Fordham Law Review

Volume 36 | Issue 4 Article 9

1968

Case Notes

CASE NOTES

Conflict of Laws—*Babcock* Doctrine Extended—Section 388 of the New York Vehicle and Traffic Law Applied to Out-Of-State Accident.—The defendant lent his car to his brother-in-law in New York for a trip to Florida. On the way back to New York the brother-in-law was involved in an accident in North Carolina, in which his wife was killed and his son injured. All parties were residents of New York, and the car was registered and insured in New York. The son and the administrator of the wife's estate sued the defendant-owner of the vehicle for injuries and wrongful death, respectively, under section 388 of the New York Vehicle and Traffic Law.[1] The defendant alleged that a North Carolina statute should be applied.[2] The New York Court of Appeals, holding that New York law applied, gave extra-territorial effect to section 388 of the New York Vehicle and Traffic Law[3] and section 130 of the New York Decedent Estate Law,[4] involving wrongful death actions.[5] The court extended the doctrine of *Babcock v. Jackson*[6] on the grounds that New York had more significant contacts with the occurrence than North Carolina and that it would have been illogical to distinguish the liability of an owner for an out-of-state accident in a guest-host relationship as determined by *Babcock* and the liability for permissive use of a vehicle outside the state. *Farber v. Smolack*, 20 N.Y.2d 198, 229 N.E.2d 36, 282 N.Y.S.2d 248 (1967).

The trend in conflict of laws in tort actions away from the *lex loci delicti*[7]

1. N.Y. Veh. & Traf. Law § 388 (formerly N.Y. Veh. & Traf. Law § 59). "Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner."

2. N.C. Gen. Stat. § 20-71.1 (1965). This statute has been construed as a rule of evidence only so that if a jury finds that the use of the vehicle was not for the owner's benefit, he is not liable. Mitchell v. White, 256 N.C. 437, 441, 124 S.E.2d 137, 140 (1962). See also Hartley v. Smith, 239 N.C. 170, 79 S.E.2d 767 (1954). The New York statute, § 388 of the Vehicle and Traffic Law, provides for liability without regard for the owner's benefit. Farber v. Smolack, 20 N.Y.2d 198, 202, 229 N.E.2d 36, 38, 282 N.Y.S.2d 248, 251 (1967). There was evidence in the instant case that the owner drove the car while in Florida and thus did benefit, but the court did not choose to decide whether under North Carolina law, this was sufficient to impose liability. Id. at 202, 229 N.E.2d at 38, 282 N.Y.S.2d at 251.

3. Prior law had refused to apply § 388 to accidents occurring outside New York. Selles v. Smith, 4 N.Y.2d 412, 151 N.E.2d 838, 176 N.Y.S.2d 267 (1958); Cherwien v. Geiter, 272 N.Y. 165, 5 N.E.2d 185 (1936); Miranda v. Lo Curto, 249 N.Y. 191, 163 N.E. 557 (1928).

4. Now N.Y. E.P.T.L. § 5-4.1.

5. 20 N.Y.2d at 204, 229 N.E.2d at 40, 282 N.Y.S.2d at 253.

6. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

7. Naphtali v. Lafazan, 8 N.Y.2d 1097, 171 N.E.2d 462, 209 N.Y.S.2d 317 (1960); Kaufman v. American Youth Hostels, Inc., 5 N.Y.2d 1016, 158 N.E.2d 128, 185 N.Y.S.2d

theory and toward the "significant contacts" theory began in New York with *Babcock v. Jackson.*[8] While the decision has been followed in New York[9] and in other jurisdictions,[10] it has generated much discussion as to the nature and scope of its doctrine.[11]

In *Babcock,* two New York residents were driving through Ontario, Canada on a weekend trip when the defendant negligently collided with a stone wall, injuring the plaintiff. In a suit in New York, the defendant alleged that Ontario's guest-host statute[12] barred the plaintiff's recovery. The New York contacts were the residences of the parties, the place of the inception and termination of the guest-host relationship, and the registration and insurance of the vehicle. The court of appeals reviewed New York's strong governmental interest in avoiding such guest-host statutes[13] and, reasoning by analogy from a decision in the field of contracts[14] and relying heavily on the *Restatement (Second) of Conflict of Laws,*[15] held that the fortuitous occurrence of an accident

268 (1959), modifying, 6 App. Div. 2d 223, 177 N.Y.S.2d 587 (2d Dep't 1958); Poplar v. Bourjois, Inc., 298 N.Y. 62, 80 N.E.2d 334 (1948); Kerfoot v. Kelley, 294 N.Y. 288, 62 N.E.2d 74 (1945). See also R. Leflar, The Law of Conflict of Laws 207 (1959).

8. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). See Currie, Comments on Babcock v. Jackson, A Recent Development in Conflict of Laws, 63 Colum. L. Rev. 1212, 1233 (1963); Comment, The Aftermath of Babcock, 54 Calif. L. Rev. 1301 (1966); 32 Fordham L. Rev. 158 (1963). On the general topic of choice of law in tort actions see Ehrenzweig, "False Conflicts" and the "Better Rule": Threat and Promise in Multistate Tort Law, 53 Va. L. Rev. 847 (1967).

9. See Glenn v. Advertising Publications, Inc., 251 F. Supp. 889, 905 (S.D.N.Y. 1966); Berner v. British Commonwealth Pac. Airlines, Ltd., 230 F. Supp. 240 (S.D.N.Y. 1964); Oltarsh v. Aetna Ins. Co., 15 N.Y.2d 111, 204 N.E.2d 622, 256 N.Y.S.2d 577 (1965); Steinberg v. Fishman, 24 App. Div. 2d 457, 260 N.Y.S.2d 403 (2d Dep't 1965); Leonard v. O'Mara, 22 App. Div. 2d 835, 253 N.Y.S.2d 826 (3d Dep't 1964); Brewi v. Handrich, 45 Misc. 2d 121, 256 N.Y.S.2d 171 (Sup. Ct. 1965); Murphy v. Barron, 45 Misc. 2d 905, 258 N.Y.S.2d 139 (Sup. Ct. 1965).

10. Gore v. Northeast Airlines, Inc., 373 F.2d 717 (2d Cir. 1967); Reich v. Purcell, 63 Cal. Rptr. 31, 432 P.2d 727 (Sup. Ct. 1967); Myers v. Gaither, 232 A.2d 577 (D.C. Cir. 1967); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964).

11. Ehrenzweig, Foreign Guest Statutes and Forum Accidents: Against the Desperanto of State "Interests," 68 Colum. L. Rev. 49 (1968); Currie, supra note 8; Leflar, Choice-Influencing Considerations in Conflicts of Law, 41 N.Y.U.L. Rev. 267 (1966); Comment, The Aftermath of Babcock, supra note 8; 30 Brooklyn L. Rev. 107 (1963); 32 Fordham L. Rev. 158 (1963); 77 Harv. L. Rev. 355 (1963); 20 N.Y.U. Intra. L. Rev. 79 (1965); 49 Va. L. Rev. 1362 (1963).

12. Ont. Rev. Stat. ch. 172, § 105(2) (1960). This statute has recently been amended to allow recovery for the driver's gross negligence. An Act to Amend the Highway Traffic Act, 1966, 14-15 Eliz. II, ch. 64, § 20(2). Ehrenzweig, supra note 8, hints that Babcock may have been the reason for the change in the law.

13. 12 N.Y.2d at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

14. Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 99 (1954).

15. Restatement (Second) of Conflict of Laws § 379(1) (Tentative Draft No. 8, 1963).

in one jurisdiction should not control the rights of the parties where all the significant contacts with the occurrence were in another jurisdiction.[16]

Before the guidelines set forth in *Babcock* became enrooted in New York law, the court of appeals decided *Dym v. Gordon*.[17] Both the plaintiff and the defendant in *Dym* were New York residents attending summer school in Colorado. They met in Colorado, and the plaintiff was injured when the defendant negligently collided with another vehicle[18] in Colorado while on a short trip to a golf lesson. In a New York suit, the defendant pleaded a Colorado guest-host statute,[19] which allowed recovery from a host only where the host was willfully and wantonly negligent.[20] The court of appeals, in a 4-3 decision, held that Colorado law applied and denied recovery because the defendant's negligence was not "willful and wanton."[21] Although the *Dym* court said it was affirming the *Babcock* rule and merely applying it,[22] it actually departed from it and confused the law of New York. *Babcock* relied heavily on New York's public policy aversion to guest-host statutes in applying the significant contacts test,[23] while the *Dym* court specifically stated that such public policy should "not be treated as 'contacts' which are found then to outweigh the factual contacts."[24] The *Dym* court, although denying that the situs of the formation of the relationship alone is controlling[25] and stating that the "general intent of the parties"[26] should be considered, proceeded to use the situs as the controlling factor after concluding that the parties intended to have Colorado law apply to their relationship: "in this case the law of the state in which the parties were living and in which the relationship was created must be held to be controlling."[27] The court found a "general intent" to adopt the law of Colorado from the fact that both parties were "living" in Colorado, although both were domiciled in New York. In placing the emphasis on the situs and the intent, the court displaced domicile and public policy as prime factors to be considered in applying the *Babcock* "contacts" doctrine.[28]

While writers and attorneys were debating the effect of the *Dym* decision on the *Babcock* rule,[29] the court of appeals decided *Macey v. Rozbicki*,[30] which

16. 12 N.Y.2d at 484, 191 N.E.2d at 285, 240 N.Y.S.2d at 752.

17. 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

18. The vehicle was operated by a Kansas driver and was registered in Kansas. 16 N.Y.2d at 130, 209 N.E.2d at 798, 262 N.Y.S.2d at 471 (dissenting opinion).

19. Colo. Rev. Stat. Ann. § 13-9-1 (1963).

20. Colo. Rev. Stat. Ann. § 13-9-1 (1963).

21. 16 N.Y.2d at 120, 209 N.E.2d at 792, 262 N.Y.S.2d at 463.

22. Id. at 128, 209 N.E.2d at 797, 262 N.Y.S.2d at 470.

23. 12 N.Y.2d at 482, 191 N.E.2d at 284, 240 N.Y.S.2d at 750.

24. 16 N.Y.2d at 126, 209 N.E.2d at 796, 262 N.Y.S.2d at 468.

25. Id. at 125, 209 N.E.2d at 795, 262 N.Y.S.2d at 467.

26. Id., 209 N.E.2d at 795, 262 N.Y.S.2d at 467.

27. Id. at 128, 209 N.E.2d at 797, 262 N.Y.S.2d at 470.

28. Id. at 127, 209 N.E.2d at 796, 262 N.Y.S.2d at 468-69.

29. See Ehrenzweig, supra note 8; Comment, The Aftermath of Babcock, supra note 8; 34 Fordham L. Rev. 711 (1966); 20 N.Y.U. Intra. L. Rev. 79 (1965).

30. 18 N.Y.2d 289, 221 N.E.2d 380, 274 N.Y.S.2d 591 (1966).

somewhat alleviated the confusion. The plaintiff, a New York resident, was visiting her sister, a New York resident, at the sister's summer home in Canada. While driving in Canada with her sister, who was driving with the defendant-owner's permission, the plaintiff was injured through the negligence of the sister. In a New York suit, the defendant pleaded the Ontario guest-host statute[31] as a defense and summary judgment for him was granted and affirmed in the appellate division on the basis of *Dym*.[32] The court of appeals, however, reasoned that the chance meeting in *Dym* could be distinguished from the "planned" meeting in *Macey* and reversed the lower courts.[33] The fact that in *Macey* the trip began and was to end in Canada was termed insignificant by the court.[34]

The then Chief Judge Desmond, writing for the majority in *Macey*, did not mention New York's governmental interest and public policy against guest-host statutes.[35] However, in a concurring opinion in *Macey*,[36] Judge Keating expressed doubts as to *Dym's* correctness and advanced his own theory for deciding *Macey* in favor of the plaintiff. He reasoned that New York's insurance laws were designed to protect a New York resident from liability outside the state and do not make distinctions between guests and other persons. The policies of New York should therefore control, he concluded, in cases involving substantial contacts with New York.[37]

Although the instant case does not mention the governmental interest of New York, it seems clear that it was considered:

> In addressing ourselves to the policy of treating this sort of transitory tort arising entirely from New York relationships as governed by New York law, there is no logical basis to distinguish the application . . . of the New York law of liability to

31. Ont. Rev. Stat. ch. 172, § 105(2) (1960). This is the same statute as in Babcock. See note 12 supra.

32. 23 App. Div. 2d 532, 256 N.Y.S.2d 202 (4th Dep't 1965).

33. 18 N.Y.2d at 292, 221 N.E.2d at 381-82, 274 N.Y.S.2d at 593.

