and the contrary of a certain answer or statement made by the assured, with a denial under the absque hoc that said answer and statement were made a warranty. For example, the second plea alleges that in and by the application it was inquired of the assured: "State fully your occupation, profession, or trade. State kind of business and duties." To which George W. Hubbard answered as follows: "Banker and broker." "Whereas the defendant avers that in truth and in fact the occupation, business, and trade of said George W. Hubbard was not, at the date of said application, that of a banker and broker," etc. The replication which is an example of the remaining replications covered by the demurrers is as follows: "And the said plaintiff saith that for everything by the said defendant corporation secondly above pleaded precludi non, because she says that the occupation, profession, and trade of said Hubbard at said time was that of a banker and broker (without this said answers are by said certificate of membership or policy of insurance warranties on the part of said Hubbard), and of this the said plaintiff puts herself on the country." The replications (with one exception) do not deny the making of the statements, but substantially deny their falsity, and furthermore deny that the answers or statements were made warranties. As the inducement of a special traverse can properly be of no other nature than an indirect denial, and as in this case it consists of a direct denial, the special traverse must be held improper. Steph. Pl. p. 184.

The defendant contends that the denial under the absque hoc is insufficient in law. If so, then, although in such case the inducement may be traversed, the replication, without a proper denial under the absque hoc, is merely a common traverse in effect, and should be so pleaded. If, on the other hand, the denial under the absque hoc is sufficient in law, then the inducement can neither be traversed nor confessed and avoided. Steph. Pl. p. 188. There is, as defendant's counsel contend, a practical difficulty in attempting to rejoin to these replications. If defendant files a similiter, and the denial under the absque hoc is good in law, then the only issue is whether the answers were warranties. But there are also, upon the face of the pleadings, material and contradictory averments upon which, according to the rules of pleading, no issue can be reached. Although the pleadings show the substantial dispute to be whether the statements of the assured were true or false, the only issue reached is whether they were warranties; thus defeating the purpose averred by the plaintiff's counsel upon his brief, and manifest throughout the pleadings, as well as violating well-established principles of pleading. The facts of the plea constitute but one connected proposition or entire point, and, on examination of the whole record, the first fault is not with the defendant, but with the plaintiff.

The third inquiry is as to the validity of the agreement of the insured that the person soliciting or taking the application, and also the medical examiner, should be the agents of the applicant, and not of the company, and that no statements or answers should be binding on the company unless reduced to writing, and contained in the application. The counsel for the plaintiff says on the brief: "All of

these clauses attempt to make the insured say that the company's agents are his, and the second that nothing known by the company is known unless in writing. Both of these propositions are bold attempts on the part of the company to alter facts, and to make that which is not the fact for the purpose of this contract to be taken as reality." The plaintiff attempts by her replication to set up a contract different from the written contract, and thereby to avoid by parol evidence the effect of the written agreement. The case of Insurance Co. v. Fletcher, 117 U. S. 519, 6 Sup. Ct. 837, has settled the law upon this question. Mr. Justice Field said that "it was his duty to read the application he signed. He knew that upon it the policy would be issued, if issued at all. It would introduce great uncertainty in all business transactions if a party making a written proposal for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it notwithstanding their falsity as to matters essential to its obligation and validity." "The present case," said the court, "is very different from Insurance Co. v. Wilkinson, 13 Wall. 222, and from Insurance Co. v. Mahone, 21 Wall. 152." "In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured. * * * Here the power of the agent was limited, and notice of such limitation given, by being embodied in the application which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is therefore bound by its statements." See, also, the opinion of Mr. Justice Harlan in Maier v. Association (February 2, 1897) 24 C. C. A. 239, 78 Fed. 566.

The fourth inquiry is: Is the company restricted in its defense to the reasons assigned in its refusal to pay? This arises upon demurrer to the sixteenth replication, which, in reply to the defense contained in the fourteenth plea (that no satisfactory proofs of the death of George W. Hubbard, made out in accordance with the provisions of the policy, had ever been presented to or accepted by the defendant), avers that the defendant, "by vote of its executive, voted, for reasons in said vote stated, to revoke, cancel, and annul the approval of said claim of said plaintiff to the payment of said policy, and that thereafterwards, to wit, on January 9, 1894, transmitted to said plaintiff a certified copy of said vote; and said plaintiff avers that in and by said vote and said copy of the same, as so aforesaid transmitted to her, said defendant does not assign, as its reason for said refusal to pay said policy, any of the several matters in said fourteenth and subsequent pleas set up by said defendant in bar of said plaintiff's said suit, and said plaintiff avers that, by said acts of said defendant as herein set forth, said defendant has waived its right, if any it ever had, to set forth any of said several matters in said pleas contained in bar of said plaintiff's said action, and is thereby estopped to plead the same herein, and this she is ready to verify," etc. As was said by Mr. Justice Field in Insurance Co. v. Wolff, 95 U. S. 326, above quoted, the doctrine of waiver is only another name for estoppel, and can only be invoked where the conduct of the company has been such as to in-

duce action in reliance upon it. And as was said in Ketchum v. Duncan, 96 U. S. 659: "An estoppel in pais does not operate in favor of everybody. It operates only in favor of a person who has been misled to his injury, and he only can set it up." There is no averment that the action of the plaintiff was influenced by the omission to set forth the ground in the notice. The defendant's demurrers are sustained, and the plaintiff's demurrers overruled.

