defendants in error had procured the contract of sale, but these contracts were, with their consent and advice, rescinded, and that the agents could only demand proportionate compensation. These findings are in accordance with well-settled principles of law. As to the cargoes of the Cyanus and Hessle, they made complete sales; and, when the plaintiff in error was unable to make up the cargoes, their agents procured from other sources the necessary quantity of phosphate rock to make up the deficiency, and thus enabled the plaintiff in error to carry out fully the contracts. McGavock v. Woodlief, 20 How. 221; Kock v. Emmerling, 22 How. 69. The compensation allowed on the other contracts rests upon the principle that where the service is begun, and an important part performed, and the factor or broker is prevented by some irresistible obstacle from completing it, and is himself without fault, he is entitled to proportionate compensation. 1 Pars. Cont. 84.

There is another ground of error assigned in connection with the allowance of commissions which was considered under the first three assignments; that is, that the court below could not, under the pleadings in the case, receive testimony as to the items making up the account for commissions. We have disposed of that question, and its further consideration is unnecessary.

We find no error in the record, and the judgment of the circuit court is affirmed.

BAKER v. NEW YORK LIFE INS. CO.

(Circuit Court, D. Nebraska. December 14, 1896.)

No. 30.

LIFE INSURANCE—FALSE REPRESENTATIONS—BREACH OF WARRANTY—WAIVER.

One B., in answering certain questions in an application for life insurance, the answers to which were by the terms of the application made warranties, stated that he had had no serious illness since childhood, and had not since childhood been confined to the house by illness. A few months before his application B. had had an attack of the grippe, which had confined him to the house for two or three days, and about which he had consulted a physician. He died six months after the issue of the policy, in December, 1893. In March, 1894, after proofs of death had been presented, the insurance company received full information of the facts as to B.'s attack of grippe. In July following it requested B.'s widow to procure her appointment as guardian of her children, pointing out that the proofs of death did not show such appointment. She presented proof of her appointment in August. In October following the company, at an interview with the attorneys for B.'s widow, first denied its liability, relying on B.'s alleged misstatement, but did not tender back the premium paid, and did not give notice of a rescission of the contract or tender back the premium until March, 1895, some months after the commencement of an action on the policy. *Held*, that the insurance company had waived any right to repudiate or rescind the contract on the ground of B.'s alleged breach of warranty.

This was an action at law by Ida M. Baker, guardian, etc., against the New York Life Insurance Company, to recover upon a policy of insurance upon the life of Ward L. Baker.

Brome, Burnett & Jones, for plaintiff.
J. H. McIntosh, for defendant.

SHIRAS, District Judge. This case came up for trial before the court and jury at the May term, 1896, and upon the issues then presented by the pleadings evidence was submitted, and special findings of fact were returned by the jury, and thereupon the plaintiff asked leave to file an amended replication for the purpose of establishing a waiver on the part of the defendant company of the right to insist upon an alleged breach of warranty on part of the assured. Leave to file the amendment was granted, and the case was continued for the purpose of permitting evidence to be procured by the parties, rendered necessary by the amendment to the pleadings. The parties then entered into a written stipulation, waiving a jury trial and submitting the case to the court, it being further agreed that the case should be submitted to the court upon the findings of fact returned by the jury and upon the evidence submitted upon the issue tendered by the amended replication, the court to make a further finding of facts based upon the evidence taken after the finding of facts had been returned by the jury, which has been done. From the facts thus found, it appears that, under date of June 24, 1893, Ward L. Baker signed an application for insurance in the sum of $5,000 upon his life in the defendant company, it being stated in such application that the applicant agrees:

"That the statements and representations contained in the foregoing application, together with those contained in the declarations made by me to the medical examiner, shall be the basis of the contract between me and the New York Life Insurance Company; that I hereby warrant the same to be full, complete, and true, whether written by my own hand or not,—this warranty being a condition precedent to and a consideration for the policy which may be issued hereon."

In the declarations made to the medical examiner it was required of the applicant that he should "give full particulars of any serious illness you may have had since childhood," to which the answer given was, "Have had none." And the question was also asked, "When were you last confined to the house by illness?" and answered, "Not since childhood." The company issued the policy, and upon payment of a year's premium the same was delivered to Baker, and within the year, to wit, on December 22, 1893, Baker died, and due proofs of death were furnished to the company. It thus appears that a prima facie case for recovery upon the policy has been made out, and the question to be determined in the case is whether the defense interposed by the defendant is sustainable under the evidence.

