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Few recent decisions will upset the peace of mind of the legal reader as will the *Brower* case.[1] Its precedents, its logic, its surprise decision, its peculiarly dissenting yet concurring opinion, all tend to mold its cast to a form which best might be described as anomalous.

The "omnibus coverage clause"[2] in the usual automobile liability policy is the subject of construction. It is itself an anomaly in the law since it gives protection to, and brings under the breadth of its coverage, persons not parties to the contract and perhaps not even in contemplation of the parties when the contract is made. Unquestionably, however, such protection is in accord with the public policy of the Commonwealth to protect persons injured in automobile accidents and with statutory requirements of personal efficiency of drivers[3] and financial responsibility of owners and operators[4] of motor vehicles. This clause makes an assured of any person using or operating the automobile "with the permission of the named assured."

As to the legal meaning of the words "with the permission of the named assured" a well-defined split in the authorities has long been recognized.[5] The

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[1]Brower, to use vs. Emp. L. A. Co., Ltd., 318 Pa. 440; April 1, 1935.

[2]The usual clause reads:

> "This policy shall cover the assured named in the Policy and any other person or persons while riding in or operating any of the automobiles described herein and the protection granted by this Policy is so extended as to be available in the same manner and under the same conditions as it is available to the named Assured, to any person, firm, or corporation legally responsible for the operation of such automobiles, provided such use or operation is with the permission of the named Assured, or if the named Assured is an individual, with the permission of an adult member of the named Assured's household other than a chauffeur or a domestic servant; except that the protection granted by this Policy shall not be available to a public garage, automobile repair shop, automobile sales agency, automobile service station and the agents or employees thereof."

[3]Motor Vehicle Code of 1929, P. L. 905 and supplements.

[4]Financial Responsibility Act of 1933, P. L. 553.

[5]For a brief survey of the pertinent decisions see 13 Huddy Ency. of Automobile Law 405; 6 Berry on Automobiles, 650; 6 Blashfield, Cyc. of Auto. Law, sec. 3943 et seq; 72 A. L. R. 1375.

so-called "broad coverage" rule has been adopted by the courts of Connecticut,[6] Tennessee,[7] Minnesota,[8] Wisconsin[9] and Louisiana.[10] It holds

> ". . . . that the words, 'providing such use or operation is with the permission of the named assured,' were intended to exclude from the protection of the policy a person who should take the automobile and use it without permission or authority in the first instance. If, however, the automobile covered by the policy is delivered to another for use, with the permission of the owner or insured, his subsequent use of it is with the permission of the insured, within the meaning of the policy, regardless of whether the automobile is driven to a place or for a purpose not within[11] the contemplation of the insured when he parted with possession."

The time of the accident, the place at which it happens, and the purpose for which the vehicle is being used at the time, are all unimportant if original permission is given to use the car.

Under this rule the bailee of the motor vehicle in each of the following cases has been held to have had "permission of the named assured" within the meaning of the clause, and therefore to be entitled to indemnity under the policy:

(1) Brother of owner loaned car to driver to go home and change clothes, telling him to hurry back. He did not take a direct route home. He stopped for a drink. He met three men and talked for fifteen minutes. He agreed to take them home in the opposite direction from his home. They stopped for more drinks. They then drove to another stop. Then to see if he still had time to go home, he started toward the center of town to look at the City Hall clock. On the way the accident occurred.[12]

(2) A salesman was given specific instructions that the car provided him was not to be used except on company business. When not so in use it was to be placed in a garage and the check given to his superior. On the morning of the accident, after completing his business, he returned the car to the garage, kept the check, and later slipped away

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[6]Dickinson vs. Maryland Casualty Co., (Conn.) 125 A. 866.

[7]Stovall vs. N. Y. Indemnity Co., (Tenn.) 8 S. W. (2d) 473.

[8]Peterson vs. Maloney, (Minn.) 232 N. W. 790.

[9]Drewek vs. Milwaukee Auto. Ins. Co., (Wis.) 240 N. W. 881.

[10]Theriot vs. Tassin, (La.) 146 S. 729.

[11]Stovall vs. N. Y. Indemnity, supra, at 477.

