

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

action was not to be taken as the conclusive judgment of the court as to the law of the case, and that, therefore, the defendant could file a motion for a new trial, which the court would take under advisement, so that, if the verdict should be approved on further investigation by the court, it would obviate the necessity of a new trial; otherwise a new trial would be ordered.

The material facts of the case are sufficiently stated in the following discussion: The controlling question to be answered is, is the contract of insurance a Missouri or a Minnesota contract? If the right of recovery is determinable by the statute law of the state of Missouri, the plaintiff is entitled to recover the whole amount of insurance expressed in the policy, but if it is a Minnesota contract the finding must be for the defendant, as the action in the latter case should have been predicated upon the award of arbitrators, duly made, instead of upon the contract for the whole amount of the insurance expressed in the policy. The evidence showed that one Windmuller, residing and doing business at St. Louis, in the nature somewhat of an insurance broker, had been for some time insuring property situate in St. Louis for the plaintiff, and being aware of the fact that the plaintiff owned a house and lot situate at Lake Minnetonka, Hennepin county, Minn., suggested to him that he procure insurance thereon, to which the plaintiff assented, whereupon Windmuller wrote to one Gilbert, an insurance agent at St. Paul, Minn., asking him if he could place \$5,000 of insurance on this property in companies represented by him. Gilbert, who was the local agent for the defendant company at St. Paul, forwarded an application to the company at Hartford, Conn., for a risk of \$2,500 on this property, which was accepted by the company, and a policy made out signed by the president of the company on the 18th day of July, 1893, and forwarded to Gilbert to be countersigned by him. The policy thus forwarded to Gilbert contained this clause: "This policy shall not be valid until countersigned by the duly-authorized agent of the company at St. Paul, Minn." On receipt thereof, Gilbert sent the policy by mail to Windmuller at St. Louis, accompanied by a letter stating the amount of the premium, and directing him to deliver the policy to the plaintiff, if acceptable. The policy was accordingly delivered to the plaintiff, who accepted the same without demur.

It is to be observed, in the first place, that Windmuller was not the agent of the defendant company, authorized by it to solicit or make insurance contracts on any property in the state of Minnesota. It was not represented by Windmuller to plaintiff that he had any such agency, nor is there any evidence whatever of any holding out by the defendant of Windmuller as its agent for any purpose. Nor had the plaintiff any ground for supposing that Windmuller was clothed with any such authority. So far as the officers of the company were concerned, there was no recognition of Windmuller in the transaction. And, so far as anything appears on the face of the policy, or from any evidence in this case, it does not appear that the defendant company, at the time it accepted the policy, even knew that the plaintiff was a resident of

Missouri. To maintain the proposition that the policy nevertheless became a Missouri contract, it is contended by plaintiff that, as nothing was said between him and Windmuller, at the time of the interview respecting the procuring of this insurance, as to the amount of the premium, and inasmuch as the company wrote into the policy a different rate from that suggested by Windmuller to Gilbert, and inasmuch as Gilbert, after the countersigning, forwarded the policy to Windmuller, to be delivered to plaintiff, if acceptable to him, the contract of insurance did not become consummate until accepted by plaintiff at St. Louis, whereby his acquiescence in the amount of the premium was manifested. This may be conceded; but the question remains, did this mere act of acceptance by plaintiff at St. Louis have the effect in law to make the policy a Missouri contract? I hold that when plaintiff accepted the policy he thereby ratified the acts of Gilbert, the Minnesota agent, and by relation it became operative as a Minnesota contract. The case is distinguishable in its facts from cases like those relied upon by plaintiff's counsel, such as life policies where the assured lived in Missouri, and the insurance was effected through a soliciting agent of the nonresident company where the assured resided, when the policy was forwarded to the local agent to be countersigned and delivered by him to the assured, to become operative on payment of the first premium; as, also, to the class of cases of fire insurance effected through a local agent to be countersigned by him and delivered to the insured. There being nothing on the face of the policy, and the attending circumstances of the transaction, indicating a purpose not to regard it as a contract subject to the laws of the state where the subject-matter of the insurance is situated, the policy providing on its face that it should not be valid until countersigned by the duly-authorized agent of the company at St. Paul, Minn., without any condition respecting the payment of the first premium, why should it be regarded as a Missouri contract? In *Golson v. Ebert*, 52 Mo. 260-271, it is held that, where the contract is made with an agent in one state, subject to the ratification of the principal in another state, when so ratified it becomes a contract of the state, to be interpreted by its laws, where the agent resides. "It would become binding, not as a new contract made at St. Louis, but the contract would become binding as made and where made by the agent, and would have just the same effect as it would have if the agent had been fully authorized to make the contract before it is made, and no ratification is necessary." The court further says: "This contract was made in New Orleans, was to be performed in New Orleans, and if it is ratified by defendant it is the contract made and to be performed. Hence we must look to the laws of Louisiana to ascertain its validity." Windmuller, as already stated, was not the agent of the insurance company, but acted rather for the plaintiff in sending his application to the company's agent at St. Paul, who countersigned it for the company as its agent, and forwarded it to Windmuller, to be delivered to the plaintiff. Windmuller was thus the mere conduit of delivery, and made so by the plaintiff. The delivery, therefore, was the same

in law as if made by Gilbert directly to plaintiff, and therefore the transaction stands in law the same as if plaintiff had made his application directly to the Minnesota agent, and received from him the policy. *Hicks v. Insurance Co.*, 9 C. C. A. 215, 60 Fed. 690; *Schwartz v. Insurance Co.*, 18 Minn. 448 (Gil. 404).