In substance, the defense is that of a breach of warranty with respect to the answer by Baker to questions contained in the medical examination, being the questions and answers just cited. On behalf of the defendant it is contended that, under the provisions contained in the application, these answers are warranties on part of Baker; that the facts found show that they are not true, in that it appears that in the preceding February Baker had suffered from an attack of the grippe, which had confined him to the house for a

period of two or three days; that this warranty was a condition precedent to and consideration for the issuance of the policy; and that its breach rendered the policy not merely voidable, but wholly void. A contract which is entered into in violation of public law, or which is contrary to public policy, is void, not voidable; and so contracts will be held to be void when the facts are such that the contract when entered into could not take effect, and in such cases neither party is bound to performance. A right, however, existing on behalf of one party to rescind a contract, or to resist its enforcement against him, by reason of some fraud practiced against him, or by reason of the failure of the other party to perform a condition precedent, does not necessarily render the contract void. The party against whom performance is sought in such cases may have the right to avoid the contract, but he may waive this right, and in that event the contract remains in force. Properly speaking, in such cases the contract is not absolutely void, but it is voidable at the option of the one against whom the fraud or breach of warranty exists.

In the case now under consideration, by the provisions of the application the answers given by the applicant to the questions forming part of the medical examination are made warranties, and therefore the company has the right to insist that they should be strictly and literally complied with; but, if the company chose to waive a strict compliance therewith, it had the right so to do. The facts which it is claimed by the defendant should have been stated in the answers given by the applicant are that in the spring preceding the issuance of the policy he had had an attack of the grippe, which had confined him to the house for two or three days. It cannot be claimed that it is illegal or contrary to public policy to issue a policy of insurance upon the life of one who has had this disease, nor is it claimed or pretended that the defendant company refuses to insure the life of one who may have had an attack of this disease and as a consequence may have been confined to his house for a few days. Whether the company would or would not have accepted the risk on Baker's life, and issued the policy, if the application had shown the facts in this particular, it is impossible to know. The utmost that can be claimed on behalf of the company is that, before it should be bound by any policy issued to Baker, it should have the opportunity, after being fully informed of the facts, to determine whether it would agree to accept the risk. Thus if, after the application had been forwarded to the company, it had been fully informed of the facts in regard to Baker's suffering from the grippe and being confined to the house, and with this knowledge it had issued the policy and received payment of the premium thereon, it would not then be open to the company to claim that the policy was either void or voidable by reason of the failure to state these facts in the application. It will be noticed that in the declarations required to be made to the medical examiner the applicant was asked whether he had had any one or more of 26 specifically named diseases, all of which questions were answered, and then comes the general question or requirement to "give full particulars of any

serious illness you may have had since childhood." Thus Baker was required to determine whether the attack of the grippe which he had suffered in the previous February was or not a serious illness, within the meaning of the question. By answering that he had no serious illness, he indicated his view of that attack; and if the company, when it issued the policy, knew the facts, and yet issued the policy, it would thereby conclusively show that it did not deem the attack in question to be a serious illness within the meaning of the application, and it would not be open to the company, after its liability on the contract had become fixed by the death of the insured, to then assert that the answer was not strictly true, and that by reason thereof the policy was not in force.

In my judgment, all that the company can rightfully insist upon in this case is that it should not be held bound by the contract of insurance unless it appears that it so consented after it had full knowledge of the facts upon which it relies to show a breach of the warranties on part of the insured. If, however, the facts show that the company treated the policy as being in force, after it had knowledge of the alleged breach of the warranties, then it must be held that the company waived its right to rescind the contract. The evidence shows that in March, 1894, the defendant company knew the facts with regard to Baker's health at the time of the issuance of the policy, and knew of his having had an attack of the grippe in the previous spring, and that he had consulted a physician with regard thereto. The company then knew that it was being asked to make payment of the amount called for by the policy, due proofs of the death of the insured having been previously served upon the company, and it knew that it then had in its possession the premium paid it by Baker when the policy was delivered. The company then knew, or had the means of knowing, all that was necessary to enable it to determine whether it would recognize the policy as an existing contract, or whether it would repudiate and rescind the same upon the ground that the insured had not fully stated the facts in regard to his health, thereby committing a breach of the warranties contained in the application. The company knew that, if it elected to rescind the contract, it was its duty to return the money it had received by reason of the contract, and, furthermore, that it must act in the premises within a reasonable time. The first action of the company was taken July 25, 1894, four months after it had received full information with regard to the alleged breach of warranty. Under that date the company addressed the plaintiff, stating that the proofs of death previously sent on did not include certified copies of letters of guardianship, showing that she had the right to act for the minor children of the deceased. In effect, this letter was a notification to Mrs. Baker that she must be appointed guardian of the property of the minors in order to complete the proper proofs called for by the policy of insurance. In obedience to this letter Mrs. Baker procured her appointment as guardian, and forwarded to the company duly certified copies thereof. The right of the company to call for proper evidence showing that Mrs. Baker had been appointed guardian of her minor children, who are