34. Id., 221 N.E.2d at 381-82, 274 N.Y.S.2d at 593.

35. Perhaps he felt that his and Judge Fuld's recent dissenting opinions in Dym, which were based on the governmental interest theory toward domiciliaries and the public policy of New York as set forth in Babcock, covered the subject adequately and did not need repeating in Macey. 16 N.Y.2d at 134, 209 N.E.2d at 800, 262 N.Y.S.2d at 474 (dissenting opinion). See also Chief Judge Desmond's concurring opinion in Davenport v. Webb, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962), where public policy was considered: "there is no New York public policy or other bar . . . . " Id. at 395, 183 N.E.2d at 905, 230 N.Y.S.2d at 20.

36. 18 N.Y.2d at 292, 221 N.E.2d at 382, 274 N.Y.S.2d at 593 (concurring opinion).

37. Id. at 293, 221 N.E.2d at 382, 274 N.Y.S.2d at 594 (concurring opinion). In Macey, both the majority and the concurring opinions failed to note that section 388 of the New York Vehicle and Traffic Law may have been a bar to the plaintiff's action. Prior to the instant case and Babcock, § 388 had never been applied to accidents outside New York because such application would have been a violation of lex loci delicti. See cases cited in note 3 supra.

gratuitous guests and the New York law of liability arising from permissive use of a vehicle.[38]

In comparing the relationship created by the lending of a vehicle and the gratuitous guest relationship, the court seems to be relying on the reasoning in *Babcock* that governmental interest and public policy do play an important part in the choice of law problem. Although the court did not discuss New York's public policy with respect to the lending of a vehicle, a glance at the history of the law will show that there is a strong policy for the protection of persons injured through the lending of a vehicle in New York.[39]

Because the court of appeals reasoned that it would be "highly incongruous and unreal to have . . . *Babcock* apply . . . where the victim of the tort is injured but not where he is killed,"[40] it applied Pennsylvania law in an action for wrongful death that occurred when a plane crashed over Maryland.[41] All the significant contacts were with Pennsylvania and the only contact Maryland had with the occurrence was its chance happening there. The court held that Pennsylvania, where the deceased was a resident and where the defendant solicited business leading to the plaintiff's death,[42] had a greater interest in having its policies of wrongful death upheld. New York's own interest in the wrongful death of its residents was enunciated in *Kilberg v. Northeast Airlines, Inc.*,[43] where the court refused to apply a limitation on damages in a Massachusetts wrongful death statute,[44] even though the court used this statute as a basis for recovery. The court based its decision on New York's policy against such limitations in wrongful death actions.[45] Therefore, the instant case held that New York's wrongful death statutes were applicable to deaths occurring outside the state under the guidelines in *Babcock*, *Kilberg*, and *Long v. Pan American World Airways Inc.*[46] As was done with the decisions that failed to give effect

38. 20 N.Y.2d at 203-04, 229 N.E.2d at 39, 282 N.Y.S.2d at 252.

39. Section 388 of the New York Vehicle and Traffic Law, which changed the common law (Miranda v. Lo Curto, 249 N.Y. 191, 163 N.E. 557 (1928)) was enacted to alleviate the hardship of those injured as a result of the lending of a vehicle in New York to one without financial responsibility. N.Y. Law Revision Comm'n Report, N.Y. Leg. Doc. No. 65(G), p. 593 (1958). To protect the owner of such a vehicle from this new liability, a provision of the New York Insurance Law, which does not distinguish between in-state and out-of-state accidents, was amended requiring protection in all automobile policies issued in New York. Id. This provision, now in N.Y. Ins. Law § 167(2), was discussed in Macey without reference to § 388. 18 N.Y.2d at 293, 221 N.E.2d at 382, 274 N.Y.S.2d at 594 (concurring opinion). See note 36 supra.

40. Long v. Pan Am. World Airways, Inc., 16 N.Y.2d 337, 343, 213 N.E.2d 796, 799, 266 N.Y.S.2d 513, 518 (1965).

41. Id. at 343, 213 N.E.2d at 799, 266 N.Y.S.2d at 517.

42. Id. at 341, 213 N.E.2d at 798, 266 N.Y.S.2d at 516.

43. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961). But see Davenport v. Webb, 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962).

44. Mass. Ann. Laws ch. 229, § 2 (1955).

45. 9 N.Y.2d at 41-42, 172 N.E.2d at 529, 211 N.Y.S.2d at 137.

46. 20 N.Y.2d at 204, 229 N.E.2d at 40, 282 N.Y.S.2d at 253.

to section 388 of the New York Vehicle and Traffic Law outside the state, the instant court overruled the decisions failing to give New York Decedent Estate Law section 130 effect outside the state.[47]

With the court of appeals' open reliance on governmental interest in *Long* and its apparent reliance thereon in *Macey* and in the instant case, it appears that the statement in *Dym* that a governmental interest approach is "too provincial"[48] should be disregarded. Moreover, the decision in the instant case suggests a reevaluation of two recent New York cases, *Fornaro v. Jill Bros., Inc.*[49] and *Davenport v. Webb*.[50]

In *Fornaro*, the plaintiff's decedent, a five year old boy, was killed while riding in the defendant corporation's car in New Jersey. The car, which was registered and customarily used in New Jersey, was being driven with the defendant's permission on a personal shopping trip. Both the decedent and the defendant corporation were New York residents. The decedent had arrived at the defendant's New Jersey property the night before the accident and had begun the trip in New Jersey. The appellate division[51] ruled, without extensive analysis, that New Jersey had more contacts with the occurrence than did New York and applied New Jersey law.[52] Analysis was not really necessary because, as the court pointed out, section 388 of the New York Vehicle and Traffic Law, the statute invoked in the case, had no application to accidents outside the state.[53] The court of appeals, in a short opinion, affirmed the appellate division and noted that there was evidence that the property in New Jersey was a truck farm operated by the defendant and the driver of the car was a resident of the farm.[54] While New Jersey had greater quantitative contacts, New York had significant qualitative contacts such as the domicile of the parties and the policy of protecting those injured as a result of the lending of a vehicle to one without financial responsibility.[55] The weight to be given to this policy has not been fully announced in the cases to date,[56] and, therefore, the *Fornaro* decision

47. See note 3 supra.

48. 16 N.Y.2d at 126, 209 N.E.2d at 796, 262 N.Y.S.2d at 468.

49. 22 App. Div. 2d 695, 253 N.Y.S.2d 771 (2d Dep't 1964), aff'd mem., 15 N.Y.2d 819, 205 N.E.2d 862, 257 N.Y.S.2d 938 (1965).

50. 11 N.Y.2d 392, 183 N.E.2d 902, 230 N.Y.S.2d 17 (1962).

51. 22 App. Div. 2d 695, 253 N.Y.S.2d 771 (2d Dep't 1964).

52. Under New Jersey law, the permittee must be on the owner's business before the owner will be liable for his negligence. Ruchlin v. A.G. Motor Sales Corp., 127 N.J.L. 378, 22 A.2d 767 (Sup. Ct. 1941); Spelde v. Galtieri, 102 N.J.L. 203, 130 A. 526 (Ct. Er. & App. 1925).

53. 22 App. Div. 2d at 696, 253 N.Y.S.2d at 773-74. See cases cited in note 3 supra.

54. 15 N.Y.2d at 820, 205 N.E.2d at 862, 257 N.Y.S.2d at 939.

55. See note 39 supra.

56. See cases cited in note 3 supra. The general policy of New York with respect to the protection of those injured in automobile accidents can be found in N.Y. Veh. & Traf. Law § 310(2), however, this section is primarily an introduction to the mandatory insurance provisions of New York and not a statement of policy with respect to the lending of a vehicle. See Duprey v. Security Mut. Cas. Co., 43 Misc. 2d 811, 252 N.Y.S.2d 375 (Sup. Ct. 1964), rev'd on other grounds, 22 App. Div. 2d 544, 256 N.Y.S.2d 987 (3d Dep't 1965).

may be sound. However, should a situation with slightly different quantitative contacts arise, the court may feel compelled by the policy behind section 388 to apply New York law.

In *Davenport*, which was decided before *Babcock*, the plaintiff's decedent was killed in an automobile crash in Maryland. The plaintiff sued in New York for wrongful death and recovered under Maryland law.[57] The court did not include prejudgment interest because the Maryland statute did not provide for it.[58] The plaintiff alleged that the court should have awarded such interest based on sections 130-32 of the New York Decedent Estate Law,[59] relying on *Kilberg* to support a departure from the law of Maryland. The court of appeals held that no prejudgment interest should be awarded because the "damages for a tort [are] . . . governed by the law of the place where the wrong occurred . . . [and] interest . . . is 'part of the damages' [and, we will not add] interest . . . unless *lex loci delictus* authorizes such an addition."[60] In addition, the court stated that New York Decedent Estate Law section 132[61] must be read with New York Decedent Estate Law sections 130-31 which have not been given effect to deaths occurring outside the state.[62] In the future, under the *Babcock* rule, the law of New York would be applied to these facts where New York has the most significant relationship with the issue presented,[63] and the instant case would allow New York Decedent Estate Law sections 130-32[64] to be applied, even though the death occurred outside the state. Therefore, should facts similar to *Davenport* occur again, there will be a different result.[65]

The emphasis on the quantitative contacts such as residence, place of the formation of the relationship, and time spent in a jurisdiction will continue to

---

See also Kell v. Henderson, 47 Misc. 2d 992, 995, 263 N.Y.S.2d 647, 650-51 (Sup. Ct. 1965), aff'd, 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (3d Dep't 1966), which discusses New York's interest in § 388.

57. 15 App. Div. 2d 42, 222 N.Y.S.2d 566 (1st Dep't 1961).

58. Id. at 43, 222 N.Y.S.2d at 567. See Md. Ann. Code art. 67 (1957).

59. N.Y. Deced. Est. Law §§ 130-32.

60. 11 N.Y.2d at 393-94, 183 N.E.2d at 903, 230 N.Y.S.2d at 18-19 (citations omitted).

61. N.Y. Deced. Est. Law § 132 (now N.Y. E.P.T.L. § 5-4.3).

62. 11 N.Y.2d at 395, 183 N.E.2d at 904-05, 230 N.Y.S.2d at 20; Murmann v. New York, N.H. & H.R.R. Co., 258 N.Y. 447, 180 N.E. 114 (1932).

63. The opinions of the courts in Davenport do not reveal the extent of the contacts with New York. In Dym, the court mentions that domicile of the parties was the only New York contact in Davenport. 16 N.Y.2d at 128, 209 N.E.2d at 797, 262 N.Y.S.2d at 470. The analysis in the text is based on the assumption that there will be enough contacts with New York to allow New York law to be applied.

64. Now, N.Y. E.P.T.L. §§ 5-4.1-4.3.

65. One federal court has reasoned that the New York Court of Appeals would not reverse Davenport v. Webb on the strength of Babcock alone because the statute which gives rise to the cause of action should determine the damages and interest. Berner v. British Commonwealth Pac. Airlines, Ltd., 230 F. Supp. 240, 245-46 (S.D.N.Y. 1964). Section 388 of the New York Vehicle and Traffic Law may now give rise to the cause of action in accidents outside the state and thus, there seems to be no basis for the conclusion in Berner.

be used as contacts, as will governmental interests and public policy.[66] With the extension of *Babcock* to New York's wrongful death and permittee statutes in the instant case, it appears that the significant contacts test will continue to expand and that decisions such as *Dym*, which limit it, will become increasingly unimportant.

Constitutional Law—Illegitimate Children Denied Equal Protection of Laws.—Three indigent mothers applying to Prince George's County, Maryland, Welfare Department for aid to their illegitimate children, revealed in answer to Department questions that they had a total of eight illegitimate children (five Negro and three Caucasian[1]). The Welfare Department required that the mothers provide the State's Attorney with information about the fathers which might enable the state to recover support money.[2] On the basis of the information given by the mothers, criminal neglect proceedings were commenced against two of them,[3] and civil proceedings were brought under a Maryland statute to declare the children "neglected" because they were "living in a home which fails to provide a stable moral environment."[4] The statute provides five criteria to

66. The weight given to New York's public policy is emphasized by Kell v. Henderson, 47 Misc. 2d 992, 263 N.Y.S.2d 647 (Sup. Ct. 1965), aff'd, 26 App. Div. 2d 595, 270 N.Y.S.2d 552 (3d Dep't 1966), where the court was faced with the converse of the Babcock facts: two Ontario residents were driving through New York on a weekend trip when the plaintiff was injured through the negligence of the defendant. The court held that Babcock did not apply because a plaintiff injured in New York has a cause of action notwithstanding his residence or contacts with another jurisdiction. Id., 263 N.Y.S.2d at 647. The correctness of this decision is doubtful even in light of New York's strong policies. See Rosenberg, An Opinion for the New York Court of Appeals, 67 Colum. L. Rev. 459 (1967); Trautman, A Comment, 67 Colum. L. Rev. 465 (1967).

1. Letter from Arthur A. Marshall, State's Attorney for Prince George's County, Maryland, to Fordham Law Review, January 2, 1968.

