NOTES

THE LAW SCHOOL—The year's enrollment is 7.4 per cent. below that of 1931-32.[1] The entering class is but three less than last year's registration, the major loss being in the Second and Third years, which are now feeling the effect of smaller original enrollments.[2] We again record a growing proportion of First Year students from the State of Pennsylvania outside the metropolitan area of Philadelphia.[3] By the generous grant of scholarships both free and loan and by an effective organization of University work suitable for student part-time jobs, everything possible has been done to ease the financial situation of deserving students.

Professor Alexander Hamilton Frey, A. B., J. S. D., who was a Visiting Professor in 1930-31 returns to us from Duke University Law School as full time professor in charge of the courses in Business Associations. He announces important changes in the program for these courses. Instead of teaching Partnerships exclusively as a Second Year course and Corporations exclusively as a Third Year course, the fundamentals of organization and the rights and liabilities of all forms of business associations will be covered in one year; in the second year of the course those students desiring more specialized and intensive training will be carried into the problems of corporate reorganization, merger, finance and accounting. This year the teaching of Third Year Corporations will be carried on without much change of content, Thomas K. Finletter, Esq., of New York, conducting a seminar in advanced phases of the subject.

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[1] 1931-32 enrollment was 443; this year's enrollment is 411. The loss last year was about 11%.

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CLASS DISTRIBUTION

	1931–32	1932–33
First Year	182	179
Second Year	128	119
Third Year	124	105
Graduate and Unclassified	9	8
	443	411

[3] Institutional and geographical distribution of the First Year:

DEGREE DISTRIBUTION, FIRST YEAR CLASS

University of Pennsylvania:		Franklin and Marshall	6	Princeton	16
College	24	Georgetown	4	Rutgers	2
Wharton	31	Gettysburg	1	St. Joseph's	6
Miscellaneous	1	Grove City	1	St. Thomas	8
	— 56	Harvard	2	Susquehanna	2
Other Institutions:		Haverford	4	Swarthmore	4
Amherst	1	Lafayette	6	Syracuse	1
Bucknell	1	Lehigh	5	Temple	7
Catholic University of America	1	Michigan University	1	Trinity	1
Centre	2	Moravian	1	Ursinus	2
Clark	1	Muhlenberg	5	Villanova	2
Cornell	2	Oregon State Agricultural College	1	Williams	2
Delaware University	1	Pennsylvania Military	1	Wesleyan	3
Dickinson	3	Pennsylvania State	8	Yale	7
Drexel Institute	1			Total	178

31+% from University of Pennsylvania.
68+% from other institutions.

GEOGRAPHICAL DISTRIBUTION

	1931–32	1932–33
Philadelphia	41+%	38+%
Pennsylvania (outside Philadelphia)	42+%	48+%
Other States and foreign countries	15+%	13+%

Professor Fowler V. Harper of the Law School of the University of Indiana has come as a Harrison Research Fellow. He is working with Professor Bohlen in Tort law and they are jointly conducting a Seminar in advanced problems in Torts open to a selected group of Third Year students.

The Library's growing collection of Public and Private International Law has been separately housed in the Henry Reed Hatfield Rooms adjoining McMurtrie Hall. Mr. Hatfield, of the Philadelphia Bar, was a generous donor towards the special Law School Fund raised in 1928. A finely equipped Periodical Room has also been added during the past year.

"Soviet Administration of Criminal Law", by Judah Zelitch, LL. M. 1932 (Gowen Fellow), appeared from the University of Pennsylvania Press in December last and has received very favorable notice in serious law journals both of this country and of Europe.

The July Pennsylvania Bar examinations resulted in 89+% of passes out of 109 examinees.

Herbert F. Goodrich.

VICARIOUS LIABILITY OF AUTOMOBILE OWNERS FOR ACTS OF GRATUITOUS BAILEES—Deaths due to motor vehicle accidents in the year 1931 reached the almost unbelievable total of 33,500.[1] The persons injured numbered almost a a million and the property damage is estimated at two and one-half billions of dollars.[2] It is not surprising therefore to find courts treating automobiles as dangerous instrumentalities in sustaining regulatory legislation as coming within the police power,[3] as well as for various other purposes.[4] It is, however, an astonishing fact that no court today bases the liability of an automobile owner for the damage done by his automobile on the familiar legal ground that he is the owner of a dangerous instrumentality,[5] and this despite the fact that owners of railroad trains which took toll of but one-fourth as many lives in the same period[6] are held liable as owners of dangerous instrumentalities.[7] Florida, in

[1] ACCIDENT FACTS (1932). Prepared by National Safety Council, Chicago, Ill.

