SURETYSHIP—FIDELITY BONDS—MATERIAL ALTERATION—IMPAIRMENT OF RIGHT OF SUBROGATION.—The defendant Surety Company executed in favor of the plaintiff Society a fidelity bond in the sum of $100,000 to indemnify the latter against any pecuniary loss it might sustain through the failure of its treasurer faithfully to perform his duties as prescribed by the constitution and by-laws of the Society or his failure to keep intact and account for all its funds. The treasurer violated his duty by depositing in the People's Bank $241,000, a sum greatly in excess of the maximum permitted by the by-laws to be lodged in any one depository. The Bank subsequently became embarrassed and state officials estimated that it could meet only from 20 to 40 percent of its liabilities. An agreement was entered into by which a Trust Company assumed all the assets and liabilities of the Bank conditioned upon the Society's agreeing to leave with the Trust Company for four years a $200,000 non-interest bearing deposit. Liquidation of the Bank was thus avoided and its depositors were ultimately paid in full. On the expiration of the four years and the repayment of its deposit, the Society brought suit on the bond, claiming $41,000 as interest lost to it through its treasurer's default and the subsequent allegedly necessary arrangement. Judgment in the trial court was for the plaintiff on the ground that the arrangement was similar to an insured's attempt at salvage after a fire; that the burden rested on the surety to prove affirmatively that what was done increased his risk; and that this was a question for the jury, which was instructed that efforts to salvage ought not to be held a prejudicial variation of the hazard. The United States Supreme Court reversed this decision, not on the ground that the risk was actually increased, or that the right of subrogation was impaired, but rather that the arrangement so altered the relationship of the parties, eliminating one—the Bank—entirely, against whom a right of reimbursement existed on payment of the loss, that it made "proof of an actual detriment impossible"; that it could not be determined what the Bank might have paid; and that as a result of the plaintiff's conduct the surety could not show whether the loss would have been greater or less than $41,000. The surety was thus discharged. *American Surety Co. of New York v. Greek Catholic Union* (1932) 52 S. Ct. 235.

The Court apparently recognizes the established rule that a fidelity bond is a form of insurance and that as such it is subject to the rules applicable to insurance contracts generally, and not to the rules ordinarily applied to sureties. *American Surety Co. v. Pauly* (1898) 170 U. S. 133; *Home Savings Bank v. Massachusetts Bonding Co.* (1917) 19 Ga. App. 352, 91 S. E. 494. Nevertheless, it actually fails to apply this principle as the courts usually apply it in fire insurance contracts when they allow recovery for any damages to the insured's merchandise which resulted from any prudent efforts to extinguish the fire. *Cohn v. National Insurance Co.* (1902) 96 Mo. App. 315, 70 S. W. 259 (goods trampled on in an effort to extinguish the fire); *Haltzman v. Franklin Insurance Co.* (C. C. D. D. C. 1833) Fed. Cas. 6,649 (damages by removal to a place deemed safe); *Lewis v. Springfield Insurance Co.* (1857) 76 Mass. 159

(damage by water). These cases indicate the unwillingness of the courts to discharge an insurance company from liability on a policy merely because the goods were destroyed by the attempts at salvage and not by the fire itself. Yet, such a discharge would be the logical result of the holding in the principal case, for such attempts make it impossible to prove what would have been the loss from the fire itself.

But even assuming that his was an ordinary contract of suretyship, and admitting that every surety on paying the creditor—the Society—has an absolute right of subrogation to the creditor's position [*United States v. National Surety Co.* (1920) 254 U. S. 73] and that any action of the creditor which changes materially the surety's risk or impairs this right of subrogation discharges the surety [*State v. McGonigle* (1890) 101 Mo. 353, 13 S. W. 758; *Cummings v. Little* (1869) 45 Mo. 183], still it is clear that the rules governing discharge of a surety by material alteration are inapplicable. An alteration affecting the surety's risk must occur before the breach of the principal contract. Here, the breach occurred and the loss for which the defendant was liable was entailed before the so-called material alteration. Thus the arrangement could have had no effect in increasing the surety's risk, since the risk became fixed as of the time of the breach of trust by the treasurer. But the question still remains was the right of subrogation impaired? The Court properly said that the surety on payment of the loss would have been subrogated to any rights that the Society had against the People's Bank and would have been entitled to step in and claim its pro rata share of the assets had the Bank been liquidated. But, said the Court, the Bank was dissolved and its assets transferred with the consent of the Society, thus eliminating any assets to which the surety company might look for reimbursement and making it impossible to determine the value of the rights to which it would have been subrogated. Does this necessarily follow? Was it not possible to determine with a fair degree of accuracy just what were the assets and liabilities of the Bank at the time the Trust Company took it over, thereby ascertaining what would have been the amount for which the surety would have been liable had the Bank been liquidated? It would then be apparent whether this amount would have been greater or less than $41,000. It does not seem reasonable to believe that a bank must be liquidated before it can be discovered what its assets and liabilities are. In this respect the decision seems to be unfair in penalizing the Society for acting with reasonable prudence under the circumstances in an attempt at salvage, especially since state authorities estimated that the loss would have been much greater had the Bank been liquidated. D. P., '33.

TORTS—NEGLIGENCE—CONSENT TO ABORTION AS BAR TO RECOVERY.—The court, in *Martin v. Morris* (Tenn. 1931) 42 S. W. (2d) 207, held as a matter of law that a woman who consents to an operation to produce an abortion cannot recover damages from the physician for injuries resulting from that operation.