St. John's Law Review

Volume 25
Number 2 *Volume 25, May 1951, Number 2*

Article 8

Mills v. Gabriel: A Procedural and Substantive Appraisal

St. John's Law Review

MILLS V. GABRIEL: A PROCEDURAL AND SUBSTANTIVE APPRAISAL

Introduction

The replacement of the horse and buggy by the automobile produced multiple social and legal problems and as a result of stringent common law rules operating upon this new means of transportation, many victims of personal and property injuries were left without an effective legal remedy. Corrective statutory measures were enacted sporadically, but frequently they were subverted by regressive or anomalous concepts as a consequence of the judicial construction process. *Mills v. Gabriel*[1] aptly illustrates this tendency.

It is the purpose of this note to present the *Mills* doctrine as it manifests itself in the procedural realm, and in addition, to treat critically its substantive value and desirability. With such as an objective, it becomes necessary to consider briefly common law and statutory precedents.

Common Law and Statutory Background[2]

The liability of an automobile owner for injury resulting from the negligence of his driver was limited by the common law to three clearly defined situations. The first of these was governed by the classic maxim *respondeat superior*. Thus an owner would be subjected to liability when a master-servant or principal-agent relationship existed, if the servant or agent was acting within the scope of his authority in furtherance of the master's or principal's business.[3] Again, the owner would be held liable by the common law when he was physically present in the automobile at the time of the accident. This so-called "presence" theory was a concomitant of the presumption of control over the driver by the owner.[4] Finally, an owner would be vicariously liable when he entrusted his vehicle to a known incompetent, thereby setting in motion a dangerous instrumentality.[5]

---

[1] 259 App. Div. 60, 18 N. Y. S. 2d 78 (2d Dep't 1940), *aff'd mem.*, 284 N. Y. 755, 31 N. E. 2d 512 (1940).

[2] See Note, 16 ST. JOHN'S L. REV. 222 (1942), for an extensive analysis of this subject matter.

[3] Psota v. Long Island R. R., 246 N. Y. 388, 159 N. E. 180 (1927); Potts v. Pardee, 220 N. Y. 431, 116 N. E. 78 (1917); Van Blaricom v. Dodgson, 220 N. Y. 111, 115 N. E. 443 (1917); *cf.* Gochee v. Wagner, 257 N. Y 344, 178 N. E. 553 (1931).

[4] Gochee v. Wagner, 257 N. Y. 344, 178 N. E. 553 (1931); *cf.* Potts v. Pardee, 220 N. Y. 431, 116 N. E. 78 (1917). However, the mere presence of the owner would not of itself render him conclusively liable. The presumption underlying this vicarious liability could be effectively rebutted by the owner's establishing the absence of control over the driver. Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406 (1915); *cf.* Piwowarski v. Cornwell, 273 N. Y. 226, 7 N. E. 2d 111 (1937).

[5] Steinberg v. Cauchois, 249 App. Div. 518, 293 N. Y. Supp. 147 (2d Dep't 1937). See RESTATEMENT, TORTS § 390 (1934).

As a plaintiff, an owner could succeed in a property damage suit [6] only where no liability would have been imputed to him if he were a defendant. Hence whenever an owner would be vicariously liable as a defendant, the common law would impute to him the contributory negligence of his driver so as to preclude a recovery.[7]

However, a bailor was not subjected to liability for the negligence of his bailee.[8] As a direct result of this strict common law attitude, which oppressed those who were unable to bear the loss, rather than those who were best able to make reparations, *viz.*, the owners, the New York Legislature enacted Section 282-e of the Highway Law [9] in 1924, the substance of which was subsequently set forth in Section 59 of the Vehicle and Traffic Law.[10] Under Section 59, the negligence of a bailee driver renders the bailor owner *liable and responsible* when the vehicle is lawfully operated upon a public highway with the express or implied permission of the owner.

It has been held that Section 59 does not affect the common law relation of master and servant upon proof that the servant's negligence occurred in his master's business.[11] *Gochee v. Wagner* [12] holds that Section 59 does not change the common law rule rendering liable an owner who is present in the automobile at the time of the accident and who is presumed to be in control. Thus Section 59 has effected no change in the common law rules of liability; it has merely created an additional liability.[13] Therefore it has no applicability to master-servant or principal-agent relationships, but is limited to the bailor-bailee situation.