HOLT COUNTY et al. v. NATIONAL LIFE INS. CO. OF MONTPELIER, VT.

(Circuit Court of Appeals, Eighth Circuit. April 19, 1897.)

No. 867.

1. RES JUDICATA—MANDAMUS TO LEVY TAX.
   A judgment against a school district, and the issuance of a mandamus requiring its officers to levy a tax to pay the same, is conclusive upon the question whether the levy ordered was in excess of the statutory power of the school district, and cannot be again raised or retried in a subsequent proceeding by either the school district, its officers, or any parties in privity with them.
2. SAME—ESTOPPEL AGAINST TAXPAYER.
   County officers whose duty it is under the statutes of a state to levy and collect the taxes voted by a school district and certified by its officers, pursuant to a judgment of mandamus of a federal court, become the mere ministerial officers of that court to enforce its judgment, and they stand in privity with all the parties to the proceeding for the mandamus.
3. SAME—FEDERAL AND STATE COURTS—INJUNCTION.
   An injunction issued by a state court at the instance of a taxpayer restraining the collection of a tax levied pursuant to a mandamus from a federal court is ineffectual, and is no excuse to the county officers for failing to collect the tax.

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

This writ of error was sued out by the county of Holt, in the state of Nebraska, and its county clerk, county treasurer, and board of supervisors, the plaintiffs in error, to reverse a judgment of mandamus against them, which directed them to collect and pay over a tax of 50 mills on the dollar which had been levied upon the property in school district No. 44 in that county, to pay a judgment in favor of the National Life Insurance Company of Montpelier, Vt., which had been rendered against that district. The case was tried by the court upon an agreed statement of facts, and the only question presented here is whether those facts warrant the judgment. The facts were these: On November 26, 1894, the National Life Insurance Company of Montpelier, Vt., recovered a judgment in the court below for $5,023.88 against school district No. 44 in the county of Holt. In the case of the United States, on the relation of this insurance company, against school district No. 44, its director, moderator, and treasurer, the same court subsequently adjudged that the school district and its officers should make and report to the county clerk and board of supervisors of the county of Holt, annually, for five years, the amount of tax upon the property in that district necessary to be levied and collected to pay one-fifth of the amount due on this judgment, with interest and costs, and that, in case the necessary steps should not be taken to make such reports and to levy and collect such taxes until the entire judgment should be paid, a peremptory writ of mandamus should issue to compel the performance of these duties. On June 25, 1895, pursuant to this judgment, the following taxes were voted by this school district for the ensuing year, viz.: For teachers' fund,

15 mills on the dollar; for fuel, repairs, books, and supplies, 10 mills on the dollar; for judgments against the district, 50 mills on the dollar,—total, 75 mills on the dollar; and the school board of that district certified these taxes to the county clerk of Holt county, and he duly levied them upon the property in the district, placed them upon the tax list, and certified them to the county treasurer of the county for collection, pursuant to the command of the judgment and the provisions of the statutes of Nebraska. On February 7, 1896, the Fremont, Elkhorn & Missouri Valley Railroad Company, a corporation, and one of the taxpayers in school district No. 44, refused to pay the tax of 50 mills which had been levied on its property to pay the judgment, on the ground that that levy was illegal, and thereupon the board of supervisors of Holt county passed a resolution to the effect that the county treasurer of that county might fail to collect that tax, and that the county attorney of that county might enter into an amicable suit with the railroad company upon an agreed statement of facts, to determine the legality of the levy of this 50 mills, which had been made pursuant to the judgment of the federal court. On February 17, 1896, the railroad company brought a suit in one of the state courts in Nebraska against the plaintiffs in error in this suit, and prayed for an injunction forbidding them to collect this tax. The railroad company was careful not to disclose to that court in its complaint in that suit the controlling fact that this tax had been levied under the judgment of the circuit court of the United States, and the state court undoubtedly acted in ignorance of that fact. The plaintiffs in error demurred to this complaint, and an injunction was issued against them as prayed. On May 28, 1896, the United States, on the relation of the National Life Insurance Company of Montpelier, Vt., brought this action, and prayed that the county of Holt and its officers be commanded to collect and pay over the tax which had been levied to pay the judgment of the insurance company against the school district, and, after answer and trial, the prayer of the petitioner was granted.