2. See Md. Ann. Code art. 88A, § 5A (Supp. 1967).

3. People v. C., JA-7382, 7383 (Prince George's County Cir. Ct., Md., filed May 24, 1967) in 9 Welfare L. Bull. 6 (July, 1967); People v. P., JA-7386, 7387, 7388 (Prince George's County Cir. Ct., Md., filed May 24, 1967) in 9 Welfare L. Bull. 6 (July, 1967).

4. Md. Ann. Code art. 26, § 52(f)(6) (1966). The statute defines a "neglected child" as a "child (1) who is without proper guardianship; (2) whose parent, guardian or person with whom the child lives, by reason of cruelty, mental incapacity, immorality or depravity, is unfit to care properly for such a child; (3) who is under unlawful or improper care, supervision, custody or restraint, by any person, corporation, agency, association, institution or other organization or who is unlawfully kept out of school; (4) whose parent, guardian or custodian neglects or refuses, when able to do so, to provide necessary medical, surgical, institutional or hospital care for such child; (5) who is in such condition of want or suffering, or is under such improper guardianship or control, or is engaged in such occupation as to injure or endanger the morals or health of himself or others; or (6) who is living in a home which fails to provide a stable moral environment. In determining whether such stable moral environment exists, the court shall consider, among other things, whether the parent, guardian, or person with whom the child lives (i) Is unable to provide such environment by reasons

determine "whether such stable moral environment exists;"[5] the court held that these children were "neglected" *solely* because their mothers had given birth to more than one illegitimate child.[6] *In re B.C.*, JA-7384 (Prince George's County Cir. Ct. Md., Sept. 21, 1967), appeal docketed, Md. Ct. App. No. 353, 1967 Term.

The court's declaration that these children were neglected and therefore subject to removal to the custody of the Welfare Department,[7] solely because their mothers had given birth to more than one illegitimate child, was an improper interpretation of the relevant statute. This statute provides that in determining whether a "stable moral environment exists, the court shall consider *among other things*," five factors.[8] In the context of the statute the phrase "among other things" requires a detailed inquiry as to whether the mother in question and her home are fit for the rearing of children. In this case there was no showing that these children were actually neglected; there was merely a showing of the existence of illegitimate children in the family.[9] The bill, as originally proposed, provided that "lack of a stable moral environment" would be *"prima facie"* established by the five criteria listed.[10] Before the statute was enacted, "prima facie" was stricken and "among other things" substituted.[11] This seems to be a legislative mandate against declaring "neglect" based on a finding that one of the listed criteria was met.[12]

---

of immaturity or emotional, mental or physical disability; (ii) Is engaging in promiscuous conduct inside or outside the home; (iii) Is cohabiting with a person to whom he or she is not married; (iv) Is pregnant with an illegitimate child; or (v) Has, within a period of twelve months preceding the filing of the petition alleging the child to be neglected, either been pregnant with or given birth to another child to whose putative father she was not legally married at the time of conception, or has not thereafter married." Md. Ann. Code art. 26, § 52(f) (1966).

5. Md. Ann. Code art. 26, § 52(f)(6)(i)-(v) (1966).

6. The court "consider[ed] this case on these facts: That these women have conducted themselves in such a way that they have brought into the world more than one illegitimate child, that those children are now living together with their mother under the same roof, or in the same group unit.

"Now the question to be decided is whether or not on that set of minimum facts, The Court can find that they are neglected within the meaning of the Maryland law." Record at 106-07, In re B.C., JA-7384 (Prince George's County Cir. Ct., Md., Sept. 21, 1967) [hereinafter cited as Record]. The court considered no other facts.

7. Md. Ann. Code art. 26, § 61 (1966). However, in the instant case the children were left in their homes. Record at 113.

8. Md. Ann. Code art. 26, § 52(f)(6) (1966) (emphasis added).

9. Record at 81.

10. Maryland Legislative Council Report to the General Assembly 55 (1963) (emphasis added).

11. Ch. 723, § 1, [1963] Laws of Md. 1510.

12. Birth of an illegitimate child, by itself, was an insufficient reason for modifying a divorce decree to remove minor children from their mother's custody in two cases decided by the Appellate Court of Illinois. The court implied that other factors, particularly the care that a mother gives her child, should be considered. Jayroe v. Jayroe, 58 Ill. App. 2d 79, 82, 206 N.E.2d 266, 268 (1965); Brown v. Brown, 13 Ill. App. 2d 56, 140 N.E.2d 528 (1957).

Moreover, this statute, as interpreted, appears to be a denial of equal protection of law to an arbitrarily selected class of the population. The fourteenth amendment[13] prohibits the states from discriminating against classes of its citizens for reasons that are "invidious,"[14] "arbitrary, oppressive or capricious, and made to depend upon differences of color, race, nativity, religious opinions, [or] political affiliations . . . ."[15] Statutes which violate the equal protection clause generally fall into two classes: those which are discriminatory on their face, and those which discriminate through their administration.[16]

On its face the Maryland statute distinguishes between homes which have more than one illegitimate child and homes in which the children are legitimate.[17] Illegitimacy, by itself, may or may not be a valid basis upon which to base a statutory classification.[18] A statute which would deny people born out of wedlock the right to vote would clearly be unconstitutional. Intestate succession based upon the legitimacy-illegitimacy dichotomy, however, is a proper matter for statutory consideration.[19] Illegitimacy appears to be a valid factor which, *along with other factors*, may constitutionally be considered as an indication of the moral environment of a home.

In effect, the present administration of the Maryland statute arbitrarily classifies children who are prospective welfare recipients as illegitimate and legitimate, in order to lessen the taxpayer's welfare burden.[20] The declaration that the children are neglected will not automatically reduce the welfare rolls.[21] However, the Maryland State Department of Public Welfare is distributing a statement to prospective welfare applicants advising them of the result of the instant case —that information divulged to the State's Attorney can result in illegitimate children being declared "neglected" and removed from their parent's custody.[22]

13. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

14. Williamson v. Lee Optical Inc., 348 U.S. 483, 489 (1955).

15. American Sugar Ref. Co. v. Louisiana, 179 U.S. 89, 92 (1900).

16. Compare Strauder v. West Virginia, 100 U.S. 303 (1879), with Ex parte Virginia, 100 U.S. 339 (1879).

17. Md. Ann. Code art. 26, § 52(f)(6)(v) (1966).

18. One commentator has questioned whether legislation may constitutionally distinguish between children born out of wedlock and those born in wedlock. Krause, Equal Protection for the Illegitimate, 65 Mich. L. Rev. 477, 483 (1967).

19. E.g., Md. Ann. Code art. 93, § 150 (1964); N.Y. E.P.T.L. § 4-1.2.

20. While only 17.0 per cent of the population of Maryland is non-white, 77.4 per cent of families receiving aid for dependent children are non-white. Maryland State Dep't of Pub. Welfare, A Report on Caseload Increase in the Aid to Families with Dependent Children Program, 1960-1966, at 17 (1967).

21. See Md. Ann. Code art. 88A, § 48(b)(3) (1964).

22. Maryland State Dep't of Pub. Welfare, Statement, Legal Action for Support From Absent Fathers—Special Situation in Prince George's County (Oct., 1967).

In the instant case the mothers's motion to intervene was denied. Record at 10. This denial was clearly erroneous. The interest of a mother in her child, although not a property right, Fischer v. Meader, 95 N.J.L. 59, 111 A. 503 (Sup. Ct. 1920), can be considered to transcend property rights. Denton v. James, 107 Kan. 729, 193 P. 307 (1920). This interest is more than a mere privilege, revocable by the state, Pierce v. Society of Sisters, 268 U.S.

A needy mother of illegitimate children is confronted with an undesirable dilemma. Either she will apply for welfare and risk losing her "neglected" children or not apply for welfare. Fear of losing custody of her children will certainly tend to dissuade a mother from applying for aid to her illegitimate children.[23]

The great majority of the illegitimate children who, as potential welfare recipients, might be affected by the instant decision are non-white.[24] Whereas only 22.3 per cent of all children born to Maryland residents in 1965 are non-white, 79.5 per cent of illegitimate children born into families which already had one illegitimate child were non-white.[25]

Although the Negro-white ratio in the instant action approximates that of the illegitimate population of Maryland,[26] it is conceivable that the discriminatory administration of the instant statute will ultimately be directed primarily against Negroes. Certainly the State's Attorney was aware that the present case is a test case[27] since the statute had not previously been interpreted. Presentation of

---

510 (1925), and should not be interfered with except in the most extraordinary circumstances. Fritts v. Krugh, 354 Mich. 97, 92 N.W.2d 604 (1958); Larson v. Larson, 30 Wis. 2d 291, 140 N.W.2d 230 (1966). Consequently, this interest cannot be taken away without due process of law, People ex rel. Lentino v. Feser, 195 App. Div. 90, 186 N.Y.S. 443 (1st Dep't 1921); DeWitt v. Brooks, 143 Tex. 122, 182 S.W.2d 687, cert. denied, 325 U.S. 862 (1944), which requires that the parents be given an opportunity to be heard in opposition to the proceeding. Creely v. Olvera, 70 Cal. App. 2d 186, 160 P.2d 870 (1945); Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81 (1931).

23. This fear should also operate to deter a white woman from seeking aid for her illegitimate children. See note 24 infra and accompanying text. The Negro family is normally dominated by a matriarch. Bureau of Pub. Assistance, U.S. Dep't of Health, Educ. & Welfare, Illegitimacy and its Impact on the Aid to Dependent Children Program 15 (1960). Moreover, the Negro moral code regards the tie between a mother and her child as most sacred and not easily severed. Id.

24. Illegitimate children born to Maryland residents numbered 8,800 in 1965. These included 2,493 white children and 6,307 non-white. Division of Biostatistics, Md. State Dep't of Health, Annual Vital Statistics Report—Maryland, 1965, at 20 (1966).

25. Calculations based upon data appearing in note 24 supra at 21, table 21.

The disproportionate number of non-white illegitimate children would not of itself necessitate a finding that equal protection is violated. See Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 429 (1936). The fourteenth amendment does not require that things which are different be treated alike, Rinaldi v. Yeager, 384 U.S. 305, 309 (1966); Tigner v. Texas, 310 U.S. 141, 147 (1940); Tussman & tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341, 344 (1949), but rather it requires "that those who are similarly situated be similarly treated." Id. Although Negroes have a higher crime rate than whites, President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report: Crime and its Impact—An Assessment 78 (1967), the indiscriminate application of criminal statutes to crime feasors is not unconstitutional. A criminal statute, however, applied only against Negroes would fall within the prohibition of the fourteenth amendment. McLaughlin v. Florida, 379 U.S. 184 (1964).

26. In the instant case five of the eight children declared "neglected" are of the Negro race. Letter from Arthur A. Marshall, State's Attorney for Prince George's County Maryland, to Fordham Law Review, January 2, 1968. See note 25 supra and accompanying text.

27. It was "obvious" to the instant court that this is a test case. Record at 105.

an "integrated" test group of defendants would facilitate judicial approval of a statute which is of questionable validity.[28] The inclusion of the three white children in the instant action can be viewed as "reverse token integration" to mask the true nature of the discriminatory application of the statute. A second "neglect" action is now pending before the Circuit Court for Prince George's County. Each of the eight children involved is of the Negro race.[29]

In the case of *Yick Wo v. Hopkins*,[30] an ordinance which prohibited the maintenance of a laundry in buildings which were not constructed of stone or brick, without the consent of a board of supervisors, had been enacted in San Francisco. Although it was claimed that the city had power to "make . . . regulations for protection against fire,"[31] the United States Supreme Court observed that 240 of the 320 laundries in San Francisco were owned by Chinese and that 310 of the 320 laundries were constructed of wood. Whereas 200 Chinese proprietors had been denied permission to operate laundries in wooden structures, only one non-Chinese owner was similarly denied permission. Additionally, while 150 Chinese were arrested for carrying on business without permission, 80 Caucasians had been left unmolested. The Court found an ulterior motive—elimination of Chinese laundries from competition with Occidental laundries.[32] Although the law was impartial and fair on its face, it had been administered "so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights" and therefore falls "within the prohibition of the Constitution."[33]

Clearly, the Maryland statute affects primarily people of the Negro race. However, reliance on *Yick Wo* as authority for holding the instant statute unconstitutional, as affecting a racial discrimination, would be premature at this point. An insufficient number of individuals have been the subject of litigation to demonstrate conclusively a purely racial discrimination. The instant case raises an interesting question of whether minority groups must wait until there is proof of systematic discrimination in the enforcement of a racially suspect statute.

Judge Bowen, in the instant case, required the mothers to study, understand and practice methods of birth control "at the risk of loosing [sic] their children,"[34] who were left in their homes pending appeal.[35] *Griswold v. Connecticut*,[36] which declared unconstitutional a Connecticut statute[37] prohibiting use

28. See notes 7-12 and 16-23 supra and accompanying text.

29. Letter from Arthur A Marshall, State's Attorney for Prince George's County Maryland, to Fordham Law Review, November 15, 1967.

30. 118 U.S. 356 (1886).

