

RECENT CASE NOTES

BILLS AND NOTES—FORGED SIGNATURE OF DRAWER—RIGHT OF DRAWEE TO RECOVER PAYMENT MADE TO HOLDER.—The plaintiff bank forwarded a check received from a depositor to its correspondent for collection. Two weeks after payment had been made by the drawee bank, the latter discovered that the drawer's signature had been forged and demanded, sued for, and recovered from the collecting bank the amount of the check, this plaintiff taking active part in the defense. The present suit was then brought to recover from the drawee the same sum. *Held*, that the plaintiff was barred by the judgment, with a dictum that a complete defense was available in the previous action, since the act of 1849 permitted recovery by a drawee of payments made upon forged paper only when the drawee was not negligent so as to cause the holder to change his position. *Bank of Portland v. Bank of Philadelphia* (1920, Pa.) 110 Atl. 792.

Actions by a drawee for the recovery of money paid upon a check in which the drawer's signature was subsequently discovered to have been forged, are governed by rules on which decisions involving forged indorsements and alterations have no bearing. *White v. Bank* (1876) 64 N. Y. 316; 10 L. R. A. (N. S.) 49, note. Most jurisdictions have followed the leading case on this point, which denied recovery on the ground that it was incumbent upon the drawee to satisfy himself that the signature was genuine before accepting or paying the bill. *Price v. Neal* (1762, K. B.) 3 Burr. 1354; Woodward, *Quasi-Contracts* (1913) sec. 80. This rule is based, not merely upon estoppel or the negligence of the drawee, as is often stated, but upon public policy, namely, that, as between the drawee and holders in due course, the drawee bank should be deemed the place of final settlement. *Germania Bank v. Boutell* (1895) 60 Minn. 189, 62 N. W. 327. The doctrine does not apply when the holder in any way contributed to the success of the fraud. *Rouvant v. San Antonio Bank* (1885) 63 Tex. 610. Nor is it available to a holder who paid no value. *Title Guarantee & Trust Co. v. Haven* (1909) 196 N. Y. 487, 89 N. E. 1082. A few states have held that the drawee may recover unless he is guilty of negligence resulting in loss to the holder. *First Nat. Bank v. Bank of Wyndmere* (1906) 15 N. D. 299, 108 N. W. 546. Pennsylvania obtained this result by statute, as seen in the principal case. Section 62 of the N. I. L. provides that the acceptance of a bill admits the genuineness of the drawer's signature. It is generally held that payment of a check must necessarily include acceptance thereof and that this section therefore adopted the doctrine of *Price v. Neal*, *supra*. *Bank of Rolla v. Bank of Salem* (1910) 141 Mo. App. 719, 125 S. W. 513; Brannan, *The Negotiable Instruments Law* (3d ed. 1920) sec. 62. One state, at least, which formerly adhered to the "change of position" rule now accepts this view. *Cherokee Bank v. Trust Co.* (1912) 33 Okla. 342, 125 Pac. 464. A few have avoided doing so through most fallacious reasoning, for example, by holding that the holder warrants the validity of the draft by his negotiation, or indorsement, of it to the drawee. *First Nat. Bank v. Brule Nat. Bank* (1917) 38 S. D. 396, 161 N. W. 616. But such a warranty arises only in case of a sale of the instrument, and not when it is presented to the drawee for payment. *Dedham Bank v. Everett Bank* (1901) 177 Mass. 392, 59 N. E. 62. The Pennsylvania courts, relying on the section of the N. I. L. which provides that an acceptance must be in writing, consider that only certification can amount to acceptance, so that their existing law was not altered. *Union Bank v. Franklin Bank* (1915) 249 Pa. 375, 94 Atl. 1085. Whether correct or not, this point of view is fatal to uniformity, for the attainment of which the N. I. L. was adopted.

BILLS AND NOTES—FORGED SIGNATURE OF PAYEE—INTENT OF FORGER AS TEST OF PAYEE'S FICTITIOUS CHARACTER.—The plaintiff's agent, who had authority to draw on the plaintiff's credit to pay for grain bought in the course of business, fraudulently made and negotiated a bill of exchange payable to the order of one Andrew Molch. The agent never intended Molch to have any interest in the transaction and forged Molch's name to an indorsement prior to presentment. The plaintiff, as drawee, without knowledge of the agent's intent, accepted and paid the bill when presented for collection by the defendant bank, under the mistaken belief that its agent had drawn upon it to pay for grain bought of Molch and that Molch's signature was genuine. The plaintiff now seeks to recover from the defendant bank on the ground that the payee's name was forged. *Held*, that the plaintiff could not recover, as the payee was fictitious. *American Hominy Co. v. Bank* (1920, Ill.) 128 N. E. 391.

Under section 9, paragraph 3, of the N. I. L. an instrument is payable to bearer when it is payable to the order of a fictitious person. An existing person may be considered fictitious within the meaning of the statute where he has no interest and is intended to have none in the transaction. *Snyder v. Bank* (1908) 221 Pa. 599, 70 Atl. 876. In most jurisdictions the intent of the drawer or maker in inserting the name of the payee is the controlling test as to whether or not the payee is fictitious. *Shipman v. Bank* (1891) 126 N. Y. 318, 27 N. E. 371; *Grand Lodge v. Bank* (1917) 101 Kan. 369, 166 Pac. 490; 8 C. J. 179. Some courts impute an agent's knowledge to his principal. *Equitable Life Ass. Co. v. Bank* (1916, Mo. App.) 181 S. W. 1176. But the better rule is *contra*. *Los Angeles Inv. Co. v. Bank* (1919, Calif.) 182 Pac. 293. Under the common law a payee is not fictitious unless the drawee or acceptor has knowledge of his fictitious character at the time of payment or acceptance. *Bennett v. Farnell* (1807, N. P.) 1 Camp. 130, and note. The N. I. L., however, is silent on this point. Kulp, *The Fictitious Payee* (1920) 18 MICH. L. REV. 296, 304. In England such knowledge was held not to be essential under the Bills of Exchange Act. *Bank of England v. Vagliano* [1891, H. L.] A. C. 107. In this country the courts appear to be tending toward the English rule in accord with the principal case. *Trust Co. v. Bank* (1908) 127 App. Div. 515, 112 N. Y. Supp. 84. Yet the requirement under the common law, whereby the party to be charged must know the payee to be fictitious, is clearly a guard against fraud. See Greeley, *Fictitious Payees in Forged Checks or Bills* (1909) 3 ILL. L. REV. 331. In cases similar to the principal case it would seem to be unnecessary to hold the payee to be fictitious when the same result could more logically be reached on the doctrines of agency and estoppel. See *Shuttle Co. v. Bank* (1915) 134 Tenn. 379, 183 S. W. 1006.

CONTRACTS—MUTUALITY—CONTRACT VOID FOR UNCERTAINTY AS TO QUANTITY.—The plaintiffs and the defendant entered into a contract whereby the defendant agreed to sell and deliver to the plaintiffs their entire consumption of vulcanized fibre and insulating papers for one year. The plaintiffs made orders upon the defendant for definite quantities of the article, which orders the defendant refused to fill. *Held*, that the contract was void for lack of mutuality and certainty, since the quantity contracted for must be reasonably certain or capable of being approximately ascertained at the time of making the agreement. *American Trading Co. v. National Fibre & Insulation Co.* (1920, Del.) 111 Atl. 290.

