and the proper designation of it, the way so appropriated ceased to be a portion of the public domain, was withdrawn from it; and the lands through which it passed were disposed of subject to the right of the road company, such right being reserved in the grant. The road company, as shown, became the owner of the right of way. By the use of its money it improved this right of way, making a highway over which the public could pass by the payment of tolls. Although the public became entitled to use the road, such right was only by compliance with the fixed regulations recognizing the ownership. The statutes also provide remedies for any interference, and it is clear that the road company could maintain trespass or other actions for any unwarranted interference with its possession and rights. The fact that the public could pass over the road at pleasure does not detract from the position here taken as long as such right was dependent upon the payment of tolls, which was a constant recognition of ownership and property. It is also clear that the company had such title as could be sold and transferred, and the successor invested with the right of possession. "Property" is defined to be "the right and interest which a man has in lands and chattels to the exclusion of others." Bouv. Law Dict. "Applied to lands, comprehends every species of title, inchoate or incomplete. Embraces rights which lie in contract, those which are executory as well as those which are executed." And. Law Dict.; Soulard v. U. S., 4 Pet. *512; Delassus v. U. S., 9 Pet. 133; Smith v. U. S., 10 Pet. 329. Tested by these well-settled principles, it will readily be seen that the contention of plaintiff that it had no tangible, taxable property in the road cannot be sustained. It had its granted right of way, together with its road, for the use of which it exacted dues. A toll road is very analogous to a railway to which congress grants the right of way over the public domain. The right of the state to tax a railway, including roadbed, track, and all betterments upon its right of way, has never been seriously questioned. It is true, a railway is not technically a public highway, but the analogy between it and a toll road, for the purposes of taxation, is so marked that they should evidently be regarded alike. See Railway Co. v Gordon, 41 Mich. 429, 2 N. W. Rep. 648; Rogers v. Burlington, 3 Wall. 664; Railroad Co. v. County of Oteo, 16 Wall. 667. The fact that the county commissioners had supervisory control to regulate tolls can have no bearing whatever. It in no way interferes with the ownership or control; only fixes the price the public shall pay for the use of the property. The right to so regulate by virtue of the police power of the state, to prevent extortion, whether by toll roads or railways, is so well settled that discussion is unnecessary; it neither divests, defines, nor modifies ownership. Section 2847, Gen. St., "The property of corporations and companies constructing canals, ditches, flumes, plank roads, gravel roads, turnpike roads, and similar improvements, shall be assessed to the company or corporation in the respective counties in which said improvement is situated." This, if necessary, might almost be regarded as an authoritative declaration by the legislature of ownership and property in constructions of this kind, and of the duty of officials to assess and collect taxes. By sections 3-6 (both inclusive) of article 10 of the state constitution all property not therein exempted is subject to taxation, and by section 2814, Gen. St., it is declared: "All property, both real and personal, within the state, not expressly exempt by law, shall be subject to taxation," etc. We conclude that the plaintiff was the owner of property subject to appraisement and taxation, and, not having been by law exempted, the judgment must be affirmed.

(3 Colo. A. 37)

MARTIN v. McCARTHY, Sheriff.

(Court of Appeals of Colorado. Nov. 28, 1892.)

ACTION AGAINST SHERIFF — UNLAWFUL SEIZURE — ESTOPPEL.

The filing of a plea of intervention, and a voluntary dismissal thereof, by an assignee for the benefit of creditors, in an action by a third person against his assignor and a sheriff who has seized under an attachment a stock of goods belonging to the assignor, is no bar to the assignee's right to maintain an action against the sheriff for the value of the goods seized.

Error to district court, Pueblo county.

Action by Edmund H. Martin, assignee of Frank C. Taft, against T. G. McCarthy, sheriff, to recover the value of goods belonging to his assignor, alleged to have been wrongfully seized under an attachment by defendant. On appeal from a judgment for plaintiff in the county court, the action was dismissed on defendant's motion, and plaintiff brings error Reversed.

Dixon & Dixon and Urmy & Crane, for plaintiff in error.

Rogers, Cuthbert & Ellis, for defendant in error.

The filing of a plea of intervention by plaintiff in error in the action by Beifeld & Co. against Taft and the sheriff was a bar to an action by plaintiff in error against the sheriff. Terry v. Munger, (N. Y. App.) 24 N. E. Rep. 272; Conrow v. Little, 115 N. Y. 387, 22 N. E. Rep. 346; Fowler v. Bank, 113 N. Y. 450, 21 N. E. Rep. 172; Morris v. Rexford, 18 N. Y. 552; Butler v. Hildreth, 5 Metc. (Mass.) 49; Bulkley v. Morgan, 46 Conn. 393.