[12]See note 6.

from his place of business and started on a 135 mile trip to another city and state to visit his fiancee. En-route the accident occurred.[13]

(3) An employee was given permission to use a car to visit his doctor and his mother. He started too late to do so, and went off on a jaunt of his own. The accident occurred twelve miles from his place of employment and in the middle of the night.[14]

(4) The owner loaned his car to another with specific instructions to return at eleven o'clock. He drove the car sixty miles into another state. The accident occurred at ten-thirty at a place from which it was impossible to return by eleven o'clock.[15]

On the other hand, what we may term the "narrow coverage" rule obtains in Ohio,[16] Maine,[17] North Carolina,[18] and the Federal courts.[19] In substance it is that permission is restricted to the time, place and purpose expressed or implied at the time of the bailment.

Coverage under this rule was denied in cases presenting the following facts:

(1) An employee had the daily duty of delivering mail to the post-office, calling at the docks and returning to the place of business of his employer. On the day of the accident he started on his duties but diverted to visit his mother and attend to some personal business.[20]

(2) The owner provided his salesman with a car to be used solely for business purposes. The car was always in the possession of the salesman. Driving the car after business hours and for personal purposes, the salesman was involved in the accident.[21]

(3) An employer delivered his car to an employee to wash and polish it. The latter washed the car and, while driving to dry it, visited his aunt and a neighbor, and then took a trip to another town. On the way back the accident occurred.[22]

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[13]See note 7.

[14]See note 8.

[15]See note 10.

[16]Denny vs. Royal Indemnity Co., (O. App.) 159 N. E. 107; Kazden vs. Stein, (O. App.) 160 N. E. 506, aff. 160 N. E. 704.

[17]Johnson vs. American Auto. Ins. Co., (Me.) 161 A. 496.

[18]Johnston vs. New Amsterdam Cas. Co., (N. C.) 158 S. E. 473. This case, although constantly cited for this proposition, will not bear the weight of scrutiny.

[19]Fredericksen vs. Emp. L. A. Corp., 26 F (2d) 76; Trotter vs. Union Indemnity Co., 35 F (2d) 104; Globe Ind. Co. vs. Nodlere, 69 F (2d) 955. But see Maryland Casualty Co. vs. Ronan, 37 F. (2d) 448 which approves the "broad coverage" rule without citing the prior Federal cases.

[20]Denny vs. Royal Indemnity Co., supra, note 16.

[21]Kazden vs. Stein, ibid.

[22]See note 17.

(4) The owner loaned his car to a friend to go to an early morning funeral. After the funeral the latter used the car for the rest of the day, driving forty miles away on a joy ride in the afternoon. About 6 P. M., on the return trip, the accident occurred.[23]

This novel question was *res nova* when presented to our appellate courts for the first time in October of 1934 in the case of *Powers v. Wells*.[24] The facts were as follows: Wells was employed by the insured as a chauffeur and had a daily duty of calling for the latter's children at school and driving them home. On the day of the accident. he left the house a little earlier than usual, drove past the school on business of his own, and was returning to the school in time to meet the children when he ran down and injured the Powers child.

When the case was argued before the Superior Court,[25] the implications of the situation were that it would follow the "broad coverage" rule. *First*: the Commonwealth had, by its legislation, reflected the demand of public opinion that greater protection be given the person injured by a motor vehicle,[26] and, *secondly*: the Supreme Court had indicated a reliance upon the persuasive authority of the Connecticut court[27] in its approach to the construction of automobile insurance policies.

Nevertheless, our Superior Court unanimously adopted the "narrow coverage" rule in its decision through Judge Baldridge on January 4, 1935. The opinion is an excellent restatement of the supporting authorities and reasons for the rule:

> "Express authority to use a car for a special purpose does not extend this right for all purposes. Permission, therefore, to use the car to carry the children home from school can not be construed as permission to Wells to use it for his private purposes. He had abandoned the duties of his employment, when, instead of going for his employer's children, he proceeded to a distant point on an individual errand. The relation of master and servant had been broken and had not been resumed. In such circumstances, there can be no question but that the employer, the owner of the car, was not liable; nor can the insurer be compelled to answer for Wells' negligence, notwithstanding he had original permission to use the car for limited purposes."[28]
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> "Our conclusion is that the terms of the policy clearly provide for the liability of the insurer only when the automobile is being used by

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[23]Fredericksen vs. Emp. L. A. Corp., supra, note 19.

[24]Powers, et al. vs. Wells, etc., 115 Pa. Super. 549.

[25]October 16, 1935.

[26]Act of 1933, P. L. 553.

