PASSENGER FOR CONSIDERATION IN AUTOMOBILE INSURANCE

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With the increase of automobile accidents during the past few years and the increase of litigation resulting therefrom, automobile liability insurance has assumed a new importance. It is the one means of protection which the average automobile owner and operator may secure against vexatious personal injury litigation arising out of automobile accidents. Indeed, even that does not always protect the insured.

The increasing importance of automobile liability insurance is shown not only by the increase in the number of such policies written, but also by legislation making such insurance practically compulsory. In 1925, Massachusetts passed a compulsory liability insurance act[1] which in brief requires that every applicant for registration of a motor vehicle must present a certificate showing that such motor vehicle is covered by a liability bond or liability insurance policy running for a period coterminous with the registration. These bonds or policies must provide indemnity against loss to the insured, and to any person operating or responsible for the operation of the vehicle with his express or implied consent, to the amount of $5,000 for the death or injury of any one person, and $10,000 for the death or injury of more than one person in any one accident. In lieu of bond or policy an applicant may deposit cash or securities in the sum of $5,000 with the state. Prior to the enactment of this measure the Supreme Court of Massachusetts, at the request of the legislature, rendered an advisory opinion[2] in which the act was held constitional in every particular as a regulation of the highways in the public interest.

In England similar legislation has been enacted[3] providing

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1. Mass. Cum. Stat. (1927) c. 175, sec. 113a. See Sleeper v. Massachusetts Bonding and Ins. Co. (1933) 283 Mass. 511, 186 N. E. 778, for a case involving an insurance policy secured under the requirements of the Massachusetts act.

2. In re Opinion of Justices (1925) 251 Mass. 569, 147 N. E. 681.

3. Road Traffic Act (1930) 20 & 21 George V, c. 43, part II, sec. 35, subdiv. 1.

that it shall be unlawful for any person to use, or permit another person to use, a motor vehicle on a road unless there is in force, in relation to such user, a policy of insurance or such security in respect to third-party risks as complies with the requirements of the act.

In many of the states there have been enacted so-called financial responsibility laws making liability insurance practically compulsory in the case of a serious accident. Typical of such statutes is the one passed in New Hampshire[4] which provides that immediately upon receipt of a report of an accident resulting in bodily injury or death, or in property damage exceeding $25, the Commissioner of Motor Vehicles shall suspend the license of the person operating, and the registration certificate and plates of the person owning, the motor vehicle involved in such accident. The suspension continues unless or until the operator or owner, or both, shall have furnished proof of financial responsibility in the amount of $5,000 for bodily injury or death to one person, $10,000 for bodily injury or death to two or more persons, $1,000 for property damage, and proof of future maintenance of such financial responsibility. The motor vehicle involved in such accident may not be registered in the name of any other person unless such financial responsibility is furnished by the operator or owner, or both, involved in such accident. The same requirements are exacted of a non-resident involved in such an accident in the state, and for his failure to furnish such proof he is deprived of the right to operate a motor vehicle in the state; and no other person may operate the automobile involved in such accident in the state. For a violation of the act, the penalty provided is imprisonment for not more than six months, or a fine of not more than $500, or both.

This increasing importance of automobile liability insurance makes an analysis of the important provisions of the ordinary policy not only interesting but extremely valuable to the present-day owner or operator of an automobile; indeed, it is of importance to anyone who rides in a motor vehicle and even to the pedestrian. Although most of the liability insurance policies are substantially the same in form, there are certain differ-

4. N. H. Laws of 1937, c. 161. For other examples of financial responsibility laws see Cal. Vehicle Code (1935) sec. 410-418; Ky. Carrol's Stats. Ann. (1936) secs. 2739n(1-36); Ohio Gen. Code (1935) secs. 6298 (1-25).

ences in the language and scope of the policies issued by the various companies. For this reason it is necessary for the particular policyholder to study his own policy to determine the exact coverage which it affords.[5]

There appears in most policies of automobile insurance a provision against the renting of the insured vehicle and against its use to carry passengers for compensation,[6] or for a consideration,[7] or for hire.[8] This provision has caused considerable difficulty in litigation involving this type of insurance.[9] In some

5. This was also true in policies which agreed to indemnify the assured against loss resulting from liability imposed by law for damages on account of death or bodily injuries caused by accident during the life of the policy, suffered by any person, by reason of the use or maintenance of horses or vehicles, while in the charge of the assured. For example, in Hygienic Ice & Refrigerating Co. v. Philadelphia Casualty Co. (1914) 162 App. Div. 190, 147 N. Y. S. 754, aff'd 222 N. Y. 583, 118 N. E. 1063, the policy declaration in behalf of the assured provided, among other things: "6. None of the horses enumerated are used under the saddle, excepting. No exceptions. 7. All teams are used exclusively in assured's trade or business, excepting. No exceptions. 8. The teams above mentioned are stabled at Albany, N. Y. 9. No vicious animal is used, so far as the assured knows, excepting. No exceptions. 10. No person under sixteen years of age is or will be permitted to drive * * * excepting. No exceptions."

6. Neilson v. American Mut. Liability Ins. Co. (1933) 111 N. J. L. 345, 168 Atl. 436; Orient Ins. Co. v. Van Zandt-Bruce Drug Co. (1915) 50 Okla. 558, 151 Pac. 323; Commercial Union Assur. Co. of London v. Hill, (Tex. Civ. App. 1914) 167 S. W. 1095.

7. American Lumbermen's Mut. Casualty Co. v. Wilcox (D. C. W. D. N. Y. 1936) 16 F. Supp. 799; Sleeper v. Massachusetts Bonding and Ins. Co. (1933) 283 Mass. 511, 186 N. E. 778; Cartos v. Hartford Accident & Indemnity Co. (1933) 160 Va. 505, 169 S. E. 594. In State Farm Mut. Automobile Ins. Co. v. Self (C. C. A. 5, 1937) 93 F. (2d) 139, the court distinguished the provision against carrying anyone for consideration from the provision against carrying passengers for compensation as illustrated in the case of Marks v. Home Fire & Marine Ins. Co. (App. D. C. 1923) 285 Fed. 959, 52 App. D. C. 225, stating that the former was a much more comprehensive provision.

8. Crowell v. Maryland Motor Car Ins. Co. (1915) 169 N. C. 35, 85 S. E. 37, Ann. Cas. 1917D 50.

9. Controversies involving a provision of this nature may arise in several ways: (1) Where the injured person is given a direct right against the insurance company by virtue of local statutory provisions, see Williams v. Nelson (1917) 228 Mass. 191, 117 N. E. 189; Lorando v. Gethro (1917) 228 Mass. 181, 117 N. E. 185; Lajoie v. Central West Casualty Co. (1934) 228 Mo. App. 701, 71 S. W. (2d) 803; Taverno v. American Auto Ins. Co. (Mo. App. 1938) 112 S. W. (2d) 941; Maryland Casualty Co. v. Martin (1937) 88 N. H. 346, 189 Atl. 162; Rothman v. Metropolitan Casualty Ins. Co. (1938) 134 Ohio St. 241, 16 N. E. (2d) 417; O'Donnell v. New Amsterdam Casualty Co. (1929) 50 R. I. 269, 146 Atl. 410; Wyatt v. Guildhall Ins. Co., Ltd. (1937) 1 K. B. 653. See also Note (1933) 85 A. L. R. 20; Note (1939) 48 Yale L. J. 908; through assignment by the insured, see Pietrantonio v. Travelers Ins. Co. (1937) 282 Mich. 111, 275 N. W. 786; or by provision in the policy itself, see Ocean Accident & Guarantee Corp., Ltd. v. Torres (C. C. A. 9, 1937) 91 F. (2d) 464; State Farm Mut. Automobile

Ins. Co. v. Self (C. C. A. 5, 1937) 93 F. (2d) 139. (2) Where the injured party, armed with a judgment against the insured, proceeds by garnishment against the insurer, see Maringer v. Bankers Indemnity Ins. Co. (1937) 288 Ill. App. 335, 6 N. E. (2d) 307; Arms v. Faszholz (Mo. App. 1930) 32 S. W. (2d) 781; Gross v. Kubel (1934) 315 Pa. 396, 172 Atl. 649. (3) Where the insured sues the insurer, see Ocean Accident & Guarantee Corp., Ltd. v. Olson (C. C. A. 8, 1937) 87 F. (2d) 465; Western Machinery Co. v. Baners Indemnity Ins. (1938) 10 Cal. (2d) 488, 75 P. (2d) 609. (4) Where the insurance company seeks a declaratory judgment in order to determine its liability, American Lumbermen's Mut. Casualty & Surety Co. v. Odom (D. C. N. D. Tex. 1937) 21 F. Supp. 574; Ocean Accident & Guarantee Corp., Ltd. v. Myers (D. C. M. D. N. C. 1938) 22 F. Supp. 450; United States Fidelity & Guaranty Co. v. Hearn (1936) 233 Ala. 31, 170 So. 59; Maryland Casualty Co. v. Martin (1937) 88 N. H. 346, 189 Atl. 162. (5) Where the injured party, unable to obtain satisfaction on a judgment rendered against the insured, sues the insurance company, see Jensen v. Canadian Indemnity Co. (C. C. A. 9, 1938) 98 F. (2d) 469; Yelin v. Columbia Casualty Co. (1934) 265 N. Y. 590, 193 N. E. 334; Gross v. Kubel (1934) 315 Pa. 396, 172 Atl. 649, 95 A. L. R. 146. In the latter situation, a recovery is limited to contracts of liability, see Walker v. New Amsterdam Casualty Co. (1930) 157 S. C. 381, 154 S. E. 221; Roadbuilders' Hauling Co. v. Constitution Indemnity Co. (1932) 165 S. C. 363, 163 S. E. 837; Fentress v. Rutledge (1924) 140 Va. 685, 125 S. E. 668; Indemnity Ins. Co. v. Davis' Adm'r (1928) 150 Va. 778, 143 S. E. 328. Such contracts are to be distinguished from contracts of indemnity, where the insurance company does not become liable until the judgment against the insured has been paid, see Goodman v. Georgia Life Ins. Co. (1914) 189 Ala. 130, 66 So. 649; Transylvania Casualty Ins. Co. v. Williams (1925) 209 Ky. 626, 273 S. W. 536; London & Lancashire Indemnity Co. v. Cosgriff (1924) 144 Md. 660, 125 Atl. 529; United States Fidelity & Guaranty Co. v. Williams (1925) 148 Md. 289, 129 Atl. 660. But see Note (1933) 85 A. L. R. 20, giving statutory provisions prohibiting, in substance, the insertion in any contract of casualty insurance of a condition that the insured must actually pay the loss before liability attaches to the insurer. Where there is a true contract of indemnity, the insurer is not liable if the insured is insolvent and has no property out of which a judgment might be satisfied, see Transylvania Casualty Ins. Co. v. Williams (1925) 209 Ky. 626, 273 S. W. 536; American Automobile Ins. Co. v. Cone (Tex. Civ. App. 1923) 257 S. W. 961; Glatz v. Kroeger Bros. (1921) 175 Wis. 42, 183 N. W. 683; see also Note (1929) 59 A. L. R. 1123. So also if he has filed a petition in brankruptcy, see Anderson v. American Automobile Ins. Co. (1930) 50 R. I. 502, 149 Atl. 797; and see Note (1929) 59 A. L. R. 1123.