Mills v. Gabriel [14]

The *Mills* case came within the purview of Section 59; yet common law precedents were relevant by way of analogy. It in-

---

[6] Since the common law "presence" doctrine still obtains, cases wherein an owner seeks recovery for *personal injuries* will not be dealt with herein. In such cases, the owner, necessarily being present at the time of the accident, will be denied recovery if he fails to rebut the presumption of control.

[7] PROSSER, TORTS 417 (1941); RESTATEMENT, TORTS §§ 485, 486 (1934).

[8] Dennis v. Glynn, 262 Mass. 233, 159 N. E. 516 (1928); *cf.* Piquet v. Wazelle, 288 Pa. 463, 136 Atl. 787 (1927); PROSSER, TORTS 500 (1941).

[9] Laws of N. Y. 1924, c. 534.

[10] Laws of N. Y. 1929, c. 54.

[11] Irwin v. Klein, 271 N. Y. 477, 3 N. E. 2d 601 (1936). However, even though a driver is nominally an "employee," if he were acting on his own behalf at the time of the accident, the owner may be liable under Section 59 upon a bailor-bailee theory. St. Andrassy v. Mooney, 262 N. Y. 368, 186 N. E. 867 (1933).

[12] 257 N. Y. 344, 178 N. E. 553 (1931).

[13] Gochee v. Wagner, 257 N. Y. 344, 178 N. E. 553 (1931); Psota v. Long Island R. R., 246 N. Y. 388, 159 N. E. 180 (1927). That Section 59 has abrogated the common law rule of *non-liability* is undisputed.

[14] See note 1 *supra.*

volved a property damage suit wherein the plaintiff's automobile was operated by a bailee, for his own purposes, with the absentee owner's permission. The defendant was the operator of his own automobile. Negligence on the part of both drivers being established, the defendant argued, relying upon common law parallelism, that Section 59 sanctioned the imputation of the bailee driver's negligence so as to preclude a recovery by the owner. This contention was rejected by the Appellate Division, whose language is of significance in view of the memorandum affirmance by the Court of Appeals.

After stating that at common law an owner was not liable for the negligence of a bailee driver and, therefore, that contributory negligence was not imputed to such an owner, the court continued:

> The statute does not change the common-law rule respecting the owner's right to recover *from* third persons under the circumstances disclosed by this record. Nor may it be invoked for the purpose of imputing the operator's negligence to the owner. It is applicable for that purpose only in actions brought *by* third persons against the owner. . . . It is suggested that if the statute does not apply, then the owner of each vehicle may recover against the other for property damage if both operators were bailees at the time of the accident, even though both were negligent.[15] This was always the rule at common law.[16]

Extension of the Mills Doctrine

The *Mills* doctrine, under which the negligence of a bailee driver constitutes no bar to a property damage suit by an automobile owner, but yet renders the selfsame owner liable when sued by a third party, has become an imposing and controlling precedent in the New York courts. Its ultimate implications were suggested in *Bandych v. Ross*[17] and *Gosselin v. Harrell*,[18] the fact patterns of which are procedurally significant.

In the *Bandych* case, the plaintiff owner instituted a property damage suit against the defendant owner and his son, who was operating his father's automobile in his absence, but with his permission and not in his business. The plaintiff's bailee was operating the plaintiff's automobile under like circumstances. A counterclaim was filed by the defendant owner based upon his property damage. Findings that the collision resulted from the concurring negligence of both drivers were amply supported by the evidence. The court, in holding that such negligence was not imputable to either owner, allowed each owner to recover from the other by means of a mutual

---

[15] This contention was the basis for the dissenting opinion of Mr. Justice Hagarty. *See* Mills v. Gabriel, 259 App. Div. 60, 62, 18 N. Y. S. 2d 78, 81 (2d Dep't 1940).

[16] Mills v. Gabriel, 259 App. Div. 60, 62, 18 N. Y. S. 2d 78, 80 (2d Dep't 1940). In reaching this conclusion, the Appellate Division adopted a construction which had been emphatically denounced five years earlier by Wilder, J., in Darrohn v. Russell, 154 Misc. 753, 277 N. Y. Supp. 783 (Rochester City Ct. 1935).

