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INSURANCE — CONCEPT OF INDEMNITY AS LIMITING RECOVERY ON FIRE INSURANCE POLICIES — In the case of *Savarese v. Ohio Farmers' Insurance Co.*[1] the New York Court of Appeals recently held that a mortgagee, insured against fire loss under a standard mortgagee clause[2] inserted in the policy of the owner, could recover on the policy despite the fact that the owner had gratuitously completely restored the premises after the fire.[3] The court reasoned that to deny recovery would be to permit an act of the owner (mortgagor) to defeat the rights of the mortgagee, in contravention of the terms of the mortgagee clause; also that while a mortgagee has an insurable interest only to the extent of the mortgage debt, the measure of his recovery in the event of fire is the amount of damage to the property insured, this being arbitrarily considered as the amount of impairment of his

[1] (N. Y. 1932) 182 N. E. 665.

[2] The clause read: "Loss or damage, if any, under this policy, shall be payable to Pasquale Savarese & Giacomo Savarese as mortgagee, as interest may appear, and this insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the within described property. . . . " Savarese v. Ohio Farmers' Insurance Co., (N. Y. 1932) 182 N. E. 665 at 666.

The legal effect of such a clause is to create a right in the mortgagee independent of the mortgagor. VANCE, INSURANCE, 2d ed., 657 (1930); RICHARDS, INSURANCE, 4th ed., 478 (1932); Atlantic Joint Stock Land Bank v. Farmers' Mutual Fire Ins. Co., (N. C. 1932) 166 S. E. 789; 19 A. L. R. 1449 (1922). Whether the effect is to create two contracts or simply to make the mortgagee a beneficiary with a "vested" right has been debated. See 29 HARV. L. REV. 334 (1916), and full analytical discussion in 33 COL. L. REV. 305 (1933).

Under ordinary "loss payable" clauses the mortgagee is simply the appointee or beneficiary under the contract, and his rights are no better than the mortgagor's. VANCE, INSURANCE, 2d ed., 656 (1930); RICHARDS, INSURANCE, 4th ed., 474 (1932); Motley v. Manufacturers' Ins. Co., 29 Me. 337 (1849); Biddeford Savings Bank v. Dwelling-House Ins. Co., 81 Me. 566, 18 Atl. 298 (1889); 15 COL. L. REV. 459 (1915); Falconbridge, "Insurance on Mortgaged Property," 55 CAN. L. J. (N. S.) 145 (1919). For distinction between this and standard mortgagee clauses see 11 CORN. L. Q. 553 (1926). A few courts have held the former to amount to assignments. Colby v. Parkersburg Ins. Co., 37 W. Va. 789, 17 S. E. 303 (1893); Cone v. Niagara Fire Ins. Co., 60 N. Y. 619 (1875).

[3] Accord, Foster v. Equitable Mutual Fire Ins. Co., 68 Mass. 216 (1854).

security at the time of the fire.[4] Lehman, J., dissented, arguing that *before* a cause of action arose in favor of the mortgagee the damage had been repaired, hence the owner did not "defeat" the rights of the mortgagee; and that the contract was one of indemnity only, which precluded recovery since plaintiff had been fully indemnified by the voluntary act of the owner.[5]

I.

Waiving the question whether a gratuitous rebuilding of the premises constitutes a breach of the mortgagee clause,[6] it is proposed here to discuss the case in relation to the broader and more fundamental problem whether the view that fire insurance is a contract of indemnity[7]

[4] Thus the courts uniformly hold that it is no defense to the insurer that the premises after the fire are ample security for the debt. Kernochan v. The New-York Bowery Fire Ins. Co., 12 N. Y. Super. 1 (1855), aff'd 17 N. Y. 428 (1858); De Wolf v. Capital City Fire Ins. Co., 16 Hun. (N. Y.) 116 (1878); Excelsior Fire Ins. Co. v. Royal Ins. Co., 55 N. Y. 343 (1873); Aetna Ins. Co. v. Baker, 71 Ind. 102 (1880).