It should be noted that when the injured party sues the insurer, he is not allowed to recover unless the insured had a cause of action against the insurer, and therefore the injured party is subject to all the provisions of the insurance policy. Ocean Accident & Guarantee Corp., Ltd. v. Myers (D. C. M. D. N. C. 1938) 22 F. Supp. 450; Western Machinery Co. v. Bankers Indemnity Ins. Co. (1938) 10 Cal. (2d) 488, 75 P. (2d) 609; Souza v. Car & General Assur. Corp., Ltd. (1932) 281 Mass. 117, 183 N. E. 140; Sleeper v. Massachuetts Bonding & Ins. Co. (1933) 283 Mass. 511, 186 N. E. 778; Dziadosc v. American Casualty Co. (1934) 12 N. J. Misc. 205, 171 Atl. 137; Venditti v. Mucciaroni (1936) 54 Ohio App. 513, 8 N. E. (2d) 460.

Another provision in automobile liability insurance policies which is frequently involved in litigation is the one which exempts the insurer from bability where the insured car is being operated by one who is not legally permitted to drive. McGee v. Globe Indemnity Co. (1934) 173 S. C. 380, 175 S. E. 849; Bailey v. United States Fidelity & Guaranty Co. (1937) 185 S. C. 169, 193 S. E. 638; Holland Supply Corp. v. State Farm Mut. Auto-

policies this provision appears in the form of a clause excluding the obligation of the company while the automobile is so used.[10] In others the provision appears in the nature of a warranty[11] which is usually promissory,[12] but is sometimes affirmative,[13] or

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mobile Ins. Co. (1936) 166 Va. 331, 186 S. E. 56. Thus the insurance company is not liable for injuries caused by the automobile while being driven by a person in violation of the law as to age. Morrison v. Royal Indemnity Co. (1917) 180 App. Div. 709, 167 N. Y. S. 732; Wagoner v. Fidelity & Casualty Co. of New York (1926) 215 App. Div. 170, 213 N. Y. S. 188, aff'd 253 N. Y. 608, 171 N. E. 803. This exemption clause applies regardless of whether the owner of the car agreed or consented to such use, as the company did not assume the risk of such driving. See Hossley v. Union Indemnity Co. of New York (1925) 137 Miss. 537, 102 So. 561.

10. In Pietrantonio v. Travelers Ins. Co. (1937) 282 Mich. 111, 275 N. W. 786, the provision reads: "This agreement shall exclude any obligation of the Company; (a) Under any of the above coverages, while the automobile is used in the business of demonstrating or testing, or as a public or livery conveyance, or for carrying passengers for a consideration, or while rented under contract or lease, unless such use is specifically declared and described in this policy and premium charged therefor." For other examples of the same type of provision see State Farm Mut. Automobile Ins. Co. v. Self (C. C. A. 5, 1937) 93 F. (2d) 139; American Lumbermen's Mut. Casualty Co. v. Wilcox (D. C. W. D. N. Y. 1936) 16 F. Supp. 799; United States Fidelity & Guaranty Co. v. Hearn (1936) 133 Ala. 31, 170 So. 59; Sleeper v. Massachusetts Bonding and Ins. Co. (1933) 283 Mass. 511, 186 N. E. 778; Gardner v. Boyer's Estate (1938) 285 Mich. 80, 280 N. W. 117; Orcutt v. Erie Indemnity Co. (1934) 114 Pa. Super. 493, 174 Atl. 625.

11. Elder v. Federal Ins. Co. (1913) 213 Mass. 389, 100 N. E. 655; Record v. Royal Ins. Co., Ltd. (1925) 253 Mass. 617, 149 N. E. 546; Crowell v. Maryland Motor Car Ins. Co. (1915) 169 N. C. 35, 85 S. E. 37, Ann. Cas. 1917D 50; De Pasquale v. Union Indemnity Co. (1930) 50 R. I. 509, 149 Atl. 795.

12. In Commercial Union Assur. Co. of London v. Hill (Tex. Civ. App. 1914) 167 S. W. 1095, the clause is worded: "It is warranted by the insured that the automobile hereby insured during the term of this policy shall not be used for carrying passengers for compensation, and that it shall not be rented or leased." For other cases involving promissory warranties see: Crowell v. Maryland Motor Car Ins. Co. (1915) 169 N. C. 35, 85 S. E. 37, Ann. Cas. 1917D 50; Orient Ins. Co. v. Van Zandt-Bruce Drug Co. (1915) 50 Okla. 558, 151 Pac. 323.

13. In Mayor, Lane & Co. v. Commercial Casualty Ins. Co. (1915) 169 App. Div. 772, 155 N. Y. S. 75, the clause provided: "None of the automobiles herein described are rented to others, or used to carry passengers for a consideration, actual or implied, except as follows: No exceptions." In this case the court construed the warranty as of the date when the policy took effect, merely warranting that the truck was not rented at the time when the policy became effective, applying the rule of strict construction against the insurance company. The court distinguished the case from Hygienic Ice & Refrigerating Co. v. Philadelphia Casualty Co. (1914) 162 App. Div. 190, 147 N. Y. S. 754, aff'd 222 N. Y. 583, 118 N. E. 1063, where a divided court expressed the opinion that a warranty with respect to the use of vicious horses, although in the present tense, should be deemed a continuing warranty as to use. Emphasis was placed on the fact that as the horses to be used were not described in the policy, the use was not limited to those then employed. The construction of the court in

a combination of both.[14] In some policies both the clause excluding liability and the warranty are included.[15] The provision in these various forms has been enforced as a reasonable limitation of the risk by the insurance company,[16] there being no rule of public policy violated since insurance companies have the right to insert in their policies reasonable conditions as to use.[17]

Undoubtedly, the provision against renting the insured vehicle and against its use to carry passengers for a consideration was originally adopted because it had been judicially determined in many jurisdictions that a lower standard of care should be exacted where the carriage is gratuitous,[18] than in the case of carriage for hire.[19] For example, in *Cartos v. Hartford Accident*

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the Mayor, Lane & Co. case is questionable inasmuch as the obvious purpose of this type of clause is to exclude liability of the insurance company when the hazard is increased by renting or carrying passengers for hire, and whether or not the vehicle was being so used at the actual moment when the policy took effect would be of little importance. It does not seem that the provision, although stated in the present tense, is ambiguous when the obvious intention of the insurance company is considered.

14. The policy provision in Western Machinery Co. v. Bankers Indemnity Ins. Co. (1938) 10 Cal. (2d) 488, 75 P. (2d) 609, reads: "None of the insured automobiles are or will be used to carry passengers for a consideration, actual or implied."

15. In Beatty v. Employers' Liability Assur. Corp., Ltd. (1933) 106 Vt. 25, 168 Atl. 919, the policy provided: "This policy shall not cover: (a) when any of the said automobiles are being * * * (4) used for renting or livery use or the carrying of passengers for a consideration," and also "None of the automobiles herein described is or will be rented to others or used to carry passengers for a consideration during the period of this policy." See also Neilson v. American Mut. Liability Ins. Co. (1933) 111 N. J. L. 345, 168 Atl. 436.

16. Orcutt v. Erie Indemnity Co. (1934) 114 Pa. Super. 493, 174 Atl. 625; Mittet v. Home Ins. Co. (1926) 49 S. D. 319, 207 N. W. 49; Cartos v. Hartford Accident & Indemnity Co. (1933) 160 Va. 505, 169 S. E. 594.

17. Crowell v. Maryland Motor Car Ins. Co. (1915) 169 N. C. 35, 85 S. E. 37, Ann. Cas. 1917D 50.

18. Armistead v. Lenkeit (1935) 230 Ala. 155, 160 So. 257; McCann v. Hoffman (1937) 9 Cal. (2d) 279, 70 P. (2d) 909; Epps v. Parrish (1921) 26 Ga. App. 399, 106 S. E. 297; Mayberry v. Sivey (1877) 18 Kan. 291; Beard v. Klusmeier (1914) 158 Ky. 153, 164 S. W. 319; West v. Poor (1907) 196 Mass. 183, 81 N. E. 960; Massaletti v. Fitzroy (1907) 228 Mass. 487, 118 N. E. 168; Flynn v. Lewis (1919) 231 Mass. 550, 121 N. E. 493; Lyttle v. Monto (1924) 248 Mass. 340, 142 N. E. 795; Gasboury v. Tisdell (1927) 261 Mass. 147, 158 N. E. 348; Murphy v. Barry (1928) 264 Mass. 557, 163 N. E. 159; Baker v. Hurwitch (1928) 265 Mass. 360, 164 N. E. 87; Birch v. City of New York (1907) 190 N. Y. 397, 83 N. E. 51; Patnode v. Foote (1912) 153 App. Div. 494, 138 N. Y. S. 221; McMillan v. Sims (Tex. Civ. App. 1937) 112 S. W. (2d) 793; Cartos v. Hartford Accident & Indemnity Co. (1933) 160 Va. 505, 169 S. E. 594; see cases collected in Note (1929) 61 A. L. R. 1252, and (1930) 65 A. L. R. 952.

