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INSURANCE -- EFFECT OF THE PASSENGER-FOR-HIRE CLAUSES ON SCOPE OF PROTECTION UNDER AUTOMOBILE INSURANCE POLICIES

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INSURANCE — EFFECT OF THE PASSENGER-FOR-HIRE CLAUSES ON SCOPE OF PROTECTION UNDER AUTOMOBILE INSURANCE POLICIES— Quite common in automobile policies insuring against risks of fire, theft, collision, personal liability, etc., from the use of the automobile is a provision either effecting a termination of the policy or excluding the particular loss from the coverage of the policy if or when the automobile is used to carry passengers for hire or consideration. The full purport of this type passenger clause is unfortunately too often not realized by the insured person until he is met with a loss, unforeseen and against which he believed himself to be protected. This comment, then, will attempt an analysis of the common types of passenger clause as to the possible and probable effects upon the practical scope of protection offered by the policy. First, it will be concerned with characterizing the "passenger for consideration" as he is contemplated in the policy. Second, it will consider the form of the passenger clause as affecting the insured's protection.

I.

Clearly the person riding in a public conveyance by right of a purchased ticket is a passenger for compensation, and there is, indeed, some authority confining the term "passenger" itself to describe a person riding in a public conveyance.[1] This narrow connotation has been repudiated in the more recent decisions, which extend the meaning of the term to include persons riding in private vehicles.[2] Keeping in

[1] Marks v. Home Fire & Marine Ins. Co., (App. D. C. 1923) 285 F. 959; Arms v. Faszholz, (Mo. App. 1930) 32 S. W. (2d) 781.

[2] American Lumbermen's Mut. Casualty Co. v. Wilcox, (D. C. N. Y. 1936) 16 F. Supp. 799; Reed v. Bloom, (D. C. Okla. 1936) 15 F. Supp. 600; Park v. National Casualty Co., 222 Iowa 861, 270 N. W. 23 (1936); Cartos v. Hartford Accident & Indemnity Co., 160 Va. 505, 169 S. E. 594 (1933). But see Jasion v. Preferred

mind the possibility that there may need be a public conveyance involved before there can be a passenger, we adopt the more recent view and proceed to apprise ourselves of the ramifications of the terms "consideration" or "hire" or "compensation" as they may appear in the policies.

The elements of consideration as the term is used in general contract law are of comparatively little aid in this problem,[3] so, as a point of departure in determining the fundamental factors, notice the language from *Park v. National Casualty Co.*:[4]

> "In making the distinction the courts take into consideration not alone the bare transaction but all its surrounding circumstances, including among other things the status and relations of the parties one to another, the existence or lack of common interest, pleasure or benefit in the making of the journey, and the relation of the amount of the money to the actual costs of carrying."

The court here held that the insured was not carrying passengers for consideration within the policy exclusion from coverage just because he received a per mile reimbursement from the orchestra coffers for carrying the orchestra, of which he was a member, to a job location. If money paid over alone determined that there was consideration, then it would seem that the *Park* case is an extreme case; but this premise, in the view of most courts, should be at the outset discarded as too narrow.[5] A number of cases to be discussed below[6] have involved the concept of passenger for consideration. By comparison of the opinions therein, it seems that most of the superficially inconsistent views of the concept can be explained.

The courts quite generally compare the amount of money paid the insured incident to the carriage with the actual running expenses of the car.[7] The theory here is that if the driver receives merely running

Accident Ins. Co., 113 N. J. L. 108, 172 A. 367 (1934) (carrying infant son on business trip held not to breach clause in policy against coverage when carrying passengers whether or not for consideration).

[3] Ocean Accident & Guarantee Corp. v. Olson, (C. C. A. 8th, 1937) 87 F. (2d) 465.

[4] 222 Iowa 861 at 870, 270 N. W. 23 (1936). The language is repeated in Ocean Accident & Guarantee Corp. v. Olson, (C. C. A. 8th, 1937) 87 F. (2d) 465 at 467.

[5] United States Fidelity & Guaranty Co. v. Hearn, 233 Ala. 31, 170 So. 59 (1936); Reed v. Bloom, (D. C. Okla. 1936) 15 F. Supp. 600; cases cited in note 4, supra. And see note 14, infra.