Be this as it may, the further controlling fact appears in this case that the subject of insurance is real property situated in the state of Minnesota. Looking at the face of the policy, the locus of the company and of the countersigning agent, and the situs of the property itself, there is nothing to indicate that it in any respect pertains to a Missouri contract subject to, or to be affected by, its local laws and internal policy. The effort of the plaintiff is to subject the policy to the operation of sections 5897 and 5898 of the Revised Statutes of Missouri. The first section applies to the instance of a single policy on the property, and declares that in case of loss by fire the insurance company "shall not be permitted to deny that the property insured thereby was worth at the time of issuing of the policy the full amount insured therein on said property; and in case of total loss of the property insured the measure of damage shall be the amount for which the same was insured, less whatever depreciation in value, below the amount for which the property is insured, the property may have sustained between the time of issuing the policy and the time of the loss; and the burden of proving such depreciation shall be upon the defendant." Section 5898 provides for the instance where the property shall be insured in more than one company. In the event of suit, "the defendant shall not be permitted to deny that the property insured was worth the aggregate of the several amounts for which it was insured at the time the policy was issued, unless willful fraud or misrepresentation is shown on the part of the insured in obtaining such additional insurance; and in such suit the measure of damage shall be as provided in the preceding section." But this section contains the further express proviso that "this and the preceding section shall apply only to real property insured." On settled principles of law, the implication is that it refers to real estate situate in this state. "The legislative authority of any state must spend its force within the territorial limits of the state." *Cooley*, Const. Lim. 151. As such statutes have no extraterritorial force, the general presumption is that they operate alone on property within the state. *Stanley v. Railway Co.*, 100 Mo. 435, 13 S. W. 709; *Merrill v. Railroad Co.*, 21 Am. & Eng. R. Cas. 48; *Ror. Int. St. Law*, 149-154. It is not conceivable that the legislature supposed they were formulating a state policy respecting insurance on real property situated within the jurisdiction of a foreign sovereignty, subject to the legislation and laws thereof.

The question here presented is, to what law did the parties to this policy intend that the matter of compensation, in case of loss, should be submitted? Courts, in considering questions like this, sometimes fail to observe the proper distinction between the *lex fori* and the *lex contractus*, and that class of contracts properly determinable by what is termed the "*lex loci solutionis*." Mr. Justice Matthews,

with characteristic learning and perspicuity, has pointed out this distinction in *Pritchard v. Norton*, 106 U. S. 124, 1 Sup. Ct. 102. After observing that the term "lex loci contractus," in common acceptation, may have a double sense, as applied indifferently to the law of the place where the contract was entered into and to the place of performance, said:

"When it is employed to describe the law of the seat of the obligation it is, on that account, confusing. The law we are in search of, which is to decide upon the nature, interpretation, and validity of the engagement in question, is that which the parties have either expressly or presumptively incorporated into their contract as constituting its obligations."

The following propositions may be formulated from this opinion: It is a principle of universal justice that in every forum a contract is governed by the law with a view to which it was made, and therefore the mere place should not govern the transaction when it appears that it is entered into with a direct reference to the law of another country. Second. That "it is necessary to consider by what general law the parties intended that the transaction should be governed, or rather by what general law it is just to presume that they have submitted themselves in the matter." Third. That it is to be remembered "that in obligations it is the will of the contracting parties, and not the law, which fixed the place of fulfillment,—whether that place be fixed by express words or by tacit implication,—as the place to the jurisdiction of which the contracting parties elected to submit themselves." There is neither anything in the Missouri statute, nor under general law, to prevent parties from making a contract solvable by the laws of Minnesota respecting property situated in that state. *Robinson v. Bland*, 2 Burrows, 1078; *Story, Confl. Laws*, 280, 281. And whether they so intended, both the subject-matter and the contract itself are to be looked at. *Justice Willes, in Lloyd v. Guibert*, L. R. 1 Q. B. 120. The house and lot were in the state of Minnesota. The only authorized agent of the defendant to solicit policies of insurance on such property and to countersign and deliver policies was located at St. Paul, in that state. And I find posted on the face of the policy a receipt from the plaintiff to the defendant for a payment on a small loss sustained on this property under this policy in 1894, which speaks of this "policy No. 4,054, issued at St. Paul, Minn., agency." The policy insures "to an amount not exceeding" \$2,500, and then it expressly provides that:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with the proper deductions for depreciations, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality. Said ascertainment or estimate shall be made by the insured and this company, or, if they differ, then by appraisers, as hereinafter provided."

The plaintiff is especially to be presumed to know the law, as he is a lawyer of learning and experience. He knew, when he accepted this policy, that the last-named provision was inoperative under the statutes of Missouri as contrary to the local policy of the state. One of the canons of the law for ascertaining the mind—the understanding—of the parties as to what jurisdiction the contract is to be re-