[17] 26 N. Y. S. 2d 830 (Utica City Ct. 1941).

[18] 194 Misc. 275, 86 N. Y. S. 2d 550 (Schenectady City Ct. 1949).

set-off, which resulted in the awarding of one judgment in favor of the plaintiff.[19] In passing, the court commented upon the illogical result which followed the application of the *Mills* doctrine; that permitting an equitable adjustment such as this in a negligence action seemed to be a departure from established legal principles.[20]

The *Gosselin* case likewise presents an example of the debatable conclusion to which the *Mills* case leads. It involved a collision causing damage to three automobiles, respectively owned by plaintiff *A*, plaintiff *B*, and defendant *C*. The operators of the automobiles owned by *A* and *C* were bailees, driving in the absence of their respective bailors, with their permission, but not on their business. Due to the concurring negligence of the bailees, the automobile of *B*, which was parked nearby, was struck and damaged by *C*'s automobile. Thereupon *A* instituted a property damage suit against *C*, wherein *C* counterclaimed, and *B* instituted a like suit against *A* and *C*. In the suit between *A* and *C*, the court held that *C* was liable to *A* because the negligence of his bailee was imputed to *C* by Section 59. Likewise, *A* was liable for *C*'s damages. Relying upon the *Mills* case, the court held that neither owner was precluded from recovering his damages in full. Therefore a judgment was rendered for plaintiff *A* against defendant *C*, and a judgment was rendered for *C*, on his counterclaim, against *A*.[21] In *B*'s suit against *A* and *C*, both defendants were held liable as joint tortfeasors and a judgment for *B* was rendered against them.

Procedural Significance and Practical Aspects of the Mills Doctrine [22]

The *Bandych* and *Gosselin* cases clearly indicate the manner in which the *Mills* case enhances the value of the many procedural "time savers" which the New York Civil Practice Act makes available to litigants of a property damage controversy. We next proceed to analyze the effective implementation of these procedural devices.

Assuming a typical fact pattern under the *Mills* principle, the plaintiff owner would institute a property damage suit against the defendant owner and also, in the usual case, against the bailee driver of the defendant's automobile. Thereupon, the defendant owner would interpose a counterclaim, for his property damage, against the

[19] The method by which the court arrived at this conclusion is presented with clarity in the carefully reasoned opinion of Walsh, J. The procedural question which was raised at the hearing of the plaintiff's motion to correct the judgment, due to the different grounds upon which the liability of the defendants was predicated, is omitted herein.

[20] Bandych v. Ross, 26 N. Y. S. 2d 830, 834 (Utica City Ct. 1941).

[21] It should be noted that separate judgments were rendered here in favor of the respective owners, while in the *Bandych* case, as a result of a mutual set-off pursuant to Section 477 of the Civil Practice Act, one judgment was rendered.

[22] The material herein is based upon an interview with the legal department of a large automobile liability insurance carrier and upon an appraisal, in the light of the Civil Practice Act, of relevant case materials. Also see note 6 *supra* as to scope limitations.

plaintiff owner. Such practice is authorized by Section 266 of the Civil Practice Act.

It would be very much to the defendant's advantage for him to bring the plaintiff's bailee into the action as a party, for upon the successful prosecution of his cause of action, the defendant could recover judgments against both the plaintiff owner and the plaintiff's bailee. As indicated by *Warren v. May*,[23] such an individual could be made a party, in the discretion of the court, by bringing a separate action against him and then moving for consolidation pursuant to Section 96 of the Civil Practice Act, or by a motion to bring him into the action as an additional defendant pursuant to Section 193(2). Such discretion will not be exercised in the latter instance.[24] While Section 271 of the Civil Practice Act authorizes the defendant to counterclaim against the plaintiff "along with" another person, thereby adding such person as a party defendant, it ". . . is primarily intended to permit a joinder of parties defendant only in contract actions where there is a joint liability or in some tort cases where the liability arises in the same acts of fraud or conspiracy, or under other circumstances where the proof against one defendant will be the same as against another. . . . It was not intended to be operative where the liability is joint and several and different proof will be required in establishing the cause of action against the parties brought in." [25]