31. Id. at 360.

32. Id. at 362.

33. Id. at 374.

34. Record at 115. It is strange that the mothers were denied permission to intervene, id. at 10, but were required to practice birth control. See note 22 supra. The Judge seems to condone promiscuity so long as it does not cost the State any money.

35. Record at 113.

36. 381 U.S. 479 (1965).

37. Conn. Gen. Stat. Ann. § 53-32 (1958).

of any contraceptive, at the same time affirmed a *right* to voluntary family planning.[38] Justice Goldberg stated that if "a law outlawing voluntary birth control . . . is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid."[39] Just as the law prohibiting voluntary birth control was declared unconstitutional, it follows that administering a law so as to require compulsory birth control is also unconstitutional.

Benefits to needy children have traditionally been considered governmental charity,[40] to which the recipient has no vested interest.[41] Under this theory, governmental grants may be denied or revoked at the discretion of the "donor."[42] However, because of the complexity of today's technological society, more people have become dependent upon public assistance. It should be a national objective to provide public assistance to all who cannot provide for themselves.[43] To further this goal it has been argued that governmental assistance to the needy should be considered a right governed by a system of laws comparable to that surrounding traditional rights, rather than a mere privilege to be given or taken away at the whim of some public official.[44] Denial of public assistance, in consequence, should not be viewed simply as the denial of a privilege, but as the denial of a right, which is protected by constitutional safeguards. The decision in the instant case is a step backward from the goal that "no American will go without the minimum necessities of life."[45]

Constitutional Law—Intergovernmental Immunities—National Bank Held Subject to State Sales and Use Taxes.—Plaintiff, a national banking association organized under a Federal statute,[1] and doing business in Massachusetts, sought a ruling exempting it from state sales and use taxes[2] imposed on purchases of personal property made for the bank's own use. The Supreme Judicial Court of Massachusetts held that the national bank was not exempt but was subject to the state sales and use taxes. *First Agricultural National*

38. Pilpel, Birth Control and a New Birth of Freedom, 27 Ohio St. L.J. 679 (1966).

39. 381 U.S. at 497 (concurring opinion).

40. Reich, The New Property, 73 Yale L.J. 733, 734 (1964); Comment, Withdrawal of Public Welfare: The Right to a Prior Hearing, 76 Yale L.J. 1234 (1967).

41. Frisbie v. United States, 157 U.S. 160, 166 (1895).

42. United States v. Teller, 107 U.S. 64, 68 (1882).

43. Newsweek, Nov. 20, 1967, at 65.

44. Jones, The Rule of Law and the Welfare State, 58 Colum. L. Rev. 143, 144-54 (1958); Reich, supra note 40, at 785-86.

45. Newsweek, Nov. 20, 1967, at 65 (emphasis deleted).

1. 12 U.S.C. § 21 (1964).

2. Mass. Gen. Laws ch. 14, § 1(6), § 2(5)(b) (1966). The amount of these taxes totaled $575.66 during the period from April 1, 1966, to June 30, 1966. First Agricultural Nat'l Bank v. State Tax Commission, — Mass. —, 229 N.E.2d 245, (1967), prob. juris. noted, 88 Sup. Ct. 774 (1968).

Bank v. State Tax Commission, — Mass. —, 229 N.E.2d 245 (1967), *prob. juris. noted*, 88 S. Ct. 774 (1968).[3]

The principle of implied tax immunity for government agencies and instrumentalities was enunciated in the landmark cases of *M'Culloch v. Maryland* and *Osborn v. Bank of The United States*.[4] In both cases Chief Justice Marshall reasoned that since the national banks are fiscal agents of the United States, they cannot be taxed for to do so would be to tax the Sovereign itself.[5] In *M'Culloch*, the national banks were compared with the judicial process, the national mint, the postal service and the custom house.[6] Noting that the power to tax involves the power to destroy, the Chief Justice reasoned that these functions of the federal government demanded immunity from state taxation.[7] Marshall's reasoning has since been questioned,[8] but the principle of governmental immunity from state taxation has not been repudiated.[9] Marshall[10] and later Justices[11] spoke of it as constitutional immunity. While *M'Culloch* and *Osborn* dealt with discriminatory taxes, the Court in *Owensboro National Bank v. Owensboro*,[12] held that a non-discriminatory franchise tax was void because

3. New York's highest court has also recently held that the national banks in New York are not exempt from its sales and use taxes. Like the Massachusetts court, the court of appeals in New York emphasized the similarity between the national banks and the state banks and refused to follow M'Culloch v. Maryland, claiming that the holding is obsolete. Liberty Nat'l Bank & Trust Co. v. Buscaglia, 21 N.Y.2d 357, 235 N.E.2d 101, 288 N.Y.S.2d 33 (1967) (mem.).

4. 17 U.S. (4 Wheat.) 316 (1819); 22 U.S. (9 Wheat.) 326 (1824). The doctrine of tax immunity as stated by Marshall was referred to by Mr. Justice Frankfurter as a "web of unreality . . . [which] withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings of our federalism . . . ." Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 490 (1939) (concurring opinion).

5. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 400-25 (1819); Osborn v. Bank of The United States, 22 U.S. (9 Wheat.) 326, 380 (1824).

6. 17 U.S. (4 Wheat.) at 431.

7. Id.

8. See Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 490 (1939) (concurring opinion); Panhandle Oil Co. v. Mississippi ex rel. Knox, 277 U.S. 218, 223 (1928) (dissenting opinion).

9. Department of Employment v. United States, 385 U.S. 355 (1966); United States v. Boyd, 378 U.S. 39, 44 (1964); Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110, 122 (1954).

10. 17 U.S. (4 Wheat.) at 426.

11. United States v. Muskegon, 355 U.S. 484 (1958); Standard Oil Co. v. Johnson, 316 U.S. 481, 485 (1942) (immunity comes from the Constitution or federal statutes); Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 480 (1939).

12. 173 U.S. 664, 667-68 (1899). Owensboro is indicative of the growth of tax immunity for government activities throughout the nineteenth and the early part of the twentieth century. In recent years, however, there has been a trend towards curtailing immunities from state taxes for government activities. Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261, 270 (1943). See Powell, The Waning of Intergovernmental Tax Immunities, 58 Harv. L. Rev. 633 (1945). For example, states have been allowed to tax government contractors even though the burden of the tax falls upon the United States, as long as

it was imposed upon the property of the national bank and not upon its shares, as explicity permitted by Congress.[13] With *M'Culloch* standing for the proposition that the Government cannot be taxed without its permission, it has been assumed that the national banks share in this immunity and thus cannot be taxed without congressional consent.[14] When the national banks were re-established in 1863, it was accepted that the states could not tax them in the absence of a federal statute:[15] "[T]he error of not conferring the power to tax, early impressed itself upon Congress; for the following year . . . power was granted to States . . . to tax the shares of stock in the names of the shareholders."[16] In 1864, Congress enacted R.S.5219.[17] In *Owensboro*[18] the Court held that this statute was the exclusive means by which the operations of the national banks may be taxed, and since then the Court has assumed this statute to be exclusive.[19] However, the principle that this statute stands at the outer limits of

---

the legal incidence of the tax does not fall upon the Government itself. Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954); Alabama v. King & Boczer, 314 U.S. 1 (1941); Curry v. United States, 314 U.S. 14 (1941); James v. Dravo Contracting Co., 302 U.S. 134 (1937). Also, the states have been allowed to tax the salaries of employees of the federal government. Graves v. New York ex rel. O'Keefe, 306 U.S. 466. 475 (1939). More recently, there have been a number of Supreme Court decisions which have indicated that private enterprises rendering a service to the Government are not immune from state taxation. United States v. Boyd, 378 U.S. 39 (1964); United States v. Detroit, 355 U.S. 466 (1958); Detroit v. Murray Corp., 355 U.S. 489 (1958). See Van Cleve, States' Rights and Federal Solvency, 1959 Wis. L. Rev. 190.

13. Rev. Stat. § 5219 (1923), as amended, 44 Stat. § 223 (1926), 12 U.S.C. § 548 (1964).

14. "[S]ince the power to create the agency includes the implied power to do whatever is needful or appropriate, if not expressly prohibited, to protect the agency, there has been attributed to Congress some scope . . . for granting or withholding immunity of federal agencies from state taxation." Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 478 (1939). When Congress legislates within its constitutional powers its acts are supreme and, therefore, the validity of state taxation of a government activity must depend upon (a) the power of Congress to create the activity and (b) the intent of Congress to have the activity remain immune from state taxation. This intent may be implied. Helvering v. Gerhardt, 304 U.S. 405, 411 n.1 (1938).

15. Owensboro Nat'l Bank v. Owensboro, 173 U.S. 664, 668 (1899).

16. Id.

17. Rev. Stat. § 5219 (1923), as amended, 44 Stat. § 223 (1926), 12 U.S.C. § 548 (1964), provides in pertinent part:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others . . . . "

18. 173 U.S. 664, 667-68 (1899).

19. See Michigan Nat'l Bank v. Michigan, 365 U.S. 467, 472 (1961), where the Court

state power to tax the national banks rests upon the premise that the national banks still share in the immunity of the Government. In denying this premise, the instant court reasoned that since the national banks have grown into commercial banks very much similar to the state-chartered banks, they are enjoying a competitive advantage over their state counterparts because of their immunity.[20] However, while the national banks enjoy an advantage due to R.S.5219, the Supreme Court has allowed the states to tax the shares of the net income of the national banks at a rate eight times as high as that imposed on state banks' shares on the ground that the resulting tax on the national banks represented a smaller percentage of the capital employed by these banks than the tax on state banks represented in respect to the capital employed by these institutions.[21]

It may be safe to assume that the operations of the Government itself, or one of its agencies,[22] may not be taxed—at least in the absence of congressional consent—but it is another thing to suggest that every agency created by Congress, insofar as it performs a service for the federal government, enjoys the same immunity. While the Supreme Court has said that an "instrumentality" is immune from state taxation unless Congress consents to its being taxed,[23] the term "instrumentality" has been used to describe a privately owned agency performing a service for the Government. Such an agency, moreover, has been held immune from state taxation.[24] Classifying a government activity as an "instrumentality" does not, ipso facto, confer tax immunity. The label, "instrumentality," is confusing and deceptive. Recently, the Court has been called upon to determine the status of the National Red Cross and the Army Post Exchanges in *Department of Employment v. United States*[25] and *Standard Oil Company v. Johnson*.[26] In the *Department of Employment* case the Court

noted that R.S. 5219 had been passed on by the Supreme Court fifty-five times without ever indicating that this statute was not exclusive.

20. — Mass. —, 229 N.E.2d 245, 258 (1967), prob. juris. noted, 88 Sup. Ct. 774 (1968).

21. Michigan Nat'l Bank v. Michigan, 365 U.S. 467 (1961). As a result of the Supreme Court's interpretation of R.S. 5219 in this case, some bankers believe that the national banks which are taxed by the fourth method allowed by the statute are discriminated against, and there have been suggestions that this section be amended to allow the states to tax the personal property of the national banks rather than to permit the states to tax the national banks at a built-up rate. National Banks and The Future: Report of the Advisory Committee on Banking to the Comptroller of the Currency 173 (1962).

22. Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954); United States v. Allegheny, 322 U.S. 174 (1944); Gillespie v. Oklahoma, 257 U.S. 501 (1922); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

23. Department of Employment v. United States, 385 U.S. 355, 358 (1966). Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 479 (1939); Owensboro Nat'l Bank v. Owensboro, 173 U.S. 664, 667-68 (1899); Osborn v. Bank of The United States, 22 U.S. (9 Wheat.) 326 (1824); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

24. United States v. Muskegon, 355 U.S. 484, 486-87 (1958).

25. 385 U.S. 355 (1966).

26. 316 U.S. 481 (1942). In Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954), the Court ruled that a tax whose legal incidence fell upon the Navy Department was unconsti-

found the American National Red Cross immune from Colorado's unemployment compensation tax, and in *Johnson,* it invalidated a privilege tax which California sought to impose on the distribution of fuel at the United States Army post exchanges. In both cases, the Court noted that the institutions sought to be taxed, the American Red Cross and the post exchanges, are regulated extensively by the federal government, that both received government subsidies[27] and that the initial authority of each is given by Congress.[28] In addition, the Court seemed to be impressed by the fact that the Government exercises a large measure of control over both agencies, the President appointing the chief administrators of the Red Cross and the post exchanges being operated and administered by the officers of the Armed Services.[29] But beyond all these factors the Court found, as apparently the most significant factor, that both institutions were vital to the execution of a specific governmental function and were properly characterized as an "arm of the Government."[30]

Prior to the *Red Cross* case, Mr. Justice Black had indicated in *United States v. Muskegon,*[31] that if an institution is so controlled and regulated by Government so as to be assimilated into the Government it shares the Government's immunity as a "servant" of the Government. Six years later, in *United States v. Boyd,*[32] contractors working for the Atomic Energy Commission (AEC), Union Carbide and H. K. Ferguson Company, sought to remove Tennessee sales and use taxes on the theory that the purchases were made for the benefit of the Government (AEC) and hence could not be subjected to a state tax. The Court held that the legal incidence of the tax was upon the contractors and not the AEC.[33] Citing the "servant" guideline, used by Justice Black in Muskegon, the Government urged that the contractors were so " 'assimilated by the Government as to become one of its constituent parts.' "[34] The Court accepted this guideline, but nevertheless held that since the AEC could have used its own employees to perform the same functions for which Union Carbide and Ferguson had contracted, Union Carbide and Ferguson did not become so assimilated into the

tutional. The Court did not attempt to set out any standards for determining when a government function is immune, but merely said that the doctrine of sovereign immunity is so imbedded in constitutional history that it does not need elaboration. Id. at 122.