The term mutuality, or lack of mutuality, has been used to apply to a number of situations in the law of contract. (1) Where there was no consideration. *Blanton v. Forrest City Mfg. Co.* (1919) 138 Ark. 508, 212 S. W. 330. In such a case it would be clearer and more accurate to say that there was no contract,

instead of saying that the contract was void for lack of mutuality. See *Gross v. Stampler* (1917, Sup. Ct.) 165 N. Y. Supp. 214, 215. (2) Where there was a real unilateral contract, that is, where one party was under no duty to do anything. *Ross-Vaughan Tobacco Co. v. Johnson* (1918) 182 Ky. 325, 206 S. W. 487; *Majestic Coal Co. v. Anderson* (1919, Ala.) 82 So. 483; see Anson, *Contract* (Corbin's ed. 1919) 25. But, by the very nature of a unilateral contract mutuality of duty cannot exist. *Underwood Typewriter Co. v. Century Realty Co.* (1909) 220 Mo. 522, 119 S. W. 400. (3) Where the legal relations of the parties to a bilateral contract were not reciprocal. *Weil v. Chicago Tool Co.* (1919) 138 Ark. 534, 212 S. W. 313; *City of Pocatello v. Fidelity Co.* (1920, C. C. A. 9th) 267 Fed. 181. However, a promise creating a legal duty on the promisor is a sufficient consideration for another promise regardless of the nature of that promise or the legal relations it creates. For example, a contract in which the defendants promised to ship to the plaintiff for sale on commission the entire output of their coal mine, while the plaintiff promised to act as agent and to guarantee all collections, was held to be enforceable, although the plaintiff did not promise that he would succeed in selling any coal. *Warren v. Coal Co.* (1919) 200 Mo. App. 442, 207 S. W. 883; *Neola Elevator Co. v. Kruckman* (1919, Iowa) 171 N. W. 743; see (1917) 30 HARV. L. REV. 517. (4) Where the equitable remedies were not mutual. See *Philadelphia Ball Club v. Lajoie* (1902) 202 Pa. 210, 215, 51 Atl. 973. (5) Where, as in the instant case, the term mutuality is used synonymously with certainty. At best the use of the term mutuality to express so many legal concepts is unfortunate. In the formation of any contract there must be an accepted offer or a promise for which consideration is given; and in either case there must exist the element of certainty, or there is no contract. *Woods v. Evans* (1885) 113 Ill. 186; *Elks v. North State Ins. Co.* (1912) 159 N. C. 619, 75 S. E. 808. An agreement is never rendered unenforceable by lack of mutuality, even where mutuality means certainty, unless it creates a want of a definite consideration. But in such a case there is no contract. See *Gross v. Stampler*, *supra*; *Raney Lumber Co. v. Schroeder Lumber Co.* (1916, C. C. A. 7th) 237 Fed. 39, 43. When the aggregate of legal relations called a contract has come into existence, a further discussion of mutuality is unnecessary and confusing. It might have argued in the instant case that there was a series of bilateral contracts, each being created by the placing of an order for a definite quantity. Such contracts should not be held void for want of certainty. See (1917) 26 YALE LAW JOURNAL, 795.

CONTRACTS—PERFORMANCE ON TIME A CONDITION PRECEDENT TO DUTY TO PAY—CONDITION NOT WAIVED BY IMPOSSIBILITY OF PERFORMANCE.—The plaintiff company sought to recover the contract price of an electric crane. The contract required delivery by a certain date and protected the manufacturer against suit for damage arising from nonfulfilment by reason of any cause beyond its control. The buyer had refused to accept the crane because it was delivered late. The court assumed that the delay was caused by priority orders of the government. *Held*, that the plaintiff could not recover. *Primos Chemical Co. v. Fulton Steel Corporation* (1920, N. D. N. Y.) 266 Fed. 945.

The plaintiff contended that by implication from the clause which protected it in case of unavoidable delay, the time for its performance was extended beyond the period stipulated in the contract. Impossibility of performance excuses non-performance. *Chicago, etc. Ry. Co. v. Hoyt* (1893) 149 U. S. 1, 13 Sup. Ct. 779; *Field & Co. v. Haven*, (1918) 36 Calif. App. 669, 173 Pac. 108. Increased difficulty, even though due to war conditions, does not excuse non-performance. *Wilson & Co. v. Tennants* [1917] 1 K. B. 208; *Richards & Co. v. Wreschner* (1915, Sup. Ct.) 156 N. Y. Supp. 1054. Such a clause as that in question has been held to protect a manufacturer against an action for damages,

where the delay was caused by government priority orders placed under the National Defence Act, U. S. Comp. St. 1916, secs. 3115f-3115h, and the Navy Appropriation Act 1917, ch. 180. *Moore & Tierney v. Roxford Knitting Co.* (1918, N. D. N. Y.) 250 Fed. 278; *Mawhinney v. Millbrock Woolen Mills* (1918, Sup. Ct.) 105 Misc. 99, 172 N. Y. Supp. 461; see COMMENTS (1919) 28 YALE LAW JOURNAL, 399. Even in the absence of such contractual provision no action would lie for damages so caused. *Lipton v. Ford* [1917] 2 K. B. 647. But a manufacturer who for some legitimate reason has not performed on time cannot charge the purchaser as for a performance. Excuse is not a performance. The court in the principal case based its decision on the ground that time was of the essence of the contract. It has been held that performance by the date set in the contract was important only as a condition precedent to the purchaser's duty to pay for the goods, if delivered. *Rosenthal v. Empire Brick and Supply Co.* (1907, Sup. Ct.) 54 Misc. 633, 104 N. Y. Supp. 769. Where the impossibility was only temporary, the obligation has been held not to be discharged but, at most, suspended. *Vorhaus v. City National Securities Co.* (1917, Sup. Ct.) 167 N. Y. Supp. 736; *Tamplin S. S. Co. v. Anglo Mexican Co.* [1916, H. L.] 2 A. C. 397. Whether a manufacturer whose performance had been temporarily excused, could, after revival of his obligation, compel a buyer who had not objected to the delay to accept delivery, is not decided in the instant case, because upon default of the plaintiff the buyer had given notice of his election to rescind. Here the plaintiff's delay was not a breach of its duty, for its promise was expressly limited by the clause concerning unavoidable delay. Its delay was a nonfulfilment of a condition precedent to any right against the buyer, because time was of the essence of the contract. The decision seems sound and protects a purchaser to whom, notwithstanding the manufacturer's justification for delay, performance on time is essential. The seller was privileged not to pay damages for delay; the buyer was privileged not to take and pay for the articles.

DAMAGES—LIQUIDATED DAMAGES AND PENALTY—CONTRACT FOR EXCHANGE OF LAND.—The plaintiff and defendant entered into an agreement for the exchange of land. The contract contained a covenant by which the plaintiff agreed to turn over farm produce, valued at \$280, to the defendant. The defendant refused to carry out the agreement and the plaintiff brought this action for breach of contract. At the trial the plaintiff offered no evidence of damage, but relied on a clause of the contract which provided that if either party should fail to perform "all of the agreements herein contained, the said party shall forfeit the sum of \$500 as liquidated damages." Held, that the plaintiff should not recover, as the sum stipulated was a penalty. *Ayers v. Houston* (1920, App. Div.) 183 N. Y. Supp. 808.