[27]Dickinson vs. Maryland Casualty Co., supra, had been followed on another point in McClellan vs. Madonti, 313 Pa. 515.

[28]Powers vs. Wells, supra, at 552.

> one other than the insured with either express or implied permission. As Wells was doing something radically different from that which he was authorized to do, there was no liability on the part of the appellee."[29]

Thereupon, for the first time, this provocative question was put before the Supreme Court in a petition for review, alleging error in the adoption of the "narrow coverage" rule.[30] This issue was now squarely before the highest tribunal of the Commonwealth.

On January 23, 1935 the petition for review was refused.

Meanwhile, on December 12, 1934 the Superior Court had heard argument in the case of *Truex vs. Pa. Manufacturers' Ins. Co.*[31] The facts alleged were simple: the insured lent his car to Truex to drive a Miss Paul to her home four blocks away. Instead he drove past her home a number of miles on a pleasure trip, during which an accident occurred and Miss Paul was injured. The Court, again speaking through Judge Baldridge held such facts constituted a sufficient defense to the claim against the insurer:

> "Permission to drive to a designated place four blocks away did not give authority to drive some miles distant in the opposite direction. This was not a slight deviation. It was a radical departure—an entirely new and different use than was averred to have been granted."[32]

The decision was handed down on February 1, 1935.

Five days after the decision refusing to review the *Powers* case, and three days befor the *Truex* decision, the *Brower* case[33] was argued directly on appeal to the Supreme Court. It presented these facts: Miss Wenzel owned an automobile and carried an automobile liability policy, in the usual form, with the defendant company. Desiring some adjustment on the car, she turned it over to Brower, a professional chauffeur and mechanic who did repair work at his home. Brower, while repairing the car, drove it 60 miles to another town taking with him his father and his fiancee for the purpose of inviting two friends to his wedding and to deliver a dog to a friend of the father's. The trip was unquestionably for his own purposes. On the return trip an accident occurred in which the elder Brower was injured. He sued and obtained judgment against his son and then proceeded against the insurer.

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[29]Ibid, at 553.

[30]The petition will be found at Superior Court, October Term, No. 337; filed January 11, 1935; refused January 23, 1935.

[31]Truex, to use vs. Pa. Mfgrs. Ins. Co., 116 Pa. Super. 551.

[32]Ibid, at 553.

[33]Brower, to use vs. Emp. L. A. Co., Ltd., 318 Pa. 440; argued January 28, 1935; decided April 1, 1935.

As in the prior cases, the difficulty "relates to the scope to be given the word 'permission' contained in the (omnibus) clause."[34] Unquestionably Brower had no initial permission or consent of the owner to operate her car at either the time or place, *or* for the purpose for which he was operating it at the time of the accident. Under the principle of the "narrow coverage" rule and the decisions in the *Powers* and *Truex* cases, there clearly was no policy coverage available to him.

But the majority of our Supreme Court, speaking through Mr. Justice Kephart, thought otherwise. Neglecting to discuss either of the Superior Court precedents or its own failure to review them, the "broad coverage" rule was adopted, sustained by the same argument of public policy and persuasive precedents that had fruitlessly been urged upon it theretofore:

> "This construction of the policy is in accord with the purpose of the various statutes adopted by the several states requiring owners of automobiles to carry indemnity insurance. These statutes are enacted as a protection to the public using the streets and highways as a matter of public policy. The aim of the legislation is to protect those injured by automobiles, no matter who may be driving the car or where it is driven, provided the owner has voluntarily entrusted possession of the car to the driver for some purpose, and regardless of whether the person in possession of the car observes or breaks the contract of bailment."[35]

And again:

> "This court has not definitely laid down any rule on the subject, but it must be said that there is much force in the argument that as indemnity insurance on automobiles has become quite general, some attention should be given to the fact that the accident occurs while one has possession of the car under color of authority. The owner puts the car in the control of the user and in his power to do the act complained of. Such adherence would bring all indemnity insurance within the lines adopted by the legislatures of the several states. It would seem that the very purpose these insurance policies are taken or required to be taken out is to give any person whose injuries are deemed by law to have been caused solely by the operation of an automobile some safe place for redress."[36]

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[34] Ibid, at 444.
[35] Ibid, at 445.
[36] Ibid, at 446.

