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 C. 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-

edge or assent of the defendant, reassigned the policy to the plaintiff, and reconveyed to him the insured property. The policy stipulated that, unless otherwise provided by agreement indorsed thereon or added thereto, it should be void if any change, other than by the death of the insured, took place in the interest, title, or possession of the insured property. Subsequently, on June 5, 1894, the loss occurred, and plaintiff gave to the company the notice required by the policy. The defendant refused or neglected to make payment to the plaintiff. On July 10, 1894, more than a month after the loss, and at least 10 days after the plaintiff had made proof of claim, one W. A. Lester, an agent of the defendant corporation, made the following indorsement upon the policy:

"Providence, R. I., July 10, 1894.

"It is understood and agreed that on and after date this policy will cover the within-described property while contained in first and second stories of within-described building. Attached to and forming a part of policy No. 5,822.

"Westchester Fire Insurance Co.,
"W. A. Lester, Agent."

By his fourth replication, the plaintiff, though confessing the unauthorized transfer to Bouvier, and the conditions of the policy making such transfer a forfeiture, claims that by the above indorsement the company acknowledged said policy to be in force between the company and himself. In other words, that the indorsement not only waived the forfeiture, but transferred the title from Bouvier to the plaintiff. Even were the indorsement a waiver of a prior forfeiture, the plaintiff, upon the state of facts set up in his replication, can have no cause of action, since he has averred the existence of a title in Bouvier; and the indorsement in no way refers or relates to a change of title. The waiver, if one were made, was merely a confirmation of Bouvier's title, and not a transfer of it. But upon examining the terms of the indorsement it is manifest that it does not relate to a change, past or future, in the interest, title, or possession of the insured property, and therefore that it is not such an agreement as by the terms of the policy is necessary to obviate a forfeiture. Neither can it be considered in the light of an independent agreement inconsistent with a denial of liability for a prior loss. By the transfer from Bouvier the liability of the company at once ceased, and did not exist at the date of loss. The company was under no liability whatever until July 10, 1894, when, by the indorsement, it assumed a liability by express language made entirely prospective. There is no inconsistency between a denial of the prior liability and this agreement to be liable in future. Neither from the terms nor from the substance of this agreement can an estoppel or waiver be inferred. The loss had already occurred, and the indorsement induced no action of the plaintiff at all affecting his prior rights, if any, to compensation for that loss. In Insurance Co. v. Wolff, 95 U. S. 326, Mr. Justice Field says:

"The doctrine of waiver, as asserted against insurance companies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon

it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow this conduct and enforce the conditions."

The decision that the indorsement effected no waiver or estoppel of course disposes of the subordinate question of the authority of Lester to make a waiver.

The fifth rejoinder alleges that Lester had no authority to make the indorsement. The surrejoinder avers that Lester was a general agent, and therefore had authority, and concludes with a verification. This is merely an argumentative denial of the allegation of the rejoinder, and, amounting merely to a simple traverse, should have concluded to the country.

The defendant's demurrers to the fourth replication and to the last surrejoinder must therefore be sustained.

CRANE ELEVATOR CO. v. CLARK.

(Circuit Court of Appeals, Seventh Circuit. May 22, 1897.)

No. 346.

1. CONTRACTS—PERFORMANCE TO SATISFACTION OF ARCHITECT.
When a contractor has undertaken to do certain work to the satisfaction of an architect, the determination of the architect so constituted an umpire is final and conclusive, and can be impeached only for fraud, collusion, or such gross mistake as implies bad faith; but the parties have a right to the independent and honest judgment of the umpire with respect to the matters submitted to him, and an arbitrary refusal to determine the fact, or to accept performance, where the work has been in good faith performed, constitutes a fraud in law, availing to dispense with the necessity for his judgment as a condition precedent to the right of recovery by the contractor for the work done.

2. SAME—EVIDENCE—QUESTION FOR JURY.
Plaintiff agreed with defendant to construct elevators in a building, payment thereof to be made when the plant should be in running order to the satisfaction of the architect. In an action to recover the price of the elevators, there was evidence tending to show that the architect had sent a representative to attend a test of the elevators, that they then worked properly, and the architect's representative expressed his entire satisfaction with them, but that the architect afterwards refused to give his approval, stating no reasons for so doing, and no specific objections to the elevators, but only transmitting to the plaintiff a letter from the owner of the building protesting against the acceptance of the elevators. *Held*, that the question whether the architect exercised an independent judgment as to the performance of the contract, or arbitrarily refused his approval, should have been submitted to the jury.

3. SAME—PLEADING AND PROOFS.
When a contractor sues in assumpsit to recover for work done under a contract requiring the approval of an umpire, his declaration containing a special count alleging performance, and also the common counts, evidence may be given under the latter of any facts dispensing with the necessity of the umpire's approval, and a recovery may be had thereon.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

This is an action of assumpsit brought by Crane Elevator Company, the plaintiff in error, to recover the unpaid balance of the contract price for the furnishing and construction in a 12-story and basement building in the city of Chicago of three high-pressure hydraulic passenger elevators. C. Everett