[6] See notes 16, 18, 19, 20, 24, 25, 28 below.

[7] Ocean Accident & Guarantee Corp. v. Olson, (C. C. A. 8th, 1937) 87 F. (2d) 465; Reed v. Bloom, (D. C. Okla. 1936) 15 F. Supp. 600; Park v. National Casualty Co., 222 Iowa 861, 270 N. W. 23 (1936); Gross v. Kubel, 315 Pa. 396,

expenses he is not concerned with making a profit or benefit, so can hardly be said to be engaged in the business of carrying passengers for hire. This reasoning indicates that the purpose for which the automobile trip is made might be pertinent to the issue.[8] What circumstances, in other words, will be found to indicate that the primary purpose of the trip was the carrying of passengers for compensation? Factors generally considered as relevant in determining this purpose are: whether the parties were strangers or friends when the trip involving the payment was initiated,[9] whether the payment approximated the actual cost of running the car or was patently intended to net the payee a profit,[10] whether there was a definite agreement between the parties before the start contemplating payment for the ride or whether the payment was but a social gesture conceived later,[11] whether there was collateral joint motivating force impelling the rider and driver to take the trip together with transportation as but

122 A. 649 (1934) (here the payment was too much). But see the Massachusetts rule: "The commercial adequacy or inadequacy of the consideration, or the want of profit to the owner or operator, is immaterial under the terms of the policy." Sleeper v. Massachusetts Bonding & Ins. Co., 283 Mass. 511 at 515, 186 N. E. 778 (1933).

[8] "It is apparent that the authorities quite generally concede that money passing from the passenger to the operator of a car, though associated with the carrying of the passenger, may or may not be a consideration for such carrying, within the meaning of a policy provision such as we are considering. . . . The evidence is that the thing that impelled Craig to drive his car was the incentive to be present in Grinnell and to function as an orchestra member. Upon the record in this case it must also be said that the mileage allowance was something quite incidental. . . ." Park v. National Casualty Co., 222 Iowa 861 at 870, 871, 270 N. W. 23 (1936).

[9] Ocean Acc. & Guarantee Corp. v. Olson, (C. C. A. 8th, 1937) 87 F. (2d) 465; Orcutt v. Erie Indemnity Co., 114 Pa. Super. 493, 174 A. 625 (1934).

[10] Gross v. Kubel, 315 Pa. 396, 172 A. 649 (1934) (a sum added over expenses was found to be consideration). In determining whether profit was intended or whether the compensation as such was a major factor where there is payment, the standards fixing the rate are pertinent evidence: were the standards all interdependent with costs like gas, oil, and storage, or were they divorced from running expense like time spent riding, number of passengers, and comparative bus rates? See, American Lumbermen's Mutual Casualty Co. v. Wilcox, (D. C. N. Y. 1936) 16 F. Supp. 799; Neilson v. American Mutual Liability Ins. Co., 111 N. J. L. 345, 168 A. 436 (1933); Cartos v. Hartford Accident & Ind. Co., 160 Va. 505, 169 S. E. 594 (1933).

[11] Jensen v. Canadian Indemnity Co., (C. C. A. 9th, 1938) 98 F. (2d) 469 at 471, "There was here a prior agreement to pay a fixed amount of money based upon the mileage traveled." See also Reed v. Bloom, (D. C. Okla. 1936) 15 F. Supp. 600, and Sleeper v. Massachusetts Bonding & Ins. Co., 283 Mass. 511, 186 N. E. 778 (1933) (notice the contractual element has independent significance under the Massachusetts view, infra notes 12 and 21); McCann v. Hoffman, 9 Cal. (2d) 279, 70 P. (2d) 909 (1937) (this case adheres to the "social gesture" idea); Perkins v. Gardner, 287 Mass. 114, 191 N. E. 350 (1934). A regular business arrangement is fatal. Orcutt v. Erie Indemnity Co., 114 Pa. Super. 493, 174 A. 625 (1934).

an incident,[12] whether the carriage with payment was a habitual undertaking.[13] All of these factors are evidentiary as indicating whether the driver was, on the particular trip, engaged in a transportation business as distinct from a private use with perhaps the transportation element but an incidental factor. This holding out as a conveyance or carrying business is so influential, indeed, that the payment of money is unnecessary where this element is patent[14] and in any event the payment need not come from the rider himself.[15]