[2] TREMENDOUS TRIFLES (1932). Prepared by Travelers Insurance Co., Hartford, Conn. The number of injured was estimated as 997,600.

[3] Hess v. Pawloski, 274 U. S. 352, 47 Sup. Ct. 632 (1927); Opinion of Justices, 251 Mass. 569, 147 N. E. 681 (1925); Bessan v. Public Service, 135 Misc. 368, 237 N. Y. Supp. 689 (1929).

[4] District of Columbia v. Colts, 282 U. S. 63, 51 Sup. Ct. 52 (1930) (automobile is dangerous instrumentality; therefore, driving it carelessly is a grave offense, a crime within article III of the Constitution guaranteeing a jury trial); Schweinhart v. Flaherty, 49 F. (2d) 533 (App. D. C. 1931) (dangerous character of automobile extends ambit of servant's scope of employment for which master is liable).

[5] In almost every case in which it is sought to impose vicarious liability on an automobile owner, the court rules out liability based on the dangerous instrumentality doctrine as one possible solution. See Note (1920) 16 A. L. R. 270; Shipp v. Davis, 141 So. 366 (Ala. 1932). The reasoning of the court in Lewis v. Amorous, 3 Ga. App. 50, 59 S. E. 338 (1907) is typical of that found in many cases, says the court at page 55, 59 S. E. at 340, "It is insisted in argument that automobiles are to be classed with ferocious animals, and that the law relating to the duty of the owners of such animals is to be applied. It is not the ferocity of automobiles that is to be feared, but the ferocity of those who drive them. Until human agency intervenes, they are usually harmless. While by reason of the rate of pay allotted to the judges of this state, few if any have ever owned one of these machines, yet some of them have occasionally ridden in them, thereby acquiring some knowledge of them; and we have, therefore, found out that there are times when these machines not only lack ferocity, but assume such an indisposition to go that it taxes the limit of human ingenuity to make them move at all. They are not to be classed with bad dogs, vicious bulls, evil disposed mules and the like."

[6] COMPENSATION REPORT, *infra* note 46, p. 18.

[7] "But the immunity from tort [where the tort arises from the wanton and wilful act of the servant] is not generally extended to railroads, whose servants are entrusted with such

1920, announced the doctrine of liability in this situation, on the basis of dangerous instrumentality.[8] That this was never followed in any other jurisdiction may account for the fact that in a series of recent cases [9] in which Florida has once again had an opportunity to review this situation, it has changed its stand, so that while still recognizing the dangerous character of an automobile, it no longer bases liability on the common law ground of dangerous instrumentality.

The method by which the Florida court reaches the same conclusion on a different theory is both novel and interesting. It points out that the statutes of Florida recognize that the auto is a more dangerous agency than a "hammer, horse and buggy, or wheelbarrow" since it has been declared subject to special statutory regulation as to use not imposed on these other instrumentalities. One mode of regulation is a requirement that the owner shall register his vehicle and obtain a license to operate it on the public highways.[10] The court concludes that since no one has a right to use the auto except pursuant to the owner's license, it follows that if the owner chooses voluntarily to entrust his car and license to another for the purpose of operation, he makes that other an agent and thus becomes liable for his acts or omissions under the doctrine of *"respondeat superior."* Any other result, according to this court, "would be to practically defeat the statutory intent and purpose which is obvious in requiring cars to be registered in the name of the owner." [11]

This extraordinary theory achieves the same result as that reached in the earlier case of *Southern Cotton Oil Co. v. Anderson* [12] by means of the dangerous instrumentality doctrine. A much more devious process of reasoning is employed, however, but one which nevertheless will not stand up under close scrutiny. The statutory intent seems clear, especially in view of recent amendments,[13] that it is the registering of the *car* and not the *owner* which is required.[14] This makes the entire reasoning of the court illogical inasmuch as the liability is imposed on *owners* by means of discovery of a legislative intent in these licensing laws. It is an interesting commentary that despite the prevalence of licensing

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dangerous instrumentalities and have thereby such unusual and extensive means of doing mischief." Stewart v. Cary Lumber Co., 146 N. C. 47 at 49, 59 S. E. 545 at 546 (1907); *accord:* Euting v. Chicago Ry., 116 Wis. 13, 92 N. W. 358 (1902).

[8] Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920).