19. Pennsylvania Co. v. Roy (1880) 102 U. S. 451; Southern R. R. v. Crowder (1901) 130 Ala. 256, 30 So. 592; Lawrence v. Kaul Lumber Co. (1911) 171 Ala. 300, 55 So. 111; Rocha v. Hulen (1935) 6 Cal. App. (2d) 245,

& Indemnity Co.,[20] the court said:

> The duty owed by the operator to a person being transported for hire is much higher than that owed to a person who is not being transported for hire; and the risk assumed by the insurer where a car is being so used is much greater than in the case of an automobile which is being used for pleasure and ordinary business purposes.
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> The provision under consideration was doubtless inserted by the insurer to exclude such more hazardous risk. It is a reasonable provision both from the standpoint of the insurer and the insuring public.

Consequently, the violation of such a provision may be the direct cause of the loss, since the use of the car to transport passengers for hire places upon the operator a liability and an obligation much greater than is borne by the operator of a car which is being used only for pleasure purposes.[21] Such violation, therefore, constitutes an increase in the risk undertaken, in that the insurer may become liable to paying passengers for injuries resulting from the negligent operation of the automobile, whereas there would have been no liability to persons carried gratuitously.[22] Therefore, unless this more hazardous risk, an exceptional risk in the case of a car used for both business and pleasure, was excluded from such policies by a clause such as the one under consideration, every insured person would have to pay a higher premium based upon the inclusion of such risks, even though he may not intend to, and in fact never does use his car in the more hazardous undertaking.[23]

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44 P. (2d) 478; Morgan v. Chesapeake & O. R. R. (1907) 127 Ky. 433, 105 S. W. 961; Taylor v. Grand Trunk R. R. (1869) 48 N. H. 304; Meier v. Pennylsvania R. R. (1870) 64 Pa. 225; Fox v. City of Philadelphia (1904) 208 Pa. 127, 57 Atl. 356; Bremer v. Pleiss (1904) 121 Wis. 61, 98 N. W. 945; Dibbert v. Metropolitan Inv. Co. (1914) 158 Wis. 69, 147 N. W. 3.

20. (1933) 160 Va. 505, 516, 169 S. E. 594.

21. American Lumbermen's Mut. Casualty Co. v. Wilcox (D. C. W. D. N. Y. 1936) 16 F. Supp. 799; Sleeper v. Massachusetts Bonding & Ins. Co. (1933) 283 Mass. 511, 186 N. E. 778. In Hadrick v. Burbank Cooperage Co. (La. App. 1938) 177 So. 831, the court distinguished the case involving an automobile liability policy from one where the automobile was insured against fire or theft, saying that in the latter case the infrequent use for commercial purposes would not ordinarily be responsible for the loss, and that that was the reason for the decisions allowing recovery in such situations.

22. Silver v. Silver (1928) 280 U. S. 117; Myers v. Ocean Accident & Guarantee Corp. Ltd. (C. C. A. 4, 1938) 99 F. (2d) 485; Sleeper v. Massachusetts Bonding & Ins. Co. (1933) 283 Mass. 511, 186 N. E. 778; Cartos v. Hartford Accident & Indemnity Co. (1933) 160 Va. 505, 169 S. E. 594.

23. Cartos v. Hartford Accident & Indemnity Co. (1933) 160 Va. 505, 169 S. E. 594.

Admitting all this, it has been contended[24] by counsel that the insurer should not be relieved of liability where there was no causal connection between the breach of the policy provision and the liability incurred, and some cases have so held.[25] The weight of authority, however, seems to be to the contrary,[26] since the liability of the insurer is a contractual liability as distinguished from the liabilty of the insured to the injured person, which is founded on the principles of tort liability.[27] Thus the insurance company has frequently been relieved of liability under such a provision even though the loss actually incurred was not caused or increased by a violation of the provision. Accordingly, the insurer was not liable where the injured partly did not give any consideration for the carriage, although some of the other passengers did;[28] and where he was not even a passenger in the insured car, but was riding in another automobile with which the insured car collided.[29] This result is reached on the theory that in the case of carriage for a consideration, within the meaning of the provision, there is a potential increase of risk against which the insurer may provide in its contract, and therefore be relieved of liability in case of a breach, regardless of whether there is any actual increase of risk.

In recent years the legislatures of a number of states have

24. Myers v. Ocean Accident & Guarantee Corp., Ltd. (C. C. A. 4, 1938) 99 F. (2d) 485.

25. For example, the courts in some cases have held the insurer liable in spite of a violation of the provision against a person driving the car while under age, where there was no causal connection shown between the immaturity of the driver and the accident which occurred. Hossley v. Union Indemnity Co. (1925) 137 Miss. 537, 102 So. 561; McGee v. Globe Indemnity Co. (1934) 173 S. C. 380, 175 S. E. 849; Bailey v. United States Fidelity & Guaranty Co. (1937) 185 S. C. 169, 193 S. E. 638. Also in a case involving the liability of an insurance company for damage to an automobile by fire, the court allowed a recovery against the insurer even though a promissory warranty against using the car for hire had been breached, apparently basing its decision on the fact that at the time the car was burned the alleged forbidden use of it had entirely ceased, and the increase of risk by the wrongful use, if there was any, had entirely determined. Crowell v. Maryland Motor Car Ins. Co. (1915) 169 N. C. 35, 85 S. E. 37, Ann. Cas. 1917D 50.

26. Travelers' Protective Ass'n v. Prinsen (1934) 291 U. S. 576; Provident Life & Accident Ins. Co. v. Eaton (C. C. A. 4, 1936) 84 F. (2d) 528; Standard Auto Ins. Ass'n v. Neal (1923) 199 Ky. 699, 251 S. W. 966; Adams v. Maryland Casualty Co. (1932) 162 Miss. 237, 139 So. 453.

27. See Witzko v. Koenig (1937) 224 Wis. 674, 272 N. W. 864.

28. Raymond v. Great American Indemnity Co. (1933) 86 N. H. 93, 163 Atl. 713; Gross v. Kubel (1934) 315 Pa. 396, 172 Atl. 649.

29. State Farm Mut. Automobile Ins. Co. v. Self (C. C. A. 5, 1937) 93 F. (2d) 139.

enacted so-called "guest statutes" of one kind or another which require a high degree of negligence in order to establish liability of a host to a guest. For example, the Ohio statute[30] provides that the owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to, or death of, a guest while being transported, without payment therefor, in or upon such motor vehicle, unless such injuries or death are caused by the wilful or wanton misconduct of such operator or owner. The California statute[31] differs in that a right of action for civil damages by the guest is denied unless the injury to, or death, of the guest proximately resulted from the intoxication or wilful misconduct of the driver of the car.

A guest statute enacted in Kentucky was held unconstitutional by the Court of Appeals in 1932[32] on the grounds that it violated the constitutional provision that all courts should be open and every person shall have remedy by due course of law for an injury done him, without denial or delay. It was also said that it violated the constitutional provision prohibiting the legislature from limiting the amount to be recovered for injuries, and the provision giving a right of action for death caused by negligence.

It is probable that the insurance companies have been in a large degree responsible for the passage of this type of legislation since, in numerous cases, collusion has been found between the owners of insured automobiles and guests, so that the latter might recover damages from the insurance companies for injuries incurred while riding in the automobile of the host. This has been especially true where the guests have been relatives or close friends of the insured.[33] Thus it can be seen that the importance of the provision against carrying passengers for a consideration may be increased greatly where a guest statute is applicable, inasmuch as the insured person may neither be

30. Ohio Gen. Code (1935) c. 21, sec. 6308-6.

31. Cal. Vehicle Code (1935) sec. 403. Conn. Gen. Stats. (1930) sec. 1628, contained the provision worded still differently and provided that there should be no liability to a guest for injury, death or loss in case of accident, unless such accident shall have been intentional on the part of the owner or operator or was caused by his heedlessness or his heedless disregard of the rights of others. This was later repealed, Conn. Gen. Stats. (1937) sec. 351d. For a general discussion of guest statutes, see Weber, Guest Statutes (1937) 11 U. of Cin. L. Rev. 24.

32. Ludwig v. Johnson (1932) 243 Ky. 533, 49 S. W. (2d) 347.

33. See Weber, Guest Statutes (1937) 11 U. of Cin. L. Rev. 24, 35.

afforded the protection of the guest statute nor have any right of recovery against the insurer.

Our problem then resolves itself into one of construing the provision against carriage for a consideration, and of determining how the courts have interpreted such a provision in varying types of cases where the liability of the insurance company was disclaimed because of the violation of the clause in question. Although in some of the earlier cases it was said that insurance policies should be liberally construed to effect the intention of the parties,[34] the prevailing rule today is that a contract of insurance is construed in favor of the insured and against the insurance company.[35] The contract is that of the company,[36] and it is only fair and just that any doubt as to the meaning of its own words should be resolved against it.[37] Even though it is

34. Yeaton v. Fry (U. S. 1807) 5 Cranch 335; Allegre's Adm'rs v. The Maryland Ins. Co. (Md. 1830) 2 Gill & J. 136, 20 Am. Dec. 424.