In the *Park* case the court found that the primary incentive impelling the driver to take his car was the desire to play in the orchestra

[12] Ocean Acc. & Guarantee Corp. v. Olson, (C. C. A. 8th, 1937) 87 F. (2d) 465; Reed v. Bloom, (D. C. Okla. 1936) 15 F. Supp. 600; United States Fidelity & Guaranty Co. v. Hearn, 233 Ala. 31, 170 So. 59 (1936); Park v. National Casualty Co., 222 Iowa 861, 270 N. W. 23 (1936). But see note 22, infra, as to view of Massachusetts court. Cf. Sleeper v. Massachusetts Bonding & Ins. Co., 283 Mass. 511, 186 N. E. 778 (1933) (there was carriage for hire because of contractual element in payment); and Askowith v. Massell, 260 Mass. 202, 156 N. E. 875 (1927) (here also there was a joint enterprise but court finds no carriage for hire because of lack of contractual element in the payment).

[13] Marks v. Home Fire & Marine Ins. Co., (App. D. C. 1923) 285 F. 959 (scattered instances of breach operated as condition subsequent nullifying the policy though there was no breach at the time of the loss); Maringer v. Banker's Indemnity Ins. Co., 288 Ill. App. 335, 6 N. E. (2d) 307 (1937); O'Donnell v. New Amsterdam Casualty Co., 50 R. I. 269, 146 A. 410 (1929); Commercial Union Assurance Co. v. Hill, (Tex. Civ. App. 1914) 167 S. W. 1095; Crowell v. Maryland Motor Car Ins. Co., 169 N. C. 35, 85 S. E. 37 (1915); Wood v. American Automobile Ins. Co., 109 Kan. 801, 202 P. 82 (1921). *Contra* (it need not be a habitual use over a period of time): Mittet v. Home Ins. Co., 49 S. D. 319, 207 N. W. 49 (1926); Rykill v. Franklin Fire Ins. Co., 80 Pa. Super 492 (1923); Orcutt v. Erie Indemnity Co., 114 Pa. Super. 493, 174 A. 625 (1934); Beatty v. Employers' Liability Assur. Corp., 106 Vt. 25, 168 A. 919 (1933); Elder v. Federal Ins. Co., 213 Mass. 389, 100 N. E. 655 (1913).

[14] The promise to pay is sufficient though no money actually changes hands. Mittet v. Home Ins. Co., 49 S. D. 319, 207 N. W. 49 (1936); Cartos v. Hartford Accident & Indemnity Co., 160 Va. 505, 169 S. E. 594 (1933); Orcutt v. Erie Indemnity Co., 114 Pa. Super. 493, 174 A. 625 (1934). The agreement to pay must precede the trip. See dictum in Indemnity Ins. Co. v. Lee, 232 Ky. 556, 24 S. W. (2d) 278 (1930). Cf. American Lumbermen's Mut. Casualty Co. v. Wilcox, (D. C. N. Y. 1936) 17 F. Supp. 799, requiring a fare paid; Elder v. Federal Ins. Co., 213 Mass. 389, 100 N. E. 655 (1913), and Arms v. Faszholz, (Mo. App. 1930) 32 S. W. (2d) 781, where "holding out" as public conveyance is considered the important element. There must be benefit to driver [Perkins v. Gardner, 387 Mass. 114, 191 N. E. 350 (1916)], whether it be money or something else, Western Machinery Co. v. Bankers Indemnity Ins. Co., (Cal. App. 1937) 68 P. (2d) 382, reversed 10 Cal. (2d) 488, 75 P. (2d) 609 (1938).

[15] Neilson v. American Mutual Liability Ins. Co., 111 N. J. L. 345, 168 A. 436 (1933). Payment to the car owner must be proved. De Pasquale v. Union Indemnity Co., 50 R. I. 509, 149 A. 795 (1930).

at the end of the run and not the reimbursement received for expenses. In reaching this conclusion, the court considered the fact that the driver was a member of the orchestra as indicating that he did not negotiate with his fellows primarily on the basis of contracting transportation. The court explained away the fact that the payment was set at a flat mileage rate instead of directly reflecting the gas and oil expenses by saying that the flat rate did approximate actual running expense and was intended as a convenient method of allowing the driver to share equally with the other members in the proceeds of the orchestra work as distinct from giving the driver compensation for the transportation.