In Excelsior Fire Ins. Co. v. Royal Ins. Co., supra, the court said at page 359:

"The undertaking is that the property shall not suffer loss by fire; that is, in effect, that its capacity to pay the mortgaged debt shall not be diminished. When an appreciable loss has occurred to the property from fire, its capacity to pay the mortgage debt has been affected; it is not so well able to pay the debt which is upon it. The mortgage interest, the insurable interest, is lessened in value, and the mortgagee, the insuree, is affected, and may call upon the insurer to make him as good again as he was when he effected his insurance."

The theory thus seems to be that any fire damage is *ipso facto* an impairment of security, against which the insurer contracts to indemnify.

[5] Hubbs, J., agreed with the majority that plaintiff should recover, but, contrary to the majority, argued that recovery should not be limited by the "co-insurance" clause, since that clause could not affect the mortgagee's "independent" rights.

[6] The argument of the majority here seems rather weak, for the purpose of such clauses is simply to preclude "acts" of misrepresentation, or breach of condition, etc., as defenses to an action by the mortgagee. The purpose is to give the mortgagee rights "higher" than those of the mortgagor. The court seems to have made an uncontemplated use of the provision. See 3 COOLEY, BRIEFS ON INSURANCE, 2d ed., 2391 (1927). *Quaere*, to what extent would the court rely on this argument if the repairs were made by someone not in privity with the mortgagor? In a sense the reasoning is circular. Fundamentally, the question is, not whether the act of the mortgagor has defeated the mortgagee's rights, but what was, in legal contemplation, the promise of the insurer?

[7] A typical statement is that made by the court in Wilson v. Hill, 44 Mass. 66 (1841), at page 68:

"An insurance of buildings against loss by fire, although in popular language it may be called an insurance of the estate, is in effect a contract of indemnity, with an owner, or other person having an interest in the preservation of the buildings, as mortgagee, tenant, or otherwise, to indemnify him, against any loss, which he may sustain, in case they are destroyed or damaged by fire."

In 1 COUCH, CYCLOPEDIA OF INSURANCE LAW, sec. 3 (1929) the principle is phrased

should, as implied in the minority opinion, limit the insured's recovery to such *actual* damage as he can show at the time of suit. At least three types of situations present this question, in each of which it is to be assumed that the insured satisfies the insurable interest requirement, and the dispute arises solely as to the measure of recovery: (a) where the insured has a so-called "limited interest" in the property, but the policy has insured the premises to their full value; (b) where the insured has, before suit, been completely indemnified by someone under tort or contractual duty to indemnify; (c) where the insured has, before suit, been completely indemnified, as in the principal case, by someone under no duty to indemnify.[8]

(a) Where the insured has a "limited interest," that is, some interest less than an unqualified fee, and the policy purports to insure against "loss or damage by fire," do the courts restrict his recovery to the actual injury to that interest, not exceeding the face of the policy and the total value of the interest? [9] As to a life-tenant the prevailing view is stated as permitting recovery for the entire damage to the property,[10] though there is case authority limiting it to damage to the insured's expectancy,[11] and at least two writers state this as the rule.[12] In these cases the question has more often arisen as to the right of the remainderman to share in the proceeds of the insurance *after* the life-tenant has, for some reason, collected in full for the damage.[13] An

thus:

> " . . . a contract of insurance is in its nature aleatory, voluntary, executory, synallagmatic, conditional, and personal, and, except as to life and accident, it is one of indemnity."

[8] See as to this particular problem, 27 MICH. L. REV. 683 (1929).

[9] See McClain, "Insurance of Limited Interests against Fire," 11 HARV. L. REV. 512 (1898), where the writer argues that recovery should not in general be restricted to damage to the insurable interest; and see collection of cases in 68 A. L. R. 1344 (1930), where the opposite is stated to be the general rule.

[10] VANCE, INSURANCE, 2d ed., 665 (1930); 6 COOLEY, BRIEFS ON INSURANCE, 2d ed., 5059 (1928); Schaefer v. Anchor Mutual Fire Ins. Co., 133 Iowa 205, 100 N. W. 857 (1904) (dictum); Kludt v. German Mutual Fire Ins. Co., 152 Wis. 637, 140 N. W. 321, 45 L. R. A. (N. S.) 1131 (1913); 29 COL. L. REV. 362 (1929).