[9] Herr v. Butler, 101 Fla. 1125, 132 So. 815 (1931); Engleman v. Traeger, 136 So. 527 (Fla. 1931); Greene v. Miller, 136 So. 532 (Fla. 1931); *cf.* Williams v. Younghusband, 57 F. (2d) 139 (C. C. A. 5th, 1932) where the federal circuit court sitting in Florida decided that an automobile owner is not liable for the negligence of a gratuitous bailee, although admitting that the language of the Florida courts made such a distinction. It distinguished the case at bar from the Florida cases, *supra,* on the ground that it involved a gratuitous bailee while the other cases involved persons who were servants, agents or relatives. An examination of these cases, however, shows that the servants were outside the scope of their employment, Engleman v. Traeger, *supra;* Eppinger v. Trembly, 90 Fla. 145, 106 So. 879 (1925), and the son in one case at least was not a member of the owner's family within the meaning of the family purpose doctrine. Herr v. Butler, *supra.* The cases are, therefore, indistinguishable.

[10] FLA. COMP. LAWS (1927) § 1281.

[11] Engleman v. Traeger, *supra* note 9, at 531.

[12] *Supra* note 8.

[13] Fla. Laws 1931, c. 15625.

[14] Brown, *A Comment on the Duties and Responsibilities of a Motor Vehicle Owner in Florida* (1932) 5 FLA. STATE BAR ASS'N L. J. 469. Mr. Brown in his comment also points out that if the court persists in its doctrine it may be open to challenge on constitutional grounds since the registration, which is the basis of liability, is required only of residents of Florida. In imposing liability, therefore, the court would unfairly discriminate in favor of non-residents of the state, a purely arbitrary distinction and as such invalid under decisions like Smith v. Cahoon, 283 U. S. 553, 51 Sup. Ct. 582 (1931); Louisville, *etc.* v. Coleman, 277 U. S. 32, 48 Sup. Ct. 423 (1928).

statutes[15] (very similar to those in force in Florida) no other court has discovered from these statutes a legislative intent to make an owner liable for the negligence of one driving his car with his knowledge and consent.[16]

Obviously, this is a device to reach the result of imposing vicarious liability on automobile owners where neither ordinary principles of agency nor the classical tort view of liability for fault only would impose liability. The same desire is to be seen in other jurisdictions. Some seventeen courts have adopted what is known as the "family purpose" doctrine.[17] This is to the effect that, where the head of the family purchases an automobile for the use of members of his family as well as himself, members of the family when using the car for their own enjoyment are quasi-agents, at least to the extent of making the head of the family liable for their negligence in operating the car.[18] These courts reason that he (the owner) has made their enjoyment his "affair and business" and when they are using the "family auto" with his consent and knowledge for their own purposes they are furthering his business.[19] Other courts, greater in number than those just considered,[20] (despite the remarks in many cases that a majority of

[15] N. C. CODE ANN. (Michie, 1931) §§ 2621 (6), 2621 (9); PA. STAT. ANN. (Purdon, 1930) tit. 75, § 92a; TENN. CODE (Williams, Shannon, Harsh, 1932) § 1149.

[16] Tyson v. Frutchey, 194 N. C. 750, 140 S. E. 718 (1927); Piquet v. Wazelle, 288 Pa. 463, 136 Atl. 787 (1927); Scates v. Sandefer, 163 Tenn. 558, 44 S. W. (2d) 310 (1932).

[17] Benton v. Regeser, 20 Ariz. 273, 179 Pac. 966 (1919); Boyd v. Close, 82 Colo. 150, 257 Pac. 1079 (1927); Maher v. Fahy, 112 Conn. 76, 151 Atl. 318 (1930); Espy v. Ash, 42 Ga. App. 487, 156 S. E. 474 (1931); Baldwin v. Parsons, 193 Iowa 75, 186 N. W. 665 (1922); Wallace v. Hall, 32 S. W. (2d) 324 (Ky. 1930); Pearson v. Northland, 184 Minn. 560, 239 N. W. 602 (1931); Dow v. Legg, 120 Neb. 271, 231 N. W. 747 (1930); Boes v. Howell, 24 N. M. 142, 173 Pac. 966 (1918); Grier v. Woodside, 200 N. C. 759, 158 S. E. 491 (1931); Carpenter v. Dunnell, 61 N. D. 263, 237 N. W. 779 (1931); Foster v. Farra, 117 Ore. 286, 243 Pac. 278 (1926) (with which *cf.* McDowell v. Hurner, 13 P. (2d) 600, 601 (Ore. 1932)); Mooney v. Gilreath, 124 S. C. 1, 117 S. E. 186 (1923); Manhardt v. Vaughn, 159 Tenn. 272, 17 S. W. (2d) 5 (1929) (motorcycle); Trice v. Bridgewater, 51 S. W. (2d) 797 (Tex. 1932); Hanson v. Eilers, 164 Wash. 185, 2 P. (2d) 719 (1931); Watson v. Bailey, 105 W. Va. 416, 143 S. E. 95 (1931).