RICHMOND, P. J. November 26, 1890, Frank C. Taft made an assignment for the benefit of his creditors to Edmund H. Martin, plaintiff in error. Prior to the assignment, the sheriff of Pueblo county, T. G. McCarthy, pursuant to a writ of attachment sued out, seized a stock of merchandise, and had the same in custody at the time of the assignment. The assignee demanded possession of the stock, which was refused. Thereafter Beifeld & Co. instituted an attachment proceeding in the district court of Arapahoe county against Taft and the sheriff of Pueblo

county, and levied upon the property covered by the assignment and former attachment writ. Subsequently Martin filed a plea of intervention, which Beifeld & Co. answered. Before the trial of the plea of intervention either on the pleadings or the merits, and after the order of sale had been entered, Martin voluntarily dismissed his intervention proceeding, with the consent of the court, and subsequently commenced an action for damages against the sheriff. Trial was had in the county court, and judgment rendered in favor of Martin for the sum of $1,542.23. An appeal was taken to the district court where, after the evidence offered by plaintiff had been received, defendant moved the court to dismiss the action, on the ground that Martin had two remedies, and, having elected to claim the property as intervener in the original attachment suit, he thereby defeated his right to institute an action for the value of the goods. The motion to dismiss was sustained. The only question involved in this appeal is, did the action of Martin in instituting the intervention proceedings, and subsequently dismissing, defeat his right to institute another action?

The Code[1] provides that any person shall be entitled to intervene in an action who has an interest in the matter in litigation, in the success of either of the parties to the action, or an interest against both. We do not think that this or any other provision of the Code makes it obligatory upon a party to intervene in proceedings where the title to property or the possession thereof is involved, although he may know of the proceedings, be the owner, or entitled to the possession. It is clearly a right that he may exercise, and one he could not have exercised unless conferred by statute. By the Code it is also provided that an action may be dismissed or a judgment of nonsuit entered in the following cases: "First. By the plaintiff himself at any time before trial upon the payment of costs if a counterclaim has not been made. * * *" Sess. Laws, 1887, p. 149. By the record in this case we learn that this action of dismissal was voluntarily made by the attorneys for the intervener. It was not the result of an agreement between the parties, nor did it amount to a retraxit. It was nothing more than a discontinuance, and, after a most thorough examination of all the authorities at our command, we have reached the conclusion that the dismissal, under the circumstances, did not defeat his right to institute another action. In Freas v. Engelbrecht, 3 Colo. 377, this language is used: "it was never heard that judgment of non pros at law, or the dismissal of a bill in equity, expressly for default of prosecution, would bar another suit at law or a new bill in equity for the same cause. The judgment or decree it is said is but 'the blowing out of a candle, which a man may light again at his pleasure.'" In the case of Parks v. Dunlap, 86 Cal. 189, 25 Pac. Rep. 917, Works, J., in commenting upon a similar proposition, says: "The contention of the appellant is that the dismissal as to him, in the former action, was a retraxit, amounted to an adjudication in his favor, as to the validity of his mortgage, and is a bar against the respondents to any defense against it. Conceding, however, that the question in litigation in the former action was the same now presented, it is well settled that the voluntary dismissal of an action, without any agreement of the parties, or other circumstances tending to show that such a dismissal was intended as a final disposition of the dispute between the parties, is not a bar to another action." Merritt v. Campbell, 47 Cal. 542; Crossman v. Davis, 79 Cal. 603, 21 Pac. Rep. 963. In the case of Bank v. Haire, 36 Iowa, 443, it was held that "where a plaintiff, by his counsel, enters a dismissal of his cause in writing on the back of the petition, with the manifest intent of dismissing it, and both parties act accordingly, the action will be deemed dismissed, and its pendency cannot be relied upon to defeat a subsequent action for the same cause. Where a suit is discontinued after judgment, the adjudication concludes no one, and is not an estoppel or bar in any sense. Loeb v. Willis, 100 N. Y. 231, 3 N. E. Rep. 177 In National Waterworks Co. v. School Dist., 23 Mo. App. 227, it was held that a "nonsuit is, in effect, a dismissal of the action, and this may be done at any time before the final submission for the verdict of the jury. A voluntary nonsuit, taken by the plaintiff at any time before the judgment, will not estop him to bring a new action. Much more so should this rule apply where the nonsuit is enforced by an adverse conclusive ruling of the court." The plaintiff, by entering a nonsuit, retains the advantage of bringing another action, and this he can doubtless do when the nonsuit is ordered by the court. Mason v. Lewis, 1 G. Greene, 496; See, also, Smith v. Ferris, 1 Daly, 18; Lambert v. Sandford, 2 Blackf. 137. A decree dismissing a bill is no bar to a subsequent suit, unless it is shown that there was an absolute determination that the party had no title, and that the matter is res adjudicata. Chase's Case, 1 Bland, Ch. 206. "It is conceded that a previous suit against one or more is no bar to a new suit against others, even though the first suit be pending or have proceeded to judgment when the second is brought. The second or even a subsequent suit may proceed until a stage has been reached in some one of them at which the plaintiff is deemed in law to have either received satisfaction, or to have elected to rely upon one proceeding for his remedy, to the abandonment of the others. * * *" Cooley, Torts, p. 157. We could multiply authorities in support of our position, but we deem it unnecessary to do so. There was no judgment upon the merits in the controversy between the attaching creditor and intervener; no agreement entered into nor personal appearance on the part of the intervener which would amount to a retraxit.