35. New York Life Ins. Co. v. Jackson (C. C. A. 7, 1938) 98 F. (2d) 950; First Nat. Bank v. Maryland Casualty Co. (1913) 162 Cal. 61, 121 Pac. 321; Allen v. Travelers' Protective Ass'n (1913) 163 Iowa 217, 143 N. W. 574; Monahan v. Metropolitan Life Ins. Co. (1918) 283 Ill. 136, 119 N. E. 68, L. R. A. 1918D 1196; Budelman v. American Ins. Co. (1921) 297 Ill. 222, 130 N. E. 513; Treolo v. Iroquois Auto Ins. Underwriters (1932) 348 Ill. 93, 180 N. E. 575; Wold v. Glens Falls Indemnity Co. (1933) 269 Ill. App. 407; Weininger v. Metropolitan Fire Ins. Co. (1935) 359 Ill. 584, 195 N. E. 420, 98 A. L. R. 169; Havens v. Home Ins. Co. (1887) 111 Ind. 90, 12 N. E. 137; Kentucky Home Life Ins. Co. v. Marks (1938) 274 Ky. 646, 120 S. W. (2d) 207; Hatch v. United States Casualty Co. (1908) 197 Mass. 101, 83 N. E. 398, 14 L. R. A. (N. S.) 503, 125 Am. St. Rep. 332, 14 Ann. Cas. 290; Turner v. Fidelity & Casualty Co. (1897) 112 Mich. 425, 70 N. W. 898; Pawlicki v. Hollenbeck (1930) 250 Mich. 38, 229 N. W. 626; Gardner v. Boyer's Estate (1938) 285 Mich. 80, 280 N. W. 117; Rudd v. Great Eastern Casualty & Indemnity Co. (1911) 114 Minn. 512, 131 N. W. 633, 34 L. R. A. (N. S.) 1205, Ann. Cas. 1912C 606; Arms v. Faszholz (Mo. App. 1930) 32 S. W. (2d) 781; Mathews v. Modern Woodmen of America (1911) 236 Mo. 326, 139 S. W. 151, Ann. Cas. 1912D 43; Connecticut Fire Ins. Co. v. Jeary (1900) 60 Neb. 338, 83 N. W. 78; Raymond v. Great American Indemnity Co. (1933) 86 N. H. 93, 163 Atl. 713; Jasion v. Preferred Acc. Ins. Co. (1934) 113 N. J. L. 108, 172 Atl. 367; Rosenthal v. American Bonding Co. (1912) 207 N. Y. 162, 100 N. E. 716; Mayor, Lane & Co. v. Commercial Casualty Ins. Co. (1915) 169 App. Div. 772, 155 N. Y. S. 75; Gazzam v. German Union Fire Ins. Co. (1911) 155 N. C. 330, 71 S. E. 434, Ann. Cas. 1912C 362; Cottingham v. Maryland Motor Car Ins. Co. (1915) 168 N. C. 259, 84 S. E. 274; Webster v. Dwelling House Ins. Co. (1895) 53 Ohio St. 558, 42 N. E. 546; Cartos v. Hartford Accident & Indemnity Co. (1933) 160 Va. 505, 169 S. E. 594.

36. Fidelity & Deposit Co. of Maryland v. Lyon (Ky. 1938) 124 S. W. (2d) 74.

37. Liverpool & London & Globe Ins. Co. v. Kearney (1901) 180 U. S. 132; Reading v. Travelers Ins. Co. (D. C. M. D. Pa. 1938) 24 F. Supp. 394; Szymkus v. Eureka Fire & Marine Ins. Co. (1904) 114 Ill. App. 401; Pietrantonio v. Travelers Ins. Co. (1937) 282 Mich. 111, 275 N. W. 786; Marcus v. United States Casualty Co. (1928) 249 N. Y. 21, 162 N. E. 571; O'Donnell v. New Amsterdam Casualty Co. (1929) 50 R. I. 269, 146 Atl. 410.

sometimes stated that there is nothing ambiguous as to the meaning of such a provision so as to require a construction by the courts,[38] still it is generally held that the burden is on the insurance company to prove that there has been a violation of the terms of the policy by the insured.[39]

It must be conceded at the outset that there is a division of authority in the construction and application of this clause. All of the cases are in accord on the proposition that, under the terms so employed, the protection of the policy does not cover an automobile when used in carrying passengers for a consideration,[40] unless the insurance company has estopped itself from denying liability by some conduct upon which the insured has relied to his prejudice,[41] or has waived its rights under the provision in question.[42] The apparent divergence in the decisions arises from the variety of fact situations which are pre-

38. American Lumbermen's Mut. Casualty Co. of Illinois v. Wilcox (D. C. W. D. N. Y. 1936) 16 F. Supp. 799; Orcutt v. Erie Indemnity Co. (1934) 114 Pa. Super. 493, 174 Atl. 625; Mittet v. Home Ins. Co. (1926) 49 S. D. 319, 207 N. W. 49.

39. Pacific Mut. Life. Ins. Co. v. Henderson (C. C. A. 5, 1931) 45 F. (2d) 587; Church v. American Casualty Co. (C. C. A. 3, 1933) 64 F. (2d) 266; General Casualty & Surety Co. v. Kierstead (C. C. A. 8, 1933) 67 F. (2d) 523; Federal Life Ins. Co. v. Zebec (C. C. A. 7, 1936) 82 F. (2d) 961; Western Casualty & Surety Co. v. Weimar (C. C. A. 9, 1938) 96 F. (2d) 635; United States Fidelity & Guaranty Co. v. Brandon (1932) 186 Ark. 311, 53 S. W. (2d) 422; Cardoza v. West American Commercial Ins. Co. (1935) 6 Cal. App. (2d) 500, 44 P. (2d) 668; Prudential Ins. Co. of America v. Cline (1936) 98 Colo. 275, 57 P. (2d) 1205; Blake v. Continental Casualty Co. (1935) 278 Ill. App. 232; Center Garage Co. v. Columbia Ins. Co. (1921) 96 N. J. L. 456, 115 Atl. 401; Glogvics v. Preferred Acc. Ins. Co. (1935) 245 App. Div. 817, 281 N. Y. S. 407; Conroy v. Commercial Casualty Ins. Co. (1928) 292 Pa. 219, 140 Atl. 905; Hill v. Great Northern Life Ins. Co. (1936) 186 Wash. 167, 57 P. (2d) 405. But see Raymond v. Great American Indemnity Co. (1933) 86 N. H. 93, 163 Atl. 713.

40. Beer v. Beer (1938) 134 Ohio St. 271, 16 N. E. (2d) 413.

41. Myers v. Continental Casualty Co. (C. C. A. 8, 1926) 12 F. (2d) 52; Commercial Union Assur. Co., Ltd., v. Lyon & Kelly (1916) 17 Ga. App. 441, 87 S. E. 761; Lunt v. Aetna Life Ins. Co. (1928) 261 Mass. 469, 159 N. E. 461; Rieger v. London Guarantee & Accident Co. (1919) 202 Mo. App. 184, 215 S. W. 920; Neilson v. American Mut. Liability Ins. Co. (1933) 111 N. J. L. 345, 168 Atl. 436; Rosenbloom v. Maryland Casualty Co. (1912) 153 App. Div. 23, 137 N. Y. S. 1064; Humes Const. Co. v. Philadelphia Casualty Co. (1911) 32 R. I. 246, 79 Atl. 1, Ann. Cas. 1912D 906; Baetty v. Employers' Liliability Assur Corp., Ltd. (1933) 106 Vt. 25, 168 Atl. 919. In Beer v. Beer (1938) 134 Ohio St. 271, 16 N. E. (2d) 413, the court said that the participation of the insurance company in the defense of the insured in the original proceeding did not estop it from setting up a violation of the carriage for consideration clause as a defense.

42. East Side Garage, Inc. v. New Brunswick Fire Ins. Co. (1921) 198 App. Div. 408, 190 N. Y. S. An insurer may waive breach of a stipulation against carrying passengers for hire, but it does not do so by entering an

sented in the various cases, each situation being judged on its particular facts.[43]

There is considerable authority to the effect that such provisions in automobile policies do not contemplate merely a single act of renting, or hiring, or carriage for a consideration,[44] or other violation,[45] but require something of a more permanent nature, such as habitual use in the prohibited manner. However, a number of cases have said that such provisions are not limited in their application to situations where the insured automobile was habitually used for carrying passengers for consideration.[46]

In any event, it seems to be the usual view that temporary non-compliance with the provisions of an insurance policy of any kind will not work a forfeiture, providing there was compliance at the time of the loss, unless such provision constitutes a warranty. The policy is merely suspended during the period of non-compliance and becomes reinstated when such period ceases.[47] However, there is authority to the contrary, some

appearance for an insured person who has concealed the breach, provided disclaimer is made within a reasonable time after discovery of such breach.

Although the fact of estoppel or waiver is ordinarily a question for the jury, Marks v. Home Fire & Marine Ins. Co. (App. D. C. 1923) 285 Fed. 959, 52 App. D. C. 225, where but a single inference can be drawn from the facts, established or admitted, it is for the court to draw such inference, Center Garage Co. v. Columbia Ins. Co. (1921) 96 N. J. L. 456, 115 Atl. 401; Orcutt v. Erie Indemnity Co. (1934) 114 Pa. Super. 493, 174 Atl. 625; De Pasquale v. Union Indemnity Co. (1930) 50 R. I. 509, 149 Atl. 795.

43. Ocean Accident & Guarantee Corp., Ltd. v. Olson (C. C. A. 8, 1937) 87 F. (2d) 465; State Farm Mut. Automobile Ins. Co. v. Self (C. C. A. 5, 1937) 93 F. (2d) 139; United States Fidelity & Guarantee Co. v. Hearn (1936) 233 Ala. 31, 170 So. 59.

44. Maringer v. Bankers Indemnity Ins. Co. (1937) 288 Ill. App. 335, 6 N. E. (2d) 307; Wood v. American Automobile Ins. Co. (1921) 109 Kan. 801, 202 Pac. 82; Berryman v. Maryland Motor Car Ins. Co. (1918) 199 Mo. App. 503, 204 S. W. 738; Crowell v. Maryland Motor Car Ins. Co. (1915) 169 N. C. 35, 85 S. E. 37, Ann. Cas. 1917D 50; O'Donnell v. New Amsterdam Casualty Co. (1929) 50 R. I. 269, 146 Atl. 410; Commercial Union Assur. Co. v. Hill (Tex. Civ. App. 1914) 167 S. W. 1095.

45. Treolo v. Iroquois Auto Ins. Underwriters (1932) 348 Ill. 93, 180 N. E. 575; Wold v. Glens Falls Indemnity Co. (1933) 269 Ill. App. 407; Bloom v. Ohio Farmers' Ins. Co. (1926) 255 Mass. 528, 152 N. E. 345; Cottingham v. Maryland Motor Car Ins. Co. (1915) 168 N. C. 259, 84 S. E. 274, L. R. A. 1915D 344, Ann. Cas. 1917B 1237; Allen v. Berkshire Mut. Fire Ins. Co. (1933) 105 Vt. 471, 168 Atl. 698, 89 A. L. R. 460.

