ture was genuine, and that the power of attorney was executed and acknowledged according to the laws of Missouri, and the record of this certificate with the power of attorney, conditions precedent to the right to record this power at all. They made such a certificate and the record of it prerequisites to the right to record any instrument affecting real estate, which was acknowledged without the territory before any other officer than a commissioner appointed by the governor of Nebraska; and this instrument was not acknowledged before such a commissioner. The power of attorney had no such certificate attached to it. Section 4338, Consol. St. Neb. 1891, which was in force during the trial of this case, provided that the certificate of the genuineness of the signature of an officer, where such certificate was required, should be recorded with the instrument acknowledged, and that, unless it was so recorded, neither the record of the instrument, nor the transcript thereof, should be read or received in evidence. The conclusion is irresistible that the power of attorney was never entitled to record, and that neither the record of it nor the certified copy of that record, which was offered in evidence, constituted any legal proof of its existence. Prentice v. Forwarding Co., 19 U. S. App. 100, 115, 116, 7 C. C. A. 293, 302, and 58 Fed. 437; Morton v. Smith, Fed. Cas. No. 9,867; Lowry v. Harris, 12 Minn. 255 (Gil. 166); O'Brien v. Gaslin, 20 Neb. 347, 30 N. W. 274; Greenwood v. Jenswold, 69 Iowa, 53, 28 N. W. 433; Ely v. Wilcox, 20 Wis. 523, 526; Fisher v. Vaughn, 75 Wis. 609, 615, 44 N. W. 831, 833.

It is strenuously argued by counsel for plaintiff in error that section 23 of chapter 31, supra, which provides that it shall be no objection to the record of a deed that no official seal is appended to the recorded acknowledgment, if there is a statement in the certificate of acknowledgment that it is made under the hand and seal of office of the person who took the acknowledgment, and the records show, by a scroll or otherwise, that there was such a seal, relieves the copy of the record of this power of attorney of the objection we have been considering. But the only effect of that section was to relieve the record of certain instruments affecting real estate from the objection that the official seal of the officer taking the acknowledgment did not appear thereon. It had the effect to relieve the record of the objection that the official seal of the mayor of the city of Savannah did not appear upon the face of the page on which it was recorded. That is not the objection to this evidence which we have been considering. The objection is not that the official seal of the mayor of the city of Savannah does not appear upon the record, but that the certified copy of that record is no evidence, under the statutes, that the power of attorney there recorded ever existed. No number of official seals would relieve the certified copy of this objection, while the certificate of the genuineness of the signature of the mayor, and of the execution and acknowledgment of the power according to the laws of the state of Missouri, was still wanting.

It is also contended that the want of this certificate is cured by the amendment found in section 4 of chapter 61 of the Laws of Nebraska of 1887, to the effect that all deeds theretofore executed and acknowledged, in accordance with the provisions of that act, should be, and

were thereby declared to be, legal and valid. But the objection here is not that this power of attorney was not legal and valid. It is that there is no competent evidence in this record that there ever was any such power. The act of 1887 does not affect the objection. It does not provide that the unauthorized record of this instrument in 1858 should become a legal or sufficient record, nor that a certified copy of that record should become evidence of the original power of attorney in the teeth of the express prohibition of the use of such evidence, by section 14 of chapter 31 of the Session Laws of Nebraska of 1856, and by section 4338 of the Consolidated Statutes of Nebraska of 1891. The act of 1887 has no effect upon the question at issue in this case. The difficulty with the plaintiff's case is that, when the trial closed, it had introduced no competent evidence that there was a power of attorney from Frodsham to Birkett, and the case stood as though no such power had ever been given, and as though the deed to Davis under that power had never been made. In this state of the proof, the evidence was that the title remained in Frodsham until 1882, when it passed to Jones, and through him to the defendant, Reed.

