the consummation of this function. Any question as to the mode of obtaining the evidence is collateral. Where it is a question of deprivation of liberty by incarceration, payment of a penalty, or forfeiture of property, the courts' solicitude for the defendant, merely as a matter of policy, is justifiable. Where, however, none of these issues is at stake, the reasons for extending the exclusion rule are not apparent.

Insurance—Interpretation of Public Liability Policy—[Ohio].—The plaintiff agreed with her brother, the defendant, to pay the expenses of a trip in the latter's automobile to see their father. Because of the defendant's negligent driving, the plaintiff sustained injuries for which she recovered damages against the defendant,[1] the court holding that she was not a guest under the Ohio "guest statute."[2] She then sought recovery against the defendant's insurer under a public liability policy, the insurer contending that the plaintiff was a "passenger for a consideration" within the clause denying the insurer's liability to such persons. *Held*, for the plaintiff, that she was not a "passenger for a consideration" within the meaning of the policy. *Beer v. Beer*.[3]

Since in the original suit against her brother the plaintiff was held not to be a "guest," the contention of the insurance company that she must be a "passenger for a consideration," would effectuate its apparent purpose to prevent *any person* riding in an insured's car from recovering against an insurance company under a public liability policy. Even though an insurance company could prove that its actual purpose in inserting the restrictive clause was to deny its liability to *all* riders in the insured's car, courts may hold with perfect logic that "one may be a passenger in an automobile without being a guest . . . . or a passenger for hire in the legal sense of the word,"[4] and may allow such residual class of riders to recover damages against an insurer.

But it requires skillful sailing to steer between these two obstacles to recovery against insurance companies, since escape from one horn of the dilemma is likely to impale the plaintiff on the other. Much depends, therefore, on the definition of the phrase "passenger for a consideration." Courts differ in their definition of this term. Thus in some jurisdictions a rider falls in this category if it appears only that he agreed prior to the trip to contribute to the expenses of running the car.[5] By this criterion the plaintiff in the instant case could not recover against the insurance company. An alternative test requires that the passenger must have agreed to contribute more than merely the running expenses of the car or his share thereof; he must also have shared the cost of wear and tear on the car.[6] The Ohio court seems to have

[1] Beer v. Beer, 52 Ohio App. 276, 3 N.E. (2d) 702 (1935).

[2] "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 . . . . unless such injuries or death are caused by the wilful or wanton misconduct of such operator. . . . ." Ohio Gen'l Code, § 6308–6.

[3] 16 N.E. (2d) 413 (Ohio 1938).

[4] Knutson v. Lurie, 217 Iowa 192, 251 N.W. 147 (1933).

[5] Reed v. Bloom, 15 F. Supp. 600 (Okla. 1936); Indemnity Insurance Co. of North America v. Lee, 232 Ky. 556, 24 S.W. (2d) 278 (1930).

[6] Ocean Accident and Guarantee Corporation v. Olson, 87 F. (2d) 465 (C.C.A. 8th 1937); Gross v. Kubel, 315 Pa. 396, 172 Atl. 649, 95 A.L.R. 146 (1934). *Cf.* Jensen *et al.* v. Canadian

applied this test in the instant case. It is noteworthy in passing that paying passengers are more likely to be included in the category of "passengers for a consideration" when they are strangers to the operator.[7]

In dealing with the legislative obstacle to recovery, courts seem to be uncertain whom to include as guests under statutes similar to that in Ohio.[8] Since the statute is in derogation of the common law, many courts require the strict construction that one who makes a payment of any kind is not a guest within the legislative intent.[9] Whether such a strict construction is appropriate should depend on the reasons for enacting the statute. If the purpose of the statute is to deny damages to the ungrateful "dog that bites the hand that feeds him,"[10] perhaps recovery should be allowed against the owner where the passenger has contributed any money, since in such a case the ingratitude is not so base. But the more generally conceded purpose of such statutes is to "rid the courts of litigation arising out of automobile accidents in which close relatives and associates sue others and engage in what is in reality a collusive suit for the ultimate spoliation of an insurance company,"[11] and to prevent such close associates from "pooling" issues to exact tribute from an insurance company."[12] Thus, those courts are justified which include in the guest category a friend who contributes toward expenses.[13] The principal case would seem to afford an ideal situation for such a collusive suit.

Insurance companies dislike the general recognition of this residual class of persons who may recover against them. It seems odd, therefore, that they should continue to seek immunity under judicial construction of the terms "guest" and "passenger for a consideration" in statutes and policies, when they could insert explicit statements in their policies that liability extends only to persons not riding in the insured's car. It is possible, however, that such a blunt and unambiguous denial of protection would render liability policies less salable to the canny public.

Indemnity Co., 98 F. (2d) 469 (C.C.A. 9th 1938) with Park v. National Casualty Co., 222 Iowa 861, 270 N.W. 23 (1936).

[7] Orcutt v. Erie Indemnity Co., 114 Pa. Super. 493, 174 Atl. 625 (1934); Park v. National Casualty Co., 222 Iowa 861, 270 N.W. 23 (1936).

[8] See note 2 *supra*.

[9] Smith v. Clute, 277 N.Y. 407, 14 N.E. (2d) 455 (1938); Rocha v. Hulen, 6 Cal. App. (2d) 245, 44 P. (2d) 478 (1935); Kerstetter v. Elfman, 327 Pa. 17, 192 Atl. 663 (1937); Campbell v. Campbell, 104 Vt. 468, 162 Atl. 379 (1932).

[10] Crawford v. Foster, 110 Cal. App. 81, 293 Pac. 841 (1930). Massachusetts courts have adopted a rule, independently of statute, substantially the same as the guest statutes. In Massaletti v. Fitzroy, 228 Mass. 487, 118 N.E. 168 (1917), one of the earliest cases expounding the rule, the court seems to view the doctrine as an application of the rule that damages may not be recovered against a gratuitous bailee for simple negligence: that "justice requires" a showing of greater negligence.

[11] Walker v. Adamson, 17 Cal. App. (2d) 360, 62 P. (2d) 199 (1936), aff'd 9 Cal. (2d) 287, 70 P. (2d) 914 (1937).

[12] Rocha v. Hulen, 6 Cal. App. (2d) 245, 44 P. (2d) 478 (1935).

[13] Olefsky v. Ludwig, 242 App. Div. 637, 272 N.Y. Supp. 158 (1934); Morgan v. Tourangeau, 259 Mich. 598, 244 N.W. 173 (1932); Rogers v. Vreeland, 16 Cal. App. (2d) 364, 60 P. (2d) 585 (1936); McCann v. Hoffman, 9 Cal. (2d) 279, 62 P. (2d) 401 (1936).