[18] Those courts which actually accept the family purpose doctrine should be distinguished from those which appear to do so in cases where the real basis of the decision is an agency relationship between owner and operator. This is particularly true where one member of the family is driving other members. There the operator is very often engaged in the owner's affairs (which according to well accepted principles of agency law need not be *business* affairs, as witness a family chauffeur) and is not going about in his own interest. There is, therefore, no necessity to invoke the family purpose doctrine to impose liability. This confusion is apparent in Note (1930) 64 A. L. R. 844, 848, where courts are cited as accepting the family purpose doctrine in jurisdictions which actually do not accept the doctrine, see *supra* note 17; *cf.* 7 & 8 HUDDY, CYCLOPEDIA OF AUTOMOBILE LAW (1931) 312 *et seq.*

[19] "The family car doctrine has from time to time had various theories for its foundation among them being (a) family relationship; (b) ownership of the automobile; (c) dangerous instrumentality; and (d) principal and agent or master and servant. It originally sprang from the idea that an automobile was a dangerous instrumentality . . . notwithstanding this idea has been abandoned, the proposition of law established under such mistaken belief still remains." Alexander, J. (dissenting) in Trice v. Bridgewater, 51 S. W. (2d) 797 at 801 (Ky. 1932); *accord,* Kennedy v. Wolf, 221 Ky. 111, 298 S. W. 188 (1927).

[20] Parker v. Wilson, 179 Ala. 361, 60 So. 150 (1912); Featherstone v. Jackson, 183 Ark. 373, 36 S. W. (2d) 405 (1931); Idemoto v. Scheidecker, 193 Cal. 653, 226 Pac. 922 (1924); Smith v. Callahan, 144 Atl. 46 (Del. 1928); Anderson v. Byrnes, 344 Ill. 240, 176 N. E. 374 (1931); McGoran v. Cromwell, 86 Ind. App. 107, 156 N. E. 413 (1927); Daily v. Schneider, 118 Kan. 295, 234 Pac. 951 (1925); Davis v. Shaw, 142 So. 301 (La. App. 1932); Robinson v. Warren, 151 Atl. 10 (Me. 1930); Schneider v. Schneider, 160 Md. 18, 152 Atl. 498 (1930); Field v. Evans, 262 Mass. 315, 159 N. E. 751 (1928); Loehr v. Abell, 174 Mich. 590, 140 N. W. 926 (1913); Smith v. Dauber, 155 Miss. 694, 125 So. 102 (1929); Murphy v. Loeffler, 327 Mo. 1244, 39 S. W. (2d) 550 (1931); Clauson v. Schroeder, 63 Mont. 488, 208 Pac. 924 (1922); Lafond v. Richardson, 84 N. H. 288, 149 Atl. 600 (1930); Missell v. Hayes, 86 N. J. L. 348, 91 Atl. 322 (1914); Van Blaricom v. Dodgson, 220 N. Y. 111, 115 N. E. 443 (1917); Bretzfelder v. Demaree, 102 Ohio 105, 130 N. E. 505 (1921); Schmitt v. Dier, 111 Okla. 23, 238 Pac. 410 (1925); Piquet v. Wazelle, 288 Pa. 463, 136 Atl. 787 (1927); Landry v. Richmond, 45 R. I. 504, 124 Atl. 263 (1924); Behseleck v. Andrus, S. D. Sup. Ct., Sept.

courts have adopted the doctrine) [21] do not accept the family purpose doctrine though accepting the same principles of the law of agency which are generally said to be the basis of the family purpose doctrine. They decide logically that calling a man an agent of another, while he is taking care of his own affairs, is a contradiction in terms [22] and since the parent-owner is liable neither because of his relationship [23] nor his ownership [24] he is not liable at all. These courts recognize that the real reason behind the acceptance of the doctrine is the realization of the dangerous quality of the automobile and since they do not base liability on the dangerous instrumentality [25] doctrine they feel logically bound to reject the family purpose doctrine.[26] They also point out that this illogical method of thought does not appear in any other field of law except that in which an automobile is concerned.[27] Thus, this time by means of the family purpose doctrine, we again find the courts reaching a conclusion not sanctioned by conservative legal precedent but one more likely to reach a preferable social result in view of the fact noted by many courts that in a majority of cases the use of this device is the only means of finding a defendant capable of compensating for the injury suffered by the plaintiff.[28]