In bringing the defendant's bailee into the action as a party defendant, the plaintiff owner may avail himself of the same procedural devices which are enumerated above as available to the counterclaiming defendant owner. However, the plaintiff may avoid any procedural difficulties, since the implementation of the measures is within the discretion of the court, by naming such bailee as a party defendant in the first instance, pursuant to Section 212(2) of the Civil Practice Act.[26]

If the defendant's bailee has been joined as a party defendant, the defendant owner may assert a cross-claim against him for indemnity pursuant to Section 264 of the Civil Practice Act. In the event that the plaintiff does not join such bailee as a party defendant,

---

[23] 243 App. Div. 620, 276 N. Y. Supp. 520 (2d Dep't 1935) (negligence action).

[24] A motion to add the plaintiff's bailee as a party defendant under the counterclaimed cause of action, pursuant to Rule 102(2) of the Rules of Civil Practice, which authorizes a motion to add or drop parties, should fare no better than one made under Section 193(2) of the Civil Practice Act, if the reasoning in the *Warren* case is applicable.

[25] Warren v. May, 243 App. Div. 620, 276 N. Y. Supp. 520, 522 (2d Dep't 1935) (negligence action). *Accord*, Zauderer v. Market St. Long Beach Realty Corp., 128 Misc. 364, 218 N. Y. Supp. 669 (Sup. Ct. 1926), *aff'd mem.*, 221 App. Div. 760, 222 N. Y. Supp. 925 (2d Dep't 1927).

[26] Cuban-Canadian Sugar Co., S. A. v. Arbuckle, 127 Misc. 64, 215 N. Y. Supp. 176 (Sup. Ct. 1926). It should be noted that the amendment to this section, by Laws of N. Y. 1949, c. 147, has made for a much more liberal practice.

the defendant owner may vouch-in the bailee, or implead him pursuant to Section 193-a of the Civil Practice Act.[27] Impleader undoubtedly would be the sounder practice, for it enables the defendant to seek indemnity from the actual tortfeasor in the same action, in the event that he is held vicariously liable to the plaintiff; whereas if he utilizes the vouching-in method, the defendant must prosecute an independent suit against his bailee for indemnity. These indemnity provisions likewise are available to the plaintiff as against his bailee in the action under the defendant's counterclaim.

Further pertinent procedural measures reveal themselves when there is a slight variation in the assumed fact pattern. Should the plaintiff choose to sue the defendant owner and the defendant's bailee separately, any of the three parties could subsequently move to consolidate the two actions pursuant to Section 96 of the Civil Practice Act. Consolidation would also be available where the defendant owner interposes a counterclaim against the plaintiff owner, but chooses to sue the plaintiff's bailee separately. Should actions be pending in different courts, *i.e.,* courts whose jurisdictions differ, Section 97, which authorizes consolidation under such circumstances, may be invoked.

Instead of moving to consolidate, the parties may utilize Section 96-a of the Civil Practice Act, which authorizes joint trials of two or more actions without consolidation. The chief difference between consolidation and jointly trying two or more actions is in the resulting judgment. Consolidation implies a merger of two or more actions with the eventual rendition of one judgment. Jointly trying two or more actions produces no such merger and separate judgments are rendered.

Thus it can be seen that the procedural device of consolidation readily adapts itself to the application of the *Mills* doctrine, which enables the respective owners to set-off their awarded damages. However, the same result is more easily accomplished where the defendant owner interposes a counterclaim in the action prosecuted by the plaintiff owner, rather than instituting an independent suit and thereafter resorting to consolidation. *Bandych v. Ross*[28] illustrates the counterclaim method and the use of a set-off, pursuant to Section 477 of the Civil Practice Act, with the court rendering one judgment for the set-off residue. However, in *Gosselin v. Harrell,*[29] the court rendered separate judgments under circumstances similar to those appearing in the *Bandych* case. It is submitted that the *Bandych* case reflects the sounder practice. Since the *Mills* case sanctions recoveries by both owners, it would appear to be more feasible for a court to render one judgment in favor of the owner who is entitled to recover the residue, after setting-off the respective recover-

[27] *See* Green v. Hudson Shoring Co., 191 Misc. 297, 301, 77 N. Y. S. 2d 842, 846 (Sup. Ct. 1947).
[28] See note 17 *supra.*
[29] See note 18 *supra.*

ies, than to render separate judgments in favor of each owner. Difficulties as to who should satisfy which judgment first would be completely avoided by such practice.