The opinion in *Reed v. Bloom*[16] relied heavily on the fact that all, including the driver, had but one object in taking the trip and that was to attend a convention. Here there was not the prior arrangement for compensation that there was in the *Park* case and that some courts consider determinative.[17] Here there was the social gesture type payment which approached the actual running and storage expenses but was not intended to net the driver a profit. This social gesture payment is predicated upon the rider's reluctance to impose so heavily upon the driver's offered generosity, for all had planned to go to the convention, the driver by car regardless of the presence of the riders, and the driver offered the riders gratuitous transportation.

This same joint-venture theory was patent in the *Hearn* case[18] wherein all riders, including the driver, estimated the expenses of the trip, motivated by the joint desire to see the Rose Bowl game, and intended by the arrangement to share the entire expense of seeing the game, not confer on the driver a profit. The automobile was being used for this joint venture and not for carrying passengers for hire.

Gross v. Kubel[19] superficially appears to be analogous to the above cases, but the opposite result was reached. The trip looked like an incident of a joint venture with purpose to play basketball, for the driver was a member of the ball team he carried. The distinctive element was that the driver was not paid on the basis of running expenses, nor did all the riders share with the driver the venture expenses of which transportation was one; instead, this driver received either the

[16] (D. C. Okla. 1936) 15 F. Supp. 600.

[17] Jensen v. Canadian Indemnity Co., (C. C. A. 9th, 1938) 98 F. (2d) 469; Indemnity Ins. Co. v. Lee, 232 Ky. 556, 24 S. W. (2d) 278 (1930) (dictum). There was no "holding out" as a public conveyance, which is considered determinative by some courts. Arms v. Faszholz, (Mo. App. 1930) 32 S. W. (2d) 781; Marks v. Home Fire & Marine Ins. Co., (App. D. C. 1923) 285 F. 959; Elder v. Federal Ins. Co., 213 Mass. 398, 100 N. E. 655 (1913).

[18] United States Fidelity & Guaranty Co. v. Hearn, 233 Ala. 31, 170 So. 59 (1936).

[19] 315 Pa. 396, 172 A. 649 (1934), annotated 95 A. L. R. 150 (1935). As to fire insurance policies on this point, see 14 A. L. R. 205 (1921).

equivalent of bus fares or running expenses plus an amount for the use of the car paid by a third party, the school, for transportation exclusively. This added amount for the use of the car was enough to throw the balance and cause the court to find that the school had hired the use of the driver's automobile.

Consistent in result on the facts with *Gross v. Kubel* but with emphasis on different elements to dictate the result is the *Sleeper* case.[20] Here the insured agreed to take persons to another state on a fishing trip only on condition that they would pay enough to cover the expenses of gas, oil and meals. The court relied solely on the existence of an intended contractual arrangement between the parties to find a carriage of passengers for hire; consequently another court has said of the Massachusetts cases:

> "In general the Massachusetts cases draw the line between riding under a business arrangement which amounts to a contract supported by a legally sufficient consideration, and riding where payment therefor in some form is not a legal obligation."[21]

This contractual approach leads to results not generally inconsistent with that of the primary purpose approach of the *Park* case, even though the Massachusetts court has never supported a joint venture theory.[22] In the *Sleeper* case the court found that the driver took the trip only on the condition that the agreement be drawn to pay him running expenses plus meals. Here we have a payment in addition to expenses, as in *Gross v. Kubel,* plus the fact that the primary purpose of the trip was conditioned on the transportation agreement, thus destroying the joint venture idea of the *Park* case. There is, to the extent of this extra charge, a use of the car for the purpose of netting profit and not for a private use, or if it is permitted by the policy,[23]

[20] Sleeper v. Massachusetts Bonding & Ins. Co., 283 Mass. 511, 186 N. E. 778 (1933).

[21] Maryland Casualty Co. v. Martin, 88 N. H. 346 at 350, 189 A. 162 (1937).

[22] See Maryland Casualty Co. v. Martin, 88 N. H. 346 at 351, 189 A. 162 (1937). See also Yelin v. Columbia Casualty Co., 265 N. Y. 590, 193 N. E. 334 (1934).

