of the trade, and with a view to superior accommodation in this particular, then it is within the exception."

This case is cited with approval in Wiggins Ferry Co. v. Ohio & M. Ry. Co., 142 U. S. 396, 12 Sup. Ct. Rep. 188. There are no covenants in the lease which, in my opinion, change, or in any manner prevent, the application of the general principles of the law, as hereinbefore announced, to the facts of this case. The covenant giving the right to the lessee to sublet the premises to other parties for other uses did not affect, and evidently was not intended to affect, the legal rights of the lessee concerning the buildings, machinery, and appliances placed upon the premises by the lessee. The covenant in relation to repairs must be interpreted as having reference to the "buildings and erections" that were upon the premises when the lease was executed, or such other buildings or erections as might thereafter be placed thereon by the lessor. The covenant giving the privilege to the lessee to purchase the premises within a specified time certainly does not affect the question as to the right of the tenant to remove the buildings, machinery, and appliances which he put upon the property for the purpose of carrying on the business in which he was engaged. It is unreasonable to believe or presume that the plaintiff,—who is shown to have exercised great care in the preparation of the lease,—if it had been the understanding or intention of the parties at the time the lease was executed that all buildings, machinery, and appliances necessary to run and operate the electric plant should be left upon the premises and become the property of the lessor at the expiration of the lease, would have signed the lease without inserting a direct covenant to that effect.

Considerable stress was placed by the plaintiff's counsel in his oral argument upon the meaning of the words "full working order." These words, as used in the contract, referred to the construction of the penstock and the placing therein of the Leffel wheel. This wheel was minutely described, its exact size stated, and it was to be put in full working order, "sufficient to develop not less than sixty horse power." This power, as thus described, was to be, and was, developed by the plaintiff at his own expense, and the penstock and wheel were not removed, and have not been materially disturbed by the acts and conduct of defendant. The argument of plaintiff's counsel to the effect that the wheel could not be put in "full working order" without the appliances and machinery to connect it with the dynamos, and that such appliances must therefore be construed and treated as part of the wheel in full working order is certainly untenable, illogical, and unsound. If it was understood that these appliances were necessary to put the wheel in full working order, plaintiff should have sued Stevenson for a failure to comply with his contract. It is admitted that the contract was carried out, and that plaintiff paid the full price to be paid for the work, and there was no suggestion upon the completion of the contract that the Leffel wheel was not in full working order. The truth is, as we have before stated, that all the appliances, belts, wheels, etc., along the line shaft and connecting the Leffel wheel with the

dynamos were a part of the electric plant, put in at the expense of the lessee; were trade fixtures, which were removable by the lessee at the expiration of the lease. In Holbrook v. Chamberlin, 116 Mass. 155, the plaintiff leased to defendants for the term of five years "a certain factory building and water privilege, with all the appurtenances thereto belonging," and the defendants covenanted to quit and deliver up the premises and all future erections and additions thereto in as good order and condition as the same then were or might be put by them. The plaintiff agreed to sell to the defendants, at any time within two years, the property known as the "Sutton Woolen Manufacturing Establishment" for a specified sum. There was a second lease for a like term for all the land and buildings as they are upon the premises known as the "Sutton Mills Estate," with a like covenant upon the part of defendants to deliver the premises in good order and condition. The premises were used by defendants for about one year, and were then changed to a cotton mill, and afterwards used as such. The machinery used therein was operated by water power in the usual manner. The defendants placed in the mill additional machinery, consisting of countershafting, pulleys, hangers, and belts. The countershaft was belted from the main shaft, and, with the pulleys and hangers appertaining thereto, was fastened to the timbers or floors of the building by bolts and screws, and was connected to the machines by belts. This machinery was all purchased for and was adapted to the use of the mill as a cotton mill. The defendants also used appliances for heating the mill by steam by means of a portable boiler and steam piping passing through the floors of the factory, and supported by hooks screwed to the building, etc. Gray, C. J., in delivering the opinion of the court, said:

"It was admitted at the argument that at the beginning of the term there was no machinery on the premises except the main shaft. The countershafting, pulleys, hangers, and belts, the portable boiler and the steam pipes connected with it, were either trade fixtures, removable by the lessees during the term, or personal chattels. * * * The fact that the lease contained an agreement of the lessor to sell the premises to the lessees did not affect their right in this respect."