The foregoing treatment is limited to cases wherein automobile liability insurance carriers are not involved on behalf of either owner. Where such carriers are involved, a modification in the use of the procedural devices heretofore discussed is effected.

Generally an insurance carrier will attempt to effectuate a settlement by way of compromising claims asserted against it and/or its insured. Therefore litigation ensues only as a last resort. When litigation does arise, everyone connected with the subject matter usually will be named or impleaded as a party to the action. This is so notwithstanding that recoveries will not be permitted as against all of the named parties. Thus a carrier will bring its insured's bailee into the action, although the so-called "omnibus clause," which is a statutory requirement for liability policies issued by New York insurers,[30] covers not only the owner but in addition any other person, with exceptions not pertinent here, lawfully operating or using the insured's vehicle. Since the bailee is an insured person within the meaning of the policy, the insurer cannot be subrogated to the rights of the owner in this instance, because a carrier may not proceed against its insured for the purpose of indemnification. With the carrier assuming the liability of the owner, the advantage gained by cross-claiming, impleading, or vouching-in the bailee entirely disappears. The owner cannot both "eat his cake and have it"; his indemnification by the insurer precludes a similar indemnification by his bailee. The purpose in naming or impleading a bailee as a party is to facilitate any subsequent examination before trial, for Section 288 of the Civil Practice Act is more liberal with respect to the examination of parties than it is with respect to the examination of witnesses.

A carrier is bound by contract to represent its insured when a claim within the policy's liability coverage is asserted. However, such is not the case with respect to property damage suffered *by* the insured unless collision coverage was also procured. If such coverage was obtained, the carrier not only will defend but also will prosecute a counterclaim[31] on behalf of the insured. In the absence of such coverage, the insured must retain private counsel for the purpose of maintaining a counterclaim in the action wherein the insurer represents the insured with respect to liability coverage, or must retain such for the purpose of instituting a separate suit to recover for his damages.

Attention must be drawn to the use of the so-called "loan agreement." Section 210 of the Civil Practice Act provides that "every

---

[30] N. Y. INSURANCE LAW § 167(2).

[31] Since the counterclaim method usually is more feasible and less expensive, the carrier will rarely institute a separate action in such cases.

action must be prosecuted in the name of the real party in interest." Obviously if the insurer were to indemnify its insured with respect to collision coverage, it could no longer maintain an action or counterclaim for indemnity against the other owner or his bailee in the name of its insured, since by subrogation, the carrier has succeeded the insured as the real party in interest. Knowing that juries have a tendency to be prejudiced against insurers, the carriers resorted to the device of the loan agreement, whereunder the insured actually is reimbursed for his collision damage, but such indemnity is treated as an advance or loan. This fictitious loan, which has been approved by the courts, is to be "repaid" upon the successful prosecution of the insured's claim, wherein he appears as the real party in interest. With the 1950 amendment to Section 210,[32] the Legislature has affixed its approval to the sophistry of the loan agreement by declaring an insured person, who executes a loan agreement to an insurer, to be a real party in interest.

When two different carriers represent the plaintiff owner and the defendant owner in an action wherein the defendant counterclaims, a question arises as to the form of the judgments, *viz.*, whether a single judgment should be rendered as a result of a set-off or whether separate judgments should be rendered. As indicated above, the better practice would seem to be the rendition of a single judgment. However, since each carrier is bound by contract to make *full* reparations for injury caused by its insured, a set-off cannot properly be employed in such a case.[33] The insurance carriers have resolved this problem by submitting such controversies involving two or more carriers to arbitration societies. Where only one of the parties is insured, there would seem to be no objection to employing the set-off, with the resulting rendition of one judgment. Where the same carrier represents both owners, arbitration would seem to be the logical remedy; to hold otherwise would be to stamp approval upon a situation wherein the same carrier both seeks and resists a recovery.