the beneficiaries under the policy, is a right conferred by the policy, treating it as an existing contract. Her appointment as guardian was not in any sense a necessary act in order to enable the company to determine whether it would repudiate the contract sought to be enforced against it. This call, made by the company upon Mrs. Baker, was not one made without due opportunity to examine into the case before taking action. It was made four months after the company had full knowledge of the facts which it now relies upon to defeat the policy. It was an act tending to show that it treated the policy as being in force, and the company thereby called upon Mrs. Baker to perform, on behalf of the beneficiaries, an act which the policy required of them provided the policy was an existing contract. In obedience to this request of the company that the beneficiaries should perform the conditions of the contract on their part, the appointment of Mrs. Baker as guardian was had, and duly certified copies of the letters of guardianship were procured and forwarded to the company, this being done in the month of August, 1894. The next action on part of the company was taken on the 23d of October, 1894, when a letter was addressed to the attorneys for plaintiff, proposing an interview with regard to the matter, which was had the latter part of that month. At this interview the representative of the company for the first time denied liability on the part of the company, and proposed a compromise, by offering to pay $1,000 for a release from all claims. This offer, after consideration, was refused, and the company notified thereof about December 1, 1894. No action was then taken by the company looking to a recission of the contract. It did not then offer to repay the money it had received on the policy, nor did it notify Mrs. Baker that it repudiated the contract for any reason. It retained the full benefit of the contract on its part until the 11th day of March, 1895, when it made a tender of the sum received and interest, this being done some months after this suit had been commenced. This sum of money it had received from Ward L. Baker in July, 1893, in consideration of issuing the policy sued on, and it had retained the same and enjoyed the use thereof for a period of one year and eight months from the date of its reception, and for a period of one year after it had obtained full knowledge of the facts upon which it now seeks to evade liability on its contract. With full knowledge of the facts, it required of Mrs. Baker that she procure letters of guardianship, and furnish certified copies thereof. With full knowledge of the fact that the compromise it had offered had been rejected, and that Mrs. Baker, as guardian, was insisting on payment of the policy, it retained the money received by it for months, without any offer to return the same; and, without notifying Mrs. Baker that it elected to rescind or repudiate the contract, it permitted Mrs. Baker to incur the expense of bringing this suit.

It was the duty of Mrs. Baker, as guardian of her minor children, to enforce the payment of this policy, if it was in force at the time of her husband's death. Up to the time the action was begun the company had not notified her that the contract was rescinded. Every act on its part indicated that the contract was deemed to be

in force. No stronger evidence of this could be asked than the fact that the company continued to enjoy the benefit of the contract and gave no sign that it was ever proposed to repay the sum received by it. Suppose the situation was now the same as it was when this action was brought. It would then appear that the company was seeking to avoid the contract as not binding upon it, and at the same time was holding fast to the benefits received by it by reason of the contract. Would it not be promptly adjudged that the company could not avoid the contract, so as to escape liability, and yet enjoy the benefits conferred thereby? When the company obtained knowledge that the answers given by the insured were not full and complete, and that it possessed the right to repudiate and rescind the contract, it also knew that the beneficiaries in the policy were relying upon the validity thereof, and were asking performance on part of the company. With this knowledge, it could not play fast and loose with the question. It must reach a conclusion thereon within a reasonable time. If it proposed to repudiate liability under the contract, it could not be permitted to induce or require the other party to the contract to take action and incur expenses in the belief that the company treated the policy as in force. It could not be permitted to enjoy the benefits of the contract on its part for a year or more, with the intent to ultimately repudiate the contract in case suit was brought against it. The acts of the company fully justify the conclusion that it treated the policy as being in force for a full year after it obtained full knowledge of the facts upon which it now relies as evidence of a breach of the warranty, and that during this period of time it retained and enjoyed the benefits of the contract on its part; and these facts justify the further conclusion that the company, when informed of the facts, did not deem the answer given by Ward L. Baker to the questions put to him to be so evasive or erroneous as to amount to a breach of warranty, or that, if they might be so held, the company at that time elected to waive its right to repudiate and rescind the contract; and, having called upon the plaintiff to take action under the policy as an existing contract, and having retained for its use and benefit the money paid it on the contract for a period of a year after it knew of its right to repudiate the contract, it must be held that it is now too late to change the election it then made to waive the alleged breach of warranty. So holding, it follows that the plaintiff is entitled to judgment for the full sum due on the policy.