[23] Some policies permit a use of the automobile in the insured's business but still prohibit carriage of passengers for hire. Central Surety & Ins. Co. v. London & Lancashire Indemnity Co., 181 Wash. 353, 43 P. (2d) 12 (1935) (insured carrying customers of employer to see lots for sale was permissible business use); De Pasquale v. Union Ind. Co., 50 R. I. 509, 149 A. 795 (1930) (no showing of payment; fails to show carriage for hire when undertaker uses car to carry funeral of brother undertaker); Jasion v. Preferred Accident Ins. Co., 113 N. J. L. 108, 172 A. 367 (1934) (policy forbids carrying any passengers, gratuitous or otherwise, but there is no breach where insured as an incident to a business trip takes along infant son). Cf. Cardoza v. West American Commercial Ins. Co., 6 Cal. App. (2d) 500, 44 P. (2d) 668 (1935) (burden of proof to show payment here failed).

a non-transportation business use. The *Sleeper* case holds that actual profit is immaterial so long as there is no contractual relationship between driver and rider and to this extent places purpose of the trip as determinative.

The *Neilson*[24] and *Wilcox*[25] cases represent a situation which would sustain a finding of consideration on either the primary purpose or the contract views. Here there was a flat rate contracted and intended to raise correlative legal obligations, the performance of which was the primary purpose of the driver. The rate was based on time devoted to the carriage by the driver, the arrangement contemplated continuous service by the driver, and there was no connection indicated between the rate paid and the running expenses. In the *Neilson* case the contract was entered into by a third party, the rider's employer, to provide transportation; but as it is the use that is prohibited, it is immaterial that payment came from the employer rather than the rider.[26] Also since it is the use that is prohibited it is immaterial that the insured attempted to prevent such use.[27]

The *Cartos* case,[28] assuming the determination of primary purpose or contractual obligation is clear, is confusing. Here insured's employees without insured's knowledge took a rider on the trip for an agreed price never paid. The facts could be resolved in either of the two above views, but the court placed its decision that there was a carriage for hire on still another ground:

> "*the carrying of passengers for a consideration* . . . means that no risk is assumed by the insurer for injuries inflicted by the owner or operator of the car while it is being used for the transportation of persons under such conditions that the operator of the car owes to the person who is being transported the duty of a person who is carrying another for hire."[29]

The court went on to say that it is just the difference in duty in the for hire situation and the gratuitous situation that makes the insurer's risk different and consequently the premium rate lower in policies

[24] Neilson v. American Mut. Liability Ins. Co., 111 N. J. L. 345, 168 A. 436 (1933).

[25] American Lumbermen's Mut. Casualty Co. v. Wilcox, (D. C. N. Y. 1936) 16 F. Supp. 799.

[26] Supra, note 15.

[27] Mittet v. Home Ins. Co., 49 S. D. 319, 207 N. W. 49 (1926). Owner's lack of knowledge of the use is immaterial. Crowell v. Maryland Motor Car Ins. Co., 169 N. C. 35, 85 S. E. 37 (1915); Wood v. American Automobile Ins. Co. 109 Kan. 801, 202 P. 82 (1921); Commercial Union Assur. Co. v. Hill, (Tex. Civ. App. 1914) 167 S. W. 1095.

[28] Cartos v. Hartford Acc. & Ind. Co., 160 Va. 505, 169 S. E. 594 (1933).

[29] Ibid., 160 Va. at 516.

limited to gratuitous carriage.[30] This theory makes the status of passenger for hire in the policy interdependent with the status in the tort field which imposes the higher duty on the operator. In terms of risk on the liability policy this seems reasonable in a state, such as Viriginia was at the time of the *Cartos* case, with common-law tort rules.[31] In the majority of states[32] now, though, there are the so-called guest statutes which, in derogation of the common law, hold the driver liable only for wanton misconduct or gross negligence in favor of a guest. If, now, the definition of the term "passenger for hire" in the statutes is considered the basis for the policy definition, then there is a "dilemma"[33] in the cases where a passenger sues the owner of the car in which he was riding. The policy purports to cover the insured's liability except in the limited field of carrying passengers for hire; yet because under the guest acts the court must find the plaintiff a passenger for hire[34] to permit recovery for ordinary negligence, the

[30] Accord: Crowell v. Maryland Motor Car Ins. Co., 169 N. C. 35 at 38, 85 S. E. 37 (1915) (a fire policy with one breach, prior to the loss, which the court found did not void the policy: "There was no increase of the risk, which would be incurred by its ordinary and perfectly legitimate use as a private automobile. . . ." See also Orcutt v. Erie Ind. Co., 114 Pa. Super. 493, 174 A. 625 (1934).