[11] Doyle v. American Fire Ins. Co., 181 Mass. 139, 63 N. E. 394 (1902), recovery by a tenant by the curtesy limited to value of his inchoate right at time of fire; Beekman v. Fulton & Montgomery Counties Farmers' Mutual Fire Ins. Ass'n, 66 App. Div. 72, 73 N. Y. S. 110 (1901); Agricultural Ins. Co. v. Yates, 10 KY. L. REV. 984 (1899); Getchell v. Mercantile & Manufacturers' Mutual Fire Ins. Co., 109 Me. 274, 83 Atl. 801, 42 L. R. A. (N. S.) 135 (1912). See generally, American Ins. Co. v. Porter, (Ala. 1932) 144 So. 129; and 29 COL. L. REV. 218 (1929).

[12] RICHARDS, INSURANCE, 4th ed. 67 (1932); 7 COUCH, CYCLOPEDIA OF INSURANCE LAW, sec. 1859 (1930).

[13] The majority view denies the remainderman any such right. Underwood v. Fortune, (Mo. App. 1928) 9 S. W. (2d) 845; 20 ILL. L. REV. 383 (1925); 33 YALE L. J. 189 (1923); 35 A. L. R. 40 (1925). An interesting investigation might be made

ordinary lessee for a term is restricted to recovery for injury to his interest, though there is some dispute whether the measure of recovery shall be simply the rental value of his unexpired term or his actual loss or damage.[14] A common carrier, warehouseman, or other bailee can recover only to the extent of his interest (including possible liability), unless he has insured for the benefit of the bailor also. If he has so insured, he recovers the entire cash value of the chattel, in the event of total destruction, but holds the surplus above his interest in trust for the bailor.[15] In the case of the unexecuted contract of sale (where the risk of loss is upon the vendee) the few courts which have had to decide the question have permitted the vendor-insured to recover the cash value of the property.[16] The vendee-insured may also recover to the same extent since that *is* the amount of his loss.[17] Where a stockholder has insured corporation property, the question has usually been whether he has an insurable interest at all, not the measure of his recovery; but it seems to be taken for granted that the measure of his recovery would be no more than the value of his stock in the corporation, and probably only his actual loss, though this raises a difficult problem of calculation.[18] An insured house-mover has been permitted to recover only to the extent of his loss.[19] A few cases of this group have allowed recovery in excess of real interest on an estoppel theory.[20]

to ascertain why, in many of these cases, the insurer has not attempted to limit the insured's recovery to the damage to his interest.

[14] 7 COUCH, CYCLOPEDIA OF INSURANCE LAW, sec. 1853 (1930); RICHARDS, INSURANCE, 4th ed., 67 (1932); Commercial Union Assur. Co. v. Jass, (C. C. A. 5th, 1929) 36 F. (2d) 9, certiorari denied 281 U. S. 758, 50 Sup. Ct. 410, 74 L. ed. 1168 (1930); Carey v. London Provincial Fire Ins. Co., 33 Hun (N. Y.) 315 (1884); Niblo v. North American Fire Ins. Co., 3 N. Y. Super. 551 (1848); Lighting Fixture Supply Co. v. Fidelity Union Fire Ins. Co., (C. C. A. 5th, 1932) 55 F. (2d) 110; Harrington v. Agricultural Ins. Co., 179 Minn. 510, 229 N. W. 792 (1930). But see Simmons v. Home Ins. Co., 235 Ill. App. 344 (1925).

[15] Brooklyn Clothing Corp. v. Fidelity-Pheonix Fire Ins. Co., 205 App. Div. 743, 200 N. Y. S. 208 (1923); Eichelberger v. Miller, 20 Md. 332 (1863); Dawson v. Waldheim, 80 Mo. App. 52 (1899).

[16] Grant v. Elliott and Kittery Mutual Fire Ins. Co., 76 Me. 514 (1884); Tiemann v. Citizens' Ins. Co., 76 App. Div. 5, 78 N. Y. S. 620 (1902). As to the vendee's right to have the proceeds applied to the purchase price (the more frequent question) see Hutton, "Some Fire Insurance Problems," 25 DICK. L. REV. 255 (1921); 10 CORN. L. Q. 379 (1925) and cases collected in 37 A. L. R. 1324 (1925).