The statutes that have been under examination are too plain for construction. If they were not, the highest judicial tribunal of the state of Nebraska has repeatedly interpreted them, and has reached the same conclusion at which we have arrived. O'Brien v. Gaslin, 20 Neb. 347, 30 N. W. 274; Hoadley v. Stephens, 4 Neb. 431; Irwin v. Welch, 10 Neb. 479, 6 N. W. 753; Trust Co. v. Reiter, 66 N. W. 658, 663. These decisions constitute a rule of property in the state of Nebraska, and are of controlling authority in the national courts. The construction by the highest judicial tribunal of a state of its constitution or statutes, which establishes a rule of property, is controlling authority in the courts of the United States, where no question of right under the constitution and laws of the nation, and no question of general or commercial law, is involved. Brashear v. West, 7 Pet. 608, 615; Allen v. Massey, 17 Wall. 351; Lloyd v. Fulton, 91 U. S. 479, 485; Sumner v. Hicks, 2 Black, 532, 534; Jaffray v. McGehee, 107 U. S. 361, 365, 2 Sup. Ct. 367; Peters v. Bain, 133 U. S. 670, 686, 10 Sup. Ct. 354; Randolph's Ex'r v. Quidnick Co., 135 U. S. 457, 10 Sup. Ct. 655; White v. Cotzhausen, 129 U. S. 329, 9 Sup. Ct. 309; Chicago Union Bank v. Kansas City Bank, 136 U. S. 223, 235, 10 Sup. Ct. 1013; Detroit v. Osborne, 135 U. S. 492, 10 Sup. Ct. 1012; Madden v. Lancaster Co., 27 U. S. App. 528, 535–537, 12 C. C. A. 566, 570, and 65 Fed. 188, 192; Ottenberg v. Corner, 40 U. S. App. 320, 22 C. C. A. 163, and 76 Fed. 263, 269. **The judgment below must be affirmed, with costs, and it is so ordered.**

KIMBALL et al. v. PALMER.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1897.)

No. 205.

CARRIERS—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

For a shipper of poultry on a freight train to attempt to get on top of the box car next to the caboose, for the purpose of walking over the tops of the cars to the car containing his shipment while the train is in motion, is manifestly dangerous; and he cannot recover for a resulting injury, unless it is clear that it was necessary for him to do so.

In Error to the Circuit Court of the United States for the Western District of Virginia.

R. M. Page and A. Fulkerson, for plaintiffs in error.

J. W. Read and A. F. Bailey, for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

SIMONTON, Circuit Judge. This case comes up by writ of error to the circuit court of the United States for the Western district of Virginia. The plaintiffs in error (defendants below) are the receivers of the Norfolk & Western Railroad Company, one of the divisions of which runs from Bristol, Va., and crosses the Baltimore & Ohio Railroad at Shenandoah Junction. The defendant in error (plaintiff below), a dealer in poultry, had hired a car from the plaintiffs in error to transport poultry from Bristol to Washington, and his car, which formed a portion of a freight train which left Bristol, was to have been, when it reached Shenandoah Junction, switched off from the Norfolk & Western to the Baltimore & Ohio road. The plaintiff below was in the caboose attached to the train, with several other passengers, dealers in live stock, who had cars in said train. As the train was approaching the junction, the conductor aroused the passengers, including the plaintiff, telling them that it was time to go to their cars. The plaintiff below did not rouse himself immediately, and did not prepare to get out until the train was very near the junction, and when it was slacking to go on the siding. He then, with others, went out of the forward door of the caboose, and started to climb a ladder on the box car nearest to it, intending to proceed over the tops of the cars to his poultry car, some cars off. As he was ascending the ladder, there were indications that the train was about to stop. He hastened up the ladder, but, as he reached the top, the train stopped with a sudden and violent jerk, and he was caught between the projecting top of the caboose and the freight car next to it, and was seriously hurt. There was evidence tending to show that any one in the caboose could have gotten on the ground, and have walked along the train of cars to any car he wished. There was evidence also tending to show that it was the custom for persons who had cars (parts of the train) to visit them by getting on the tops of the cars. There was evidence also tending to contradict this evidence of such a custom. There was evidence also tending to show that there was some defect in the bumper of the box car next to the caboose,