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ON THE INSURABLE INTEREST

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I. *Construction of Insurable Interest*

1. Fromerly, the study of the substance of insurable interest was not very actively pursued, because there were few kinds of singular insurance in actual transactions. However, this study has recently shown marked progress with interesting results. I have no intention here to propound any special opinion, but I shall attempt to make the concept of insurable interest clearer through a general investigation and classification of various kinds of insurable interest. In so doing I must have it understood that I hold the view that the existence of an expenditure risk, special risk or peril insured against, shall be recognized in conjunction with a liability risk as popularly known, in the construction of negative insurable interest.[1]

In order to understand the real concept of insurable interest, we must begin by studing the reason why a person needs to effect an insurance contract; the problem will start from this point. The reason why we find it necessary to effect a damage insurance contract with an insurer is that we are in danger of economic damage through certain hazards. This danger of economic damage will usually be found when a person owns a certain property, but, in some cases, a person will suffer from economic damage even when he owns no property or has no relation to special

[1] As regards the meaning of insurable interest, I already published my opinion in the following books: Y. Kato, *Study of Marine Insurance*, 3 vols (Tokyo, 1932-37, in Japanese) and *The Construction of Insurable Interest* (Tokyo, 1940, in Japanese).

property. For instance, when a person is responsible for compensation for the destruction, caused through his fault, of property received in charge, or when a shipowner is liable to compensation for the loss of another ship which is sunk by collision caused by the fault of his crew.

As mentioned above, the necessity to effect a damage insurance contract exists not only in case when a person owns property but also in case when he has no property. Thus, if a subject of insurance is necessary for the validity of an insurance contract, the subject cannot be said to be property, thing or other substances. However, the damage cannot be regarded as the substance of an insurance contract, because the damage cannot exist before the hazard happend. There will exist a source for the occurrence of damage, and this source will be the subject of insurance. The subject of insurance which is a source of damage but not a property or other substance must be a relation or concern existing between a person who desires to effect an insurance and a certain subject-matter. In this relation or concern, we find a possibility or danger of economic damage to the insured by accident on certain subject-matters. For example, an owner of a building who desires to effect insurance has an interest in this building because he will suffer from economic damage when a fire breaks out in the building. This relation is the subject of insurance, and a building or other property cannot be said to be the subject. These properties form only a factor in the construction of insurable interest as a subject-matter of insurance. This subject-matter is an individual substance in the case of ordinary insurable interest or so-called interest in positive property, but comprises all properties held by those who desire to effect insurance in the case of the interest in negative property. Section III, 3. of this paper, Interest in negative property refers to this point.

2. As above stated, the substance or meaning of insurable interest is quite different from that popularly known. As there are various kinds of insurable interest at present, the meaning common to all shall be defined by an abstract standard as a relation between persons and things, wherein the insured is in danger of suffering from economic damage through certain risks or perils against which he is insured on certain subject-matters. Substance of insurable interest is thus a relation between persons and things, but it includes important factors of an insurance contract such as (1) subject-matters of insurance or objects in or on which the risk realizes itself—buildings, movables, ships, etc., (2) perils or risks, (3) the insured, and (4) possible loss or damage.

Formerly, insurable interest was understood as a property or a thing, and it was regarded as quite different in substance from perils insured against, another factor of an insurance contract. But, it has become

clear that insurable interest includes, in fact, peril insured against and various other factors. Insurable interest can be said to constitute the microcosm of an insurance contract. Possible economic loss or damage in insurable interest corresponds to realized loss or damage after the perils insured against have been realized, and the highest estimated amount of the former is no more than the value of insurable interest or insurable value. Accordingly, the value in an insurance contract has a negative meaning, contrary to that in general economic transactions. As regards the definition of insurable interest, Section 5, Marine Insurance Act 1906 stipulates that ".....in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss....." It must be said that benefit and prejudice in this case are treated as one. From this, it will be clear that the view that the substance of insurable interest is a value is wrong. (See Section II, of this paper, Brief Survey of the History of Theories concerning the Meaning of Insurable Interest, Second Period.)