[17] Dupuy v. Delaware Ins. Co., (C. C. W. D. Va. 1894) 63 Fed. 680. But a mere *optionee*, having paid part of the purchase price, with an option to complete the purchase, can recover only the amount he has paid. Davis v. Phoenix Ins. Co., 111 Cal. 409, 43 Pac. 1115 (1896).

[18] 2 COUCH, CYCLOPEDIA OF INSURANCE LAW, sec. 426 (1929).

[19] Planters' & Merchants' Ins. Co. v. Thurston, 93 Ala. 255, 9 So. 268 (1891).

[20] Borden v. Hingham Mutual Fire Ins. Co., 35 Mass. 523 (1836); Western Assur. Co. v. Stoddard, 88 Ala. 606, 7 So. 379 (1889); Simmons v. Home Ins. Co., 235 Ill. App. 344 (1925). In the last two cases the insurer had knowledge of the

These are a few of the many "limited interest" situations. Were they all listed, they would form a complete gamut of cases ranging from the extensive interest of the life-tenant to the more tenuous interest of the bare possessor. The cases are far from uniform on the question of measure of recovery. Where the limited nature of the interest is palpable, however, recovery is apparently either definitely restricted, or else the courts are ready to find an intent to insure for the benefit of the other interests in the res. Where the interest is substantial, it may be said that the courts generally limit recovery to the loss to the insured's particular interest; but if that loss is difficult of ascertainment, many courts, apparently in lieu of a better solution, are prone to take the line of least resistance, and measure the insurer's liability by the actual damage to the property, on the theory that it is better to award too much than too little.[21]

(b) Where the insured has, before suit, been completely indemnified by someone under tort duty to indemnify, subrogation theories clearly give the insurer a defense. The insurer will be subrogated to the rights of the insured against the tort-feasor in the event of payment by the insurer;[22] therefore, if the tort-feasor has already compensated the insured, the latter cannot recover further from the company.[23] As to this there is uniform agreement. Where the insured has been indemnified by a collateral contract obligor, as where a lessee or mortgagor under duty to repair has performed that duty, subrogation principles still generally prevent recovery on the policy.[24] The cases so holding have, however, been seriously questioned by writers,[25] and there is dissent among some courts.[26]

(c) There is still more uncertainty in the law where the insured has been completely indemnified by one who was under no legal duty to indemnify. If the *Savarese* case is broadly read, it must be taken as denying that the insurer may succeed on such a defense. This view has

nature of the insured's title, but accepted the full value policy regardless, charging premiums therefor.

[21] See McClain, "Insurance of Limited Interests against Fire," 11 HARV. L. REV. 512 at 518 (1898).

[22] 7 COOLEY, BRIEFS ON INSURANCE, 2d ed., 6675 *et seq.* (1928).

[23] RICHARDS, INSURANCE, 4th ed., sec. 57 (1932).

[24] Castellain v. Preston, 11 Q. B. D. 380 (1883); Chicago, St. L. & N. O. Ry. v. Pullman Car Co., 139 U. S. 79, 11 Sup. Ct. 490, 35 L. ed. 97 (1891); Weber v. The Morris & E. R. R., 35 N. J. L. 409 (1872); Larner v. Commercial Union Assur. Co., 127 Misc. 1, 215 N. Y. S. 151 (1926); Union Ins. Soc. v. Consolidated Ice Co., (Mich. 1932) 245 N. W. 563; Schultz v. Home Ins. Co., 205 Ill. App. 297 (1917).

[25] VANCE, INSURANCE, 2d ed., 672 (1930); 28 COL. L. REV. 202 (1928).

[26] Foley v. Manufacturers' & Builders' Fire Ins. Co., 152 N. Y. 131, 46 N. E. 318, 43 L. R. A. 664 (1897).

been enunciated by other courts in analogous situations.[27] But the contrary has been asserted on the theory that the insured must not be more than fully indemnified. Thus, the Wisconsin court in *Ramsdell v. Insurance Co.* denied recovery to a lessor after his lessee had completely rebuilt the premises.[28] The decisions in this group of cases appear to be in direct conflict.