[31] It was not until 1938 that Virginia passed its guest act, while the Cartos case arose in 1933. Va. Acts (1938), c. 285, p. 417. Contra as to common-law rule followed by Virginia is Armistead v. Lenkeit, 230 Ala. 155 at 157, 160 So. 257 (1935): "Obviously, an arrangement by which the car owner agrees in advance to transport another on a trip, which both wish to take, each contributing thereto, one by furnishing the car and driving it, and the other furnishing gas and oil, does not impose on the driver the degree of care required of a common carrier of passengers. Neither does it impose the same obligations as a private carrier for hire, save in so far as like duties arise from the intendments of the relation." After this case was decided in 1935 the Alabama legislature passed a guest act. Ala. Acts (1935), p. 918. Note also United States Fidelity & Guaranty Co. v. Hearn, 233 Ala. 31, 170 So. 59 (1936), holding that there is not the same degree of tort duty to a co-joint-venturer that there is to the passenger of a private carrier for hire.

[32] About 27 states now have guest statutes, and some other states follow the same rules by judicial decisions. 26 CAL. L. REV. 251, notes 5 and 6 (1937). See also 36 MICH. L. REV. 268 (1937).

[33] "In other words, the attempted dilemma is as follows: Either the appellee was a rider for compensation, and was excluded by the terms of the policy, or she was a guest rider, and was barred from recovery by the [guest] statute of California." Ocean Acc. & Guarantee Corp. v. Torres, (C. C. A. 9th, 1937) 91 F. (2d) 464 at 470. See also 26 CAL. L. REV. 251, 503 (1938).

[34] See annotations, 82 A. L. R. 1365 (1933); 95 A. L. R. 1180 (1935); 109 A. L. R. 667 (1937) for interpretation of the term "passenger for hire" in the guest statutes. See also McCann v. Hoffman, 9 Cal. (2d) 279, 70 P. (2d) 909 (1937). "And the weight of authority now supports the view that almost any benefit or profit accruing to the driver or bus principal from the transportation is compensation removing the rider from the guest category." 26 CAL. L. REV. 251 at 252 (1937) (authorities cited note 13).

policy becomes of no practical benefit unless there was "gross negligence," permitting the court to call the plaintiff a "guest." Certainly, in the absence of expression, this does not seem to be the intended scope of protection offered in the policy and on this basis some courts have expressly refuted the theory.[35]

2.

Assuming that a carriage of the passenger for hire has been found; what effect does the form of the clause have upon the protection offered by the policy? This is the question presented in the second division of the analysis.

The *Cartos* case suggests a caveat which seems most reasonable, though practically none of the other cases seem to mention it. The court said:

> "The plaintiff cites us to several cases in which, in construing *warranties* in fire insurance policies covering automobiles . . . the court has held that a single, occasional, isolated, or casual use of the car for carrying persons for hire or compensation does not constitute a breach of the warranty which will avoid or work a forfeiture. . . . Forfeitures are never favored either at law or in equity. . . . In such cases they [the courts] have also shown astuteness so to construe clauses providing for a forfeiture as to prevent a forfeiture whenever the language used may, by strict construction, be construed so as not to cover the acts upon which the forfeiture is claimed."[36]

For these reasons the court said that the warranty cases are not of great value as precedents for the reasonable limitations which do not effect forfeitures. The reasonable limitations are construed against the insured perhaps but with not the strictness of warranties.[37] It needs

[35] Ocean Acc. & Guarantee Corp. v. Torres, (C. C. A. 9th, 1937) 91 F. (2d) 464; Roadbuilders' Hauling Co. v. Constitution Indemnity Co., 165 S. C. 363, 163 S. E. 837 (1932) (maid servant and fellow employees are not passengers for hire under policy but are under guest act); Western Machinery Co. v. Bankers Ind. Ins. Co., 10 Cal. (2d) 488, 75 P. (2d) 609 (1938) (passenger under guest act is not necessarily passenger under policy). But notice the report of the California case below, overruled by the Supreme Court, (Cal. App. 1937) 68 P. (2d) 382 at 384 (1937), where it was said, "The latter provision [policy clause] clearly restricted the use of the automobile to the class of persons to whom the assured owed no higher duty than to a guest." See also Jensen v. Canadian Indemnity Co., (C. C. A. 9th, 1938) 98 F. (2d) 469.