Probably the real test as to whether an amount stipulated in a contract for the exchange of land is a penalty or liquidated damages, regardless of the language used or the particular basis on which the courts claim to arrive at their decisions, is whether the amount is reasonable or not. *Morse v. Rathburn* (1868) 42 Mo. 594; *Scofield v. Tompkins* (1880) 95 Ill. 190. There seems to be considerable confusion, however, as to how the test of reasonableness should be applied. Some courts compare the sum stipulated with the actual damage sustained. See *Blunt v. Egeland* (1908) 104 Minn. 351, 354, 116 N. W. 653, 654; *Holland Torpedo Boat Co. v. Nixon* (1908, Sup. Ct.) 61 Misc. Rep. 469, 115 N. Y. Supp. 573. So if no injury results it will be regarded as a penalty. *Dunn v. Morgenthau* (1903) 73 App. Div. 147, 76 N. Y. Supp. 827, affirmed in 175 N. Y. 518, 67 N. E. 1081. On the other hand, most courts adopt what seems to be a sounder view, that the comparison should be made between the amount stipulated and the damages which might reasonably have been expected

to follow on a breach. *Rabinowitz v. Apter* (1915) 90 Conn. 1, 96 Atl. 157; *Webster v. Bosanquet* [1912, P. C.] A. C. 394; *Ellicott Machine Co. v. United States* (1907) 43 Ct. Cl. 232. It is possible that if the court had applied the latter doctrine the decision might have been different. It can better be sustained on the ground that the agreement contained one covenant, among others, the breach of which could not possibly have resulted in damages as great as the amount stipulated. *Johnson v. Dittes* (1917) 137 Minn. 175, 162 N. W. 1078; *Boalware v. Crohn* (1907) 122 Mo. App. 571, 99 S. W. 796; *contra, Madler v. Silverstone* (1909) 55 Wash. 159, 104 Pac. 165.

EVIDENCE—EXTRAJUDICIAL ADMISSIONS—SILENCE AFTER AN ACCUSATION—EFFECT OF COUNSEL'S ADVICE.—The defendant and two others were arrested and taken into custody charged with attempted robbery. One of the participants made a confession implicating the defendant. The latter refused to make any statement, assigning as his reason the advice of counsel. The lower court over objection admitted the accusation and the conduct of the accused, although it did not then have before it the testimony as to the genuineness of the defendant's excuse. *Held*, that the evidence was properly admitted. *People v. Graney* (1920, Calif. App.) 192 Pac. 460.

If a person charged with crime remains silent when accused of guilt, where the circumstances are such as would naturally call for a denial, the accusation and his conduct may be introduced in evidence for the jury to determine whether his silence is to be regarded as an admission of the truth of the accusation. *Kelley v. People* (1874) 55 N. Y. 565; *People v. Jordan* (1920) 292 Ill. 514, 127 N. E. 117; 2 Wigmore, *Evidence* (1904) sec. 1071. The accusation, without proof of the silence of the accused, is never admissible for the truth of the facts contained in it. Silence, however, is not always equivalent to admission; it is often explicable as ignorance or dissent and without the background of the particular occasion has no significance. It is, then, the function of the court to determine as a preliminary question whether the accusation under the circumstances called for a reply or whether the accused was in a position where he could, or the ordinary man would, reply. *Weightmover v. State* (1903) 46 Fla. 1, 35 So. 856; *People v. Byrne* (1911) 160 Calif. 217, 116 Pac. 521. Where the testimony as to the surrounding circumstances is conflicting, theoretically the question should be determined by the trial court, but it is the practice of some courts to leave the question to the jury under proper instructions. *State v. Guffey* (1917) 39 S. D. 84, 163 N. W. 679; *State v. Christ* (1920, Iowa) 177 N. W. 54. The courts are in conflict as to when silence is justifiable. Some hold that the mere fact of arrest is sufficient to excuse a failure to answer. *Bouldin v. State* (1920, Tex. Cr. App.) 222 S. W. 555; *Ellis v. State* (1913) 8 Okla. Cr. App. 522, 128 Pac. 1095. The sounder view would seem to be that of the instant case, that arrest is not a ground for exclusion unless it is shown that the accused was not free to speak. *People v. Swaile* (1909) 12 Calif. App. 192, 107 Pac. 134; *State v. Booker* (1910) 68 W. Va. 8, 69 S. E. 295. The party offering the evidence must of course prove affirmatively that the accused heard the statement. *Commonwealth v. Brown* (1919) 264 Pa. 85, 107 Atl. 676. The advice of counsel would also seem to be a proper reason for silence and a tenable ground for exclusion of the evidence, and it has been so held in a recent case similar on its facts to the instant case. *People v. Conrow* (1911) 200 N. Y. 356, 93 N. E. 943.

INSURANCE—MUTUAL BENEFIT SOCIETIES—BY-LAW ABOLISHING PRESUMPTION OF DEATH.—The defendant's contract of insurance expressly reserved the right to bind members by subsequently enacted by-laws. After issuance of the certificate in suit, but before the insured's disappearance, the society enacted a by-law to the effect that absence without communication should never entitle a

beneficiary to recover on the certificate, until the full term of the member's expectancy in life had expired, and provided that up to such expiration premiums had been duly paid. The plaintiff, as beneficiary, after presenting proof of the insured's unexplained absence for over seven years, brought an action to recover on the certificate. *Held*, that the plaintiff should recover, as the defendant could not impair the essential obligations of its contract without the consent of the insured. *Haines v. Modern Woodmen of America* (1920, Iowa) 178 N. W. 1010.

The cases are in conflict as to how far mutual benefit societies can change the contracts of insurance with their members by subsequently enacted by-laws, even where the power to amend is expressly reserved. See COMMENTS (1914) 24 YALE LAW JOURNAL, 337. On the ground that the mutual interests of the members warranted their regulating their own affairs to the entire exclusion of the courts, such an amendment as that in the instant case has been held valid. *McGovern v. Brotherhood of Locomotive Firemen & Engineers* (1909) 31 Ohio C. C. 243, affirmed in (1911) 85 Ohio, 460, 98 N. E. 1128; *Kelly v. Supreme Council* (1899) 46 App. Div. 79, 61 N. Y. Supp. 394. By the weight of authority, however, such an amendment is not binding, because it is unreasonable. *Hannon v. A. O. U. W.* (1917) 99 Kan. 734, 163 Pac. 169; see L. R. A. 1917 C, 1029, note; *Samberg v. Knights of Maccabees* (1909) 158 Mich. 568, 123 N. W. 25. In some states where the presumption of death from long absence unexplained has been made statutory, it has been held that the society could not lawfully make a by-law inconsistent with the specific statutory provision. *Sovereign Camp v. Robinson* (1916, Tex. Civ. App.) 187 S. W. 215; *National Union v. Sawyer* (1914) 42 App. D. C. 475. Even though the member has assented in advance to any subsequently enacted by-law, the power to amend is not unlimited. The society cannot materially alter or nullify the essential obligations of its contract. *Parks v. Supreme Circle* (1914) 83 N. J. Eq. 131, 89 Atl. 1042; *Stirn v. Supreme Lodge* (1912) 150 Wis. 13, 136 N. W. 164. A material element of the contract in the principal case was the right of the beneficiary to recover on proof of certain facts raising a presumption of death. The subsequent amendment would nullify the society's duty to pay under those circumstances, and would materially change the performance required of the members or his beneficiary, by adding a burdensome condition. In this connection, it is interesting to note the tendency of the courts to extend the power to amend the by-laws to include a change in the rates to be paid. *Supreme Lodge v. Mims* (1916) 241 U. S. 574, 36 Sup. Ct. 702; *Supreme Lodge v. Smyth* (1918) 245 U. S. 594, 38 Sup. Ct. 210. These decisions may be justified on the ground that without such a change insolvency of the society might destroy the insured's investment, whereas with the change, that investment is preserved as far as possible, in accordance with the original intention of the parties. See COMMENTS (1914) 24 YALE LAW JOURNAL, 337. It is submitted that the instant case is sound, and represents the weight of authority.