27. 385 U.S. at 359; 316 U.S. at 484.

28. Id.

29. Id.

30. 385 U.S. at 359-60; 316 U.S. at 485.

31. 355 U.S. 484, 486 (1958). The United States owned a plant in Muskegon which Continental Motors Corporation used while performing several contracts for the Government. Continental agreed to deduct the price of rent from its costs. The corporation was taxed for the use of the tax-exempt property in its business, and it claimed that it was immune from this tax because the tax was upon government property. The Court held that Continental had to pay the tax because it was using the property in its own commercial activities.

32. 378 U.S. 39 (1964).

33. Id. at 44.

34. Id. at 46-47 (citation omitted).

Government as to obtain tax exemption.[35] The Court implied, however, that had Carbide and Ferguson been such a part of the AEC as to be essential to functioning, they would have enjoyed the same immunity as the AEC itself.[36]

From the above discussion, the following factors emerge as guidelines for determining whether a particular activity is essential to the function of some facet of the Government: (1) the extent of government regulation; (2) extent of government control; (3) existence of congressional charter; (4) government subsidization; (5) private ownership and profit-making activity;[37] and (6) government reliance on the services of the particular activity.

The instant court emphasized the change in character and functions of the national banks—from entities primarily serving the needs of the Government to corporations serving, primarily and predominantly, the interests of their private shareholders. The advent of the Federal Reserve System in 1913, fourteen years after *Owensboro*,[38] brought a substantial change to the character and function of the national banks. Like the Red Cross and the post exchanges, they are, however, regulated extensively by Congress.[39] The control and the adminis-

35. Id. at 47-48.

36. Id.

37. There is no doubt that the private profit-making nature of the government contractors detracts from their claim to tax immunity. See United States v. Boyd, 378 U.S. 39, 45 (1964); United States v. Muskegon, 355 U.S. 484, 486 (1958); United States v. Detroit, 355 U.S. 466, 474 (1958). The instant court placed considerable importance upon the fact that the national banks are profit-making enterprises. — Mass. —, 229 N.E.2d at 252-53. However, the Supreme Court noted in Standard Oil Co. v. Johnson, 316 U.S. at 485, that the post exchanges sometimes make profits which go to the troops and this did not prevent the Court's finding that the post exchanges are immune. Also, the fact that the Red Cross is essentially a privately operated institution in that its employees do not work for the Government and that Government officials do not direct its everyday affairs did not lead the Court to declare that the Red Cross is not immune. Department of Employment v. United States, 385 U.S. 355, 360 (1966).

38. The Owensboro case was decided when the status of the national banks was governed solely by The National Bank Act. Act of June 3, 1864, 13 Stat. 99. This act provided for a national currency, secured by a pledge of United States Bonds, and authorized the establishment of national banks. Act of June 3, 1864, § 5, 13 Stat. 99. The national banks were to be used as depositories and as financial agents of the Government in carrying out the nation's fiscal policies. Act of June 3, 1864, § 45, 13 Stat. 113. With the enactment of the Federal Reserve System in 1913, the national banks' role as fiscal agents was reduced. A special report for the New York Tax Commission said the following: "Today national banks play but an insignificant role in the guise of federal instrumentalities. The duty of providing a sound currency has devolved almost entirely upon the Federal Reserve Banks . . . . National banks are now hardly more a federal instrumentality than railroads and steamships and airlines that carry mails or any other private concern which enters into contracts for the performance of government services. Their only important claim to distinction from state member banks is their compulsory membership in the Federal Reserve System." New York Tax Commission, Special Report No. 7, Welch, State and Local Taxation of Banks in The United States 209-10 (1934).

39. See 12 C.F.R. §§ 1-1.2 (1967). See also United States v. Muskegon, 355 U.S. 484, 486

tration of the national banks is under the supervision of the Comptroller of Currency who is the head of the Bureau of Comptroller, a division of the Treasury Department,[40] and, of course, the national banks are chartered by Congress.[41] The greatest single basis for the tax immunity of the national banks, however, is their essential role in the Federal Reserve System which is the nation's means of stabilizing the currency. Though the System consists of privately owned member banks,[42] control of the System is lodged in the Board of Governors appointed by the President and approved by the Senate. The Federal Reserve System's purpose is to foster a flow of credit and money which is designed to facilitate the economic growth of the nation. This is done through the member banks, primarily by means of the System's control over the reserve positions of the member banks. It is these reserves which determine how the member banks extend credit. The System's control of credit is a crucial factor in controlling the rate of economic growth.[43] Thus, there is substance to the argument that the national banks, as the only mandatory members of the Federal Reserve System, are indispensable vehicles for carrying out the nation's fiscal policy.

The instant court wrote off as dictum the statement of Mr. Justice Fortas in the *Red Cross* case that "the Red Cross is like other institutions—e.g., national banks—whose status as tax-immune instrumentalities of the United States is beyond dispute."[44] The court's ignoring the Fortas dictum is certainly questionable. Though it be merely dictum, it is one which has behind it one hundred-fifty years of judicial consensus and an invariable practice of exemption of national banks from state taxation. Despite the growing similarities between national and state banks, especially those state banks which are members of the Federal Reserve System, taxation of the national banks has traditionally been a matter of congressional concern. Altering the methods of taxing them is not the proper function of the courts, but a matter for Congress to consider.

Constitutional Law—Search and Seizure—Specific Warnings of Fourth Amendment Rights Held Not Necessary to Validate Consensual Search After Suspect Has Been Given *Miranda* Warnings.—The defendant was arrested by New York narcotics agents in 1964. He was taken to a police station where he was advised of his right to counsel. Later he was interviewed by an FBI agent who advised "him of his right to remain silent, to call an attorney,

(1958) (regulation by the Government indicates assimilation by the Government for the purposes of tax immunity).

40. 12 U.S.C. § 1 (1964).

41. The national banks were established by Congress in 1863 by the National Bank Act, 13 Stat. 99, as amended, 12 U.S.C. § 1 (1964).

42. All national banks are required to be members of the Federal Reserve System. 12 U.S.C. § 222 (1964).

43. The Federal Reserve System: Purposes and Functions 4, 8-10, 20 (1963).

44. 385 U.S. at 360.

to have an attorney provided for him if he could not afford one, and of the fact that anything said might be held against him."[1] At this time he was suspected of being involved in a Rhode Island bank robbery. The FBI agent, seeing a motel receipt in defendant's possession, asked him if he had any objection to his room being searched, and the defendant replied " 'Go ahead; look in the room.' "[2] In the room evidence was found connecting him with the robbery. The defendant was convicted and appealed on the ground that the search of the motel room violated his rights under the fourth amendment.[3] The Court of Appeals for the First Circuit affirmed the conviction and held that the defendant had "consented" to the search. *Gorman v. United States*, 380 F.2d 158 (1st Cir. 1967).

The court relied on *Johnson v. Zerbst*,[4] the leading case on waiver of constitutional rights, for the proposition that the "consent must be seen to be an 'intentional relinquishment or abandonment of a known right.' "[5] Subsequent cases have held that consent must be " 'unequivocal, specific and intelligently given, uncontaminated by any duress or coercion . . . ,' "[6] and that the government bears a heavy burden of proving voluntariness.[7] The court rejected the suggestion that by analogy to *Miranda v. Arizona*[8] a specific warning of fourth amendment rights was required to validate a warrantless search after a suspect has been arrested and given the *Miranda* warnings.[9]

The instant court reasoned that a suspect who has been warned of his right to remain silent and has been told that anything he might say can be used against him has been sufficiently warned of his right to refuse to consent to a search. In effect the court is saying that by giving the warning set forth in *Miranda*, the police have complied with *Zerbst*. The defendant, therefore, has been given enough knowledge to make a knowing waiver of his rights, and the need for a specific fourth amendment warning has been obviated.

The court stated that there was no analogy between *Miranda* and the fourth amendment, since the differences in the underlying rules governing search and seizure and those governing self-incrimination are too great.[10] The *Miranda*

1. Gorman v. United States, 380 F.2d 158, 161 (1st Cir. 1967).

2. Id.

3. U.S. Const. amend. IV: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . . "

4. 304 U.S. 458 (1938).

5. 380 F.2d 158, 163 (1st Cir. 1967).

6. Id.

7. See Johnson v. Zerbst, 304 U.S. 458, 465 (1938); United States v. Page, 302 F.2d 81, 83-84 (9th Cir. 1962).

8. 384 U.S. 436 (1966).

9. "We therefore see no reason in policy or precedent automatically to borrow a procedure adapted to one set of constitutional rights at one stage of a criminal proceeding and apply it to a quite different right, serving quite different purposes, at another stage." Gorman v. United States, 380 F.2d 158, 164 (1st Cir. 1967).

10. Id.

warnings are designed to exclude unreliable evidence, to protect against self-incrimination and to insure that the suspect knows of his right to counsel.[11] The court indicated that the restrictions on search, however, are designed only to maintain "civilized standards of police practice"[12] and concluded that *Miranda* can have no application to the consensual search situation.

There are very few cases on the doctrine of "knowing waiver" in the consensual search field. Though much mention has been made of this doctrine by the courts, it has had little effect upon their decisions.[13] In almost all cases that quote the *Zerbst* definition of waiver of a constitutional right (the "knowing waiver" doctrine) the element of prime import has not been lack of knowledge, but coercion. Lack of knowledge of rights is generally passed over, or at most, used as further proof of coercion.[14] Recently, however, the courts have begun to face the problem squarely.

In *United States v. Blalock*,[15] a federal district court case in Pennsylvania, FBI agents, who had long suspected the defendant of a bank robbery, met him in a hotel lobby. There, without a warrant, they frisked him and obtained his permission to search his room, where they found incriminating evidence. They did not warn him of his fourth amendment rights. The court said that the consent did not meet the "intelligent" standard of *Zerbst* because the defendant was not informed of his rights[16] and that the fourth amendment requires just as knowing a waiver as the fifth and sixth. As one must be aware of one's rights to surrender them, the court suggested that all police officers should inform the person to be searched of his right to require a warrant.[17] The *Blalock* case in effect held that the knowing waiver of a constitutional right requires *actual knowledge* of that right by the party waiving it.

This position is upheld in the case of *United States v. Nikrasch*,[18] decided in the Seventh Circuit. Here the defendant was arrested while driving late at night. While he was detained in the stationhouse he consented to a search of his car and false serial numbers were found on it. Later these were used as incrimi-

---

11. Id.

12. Id.

13. See Cipres v. United States, 343 F.2d 95 (9th Cir. 1965), cert. denied, 385 U.S. 826 (1966); Villano v. United States, 310 F.2d 680 (10th Cir. 1962); Channel v. United States, 285 F.2d 217 (9th Cir. 1960); Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951).

14. See Note, Consent Searches: A Reappraisal After Miranda v. Arizona, 67 Colum. L. Rev. 130, 133 (1967). Typical is Cipres v. United States, 343 F.2d 95 (9th Cir. 1965), in which, after a long discussion citing Zerbst, the defendant was held not to have waived her rights, not because she didn't know them—which the court decided actually was the case—but because she was coerced by the "'color of the badge.'" Id. at 98.

15. 255 F. Supp. 268 (E.D. Pa. 1966).

16. "Certainly, one cannot intelligently surrender that which he does not know he has." Id. at 269 (emphasis deleted).

17. "To require law enforcement agents to advise the subjects of investigation of their right to insist on a search warrant would impose no great burden . . . ." Id. at 269-70.