And finally:

> "They were intended to be broad and sweeping. That they were intended to be so is found not only by what has been discussed but in the concluding or excepting part of the omnibus clause, the third part of which reads, 'except that the protection granted by this policy shall not be available to a public automobile garage, automobile repair shop . . . and the agents or employees thereof.' Under the maxim expressio unius exclusio alterius it would seem that every other person, firm or corporation operating the car with color of authority than those within the specified class who are excluded are impliedly under the coverage of the policy."[37]

The strong dissent of Mr. Justice Drew (Mr. Justice Schaffer concurring) urges the adoption, or, more properly, the retention, of the "narrow coverage" rule citing the cases of the supporting jurisdictions and of the Superior Court. In its concise statement of the rule, the dissenting opinion reveals the fallacies of its own argument. To sustain its position there must be read into the terms of the omnibus clause additional requirements as to the time, place and purpose of operation which the insurer had never inserted for its own protection when it drew the contract. Not having sufficiently protected itself in drawing the instrument, the court should not feel constrained to insert exonerating clauses for the benefit of the insuring company.

In its application of the established principle of strict construction of policies against insurers to the omnibus clause the majority's adoption of the "broad coverage" rule must be considered a great step in the direction of liberalization of the law as applied to one of today's greatest social problems. In that regard it unquestionably reflects the public policy of the Commonwealth and puts the courts at least one step further along the desired path than is the legislature. It also achieves the oft-sought legal result of harmony with analogous situations, bringing the law on the decided question in line with the well-established principle that unauthorized use following original consent does not constitute a violation of penal statutes creating the crime of unauthorized operation of motor vehicles.[38]

Perhaps the day is not far distant when the next step will be taken by our legislature—a compulsory insurance law that will require approved coverage of all drivers of motor vehicles similar to those of other progressive states.

The unhappy situation created by the existence, side by side, of the *Brower* decision and the Superior Court rulings may be regarded by some as an indictment of the dual appellate court system. It must be conceded to be unfortunate, but this and similar isolated instances can hardly be deemed evidence of serious defect in

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[37]Ibid, at 447.

[38]8 Blashfield, Cyc. of Auto Law, sec. 5613, citing State vs. Boggs, (Ia.) 164 N. W. 759; State vs. Mularkey, (Minn.) 218 N. W. 809.

the judicial structure. The law is replete with instances where the public good has been enhanced by a decision working individual injury.

But there is another phase of the *Brower* case anomaly. The application of the exception in the omnibus clause coverage remains to be considered.

This clause excludes "a public automobile garage, automobile repair shop, . . ." As to this, Mr. Justice Kephart says:

> "The purpose and the intention was to exclude those engaged in repairing cars from the policy's benefits. This is obvious. Without any control from the owner as to the selection of the driver, the place driven, and the manner of driving, the repair man having this entirely in his control, the hazard was evidently too great for the indemnity companies to assume, and therefore that hazard was excluded."[39]

Again there is a strong voice of dissent, now in favor of coverage and supported by the very logic drawn from the well of public policy used by the majority on the first issue:

> "To say that one regularly employed as a chauffeur who during his spare time undertakes to repair a car of a third person is, without more, an 'automobile repair shop' or an agent or employee thereof, within the meaning of the policy is to strain the construction of the clear language. In view of the broad interpretation of 'permission' suggested by the majority opinion, the effect of which would be to enlarge the insurer's liability, such an all-inclusive interpretation of the exception, in favor of the insurer is remarkable."[40]

This characterization certainly has merit. It is difficult, if not impossible, to reconcile the approach of the majority to the two issues in the case, or to harmonize its reasoning that:

> "The insured is interested in protecting those who may be injured by his car, and when he lends it to another, he has sufficient confidence in the other that he will not wilfully destroy or injure any member of the public."[41]

with the ultimate decision that:

> "Without any control from the owner as to the selection of the driver, the place driven, and the manner of driving, the repair man having this entirely in his control, the hazard was evidently too great for the indemnity companies to assume, and therefore the hazard was excluded."[42]

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[39]Brower, to use; supra, at 448.
[40]Ibid, at 450.
[41]Ibid, at 446.
[42]Ibid, at 448.

The ultimate construction of the policy in these cases can hardly be resolved on the question of control. Nor can it readily be found to rest upon either the unexpressed intention of the parties or the nature of the hazard incurred by the bailment. Less right of control may be reserved and much greater hazard assumed when the vehicle is bailed to a next-door neighbor to drive to the post-office a mile away than when it is turned over to one of the specifically excepted agencies. Insurance statistics would probably prove the latter to be the lesser risk.