46. Myers v. Ocean Accident & Guarantee Corp., Ltd. (C. C. A. 4, 1938) 99 F. (2d) 485; Sleeper v. Massachusetts Bonding & Ins. Co. (1933) 283 Mass. 511, 186 N. E. 778; Mittet v. Home Ins. Co. (1926) 49 S. D. 319, 207 N. W. 49.

47. Myers v. Ocean Accident & Guarantee Corp. Ltd. (C. C. A. 4, 1938) 99 F. (2d) 485; Insurance Co. of North America v. McDowell (1869) 50

cases holding that a violation of the provision avoids the policy entirely and does not merely suspend it during the time of the violation.[48] This is especially true where the violation involves a breach of warranty,[49] such as one against carrying passengers for hire.[50]

What factors, then, shall determine whether or not the provision has been violated in any individual case? The usual definition of the term "passenger" in the legal sense of the word is one who travels in some public conveyance by virtue of an implied contract with a carrier, as evidenced by the payment of a fare or by that which is accepted as the equivalent thereof.[51] Some of the cases have limited the effect of the clause to situations of this type. On the contrary, there is a great deal of authority to the effect that a person may be a passenger for a consideration, within the meaning of the provision, when

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Ill. 120; Szymkus v. Eureka Fire & Marine Ins. Co. (1904) 114 Ill. App. 401; Union Cent. Life Ins. Co. v. Hughes' Adm'r (1901) 110 Ky. 26, 60 S. W. 850; Hinckley v. Germania Fire Ins. Co. (1885) 140 Mass. 38, 1 N. E. 737; Greenleaf v. St. Louis Ins. Co. (1865) 37 Mo. 25; Mears v. Humboldt Ins. Co. (1879) 92 Pa. 15; Sumter Tobacco Warehouse Co. v. Phoenix Ins. Co., Ltd. (1907) 76 S. C. 76, 56 S. E. 654; Mittet v. Home Ins. Co. (1926) 49 S. D. 319, 207 N. W. 49; Kircher v. Milwaukee Mechanics' Mut. Ins. Co. (1889) 74 Wis. 470, 43 N. W. 487.

48. McKernan v. North River Ins. Co. (D. C. E. D. Wash. 1912) 206 Fed. 984; German-American Ins. Co. v. Humphrey (1896) 62 Ark. 348, 35 S. W. 428; Jones & Pickett, Ltd. v. Michigan Fire and Marine Ins. Co. (1913) 132 La. 847, 61 So. 846; Gray v. Guardian Assur. Co. (1894) 82 Hun. 380, 31 N. Y. S. 237; Insurance Co. of North America v. Wicker (1900) 93 Tex. 390, 55 S. W. 740.

49. Imperial Fire Ins. Co. of London v. Coos County (1894) 151 U. S. 452, Northern Assur. Co. v. Grand View Building Ass'n (1902) 183 U. S. 308; Atlas Reduction Co. v. New Zealand Ins. Co. (C. C. A. 8, 1905) 138 Fed. 497; Mulrooney v. Royal Ins. Co. (C. C. A. 8, 1908) 163 Fed. 833; Gilchrist Transp. Co. v. Phenix Ins. Co. (C. C. A. 6, 1909) 170 Fed. 279; McKernan v. North River Ins. Co. (D. C. E. D. Wash. 1912) 206 Fed. 984.

50. Wood v. American Automobile Ins. Co. (1921) 109 Kan. 801, 202 Pac. 82; Elder v. Federal Ins. Co. (1913) 213 Mass. 389, 100 N. E. 655; Sleeper v. Massachusetts Bonding & Ins. Co. (1933) 283 Mass. 511, 186 N. E. 778; Center Garage Co. v. Columbia Ins. Co. (1921) 96 N. J. L. 456, 115 Atl. 401; Neilson v. American Mut. Liability Ins. Co. (1933) 111 N. J. L. 345, 168 Atl. 436; Orient Ins. Co. v. Van Zandt-Bruce Drug Co. (1915) 50 Okla. 558, 151 Pac. 323; Beatty v. Employers' Liability Assur. Corp., Ltd. (1933) 106 Vt. 25, 168 Atl. 919.

51. The Main v. Williams (1894) 152 U. S. 122; Marks v. Home Fire & Marine Ins. Co. (App. D. C. 1923) 285 Fed. 959, 52 App. D. C. 225; Schepers v. Union Depot R. R. (1895) 126 Mo. 665, 29 S. W. 712; Arms v. Faszholz (Mo. App. 1930) 32 S. W. (2d) 781; Pennsylvania R. R. v. Price (1880) 96 Pa. 256; Bricker v. Philadelphia & R. R. (1890) 132 Pa. 1, 18 Atl. 983; Galen Hall Co. v. Atlantic City (1908) 76 N. J. L. 20, 68 Atl. 1092; Norfolk & W. Ry. v. Tanner (1902) 100 Va. 379, 41 S. E. 721.

traveling in an automobile ordinarily operated as a private, as distinguished from a public, conveyance.[52]

The fact that the clause prohibits the carrying of "passengers" for a consideration does not mean that it will not be violated in a case where there is but a single passenger as was contended by the insurance company in one case.[53] Nor is the clause inoperative, where passengers were carried for a consideration, merely because the injured person did not pay any part of such consideration,[54] or because the injured person was not a passenger in the insured car, but was riding in another automobile with which the insured car collided.[55] The same should be true where the action is brought by a pedestrian who has been injured by the insured car, although the violation of the provision did not contribute to the loss.[56]

It is not necessary that consent by the owner of the car to use it for carrying passengers for a consideration be given in order to constitute a violation of the clause,[57] and if the car is so used, even though the owner is ignorant of such fact, the insurance company is not liable.[58] This is also true where the owner has expressly forbidden such use or has stipulated by

52. American Lumbermen's Mut. Casualty Co. v. Wilcox (D. C. W. D. N. Y. 1936) 16 F. Supp. 799; Neilson v. American Mut. Liability Ins. Co. (1933) 111 N. J. L. 345, 168 Atl. 436; Dziadosc v. American Casualty Co. (1934) 12 N. J. Misc. 205, 171 Atl. 137, rev'd on other grounds 114 N. J. L. 137, 176 Atl. 150; Beer v. Beer (1938) 134 Ohio St. 271, 16 N. E. (2d) 413; Cartos v. Hartford Accident & Indemnity Co. (1933) 160 Va. 505, 169 S. E. 594.

53. In American Lumbermen's Mut. Casualty Co. v. Wilcox (D. C. W. D. N. Y. 1936) 16 F. Supp. 799, the court said: "The rule of construction is that singular number includes plural number in the interpretation of contracts, and a contrary construction is only necessary where the plain intent of the contract shows the contrary construction necessary to give effect to the intention of the contracting parties."

54. Raymond v. Great American Indemnity Co. (1933) 86 N. H. 93, 163 Atl. 713; Gross v.Kubel (1934) 315 Pa. 396, 172 Atl. 649.

55. State Farm Mut. Automobile Ins. Co. v. Self (C. C. A. 5, 1937) 93 F. (2d) 139; Neilson v. American Mut. Liability Ins. Co. (1933) 111 N. J. L. 345, 168 Atl. 436.

56. See Maringer v. Bankers Indemnity Ins. Co. (1937) 288 Ill. App. 335, 6 N. E. (2d) 307. In this case, however, recovery against the insurance company was allowed, because the court thought that the facts of the case did not show that the insured automobile was used for the carriage of passengers for hire, either express or implied, within the meaning of the provision of the policy.

57. Ocean Accident & Guarantee Corp., Ltd. v. Myers (D. C. M. D. N. C. 1938) 22 F. Supp. 450; Mittet v. Home Ins. Co. (1926) 49 S. D. 319, 207 N. W. 49.

58. Wood v. American Automobile Ins. Co. (1921) 109 Kan. 801, 202 Pac. 82; Hadrick v. Burbank Cooperage Co. (La. App. 1938) 177 So. 831.

contract against it.[59] The contrary is true, of course, where the policy provision expressly states that no liability is assumed because of accidents occurring while the insured automobile is being so operated with the *consent* of the insured.[60] Where a warranty is involved, the question of whether or not it has been breached can never depend upon the knowledge, ignorance, or intent of the party making it.[61] The clause may also be violated even though the compensation is paid by a third person rather than by the passenger, inasmuch as the consideration does not need to pass from the passenger to the driver in order to take the former out of the relationship of guest,[62] although it is possible for a person to be an occupant of an automobile without being either a guest or a passenger for hire.[63]

In considering the problem further, it is helpful to attempt a classification based upon the various fact situations which are to be found in the different cases. In general, the cases involving the question of carrying passengers for a consideration may be divided into three groups.

Probably the case most frequently found is where the so-called passenger has paid or shared in the operating expenses of the trip, such as for gas and oil, either voluntarily,[64] or under agreement[65] made with the owner before the commencement of

59. Myers v. Ocean Accident & Guarantee Corp., Ltd. (C. C. A. 4, 1938) 99 F. (2d) 485.

60. For such a provision, see Orcutt v. Erie Indemnity Co. (1934) 114 Pa. Super. 493, 174 Atl. 625.

61. See Liverpool & London & Globe Ins. Co. v. Gunther (1885) 116 U. S. 113; Leonard v. Northwestern Nat. Ins. Co. (App. D. C. 1923) 290 Fed. 318; Matson v. The Farm Buildings Ins. Co. (1878) 73 N. Y. 310.

62. Smith v. Fall River Joint Union High School Dist. (1931) 118 Cal. App. 673, 5 P. (2d) 930; Sullivan v. Richardson (1932) 119 Cal. App. 367, 6 P. (2d) 567; McGuire v. Armstrong (1934) 268 Mich. 152, 255 N. W. 745; Dahl v. Moore (1913) 161 Wash. 503, 297 Pac. 218.