18. 367 F.2d 740 (7th Cir. 1966).

nating evidence against him. At no time was the defendant advised of his right to resist a warrantless search. The court held that as he had not been so advised, true consent to the search had not been given.[19]

Recently the Court of Appeals for the Ninth Circuit affirmed a district court decision that held that a defendant's consent to a search was not knowing or intelligent, and hence void, because he had not been advised of his right to resist a warrantless search.[20]

It would seem that in the instant case the defendant had not made a knowing waiver of his fourth amendment right. The court has, in effect, held that when the *Miranda* warnings were given, the defendant received *constructive knowledge* of his right to resist a search. Contrary to the cases discussed above, the instant court implies that actual knowledge of one's rights is not necessary to make a valid waiver of them. The instant court seems to back away from the rigid standard set in the *Zerbst case*[21]—a standard that has been upheld in many other instances.[22]

The "knowing waiver" doctrine sets up the basic requirement for the waiver of any constitutional right: "an intentional relinquishment . . . of a known right or privilege."[23] Later cases have held, moreover, that a "knowing waiver" requires actual knowledge of the right to be waived. Perhaps *Miranda* sets new standards of knowledge for a "knowledgeable waiver." For such a waiver to exist in respect to the fifth and sixth amendments, the Supreme Court has held, the suspect must be informed not only of his right to be silent, but also that anything he says can be used against him, that he has a right to a lawyer and that one will be provided for him if he cannot afford one.[24] These elements interlock "to make him aware not only of the privilege, but also of the consequences of foregoing it. It is only through an awareness [actual knowledge] of these consequences that there can be any assurance of real understanding and intelligent exercise [or waiver] of the privilege."[25] The *Zerbst* "knowing waiver" doctrine requires that actual knowledge is necessary for valid waiver of a right. *Miranda*,

19. Id. at 744.

20. Gladden v. Pogue, 384 F.2d 920 (9th Cir. 1967).

21. "But that things which might be found in a search could be used against an accused seems implicit in the warning of the right to remain silent. . . . " Gorman v. United States, 380 F.2d 158, 164 (1st Cir. 1967).

"[W]hen the accused is directly asked whether he objects to the search, there must be at least some suggestion that his objection is significant or that the search waits upon his consent. When this is combined with a warning of his right to be silent, and his right to counsel, which would seem in the circumstances to put him on notice that he can refuse to cooperate, we think it fair to infer that his purported consent is in fact voluntary." Id. at 163-64.

22. See Johnson v. United States, 333 U.S. 10 (1948); Wren v. United States, 352 F.2d 617 (10th Cir. 1965), cert. denied, 384 U.S. 944 (1966); United States ex rel. Mancini v. Rundle, 337 F.2d 268 (3d Cir. 1964); Channel v. United States, 285 F.2d 217 (9th Cir. 1960).

23. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

24. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

25. Id. at 469.

in addition to actual knowledge, requires that a rigid set of warnings be delivered to ensure uniformity of police practice. Reading *Zerbst* and *Miranda* together, one could argue that the defendant was entitled to a specific warning of his fourth amendment right to resist a search. Only with such a warning would the defendant be given enough knowledge not only to know of the right, but also to know of the consequences of foregoing it, as the *Miranda* standard of knowledge requires. In any cases, the defendant in the instant case was at least entitled to his rights under *Zerbst*, and these were denied. The instant court's use of a *Miranda* fifth and sixth amendment warning to give the suspect constructive knowledge of his fourth amendment rights cannot be sufficient for *Zerbst*. A mere warning of the suspect's right to insist upon a warrant may not be sufficient either because such a warning does not ensure that the suspect knows all of his courses of action and their consequences.[26]

Since the instant case involved a consent search a further basis for the application of *Miranda* exists. Courts have most often considered coercion to be the prime element that invalidates consent to a search. A custodial consent gives rise to a strong presumption that any information or waiver obtained from a suspect has been coerced.[27] Even where a party is not under arrest, but only being questioned in a public place, the courts have said that any consent obtained was obtained "under color of the badge"[28] and was presumptively coerced. Before *Miranda*, courts had implied that the presence of a peace officer is prima facie evidence of coercion.[29] As it is only prima facie evidence, however, if no warning has been given, this presumption can be rebutted by other evidence of surrounding circumstances. According to *Miranda*, however, one element of compulsion is lack of knowledge of one's rights.[30] If no warning is given, then, there exists not prima facie, but conclusive evidence of compulsion. A warning, then, is necessary, for only through that means can the suspect be ensured of having actual knowledge of his rights (of course, it would have to be a *Zerbst* warning at the very least).

Arguably, the instant court's rejection of the analogy between *Miranda* and the fourth amendment was unsound.[31] The court reasoned that *Miranda* deals only with compulsory self-incrimination and that there can be no analogy with the fourth amendment which deals with the sanctity of the home and personal possessions. Furthermore, the essential element of the fifth amendment is compulsion, while that of the fourth is unreasonableness.

---

26. For a model of such a warning see Note, Consent Searches: A Reappraisal After Miranda v. Arizona, supra note 14, at 158.

27. Miranda v. Arizona, 384 U.S. 436 (1966). "Non-resistance to the orders or suggestions of the police is not infrequent in such a situation; true consent, free of fear or pressure, is not so readily to be found." Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951).

28. United States v. Page, 302 F.2d 81, 84 (9th Cir. 1962).

29. See generally id.

30. Miranda v. Arizona, 384 U.S. 436, 465-67 (1966).

31. The Kansas Supreme Court has likewise rejected any such analogy. State v. McCarty, 199 Kan. 116, 427 P.2d 616 (1967).

It should be noted that when *Zerbst* was decided, it applied only to the sixth amendment, but its general definition of waiver was later applied to the fourth. Perhaps *Miranda*, which also sets forth a general standard of waiver for the sixth, as well as the fifth amendment will be similarly extended. Another argument for *Miranda's* extension is that consent to a search may be considered a form of self-incrimination.[32] Historically, too, a close connection has been made by the Court between the fourth and fifth amendments.[33] The fields they are meant to protect are similar—person and property, and privacy—and may quite logically be viewed as different aspects of the same problem.

Domestic Relations—Mexican Law Applied on Effect of Mexican Bilateral Divorce Decree Upon Alimony and Support Provisions of a Prior New York Separation Decree.—Plaintiff and defendant were married in 1948. In 1964 the plaintiff, Mrs. Lappert, obtained a New York separation, which included certain alimony and support provisions. The defendant, Mr. Lappert, also stipulated upon the court record that the requirements for alimony and support should not be affected by a subsequent divorce decree. Mrs. Lappert thereafter obtained a bilateral Mexican divorce decree which "incorporated the separation agreement and provided that it did not merge in the decree, but survived it."[1] Two years later, in July, 1966 her husband moved to modify the judgement of separation by deleting the alimony and support provisions of the separation agreement "on the ground that the divorce decree overrides them."[2] In the supreme court, trial term, the husband's motion was granted.[3] The appellate division reversed, certifying to the court of appeals the question of whether its order was properly made.[4] The court of appeals affirmed, applying the same rule it would have followed had the divorce been granted in a sister state, extended the rule of *Lynn v. Lynn*[5] and recognized the effect of the Mexican decree upon the alimony provisions of the prior New York separation agreement. *Lappert v. Lappert*, 20 N.Y.2d 364, 229 N.E.2d 599, 283 N.Y.S.2d 26 (1967).

Although required to afford full faith and credit to divorce decrees granted by sister states having proper jurisdiction,[6] New York is free to deny recognition

32. See Note, Consent Searches: A Reappraisal After Miranda v. Arizona, supra note 14, at 134.

33. Boyd v. United States, 116 U.S. 616 (1886); Note, Consent Searches: A Reappraisal After Miranda v. Arizona, supra note 14, at 134.

1. Lappert v. Lappert, 20 N.Y.2d 364, 366, 229 N.E.2d 599, 600, 283 N.Y.S.2d 26, 28 (1967).

2. Id. at 367, 229 N.E.2d at 600, 283 N.Y.S.2d at 28.

3. Order of the Supreme Court, Queens County, October 18, 1966. 27 App. Div. 2d 559, 276 N.Y.S.2d 50, 51 (2d Dep't 1966).

4. Id., 276 N.Y.S.2d at 50.

5. 302 N.Y. 193, 97 N.E.2d 748, cert. denied, 342 U.S. 849 (1951).

6. U.S. Const. art. IV, § 1. See generally Reese and Johnson, The Scope of Full Faith

of the decrees of any foreign nation.[7] Generally, notions of comity[8] govern the willingness of a state court to recognize a divorce decree of a foreign nation. The basic criterion by which these decrees are judged is whether " 'they . . . contravene our public policy.' "[9] In deciding whether to recognize a foreign divorce decree, the most critical aspect of the foreign law a state will scrutinize is its requirement for jurisdiction over both the marital *res* and the "persons" of the parties.[10]

The New York Court of Appeals, in *Rosenstiel v. Rosenstiel*,[11] decided to recognize Mexican bilateral divorces where " 'residence' has been acquired by one party through a statutory formality based on brief contact."[12] The *Rosenstiel* court reasoned that the contacts required by Mexican law to give its courts jurisdiction over the marital *res*[13] were in effect no different from the six week residency requirement of Nevada, whose divorces New York is bound to recognize under full faith and credit[14] and, apparently, that Mexico's "substantive" grounds for divorce were no longer contrary to the public policy of New York.[15] A question remained, however, concerning the recognition the

and Credit to Judgements, 49 Colum. L. Rev. 153 (1949); von Mehren, The Validity of Foreign Divorces, 45 Mass. L.Q. 23 (1960).

7. See Hilton v. Guyot, 159 U.S. 113 (1895). See also Martens v. Martens, 284 N.Y. 363, 365, 31 N.E.2d 489, 490 (1940).

8. " 'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." Hilton v. Guyot, 159 U.S. 113, 163-64 (1895).

9. Rosenbaum v. Rosenbaum, 309 N.Y. 371, 375, 130 N.E.2d 902, 903 (1955) (citation omitted).

10. See Nussbaum, Jurisdiction and Foreign Judgements, 41 Colum. L. Rev. 221, 223 (1941).

11. 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965).

12. Id. at 71, 209 N.E.2d at 711, 262 N.Y.S.2d at 89.

13. Here proof of residence of a party was established by the mere signing of the Municipal Register. Id. at 70, 209 N.E.2d at 710, 262 N.Y.S.2d at 88. See 51 Cornell L.Q. 328 n.4 (1965). For general discussion of Mexican divorce law see Comment, Mexican Divorce—A Survey, 33 Fordham L. Rev. 449, 462 (1965).

14. 16 N.Y.2d at 73, 209 N.E.2d at 712, 262 N.Y.S.2d at 90.

15. Id. at 74, 209 N.E.2d at 713, 262 N.Y.S.2d at 91. The dissent in Wood v. Wood, which was decided along with Rosenstiel, protested that recognition of the Mexican "consent" divorce (based on "incompatibility and ill treatment") was indeed offensive to New York's public policy. It cited the legislative pronouncements (before September 1, 1967 the sole ground for divorce in New York was adultery) and decisions of the state's highest court as indicative of the state's concern for the "traditionally solemn nature of the marriage contract. . . . " Id. at 86, 209 N.E.2d at 720, 262 N.Y.S.2d at 101. Fundamental to this concern has been the notion that the state itself has an interest in preserving marriages, and that parties may not dissolve them at will: "A husband and wife cannot contract to alter or dissolve the marriage. . . ." N.Y. Gen. Obl. Law § 5-311. While

New York courts would grant to Mexican decrees concerning the respective personal rights of the parties which had been altered. The doctrine of "divisible divorce"[16] establishes that the dissolution of a marriage itself must be distinguished from the "legal and economic incidents"[17] or personal rights of the parties which spring from the marriage that has been dissolved.[18] The precise problem before the instant court was whether it should follow Mexican law governing the effect of a Mexican divorce decree upon alimony provisions of a prior New York separation agreement. If the divorce had been granted in a sister state, New York would have applied the rule established in *Lynn v. Lynn*[19] that the law of that sister state will prevail as to the overriding effect of its divorce.[20] The instant court, while acknowledging that it was free to ignore the rule of *Lynn v. Lynn* where a foreign divorce was involved,[21] nevertheless stated that such a decision would be inconsistent with the reasoning contained in *Rosenstiel*.[22] Since *Rosenstiel* had established that Mexico's requirement for

---

Rosenstiel has been accused of recognizing a foreign decree which is contrary to the public policy of New York, "without pretense of constitutional compulsion" (Currie, Suitcase Divorce in the Conflict of Laws: Simons, Rosenstiel, and Borax, 34 U. Chi. L. Rev. 26, 57 (1966)), it nevertheless still stands for the proposition that New York will not recognize Mexican law unless "[it] offends no public policy of this state." 16 N.Y.2d at 74, 209 N.E.2d at 713, 262 N.Y.S.2d at 91. The indication in Rosenstiel that New York's public policy had in fact become more liberal than the dissent would allow has recently been confirmed by New York's new divorce law. Grounds for divorce now include cruelty, abandonment, confinement to prison, adultery, as well as living apart pursuant to either a decree of separation or a written separation agreement. N.Y. Dom. Rel. Law § 170 (Supp. 1967).

16. See Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); Estin v. Estin, 334 U.S. 541 (1948).

17. Baylek v. Baylek, 25 Misc. 2d 391, 392, 206 N.Y.S.2d 359, 361 (Sup. Ct. 1960). "Legal and economic incidents" would include rights of the parties regarding, e.g., alimony, custody and support of children, and the permissibility of collateral attacks on foreign divorce decrees.

18. See generally Herzog, Conflict of Laws, 17 Syracuse L. Rev. 139, 143-47 (1965).

19. 302 N.Y. 193, 97 N.E.2d 748, cert. denied, 342 U.S. 849 (1951).