2.

Such being the state of the authorities in these three classes of cases, no rationalization will harmonize them all. A strict principle that fire insurance is a contract of indemnity only, though often suggested,[29] is inadequate, for in the "limited interest" cases the insured is frequently permitted to recover more than his actual loss. And this theory would not account for those cases in either the second or third groups of cases where recovery is permitted despite the fact that at the time of suit the insured can show no real loss. Nor can the true rule be that indemnity only goes to the question of *insurable interest*, and that if the plaintiff has an insurable interest he may in all cases recover for the actual fire damage to the property to the limit of his policy, unless the policy specifically provides otherwise.[30] Such a principle would not adequately cover the "limited interest" cases, and would be in direct conflict

[27] Foster v. Equitable Mutual Fire Ins. Co., 68 Mass. 216 (1854), where premises had been repaired by owner of equity of redemption; Aetna Ins. Co. v. Baker, 71 Ind. 102 (1880), another case of repair by mortgagor.

[28] 197 Wis. 136, 221 N. W. 654 (1928), commented upon in 27 MICH. L. REV. 683 (1929). This statement is made at page 139 of the opinion:

> "The court looks to the substance of the whole transaction rather than to seek a metaphysical hypothesis upon which to justify a loss that is no loss. This is not a case where a stranger to the transaction, out of charity, or for other reasons, might make good the loss of the lessors. The loss has been made good out of a related transaction where the insurance companies might lawfully pool their losses and restore the building at the cost of the damage to the building. They did not do this, but the lessee did restore the building and he has been paid by the insurer the full cost thereof. In equity and good conscience the insurance companies may yet prorate the loss, but we cannot see how it can be held that plaintiffs below had any actual loss."

[29] Thus, according to RICHARDS, INSURANCE, 4th ed., sec. 24 (1932), "Insurance is a contract of indemnity. This means that the assured can recover no more than the actual loss or damage that would have been sustained had the insurance not existed." And in 1 MAY, INSURANCE, 4th ed., sec. 2 (1900), it is stated that the policy

> " . . . promises INDEMNITY. This principle underlies the contract, and it can never, without violence to its essence and spirit, be made by the assured a source of profit, its sole purpose being to guaranty against loss or damage."

[30] Schaefer v. Anchor Mutual Fire Ins. Co., 133 Iowa 205, 100 N. W. 857 (1904). See McClain, "Insurance of Limited Interests against Fire," 11 HARV. L. REV. 512 (1898). The estoppel argument really comes to this, and has been criticized, as applied to insurable interest cases, by Fegan in "Some Recent Tendencies in the 'Law of Insurance'," 15 VA. L. REV. 415 at 424 (1929).

with the law of insurance subrogation, for if literally applied an insured could recover even after being indemnified by a tort-feasor.[31] It is believed that the cases can best be explained according to a principle of recovery such as this: *The measure of liability of the insurer is the damage to the insured's actual interest at the time of the fire except where the considerations of policy underlying this rule do not apply or must yield to countervailing considerations of policy.*

The theoretical justification for this statement is the fact that it is the law's abhorrence of wagers and criminal inducements which limits the otherwise perfect competency of the insurer to contract to pay any sum it chooses to, upon the contingency of a fire;[32] that the indemnity principle is thus a *rule of construction*[33] applied to the damage clause of the contract to satisfy these particular requirements of policy and at the same time preserve the contract in force; but that in the very generality of this control device lies its weakness in certain situations; and hence in those situations the question must be whether there are suffici-

[31] To say that subrogation in insurance is based on some theory of "primary" liability as between the two responsible parties is merely to beg the question. What, in turn, aside from agreement of the parties, shall determine whether *either* party is "primarily" liable, and if one is, which one?

In Castellain v. Preston, 11 Q. B. D. 380 at 386 (1883), Lord Justice Brett observed thus:

> "The very foundation, in my opinion, of every rule which has been applied to insurance law, is this, namely, that the contract of insurance . . . is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but never shall be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it . . . that proposition must certainly be wrong."