[36] Cartos v. Hartford Acc. & Ind. Co., 160 Va. 505 at 517, 518, 169 S. E. 594 (1933).

[37] This concept may explain the conflicting points of view as to the necessity for continued use to avoid the policy instead of merely suspending it. Berryman v. Maryland Motor Car Ins. Co., 199 Mo. App. 503, 204 S. W. 738 (1918) (isolated use

but this mention to indicate the reasons for the fact that most of the passenger clauses of recent years appear in form as exemptions or exclusions which do not affect the life of the policy when the limitation is overstepped.[38] These exclusions do limit the scope of the coverage, though, so if the loss occurs during or as a result of the exempted use there is no coverage.[39] It should be pertinent here to indicate a growing statutory tendency to require materiality in fact and substantial breach of even a warranty before forfeiture is effected.[40] This

does not avoid fire insurance policy containing a warranty); Rykill v. Franklin Fire Ins. Co., 80 Pa. Super. 492 (1923) (prior use nullified the policy where policy so provided); Orient Ins. Co. v. Van Zant-Bruce Drug Co., 50 Okla. 558, 151 P. 323 (1915) (fire policy contained warranty, so a single use avoided the policy).

[38] VANCE, INSURANCE, § 116 (1930).

[39] Cardoza v. West American Commercial Ins. Co., 6 Cal. App. (2d) 500, 44 P. (2d) 668 (1935) (accident insurance); Maryland Casualty Co. v. Martin, 88 N. H. 346, 189 A. 162 (1937) (liability insurance); Sleeper v. Massachusetts Bonding & Ins. Co., 283 Mass. 511, 186 N. E. 778 (1933) (liability); Beatty v. Employers' Liability Assur. Corp., 106 Vt. 25, 168 A. 919 (1933) (liability); United States Fidelity & Guaranty Co. v. Hearn, 233 Ala. 31, 170 So. 59 (1936) (liability); Reed v. Bloom, (D. C. Okla. 1936) 15 F. Supp. 600 (liability); American Lumbermen's Mutual Casualty Co. v. Wilcox, (D. C. N. Y. 1936) 16 F. Supp. 799 (liability); Ocean Acc. & Guarantee Corp. v. Olson, (C. C. A. 8th, 1937) 87 F. (2d) 465 (liability); Gross v. Kubel, 315 Pa. 396, 172 A. 649 (1934) (liability); Jasion v. Preferred Acc. Ins. Co., 113 N. J. L. 108, 172 A. 367 (1934) (liability); Pietrantonio v. Travelers Ins. Co., 282 Mich. 111, 275 N. W. 786 (1937) (accident); Partridge v. Portsmouth, 86 N. H. 594, 163 A. 713 (1932) (accident); Park v. National Casualty Co., 222 Iowa 861, 270 N. W. 23 (1936) (liability); Orcutt v. Erie Indemnity Co., 114 Pa. Super. 493, 174 A. 625 (1934) (liability); Cartos v. Hartford Acc. & Ind. Co., 160 Va. 505, 169 S. E. 594 (1933) (liability); Jensen v. Canadian Indemnity Co., (C. C. A. 9th, 1938) 98 F. (2d) 469 (liability). Then some cases exemplifying the condition subsequent: Arms v. Faszholz, (Mo. App. 1930) 32 S. W. (2d) 781 (liability); Wood v. American Automobile Ins. Co., 109 Kan. 801, 202 P. 82 (1922) (theft); Marks v. Home Fire & Marine Ins., (App. D. C. 1923) 285 F. 959 (fire). If policy reads for exemption "while" so used, insurer is immune even from liability to gratuitous passengers or those not riding in insured's car. Neilson v. American Mut. Liability Ins. Co., 111 N. J. L. 345, 168 A. 436 (1933); Gross v. Kubel, 315 Pa. 396, 172 A. 649 (1934); Raymond v. Great American Indemnity Co., 86 N. H. 93, 163 A. 713 (1932); Maringer v. Bankers Indemnity Ins. Co., 288 Ill. App. 335, 6 N. E. (2d) 307 (1937).