The sole logical foundation for the majority's holding would seem to be that, regardless of the reason for their inclusion, the *express words* of the policy exclude the bailee from coverage. The presence of these printed words needs no explanation; they are the contract of the parties. In a very recent case our Superior Court so ruled, stating:[43]

> "Whatever reason may have prompted the insertion of the exceptions is of no consequence if the business is included within the exceptions. The parties had a right to write their own contract, and it is not the function of the court to re-write the same or to give any other construction thereto than implied from the plain language used."

Applying this rule the sole question to be determined is the precise legal status of the bailee. Was Brower proved to be either a "public automobile garage" or a "repair shop"? The Supreme Court has assumed, but not decided, that the word "public" in the excepting clause applies only to the words immediately following, viz: "automobile garage," and not also to "automobile repair shop," etc. On this score there may exist some valid difference of opinion, a difference which of itself may give rise to such ambiguity as will create a question of fact determinable only by a jury. The Court has also determined as a matter of law that Brower's business was that of a "repair shop." Again this may give rise to difference of opinion. The record discloses that Brower was a driver for a furniture concern[44] and had kept Miss Wenzel's car in repair after working hours.[45] There is no evidence that he repaired other cars or conducted a business which might customarily be referred to as a "repair shop."

There would seem to be at least some slight question on this subject. It is difficult to reconcile this decision with the Court's recent declaration that a passenger in an airplane does not fall within a policy exception against "engaging as a passenger . . . in aeronautic expeditions."[46] Using the ordinary and accepted meaning of the words of the policy, as is there required,[47] it is difficult to con-

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[43]Alberga vs. Pa. Indemnity Co., 114 Pa. Super. 42.

[44]Record 25a, 103a, 115a.

[45]Record 26a.

[46]Provident T. Co. vs. Equitable L. A. Soc., 316 Pa. 121.

[47]Ibid, at 124; citing Restatement, Contracts, sec. 235 (a).

ceive of Brower as a "repair shop." And if the issue be in doubt. the concluding sentence of that opinion is compelling:

> "If, however, we accepted the essential part of appellant's argument, we should still be required to affirm the judgment on the ground that equivocal words (they only become so by appellant's argument) must be taken against the insurer."[48]

A further question must become apparent. It is decided that Brower had permission to use the vehicle. It is conceded that he was on a personal errand not connected with his business when the accident occurred. Is his status under the exception determined by the nature of his general employment or by the specific nature of the business which he was furthering at the time of the accident? If the latter, Brower was clearly entitled to the coverage of the omnibus clause. The majority has assumed the former, although the decision is contrary to the sole existing authority on the subject, which was not cited to or by it.[49] In that case the Supreme Court of Minnesota held that the exception does not exclude from coverage persons following the proscribed occupations but at the time of the accident using the insured vehicle for purposes outside the scope of such employment. On this phase of the case, the majority opinion may well require future clarification.

But now for the anti-climax.

The question of the exclusion of Brower from the policy coverage as a "repair shop" *was not presented or suggested in the briefs of counsel nor argued to either the lower court or the Supreme Court.* The decision on this point is unquestionably a departure from the Court's oft-stated rule that:

> "We have repeatedly held that questions not raised in the lower court will not be considered on appeal.[50]

The plaintiff was not heard on this proposition, nor does his brief treat of it.

Perhaps the facts of the case required the decision. Perhaps the true merit of the opinion lies in the thought of Oliver Wendell Holmes:

> "I find that the great thing in the world is not so much where we stand, as in what direction we are moving."

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[48]Ibid, at 125, citing Frick vs. United F. Ins. Co., 218 Pa. 490; Restatement, Contracts, sec. 236 (d).

[49]Barry, et al. vs. Sill, et. al. (Minn.) 253 N. W. 14. In this case the owner lent his car to a garage employee for personal use on a trip after business hours. The insurer's defense was predicated on the ground that the policy exception excluded all persons engaged in the named occupations regardless of the particular purpose of user at the time of the accident. The court said: "Under the well-known rule as to the construction of such insurance policies with reasonable strictness against the insurer, we do not so construe the policy." Held: the driver was covered.

[50]Henes vs. McGovern, 317 Pa. 302; Webster's Est., 314 Pa. 233; Hurst vs. Fuller Canneries Co., 263 Pa. 238; Filer vs. Filer, 301 Pa. 461.