3. Finally, we must refer to the problem of fixing the individual character of insurable interest. In order to effect or continue an insurance contract, a certain insurable interest shall actually exist and, the same insurable interest shall be provided in the insurance contract. This insurable interest will be revealed after specifying (1) a person who stands in the relation to a thing, or the insured, (2) a thing insured or the subject-matter of insurance, and (3) rights (for instance, ownership, mortgage) or interests (for instance, an expectation of profit) which constitute a basis or a source for the said relation. (See Section III of this paper, Various Kinds of Insurable Interest and Their Analysis.) For instance, the insurable interest of "Tokyo-Maru" will be specified by the facts that the insured is Tokyo Shipping Co., the subject-matter of insurance is "Tokyo-Maru" and that relation is based on ownership. When the shipowner makes an error in describing these items in the insurance policy — for instance, the basis of the relation between Tokyo Shipping Co., and "Tokyo-Maru" is described as a mortgage instead of ownership — actual insurable interest differs from the insurable interest described in the policy, and the contract will not be valid due to the lack of prerequisites. Among the three factors for fixing the individual character of insurable interest, the last two factors are expressed by the term subject-matter of insurance in Japanese Commercial Law. This expression is not proper and is liable to misunderstanding of the meaning of insurable interest. I always discriminate between the subject-matter of insurance in the first meaning and that in the second meaning in my essays and books.

The avove explanation concerns the insurable interest in positive property. The discussion concerning negative property will be omitted in

this paragraph, though there are various points to be explained.

II. *Brief Survey of the History of Theories concerning the Meaning of Insurable Interest*

The development of theories concerning the meaning of insurable interest can be divided into three periods. However, the time of each period indicates legislation, cases, and theories which may be regarded as pioneers for the next period. Therefore, it cannot be said that the year indicated is exactly that when general opinion diverged into the next period.

First period:
1484 (Ordinance of Barcelona)
– 1781 (England — Publication of Weskett, Digest)
– 1860 (Germany—Enactment of old Commercial Law)

In the first period, the term "interest" began to be used following the commencement of insurance business–exactly speaking, marine insurance. This period covers about 300–400 years from the promulgation of the Ordinance of Barcelona (1484). During this period, insurable interest was understood as a relation between a person and a thing, or participation of a person in a certain thing, which coincides with the popular view prevailing at present.[2] The meaning of the term "interest", "interesse" or "intérêt" was originally understood as "inter-est" except the cases when it was used in Roman Law.[3] However at that time, the subject of insurance was regarded not to be interest as at present, but a thing such as a ship, cargo, etc. And for the validation of an insurance contract, the insured must have an interest or economic relation to the thing or adventure. It was understood that if the insured had no economic relation with the thing, the contract became void, because it was a wagering contract. Consequently, the term "Interest" was at that time used specifically, and I found from investigations that the term "insurable interest" or "the interest to be insured" was not used, but the term "interest" was used in such way as "a person having an interest in a certain thing" or "a person shall have an interest in a certain thing."[4]

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[2] "...ò de lurs participis à d'altres havents part ò interes."

[3] See the explanation of the second period as to the meaning of interest in Roman Law.

[4] In the clause of "Interest or not interest" which was forbidden inserting in insurance contracts by the Marine Insurance Act of 1746, the term "interest" or "not interest" means that the insured has or has not an interest in such insurance (Margens, *On Insurance* (1755), Vol. I, p. 28), and ships, cargo, freight and other things and properties were listed as the subject of insurance ("What thing to be insured?" *ibid.*, p. 4). In Germany, the fact that the insured had an interest in the adventure and that a subject of insurance existed was regarded as a fundamental conditions for the validation of an insurance contract, as stated in Langenbeck,

In short, the use of the term "interest" during this period was natural and the explanation of the meaning was not wrong, but there were misunderstandings as to the subject of insurance.

Second period

England (1781–1806, Dicta of Lawrence J.)

Germany (1860–1893, Ehrenberg, Versicherungsrecht)

During this period, it became clear that the subject of insurance is an interest, but at the same time, the meaning of this interest was obscure. In England, the term insurable interest was found in various documents after the latter half of the 18th century. The theory of insurable interest made marked progress,[5] but more than one step was necessary to attain the present theory. In this period, the view that the subject of insurance is an interest and not a thing became popular, but differed as regards the substance of interest, whether it is a thing, the value of a thing, property, right, etc.[6] Thus, the meaning of the subject of insurance was formally settled, but actually it could not get rid of the old idea. It may be said that this was due to the confusion of the subject of insurance with the subject-matter of insurance, but even at present not a few scholars of insurance law confound these two terms.[7]