[40] One of these statutes which give warranties the same effect as representations in that they must be material in fact and substantially breached before a forfeiture is effected was applied in Berryman v. Maryland Motor Car Ins. Co., 199 Mo. App. 503 at 505, 204 S. W. 738 (1918): "It follows that the thing warranted against was not material to the risk, thereby becoming, under the statute, a mere representation." Some of these statutes render representations immaterial unless the risk of loss is increased by their breach. Mass. Gen. Laws (1932), c. 175, § 186, interpreted in White v. Provident Sav. Life Assur. Society, 163 Mass. 108, 39 N. E. 771 (1895); Minn. Gen. Stat. (1913), § 3300 [Stat. (Mason, 1927), § 3370], interpreted in Johnson v. National Life Ins. Co., 123 Minn. 453, 144 N. W. 218 (1913); N. D.

tendency alleviates the hardship of the common-law technical breaches and should, by the *Cartos* case theory, place warranties on the same basis of construction as are the nonforfeiting forms.

Though a search has unearthed no authority even as obiter dictum for the proposition, it would seem that if the materiality to the risk is considered important[41] then the limiting effect upon the practical scope of the protection with the passenger clause should to some degree depend upon the type policy involved.[42] Does a carriage of passengers for hire entail the same risk to the insurer in the fire or theft policy as it does in the liability, accident, or collision policies so that the breach in all cases can be said to be sufficiently substantial to excuse the insurer?

Our point of departure was that the surrounding circumstances are the determining factors in defining the term "passenger for hire." The possibilities for precise application of this rather elastic concept are as varied as are the ever-changing fact situations presented. Some courts still require a "holding out" of the car as a public conveyance before the passenger clause will be held to prevent recovery on the policy. It can be said, however, with some degree of certainty that the courts in general will be reluctant to find that a use, in fact immaterial to the insurer's risk, effects a forfeiture of all protection. This reluctance manifests itself in the fact that the courts state that the compensation

Comp. Laws (1913), § 6501, interpreted in Donahue v. Mut. Life Ins. Co., 37 N. D. 203, 164 N. W. 50 (1917). Then many statutes place warranties on the same footing with representations. N. C. Code (1935), § 6289: "All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed representations and not warranties, and a representation, unless material or fraudulent, will not prevent a recovery on the policy." See also: Ga. Code Ann. (Park, 1937), §§ 56-821, 56-822; Iowa Code (1935), §§ 8980, 8981; Ky. Stat. (Carroll, 1930), § 639; Md. Code Ann. (Bagby, 1924), art. 48A, § 87; Mich. Comp. Laws (1929), §§ 12427, 12444, Stat. Ann. (1938), 24.263, 24.280. These statutory provisions prevail over the express agreement of the parties. King Buick Mfg. Co. v. Phoenix Ins. Co., 164 Mass. 291, 41 N. E. 277 (1895).

[41] Berryman v. Maryland Motor Car Ins. Co., 199 Mo. App. 503, 204 S. W. 738 (1918). Supra, note 40. See also Cartos v. Hartford Ind. Co., 160 Va. 505, 169 S. E. 594 (1933).

[42] There is but incidental mention in the Cartos case which might imply support here. "The plaintiff cites us to several cases in which, in construing *warranties* in fire insurance policies covering automobiles which are couched in language similar to the italicized words above quoted. . . . The cases cited by the plaintiff are clearly distinguishable from the case here under consideration." Cartos v. Hartford Ind. Co., 160 Va. 505 at 517-518, 169 S. E. 594 (1933). The court, though, distinguishes on the ground that the plaintiff's cases involved promissory warranties while the Cartos case involved exceptions from the risk. That the court talks of forfeiture depending on materiality to the risk of the breach might make the distinction rely somewhat on the fact that the plaintiff's cases involved fire policies and the Cartos case a liability policy.

paid by or for the passenger must be a substantial element either in purpose or as raising a legal obligation in the driver before they will find that the passenger clause prevents recovery.

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