Another method used to impose vicarious liability on automobile owners, in disregard of accepted principles of tort and agency law is illustrated by the recent case of *Gouchee v. Wagner*.[29] That case decides that irrespective of section 59 of the *N. Y. Vehicle and Traffic Law*,[30] an owner of an automobile, rid-

10, 1932; McFarlane v. Winters, 47 Utah 598, 155 Pac. 437 (1916); Jones v. Knapp, 156 Atl. 399 (Vt. 1931); Blair v. Broadwater, 121 Va. 301, 93 S. E. 632 (1917); Papke v. Haerle, 189 Wis. 156, 207 N. W. 261 (1926).

[21] Hope, *The Doctrine of the Family Automobile* (1922) 8 A. B. A. J. 359, 360; BERRY, AUTOMOBILES (6th ed. 1930) § 1473; 20 R. C. L. 629. But *cf.* Lattin, *Vicarious Liability and the Family Automobile* (1928) 26 MICH. L. REV. 846, 851, where the author shows that the family purpose doctrine was never accepted by a majority of courts, but suggests that numerous repetitions of the statement that "the great weight of authority supports the family purpose doctrine" may have been instrumental in establishing that doctrine in courts of first impression.

[22] Arkin v. Page, 287 Ill. 420, 123 N. E. 30 (1919); Stumpf v. Montgomery, 101 Okla. 257, 226 Pac. 65 (1914).

[23] Cruse-Crawford Co. v. Rucker, 220 Ala. 101, 123 So. 897 (1929); Olson v. Ames Co., 195 Iowa 419, 192 N. W. 143 (1923); Flaherty v. Helfont, 123 Me. 134, 122 Atl. 180 (1923); Khoury v. Edison Co., 265 Mass. 236, 164 N. E. 77 (1928).

[24] King v. Smythe, 140 Tenn. 217, 204 S. W. 296 (1918); McFarlane v. Winters, *supra* note 20.

[25] Arkin v. Page, *supra* note 22; Watkins v. Clark, 103 Kan. 629, 176 Pac. 131 (1918).

[26] Clauson v. Schroeder, Smith v. Callahan, both *supra* note 20; Watson v. Clark, *supra* note 25.

[27] See Smith v. Callahan, *supra* note 20, at 49; Doran v. Thomsen, 76 N. J. L. 754, 761, 71 Atl. 296, 299 (1908); Van Blaricom v. Dodgson, *supra* note 20, at 115, 115 N. E. at 445; Felcyn v. Gamble, 241 N. W. 37 (Minn. 1932) decides that the family purpose doctrine is not applicable to motor boats.

[28] "A judgment for damages against an infant daughter or an infant son, or a son without support and property, who is living as a member of the family, would be an empty form. . . . The dictates of natural justice should require that the owner should be responsible for its negligent operation." King v. Smythe, *supra* note 24, at 226, 204 S. W. at 298; *accord:* Watson v. Burley, 105 W. Va. 416, 143 S. E. 95 (1928).

[29] 257 N. Y. 344, 178 N. E. 553 (1931).

[30] "Every owner of a motor vehicle . . . shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle . . . by any person legally using or operating the same with the permission express or implied of such owner."

The court said at page 348, 178 N. E. at 554, "When the respondent [owner] entered the car, he regained dominion over it, and the rule applicable under the statute in the absence of the owner ceased to apply." The court appears to regard it as still an open question whether the statute carries the owner's responsibility so far as to make his gratuitous licensee's negligence a bar to his own recovery. *Cf.* (1931) 31 COL. L. REV. 1193, where it is suggested that a proper interpretation of the statute does not require an imputation of negligence coincident with the imposition of liability.

ing with a person, whether a member of his family or a stranger, whom he permits to drive, is liable, because of his ownership and presence, for any injury done by the permittee's negligent driving, and furthermore is barred by such negligence from recovery against a third person whose negligence concurs with that of the driver in bringing about an injury to the owner. This doctrine has been announced by other courts [31] and deserves careful attention in determining whether there is any merit in it.