In Germany there was also a time when the subject of insurance was understood as interest, but the meaning of interest was misunderstood. However, the misunderstanding in Germany was quite different from that in England, and the substance of interest was explained as damage or similarly. In England, the substance of interest was rather practically explained, whilst in Germany, it was specifically explained. In this respect, the following circumstances cannot be overlooked. At that time, the study of the meaning of "Interesse" in compensation for damage in the civil law was very active among scholars of civil law. Two books by F. Mommsen, *Zur Lehre von dem Interesse 1855*, and Cohnfeld, *Die Lehre vom Interesse 1865*, were successively published. Scholars of insurance law naturally adopted the results of these studies in the theory of insurance. It was in this period that Malss (1862)[8] and Cohn (1873)[9] published opinions that

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Anmerkungen über das Hamburgische Schiff-und See-Recht (1727), pp. 389, 400; *Assecuranz-u-Havarey-Ordnung V. 1731*, Art. 3, 1 u. 2; *Allgemeiner Plan hamburgisher Seeversicherung vom Jahre 1847*, Art. 2, 9; *Revidierter allgemeiner Plan hamburgisher Seeversicherung* 1853, Art. 2. 9. However, as an only exception, the explanation in Pöhls, *Handelsrecht* (1832), IV, p. 66 et seq. may be said to belong to the second period, but Pöhls' opinion was probably influenced by theories in England, where the second period had already started.

[5] For example, see Weskett, *A Complete Digest of the Theory, Laws and Practice of Insurance* (3rd ed. 1796), p. 492.

[6] For example, see Weskett, *ibid.*, p. 309, 537; Marshall, *A Treaties of the Law of Insurance*, 2 vols. (Philadelphia, 1810), p. 104 et seq.

[7] For example, see S. Aoyama, *The Contract of Insurance* (Tokyo, 1920), p. 106.

[8] Malss, *Betrachtung über einige Frage des Versicherungsrechts* (1862), p. 1, 5.

[9] Cohn, *Der Versicherungs-Vertrag* (1873), p. 4.

the idea of insurable interest was equivalent to loss, that it was possible loss, or even a hypothetical benefit—a benefit to be expected if the accident does not happen and consequently a loss does not occur. It is very interesting that in England the substance of interest was explained from practical consideration as the actual and real thing, whilst the deliberation of scholars of insurance law in Germany, influenced by the study of civil law, centered on the negative idea such as loss, etc. The studies by Mommsen, Cohnfeld, etc. developed the concept of *id quod* interest or *quanti interest* in Roman law.[10] It is clear that this idea, though it is based on damage compensation, cannot be adopted in insurance law which is of a special nature.

Third Period

After 1806 in England, and after 1893 in Germany

The following description given by Lawrence J. in the case of Lucena v. Craufurd in 1806 draws a line between the second and third period in England. "……Interest does not necessarily imply a right to the whole or part of a thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in, the subject of the insurance; which relation or concern, by the happening of the perils insured against, may be so affected as to produce the damage, detriment or prejudice to the person insuring……"

The reason why a comparatively theoretical problem such as the meaning of insurabe interest was deliberated at the court at that time was that various cases of special insurable interest arose successively with the development of marine insurance, such as Boehm v. Bell 1799, concerning a liability interest, Barclay v. Cousin, 1802, concerning a profit interest, Lucena v. Craufurd, 1806, concerning a contingent etc. Under these circumstances, Lawrence J. carried out a fundamental study as regards the meaning of insurable interest. It is an interesting fact that this dicta of Lawrence J. was not supported by scholars in England, and after 40 years, in 1848, was adopted by Arnould, *Marine Insurance* (lst ed.) p. 230.[11] The Marine Insurance Act of 1906, sec. 5 was enacted following the opinion of Lawrence.

In Germany, Ehrenberg made public the theory of relation in 1893, and this theory is generally recognized at present. His opinion is that insurable interest means the relation between a person and object, as damage will arise to a certain person by the happening of an accident to certain object.[12] As to the setting up of this theory by Ehrenberg, it is

[10] This means the difference between the value of property actually owned by a person at a certain time and the value of property which would be expected at that time if damage does not arise during the period (Mommsen, *ibid.*, p. 1).

[11] Before Arnould abopted the theory of Lawrence, Marshall, *Marine Insurance* (4th ed. 1861), Park, *Marine Insurance* (last ed. 1842), etc. did not adopt this theory.

[12] Ehrenberg, *Versicherungsrecht* (1893), p. 286, 9.

necessary to consider the following development. As mentioned above, the view which prevailed in Germany in the second period was that the substance of insurable interest was no more than loss. Later, Hecker published his opinion advocating that the substance of insurable interest is the value of a thing, because the insurable interest is not a negative idea such as loss but must be the positive idea of it.[13] However, as it was clear that the insurable interest is a source of value and that insurable interest and value are different, it was necessary to develop the idea of Hecker, in order to grasp the true meaning of insurable interest. This study resulted in the above mentioned doctrine of Ehrenberg.