William B. Sterling, B. T. White, and H. E. Murphy, for plaintiffs in error.

Lionel C. Burr and Charles L. Burr, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The only ground on which it is contended that the judgment below in this case was erroneous is that the tax of 50 mills on the dollar, which was levied on the property in school district No. 44, pursuant to the judgment of mandamus against that district, to raise money to pay a part of the money judgment against it, was in excess of the limitation prescribed by the statutes of Nebraska for the annual levy of taxes by that district, and was therefore illegal and void. The legislature of the state of Nebraska by "An act to provide for the payment of judgments recovered against municipal corporations," which took effect on February 18, 1867, provided:

"4112. That whenever any judgment shall be obtained in any court of competent jurisdiction in this territory for the payment of a sum of money against any county, township, school district, road district, town or city board of education, or against any municipal corporation, or when any such judgment has been recovered and now remains unpaid, it shall be the duty of the county commissioners, school district board of education, city council, or other corporate officers, as the case may require, to make provisions for the prompt payment of the same.

"4113. If the amount of revenue derived from taxes levied and collected for ordinary purposes shall be insufficient to meet and pay the current expenses for the year in which the levy is made, and also to pay the judgment remain-

ing unpaid, it shall be the duty of the proper officers of the corporation, against which any such judgments shall have been obtained and remaining unsatisfied, to at once proceed and levy and collect a sufficient amount of money to pay off and discharge such judgments.

"4114. The tax shall be levied upon all the taxable property in the district, county, township, town, or city, bound by the judgment, and shall be collected in the same manner and at the same time provided by law for the collection of other taxes.

"4115. The corporate officers whose duty it is to levy and collect taxes for the payment of the current expenses of any such corporation, against which a judgment may be so obtained, shall also be required to levy and collect the special tax herein provided for, for the payment of judgments.

"4116. If any such corporate authorities whose duty it is, under the provisions of this act, to so levy and collect the tax necessary to pay off any such judgment, shall fail, refuse or neglect to make provisions for the immediate payment of such judgments, after request made by the owner, or any person having an interest therein, such officers shall become personally liable to pay such judgments, and the party or parties [interested] may have an action against such defaulting officers to recover the money due on the judgment, or he or they having such interest may apply to the district court of the county in which the judgment is obtained, or to the judge thereof in vacation, for a writ of mandamus to compel the proper officers to proceed to collect the necessary amount of money to pay off such indebtedness, as provided in this act; and when a proper showing is made by the applicant for said writ, it shall be the duty of the court or judge, as the case may be, to grant and issue the writ to the delinquents, and the proceedings to be had in the premises shall conform to the rules and practice of said court, and the laws of this territory, in such cases made and provided."

Cobbey's Consol. St. Neb. 1891.

By "An act to establish a system of public instruction for the state of Nebraska," approved March 1, 1881, which took the place of similar acts passed or amended in 1867, 1869, 1871, 1873, and 1875, the same legislature enacted that:

"3542. The legal voters at any annual meeting shall determine by vote the number of mills on the dollar of the assessed valuation which shall be levied for all purposes—except for the payment of bonded indebtedness and purchase or lease of school house—which number shall not exceed twenty-five (25) mills in any year. The tax so voted shall be reported by the district board to the county clerk, and shall be levied by the county board, and collected as other taxes.

"3543. The legal voters may also, at such meeting, determine the number of mills, not exceeding ten mills on the dollar of assessed valuation, which shall be expended for the building, purchase or lease of school house in said district, when there are no bonds for such purpose, which amount shall be reported, levied and collected as in the preceding section; provided, that the aggregate number of mills voted shall not exceed twenty-five (25) mills."

Cobbey's Consol. St. Neb. 1891.

The claim of the plaintiffs in error is that sections 3542 and 3543, supra, limit the power of school districts to vote taxes to pay judgments under the special law of 1867 to 25 mills on the dollar, annually, for all purposes, and that, as in this case the district voted 25 mills for current expenses and 50 mills to pay the judgment, the levy of the 50 mills was in excess of the limitation, and void. If this contention could have been maintained under the law, it might have constituted a good defense for the school district in the original action for a mandamus against that corporation; but it is difficult to understand how, after that judgment was rendered, it could be any excuse for the failure of the county treasurer or any other county officer to

