described and that all facts necessary to justify an implication of a contract to pay for the use are sufficiently averred. The claim is not

upon several contracts but a single one based upon the circumstances attending the use of the several machines. Under the laws of this state, and the practice here, it would probably be unimportant if the suit embraced several of such contracts; and if in such case the sum claimed aggregated \$2,000 the defendant could not object to the jurisdiction selected.

LAUGHLIN v. ATLANTIC CITY R. CO. et al.

(Circuit Court, E. D. Pennsylvania. December 29, 1896.)

JOINDER OF ACTIONS—JOINT NEGLIGENCE—RAILROADS.

An action will lie against two railroad companies jointly for an injury to a passenger in a train of one of them when occasioned by a collision of that train with a train of the other.

T. J. Shoyer, for plaintiff.

David W. Sellers, for defendant West Jersey & S. R. Co.

Gavin W. Hart, for defendant Atlantic City R. Co.

DALLAS, Circuit Judge. The defendant the West Jersey & Seashore Railroad Company demurs to the plaintiff's statement of claim, and assigns for cause "that it does not appear therefrom that there was any joint duty of the defendants to the plaintiff." The statement of claim is as follows:

"The above-named plaintiff, Harry Laughlin, a citizen of the state of Pennsylvania, seeks to recover from the above-named defendants, the Atlantic City Railroad Company and the West Jersey & Seashore Railroad Company, the sum of \$25,000 upon the cause of action of which the following is a statement: The above-named defendant the Atlantic City Railroad Company is a corporation of the state of New Jersey, doing business by carrying passengers for hire in cars drawn by locomotives propelled by steam through the state of New Jersey. The West Jersey & Seashore Railroad Company is also a corporation of the state of New Jersey, engaged in the same business and conducted in the same manner, and in said state. That in carrying on their business as aforesaid both of the above-named defendant companies ran and operated trains of cars from Camden to Atlantic City, in the state of New Jersey. It was and became the duty of both of the said defendants, in the operation and conduct of their said trains aforesaid, through their agents and servants, that passengers in their respective trains should suffer no injury in the trains of said defendant companies. That, notwithstanding their duty in this behalf, on the 30th day of July, A. D. 1896, the said defendant companies, through their agents and servants, ran and conducted their trains in a negligent and careless manner, as follows, to wit: On the day and year aforesaid the above-named plaintiff, Harry Laughlin, was lawfully riding on the train operated and controlled by the defendant company the Atlantic City Railroad Company, and rode from Camden to Atlantic City, which was known as the '5:40 Express from Philadelphia.' That when said train arrived, a little before 7 o'clock, at the 'Meadows,' adjacent to Atlantic City, where the tracks of the West Jersey & Seashore Railroad Company intersect the tracks of the Atlantic City Railroad Company, the train of the said Atlantic City Railroad Company, through its agents and servants, to wit, the engineer, ran into, against, and upon a certain train operated by the West Jersey & Seashore Railroad Company, the other of said defendants. That on the day and year aforesaid, at the place aforesaid, the defendant company, the West Jersey & Seashore Railroad Company, through its agents and servants, ran into and against the train of the Atlantic City Railroad Company, in which this plaintiff was riding. That both of said trains were running at an unlawful rate of speed, and un-

lawfully attempted to cross the tracks of the other defendant company, at the intersection aforesaid, without giving to the other the proper notice and warning, which it was their respective duties to do. That by virtue of the terrific force and violence of said collision this plaintiff was thrown violently against the back of the seat of the car in which he was riding, whereby he suffered injury to his spine and other parts of his body, and has suffered great pain and agony; as a result therefrom has been unable to follow his usual occupation, and has been permanently disabled, and has suffered damages in the sum of \$25,000. Wherefore he brings this suit."

The demurrer cannot be sustained. "Where more than one person is concerned in the commission of a wrong, the person wronged has his remedy against all, or any one or more, of them, at his choice." See Webb, Pol. Torts, p. 230, and note, in which the American authorities are cited. The learned counsel of the demurrant has referred to three Pennsylvania cases, which might lend some support to his position, but for the fact that, in a more recent one, in which the material facts are quite analogous to those here presented, the supreme court of that state seems to have entertained no doubt that an action will lie against two companies jointly for injury to a passenger in a car of one of them, when occasioned by a collision of that car with a train of the other of them. *Downey v. Railroad*, 161 Pa. St. 588, 29 Atl. 126; *Colegrove v. Railroad Co.*, 20 N. Y. 492; *The Atlas*, 93 U. S. 302-315. The doctrine of *Thorogood v. Bryan*, 8 O. B. 115, as to the identification of the passenger with his carrier, was long since exploded in England, and has been repeatedly repudiated by our courts.

The demurrer is overruled, with leave to plead in eight days.

ST. ONGE v. WESTCHESTER FIRE INS. CO.

(Circuit Court, D. Rhode Island. May 5, 1897.)

1. FIRE INSURANCE—WAIVER OF FORFEITURE—ESTOPPEL.

A prior forfeiture of a fire insurance policy is not waived where an agent of the insurer, after a loss, indorses on the policy an agreement assuming liability for future losses, since such indorsement does not induce any action of the policy holder affecting his rights, and therefore cannot operate by way of estoppel.

2. PLEADING—ARGUMENTATIVE DENIAL.

An argumentative denial of the allegation of a rejoinder amounts to a simple traverse only, and must conclude as such.

Dexter B. Potter, for plaintiff.

Comstock & Gardner, for defendant.

BROWN, District Judge. This is an action on a fire insurance policy issued by the defendant to the plaintiff September 3, 1893, upon a stock of merchandise and fixtures in plaintiff's shop, partially destroyed by fire on June 5, 1894. A decision upon the demurrers now before the court requires the assumption of the following state of facts: Before the date of the loss, the plaintiff, to whom the policy was originally issued, with the consent of the company, assigned the policy to one Bouvier, together with the property covered thereby. Prior to the loss, Bouvier, without the knowl-