(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.

This decision raises for the first time in five years the efficacy of consent as a defense in a civil action for damages where the cause rests upon the commission of a crime by which the public peace or the life of an individual or his person is affected. 1 Cooley, TORTS (3rd ed. 1906) 282.

The most recent case prior to the principal one is *Szadiwicz v. Cantor* (1926) 257 Mass. 518, 154 N. E. 251, which held in accord with the instant case, and strengthened a position, which hitherto had been in the minority, refusing recovery on the strict doctrine that a court will not lend its aid to one who founds his cause of action upon an immoral or illegal act to which he has consented. This view is favored in Throckmorton's, *Cooley on Torts* (1930) 240, as consonant not only with the general principle of *volenti non fit injuria*, but with common sense justice.

The contrary doctrine and probably the majority rule is asserted in *Milliken v. Heddesheimer* (1924) 110 Ohio St. 381, 144 N. E. 610; *Lembo v. Donnell* (1917) 116 Me. 505, 101 Atl. 469; *Miller v. Boyer* (1896) 94 Wis. 123, 68 N. W. 869. The rule which denies the ability to consent to an assault and battery accompanied by a breach of the peace is extended by these cases to include abortions, as affecting a public interest in the life and safety of individuals, which forbids the power to consent. This public interest is evidently of a different nature from that sought to be protected by the criminal law. The Missouri statutes are directed solely at the physician and make him guilty of manslaughter if the operation is fatal to the mother of an unborn "quick" child, and if the operation is successful, he is guilty of a felony. R. S. Mo. (1929) secs. 3990, 3991. Performing any criminal abortion is a ground for revocation of the surgeon's license to practice. R. S. Mo. (1929) sec. 9120.

In many jurisdictions, as in Missouri, the question as to civil liability has never arisen. The trend of the last twenty years is with the minority rule, upholding consent as a defense. This position was adopted by the American Law Institute in its RESTATEMENT OF THE LAW OF TORTS (Am. L. Inst. 1925) no. 1 sec. 75.

Where, however, there is negligence resulting in injuries which are beyond the normal consequences of the illegal operation, there is no apparent reason why the physician should not be held liable as in every other case of malpractice. Such negligence overreaches the scope of consent and expectancy. If it is recognized that such operations will inevitably be performed, a liability for negligence would seem desirable as an additional protective measure tending at least to induce care. S. M. R., '33.

WORKMEN'S COMPENSATION—INJURY ARISING "OUT OF" AND "IN COURSE OF EMPLOYMENT."—Plaintiff whose duty it was to see that lights were burning on defendant's trucks parked on a street adjacent to defendant's premises was injured while crossing a street other than the one on which the trucks were parked. *Held*, that the injury of plaintiff did not arise out of and in the course of plaintiff's employment so as to permit recovery