FOREST et al. v. ST. FRANCIS LEVEE DIST. OF MISSOURI.

(Circuit Court, E. D. Missouri, E. D. October 29, 1896.)

No. 3,931.

1. CORPORATIONS—POWER TO CONTRACT—ACTION ON CONTRACT—DEMURRER.
Although, where a corporation is invested by its charter with power to enter into a contract, on certain antecedent conditions, it is sufficient, in

declaring thereon, to aver the making of a contract, yet, if it be apparent, from the face of the plaintiff's pleading, taken as a whole, that the antecedent conditions were not in fact fulfilled, such pleading will be demurrable.

2. SAME—CORPORATION TO CONSTRUCT LEVEES.
Defendant, a corporation organized out of a portion of the territory of a state, for the purpose of constructing levees to prevent inundation, was authorized to make contracts for constructing such levees. The charter specified the steps to be taken, including a resolution by the board of directors, at its annual meeting, to be held in May; approval by the landowners at an election; advertisement for bids, and award to the lowest bidder; and the taking of a bond to secure the performance of the work. Plaintiffs brought an action, alleging an agreement by defendant to pay for building a levee, and set forth in their petition that, in September, 1896, they made a contract with the United States to build a levee, under which contract they were not required to begin work till the summer of 1895; that, on November 8, 1894, the defendant contracted with them, in consideration of their endeavoring to finish the work before the summer of 1895, to pay them five cents for every cubic yard of earth put into the levee, according to their monthly estimates in their accounts with the United States. *Held*, that it sufficiently appeared, on the face of the petition, that no contract could have been or was made in conformity to the terms of defendant's charter, and that the petition was demurrable.

This was an action upon a contract, and was brought by William M. Forest and Patrick McCadden, trading under the firm name and style of Forest & Co., against the St. Francis Levee District of Missouri, a corporation. The case was heard on demurrer to the amended complaint.

Dodge & Mulvihill, S. S. Merrill, and Geo. S. House, for plaintiffs.
R. B. Oliver and Geo. D. Reynolds, for defendant.

PHILIPS, District Judge. This cause has been submitted upon demurrer to the amended petition. The action is predicated of a contract alleged to have been made between the plaintiffs and the defendant. The defendant is a corporation created by special act of the legislature of the state of Missouri. Laws Mo. 1893, p. 200. The controversy involves the authority of the board of directors to make the contract sued on. Generally stated, said act formed into a levee district a certain area of the state, known as a part of the St. Francis Basin, in the counties of Dunklin, New Madrid, and Pemiscot, subject to inundation from the Mississippi river. It named a board of levee directors, declared "to be a body politic and corporate by the name and style of the 'Board of Directors of St. Francis Levee District of Missouri,'" etc. Section 5 declares the powers of the board—

"To levee the St. Francis front in counties herein named in this state, and to protect and maintain the same in such effective condition as honest, able and energetic effort on their part may maintain, by building, repairing, and raising levees on the river bank of the Mississippi river, or such other places as the said board may select. They shall have power to employ all agents necessary to the execution of their duties. They shall determine the base, crown, height, slope and grade of the levee, and make all needful regulations, and do all acts in their opinion necessary to secure the levee district under their charge from overflow by the waters of the Mississippi river."