63. See Jensen v. Canadian Indemnity Co. (C. C. A. 9, 1938) 98 F. (2d) 469; Knutson v. Lurie (1933) 217 Iowa 192, 251 N. W. 147; Askowith v. Massell (1927) 260 Mass. 202, 156 N. E. 875. But see Maryland Casualty Co. v. Martin (1937) 88 N. H. 346, 189 Atl. 162.

64. Reed v. Bloom (D. C. W. D. Okla. 1936) 15 F. Supp. 600; Yelin v. Columbia Casualty Co. (1934) 265 N. Y. 590, 193 N. E. 334.

65. Jensen v. Canadian Indemnity Co. (C. C. A. 9, 1938) 98 F. (2d) 469; Maryland Casualty Co. v. Martin (1937) 88 N. H. 346, 189 Atl. 162. In Armistead v. Lenkeit (1935) 230 Ala. 155, 160 So. 257, the court said: "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."

the journey. It may also be that the guests on a trip, without any agreement with the owner, have an understanding among themselves that they will pay for the expenses of the trip.[66] Ordinarily, such paying or sharing of expenses does not constitute carrying passengers for a consideration.[67] Thus where the owner has received a certain sum per mile, it has been considered merely as an approximation of the cost of operating the car.[68] For example, in *Gardner v. Boyer's Estate*,[69] the court said:

> The transportation of a passenger in consideration of his paying for the oil and gas is not at all an uncommon practice, and this cannot be deemed carrying passengers for hire under the clause in the insurance policy. Policies are most strongly construed against the insurer.

Nor does the sharing of expenses prevent a passenger from being a guest within the provisions of a guest statute.[70] One court went so far as to hold that there was no violation of the

66. This was apparently the situation in Indemnity Ins. Co. of North America v. Lee (1930) 232 Ky. 556, 24 S. W. (2d) 278, where the court said: "It may be that if Cooper had agreed with the Lees and others accompanying him on the trip to take them along in consideration of their paying for the gasoline, the case would be one where the car was being 'used to carrying passengers for a consideration,' but it not infrequently happens that guests on a long trip, without any agreement whatever with the owner have an understanding among themselves that they will pay for gasoline, or pay for it without such understanding * * * and, where this is the case, they cannot be regarded as passengers for a consideration."

67. Reed v. Bloom (D. C. W. D. Okla. 1936) 15 F. Supp. 600; Ocean Accident & Guarantee Corp., Ltd. v. Olson (C. C. A. 8, 1937) 87 F. (2d) 465; United States Fidelity & Guaranty Co. v. Hearn (1936) 233 Ala. 31, 170 So. 59; Park v. National Casualty Co. (1936) 222 Iowa 861, 270 N. W. 23; Perkins v. Gardner (1934) 287 Mass. 114, 191 N. E. 350; Gardner v. Boyer's Estate (1938) 285 Mich. 80, 280 N. W. 117; Beer v. Beer (1938) 134 Ohio St. 271, 16 N. E. (2d) 413.

68. Park v. National Casualty Co. (1936) 222 Iowa 861, 270 N. W. 23. But see Jensen v. Canadian Indemnity Co. (C. C. A. 9, 1938) 98 F. (2d) 469, where an agreement to pay a certain sum per mile was not considered as a reimbursement to the owner of the car for operating expenses, but rather as money paid for the use of the car, which constituted the carrying of passengers for compensation within the language of the policy.

69. (1938) 285 Mich. 80, 280 N. W. 117, 118.

70. Rogers v. Vreeland (1936) 16 Cal. App. 344, 60 P. (2d) 585; Morgan v. Tourangeau (1932) 259 Mich. 598, 244 N. W. 173; Ernest v. Bellville (1936) 53 Ohio App. 110, 4 N. E. (2d) 286; Raub v. Rowe (Tex. Civ. App. 1938) 119 S. W. (2d) 190; see Olefsky v. Ludwig (1934) 242 App. Div. 637, 272 N. Y. S. 158; Eubanks v. Kielsmeier (1933) 171 Wash. 484, 18 P. (2d) 48. But see Beer v. Beer (1938) 134 Ohio St. 271, 16 N. E. (2d) 413.

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

72. Gross v. Kubel (1934) 315 Pa. 396, 172 Atl. 649.

clause even though the payment of operating expenses included the payment of the living expenses of the owner of the car during the trip.[71] However, it has been held otherwise where the payment of expenses exceeded the cost of gasoline and oil and included an amount intended to reimburse the owner for the wear and tear on his automobile.[72] Also, where there is a contract made in advance that the passengers shall share in the operating expenses and pay the cost of gas and oil, it is sometimes held that carriage under such an arrangement constitutes carriage for a consideration.[73] In distinguishing the various cases, the courts take into consideration all of the circumstances surrounding the particular case. They consider the relationship of the parties to each other, that is, whether or not they are relatives, friends, or absolute strangers; the existence or lack of a common interest; the pleasure or benefit to be derived from making the journey; the relation of the amount of money paid to the actual costs of the trip; and whether or not the dominating purpose of the owner of the car was the carrying of passengers for a consideration.[74]

United States Fidelity & Guaranty Co. v. Hearn,[75] which falls within this group, represents a liberal construction of the clause in question in favor of the insured. In that case, Hearn and several companions had agreed to drive from Alabama to Pasadena, California, to see the Rose Bowl football game. It was agreed in advance that Hearn would furnish his car and his personal services as the driver, and in return his companions were to pay all of the operating expenses of the car during the trip and, in addition, Hearn's living expenses. During the trip the automobile was wrecked and the passengers were injured, resulting in a suit against Hearn. The Guaranty Company had issued Hearn a liability policy covering his automobile and containing an exclusion clause exempting the company from liability when the car was being used for carrying passengers for a consideration. The company filed suit under the declaratory judgment act to determine whether or not it was liable.

73. Sleeper v. Massachusetts Bonding & Ins. Co. (1933) 283 Mass. 511, 186 N. E. 778; Maryland Casualty Co. v. Martin (1937) 88 N. H. 346, 189 Atl. 162; Campbell v. Campbell (1932) 104 Vt. 468, 162 Atl. 379.

74. Ocean Accident & Guaranty Corp., Ltd. v. Olson (C. C. A. 8, 1937) 87 F. (2d) 465; Park v. National Casualty Co. (1936) 222 Iowa 861, 270 N. W. 23; Beer v. Beer (1938) 134 Ohio St. 271, 16 N. E. (2d) 413.

75. (1936) 233 Ala. 31, 170 So. 59.

The court said that from the agreement it appeared that the payment of the expenses by the passengers, even including Hearn's living expenses, was only an incident and not a consideration of the carriage. The automobile was shown not to have been used, at the time of the accident, within the reservations or exclusions of obligation contained in the policy, and the company was therefore not relieved of liability.

On the other hand, in *Sleeper v. Massachusetts Bonding and Insurance Co.*,[76] Sleeper and one Ryerson were being driven in New Hampshire by Stetson under an agreement that Stetson should carry them from Boston to Meredith, New Hampshire, and return, upon payment of "enough to pay for his gas, oil and meals." Stetson had no personal pleasure or interest in the journey, but was willing to undertake it upon those terms. He received $8, besides his meals. In deciding that this constituted the "carrying of passengers for a consideration" within the meaning of the provision, the court said:

> We think that whenever there is a contract, based on valuable consideration, having as its main purpose the carrying of passengers, the insurer under the form of policy in this case does not undertake to indemnify the owner or operator against liability for an occurrence during the journey covered by the contract. * * * 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.

The court distinguished *Askowith v. Massell*,[77] on the ground that in that case the division of the expense of operating the automobile among members of a fishing party was held noncontractual, and consequently the passengers were within the class of guests. This distinction is questionable, inasmuch as there was an agreement in the *Askowith* case that the expenses of the trip should be divided among the members of the party, and that each member should pay a proportionate share of the cost for gasoline, oil and garage bills. It should be noted, however, that the cases might be distinguished on the ground that in the *Sleeper* case the owner of the car had no personal interest in the journey, so that the main purpose of the trip was

76. (1933) 283 Mass. 511, 514, 186 N. E. 778.
77. (1927) 260 Mass. 202, 156 N. E. 875.

the carrying of passengers, while in the *Askowith* case the owner of the car was personally interested in the fishing trip, thus making it in the nature of a joint enterprise. Therefore the carrying of passengers who would share the trip expenses was secondary to the main purpose of the journey.

In *Gross v. Kubel,*[78] the insured car was being used to carry a basketball team to an out-of-town game. An accident occurred and the resulting injuries were the basis of a suit involving the insurance company. The court held that the insurance company was relieved of liability because the arrangement for compensation under which the owner of the car was carrying his passengers was more than a mere reimbursement for the gas and oil used on the trip, but went to the additional extent of compensating him for the use of the car. In reaching the decision that it did, the court, quoting from a statement of the trial judge, intimated that if the insured had been paid only a sum equivalent to the cost of gas and oil used, a serious question might have arisen as to whether such a payment would have constituted a carrying for hire. The additional sum paid to him for the use of the car was thought to have brought the operation of the car squarely within the clause of the policy.

There is a second group of cases where the passenger has paid to the owner of the automobile a sum certain which has no relation to the cost of operation of the car during the trip.[79] In this type of case the courts generally seem to have held that the payment of such sum makes the carriage one for a consideration.[80] Especially is this true where there is an absence of friendship or relationship between the owner and the passenger. In this type of transaction, the transporting is considered merely as a business arrangement, and the courts ordinarily hold that it constitutes the carrying of passengers for

78. (1934) 315 Pa. 396, 172 Atl. 649.

79. American Lumbermen's Mut. Casualty Co. v. Wilcox (D. C. W. D. N. Y. 1936) 16 F. Supp. 799; State Farm Mut. Automobile Ins. Co. v. Self (C. C. A. 5, 1937) 93 F. (2d) 139; Ocean Accident & Guarantee Corp., Ltd. v. Myers (D. C. M. D. N. C. 1938) 22 F. Supp. 450; Orcutt v. Erie Indemnity Co. (1934) 114 Pa. Super. 493, 174 Atl. 625; Cartos v. Hartford Accident & Indemnity Co. (1933) 160 Va. 505, 169 S. E. 594; Lewis v. Bertero (1938) 77 P. (2d) 786, 194 Wash. 186.