By the common law of New York mere ownership is not enough to make the owner responsible for one whom he merely permits to drive his car,[32] the owner's presence in the car being required in order that the driver's negligence should have the above-mentioned effects. The basis of liability cannot therefore depend on the *right* to control since according to well settled principles of that part of the law of agency relating to master and servant, once granted the master has the *right* to control, then whether or not he is present to exercise that right is immaterial. The presence of the owner being required for liability, it would seem then that his power to control is all important. In the present case the facts are not clear but it appears that defendant's wife, who was driving, and his mother-in-law sat in the front of the car while the defendant occupied a back seat.[33] This indicates that he had a limited power, if any, to observe the manner in which the car was driven. On this point, courts seem to be in accord that there is no duty for anyone, owner or otherwise, to be on the alert to do back seat driving.[34] The court itself says that the power of control is unimportant and that "The mere fact that he (defendant) chose to sit in the rear seat and refrained from directing its (the car's) operation did not change his rights or limit his liability." [35] We are therefore forced to the conclusion that neither the right to control nor the power to control is the basis of liability in this situation.

It is, then, again evident that the basis of vicarious liability lies outside the field of both tort and agency law and seems to be a doctrine developed to meet the exigencies of the peculiar situation where one for whom an owner is not ordinarily liable causes an injury through the use of the auto. The statutory law shows an even more distinct trend in this direction.[36] Since the first statute on the subject in Michigan in 1909 [37] other jurisdictions have passed statutes

[31] Fuller v. Metcalf, 125 Me. 77, 130 Atl. 875 (1925); Risser v. Parr, 180 Iowa 1146, 168 N. W. 865 (1918). The court in the Maine case said, "You shall not be permitted to shuffle yourself down to the bottom of the pack as a mere passenger and turn up a probably impecunious and irresponsible driver as the only person subject to liability." *Contra:* Beaudoin v. Mahaney, 159 Atl. 567 (Me. 1932) which holds that the owner can give up the right to control although present and establish a bailor-bailee relationship.

[32] Fisher v. International Ry., 112 Misc. 212, 182 N. Y. Supp. 313 (1920); Fallon v. Swackhamer, 226 N. Y. 444, 123 N. E. 737 (1919).

[33] 257 N. Y. at 345, 178 N. E. at 553.

[34] See Southern Pacific Co. v. Wright, 248 Fed. 261, 264; Chambers v. Hawkins, 233 Ky. 211, 214, 25 S. W. (2d) 363, 364 (1930); Kirkpatrick v. Phila. R. T., 290 Pa. 288, 298, 138 Atl. 830, 834 (1927).

[35] 257 N. Y. at 348, 178 N. E. at 554.

[36] Some of the more important articles showing this trend are Heyting, *Automobiles and Vicarious Liability* (1930) 16 A. B. A. J. 225; Heyting, *Automobiles and Compulsory Liability Insurance* (1930) 16 A. B. A. J. 362; Heyting, *Statutory Liability of Automobile Insurance Companies* (1931) 17 A. B. A. J. 362; Dowling, *Motor Vehicle Statutes: "Hit and Run"; Service of Process on Non-Residents* (1931) 17 A. B. A. J. 796; Note (1931) *Vicarious Liability: Statutes as a Guide to Its Basis,* 45 HARV. L. REV. 171 at 173.

In the case of airplanes, the idea of liability without fault seems to be an accepted fact; see UNIFORM STATE LAW FOR AERONAUTICS, § 5. For a discussion of liability both at common law and under statute, see ROLFING, NATIONAL REGULATION OF AERONAUTICS (1931) 252 *et seq.*

[37] MICH. PUB. ACTS 1909, No. 318, § 10 (3). This statute was declared unconstitutional in Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615 (1913), on the ground that it imposed liability on the owner even though he did not consent to the use of the car and that this was not a necessary regulation in the exercise of the police power. The present act, *infra* note

imposing on a car owner liability for the negligence of one driving his automobile with his knowledge and consent.[38] This regulation has been upheld as constitutional being within the police power of the state, since an automobile is such a dangerous instrumentality.[39] Other jurisdictions have imposed the same sort of liability where the permittee is a lessee [40] and again where he is a minor.[41] Another type of statute, showing the same trend is that which gives the injured plaintiff a lien on the car by the negligent driving of which he was injured.[42]

The customary method of writing insurance policies for owners, to cover the negligence of those whom they permit to drive,[43] has the effect of enforcing a vicarious liability on automobile owners since it is they who pay the insurance premiums. This form of policy is made mandatory on every motorist in the state of Massachusetts under the Compulsory Insurance Act of 1925.[44] The same sort of policy is required by Financial Responsibility Acts, adopted in many jurisdictions,[45] in the case of a motorist who has been guilty of negligence in a prior accident.