20. In Lynn v. Lynn, plaintiff and defendant were separated in New York by a decree also providing for the wife's support. The husband subsequently obtained a bilateral divorce in Nevada which did not award alimony. When plaintiff wife later sought an increase in the support payments ordered in the original decree, the New York Court of Appeals held that, as the Nevada court had personal jurisdiction over the parties, full faith and credit required recognition of Nevada law on the effect of its divorce decree upon alimony awarded in the New York separation decree. Since the Nevada divorce made no provision for alimony, the wife was no longer entitled to support. It is significant to note that while New York here recognized the law of Nevada, i.e., that "no right of support can survive except as awarded by the final decree of divorce or by an authorized amendment to such decree" (302 N.Y. at 203, 97 N.E.2d at 753 (citations omitted)), New York law, along with "the general current of authority," was the same as that of Nevada. Id., 97 N.E.2d at 753 (citations omitted).

21. 20 N.Y.2d at 368, 229 N.E.2d at 601, 283 N.Y.S.2d at 29.

22. Id., 229 N.E.2d at 601, 283 N.Y.S.2d at 29.

jurisdiction in a divorce action was no longer offensive to public policy, the *Lappert* court saw no reason to refuse to apply to the Mexican divorce the same rule that applies to decrees of sister states governing the effect of its divorces upon prior alimony awards.[23]

Arguably, the instant court's extension of *Lynn v. Lynn* to Mexican bilateral divorces portends the application of Mexican law by the New York courts on the effect of Mexican divorce decrees upon alimony provisions of any prior New York separation agreement. Further, it would be consistent to assume that in the future New York will extend the same basic conflict of laws principles to other adjudications of Mexican courts governing the respective personal rights of parties to a divorce.

The more recently decided case of *Schoenbrod v. Siegler*[24] seems to support such a conclusion. This case involved the related question of when New York will allow a collateral attack upon a Mexican divorce. Plaintiff and defendant were married in the West Indies in 1963. Plaintiff thereafter obtained a Mexican bilateral divorce, which incorporated a separation agreement entered into by the parties just prior to the divorce. Shortly thereafter the plaintiff learned that the marriage ceremony allegedly solemnized in Granada, West Indies was performed by a public official unauthorized under the laws of that jurisdiction to solemnize a marriage. He then instituted an action in New York to declare the marriage void and to set aside the separation agreement on the ground that the parties were never married. The supreme court denied the motion of the divorced wife to dismiss the complaint.[25] The appellate division reversed and held that the prior bilateral Mexican divorce decree approving the separation agreement was res judicata on the issue of the validity of the marriage.[26] The divorced husband appealed to the court of appeals. Since Mexican courts lacked the "jurisdiction or power to vacate their own divorce decrees for any reason at all," the court reasoned, the only way the plaintiff could obtain the relief sought was by way of a collateral attack on the judgement.[27] The court of appeals, in reversing the appellate division, held that "[s]ince the rendering nation would permit such an attack . . . plaintiff 'may collaterally attack [the decree] in our courts' and litigate the validity of the marriage which the divorce purportedly terminated."[28]

While New York will allow collateral attacks upon a sister state's bilateral

23. Though the Lappert court decided to follow Mexico's law, since it was not briefed on the appeal, the court consequently assumed it to be the same as New York's which it applied. It then held that where a husband in a separation action commenced by his wife stipulated on record that required alimony and support payments should not be affected by any decree of divorce, he freely waives (is estopped from maintaining) his right to assert the overriding effect of a subsequent Mexican divorce decree concerning such provisions of the separation judgement. Id. at 369, 229 N.E.2d at 602, 283 N.Y.S.2d at 29.

24. 20 N.Y.2d 403, 230 N.E.2d at 638, 283 N.Y.S.2d 881 (1967).

25. Schoenbrod v. Siegler, 50 Misc. 2d 202, 270 N.Y.S.2d 19 (Sup. Ct. 1966).

26. 27 App. Div. 2d 531, 275 N.Y.S.2d 575 (1st Dep't 1966) (per curiam).

27. 20 N.Y.2d at 409, 230 N.E.2d at 641, 283 N.Y.S.2d at 885 (1967).

28. Id., 230 N.E.2d at 641, 283 N.Y.S.2d at 885 (citations omitted).

divorce decrees only if the law of that sister state would permit such an attack,[29] it is naturally free to ignore this rule in regard to collateral attacks on Mexican decrees.[30] The court was moved basically by the same principles which motivated the court in *Rosenstiel* to recognize the Mexican bilateral divorce, and in *Lappert* to recognize Mexican law on the priority of its divorce decree over a prior separation agreement. Both cases were guided by the general proposition that New York will recognize Mexican law if it does not offend its public policy. Since Mexican bilateral divorces were no longer offensive to the public policy of New York, there appeared to be no objection to extending the rule governing permissibility of collateral attacks upon a sister state divorce to the Mexican divorce as well. Before deciding to recognize Mexico's law, however, the court did first determine that the law of New York would allow a collateral attack under similar circumstances. Though the majority in the appellate division were of the opinion that New York law would not permit such a collateral attack " 'under constraint of *Statter v. Statter*,' "[31] the court of appeals found a significant distinction between the two cases. In *Statter*, one essential fact motivating the court's finding that a New York separation decree was res judicata on the issue of the validity of the marriage was that "relief from the earlier judgement of separation was available 'by way of motion in the first proceeding . . . .' "[32] While a party in New York may obtain relief from a judgement on the ground of newly discovered evidence,[33] Mexican courts have neither the jurisdiction nor the power to vacate their own divorce decrees. It follows, then, that New York law would allow a collateral attack upon a divorce decree rendered in a jurisdiction where such direct relief was not available to a party. Having established that New York and Mexican law would both allow the husband's collateral attack,[34] the court decided to apply the same rule

29. See Cook v. Cook, 342 U.S. 126 (1951); Johnson v. Muelberger, 340 U.S. 581 (1951).

30. See note 7 supra and accompanying text.

31. Schoenbrod v. Siegler, 20 N.Y.2d 403, 407, 230 N.E.2d 638, 640, 283 N.Y.S.2d 881, 884 (1967). Statter v. Statter, 2 N.Y.2d 668, 143 N.E.2d 10, 163 N.Y.S.2d 13 (1957), held that since an action for separation could be maintained only " 'by a husband or wife against the other party to the marriage' " the existence of a valid marriage is "a condition precedent to the successful maintenance of a cause for separation," and thus "a judgement of separation establishes [res judicata] the existence of a valid and subsisting marriage between the parties . . . . " Id. at 672, 143 N.E.2d at 12, 163 N.Y.S.2d at 16 (citations omitted). There the majority in invoking the doctrine of res judicata, stated that "[p]erhaps the most relevant factor here is the law's desire to secure stability and consistency of judicial determinations." Id. at 674-75, 143 N.E.2d at 13-14, 163 N.Y.S.2d at 18. The dissent protested that the majority misapplied res judicata to this case since the existence of a valid marriage between plaintiff and defendant had never actually been tried in the earlier separation suit. It felt that proper public policy would value the notion that "the marriage status is not to be altered by consent or default directly or indirectly . . . . " more highly than the "need for finality in litigation." Id. at 676, 143 N.E.2d at 15, 163 N.Y.S.2d at 20 (citations omitted).

32. 20 N.Y.2d at 408, 230 N.E.2d at 641, 283 N.Y.S.2d at 885.

33. N.Y. C.P.L.R. § 5015(a)(2).

34. Judge Burke in his dissenting opinion questioned whether in fact Mexican law does

governing the permissibility of collateral attacks on sister state decrees and allowed the collateral attack "[s]ince the rendering nation would permit such an attack . . . ."[35]

With *Rosenstiel* opening the door to the Mexican "suitcase divorce,"[36] and the *Lappert* and *Schoenbrod* decisions clearly reflecting the willingness of New York to recognize Mexican law governing the subsequent rights of the parties, the courts may be tested more frequently on just how far they will go in recognizing Mexican law on all issues related to the bilateral divorce. Though the *Lappert* and *Schoenbrod* decisions indicate that New York, while not compelled by full faith and credit, will in fact grant Mexican law governing rights of parties to Mexican divorces the same effect as that of New York's sister states, it must be remembered that such recognition is still discretionary and may be withheld if New York's public policy is offended. One specific area where New York would certainly refuse to apply its "normal" conflict of laws principles[37] to a Mexican decree is in the area of divorced parties' custody rights.[38] Principles of comity will often dictate that a foreign jurisdiction's

---

permit such a collateral attack. He felt that the appellant failed to make "an adequate showing of the availability in Mexico of a remedy by way of 'collateral attack,'" relying instead on an affidavit which did not "satisfy even the requirements of CPLR 4511 (subd. [b]) that before a court shall be required to take judicial notice of the law of a foreign country the party requesting such notice must 'furnish . . . the court sufficient information to enable it to comply with the request.'" 20 N.Y.2d at 411-12, 230 N.E.2d at 642-43, 283 N.Y.S.2d at 887 (dissenting opinion). Judge Van Voorhis, in a separate dissenting opinion, stated that since the decree could not be collaterally attacked in New York or Mexico "by reason of any other defect in the Mexican court's jurisdiction of the subject matter, the collateral attack should not be allowed on the ground that there was no marriage to dissolve." Id. at 410, 230 N.E.2d at 641, 283 N.Y.S.2d at 886 (dissenting opinion).

35. Id. at 409, 230 N.E.2d at 641, 283 N.Y.S.2d at 885.

36. See Currie, Suitcase Divorce in the Conflict of Laws: Simons, Rosenstiel and Borax, 34 U. Chi. L. Rev. 26 (1966).

37. New York courts usually apply principles of comity to foreign custodial decrees and follow the law of the child's domicile. "A child's domicile is that of the parent to whose custody it has legally been given . . . ." Application of Lang, 9 App. Div. 2d 401, 405, 193 N.Y.S.2d 763, 767 (1st Dep't 1959) (citations omitted), aff'd per curiam, 7 N.Y.2d 1029, 166 N.E.2d 861, 200 N.Y.S.2d 71 (1960). It is also established that "the mere physical presence of a child in the State is sufficient to confer on its courts power to make effective disposition for the child's welfare, including the determination of custody." Id. at 406, 193 N.Y.S.2d at 768. See also People v. Uzielli, 23 App. Div. 2d 260, 260 N.Y.S.2d 329 (1st Dep't), aff'd per curiam, 16 N.Y.2d 1057, 213 N.E.2d 460, 266 N.Y.S.2d 131 (1965).

38. In Rudnick v. Rudnick, 285 N.Y.S.2d 996 (Family Ct. 1967), the court held that where a Mexican divorce decree orders a father to make support payments for his child which the New York court considers inadequate under the circumstances, the New York court may withhold recognition of such provisions. "This court now holds that a foreign country decree which provides for a child who is domiciled in and is a citizen of New York State in an improvident and inadequate manner offends our public policy and is not entitled to recognition in that respect." Id. at 1001. In Baylek v. Baylek, 25 Misc. 2d 391, 206 N.Y.S.2d 359 (Sup. Ct. 1960), the New York Supreme Court, relying on Lynn, decided to recognize Mexican law on the effect of its divorce decree upon the custody provisions

custody decree be upheld in New York. In this area, however, the welfare of the children provides the "primary basis for judicial action,"[39] and the courts are free to withhold recognition of any foreign decree. Nevertheless, the court in *Application of Lang* cautions that the power to "depart from principles of comity does not mean that the power should be exercised in the absence of extraordinary circumstances demonstrating that otherwise the children will suffer . . . ."[40] With this one reservation, then,—that extraordinary circumstances of a particular case may offend some public policy of New York[41]—it appears safe to assume that Mexican adjudications governing subsequent rights of parties to its divorces will be granted the same effect that would have been given to such a decree had it been rendered by a sister state.

Torts—Conversion—Use of Information Contained in Stolen Documents Held to Constitute a Conversion.—Two former employees and two persons then employed by the plaintiff, a United States Senator, removed several thousand documents from his offices. Before returning them, the employees made copies which they later turned over to the defendant newspapermen. Defendants, who were aware of the circumstances under which the copies were obtained, reproduced in their newspaper column portions of the copies which they had received and wrote articles for their column based on information contained in the copies received. The District Court for the District of Columbia, on plaintiff's motion for summary judgment, found the defendants liable in conversion but denied summary judgment on an invasion of privacy theory. The court held that "a person who receives copies of documents that have been purloined from another and uses the information contained in them, knowing that the originals have been purloined, is liable for damages to their owner."[1] The issue of damages was left for determination at trial. *Dodd v. Pearson*, No. 66 Civ. 1193 (D.D.C., Jan. 15, 1968).

The rights protected in a cause of action sounding in conversion have been

contained in a prior New York separation agreement but failed to discuss the question of public policy.