80. American Lumbermen's Mut. Casualty Co. v. Wilcox (D. C. W. D. N. Y. 1936) 16 F. Supp. 799; Elder v. Federal Ins. Co. (1913) 213 Mass. 389, 100 N. E. 655; Cartos v. Hartford Accident & Indemnity Co. (1933) 160 Va. 505, 169 S. E. 594.

a consideration within the provision of the policy, thereby relieving the insurance company of liability.[81]

Within this classification is *State Farm Mutual Automobile Insurance Co. v. Self*.[82] Here the insurance company had issued a public liability policy to one Woodhouse which covered the operation of the car for pleasure and business, but contained an exclusion clause of the type here being considered. The insured desired to make a trip from his home near Phoenix, Arizona, to a farm that he owned, located about one hundred miles south of Tulsa, Oklahoma. Wishing to secure someone to make the trip with him in order to help defray expenses, he went to a public travel agency in Phoenix where he arranged to transport five strangers to various addresses in Oklahoma City and Tulsa, for a total sum of $37.50 or $7.50 for each passenger. Woodhouse cautioned one of the passengers to say nothing about having paid for his transportation. While carrying these passengers, a collision occurred between the car driven by insured and another car driven by one Joe Self. The accident resulted in bodily injuries to Self's wife and damage to his car for which Self recovered a judgment against insured in a Texas court. Execution having been returned *nulla bona*, Self instituted an action against the insurance company to enforce liability under the insolvency and bankruptcy clause of the policy. The insurance company contended that the insured was, at the time of the collision, carrying passengers for a consideration and that such operation of the car was excluded from the coverage of the policy. The court sustained the insurance company's contention, finding that the insured had been carrying passengers for a consideration. The court rightly stressed the fact that in this case the travelers carried were total strangers to the owner of the automobile and they had no common interest in the journey. The court also seemed to think it important that the passengers were being carried for a predetermined and already collected fare which was fixed, not with reference to the actual expenses of the trip, but at an arbitrary amount which might have exceeded or been less than the actual cost of the

81. State Farm Mut. Automobile Ins. Co. v. Self (C. C. A. 5, 1937) 93 F. (2d) 139; Myers v. Ocean Accident & Guarantee Corp., Ltd. (C. C. A. 4, 1938) 99 F. (2d) 485; Orcutt v. Erie Indemnity Co. (1934) 114 Pa. Super. 493, 174 Atl. 625.

82. (C. C. A. 5, 1937) 93 F. (2d) 139.

trip. These facts took the persons so carried out of the category of contributing guests and made them paying passengers. The court distinguished this type of case from the case where the persons transported were friends or relatives of the operator of the car and the payments made were unsolicited contributions. The court also distinguished *Marks v. Home Fire & Marine Insurance Co.*,[83] on the ground that the policy exception there involved was carrying "passengers" for "compensation," while in the present case the exception was carrying "anyone" for "consideration," which was much more comprehensive.

Myers v. Ocean Accident & Guarantee Corp.[84] is an example of a case which falls within both of the afore-mentioned groups, as it involves both a division of the expenses of the trip, and the payment of a predetermined fare for the journey. In this case, the Bronart Company of Akron, Ohio, was engaged in renting automobiles in Miami, Florida, and for that purpose purchased automobiles in Michigan and elsewhere and had them driven by employes to Miami. In order to cover any legal liability that might possibly result during such transit, the company procured, from time to time, endorsements on a blanket liability policy which it carried with the Ocean Accident and Guarantee Corporation, to cover particular cars as purchased and driven from Ohio to Florida in this manner. The policy described such automobiles as used for pleasure purposes, defining the term as including business calls, but excluding the renting or livery use of any disclosed motor vehicle and the carrying of persons for a consideration. In January, 1935, the Bronart Company made a written agreement with one Doris Goldman to drive an automobile from Akron to Miami, for which she was to be paid $5 upon arriving at her destination. The contract provided that she was not to transport or carry in the vehicle any passenger for hire or for any consideration, whatsoever, while she was operating it. Before leaving Akron, Miss Goldman arranged with two of her girl friends to go with her to Florida, and the three contributed to a common fund in her charge for the purpose of paying their expenses on the trip, including the cost of oil and gasoline for the car. When they reached Cincinnati, they learned that a Mr. Manoff, his wife,

83. (App. D. C. 1923) 285 Fed. 959.
84. (C. C. A. 4, 1938) 99 F. (2d) 485.

and a young man were seeking transportation to Florida after the breakdown of their own car. Although these three persons were total strangers to Miss Goldman and her companions, she agreed to take them and their baggage to Florida. It was agreed that they should pay $10 each for the transportation, and she accepted the $30 and put it into the pool out of which she made disbursements for gas and oil and other expenses of the trip. No change was made in the intended route to Florida in order to take the Cincinnati passengers. While the car was being driven near Waycross, Georgia, it collided with a car in which three members of the Myers family were riding. All three were seriously injured and each instituted a suit against the Bronart Company. The insurance company then brought a suit to obtain a declaratory judgment to determine its liability under the indemnity policy issued to the Bronart Company. It was held that the policy did not cover the injuries sustained by the Myers because of the exclusion clause and that the insurance company was entitled to a declaratory judgment to that effect. The court said that other cases have distinguished the situation where the sum paid was a proportionate part of the expenses of the trip, as where the driver and passengers were friends engaged in a joint enterprise for mutual pleasure, the use of the automobile being only incidental thereto, from the situation where a definite sum, not related to the expenses of the trip, was paid by the passengers as compensation or profit to the owner or driver of the car. Under this test, the arrangement between Miss Goldman and her two friends before leaving Akron would probably not be within the scope of the exclusion clause, but the subsequent arrangement with the three persons in Cincinnati would be. The fact that in the latter situation the passengers were complete strangers to the driver and her companions, and that they had no common interests except that they were all going to Florida, was of importance, as was the fact that the amount of fare to be paid for the transportation was agreed upon in advance. The court said that this arrangement was not only contrary to the literal wording of the exclusion clause, but also violated its purpose and intent by increasing the risk to the insurance company. The company might thereby become liable to paying passengers for damages to them for negligent operation of the automobile. The court also said that

the possibility of accident was increased because of the necessity of riding three in the front seat, thereby impairing the driver's efficiency. The latter point is really of no importance inasmuch as the risk to the insurance company might conceivably be increased at any time by three persons riding in the front seat and, in the absence of violation of the terms of the policy, the insurance company would still remain liable. Then, also, it was not necessarily the violation of the clause that resulted in the overcrowded car, as the clause might have been violated with the carrying of only one of the fare-paying passengers. It is also interesting to note that in this case the liability of the insurance company to the Myers family was not increased by the use of the insured's automobile in violation of the provision, since they were not riding in the insured vehicle and the insured owed them no greater duty than if no paying passengers were being carried. This fact, however, does not deprive the insurance company of its exemption under the exclusion clause.[85]

The third group of cases arises in situations where no monetary consideration has passed to the owner or driver of the car, but where some benefit has accrued by reason of the carriage, or where the transportation is for the mutual benefit of both parties. Where some benefit has thus been conferred upon the owner or operator, such passenger is usually not considered

85. State Farm Mut. Automobile Ins. Co. v. Self (C. C. A. 5, 1937) 93 F. (2d) 139. See also Universal Indemnity Ins. Co. v. North Shore Delivery Co. (C. C. A. 7, 1938) 100 F. (2d) 618, involving an insurance policy which provided that the insurance company should not be liable "in respect of injuries caused in whole or in part by any automobile insured hereunder while being operated or manipulated by any person violating regulations governing the licensing of motor vehicle operators, or when driven by any person whose right to drive has been enjoined by proper authority or whose license to drive has been suspended or revoked." The court said: "It is not necessary that the violation of the licensing regulations in fact increased the risk of the insurer in the instant case. It is obvious that a practice of employing unlicensed chauffeurs would increase the risk of the insurer and it is this general risk that the exception is intended to eliminate. There are no facts in the instant case to show that the unlicensed driver became any less skillful during the period he was unlicensed; but we accept as a fact that the practice of requiring drivers to be licensed is justified by experience as a sound safety measure. The coverage exception in question affords the insurer legitimate protection against a substantial risk which it is entirely proper for an insurer to guard against." The same reasoning would apply to a situation involving the clause relieving the insurer of liability for injuries incurred while the automobile was being used to carry a passenger for a consideration.

as coming within the category of "guest" within the meaning of the guest statutes.[86] In a Massachusetts case[87] the plaintiff had agreed to give the defendant the use of her garage for his automobile without paying rent, and the defendant, in consideration of such agreement and use, promised to take the plaintiff and her husband riding on such Sundays, evenings, and holidays as she and the defendant might reasonably agree upon. The court said that the jury would have been warranted in finding that the plaintiff and her husband, riding in the automobile in pursuance of such agreement, were not being entertained by the defendant as guests when the accident occurred. However, in other Massachusetts cases, where the benefit conferred was somewhat more remote, such as securing a loan for the defendant,[88] bringing money from Boston to the defendant at Worcester,[89] and helping the defendant's daughter to select a new fur coat,[90] the passenger was still considered to be a "guest" in spite of the benefit conferred upon the owner of the car. It has also been said that where the benefit conferred was not intended to be compensation for the transportation, the passenger was still a "guest" within the meaning of the statute.[91] In cases where the transportation is for the mutual benefit of both parties, the passenger is generally not considered as a "guest,"[92] the relationship being rather a joint enterprise.[93] However, the fact that he is not a guest does not necessarily mean that he is a passenger for hire.[94]

86. Crawford v. Foster (1930) 110 Cal. App. 81, 293 Pac. 841; Lerma v. Flores (1936) 16 Cal. App. (2d) 128, 60 P. (2d) 546; Bree v. Lamb (1935) 120 Conn. 1, 178 Atl. 919; Brookhart v. Greenlease-Lied Motor Co. (1932) 215 Iowa 8, 244 N. W. 721.