A further plan for the vicarious liability of automobile owners has recently been advanced by the Committee to Study Compensation for Automobile Accidents of Columbia University.[46] After a study running over a period of two

38, does not have this objectionable feature since it imposes liability only where the operator drives with the consent of the owner. This was declared constitutional in Stapleton v. Independent Brewing Co., 198 Mich. 170, 164 N. W. 520 (1917).

[39] IOWA CODE (1931) § 5026; MICH. COMP. LAWS (1929) § 4648; N. Y. VEH. & TR. LAW (1929) § 59; R. I. Pub. Laws 1929-30, c. 1429, § 10. For a discussion of the ambiguous Rhode Island statute, see Heyting, *supra* note 36, 16 A. B. A. J. 225, at pp. 226-227.

[40] Opinion of the Justices, *supra* note 3; Stapleton v. Independent Brewing Co., *supra* note 37.

[41] CONN. GEN. STAT. (1930) § 1627; ME. REV. STAT. (1930) c. 29, § 99. In Arizona, Illinois, and New Jersey, acts requiring compulsory insurance covering lessees achieve the same result. ARIZ. CODE (Struckmeyer, 1928) § 1649; ILL. REV. STAT. (Cahill, 1931) c. 95a, § 47 (1); N. J. COMP. STAT. (Supp. 1930) § 135-108.

[42] ARIZ. CODE (Struckmeyer, 1928) § 1671 (under 18 years of age); Del. Laws 1929, c. 10, § 72 (18 years); Idaho Session Laws 1929, c. 274, § 1 (16 years); IOWA CODE (1927) § 5026 (15 years); ME. REV. STAT. (1930) c. 29, § 35 (18 years); PA. STAT. ANN. (Purdon, 1930) tit. 75, § 211 (16 years).

ALA. CODE (Michie, 1928) § 1397 (152) (insurance required between ages of 16 and 18); CONN. GEN. STAT. (1930) §§ 1590-1592 (under 16 years and unaccompanied by an adult); *cf.* CAL. GEN. LAWS (Deering, 1931) Act 5128, §§ 61, 62 (minor required to have adult sign his license application and adult so signing jointly liable with minor).

[43] S. C. CIV. CODE (1932) § 8785; TENN. CODE (Williams, Shannon, Harsh, 1932) § 3079a, 197; VA. CODE ANN. (Michie, 1930) § 2145 (74).

[44] SUNDERLEIN, AUTOMOBILE INSURANCE (1929) §§ 926-931; 13-14 HUDDY, *supra* note 18, at 410. For statutory requirements of so-called omnibus coverage clause, see *infra* note 45.

[45] MASS. CUM. STAT. (1927) c. 90, §§ 1A, 34A-34I (Mass. Acts 1925, c. 346). For a discussion see Compensation Report, *infra* note 46, c. VII.

[46] CAL. GEN. LAWS (Deering, 1931) Act 5128, §§ 36½, 36¾; Ind. Acts 1931, c. 179, § 12; ME. REV. STAT. (1930) c. 29, § 91; Md. Laws 1931, c. 498 (187m); Neb. Laws 1931, c. 108 (22c); N. Y. VEH. & TR. LAW (1929) § 94; N. C. CODE ANN. (Michie, 1931) § 2621 (112) (123); N. D. Laws 1929, c. 163.

The following states have Financial Responsibility Laws also fashioned after that sponsored by the American Automobile Association, but the insurance policy need not contain an omnibus clause covering those operating the automobile with the consent of the insured. CONN. GEN. STAT. (1930) § 1609; Del. Laws 1931, c. 14; N. J. COMP. STAT. (Supp. 1930) § 135, 119; R. I. Laws 1929, c. 1429; still others merely demand a bond covering the delinquent driver or owner. MINN. STAT. (Mason, 1927) § 2720-61; S. D. Session Laws 1931, c. 179. Three other jurisdictions merely require that past judgments be satisfied: Iowa Laws 1929, c. 118; N. H. Laws 1927, c. 54; Wis. Laws 1929, c. 76. These latter statutes become important as regards vicarious liability only when by some other method vicarious liability is imposed on the delinquent motorist who falls within the mandatory provisions of the statute. For a discussion of these statutes see COMPENSATION REPORT, *infra* note 46, c. VI, and HEYTING, *supra* note 36, 16 A. B. A. J. 362.