39. Application of Lang, 9 App. Div. 2d at 403, 193 N.Y.S.2d at 765.

40. Id. at 406, 193 N.Y.S.2d at 768 (citations omitted).

41. The New York Court of Appeals in a more recent decision failed to find certain allegedly "offensive" provisions of a Mexican divorce decree repugnant to New York's public policy. Gunter v. Gunter, 20 N.Y.2d 883, 232 N.E.2d 853, 285 N.Y.S.2d 855 (1967) (per curiam). Here plaintiff husband unsuccessfully tried to set aside a New York separation agreement which had been incorporated in a Mexican divorce decree on the ground that it was "contrary to public policy." The court of appeals rejected plaintiff's contention that the incorporated separation agreement which included an arbitration clause was "repugnant to Section 5-311 of the General Obligations Law," which forbids parties to "contract to alter or dissolve a marriage." Id. at 856, 232 N.E.2d at 853, 285 N.Y.S.2d at 856. See note 15 supra.

1. Dodd v. Pearson, No. 66 Civ. 1193, at 1 (D.D.C., Jan. 15, 1968).

gradually expanded.[2] At first, conversion protected only those property rights associated with possession of chattels.[3] Thus, if a writing (which is a chattel) was taken, the owner's property right in the writing was nominally protected by an action for conversion to the extent of the price of the piece of paper itself.[4] However, the conversion of a writing which symbolizes a chose in action often effectively deprives its owner of an intangible interest beyond the value of the piece of paper taken. In cases involving choses in action the courts have therefore held that the intangible interest may be converted by taking a writing which symbolizes it.[5] In such cases mere possession of the writing by the converter confers upon him either rights inimical to those of the true owner or makes exercise of the true owner's right so difficult that a conversion of the writing is deemed a conversion of the underlying right.[6] For example, when a bankbook is wrongfully taken, in addition to the conversion of the bankbook itself, the money on deposit in the bank is also converted because the right of the owner of the bankbook to withdraw that money has been interfered with.[7] It has even been held that some intangible rights may be converted without converting the tangible evidence of those rights.[8] For example: X purchases shares of stock in C corporation from B, but C corporation wrongfully refuses to register the change in ownership on its records. Although C corporation does not possess the stock certificates, it is liable as a converter because it has deprived X of the right to dividends, the right to sell the shares and other rights associated with ownership of the shares.[9]

The instant court, recognizing that the plaintiff had been injured, stated that if the employees who physically removed and copied the Senator's documents were defendants in this case, they would be liable for damages in trespass and conversion.[10] However, the Senator's employees were not defendants in this case, and their acts alone could not be used as a basis for imposing liability on the

2. Ames, The History of Trover, 11 Harv. L. Rev. 374, 386 (1898).

3. Comment, Conversion of Choses in Action, 10 Fordham L. Rev. 415 (1941).

4. Teall v. Felton, 1 N.Y. 537 (1848), aff'd, 53 U.S. (12 How.) 284 (1851) (newspaper and wrapper); Clendon v. Dinneford, 5 Car. & P. 13, 172 Eng. Rep. 855 (K.B. 1831) (letters); Earle v. Holderness, 4 Bing. 462, 130 Eng. Rep. (K.B. 1828) (letters).

5. E.g., Otten v. United States, 210 F. Supp. 729 (S.D.N.Y. 1962) (bonds); United States v. Michaelson, 58 F. Supp. 796 (D. Minn. 1945) (checks); Hamilton v. Hamilton, 255 Ala. 284, 51 So. 2d 13 (1951) (insurance policy); Plunkett-Jarrell Grocery Co. v. Terry, 222 Ark. 784, 263 S.W.2d 229 (1953) (account books); Teper v. Weiss, 115 Ga. App. 621, 155 S.E.2d 730 (1967) (notes); Iavazzo v. Rhode Island Hosp. Trust Co., 51 R.I. 459, 155 A. 407 (1931) (savings bank book).

6. See generally Comment, Conversion of Choses in Action, supra note 3, at 416-22.

7. Stebbins v. North Adams Trust Co., 243 Mass. 69, 136 N.E. 880 (1922); Iavazzo v. Rhode Island Hosp. Trust Co., 51 R.I. 459, 155 A. 407 (1931).

8. London, Paris & American Bank v. Aronstein, 117 F. 601 (9th Cir.), cert. denied, 187 U.S. 641 (1902); Bond v. Mount Hope Iron Co., 99 Mass. 505 (1868); Humphreys v. Minnesota Clay Co., 94 Minn. 469, 103 N.W. 338 (1905).

9. Herrick v. Humphrey Hardware Co., 73 Neb. 809, 103 N.W. 685 (1905).

10. Dodd v. Pearson, No. 66 Civ. 1193, at 6 (D.D.C., Jan. 15, 1968).

defendant columnists. Had the court found that the Senators' employees acted as agents of the defendants, then the defendants would be liable as joint tortfeasors.[11] But the agency issue presents a question of fact,[12] which could not be resolved on the motion for summary judgment.[13] Unable, therefore, to find that the defendants were joint tortfeasors, the court found that defendants were successive converters.[14] "[A] person who [knowingly] receives and uses the property of another that has been wrongfully obtained . . . is likewise guilty of conversion and liable for damages."[15] Precisely what "property" does the court mean that the defendants have converted? Since the defendants received only copies and were never in possession of the Senator's original documents,[16] clearly the defendants have not converted the papers which comprise the plaintiff's original records.

If the court means that the defendants deprived the plaintiff of an underlying interest in the records (the information contained therein), then the case is analogous to the shareholder case because the defendant has deprived plaintiff of an underlying interest without physically taking the tangible evidence representing that interest. In the shareholder case the *stock certificates* were not interfered with by the defendants; the corporation effected the conversion by manipulating through the use of corporate control the rights represented by the certificates.[17] In the case at hand, the original *documents* were not interfered with by the defendants;[18] the defendants effected the conversion by knowingly accepting copies of converted documents. In several criminal cases the federal courts,[19] as well as the New York Penal Law,[20] have recognized that the con-

11. "The law is well established that all persons who instigate, command, encourage, advise, ratify or condone the commission of a trespass are cotrespassers and, as such, are jointly and severally liable as joint tortfeasors." Kapson v. Kubath, 165 F. Supp. 542, 551 (W. D. Mich. 1958). See also Christensen v. Frankland, 324 Ill. App. 391, 58 N.E.2d 289 (1944); Oyler v. Fenner, 264 Mich. 519, 250 N.W. 296 (1933).

12. See Plaintiff's Motion for Summary Judgment, Dodd v. Pearson, No. 66 Civ. 1193, at 2 (D.D.C., Jan. 15, 1968), where reference is made to a previous motion for summary judgment which was denied because "the affidavits of Pearson and Anderson raised a genuine issue of fact as to whether defendants had induced . . . [the employees] to abstract documents from plaintiff's files."

13. Fed. R. Civ. P. 56(c) provides for granting summary judgment if "there is no genuine issue as to any material fact . . . ."

14. Dodd v. Pearson, No. 66 Civ. 1193, at 6 (D.D.C., Jan. 15, 1968).

15. Id.

16. Neither the allegations of the plaintiff nor the finding of the court indicates that the instant defendants ever had possession of the original records of the plaintiff.

17. Herrick v. Humphrey Hardware Co., 73 Neb. 809, 811, 103 N.W. 685, 687 (1905).

18. This is assuming there was no agency relationship between the plaintiff's employees and the defendants.

19. United States v. Bottone, 365 F.2d 389 (2d Cir.), cert. denied, 385 U.S. 974 (1966) (secret formulae); United States v. Lester, 282 F.2d 750 (3d Cir. 1960), cert. denied, 364 U.S. 937 (1961) (oil field map); United States v. Seagraves, 265 F.2d 876 (3d Cir. 1959) (oil field map).

20. In 1967 New York adopted a new Penal Law which included a provision which makes it a crime unlawfully to use secret scientific information. The section provides that

tents of certain writings have value apart from the written expression and that there is commercial value in keeping knowledge of the contents of secret scientific writings limited to their rightful owner. When an owner's documents are copied the owner may be deprived of the commercial value of keeping the papers secret without being deprived of the original documents. Thus one may steal a secret formula without actually taking the formula itself from the owner.[21] The well established federal doctrine which allows the maintenance of a private suit for harm resulting from conduct in violation of a statute[22] has not been applied to cases of this type. It is not unreasonable, however, to expect that the civil law will eventually parallel the penal law and allow conversion to lie in cases of this type.[23] But the instant plaintiff did not claim to have been deprived of underlying rights in any way related to secret scientific information. Although the plaintiff's records undoubtedly proved valuable to the defendants, they did not contain the secret type of information[24] which has commercial value to their rightful owner. The plaintiff did not seek redress for the type of underlying commercial injury which is ordinarily contemplated in conversion. Rather, the gravamen of plaintiff's complaint is that his interest in keeping personal information confidential was invaded.

Traditionally, one who complains that he has been injured in reputation and has suffered mental anguish and personal embarrassment because undesirable publicity has been given to his affairs may recover under the theories of libel[25] or invasion of privacy.[26] However, a United States Senator is a public official who derives his powers from the people who elect him as their representative.[27] Because the ultimate power in our society is derived from the people,[28] the first amendment to the Constitution guarantees the right to discuss, debate and criticize the conduct of public officials.[29] It has therefore been necessary

one is guilty of a class E felony if one "makes a tangible reproduction or representation of such secret scientific material by means of writing, photographing, drawing, mechanically or electronically reproducing or recording such secret scientific material." N.Y. Pen. L. § 165.07.

21. See note 19 supra.

22. E.g., J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (violation of the Securities Exchange Act); Texas & Pac. Ry. v. Rigsby, 241 U.S. 33 (1916) (violation of the Federal Safety Appliance Act).

23. Thus if a plaintiff can prove that property of the value of $5,000 or more was stolen by copying it in some manner and that the property was transported across state lines, there is a strong possibility that a federal court will allow a recovery in conversion, even if the property is of a type never before protected in conversion.

24. The Senator claimed that the information consisted of financial records, tax returns, books of account, cancelled checks and stubs and private correspondence.

25. See generally W. Prosser, Torts § 108, at 785 (3d ed. 1964).

26. Id. § 112, at 834-37.

27. U.S. Const. amend. XVII.

28. See A. Meiklejohn, Political Freedom: The Constitutional Powers of the People (1948).

29. "[T]he controversy over seditious libel [is] the clue to 'the central meaning of the First Amendment.' . . . The Amendment has a 'central meaning'—a core of protection of speech without which democracy cannot function, without which, in Madison's phrase,

to limit a public official's right to recover in privacy and libel. Although a public official may have a cause of action for invasion of privacy concerning publicity given to intimate aspects of his private life,[30] a public official has no cause of action for invasion of privacy concerning publicity given to the public aspects of his life.[31] Similarly, since the landmark case of *New York Times v. Sullivan*,[32] a public official who is defamed in his public capacity,[33] cannot recover "unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[34] A public official, who has not had his personal life invaded by unwanted publicity[35] and who is unwilling or unable to prove malice or a reckless disregard for the truth or falsity of the publication,[36] should not be allowed to recover in conversion for injury to reputation and thereby to circumvent the constitutional safeguards deemed necessary to protect the first amendment rights of free speech and a free press. If the publication of information gleaned from "converted" documents is to be made actionable in conversion, then the constitutional safeguards deemed necessary to protect first amendment freedoms in defamation and privacy actions should likewise be made applicable to these "conversion" actions.

'the censorial power' would be in the Government over the people and not 'in the people over the Government.'" Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 The Supreme Court Review 191, 208.

30. W. Prosser, Torts § 112, at 849 (3d ed. 1964). See generally Spiegel, Public Celebrity v. Scandal Magazine—The Celebrity's Right to Privacy, 30 S. Cal. L. Rev. 280 (1957).

31. Estill v. Hearst Publishing Co., 186 F.2d 1017 (7th Cir. 1951) (published photograph linking public prosecutor with "Baby Face" Dillinger); Martin v. Dorton, 210 Miss. 668, 50 So. 2d 391 (1951) (photograph of sheriff while on duty); Hull v. Curtis Publishing Co., 182 Pa. Super. 86, 125 A.2d 644 (1956) (dictum) (photograph of a policeman on duty).

32. 376 U.S. 254 (1964).

33. Id. at 279.

34. Id. at 279-80.

35. See note 31 supra.

36. Rosenblatt v. Baer, 383 U.S. 75 (1966), reversed a libel judgment in favor of a supervisor of a county recreation area and remanded to determine if plaintiff was a public official within the Times doctrine and, if so, to allow him an opportunity to prove malice. The Court reversed a criminal sedition conviction in Garrison v. Louisana, 379 U.S. 64 (1964), because the Times rule makes only those false statements made with a high degree of awareness of their probable falsity the subject of either civil or criminal sanctions. Id. at 74-75. Another court dismissed a libel suit brought by a congressman for failure to comply with the Times rule. Washington Post Co. v. Keogh, 365 F.2d 965 (1966), cert. denied, 385 U.S. 1011 (1967).