INSURANCE—STATUTE OF FRAUDS—PAROL WAIVER OF CONDITIONS IN A GUARANTY BOND OF A SURETY COMPANY.—A building contractor took a surety company bond from a subcontractor. The bond provided for notice of any default on the part of the subcontractor, and gave the surety company the privilege of proceeding with the performance of the contract. The subcontractor abandoned the work and the agent of the surety company, with authority, verbally waived the written notice and his principal's privilege to proceed with the work; he then directed the plaintiff to proceed with the work and render an account of the expenditures to him. The plaintiff sued on the bond to recover damages for the default. The defense was the failure of written notice, a condition precedent in the bond, and the statute of frauds, the promise being to answer for the default of another. *Held*, that this was a contract of guaranty insurance,

and not a contract of suretyship within the statute of frauds, and that therefore a parol waiver of any of its conditions was valid. *Everly v. Equitable Surety Co.* (1920, Ind.) 127 N. E. 616.

It is generally conceded that a contract of fidelity guaranty, where the guarantor is a corporate surety, will be construed by the courts according to rules of construction of insurance contracts, because of the similarity in the nature of both kinds of business. *American Bonding Co. v. Morrow* (1906) 80 Ark. 49, 96 S. W. 613; *Hunter v. United States Fidelity & Guaranty Co.* (1914) 129 Tenn. 572, 167 S. W. 692; see also Stearns, *Suretyship* (2d ed. 1915) sec. 238. In the application of the insurance rules to such contracts, the courts have been called on to decide, not the rights of the parties under the contracts, but the effect of the contract after it has once been performed. Mendow, *Oral Contracts of Fidelity Guaranty* (1917) 24 CASE AND COMMENT 42, 44. On the other hand, the rights of the parties, as well as the validity of the contract, are governed by the law of suretyship and not of insurance, even where the guarantor is a surety corporation in the business. Stearns, *op. cit.*, sec. 233. It follows, therefore, that since the validity of a guaranty contract of a compensated surety corporation is governed by the law of suretyship, it will not be binding unless in writing, as it is within the statute of frauds, and the payment of a consideration cannot supply the place of a writing signed by the person to be charged, or have the effect of taking out of the statute an agreement that would otherwise be void. *Commonwealth v. Hinson* (1911) 143 Ky. 428, 136 S. W. 912; *Wainwright Trust Co. v. United States Fidelity & Guaranty Co.* (1916) 63 Ind. App. 309, 114 N. E. 470; *contra*, *Quinn-Shepherdson Co. v. United States Fidelity & Guaranty Co.* (1919) 142 Minn. 428, 172 N. W. 693; see also Frost, *The Law of Guaranty Insurance* (2d ed. 1909) sec. 6. It seems, however, that the conclusion reached by the court in the principal case is correct and may be justified on other grounds. As a general rule, a parol waiver by the surety of conditions in a guaranty bond will not be binding, since the bond itself is required by the statute of frauds to be in writing. *Wainwright Trust Co. v. United States Fidelity & Guaranty Co. supra*. But if one party makes it known that he does not seek strict performance and thereby causes the other party to fail to perform a condition, he would be estopped from setting up the other's failure to perform, as one who has caused a certain situation cannot rely upon it as an excuse for a failure to perform his own obligations. *Hellman v. City Trust, Safe Deposit & Surety Co.* (1906) 111 App. Div. 879, 98 N. Y. Supp. 51; Browne, *Statute of Frauds* (5th ed. 1895) sec. 423 ff.; 1 Williston, *Contracts* (1920) sec. 595. The courts, in their efforts to protect a premium-paying public, will probably follow the principal case in holding that guaranty contracts of corporate surety companies need not be in writing, though such contracts seem to be within the statute of frauds.

MUNICIPAL CORPORATIONS—GARNISHMENT—CITY TREASURER NOT LIABLE TO GARNISHMENT OF MONEY ORDERED PAID TO CONTRACTOR.—The city council had ordered the treasurer of the city to pay the defendant for fire engines. In an action for damages caused by the negligence of the defendant, the plaintiff tried to garnish the sum due in the hands of the city treasurer. *Held*, that the garnishment process should be quashed, as a city official is not subject to such process for reasons of policy. *Leiter v. American-La France Fire Engine Co.* (1920, W. Va.) 104 S. E. 56.

The rule generally stated is that a municipal corporation is not subject to garnishment. *Haddock v. McDonald* (1916) 98 Kan. 628, 159 Pac. 402; *Tribune Reporter Printing Co. v. Homer* (1917) 51 Utah, 153, 169 Pac. 170. It follows that a city official is also exempt. *Triebel v. Colburn* (1872) 64 Ill. 376. The garnishment statutes are so construed that "person," though including corporations, does not include municipal corporations. *Welch Lumber Co. v. Carter*

Bros. (1916) 78 W. Va. 11, 88 S. E. 1034; *contra*, *Bray v. Wallingford* (1850) 20 Conn. 416. A similar interpretation is given to the word "corporations." *Underhill v. Calhoun* (1879) 63 Ala. 216; *contra*, *Wilson v. Lewis* (1872) 10 R. I. 285. This exemption is based on reasons of public policy: a public corporation, existing for the welfare of the public, can not be subjected to inconvenience and expense in order that one private individual may the better collect a demand from another; the time of the officers would be consumed; it would lead to the impoverishment of the public service if salaries could be garnished; and performance of contracts would be impaired if the means therefor could be attached. *Merwin v. City of Chicago* (1867) 45 Ill. 133; *Switzer v. City of Wellington* (1888) 40 Kan. 250, 19 Pac. 620. The last two reasons have especial weight, and the garnishment of salaries or of money for contracts not yet performed is not generally allowed. *Tribune Reporter Co. v. Homer*, *supra*. But, except for these classes of debts, garnishment is frequently allowed. *Mayor of Jersey City v. Horton* (1875) 38 N. J. L. 88; *Laredo v. Nalle* (1886) 65 Tex. 359. Statutes have indirectly influenced decisions in this direction. *City of Denver v. Brown* (1888) 11 Colo. 337, 18 Pac. 214; *Mitchell v. Miller* (1905) 95 Minn. 62, 103 N. W. 716. Express statutory provisions illustrate this same tendency. *Ott Hardware Co. v. Davis* (1913) 165 Calif. 795, 134 Pac. 973. Where garnishment is not allowed, a bill in equity is sometimes granted. *Pendleton v. Perkins* (1872) 49 Mo. 565; *Plummer and Davis v. School Dist. No. 1* (1909) 90 Ark. 236, 118 S. W. 1011; *contra*, *Dollar v. Commission Co.* (1900) 78 Miss. 274, 20 So. 876. The view that garnishment should be allowed in the case of an ordinary debt, as where the contract with the city has been completed, has the support of Mr. Dillon. 1 Dillon, *Municipal Corporations* (5th ed. 1911) sec. 249. A creditor has in general a power to subject all assets of a debtor, except such as are expressly exempted by law from execution, to payment of his debts. The immunity of a city which restricts this power should be limited strictly to those cases where policy strongly requires that such immunity be granted. The instant case, following precedents in West Virginia, overlooks all such distinctions and rejects what is submitted to be the more modern and more liberal tendency.