The buildings and machinery were not entirely removed from the premises before the expiration of the lease, and hence it is claimed that the removal was unlawful. In Wood's Landlord & Tenant, (page 908, § 532,) cited and relied upon by plaintiff, it is, among other things, said:

"It would rather seem that a tenant for years, who holds over on sufferance after the expiration of his term, may, during such holding over, remove such fixtures as he might have removed during the term; but if he quits possession pursuant to a notice and demand of possession, and leaves any fixtures on the premises, his right to them is gone."

As the testimony shows that defendant continued in possession of the premises until all the trade fixtures were removed, the text does not support the claim contended for by counsel. In Lewis v. Pier Co., 125 N. Y. 341, 26 N. E. Rep. 301, the court held that a tenant having the right to remove fixtures placed by him upon the demised premises during the term, in case he holds over after its termi-

nation without a new lease, has the same right of removal so long as he remains in possession, and, on being evicted by summary proceedings on account of such holding over, if he claims and is refused the right to take such fixtures with him, he may maintain an action for their conversion, and in the course of the opinion, upon this subject, it is said:

"There is no reason why the right should be lost before he quits possession as tenant, even though he holds over. The rule is based upon a question of public policy, which suggests that the tenant shall remove during his term—i. e. while in possession as a tenant—whatever he has the right to remove at all, so that the landlord may be himself protected, and so that the tenant shall not be permitted, after his surrender of possession, to enter upon the possession of the landlord or his succeeding tenant, and remove what he might have taken before, but which, by leaving, he has tacitly abandoned, and which the landlord may already have let to his succeeding tenant. A regard for such succeeding interests requires the adoption of a rule necessitating the removal of fixtures during the time of possession, but not in all cases during the running of the term."

Under this rule, and upon the undisputed facts of this case, the removal of the fixtures was not unlawful, and plaintiff is not entitled to any damages therefor. It is proper to add that there was no material damage to the freehold by the act of removal.

This case was tried before the court without a jury, and, having disposed of all the legal questions, it only remains for me to assess the damages to which plaintiff is entitled by reason of the failure of the defendant to keep the premises in good, substantial repair during the term of the lease, and to "quit and surrender the premises and all appurtenances in as good state and condition as reasonable use and wear thereof will permit." The testimony upon this point is conflicting, and wholly irreconcilable. It would serve no useful purpose to review it at any length. Suffice it to say that the testimony upon the part of plaintiff estimated the damages to be about $1,500, viz.: To repair the dam, about $715; flume, $555; ditch and tail race, $200; stone wall, $40. The testimony on the part of the defendant ranged from a mere nominal sum to about $200 for the entire work; the highest estimate to repair the dam being placed at about $100, and the highest estimate on the flume at $50. One witness, a carpenter by trade, testified that he would take a contract and give a bond to furnish all the lumber, materials, and labor and put the flume in good repair for $50. It was satisfactorily shown that with the dam, the ditch, and the tail race in perfect repair it was sometimes difficult to obtain the 60-horse water power necessary to run the electric plant, and that defendant had been compelled to repair the flume, and to frequently clean out the ditch, in order to get the required amount of water. It is shown that the plant was in full operation up to the time when the taking down of the buildings and removal of the fixtures was commenced, and that at that time there was as much water as usual running through the flume, etc. After due consideration of all the facts in this case, I assess the damages, under this covenant, in the sum of $425. Judgment will be entered in favor of plaintiff for that amount.