A discussion of the practical aspects of the *Mills* principle would be incomplete without some consideration of the husband-wife situation. It is a matter of common knowledge that many husbands place the nominal title to their automobiles in their wives' names as a security measure, while retaining the control and, in many instances, the exclusive use of the vehicle Such manipulations are of no significance under the *Mills* doctrine, which views the one in whom the title reposes as the true owner. Therefore, despite the fact that the husband-driver is negligent and despite the fact that he maintains exclusive control over the automobile, the "owner"-wife may recover for property damage notwithstanding that the very funds recovered may pass into the exclusive control of the husband.

---

[32] Laws of N. Y. 1950, c. 529.

[33] This may explain the rendition of separate judgments in the *Gosselin* case, *supra* note 21 and text thereto.

Substantive Appraisal and Recommendations

Many jurists have criticized the doctrine promulgated by the *Mills* case, some doing so even prior to its formulation in 1940. This is best illustrated by the well-considered opinion of Mr. Justice Wilder in *Darrohn v. Russell.*[34] There, in a situation similar to those appearing in the subsequently decided *Bandych* and *Gosselin* cases, the court dismissed both the complaint and the counterclaim, holding that an owner is barred by the negligence of his bailee. Similarly, the court imputed the bailee's negligence to a plaintiff owner in *Renza v. Brennan,*[35] and, although the *Mills* doctrine governed the decision in the *Bandych* case,[36] the court deplored its startling and illogical consequence and approved the rationale of the *Darrohn* case. More recently, the result flowing from the application of the *Mills* principle has been termed an "apparently anomalous situation." [37] Yet, despite criticisms and recommendations from members of the bench and of the bar, the Legislature has seen fit to suffer the continuation of an altogether arbitrary doctrine——a doctrine not consonant with the bases for the common law rules of liability and non-liability.

The common law rule concerning contributory negligence, imputing such to a master or principal, was sound both in principle and in purpose. One who has the choice, freely exercised, in selecting another to act in his behalf should be responsible for any dereliction on the part of such selectee which causes injury to innocent third persons, and this is so whether he be a plaintiff or a defendant. The same reasoning should be applicable to the *Mills* situation. An owner should be required to entrust his vehicle to one who is both a competent and a conscientious operator. Having the opportunity to select such an operator, and being subject to a statutory liability for any injury caused by his operator, an owner should fare no better when he assumes the status of a plaintiff than he does in the capacity of a defendant. To argue otherwise is to sanction the granting of both an undeserved and an unwarranted privilege. Section 59 was enacted to protect innocent *third* parties, and their welfare is not enhanced by an extension of benefits to one who voluntarily entrusts to another a force capable of incalculable destruction. As was stated in the *Darrohn* case with reference to the argument advanced and supported in the subsequent *Mills* construction of Section 59: "Is it both a sword and a shield? Does it impale him [the owner] upon a new liability to third persons but protect him from responsibility for his own damage?" [38]

---

[34] 154 Misc. 753, 277 N. Y. Supp. 783 (Rochester City Ct. 1935) (excellent critique of *Mills* doctrine).

[35] 165 Misc. 96, 300 N. Y. Supp. 221 (Westchester County Ct. 1937).

[36] See note 20 *supra* and text thereto.

[37] Cote v. Autocar Sales & Service Co., 191 Misc. 988, 991, 79 N. Y. S. 2d 130, 133 (Sup. Ct. 1948).

[38] Darrohn v. Russell, 154 Misc. 753, 754, 277 N. Y. Supp. 783, 785 (Rochester City Ct. 1935).

Realizing this fallacious position, other jurisdictions have taken steps to impute contributory negligence to the owner. The Iowa court, in *Secured Finance Co. v. Chicago, R. I. & P. Ry.*,[39] held, under a statute similar in substance to Section 59, that the contributory negligence of a bailee was imputable to the owner so as to preclude his recovery. The court stated, as the reason for the refusal by the common law to impute contributory negligence to a bailor, that since a bailor was not liable as a defendant for the negligence of his bailee, the bailee's contributory negligence was not imputed to him as a plaintiff. When such reason fell, due to the enactment of a statutory liability, the rule of non-imputation itself fell for want of a proper reason to support it. It has been held in Michigan [40] that, since an owner would be liable as a defendant under the applicable statutory provision, the contributory negligence of his bailee would be imputed to him when he assumed the role of a plaintiff.[41]

In Louisiana [42] it was held under a statute imposing liability upon a father for the negligent acts of his son, that a plaintiff father was precluded from recovering damages for injury to his automobile as a result of a collision in which his son was contributorily negligent.