To execute the given powers, section 6 directs said board—

"To assess and levy annually a tax, not exceeding five per cent. of the increased value or betterment estimated to accrue from protection given against floods from the Mississippi river by said levee, on all lands within said levee district: Provided, that said board of directors shall call a meeting of the land-owners in each of the respective counties within said levee district in each county, by posting notices of the time and place of said several meetings in ten conspicuous places in each county, ten days before the day fixed for the meeting, at which time the proposition to levy said annual assessments shall be submitted to said land owners; and if a two-thirds majority of the land-owners in such levee district, who appear at such meeting, shall vote for such assessment, it shall then be the duty of said board of directors to levy annually said tax. Said meetings shall be held by the directors in each county, who shall appoint two clerks of election; the said directors and said clerks shall perform their respective duties under oath, to hold the elections fairly, and to make returns of the election fairly to the secretary of said levee board, who shall, with the president and treasurer of said board, proceed to canvass the returns and declare the result; and if it shall appear from the returns that two-thirds of the land-owners represented at said meeting voted for said annual assessment, then the said president of said board shall give notice of the fact throughout the said levee district, and the tax shall be levied as hereinafter provided, and the annual levy, not to exceed five per cent., shall continue no longer than is found to be necessary to accomplish the objects of this act, and when no longer needed, the president shall notify the assessor and direct him not to assess for this purpose."

The act then provides the mode of assessment on the lands of the levee district, and for collection of the taxes to meet these betterments, and declares such burdens to be a lien on said lands. It also provides for an engineer to make surveys and exercise supervision of all work done under contracts. Section 22 declares that:

"If at any regular annual meeting of said board of levee directors they shall decide to do any certain amount of work that year, and if the assessment upon betterments accruing to the lands in said levee district to pay for said work be approved by the land-owners, as herein provided for, then the president of said levee board shall contract for the construction or performance of said work in such parcels or divisions as may be to the best interest of the levee district. Said contracts shall be let to the lowest responsible bidder; to this end the president of said levee board shall cause a letting of said work to be advertised throughout said district, for thirty days, asking for sealed proposals on each and every item of the work so advertised, and upon a certain day therein named, with the aid of the secretary and treasurer of said board, open and canvass said sealed proposals and award the same: Provided, that any and all bids may be rejected, and that no proposal shall be entertained without such guarantee of good faith as the board may require: Provided, further, that the board shall require of all contractors an approved bond, in a sum equal to the estimated cost of work so contracted for, to secure the prompt execution of their contract, conditioned to pay any damages which will result to the land-owners of said district from a failure to perform their said contracts, or by reason of a negligent performance of the same: Provided, however, that in case of a break in the levee, or a break threatened by caving bank or other cause, demanding immediate attention, the president of said board may and is hereby authorized to take such action in the case as may best protect the interests of the district."

On argument of the demurrer to the original petition herein, it was insisted, inter alia, by defendant's counsel, that the board of directors, in entering into the alleged contract sued on, had not complied with the provisions of said sections 6 and 22 of the enabling act; that they had not taken the preliminary steps therein provided

as prerequisite to the exercise of authority to enter into any such contract. When the court came to consider that question, it discovered that it did not affirmatively appear on the face of the petition on what statute or legislative act the contract was predicated, nor did it affirmatively appear whether or not the board of directors had taken the preliminary steps required by said statute in obtaining the assent of the taxpayers of the district to make such contract. As the determination of this question was deemed by the court to be vital, in sustaining the demurrer the court invited the plaintiffs, in their amended petition, to state plainly and candidly the facts as to whether or not the things required of said board by the statute had been done, with the suggestion that by such a course the plaintiffs could invite a demurrer, and, by having this question of law determined in advance, the parties might avoid the unnecessary trouble and expense of a trial. But the amended petition evidently seeks to evade an open avowal as to this question of fact, thereby creating a strong inference that the facts are adverse to the plaintiffs. The amended petition alleges, in substance, that in the month of September, 1894, the plaintiff Forest—

"Entered into a contract with the United States to build and construct a levee of earth along and near the western bank of the Mississippi, in the county of Pemiscot, etc., to protect the land west of said levee from overflow by said river, and that by the terms thereof said Forest was not required to begin his work thereunder until during the summer of the year 1895, and that on the 8th day of November, 1894, the defendant entered into a contract with the plaintiffs, wherein, in consideration that the plaintiffs would use every possible effort to finish the said contract of said Forest with the United States before the next high water in the Mississippi river, which was to be apprehended in the summer of 1895, the defendant, among other things, agreed to pay the plaintiffs, in bonds or written acknowledgments of indebtedness, called 'script,' of the defendant, at the discretion of plaintiffs, five cents for every cubic yard of earth put by plaintiffs on the said levee in the construction thereof, so far as the same was constructed in said St. Francis levee district, which was to be determined by said Forest's monthly estimate of work done under his said contract with the United States on said levee, and allowed by the United States, until such time as the plaintiffs should be forced to suspend the work under said contract by reason of high water in the said Mississippi river."

