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-

ferred for solution is that "the parties cannot be presumed to have contemplated the law which would defeat their engagements." Pritchard v. Norton, 106 U. S. 137, 1 Sup. Ct. 112. As said by Judge Chitty in Re Missouri S. S. Co., 42 Ch. Div. 329:

"The circumstance that the stipulations which the client asks to have struck out of the contracts are allowed by the law of one country and disallowed by the law of the other country affords a cogent reason for holding that the parties were contracting with reference to the law of the country which allowed, and not to the law which disallowed, the stipulation. It is unreasonable to presume that the parties inserted in the contract stipulations which they intended should be nugatory and void."

At the time this policy was issued, the statute of Minnesota (1 Gen. St. 1894, § 3201 et seq.) provided that after January 1, 1890, "no fire insurance company, corporation or association, their officers or agents, shall make, issue, use or deliver for use any fire insurance policy on property in this state," etc., except in conformity with requirements of its statute, which provided that the insurance commissioner should formulate a form of policy in conformity with that employed in the state of New York. This policy was on the form prepared by the insurance commissioner of that state, and was received by the plaintiff with the words "Minn. Standard Policy" printed in large type on the front of the policy when folded. It is true that so much of this policy as authorized said commissioner to prepare a form of policy, as near as may be, like that prescribed by the law of the state of New York, has been declared by the supreme court of Minnesota to be unconstitutional, on the ground that it was a delegation of legislative power to the commissioner. Anderson v. Assurance Co., 59 Minn. 182, 60 N. W. 1095, and 63 N. W. 241. But this in no wise impairs the force of the argument that the parties to the contract—the one by employing and the other by accepting this form of policy—indicated their understanding that it was a Minnesota contract. In this connection it is well enough to advert to the fact that at the trial the plaintiff sought to testify in his behalf that at the time he authorized Windmuller to send in his application for insurance he stated to him, in effect, that he wanted a Missouri policy contract, to prevent any trouble on the question of the law of its solution. This was excluded by the court, for the reason that the ground upon which such statements to agents are admissible being that, as it is the duty of the faithful agent to make known to his principal any material information or fact coming to him in the transaction of the business of his agency, the law presumes that he performs such duty, does not obtain in this case, because Windmuller at the time was not the agent of the defendant, commissioned to transact this business; and there is no pretense that he ever informed the company or Gilbert of such claimed statement; and because it was an attempt to interpolate into a contract, afterwards reduced to writing, a provision embracing the substance of an antecedent statement inconsistent with that expressed in the instrument itself; and because, when the plaintiff accepted the policy in its present form, he is presumed to have waived any such preference for a Missouri contract policy. For, not only was it blazoned before his

eyes, when he accepted the policy, that this is a Minnesota standard policy, but in the very body of the instrument, in large type, did it expressly declare that any loss by fire should be adjusted on the basis of the actual value of the property, as provided under the law of Minnesota, and inadmissible under the law of Missouri. With this stipulation in the policy, he accepted it, and for over two years made no objection thereto; and when the loss occurred he declared his understanding of the contract to be that the provisions respecting the valuation of the loss were binding, because he consented, after an unsuccessful parley for adjustment with the defendant, to submit to arbitration as provided in the policy. He selected his arbitrator, as did the defendant, who selected the umpire; and not until after these arbitrators had entered upon the discharge of their duties did the plaintiff protest that he made claim under the Missouri statute, and this, doubtless, because he had reason to fear the result of their finding, which placed a valuation lower than he claims. It is inadmissible to say that this action on his part is consistent with his present interpretation of the contract. There was no occasion for a submission to arbitration, if it was intended by plaintiff to be a Missouri contract.

When this policy was issued by the defendant, countersigned by its only recognized agent at St. Paul, insuring a house situated in Minnesota, and when it was accepted by the plaintiff, there was no fact or circumstance to give color to a supposition that the company was making a contract subject to the local insurance laws of the state of Missouri; nor did the plaintiff believe so for two years thereafter, and until after the time he elected to submit the matter to arbitration. Therefore, to hold the defendant amenable to the greater liability imposed by the Missouri statute, would, in my judgment, be little less than a fraud on the defendant. It results that the motion for a new trial should be sustained.

STRYKER v. BOARD OF COM'RS OF GRAND COUNTY, COLO.

(Circuit Court of Appeals, Eighth Circuit. November 2, 1896.)

No. 737.

1. JUDGMENTS ON COUNTY WARRANTS—LEVY OF TAX—MANDAMUS TO COMMISSIONERS.
   Neither section 8 of the Colorado statute of March 24, 1877 (Laws Colo. 1877, p. 219), nor the statute of April 28, 1887 (Laws Colo. 1887, p. 240), entitles the holder of a judgment against a board of county commissioners, recovered upon warrants issued for ordinary county expenses, to compel such board, by mandamus, to levy a special tax to pay such judgment; but the most that such a creditor can demand is that a tax shall be levied each year to the full amount of the limit fixed by statute for taxation for ordinary county expenses, until his judgment is paid. Sanborn, Circuit Judge, dissenting.
2. FEDERAL COURTS—CONSTRUCTION OF STATE STATUTES—STATE DECISIONS.
   The circuit court of appeals will not reverse its ruling upon the interpretation of a state statute, made in a former case, decided before there had been any adjudication upon the subject by the state courts, in deference to a contrary ruling made by a court of the state, not its highest judicial tribunal, which does *not* commend itself as sound. Sanborn, Circuit Judge, dissenting.