87. Chooljian v. Nahigan (1930) 273 Mass. 396, 173 N. E. 511.

88. Jacobson v. Stone (1931) 277 Mass. 323, 178 N. E. 636.

89. Baker v. Hurwitch (1928) 265 Mass. 360, 164 N. E. 87.

90. Flynn v. Lewis (1919) 231 Mass. 550, 121 N. E. 493.

91. Chaplowe v. Powsner (1934) 119 Conn. 118, 175 Atl. 470.

92. Woodman v. Hemet Union High School Dist. (1934) 136 Cal. App. 544, 29 P. (2d) 257; Kruy v. Smith (1929) 108 Conn. 628, 144 Atl. 304; Russell v. Parlee (1932) 115 Conn. 687, 163 Atl. 404; Johnson v. Smither (Tex. Civ. App. 1938) 116 S. W. (2d) 812.

93. Derrick v. Salt Lake &. O. R. R. (1917) 50 Utah 573, 168 Pac. 335; Wentworth v. Waterbury (1916) 90 Vt. 60, 96 Atl. 334; Jensen v. Chicago, M. & St. P. R. R. (1925) 133 Wash. 208, 233 Pac. 635. But see Coleman v. Bent (1924) 100 Conn. 527, 124 Atl. 224; Fisher v. Johnson (1925) 238 Ill. App. 25; Berry, *The Law of Automobiles* (4th ed. 1924) sec. 565; Weintraub, The Joint Enterprise Doctrine in Automobile Law (1931) 16 Corn. L. Q. 320.

94. Knutson v. Lurie (1933) 217 Iowa 192, 251 N. W. 147.

In cases involving the "passenger for a consideration" clause, it seems generally to be held that the fact that a non-pecuniary benefit has been conferred upon the owner or operator of the car does not bring the situation within the meaning of the provision.[95]

In a typical case coming within this group, Esther Rothman brought suit against the Metropolitan Casualty Insurance Company to recover damages claimed to have been sustained by her while riding in an automobile of the Malkin Furniture Company of Youngstown, Ohio, being driven by its president. She had visited the furniture store for the purpose of purchasing some rugs and furniture and, upon expressing a desire to see certain other rugs and furniture in Cleveland, Mr. Malkin took her to Cleveland by automobile for such purpose. Some selections were made there, and it was upon the return trip that the accident and resulting injuries to Mrs. Rothman occurred. Having recovered a judgment against the furniture company, Mrs. Rothman filed a supplemental petition against the insurance company which had insured the furniture company against such liability, pursuant to the provisions of the Ohio General Code. The casualty company defended on the ground that at the time of the injury the plaintiff was traveling as a passenger for a consideration, which use was expressly excluded by the terms of the policy. In holding for the plaintiff against the insurance company the court said:

> In view of the fact that this automobile was insured as the property of a business concern and, according to the terms of the policy, is covered for business as well as personal use, a strained construction must be resorted to if it be held that under the facts above stated the automobile was being "used to carry passengers for a consideration express or implied," at the time of the accident. When all the terms and conditions of the policy are considered together, it must be concluded that such use as that in question was contemplated by the parties; at least, that it was not embraced within the exception stated.[96]

95. Western Machinery Co. v. Bankers Indemnity Ins. Co. (1938) 10 Cal. (2d) 488, 75 P. (2d) 609; Pietrantonio v. Travelers Ins. Co. (1937) 282 Mich. 111, 275 N. W. 786; Jasion v. Preferred Acc. Ins. Co. (1934) 113 N. J. L. 108, 172 Atl. 367; Rothman v. Metropolitan Casualty Ins. Co. (1938) 134 Ohio St. 241, 16 N. E. (2d) 417; Central Surety & Ins. Corp. v. London & Lancashire Indemnity Co. (1935) 181 Wash. 353, 43 P. (2d) 12.

96. Rothman v. Metropolitan Casualty Ins. Co. (1938) 134 Ohio St. 241, 16 N. E. (2d) 417, 421.

It should be noted that the facts that the insured was a business concern, and that the policy issued covered business as well as personal use, seemed to influence the court in determining that the benefit to the owner of the automobile did not constitute a consideration within the meaning of the provision. In such case the court seemed to think that the automobile was being used for business purposes within the meaning of the insurance contract and that such use was contemplated by the parties as being covered by the provisions of the policy.[97]

The fact that the insured was a business concern is not controlling, however, for the same conclusion was reached by the court in *Pietrantonio v. Travelers Insurance Co.*,[98] where the insured was an individual. In that case the insured, at the time of the accident, was demonstrating his car to the plaintiff as a possible purchaser, and the plaintiff received severe injuries. The plaintiff brought suit under an assignment of the insured's right against his insurance company. The company contended that, since the car was being demonstrated to the plaintiff at the time of the accident, he was a passenger for a consideration, and therefore the company was not liable. The court dismissed this contention as without merit, saying, "Plaintiff could not be considered as a passenger for hire under any interpretation of the exclusion clause." In a like manner, the court disposed of a provision in the policy against using his car for demonstrating.

97. In Western Machinery Co. v. Bankers Indemnity Ins. Co. (1938) 10 Cal. (2d) 488, 75 P. (2d) 609, the passenger was being transported by the insured company to inspect some machinery being offered for sale by the company to determine whether the passenger's employer would buy it. On the return trip an accident occurred through the negligence of the driver of the car which resulted in injuries to said passenger. The position of the insurance company in contesting the claim was that since the passenger was not a "guest" within the meaning of the provisions of the California Vehicle Act, prohibiting the recovery by a person injured through the negligence of his host, he necessarily became a passenger for consideration within the meaning of the policy provision, and therefore it was not liable. No monetary or other valuable return for the transportation of the passenger, Lawton, was made to the insured and, therefore, the claim of the insurance company can only be supported by holding that the benefit conferred upon the insured by the subsequent sale of the machinery to the passenger's employer amounted to a consideration within the meaning of the clause in question. The court held that the insured was not using the automobile to carry passengers for a consideration, either actual or implied, and said: "the carriage of Lawton to inspect the machinery was a permissible business use of the automobile and the rights of the parties are governed accordingly."

98. (1937) 282 Mich. 111, 115, 275 N. W. 786.

The court expressed the view that since it was a matter of common knowledge that a majority of automobiles were at some later date sold by the original purchaser, and the buyer of a used car would undoubtedly want to drive or at least ride in the car before purchasing, the policies were written by the companies and accepted by the insured with such facts in view.

On the other hand, in *Rowan v. Allen*,[99] a non-pecuniary benefit to the owner of the car was considered as sufficient to sustain the finding of the jury that the owner of the car was conveying a passenger in his car for a consideration, which would be sufficient to remove the case from the Texas guest statute, although the case did not involve the problem of insurance.[100] In that case it appeared that the owner of the car, one Rowan, wanted to take his wife and a Mrs. Allen in his automobile to the races. The Rowans' son, aged nine, was sick and confined to his room, and it was agreed that if Mrs. Allen would allow her daughter to go to the Rowan residence and remain with the sick son, they would take Mrs. Allen to the races. The court was of the opinion that this arrangement was sufficient to constitute the carrying of Mrs. Allen in the Rowan car for a consideration[101] under the guest statute. Under this decision the court might have found that the exclusion clause under consideration had been violated if the insurance question had been involved. This result, however, would be questionable, inasmuch as the insurance com-

99. (Tex. Civ. App. 1938) 113 S. W. (2d) 322.

100. In Loftus v. Pelletier (1916) 223 Mass. 63, 111 N. E. 712, the court held that the carrying of a district nurse, by a doctor, to call upon a patient, under a contract of employment requiring her to accept the doctor's automobile as the method of transportation when it was offered to her, was sufficient to constitute a carriage for hire, and that it was not a joint enterprise. The question of insurance was not involved.

101. In cases involving liability for injuries received in elevator accidents, it has been held that the owner of the elevator is a carrier for hire and must exercise the highest degree of care in providing for the safety of the passengers. This is true although no fare is exacted for carriage in the elevator. In the case of an office building the rental paid by its tenants is considered as sufficient compensation and that is likewise true in the case of hotels and apartment houses. In the case of a store, the reward of the owner is considered to be the benefit, advantage, and profit derived from purchasers or prospective purchasers. The prices charged for goods would include reimbursement to the owner for the expenses of running the elevator and hence would constitute a sufficient reward for the carriage, bringing the owner within the category of a carrier for hire. See Champagne v. A. Hamburger & Sons, Inc. (1915) 169 Cal. 683, 147 Pac. 954; Dibbert v. Metropolitan Inv. Co. (1914) 158 Wis. 69, 147 N. W. 3.

panies in drafting such a provision, probably never intended that the provision should be applicable to such a situation. Probably the majority of the courts would so hold.

In conclusion, it seems evident from the ever-increasing amount of automobile liability insurance litigation that the insured automobile owner can never be absolutely certain that his insurance will protect him at all times, since he may be inadvertently violating one of the terms of his policy without realizing what the consequences might be in case of an accident involving serious injuries to others. The careless acceptance of compensation, no matter how small, might take away his one means of protection and wipe out his entire savings. Fortunately for the insured, the courts have been sympathetic toward the policyholder and, wherever possible, have tried to avoid a forfeiture of the policy. Only where the consideration has been the payment of a stipulated sum, agreed upon in advance, have the courts uniformly relieved the insurance company of liability. Any other type of consideration, whether pecuniary or not, is usually not considered as a sufficient violation, in the absence of other circumstances giving the transaction the appearance of a business, rather than a personal, undertaking. In addition, the intention of the parties involved in the transportation plays a most important part in determining whether or not there has been a violation. However, in spite of the leniency of the courts, every policyholder should make a careful examination of the provisions of his policy, and should conscientiously attempt to comply with its terms. There still remains a construction of the policy, of course, but in the absence of an intentional violation, the courts will probably construe any doubt in favor of the insured. On the other hand, if there has been an obvious violation of the contractual provisions of the policy, it is only fair and just that the insurance company be relieved of liability under its contract. The final result must necessarily always be determined by the circumstances of each individual case.