The petition then avers a performance of this contract by the plaintiffs, and a failure of the defendant to pay therefor.

It is to be conceded, to plaintiffs' contention, that where a corporation is invested by its charter with power to enter into a specific contract on certain conditions, to be performed antecedently, it is sufficient, in declaring thereon, to aver the making of a contract. If some act or requirement of the charter be a prerequisite to the validity of such contract, it is a matter of defense, to be pleaded by the defendant. Barber Asphalt Paving Co. v. City of Denver, 19 C. C. A. 144, 72 Fed. 341. It is something like an action predicated of a contract, which, by the statute of frauds, is required to be in writing. When the petition declares upon the contract, the presumption of law is that the contract was such as the law authorizes, and this presumption continues until the contrary fact is made to appear on the trial of the case. Springer v. Kleinsorge, 83 Mo. 155. But, notwithstanding this rule of plead-

ing, and notwithstanding the manifest purpose of the pleader to evade a direct admission, if it be apparent from the face of the petition, taken as an entirety, that the antecedent steps required by the statute to authorize the board of directors to enter into the given contract were not in fact taken before it attempted to make the alleged contract, it will invite a demurrer, and raise the validity of the contract.

An analysis of the amended petition renders it quite plain, to my mind, that the requirements of said sections 6 and 22 were not complied with by the levee board before entering into this contract. In the first place, as has already been shown, the petition alleges that the plaintiff Forest first entered into a contract in September, 1894, with the United States, for the construction of this levee, and that the co-plaintiff McCadden came into the arrangement with the plaintiff in November, 1894, by which it was agreed with the defendant to pay the plaintiffs a bonus of five cents on said contract with the government for doing said work, in consideration that they begin the work at an earlier date. As evidence that the work done by the plaintiffs was in execution of the said contract with the United States, and under its supervision, the petition declares "that they entered upon the performance of said contract with the United States in the month of October, 1894, and continued said performance without interruption or cessation, and finished all of the work called for by said contract"; evidently referring to the contract with the United States, for it proceeds in the same connection to state "that, while they were performing their work under the said last-mentioned contract, they were not forced to suspend said work by high water in the said Mississippi river." This is followed up with the averment "that, under said contract with the United States on the levee in the said district," they put on the said levee specified cubic yards of earth. It then declares that the said Forest was entitled to payment from the said United States under his said contract for placing all the said cubic yards of earth on said levee, and that his monthly estimates with the United States showed that he had earned the payment of all of said work, and the United States allowed the said estimates, and admitted that all of said work had been done, and paid said Forest therefor. From this it is quite apparent that the work done by these plaintiffs, as already suggested, was under the supervision and direction of the government of the United States, its agents and officers, and that the estimates thereof were allowed by the United States, and on this estimation the petition counts; whereas, by section 23 of the act of the legislature authorizing the board of directors to execute such contract it is expressly provided that:

"All work let or contracted for by said board, as herein provided for, shall be executed according to plans and specifications furnished by said board, and made a part of said contracts, and shall be performed under the supervision and to the satisfaction of the chief engineer; and when partial payments from time to time are contracted for, they shall be made upon estimates furnished by said engineer, and fifteen per cent. retained to guaranty a faithful performance of contract; and final settlement of said contractors shall be made only upon

estimates furnished by said engineer, and his certificate that said work has been performed and completed to his satisfaction."