This sound principle the Lord Justice applied, erroneously perhaps, to permit subrogation of the insurer even to collateral contract rights of the insured.

[32] These statements are typical: Niblo v. North America Fire Ins. Co., 3 N. Y. Super. 551 at 555 (1848), " . . . it would be extravagant and dangerous to hold, that the lessee of a house for a year, can recover its entire value on a destruction by fire, upon a policy insuring it for its value"; Getchell v. Mercantile & Manufacturers' Mutual Fire Ins. Co., 109 Me. 274 at 277, 83 Atl. 801 at 802 (1912), "A contract of insurance is a contract of indemnity, the object being to reimburse the insured for his actual loss not exceeding an agreed sum. Wagering policies are forbidden as against public policy"; and Harrington v. Agricultural Ins. Co., 179 Minn. 510 at 513, 229 N. W. 792 at 793 (1930), "To rule that an insured may recover regardless of the value of his interest would require, in our judgment, an erroneous construction and application of the insurance contract. It would remove it from the class of contracts for indemnity against loss, to which agreements to insure must be confined to prevent their being gambling contracts and so against public policy. It would change the contract from one of pure indemnity to one for gain."

[33] Permissible for much the same reason as the rule adopted by some courts restricting recovery to even less than actual loss, viz., where a lessee is confined to rental value of his unexpired term rather than loss of profits. See Niblo v. North American Fire Ins. Co., 3 N. Y. Super. 551 at 556 (1848).

ent countervailing policy factors to overcome the objections of wager and criminal inducement, or whether such objections exist at all. A needed "variable" is thus injected to take care of the unusual case and ameliorate the effects of rigid adherence to the indemnity rule.[34]

Thus, applying this theory in the "limited interest" group the courts would always strive to restrict recovery to actual loss proved. But, where that amount is substantial but so uncertain and difficult of calculation as to be a matter of speculation for the jury, the court might well hold that the net balance of policy factors requires that full damage to the insured property be taken as the measure of recovery. In this manner the life-tenant cases may be reconciled. Since at best an evaluation of a life estate involves the use of mortality tables of uncertain individual application, and estimates of future rental value, which are difficult to make, it would not be unreasonable for a court to conclude that whatever the wagering element, it is overcome by the desirability for certainty of result.[35] In the mortgage cases it seems fairly clear that the courts have seized upon full damage to the insured property as the measure of the insurer's liability to the mortgagee as a means of escaping the embarrassing problem of ascertaining the real loss to the mortgagee's interest which is, after all, only a security interest. The rationalization commonly invoked is that the security impairment is commensurate with the amount of property damage.[36] Likewise in other situations where the strict indemnity principle is not followed, the suggested view makes the decisions, in contrast perhaps with the courts' remarks, understandable.

In cases of the second group, where a tortfeasor has made good the loss, *both* the policy opposing wagering contracts and the policy requiring that the party *at fault* should bear a loss suggest that the insurer should have a defense. More complicated, however, is the case of the collateral obligor, such as the lessee or lessor under duty to rebuild, or the building contractor under obligation to complete his

[34] This is not a "variance" from the principle set forth by Lord Justice Brett in Castellain v. Preston, 11 Q. B. D. 380 at 388 (1883), supra, n. 31. It is an application of this principle, recognizing, however, that because considerations of policy are the foundation of the indemnity rule, other considerations of policy may properly demand its relaxation in certain situations.

[35] As illustrating the difficulty see Commercial Union Assur. Co. v. Jass, (C. C. A. 5th, 1929) 36 F. (2d) 9 at 10, where the court had instructed the jury that plaintiffs were entitled to recover the value of the use of the building, and that " . . . it would be worth something according to the length of time a person could expect to remain in the building and use it; that they might consider the possibility of the lease running for the life of Moses Jass," and the lessor's option to terminate " . . . would tend to depreciate the value of the expectancy." It is perhaps significant that the jury found for plaintiffs for the entire amount of the policy.