ST. PAUL FIRE & MARINE INS. CO. v. KIDD et al.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

INSURANCE—CONSTRUCTION OF POLICY—SUBROGATION.

A policy of insurance on certain whiskies to be shipped was made "as per form attached," and by the attached form the insurer's liability was limited to the excess in value over $20 per barrel, carriers to have the right to limit their liability for loss to $20 per barrel, and the insured to have the right, on collecting that sum from the carrier, to give a release from all liability. The body of the policy, however, contained a provision that any claim against the carrier for loss should be assigned to the insurer. *Held*, that the provisions of the attached form must prevail over the inconsistent provisions contained in the body of the policy, and that it was no defense to an action on the policy that the shipper, by accepting a bill of lading providing that the carrier should have the benefit of all insurance on the goods, had destroyed the insurer's right of subrogation.

At Law. Action by George W. Kidd and others against the St. Paul Fire & Marine Insurance Company. From a judgment for plaintiffs, defendant brings error. Affirmed.

Joseph A. Shoudy, for plaintiff in error.

John G. Milburn, for defendants in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The plaintiff in error was the defendant in the court below. It was sued by the plaintiffs upon its policy of fire insurance issued to them. The action was tried before a jury, and the judge, upon a statement of facts agreed to by the parties, and which presented merely questions of law, directed a verdict for the plaintiffs. The defendant excepted, and has assigned error of that ruling.

An open policy was issued by the defendant, May 22, 1890, insuring the plaintiffs in the sum of $3,000, on account of whom it may concern, loss, if any, payable to them, for the term of one year, on spirits, whiskies, etc., and packages containing the same, while in transportation in the state of Illinois and elsewhere, on railroads or on ferryboats, to destination in another state. It contains the following clauses, among others:

"This policy to be liable only for excess of value above $20 per barrel, which will be deducted from all losses before presentation of claim." "It is understood that the transportation companies may limit their liability to the insured to $20 per barrel on goods shipped under this policy, and the said insured may, in the case of loss, collect said sum from said companies, and release the same from all liability, without affecting the liability of the insurer."

These clauses were inserted in an ordinary cargo policy adapted to marine insurance, by attaching a form to the policy. The policy reads that the property is insured "as per form attached." The body of the policy contains the following condition:

"Should any loss or damage under this policy be occasioned by any other vessel, person, or persons, in such a manner that such other vessel, or the owners thereof, or such person or persons, should be liable therefor, then all claims for such losses and for damage shall be assigned over to this company, and shall inure to its benefit, in proportion to the amount of such loss sus-

tained by them; that is to say, the amount of such loss shall be satisfied and paid out of what shall be recovered by such claimants in the same proportion (according to such amount) as the losses sustained by other sufferers shall be paid out of said recovery."

October 13, 1890, the plaintiffs shipped at Peoria, Ill., for transportation to them at New York, over the railroad of the New York, Chicago & St. Louis Railroad Company and the railroad of the Delaware, Lackawanna & Western Railroad Company, certain spirits, of which 63 barrels, of the value of $6,349.03, were destroyed by fire October 17, 1890, and became a total loss, while in the course of transportation on the railway of the New York, Chicago & St. Louis Railroad Company. The plaintiffs shipped the spirits pursuant to a bill of lading received by them from the railroad companies, which, among other things, contained the following condition:

"In case of loss or damage of any goods named in this bill of lading, for which these companies may be liable, it is agreed and understood that they may have the benefit of any insurance effected by or on account of the owner of said goods."

The fire occurred solely through the negligence of the New York, Chicago & St. Louis Railroad Company. Thereafter due notice of the loss was given to the defendant, and proofs of loss were made and presented to it, conformably to the provisions of the policy. The time for the payment of the loss had expired, and the defendant had not paid the same at the time of the commencement of the suit.