MUNICIPAL CORPORATIONS—LIABILITY FOR TORTS IN CONNECTION WITH ULTRA VIRES OR "GOVERNMENTAL" ACTS.—The officials of the defendant town expelled the plaintiffs from town by means of unlawful criminal prosecution. The town by vote authorized or ratified these wrongful acts of its servants; and these suits were brought by the plaintiffs to recover against the town for malicious prosecution, abuse of legal process, and conspiracy. *Held*, that the plaintiffs should not recover, because the acts complained of were wholly beyond the powers of the town. *Brown v. Town of Edgartown*, *Norton v. Town of Edgartown* (1920, Mass.) 128 N. E. 1.

The law seems to be well settled in most jurisdictions that a municipal corporation is not liable for torts committed in the exercise of its "governmental" functions. *Bolster v. City of Lawrence* (1917) 225 Mass. 387, 114 N. E. 722; *Bernstein v. City of Milwaukee* (1914) 158 Wis. 576, 149 N. W. 382, L. R. A. 1915 C, 435, note; 4 Dillon, *Municipal Corporations* (5th ed. 1911) 2838. On the other hand, municipal corporations are generally held liable for torts committed in the exercise of its so-called "ministerial" duties. *Chicago v. Selz* (1903) 202 Ill. 545, 67 N. E. 386; 4 Dillon, *op. cit.*, 2902. There is a tendency in some recent cases to hold a municipal corporation liable for torts committed in the exercise even of its "governmental" duties. *Johnston v. City of Chicago* (1913) 258 Ill. 494, 101 N. E. 960; *Kriebel v. Worcester Township* (1916) 253 Pa. 452, 98 Atl. 686; see COMMENTS (1920) 29 YALE LAW JOURNAL, 911. The courts are almost unanimous in holding that if the tort was committed in connection with an act which is wholly *ultra vires*, the town is not liable. 6

McQuillin, *Municipal Corporations* (1913) 5439; 4 Dillon, *op. cit.*, 2868. The court in the instant case might have excused the town from liability on the ground that the tort was committed in the exercise of its "governmental" function. In a very recent decision it was held that a town was under a duty to pay damages in a libel action for tort committed in connection with a ministerial duty. *Stanley v. Town of Sangerville* (1920, Me.) 109 Atl. 189. It seems very clear that the acts done in the instant case were "governmental" as well as *ultra vires*, and therefore the town might have been excused from liability on either ground.

MUNICIPAL CORPORATIONS—POWER OF A MUNICIPALITY TO ACT BEYOND ITS CORPORATE BOUNDARIES.—A part of the defendant city bordering on the ocean was organized into a municipal improvement district, and the city was authorized by statute to issue bonds of the district for the purpose of supplying the funds with which to construct improvements therein. Some of the improvements, which consisted of pleasure piers and rock jetties, were to lie partially within the corporate limits and partially on the ocean bed, while others were totally outside the city limits. The plaintiff, a resident and taxpayer in the improvement district, brought this bill to enjoin the issuance and sale of these bonds. *Held*, that the city should be enjoined from issuing bonds for an improvement outside its corporate limits. Olney, Lawlor, and Sloane, JJ., dissenting. *Mulville v. City of San Diego* (1920, Calif.) 192 Pac. 702.

A municipal corporation may exercise those powers: (1) which are expressly granted, (2) which are necessarily or fairly implied in, or incidental to, the powers expressly granted, and (3) which are essential to the declared object and purpose of the corporation, not simply convenient, but indispensable. 1 Dillon, *Municipal Corporations* (5th. ed. 1911) 448; *City of Independence v. Cleveland* (1902) 167 Mo. 384, 67 S. W. 216. The general rule is that a city cannot purchase and hold real estate beyond its territorial limits unless this power is expressly conferred by the legislature. 3 Dillon *op. cit.*, 1566; *Common Council of the Village of Houghton v. Huron Copper Mining Co.* (1885) 57 Mich. 547, 24 N. W. 820. Nevertheless there are exceptional purposes for which a corporation may, without special grant, purchase and hold extra-territorial lands, such as for a pest-house or for a cemetery. 3 Dillon *op. cit.*, 1567; *City of Champaign v. Harmon* (1881) 98 Ill. 491. In dealing with this question of holding land outside its corporate boundaries some courts have limited the doctrine and have held that although a city may not extend its governmental authority, yet it may carry on business for a public purpose beyond the city limits. *Schneider v. Menasha* (1903) 118 Wis. 298, 95 N. W. 94. Thus it has been held that the power to purchase quarries from which to obtain raw materials, outside the city, is necessary and convenient to the fulfilment of the municipality's duty to pave the streets. *Somerville v. Waltham* (1898) 170 Mass. 160, 48 N. E. 1092; *Lester v. Mayor of Jackson* (1892) 69 Miss. 887, 11 So. 114; *contra*, *Donable's Adm'r. v. Town of Harrisonburg* (1905) 104 Va. 533, 52 S. E. 174. The question of the powers of a city to hold extra-territorial land has been raised in cases where cities had to seek reservoirs and outlets for sewers outside their limits or have attempted to build wharves along river banks. In the case of reservoirs and sewer outlets, which are necessary for the public health, the courts are practically unanimous in considering the holding of land as indispensable to the object of the corporation. *McLaughlin v. City of Hope* (1913) 107 Ark. 442, 155 S. W. 910; *Hall v. Mayor of Calhoun* (1913) 140 Ga. 611, 79 S. E. 533. Also a city may have the power as a necessary incident of its incorporation to acquire property for wharfing. *Hafner v. City of St. Louis* (1901) 161 Mo. 34, 61 S. W. 632. A recent Alaska case, with facts similar to those in the principal case, held that a city had power to build a pier beyond the high water mark over an arm of the sea separating two parts of the city.

Town of Ketchikan v. Zimmerman (1911) 4 Alaska 336. Constant increase in population necessitates the expansion of the city's business powers beyond its limits in order to provide for parks and other recreation centers which are no longer possible within the city limits. The instant case does not seem to be in keeping with the social development of progressive municipalities.

PARTNERSHIP—COVENANT TO REFRAIN FROM BUSINESS—ABROGATION BY PARTNERSHIP AGREEMENT.—The defendant contracted in writing with the plaintiff to refrain from writing hail insurance in Childress county. Subsequently, the plaintiff and the defendant orally agreed to form a partnership to write hail insurance in Childress county. After the conclusion of this partnership, the defendant continued to write hail insurance in the county, thus competing with the plaintiff. This suit was then instituted by the plaintiff to enjoin him from violating the first contract. *Held*, that the injunction should be denied, because the subsequent partnership agreement abrogated the earlier contract. *McLeod v. Schluter* (1920, Tex. Com. App.) 221 S. W. 961.