Again, by section 11 of this act, the regular annual meeting of the board of directors is fixed for the second Monday in May of each year. Then section 22, as already quoted, provides that the time when the board of directors shall decide to do any certain amount of work that year shall be at a regular annual meeting of the board. It is, therefore, apparent that no such action was taken at any regular meeting of the board, which for that year would have been the second Monday in May, as the contract between Forest and the United States was not made until the month of September, and the contract in question supervened on November the 8th following. It is also inconceivable, under the allegations of the petition, that after Forest had entered into his contract with the United States for this work, and the negotiations had with the board of directors in respect thereof by the plaintiffs, there could have been a compliance with the requirements of section 22 by the 8th day of November. In the first place, there had to be an approval by the landowners, as provided in section 6, to be followed by the letting of the proposed contract after advertisement throughout the district for 30 days, asking for sealed proposals on every item of the work, to be followed by a canvass of the proposals, and award of the contract to the lowest bidder, and bond then to be taken and approved to guaranty the performance of the work by the contractor. On the contrary, the very framework of the petition precludes the idea of any competitive bidding. The contract providing for the manner of constructing the work, the cost thereof and mode of estimating the same were provided for in the contract between Forest and the United States. The landowners of the district had no voice therein, nor gave any assent to be assessed therefor. There could have been no awarding of the contract among competing bidders, because the petition shows that the board entered into the contract with the plaintiffs upon the bald proposition to pay them the arbitrary sum of 5 per cent. upon the gross sum agreed to be paid by the United States. Such a transaction is not within the spirit or the terms of the statute. It cannot be assumed that the landowners of this district would have given their consent to such an arrangement. On the contrary, it is within the bounds of reasonable presumption that, the United States having undertaken to have this work done on its own account, the landowners would hardly, in the fall of 1894, have willingly consented to vote a tax upon themselves for the same work out of a mere apprehension that a rise in the river, not to be anticipated before the freshets of 1895, might come before the work was completed. The only instance in which the board of levee directors is authorized to act and incur liabilities in this respect without consulting the landowners, and without a compliance with the directions of sections 6 and 22, is contained in the last proviso of section 22, to wit:

"In case of a break in the levee, or a break threatened by a caving bank or other issue demanding immediate attention."

Clearly, no such emergency existed in this case, as no dangerous rise in the river was apprehended before the summer of 1895, and the petition asserts that none occurred even then.

It hardly needs the citation of authorities on the proposition that the plaintiffs, in dealing with the board of directors, created by a special enactment of the legislature, must take notice of the limitations and conditions imposed by the act of their creation. If any of the essential proceedings prescribed by the statute for investing the officers of such a corporation with power to contract be dispensed with, no liability is imposed upon the corporation by reason of such a contract. McClure v. Oxford Tp., 94 U. S. 429; National Bank of Commerce v. Town of Granada, 48 Fed. 278; Id., 4 C. C. A. 212, 54 Fed. 100; Pearce v. Railroad Co., 21 How. 442; Matthews v. Skinker, 62 Mo. 329.

As a body corporate, the defendant has a right to say to the demand of the plaintiffs, "Non hæc in fœdera veni." The demurrer is sustained.

GIBSON v. CONNECTICUT FIRE INS. CO.

(Circuit Court, E. D. Missouri, E. D. November 11, 1896.)

No. 3,973.

CONFLICT OF LAWS—INSURANCE POLICIES.

One W., an insurance broker, residing in Missouri, with the assent of plaintiff, also a resident of Missouri, wrote to the agent of defendant insurance company at St. Paul, Minn., asking him to place insurance upon certain real estate of plaintiff in Minnesota. The agent forwarded the application to defendant, at its home office in Connecticut. It was accepted, and a policy forwarded to be countersigned by the agent at St. Paul, who forwarded it to W., in Missouri, to be delivered to plaintiff, if acceptable; and it was delivered to and accepted by plaintiff, in Missouri. The policy was conspicuously indorsed, "Minnesota Standard Policy," and contained a clause requiring the counter signature of the agent at St. Paul to its validity, and also provisions which were valid by the law of Minnesota, but void under those of Missouri. *Held*, that the parties must be deemed to have intended to contract with reference to the laws of Minnesota, and the policy was accordingly a Minnesota, and not a Missouri, contract.

This was an action by Charles Gibson against the Connecticut Fire Insurance Company on a policy of insurance. There was a verdict for plaintiff, and defendant moves for a new trial.

Campbell & Ryan, for plaintiff.

Boyle, Priest & Lehmann, for defendant.

PHILIPS, District Judge. This cause was tried before a jury. There being practically no dispute between the parties as to the controlling facts of the case, it was suggested to counsel by the court that, as the determination of the case turned entirely upon the law arising from the conceded facts, the jury should, by consent, be discharged, to afford the court an opportunity for investigation of the questions of law involved. This suggestion not being accepted by the plaintiff, the court directed the jury to return a verdict for the plaintiff, stating to counsel at the time that this