In short, in England the study of the meaning of insurable interest started from actual and positive considerations and reached the theory of the relation between a person and a thing. In Germany, the study reached the same conclusion as in England through an opposite course started from negative considerations.

III. *Various Kinds of Insurable Interest and Their Analysis*

1. Insurable interest can roughly be divided into two categories. One is an interest in positive property and the other an interest in negative property. This classification was made following the types of economic damage, namely economic damage to a specified or individual property and damage to all properties owned by the insured. For instance, the insurable interest in buildings and ships is an interest in positive property, because a fire or maritime perils will cause damage to a building or ship, the specified property of the insured. The expenditure risk interest or liability risk interest is the interest in negative property, as an expenditure risk or liability risk will bring about a certain burden (actual or legal obligations of monetary payment) on all properties of the insured. These two kinds of interest can be divided in detail following their construction. Before explaining in detail, a general classification table is given below. As regards the standard of classification of insurable interest, refer to Section I, Construction of Insurable Interest, 3 of this paper.

[13] Hecker, *Rechtliche Natur der Versicherings-Verträge* (1892), p. 25.

(1) Interest in positive property

Classified by kinds of risk insured against	Classified by subject-matters of insurance	Classified by source or basis of the interest relation
(a) Fire risk interest (b) Transport risk interest (c) Burglary risk interest	(a) Tangible object interest	(a) Ownership interest (b) Mortgage interest (c) Security interest
(d) Credit risk interest	(b) Rights interest	(d) Utilization interest
(e) Technique risk interest	(c) Other economic interests	(e) Produce and profit interest

(2) Interest in negative property

Classified by kinds of risk insured against

a. Expenditure risk interest
b. Liability risk interest

2. Interest in positive property

Interest in positive property can be classified by the kind of risk insured against into fire risk interest, transport risk interest, burglary risk interest, credit risk interest, technique risk interest, etc. By another classification from the object of the risk insured against (the subject-matter of insurance in the first or proper meaning), it can be divided into tangible object interest, rights interest and other economic interests. Buildings, movables, ships, human bodies (interest in accident insurance and passage money of marine insurance) etc. belong to the first category. The second category includes, for instance, copyrights, fishing rights, mining rights, rights to payment of credit sales (in case of credit insurance). Goodwill, technique (in case of insurance for the loss of economic value of technique due to superannuation), designs (fashion insurance), honour, official posts, secrets of business (insurance for leakage of business secrets), etc. belong to the third category. This classification correlates with the first classification to some extent ; if the object of the risk insured against is a tangible property, the risk insured against is a visible accident, and if the former is an intangible property (for instance, right to payment of credit sales), the latter is naturally an invisible accident.

By the third classification according to source or basis of a relation of interest (the subject-matter of insurance in the second meaning), the interest can be divided into ownership interest, mortgage interest, "security for advances or disbursements" interest, utilization interest, and produce and profit interest. (Security interest exists when a property owned by a person is disbursed for a certain purpose, and there exists a tangible or intangible property as security or means of substitution which is in danger of loss due to various accidents ; for insutance, a freight interest in marine insurance.) This classification has no special correlation with the second classification, but the five categories of interest based on the third

classification can be found item by item in the second classification. According to whether the interest in the second classification concerns tangible or intangible property, the meaning of ownership, mortgage, or other ideas will be different to some extent. More detailed explanations would be necessary to understand the real meaning of these interests. Such explanations, however, exceed the scope of this paper but will be found in my above mentioned books.

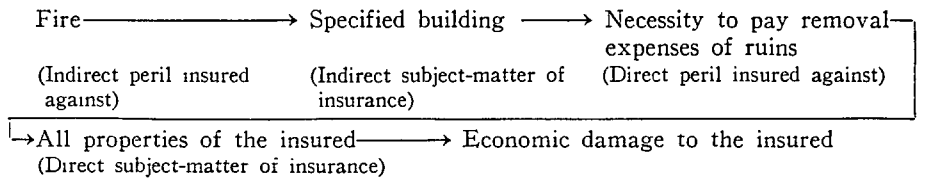
3. Interest in negative property

Insurabe interest in positive property exists as a relation between a person and a thing, when said person is in danger of suffering from damage positively through the loss of individual property due to the realization of the risk insured against. The insurable interest in negative property exists as a relation between a person and all his properties when said person is in danger of suffering from damage negatively due to the realization of the risk insured against to all properties (the subject-matter of insurance in negative property interest). The risk insured against which will cause a damage negatively is divided into expenditure risk and liability risk. By the realization of these risks, a burden of monetary disbursement is levied on all properties of a certain person or the insured.