There is a square conflict of authority upon the question involved in the instant case. Manifestly, refraining from competition in the same line of business is not a part of the good will of a partnership. Burdick, *Law of Partnership* (2d ed. 1906) 372. In the instant case the court argued that under the first contract it was the defendant's duty not to write hail insurance in Childress county; but, conceding that the object was to prevent competition between the parties and that no competition resulted from the formation of the subsequent partnership, it was the defendant's duty as a partner to write hail insurance in that county. Therefore the duty imposed by the subsequent partnership agreement was inconsistent with the duty imposed by the restrictive covenant and superseded it. *Norris v. Howard* (1875) 41 Iowa, 508; *Menefee v. Rankins* (1914) 158 Ky. 78, 164 S. W. 365. Other courts argue that the defendant's duty under the restrictive covenant is not to write hail insurance in Childress county in competition with the plaintiff; and that under the partnership agreement it is the duty of the defendant to write hail insurance in Childress county, not in competition, but in conjunction with the plaintiff. Therefore there is no inconsistency between the two contracts, and the negative covenant is not abrogated. *Scudder v. Kilfoil* (1898) 57 N. J. Eq. 171, 40 Atl. 602; *Faust v. Rohr* (1914) 166 N. C. 187, 81 S. E. 1096. This latter view was followed in the instant case in the lower court. *Schluter v. McLeod* (1917, Tex. Civ. App.) 199 S. W. 311. While this decision was here reversed, it seems more logical, and more in accord with business custom and the actual intentions of the parties. It is submitted that in the development of this new phase of the law, the latter view should be adopted.

PRACTICE—TRIALS—DISQUALIFICATION OF JUDGES FOR INTEREST IN CAUSE.—The defendant was indicted for extortion in his office as district attorney. At the inception of the prosecution he filed an affidavit alleging that the indictment had been improperly brought about by the trial judge in order to enhance his own candidacy in a prospective judgeship contest between the trial judge and himself, and that because of the judge's bias and personal interest in the cause he could not obtain a fair trial. For these reasons he demanded that the judge recuse himself. The trial judge dismissed the complaint as frivolous and held the defendant guilty of contempt of court for filing the same. The defendant appealed. Under a Louisiana statute a judge may be recused on the grounds of being interested in the cause, relationship within the fourth degree, or having performed any other judicial act or acts in the cause in court. *Held*, that the judge should recuse himself or appoint another judge to determine upon his recusation, since the grounds of the demand were not frivolous and

the complaint stated a case within the statute. *State v. Nunez* (1920, La.) 85 So. 52.

At common law a substantial and direct interest in the event of litigation or near relationship—generally within the fourth degree of consanguinity or affinity—were the only grounds for the disqualification of judges. *State v. Ham* (1910) 24 S. D. 639, 124 N. W. 955; *Ex parte Fairbanks Co.* (1912, M. D. Ala.) 194 Fed. 978. But by statute these grounds have been greatly enlarged upon. In some states a judge may even be disqualified on grounds of personal bias and prejudice if it be well established. *Powers v. Commonwealth* (1902) 114 Ky. 237, 70 S. W. 644; *Ingles v. McMillan* (1911) 5 Okla. Cr. App. 130, 113 Pac. 998. As to the sufficiency and nature of the disqualifying interest there is much diversity of opinion. It is often held that the interest must be a pecuniary or proprietary one and capable of clear proof. *Northampton v. Smith* (1846, Mass.) 11 Metc. 390; *Elliot v. Hipp* (1910) 134 Ga. 844, 68 S. E. 736. But the slightest pecuniary or proprietary interest will be sufficient. *Moses v. Julian* (1863) 45 N. H. 52; *Findley v. Smith* (1896) 42 W. Va. 299, 26 S. E. 370. Nor will the court inquire into the extent of the interest or its effect upon the judge's ruling. *Lindsay-Strathmore v. Superior Court* (1920, Calif.) 187 Pac. 1056. But it is well settled, and in many states specifically provided by statute, that a judge's mere interest as a citizen and taxpayer in a community which is a party to or interested in an action before him is not such an interest in the cause as to disqualify him from sitting. *Moses v. Julian, supra*; 23 Cyc. 578. Other jurisdictions, even in the absence of statutory provision for disqualification on the grounds of bias or prejudice, have held that "any interest the probable and natural tendency of which is to create a bias in the mind of the judge for or against a party to a suit" is sufficient to disqualify him. *Bryce v. Burke* (1911) 172 Ala. 219, 55 So. 635. The principal case might be sustained upon this premise, as the Louisiana statute apparently does not include such a remote interest as bias and prejudice, in its grounds for the recusal of judges. The unusual circumstances of the case perhaps justify the liberal construction of the statute invoked to sustain it.

PROPERTY—DEEDS—RECITAL OF PURPOSE—DISTINCTION BETWEEN ABSOLUTE FEE, CONDITIONAL FEE, AND EASEMENT.—The grantor conveyed to the city of Los Angeles a strip of land dividing his property. The deed contained the usual granting clause for a conveyance in fee, and the habendum clause which was limited by a recital that the purpose of the conveyance was for a public road. The road having been vacated by ordinance, the grantor brought an action of ejectment to recover possession. *Held*, that the deed conveyed an absolute fee with a restrictive covenant. *Cooper v. Selig* (1920, Calif. App.) 191 Pac. 983.

The instant case follows the generally adopted rule of construction that a mere recital of purpose will not operate to limit a grant to a conditional fee or to an easement. *Fitzgerald v. Modoc County* (1913) 164 Calif. 493, 129 Pac. 794; *Bald v. Nuernberger* (1915) 267 Ill. 616, 108 N. E. 724; Ann. Cas. 1916 B, 606, note; Devlin, *Deeds* (3d ed. 1911) sec. 970, 970 b. This is universally applied where the grant is between private individuals and the grantor expects no special benefit from the user. *Polebitske v. John Week Lumber Co.* (1914) 157 Wis. 377, 147 N. W. 703. Likewise it is so held where the conveyance is for civic purposes and the grantor is to benefit only as a member of the community. *Thompson v. Hart* (1909) 133 Ga. 540, 66 S. E. 270; *Brady v. Gregory* (1912) 49 Ind. App. 355, 97 N. E. 452. When, however, the purpose is specifically to benefit the grantor, a few courts have adopted a more liberal rule, notably in conveyances made for the purposes of support. *Huffman v. Rickets* (1916) 60 Ind. App. 526, 111 N. E. 322. And this rule has been extended to cases where equity will not grant specific performance and the remedy at law is inadequate. *Seaboard Air Line Ry. v. Anniston Mfg. Co.* (1914) 186 Ala. 264, 65 So. 187; *Forgeus v. Santa Cruz County*

(1914) 24 Calif. App. 193, 140 Pac. 1092. Whether the grant will then be construed as an easement or as a conditional fee depends upon the adequacy of consideration and the situation of the parties. *Robinson v. Missisquoi Ry.* (1887) 59 Vt. 426, 10 Atl. 522; *Maxwell v. McCall* (1910) 145 Iowa, 687, 124 N. W. 760. An unusual and doubtful test is proffered in the instant case, namely, the inclusion in the granting clause of the words "together with . . . the reversion and remainders," which is held to show an intent to create a conditional fee and not an easement. This confuses reversion with possibility of reverter. See 1 Tiffany, *Real Property* (1920) secs. 129-132. It is suggested that the court in the instant case might better have served the ends of justice by adopting the more liberal rule laid down in a previous California decision. See *Forgeus v. Santa Cruz County*, *supra*.