collect the tax which the district voted, certified, and caused to be levied in compliance with the judgment in that case. The circuit court necessarily heard and decided the very issue which the plaintiffs in error are seeking to retry here before it adjudged that the school district must certify and cause the 50 mills on the dollar to be levied on the property within its boundaries to pay the money judgment. That court could have directed no levy which the district and its officers had not the power to certify and cause to be made, and the extent of that power, under the statutes we have quoted, must have been the very first question that challenged its consideration, and demanded its judicial decision in that case. That its decision was adverse to the view urged upon us by the counsel for the plaintiffs in error is evident from the fact that it directed the school district to cause twice the total amount which they claim it could cause to be levied annually for all purposes to be levied annually for the sole purpose of paying this judgment. It is not material that the school district and its officers failed to interpose the defense now urged in that action. It is a universal rule that in an action between the same parties, or those in privity with them, upon the same claim or demand, a judgment upon the merits is conclusive, not only as to every matter offered, but as to every admissible matter which might have been offered to sustain or defeat the claim or demand. Board of Com'rs v. Platt, 79 Fed. 567; Cromwell v. Sac Co., 94 U. S. 351, 352; Dickson v. Wilkinson, 3 How. 57, 61; Dimock v. Copper Co., 117 U. S. 559, 565, 6 Sup. Ct. 855. The parties to the original action of mandamus were the defendant in error in this case on one side and school district No. 44 and its officers on the other; and as to them, and as to all parties in privity with them, the question which counsel seek to present in this case is res adjudicata. The judgment in that case conclusively estops them all from again presenting this defense, for that judgment has never been reversed, set aside, or modified, and this action is based upon the same claim as was that. How, then, can the plaintiffs in error be heard to retry this question? Their only connection with, or interest in it, or in any question involved in this case, arises by virtue of their privity with the parties to that proceeding. They have no pecuniary interest in any of these questions. They bear no relation to the subject-matter of the controversy, or to the questions involved in it, save that which is established by the law and the statutes of Nebraska, which impose upon them the duty of levying, collecting, and paying over the tax which the school district voted and certified, pursuant to the command of the judgment in that case. Their relation to that judgment of mandamus and to the parties to that action is the same that a sheriff holding an execution bears to the parties to the action in which it was rendered. The county treasurer of Holt county holds the tax list which contains this tax of 50 mills on the dollar upon the property in school district No. 44, and the warrant of the county clerk, and the direction of the statute, commanding him to collect it, and pay it over for the benefit of this insurance company, pursuant to the judgment under which it was levied. Cobbey's Consol. St. Neb. 1891, §§ 3981, 3982, 3986, 3988. The plain-

tiffs in that judgment ask him to proceed to collect the money, and pay it over for the benefit of the plaintiff in the money judgment, and the county treasurer and the other plaintiffs in error answer that they will not, because the original judgment of mandamus against the district was for the wrong party. Who made them an appellate tribunal to review the judgments of the courts? Who ever heard that a sheriff could lawfully excuse himself from collecting an execution against the defendant on the ground that the judgment of the court which issued it should have been against the plaintiff? The fact is that under the law and the statutes in Nebraska the plaintiffs in error are the mere hands of the court in this case, the mere ministerial officers upon whom the duty has been imposed of taking the amount owing under the original judgment of mandamus from the taxpayers in school district No. 44, and paying it over to the insurance company to whom it is due. They stand in privity with both the plaintiffs and defendants in the original judgment of mandamus, and their only connection with the subject-matter of that action, or with this case, arises from that privity alone. They are, accordingly, as effectually estopped from questioning the decision of the court in that case, and from retrying the question of the legality of the levy directed by that judgment, and the question of the power of the school district to vote and certify the tax ordered thereby, as is the district itself. Nor was the railroad company which applied for the injunction against the collection of this tax in any better plight. It was a taxpayer in school district No. 44, and, as long as the judgment of mandamus against that district stood unreversed, unmodified, and unimpeached for fraud or collusion, it conclusively estopped every citizen and every taxpayer in it from questioning or retrying the extent of the power of that district to vote and certify the tax ordered by the judgment, or any other question which involved the legality of that tax. In that litigation the school district was the representative of the railroad company and of every other taxpayer in it, and the decision and the judgment, in the absence of fraud or collusion, were as conclusive upon them as upon the corporate entity itself. Freem. Judgm. § 178; 2 Black, Judgm. § 584; Clark v. Wolf, 29 Iowa, 197; Ashton v. City of Rochester (N. Y. App.) 30 N. E. 965; Railroad Co. v. Baker (Wyo.) 45 Pac. 494, 501.

It is not claimed that the injunction issued by the state court is any defense to this action, and with good reason. The circuit court of the United States had jurisdiction of the parties against whom its judgments were rendered, and of the property which those judgments charged with liens years before the suit in the state court was commenced. When it was commenced, the federal court was proceeding by its judgment of mandamus to collect its judgment for money. The former was, in effect, the writ of execution to enforce satisfaction of the latter, and the plaintiffs in error were, as we have seen, the ministerial officers charged under the law and the statutes with the duty of executing this writ. The tax of 50 mills on the dollar to pay the judgment had been voted, certified, levied, and placed upon the tax list of the county, pursuant to the command of the judgment of mandamus in that court, and the county clerk had delivered to the