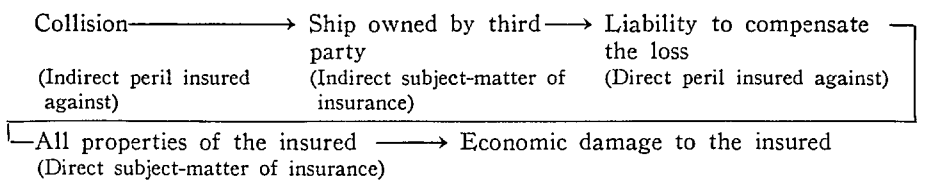
As above stated, there are two categories of risk in this kind of insurable interest. The existence of a liability risk is well recognized at present and there is no question about this, but as regards expenditure risk, there are some objections. However, I am of the opinion that the existence of an expenditure risk is undeniable in case when the insurable interest is divided into positive property interest and negative property interest, and when the existence of a liability risk is recognized. The liability risk means the legal necessity for a monetary disbursement to compensate a loss due to the materialization of a premised accident, for instance, a fire (see explanation diagram). Similar circumstances can be found in the case of an expenditure risk. For example, when the necessity arises for a shipowner to grant sympathy money in the case of disaster to a crew caused by maritime peril, it can be said not to be against social justice at present to protect a person who is confronted with this necessity, by insurance through the recognition of the existence of such insurable interest, though it be not strictly a legal necessity but a social and moral necessity for him. Although a moral, economic and social necessity or a necessity of courtesy may not be as compelling as a legal necessity, and the limits of the necessity or the necessity amount to be paid may not be clear as in the case of the latter, I believe that it is not permissible to deny the risk of such necessity as a factor constituting an insurable interest. The point is that necessities shall be such as may be regarded as social norm.

Next to this, the special construction of the negative property interest must be noted. As regards this kind of insurable interest, there exist ordinary risks which are considered as a cause or premise of expenditure and liability risks. An example will be found in the necessity to pay removal expenses of the ruins of a building burned down, and in the liability to compensate the loss of another shipowner due to collision. In short, this kind of interest is characterized by the fact that there exists a double risk insured against and subject-matter of insurance; the one which is in direct relation to the damage is a speciality of negative property interest, and the other which is in indirect relation to the damage is an ordinary one of general insurance (in the above example, fire risk and collision risk).

Example 1



Example 2



There is the question which of these two kinds of peril or risk insured against and subject-matter of insurance is proper to the insurable interest in negative property. If the risk or peril insured against and the subject-matter of insurance which is in indirect relation to the damage is regarded as proper, the insurable interest in negative property, a special interest, cannot exist. These constitute only an ordinary interest or one kind of insurable interest of fire insurance, marine insurance, burglary insurance and other insurances. However, if it is theoretically correct in the synthetic classification of the insurable interest to start from the point that damage will occur to a specified property or all properties of the insured, expenditure risks and liability risks which are in direct relation to the damage and all properties of the insured must be considered as proper risks or perils and subject-matter of insurance. If the first theory is adopted, the rational and synthetic classification of the insurable interest

will be impossible, and, at the same time, the true meaning of insurable interest cannot be grasped in the case of the insurable interest in negative property.

The above explanation deals with the contingency when damage due to expenditure or liability risk is insured independently. However, the expenditure damage or liability damage can be regarded as an indirect damage in consideration of the accident which is primary or a premise to the damage (direct damage is damage to a specified property such as buildings, movables, ships, cargo, etc.); if this indirect damage is clearly covered with the direct damage by the insurer in the policy of fire insurance, marine insurance, burglary insurance, etc., it is possible to attain the same purpose as in expenditure and liability insurance by ordinary insurance contract. For instance, the running-down clause is generally included in a marine insurance contract (Hull Policy) at present, and this is one example where an attempt is made to attain the same object in marine insurance as in liability insurance.

Another special feature of the insurable interest in negative property is that when the substance of insurable interest is regarded as a relation between a person and a thing, there exists no source or basis of such a relation (for instance, ownership in case of interest in positive property). In other words, there exists no subject-matter of insurance in the second meaning as stipulated in the Japanese Commercial Law. This is a natural result of the special condition that damage to the insured due to accident is not a loss of a specified property but is a burden on all his properties. It will be clear from the above that the risk insured against in the interest in negative property is limited to expenditure and liability risk.