PROPERTY—FIXTURES—RIGHTS OF A CONDITIONAL VENDOR TO ANNEXED CHATTELS.—The Otis Elevator Company installed an elevator plant in the apartment house of one R under a conditional sales contract which was not recorded. The plaintiff brought this action under the Washington code against several other materialmen, a mortgagee of the realty, and the elevator company to foreclose his materialman's lien. The lower court held that the claims of the plaintiff, of the other materialmen, and of the mortgagee should be subordinated to the right of the elevator company to remove the elevator under the contract, even though they had no actual or constructive notice of it. *Held*, that the materialmen's liens should be foreclosed against the elevator as part of the realty. *King v. Blickfeldt* (1920, Wash.) 191 Pac. 748.

If the mortgage of the realty is subsequent to the annexation of the chattels thereto, and the mortgagee has no notice of the claim of the conditional vendor, the great majority of courts deny the rights of the latter. *In re Savage Baking Co.* (1919, D. N. J.) 259 Fed. 976; 1 Tiffany, *Real Property* (2d ed. 1920) 271. If the subsequent mortgagee or even purchaser has notice of the conditional sale, the conditional vendor has a right to remove the chattels. *Allis-Chalmers Mfg. Co. v. City of Ellensburg* (1919, Wash.) 185 Pac. 811. If the real mortgage has been executed prior to the annexation of the chattels, the conditional vendor has a right to remove them. *Cox v. New Bern Lighting Co.* (1909) 151 N. C. 62, 67 S. E. 477; *contra*, *Meagher v. Hays* (1890) 152 Mass. 228, 25 N. E. 105. However, he is under a duty so to remove the chattels that no substantial damage will be done to the realty, impairing the security. *Hershberger v. Johnson* (1900) 37 Ore. 109, 60 Pac. 838. For a discussion of these questions see COMMENT (1920) 8 CALIF. L. REV. 442. In the instant case, the materials were furnished and the mortgage was executed during a period which was substantially contemporaneous with the installation of the elevator plant. Under such circumstances the court decided that because of the reliance of the materialmen and of the mortgagee on the fact that the elevator was to become part of the realty, the elevator company should have no preference over them by reason of the conditional sales contract of which they had no notice. It is submitted that this decision meets all the necessities of the case in a satisfactory manner. The elevator company is not deprived of all remedy. It still has a lien against the realty generally for materials furnished.

PROPERTY—HUSBAND AND WIFE—ESTATE BY ENTIRETIES CREATED IN A DEED IN SPITE OF WORDS "SHARE AND SHARE ALIKE" IN THE PREMISES.—The plaintiff as heir-at-law of the husband of the defendant, claimed a tenancy in common and brought suit for one half interest in land conveyed to the defendant and her husband by a deed, in the premises of which were the words "share and share alike," but the operative parts of it were in the usual form to convey an estate by the entireties. The defendant and her husband each contributed

one half of the purchase price. *Held*, that an estate by the entireties was created, in the absence of proof of a clear intention to the contrary, in spite of the limiting words in the premises. *Wilhite v. Wilhite* (1920, Mo.) 224 S. W. 448.

The common law regarded the unity of husband and wife as so complete that neither could dispose of any property deeded to them without the assent of the other, and the whole estate remained to the survivor. 2 Blackstone, *Commentaries* (8th ed. 1778) 182; see *Hiles v. Fisher* (1895) 144 N. Y. 306, 311, 39 N. E. 337. The enactment of the married women's acts has caused a direct conflict in the authorities on the subject. See 30 L. R. A. 305, 314; 13 R. C. L. 1112. Though the tendency is toward the abolition of all forms of joint tenancies, the instant case still follows the old common-law rule. It has frequently been held, however, that the words "share and share alike" were indicative of an intent to create a tenancy in common. *Kellogg v. Burnett* (1908) 74 N. J. Eq. 304, 69 Atl. 196; *Jenne v. Jenne* (1916) 271 Ill. 526, 111 N. E. 540. The only objection to the construction in the instant case is the fact that the words occur in the premises of the deed and not in the operative parts, which simply name the grantees as "said parties of the second part." These last words seem to refer to something that has been mentioned above in the document. *Commonwealth v. Schweiters* (1906) 122 Ky. 874, 93 S. W. 592; *In re De Rycke's Will* (1904) 99 App. Div. 596, 91 N. Y. Supp. 159. It would seem that since "parties of the second part" was evidently meant to refer to "William and Margaret Wilhite, share and share alike" the same construction should be given to the words "share and share alike" as if they were in the operative parts of the deed. It has been held that estates by the entireties still exist, although the legal unity which gave rise to them has been abolished, thus showing that their existence to-day depends upon a legal survival. *Holmes v. Kansas City* (1908) 209 Mo. 513, 108 S. W. 9. Hence it might well have been argued that the words "share and share alike" should logically be construed to indicate an intention to create a tenancy in common. The instant case, however, follows an established rule in that state. *Wilson v. Frost* (1905) 186 Mo. 311, 85 S. W. 375; *Ashbaugh v. Ashbaugh* (1917) 273 Mo. 353, 201 S. W. 72.

SURETYSHIP—DISCHARGE OF SURETY BY CHANGE IN RELATION OF PERSON BONDED TO OBLIGEE.—The defendant surety company gave bonds to the plaintiff bank covering Syverson as cashier and Flindt as assistant cashier. Syverson was a director at this time. By these bonds the surety company covenanted to make good any loss that the bank might sustain by reason of any act of embezzlement by the "employees" bonded. The bond also provided that the bank might shift the employee from one position to another within the bank, and that the company would remain liable in the same manner as if there had been no transfer. Syverson and Flindt became holders of the majority of the bank stock and elected Syverson president and Flindt cashier and director. The third director was a small stockholder. Both Syverson and Flindt defaulted and the bank sued on the bonds. *Held*, that the plaintiff could recover. *Bank of Willow Lakes v. Syverson* (1920, S. D.) 178 N. W. 989.