[46] The Committee recently submitted a report, dated February 1, 1932, to the Columbia University Council for Research in the Social Sciences, entitled—REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS. For a detailed discussion of the ad-

years the committee came to the conclusion that the present theory of liability in automobile cases was entirely inadequate from a social point of view and suggested a plan placing an even greater legal liability on the automobile owner than any court has yet evolved. "The general purpose of the compensation plan is to impose on the owners of motor vehicles a limited liability, without regard to fault, for personal injury or death caused by the operation of their motor vehicles. The liability to pay rests primarily on the owner of the motor vehicle and the plan provides security for this liability by requiring every registered motor vehicle to be covered by compensation insurance." [47] The basis of liability under this plan is the causal connection between the automobile, driven by owner or his permittee, and the injury.[48] The liability is fixed by means of a scale based on that used in the workmen's compensation acts.[49]

This plan, although not yet adopted in any jurisdiction, shows the same trend to impose vicarious liability on automobile owners that is present in court decisions and legislative enactments. The tendency is by no means limited to this country. Professor Deak has recently pointed out that the French courts have worked out a doctrine of liability without fault in place of a previously accepted one of liability for fault only, at least as respects pedestrian accidents.[50] In Canada, three provinces have statutes similar to those adopted in this country making an owner liable for his permittee's negligence.[51] England has gone to the extent of declaring that at common law, the permittee is an agent of the owner,[52] and has already adopted an act for compulsory insurance similar to that adopted in Massachusetts.[53] There is also pending before the House of Lords a bill which would extend the owner's liability in pedestrian cases almost to the extent suggested by the compensation plan, liability being based on the proof that the operation of the motor vehicle is the legal cause of the injury and contributory negligence is the only defense.[54] In Germany the lawful possessor is liable regardless of fault for damages caused by the operation of a motor vehicle.[55] Finland, Norway and Denmark have legislation not only requiring compulsory insurance but imposing a liability without fault on owners for injuries caused by their motor vehicles.[56]

It is clear that in one way or another the owners of automobiles have been made responsible for the manner in which they are used by persons whom they permit to use them, or at least to some more or less restricted class of such persons. It is equally clear that the trend in the direction of vicarious liability of this sort is increasing constantly. One cannot escape the conviction that it is

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vantages and disadvantages of this plan see, *Compensation for Automobile Accidents: A Symposium* (1932) 32 COL. L. REV. 785, I Smith, *The Problem and Its Solution;* II Lilly, *Criticism of the Proposed Solution;* III Dowling, *Constitutional Questions.*

[47] COMPENSATION REPORT, *supra* note 46, at 138 and 143 (g). See page 238, section 4 of Director's draft of parts of Compensation Act.

[48] *Id.* pp. 133, 138 (b).

[49] *Id.* p. 140 (f).

[50] Deak, *Automobile Accidents: A Comparative Study of the Law of Liability in Europe* (1931) 79 U. OF PA. L. REV. 271.

[51] STATUTES OF ONTARIO, 6 Ed. VII, c. 46, § 13 (1906); 2 GEO. V, c. 48, §§ 19-23 (1912); 4 GEO. V, c. 36, § 3 (1914); STATUTES OF ALBERTA, 1-2 GEO. V, c. 6, § 35 (1911-12); STATUTES OF MANITOBA, 5 GEO. V, c. 41, § 14 (1915).

[52] Parker v. Miller, 42 T. L. R. 408 (1926); but *cf.* Britt v. Galmoye, 44 T. L. R. 294 (1928), where a master was held not to be liable for the negligence of a servant to whom he loaned his motor vehicle for the servant's own benefit.

[53] ROAD TRAFFIC ACT, 20 & 21 GEO. V, c. 43, §§ 35-43 (1930).

[54] This proposed bill has recently passed its second reading before the House of Lords. See Parliamentary Debates of the House of Lords for June 2, 1932.

[55] Deak, *supra* note 50, at 300.

[56] *Id.* pp. 301-303.

the character of the automobile, putting it on the ground of being a dangerous instrumentality or not, which has really led the courts to the rules traveling these roads to a common end. As has been noted above, the principles enunciated in imposing liability are not consistent with accepted principles of the law dealing either with personal or vicarious liability, and are, in many instances, limited to that field of the law concerned with motor vehicles. The result however is to add to one defendant, the permittee, who is likely to be irresponsible financially, another defendant more likely to be responsible, an automobile owner. It is evident that these theories are tools through which a distinctly social result is accomplished legally. As one great judge has said, speaking in another particular,

> "Finally, when the social needs demand one result rather than another there are times when we must bend symmetry, ignore history, and sacrifice custom in the pursuit of other and larger ends." [57]

G. G. A.

[57] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921) 65.