[36] See cases cited supra, n. 4, and in general Watts, "Fire Insurance by Mortgagee and Mortgagor," 5 AUST. L. J. 368 (1932).

contract despite the fire, where the obligation has been performed and the insured placed *in statu quo*. Undeniably, to permit recovery in addition on the policy gives the insured a profit out of the fire, and injects the element of wager.[37] It is arguable, therefore, that if recovery is permitted at all, the "other insurance" analogy should be applied, and the loss apportioned between the insurer and the obligor. But such a result is never reached in the cases, the doctrine of contribution being confined to multiple *insurance* of the same interest.[38] The question is, then, under the suggested principle, whether there are sufficient policy factors favoring recovery to overcome the objections to double recovery. Would the application of this principle increase the moral hazard? An empirical examination of the results of a rule permitting recovery would best settle the matter. But data are not available, and the answer must be entirely speculative. Perhaps it is not unreasonable to suppose that the hazard is not greatly increased. In fact, in the usual case, as where he is a lessee or vendee in possession, the collateral obligor has a large measure of control over the property, the fact of his liability tends to increase his care, and therefore the total quantity of care which the property receives is fully as great even though the care given by the insured may be somewhat decreased. It follows, then, that since the insurer has contracted in terms to pay for the actual damage, receiving premiums in proportion, and since the wager objection is overcome, he should have no defense simply because a collateral obligor has responded, and by the same token he should not be subrogated to rights against such obligor.[39] In any event it is apparent that the problem is essentially one of balancing considerations of policy, as to the result of which reasonable minds may and do differ, as is shown by the divergence of views in the cases. The proposed principle, therefore, would permit the defense in the tortfeasor cases of this group in accordance with the universal holding; in the collateral contract cases recovery would be allowed unless the court felt that the objections of wager and criminal inducement were not overcome.

In the third group of cases, where the insured has been indemnified by someone gratuitously, the application of the proposed principle would seem clearly to permit recovery on the policy. True, this again would be super-indemnity,[40] but, measured as of the time of the fire,

[37] Castellain v. Preston, 11 Q. B. D. 380 (1883).

[38] See as to contribution among concurrent insurers of the same interest, VANCE, INSURANCE, 2d ed., 78 (1930).

[39] See comment upon this subject in 28 COL. L. REV. 202 (1928), and collection of cases in 52 A. L. R. 278 (1928).

[40] Though not in the Savarese case, since by the terms of the policy the mortgage debt was reduced by the amount recovered.

the insured has suffered a loss within the rule, and should be paid by the insurer unless policy factors militate against it. Certainly the moral hazard is not increased by recovery, for gratuitous compensation is not sufficiently certain to decrease the insured's care of his property, or to induce crime.

It is, therefore, submitted that the suggested principle would serve quite well to explain the decisions in the "limited interest" group, would enable a court to approach rationally the divergent views in cases of compensation by a collateral obligor, and would uphold the decision of the *Savarese* case permitting recovery on the policy, while rejecting the contrary view where the insured has been indemnified gratuitously.[41]

R. A. S.

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[41] For discussions of insurable interest see 1 COUCH, CYCLOPEDIA OF INSURANCE LAW, c. 7 (1929), and 1 COOLEY, BRIEFS ON INSURANCE, 2d ed., c. 2 (1927).

Under this theory what becomes of the requirement of insurable interest? It might be argued that this principle of recovery is so protective of the public need as to eliminate all necessity of proving an insurable interest. But such is not the case. There would still remain certain classes of cases in which, though damage could be proved in the event of fire, no insurance should be permitted at all. Such a case, perhaps, is that of the factory employee who desires to insure the machine he operates; or the motor bus company wishing to insure a public bridge against fire; or a garage owner desirous of insuring a nearby hotel building from which emanates much of his patronage. The function of the doctrine of insurable interest would be to eliminate such cases entirely where it is deemed socially unwise to permit insurance, even though the individual is damaged from a fire. That is, the insurable interest requirement would serve to define the *scope* of fire insurance, while the principle of recovery suggested would serve to determine the *extent* of the insurer's liability. The concept that fire insurance is a contract of indemnity permeates both doctrines, but this is necessary in order to preserve the integrity of the fire insurance contract.