The cashier of a bank is ordinarily the executive and has charge of the routine business. *Burril v. Nahant Bank* (1840, Mass.) 2 Met. 163. His functions are of an importance and responsibility equal to those of the president. Hence the transfer of Syverson from the office of cashier to that of president would seem to be merely a change of positions within the bank, not attended by any increase of hazard to the indemnitor and permitted by the express stipulations of the bond. But when Flindt became cashier and director, his powers and responsibilities, as well as the hazard of the indemnitor, became greatly increased. A director is not an "employee" of the corporation, nor can he be said to occupy a "position" in the bank. The directors control the policy of the bank and direct its officers in the execution of this policy. In conjunction with Syverson,

Flindt had acquired control of the majority of the bank stock. The position of the surety is changed from that of surety for two officers in the discharge of their duties to the bank to that of surety for the acts of those in direct control of the bank and owning a majority of its stock. Such a change in its duties can scarcely be considered as included in the clause allowing a "change of position" of an "employee" within the bank. In a similar situation where the person bonded alone obtained a majority of the stock, this same court has held that the surety was discharged. *Farmer's and Merchant's Bank v. United States Fidelity Co.* (1911) 28 S. D. 315, 133 N. W. 247. Where there is a specific guaranty of a specific contract, any change, though not material, in the contract releases the surety. *Page v. Krekey* (1893) 137 N. Y. 307, 33 N. E. 311; *Evans v. Graden* (1894) 125 Mo. 72, 28 S. W. 439. If the contract of guaranty is general, covering the performance of a number of duties to the obligee, as in the instant case, the usual rule is that a material change in those duties discharges the surety, even though the change is beneficial to the surety. *Whitcher v. Hall* (1826, K. B.) 5 B. & C. 269; *Driscoll v. Winters* (1898) 122 Calif. 65, 54 Pac. 387. But in a number of jurisdictions it has been held that, when it is self-evident without further inquiry that the change in the duties of the person for whom the surety became obligated is necessarily of benefit to the surety, he is not discharged. *Cambridge Bank v. Hyde* (1881) 131 Mass. 77; *Ullman Realty Co. v. Hollander* (1910, City Court N. Y.) 123 N. Y. Supp. 772; *Preston v. Huntingdon* (1887) 67 Mich. 139, 34 N. W. 279. Even under this rule, if the bond is construed not to permit such changes as ensued when Flindt became director it is submitted that it does not follow as a matter of law that such changes may not be prejudicial to the surety company.

TORTS—LIABILITY FOR INNOCENT MISREPRESENTATION.—The defendant's agent, to induce the plaintiff to purchase certain water rights, represented to him that a reservoir had a holding capacity three times as great as it actually had. In this action to recover damages resulting from the misrepresentation, the plaintiff's petition did not allege *scienter*. The lower court overruled the defendant's demurrer. Held, that the judgment should be affirmed, there being a breach of duty, although the defendant's agent did not know that his statement was false. *Becker v. McKinnie* (1920, Kan.) 186 Pac. 496.

The leading English case decided that an action of deceit could not be sustained unless the false representation was made "knowingly, or without belief in its truth, or recklessly, careless whether it be true or false," i. e., made with conscious dishonesty. See *Derry v. Peek* (1889, H. L.) 14 A. C. 337, 374. This case has apparently settled the law in England, although equity recognizes fraud without *mens rea*. *Nocton v. Ashburton* [1914, H. L.] A. C. 932; Anson, *Contract* (Corbin's ed., 1919) sec. 227. American rulings on the subject lack uniformity. Some courts follow *Derry v. Peek* in confining the action to cases where the defendant either knew his statement to be false, or was conscious that he did not know whether it was true or false. *Reno v. Bull* (1919) 226 N. Y. 546, 124 N. E. 144; *Peters v. Lohman* (1913) 171 Mo. App. 465, 156 S. W. 783. Others "presume knowledge," i. e., do not require *scienter*, if the defendant has peculiar means of knowledge. 12 R. C. L. 335. It has been suggested that an action on the case for negligence should lie, under limited circumstances, for misrepresentations made carelessly, though honestly; negligent words may cause as much damage as negligent acts. Jeremiah Smith, *Liability for Negligent Language* (1900) 14 HARV. L. REV. 184; *Cunningham v. Pease House Furnishing Co.* (1908) 74 N. H. 435, 69 Atl. 120. But there are objections to throwing the matter into the law of negligence. See Williston, *Liability for Honest Misrepresentation* (1911) 24 HARV. L. REV. 415, 436. It is submitted that justice is accomplished by those courts which, in a limited class of cases, support actions akin to deceit without requiring *scienter*. They

really allow recovery for negligence, which seems sound, and yet they avoid the difficulties of an action of negligence *eo nomine*. This would seem a just and conservative departure from the older conception of "deceit" as involving conscious dishonesty. The instant case seems clearly sound, and is in accord with previous Kansas decisions. *Bice v. Nelson* (1919) 105 Kan. 23, 180 Pac. 206.

TORTS—MALICIOUS PROSECUTION—CIVIL ACTION—ABSENCE OF INTERFERENCE WITH PERSON OR PROPERTY.—The defendant had harassed the plaintiff, by instituting civil suits against her and dismissing them on appearance of counsel, in the hopes of extorting money from her. There had been no seizure of her property or interference with her person. From a judgment in favor of the plaintiff in an action for malicious prosecution the defendant appealed. *Held*, that the action did not lie for merely beginning a civil action, unless property or person had been wrongfully seized or in some manner injuriously affected by process issued therein. *Pye v. Cardwell* (1920, Tex. Civ. App.) 224 S. W. 542.

There are two views concerning the essential elements of the tort of malicious prosecution of a civil action. According to the first, the cause of action is dependent upon the nature of the injury resulting from the commencement of the suit. Where there is a special injury to reputation, to property, or to person, a cause of action arises. *Luby v. Bennett* (1901) 111 Wis. 613, 87 N. W. 804; *Lawrence v. Hagerman* (1870) 56 Ill. 68; Chapin, *Torts* (1917) 477. Where there was no special injury, as in the instant case, no recovery is allowed. *Weber-Pleuthert Co. v. Leventhal* (1918, Sup. Ct.) 103 Misc. 80, 169 N. Y. Supp. 248. Some courts on this principle hold that the defendant has his action if he shows special damages over and above taxable costs. *Carbondale Investment Co. v. Burdick* (1903) 67 Kan. 329, 72 Pac. 781. By the other and preferable view one has no legal privilege to commence an action with malice and without probable cause. The act of commencing is the tort, the injury resulting being merely the measure of damages. *Kolka v. Jones* (1897) 6 N. D. 461, 71 N. W. 558; *Peerson v. Ashcraft Cotton Mills* (1918) 201 Ala. 348, 78 So. 204; see (1918) 16 MICH. L. REV. 653; (1918) 32 HARV. L. REV. 85. The action of malicious prosecution existed at common law. *Waterer v. Freeman* (1640) Hob. 205, 266; 1 Co. Lit 161a; see Lawson, *The Action for the Malicious Prosecution of a Civil Suit* (1882) 30 AM. L. REG. 281, 283. But the Statute of Marlbridge [52 Hen. III c. 6 (1267)] took away the necessity for it by allowing heavy costs to the defendant in actions brought *pro falso clamore*. Thereafter the action was denied unless some special injury was shown. *Saville v. Roberts* (1698, K. B.) 1 Ld. Raym. 374. American Courts following the English rule lack the fundamental reason for it, as costs awarded in American courts do not pretend to approximate the expenses of litigation. See *Kolka v. Jones* (1897) 6 N. D. 461, 466, 71 N. W. 558, 561. It is also said in support of the rule of the instant case that honest litigants will be deterred from coming into court and that the courts will be crowded with actions of malicious prosecution if a contrary policy should be adopted. Such, however, has not been the result. See *Peerson v. Ashcraft Cotton Mills*, *supra* (1918). Nor does much harm seem to have resulted from arming "fraudulent debtors with a right to recover damages through perjured testimony." The tendency now appears to be opposed to the principal case. *Teesdale v. Liebhawager* (1919, S. D.) 174 N. W. 620; see 26 Cyc. 15; L. R. A. 1918 D, 550, 555. It is suggested that a solution of the question lies in legislation granting costs and damages to a successful defendant when he could prove the suit was brought maliciously and without probable cause.