California's statute, which had been almost identical to Section 59, was amended in 1937 so as to impute the negligence of the operator to the owner "for all purposes of civil damages." [43] The California court in *Milgate v. Wraith* [44] held that such amendment was constitutional and that it conclusively effected a bar to an action by the owner. In answer to the plaintiff's contention that the *Mills* principle should be considered in construing the California statute, the court stated that since the statute in view of the 1937 amendment was no longer similar to that which was operative in New York, the *Mills* case was of no weight in construing it.

Although the New York courts are responsible for the promulgation and the preservation of the *Mills* principle, the creators of Section 59 planted the seed from which it germinated. Therefore legislative action is required as the means by which this "hybrid" formula is to be revamped, if it is to be revamped at all. As was pointed out in the *Mills* case itself: "If the statute operates illogically or unjustly it is for the Legislature and not the courts to extend its scope." [45]

---

[39] 207 Iowa 1105, 224 N. W. 88 (1929).

[40] Meisenheimer v. Pullen, 271 Mich. 509, 260 N. W. 756 (1935).

[41] To the same effect is National Trucking & Storage Co. v. Driscoll, 64 A. 2d 304 (D. C. Mun. App. 1949) (statute created an agency relationship).

[42] Di Leo v. Du Montier, 195 So. 74 (La. App. 1940).

[43] CAL. VEHICLE CODE § 402 (1935), as amended, CAL. STATS. 1937, p. 2353.

[44] 19 Cal. 2d 297, 121 P. 2d 10 (1942) (containing an excellent review of the earlier New York cases holding contrary to the subsequent *Mills* doctrine).

[45] Mills v. Gabriel, 259 App. Div. 60, 62, 18 N. Y. S. 2d 78, 81 (2d Dep't 1940).

Such legislative action was attempted, but proved to be unsuccessful. On February 18, 1948, a bill[46] was introduced in the New York Assembly, the pertinent provisions of which are as follows:

§ 59. Negligence *and contributory negligence* of operator other than owner attributable to owner. Every owner of a motor vehicle . . . operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle . . . , in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner. *The contributory negligence of any person legally using or operating a motor vehicle . . . , with the permission of the owner express or implied, in the business of such owner or otherwise shall be imputable to such owner.*

After its introduction, the proposal was referred to committee, from which it was never reported out. To pigeonhole such a corrective measure is to perpetuate New York's adherence to a basically unsound rule. Other jurisdictions have taken the initiative, so far as similar statutes were concerned, and it remains to be seen for how long a period New York will be content to lag behind. It is submitted that "By amending the Vehicle and Traffic Law so that the negligence of the driver will be imputed to the owner in all cases where the vehicle is used with his consent, express or implied, the legislature may achieve a result that is uniformly just."[47]

THE "NOW OR HEREAFTER ACQUIRED PERSONAL PROPERTY" CLAUSE

Introduction

Nowhere in the New York Law of Mortgages is "judicial surgery" and accurate statutory draftsmanship more needed than in that aspect of the law which treats of "personalty" clauses in real property mortgages. Hindered by loose language,[1] stare decisis,[2]

---

[46] 1948 Sess. Int. 2260, Pr. No. 2414, introduced by Assemblyman Samuel Roman. At the same time, Senator Seymour Halpern introduced a similar bill in the New York Senate, 1948 Sess. Int. 1910, Pr. No. 2092.

[47] Note, 16 ST. JOHN'S L. REV. 222, 230 (1942).

[1] See note 26 *infra*.

[2] In a speech made before the New York State Bar Association, Judge Cardozo said: ". . . bearing in mind the fact that sellers of the ranges under contracts of conditional sale had made their sales in the faith that the ranges were personalty merely, and had refrained from taking measures to protect themselves by recording their bills of sale in ways that would have been appropriate if they had supposed that the ranges were annexations to the land . . . a majority of the court believed that in view of the probable reliance by innocent parties upon a decision which the same majority would have refused to make if the question had been a new one, there was nothing to do except