Clark, the defendant in error, was the contractor for the construction of the building for William D. Boyce, the owner. The declaration contained a special count setting forth the contract with the plaintiff in error, which contained the following provision: "One-half of the contract price shall be paid when the cylinders are in permanent position; the balance when the plant is running to the satisfaction of the architect, and has been accepted by him." The special count alleges performance of the contract, and that the "elevators, and each of them, were accepted by Henry Ives Cobb, the architect of said building, and the agent of said W. D. Boyce and of the defendant in that behalf." The declaration contained a special count upon an independent agreement for the use of certain steam-belt freight elevators, touching which there was no contest, and also contained the common counts. The plea was the general issue. At the trial the plaintiff gave evidence tending to prove: The performance by it of the work specified in the contract. That on the 24th day of October, 1893, the plant was tested to determine whether the contract had been performed with reference to speed and load. This test was prearranged, the defendant (by his agent) and the owner of the building being present. The architect was notified of the test to be made, and was requested to be present or be represented at such test, and promised to be represented, and was represented by his assistant, C. J. Clark, who, after the conclusion of the test, then and there expressed his satisfaction; stating that the test, as to capacity and the speed of the elevators, fulfilled every condition of the contract, and that he was perfectly satisfied with it. That, upon application to the architect for a certificate, he made no specific objection, but stated certain objections that had been urged by the owner of the building. The defendant gave evidence tending to prove that in certain respects the contract had not been performed. The architect testified that the elevators were not completed to his satisfaction, and had not been accepted by him; that he declined to give a certificate "until the work was completed according to contract"; that he thought he gave some reasons, "as I usually do," but could not recall the reasons, if any, that he gave. He did not, at the trial, give any particulars wherein the work was defective or incomplete. He stated that before the test he had observed that the elevators did not start and stop properly, and were too noisy; that he is not an expert with respect to elevators, and he does not state whether the failure to start and stop properly was owing to a defect in workmanship or in operation; that noise is incidental to the operation of all elevators; that on the 31st day of October, 1893, he received from the owner, Mr. Boyce, a letter which states that he is informed that Mr. Cobb contemplated acceptance of the elevator plant, and states certain objections, and, closing, "I do most positively protest against the acceptance of the elevators in my name or in my behalf, and forbid you to do so." A copy of this letter he sent upon the following day to the plaintiff in error without comment. The witness made this further statement: "I think it is well to explain my understanding of my position relative to this contract. I look upon myself as an arbiter between the two,—the owner and the contractor. If the owner, Mr. Boyce, had agreed to accept these elevators in spite of the report of my inspector being that they were not satisfactory, he has a right to do it, and, as they both agree that they shall be accepted, I have to accept them, because the two parties agree." There was no evidence given of any report made by Mr. Clark to the architect, nor was the former called as a witness. There was also evidence tending to prove that after the test the owner, Mr. Boyce, took possession of the elevators and contracted for their operation; and evidence was given tending to the effect that the objectionable noise arose from the operation of an electric pump placed at the request of the owner, and contrary to the advice of the plaintiff in error.

At the conclusion of the testimony, and upon motion of the defendant, the court directed a verdict for the plaintiff in error to the amount of $1,218.07, the sum of certain undisputed items, and refused to submit to the jury the right of the plaintiff to recover the unpaid balance upon the contract, amounting to $8,332.50. The court, with respect thereto, instructed the jury as follows: "I regret that the view of the court as to the law applicable to the contract renders it impossible for the plaintiff to recover upon it in the present form of action in this case. The contract that was entered into between the

Crane people and Clark was a contract that, so far as any evidence before the court or jury goes to show, was deliberately and fairly and understandingly entered into. It was stipulated in that contract that the last payment should not become due or payable until the elevators had been completed to the approval of Henry Ives Cobb, a disinterested architect selected mutually by the parties to pass on that question,—until they had met his approval, and until he had accepted them. There is no evidence in this case, gentlemen of the jury, that that condition of things has happened, and, in the view the court takes of the law, there can be no recovery until that has happened or has been dispensed with or waived, and there is no averment in the pleadings in this case that there has been any waiver. The suit is a straight, square suit, alleging on the part of the plaintiff that the contract has been completed in all its terms, and the proof shows that it has not been. I do not say anything about the evidence as to whether or not the work was such that Henry Ives Cobb ought to have accepted it or not. There might have been a recovery, under a proper state of the pleadings, if that had been the case, but that is not the condition of the pleadings here. That is not the state of the case here. The proof in this case is absolutely clear, without any contradiction, to show that at least that term of the contract has not been performed; and, in the judgment of the court, there can be no recovery under that contract, any more than, if I should execute a note due in sixty days, a party could recover on it before the sixty days have gone by."

Henry W. Prouty, for plaintiff in error.

Cyrus Bentley, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). The contract between the parties provided that one-half part of the contract price should be paid "when the plant is running to the satisfaction of the architect, and has been accepted by him." This clearly constituted him the arbiter of disputes between the parties to the contract with respect to its performance. The general doctrine is not disputed, that, when the payment of the contract price is conditioned upon the obtaining of the umpire's certificate, such certificate is a condition precedent to the right of the contractor to recover the contract price. The question arises, however, in regard to the right of the contractor when he has specifically and in good faith performed his contract, and the umpire refuses to accept the work or to give the required certificate. The English and early American cases held to the doctrine that the completion of the work to the satisfaction and acceptance of the umpire, or the obtaining of his certificate, is a necessary affirmative act of performance, and that the decision of the umpire can be refuted only for fraud, collusion, or bad faith. The later decisions of the courts of some of the states, of which Thomas v. Fleury, 26 N. Y. 26; Nolan v. Whitney, 88 N. Y. 648; Weeks v. O'Brien, 141 N. Y. 199, 36 N. E. 185; Chism v. Schipper, 51 N. J. Law, 1, 16 Atl. 316,—are examples, hold to the doctrine that the architect, in his relation as umpire, is the agent of the party for whom the work is to be done and for whose benefit the stipulation is made; that, when the work has been specifically and in good faith performed, a refusal to accept or to issue a certificate is unreasonable; and that a recovery may be had upon evidence other than the architect's certificate of performance. It is not necessary that we should consider the numerous cases to which we have been referred, and which are, perhaps, somewhat in antagonism, because