Upon these facts the defense interposed by the defendant was that, by agreeing with the railroad company that it should have the benefit of the insurance, the plaintiffs destroyed the right of subrogation reserved by the policy, and deprived defendant of any remedy against the transportation company for the loss, and consequently could not recover on the policy. In directing the jury to find a verdict for the plaintiffs the trial judge overruled this defense. We think there was no merit in the defense, because the special conditions of the form written into the policy are inconsistent with the retention of the insurer's ordinary right of subrogation, and are intended to give to the plaintiffs the sole and exclusive benefit, in the event of a loss, of any remedy against any transportation company responsible therefor. If there is any collision between these conditions and the subrogation clause in the body of the policy, the latter must give way. The instrument, having been prepared by the defendant, is to be construed most strongly against the defendant if its provisions conflict. National Bank v. Insurance Co., 95 U. S. 673. The form is expressly referred to in the policy as embodying the terms of the insurance, and is obviously designed to cover a special class of risks to which many conditions in the policy do not attach. The terms supersede any inconsistent terms in the body of the policy. Chadsey v. Guion, 97 N. Y. 333; Halpin v. Ins. Co., 120 N. Y. 73, 23 N. E. Rep. 988; May, Ins. (3d. Ed.) § 177.

By the first of the special clauses the risk is divided into two parts in case of a loss, so that the plaintiffs are to bear it to the extent

of $20 per barrel, and the defendant is to bear it only as to the additional value; and by the second the plaintiffs are authorized to contract with every transportation company so as to release the carrier from liability for any loss applicable to the defendant's part of the risk. By the latter clause the plaintiffs are also authorized to release the carrier wholly upon collecting indemnity for the loss upon their own part of the risk. Obviously it was quite immaterial to the defendant whether the plaintiffs, in case of loss, should collect their part from the transportation company or not. If they were to do so, the defendant would get nothing by it, nor could the defendant lose anything by the omission of the plaintiffs to collect. It is the manifest purpose of the provisions to give to the plaintiffs any indemnity for their own part of the loss which they may choose to require of the carrier, and it would be absurd to construe the provision as intending to compel them to indemnify themselves.

The language of the second clause does not, in terms, permit the plaintiff to release the transportation companies wholly from liability in advance of a loss; on the contrary, fairly interpreted, it contemplates that they shall not do so. It is usual for underwriters to insure the property at risk at something less than its full value, in order that the insured shall have an interest in preventing loss, to guard against his carelessness or dishonesty. Ang. Ins. § 92. As the risk here, upon property while in transportation by carriers, was to be largely affected by the vigilance of the carriers, it was natural that the defendant should wish to compel the transportation companies, in the event of a loss, to bear some of the consequences. The clause contemplates that the transportation companies, as well as the plaintiffs, should bear the risk to the extent of $20 per barrel. We are not called upon to determine whether a breach of this condition by the plaintiffs would afford a defense to the action, because no defense has been interposed based upon the theory that the plaintiffs violated their agreement not to release the transportation companies before a loss. If they had a right to release the railroad company after a loss, without accounting to the defendant, the defendant has not been injured in its right of recourse by subrogation. The judgment is affirmed.

SMITH v. SUN PRINTING & PUB. ASS'N.

(Circuit Court of Appeals, Second Circuit. April 18, 1893.)

1. FEDERAL COURTS—JURISDICTION—PROOF OF CITIZENSHIP.
   In an action by a married woman for libel, the testimony of the plaintiff's husband, that he has resided at Toronto, Can., all his life, and of the plaintiff, that she has been married nearly six years, during which time she has also resided there, is sufficient to establish an averment of the complaint that the plaintiff is a British subject, and resides at Toronto, Can., especially when no objection to the sufficiency of the evidence is interposed at the trial.

2. LIBEL—COMPETENCY OF EVIDENCE—HARMLESS ERROR.
   In an action for libel, alleged error in allowing witnesses to answer question, "Did you know to whom the article related?" does not prejudice the