The contention of defendant in error that the parties, having elected to file a petition in intervention, whereby they claimed the possession of the property in

[1]Code Civil Proc. 1883, § 16.

controversy as against all the parties, are estopped from bringing this action, we cannot sanction. All of the cases cited in support of their contention do not present the question as in the case at bar. There is no doubt that there are certain acts or omissions of a party by which another is injured, from which a liability results to make compensation in damages. In such cases the law implies a promise to pay the damages, and the injured party may treat the action as arising from the tort, or, by waiving the tort, sue upon an implied contract, by setting forth the facts from which the law infers a promise. This right exists for the wrongful taking or conversion of chattels, things in action, or money; the wrongful use of lands; appropriation of rents and profits; fraud of purchaser in obtaining goods on credit. Thus, when goods and chattels have been wrongfully taken or detained, and have been sold or disposed of by the wrongdoer, the owner may sue in tort for the damages, or he may waive the tort, and bring his action on the implied promise. Maxw. Code Pl. p. 581. By the intervention proceedings, Martin did not waive the tort, nor was it a complaint based upon an implied promise. In neither of the proceedings—the one now under consideration, or the intervention—was or is there a waiver of the wrongful taking. The single principle upon which the entire doctrine of election rests is very simple, and is formulated by Mr. Pomeroy as follows: "From certain acts or omissions of a party creating a liability to make compensation in damages, the law implies a promise to pay such compensation. Whenever this is so, and the acts or omissions are at the same time tortious, the twofold aspect of the single liability at once follows, and the injured party may treat it as arising from the tort, and enforce it by an action setting forth the tortious acts or defaults; or may treat it as arising from an implied contract, and enforce it by an action setting forth the facts from which the promise is inferred by the law. * * *" Pom. Rem. & Rem. Rights, § 568. The New York cases cited are in keeping with this principle, and in no sense militate against our conclusion. We think the court erred in sustaining the motion to dismiss the action. The judgment must be reversed, and the cause remanded for further proceedings.

On Rehearing.

(March 13, 1893.)

PER CURIAM. We have carefully examined the authorities submitted on the rehearing in this case. At the time of writing the opinion our attention had not been called to cases wherein the exact proposition now under consideration had been discussed. In the case of Perrin v. Claflin, 11 Mo. 13, it is held that "where the goods of one are seized under an attachment against another, on an interpleader filed by the owner of the goods so taken, if the plaintiff in the attachment defend the interpleader, it will be evidence of his assent to the seizure by the officer, and such subsequent assent will render the plaintiff liable in trespass." The general doctrine is that "when one who is the owner of property attached as that of another may either intervene in the suit to claim his property, or he may sue the sheriff or the purchaser without making himself a party to the attachment suit, when he has been adjudged the owner, he has his action against the sheriff for wrongful seizure. * * *" Wap. Attachm. p. 483. The supreme court of Missouri, in the case of Clark v. Brott, 71 Mo. 473,—a case similar to the one now under consideration,—say: "It is contended with plausibility, by defendants' counsel, that Clark, on the seizure of the goods by the sheriff, had his election to sue in trespass or replevin, or to interplead under the statute; and that, having elected to proceed under the statute, and obtained a judgment in his favor, he is precluded from resorting to any other remedy. The judgment rendered was for the recovery of the property which had been sold under the order of the court, and the proceeds of sale were considerably less than the invoice price of the goods." Held, that "the recovery of judgment by an interpleader in attachment proceedings will be no bar to an action by the interpleader against the attaching officer for the wrongful seizure. These authorities, and others furnished by the plaintiff in error, conclusively satisfy us that we should adhere to our opinion.

STATE ex rel. PETERSON v. SUPERIOR COURT OF PIERCE COUNTY et al.

(Supreme Court of Washington. Jan. 31, 1893.)

LEVY OF ATTACHMENT — PROPERTY IN ANOTHER COUNTY — TRIAL OF RIGHTS OF CLAIMANT — VENUE.

When property is seized under a writ of attachment issued in a suit brought in another county, and a third person, claiming the property, files with the sheriff the affidavit and bond required in such case by Code 1881, c. 33, the statute provides that such officer shall return these papers to the clerk of the county where the property was seized, and that such clerk shall place the cause for the determination of the rights of the parties as to the property on the trial docket of the court of his county at the next term; the person claiming the property being the plaintiff, and the sheriff and the plaintiff in attachment, defendants. *Held*, that the provision requiring the trial of the rights of the parties in the county in which the property was seized is mandatory, and a writ of prohibition will issue if the court of another county attempts to proceed with the trial.

Petition by the state of Washington, on the relation of J. S. Peterson, against the superior court of Pierce county and others, for a writ to prohibit defendant court from proceeding with the trial of a certain cause. Granted.

Fred H. Peterson and John H. Elder, for relator.

STILES, J. The relator's petition shows that about June 1, 1890, one H. T. Wright commenced an action in the superior court of King county against one Thomas Johnson, which cause was docketed in that court as cause No. 3,904, and a writ of attachment was issued in the action, and directed to the sheriff of Mason