and recover the said vessel, or after recovery to cause the same to be repaired, or both, for account of the insured, to the expenditures and amount whereof the said insurance company will contribute according to the proportion the sum insured bears to the valuation aforesaid, and the surplus, if any, paid to or incurred by said insurers,—with the premium note, if unpaid,—shall be a lien upon and shall be recoverable against the said vessel, etc.; but in case this insurance shall be against total loss only, and no claim for the same be sustained, then the whole of said expenditures and amount paid or incurred by said insurers shall be a lien, and recoverable as aforesaid," etc.

It was further agreed, in the clause first quoted, that the acts of the insured or insurers in recovering, saving, and preserving the property insured, in case of disaster, shall be without prejudice to the rights of either, and shall be considered as done for the common benefit. There is nothing, therefore, in the suing and laboring clause which, according to the express agreement of the parties, can be construed as affecting the right of the assured to abandon. In pursuance of the terms by which that right is defined and limited, the very object of the suing and laboring clause was to enable each party to do what was best for both, without prejudice to either; and it contains no obligation on the part of one to refund any expenditure made by the other, except according to their respective interests. That is to say, if the loss is partial only, then the expenses incurred are to be borne by each in proportion to the interests covered by the policy, and those at the risk of the owners. But if the loss, under the terms of the policy, is a total loss, whether actual or constructive, any expenditures made by either constitute a part of the loss, and as by the abandonment the whole interest in the subject of the insurance vests in the insurer, the whole expense falls upon him, without recourse upon the insured. An abandonment, either accepted or justified by the event, executes in full the contract between the parties as of its date, so that no new rights can be acquired by either against the other without further assent. Expenses incurred after that by the insurer are contracts upon his own account alone and for his own interest.

The conclusion is, therefore, that the several plaintiffs are entitled to recover, according to their claim for a total loss, the whole amount of the insurance, less any set-off for unpaid premium. Judgment will be entered accordingly.

GROSS *v.* ST. PAUL F. & M. INS. CO.

(Circuit Court, D. Minnesota. October 24, 1884.)

1. FIRE INSURANCE—POLICY—EXAMINATION OF INSURED UNDER OATH.
   A stipulation in a policy of insurance that "the assured shall, if required, submit to an examination or examinations under oath by any person appointed by the company, and subscribe thereto, when reduced to writing, and a refusal to answer any such questions or sign such examination shall cause a forfeiture of all claim under the policy," is valid.
2. SAME—INCONSISTENT DEFENSES—ELECTION—SPECIAL VERDICT—GENERAL VERDICT—JUDGMENT.
   A defense that the fire by which the insured property was destroyed was of an incendiary character and plaintiff implicated therein, may be joined in the answer with a defense that the policy contained a condition that plaintiff should submit to an examination under oath, and that such examination had been demanded and refused; and where the jury, in answer to special questions, find that plaintiff has refused to submit to such examination when demanded, and plaintiff has not moved to compel defendant to elect as to which defense it will rely upon, judgment may be entered in favor of the defendant notwithstanding a general verdict against it.

On Motion for Judgment.

BREWER, J. This was an action on a policy of insurance. The answer alleged, as a separate defense, that the policy contained the following stipulation:

"The assured shall, if required, submit to an examination or examinations under oath by any person appointed by the company, and subscribe thereto, when reduced to writing, and a refusal to answer any such questions or sign such examination shall cause a forfeiture of all claim under this policy."

—And also that the company demanded and the plaintiff refused to submit to such an examination. The policy, when produced on the trial, contained the stipulation, and the jury, in answer to special questions submitted, found that there was a demand and refusal as alleged. Upon this the company moved for judgment notwithstanding the general verdict against it. Plaintiff insists that this defense must be disregarded because inconsistent with another specially pleaded, to the effect that the fire was of an incendiary character and the plaintiff implicated therein. That defense, counsel argues, was that no liability ever existed; this admits that one existed, but claims that it has become discharged by subsequent action of the plaintiff. Both cannot be true. But, if inconsistent, no motion was made to compel defendant to elect. *Conway* v. *Wharton*, 13 Minn. 160, (Gil. 145.) And why should defendant be now compelled to stand upon that defense which the jury have found against it? But they were not inconsistent. The facts alleged in each may have been true. The plaintiff may have burned the property, and he may also have refused to submit to an examination. The defendant may set up all the defenses it claims, and if it fails to prove one, may rely on another. In an action to charge an indorser on a note, the defendant may plead no notice and the statute of limitations. Both, as facts, may be true, and