Washington University Law Review

Volume 6 | Issue 3

January 1921

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Charles E. Kimball Jr.

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Recommended Citation

Charles E. Kimball Jr., *Immunities and Privileges of Foreign Consuls While Passing Through a Third State*, 6 St. Louis L. Rev. 125 (1921).
Available at: https://openscholarship.wustl.edu/law_lawreview/vol6/iss3/2

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IMMUNITIES AND PRIVILEGES OF FOREIGN CONSULS WHILE PASSING THROUGH A THIRD STATE

PART 1

EXCEPTIONS AND IMMUNITIES OF CONSULS.

It frequently happens that consuls while *en route* to their posts become involved in litigation due to some act in violation of laws of the country in which they are temporarily staying, through ignorance of its laws.

As a general rule consuls are not considered as ambassadorial officers, but are not the less entitled to certain privileges and immunities. The treaties and internationl custom usually provide for the freedom of the consulate, of the papers contained therein, for the exemption from arrest for misdemeanors of the consular officers, and in addition for all the privileges extended to consuls by the local law or by international custom as well as any privileges and immunities specially secured to consuls by treaty. As a general rule consuls and sub-consuls are amenable to the civil processes of the country to which they are accredited and are responsible for contract liabilities arising out of the pursuit of their own personal interests. It is thus generally said that the result of the English, American and French cases establishes that consuls have certain privileges, but that they are not diplomatic officers and that they cannot claim any of the immuniities accorded specially to members of the diplomatic service.

Viseash v. Becker, 3 M. & S. 284; *Clark v. Cretico,* 1 Taunt 186; *Aspinwall v. Queens Proctor,* 2 Curteis 241; *Sorensen v. Reg.,* 11 Mo. P. C. 141; *The Octavie,* 33 L. J. Adm. 115; *Davis v. Packard,* 7 Peters 276; *St. Lukes Hosp. v. Barkley,* 3 Blatchf. 259; 2 *Calvo. Droit International,* Sec. 485.

This opinion is also concurred in by *Pigott-Foreign Judgments and Jurisdiction,* Part L, p. 321; *Moore's Dig. of Inter-*

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national Law, Vol. V. pp. 61, et seq. The reasons are given best in a French work—*L'Immunité civile de Jurisdiction* by Ozanam, who says (pp. 69-71) (our translation):

"Immunity is granted to individuals representing the state and accredited by it and having for their exclusive mission the playing of a representative role. Outside of such capacity it is evident that there is no need for them to have the benefit of such privilege . . . Diplomatic agents and consuls fall into two distinct categories, having their respective attributes and their own rules. Consuls do not represent in any fashion the sovereignty of the state appointing them . . . Their functions have of course an official character, but not political. Their part consists only in taking care of the private interests of their nationals, and accordingly it is not clear that their independence would in any way be compromised by their subjection to a foreign tribunal. Hence jurisprudence does not hesitate to except consuls from the benefits of civil immunities, and the authors of all nationalities share this view."

To the same effect, see, *Droit L'Exterritorialité des Agents Diplomatiques,* pp. 2-3.

PART II.

TREATY PROVISIONS AS BETWEEN THE UNITED STATES AND GREAT BRITAIN.

By the "Convention of Commerce and Navigation" between the United States and Great Britain, ratified December 22, 1815, and indefinitely extended by convention of August 6, 1827, it is provided in Article Fourth, in very general language, that for misbehavior of consuls they may be punished either according to the law of the country to which they are accredited, or sent back to Great Britain with a letter assigning the reasons for the discharge. The treaty is silent as to privileges and immunities granted to representatives of the grade of consul, vice-counsul and pro-consul.

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PART III.

LAWS AND CUSTOM OF THE UNITED STATES.

By the Constitution the judicial power of the United States extends to all cases affecting ambassadors, other public ministers and consuls, and by the Judiciary Act of 1789 it is provided that the several district courts of the United States, exclusively of the courts of the several states, have jurisdiction of all suits against consuls and vice-consuls, certain offences excepted.

PART IV.

THIRD STATES.

The rule as to the exemptions and immunities of ambassadorial officers, and likewise of consuls when passing through a friendly third state on their way to take up their duties in a particular country, and as to the duties which a third state owes to the officers and representatives of a foreign power temporarily within its borders, is subject to some controversy. The modern weight of authority, however, seems to favor the according to these officers of the same privileges and immunities which would be granted to them were they accredited to the Government of the third state through which they are passing.

Merlin Repertoire Ministre Publique, sec. 5, par. 3, nos. 4 and 12, says (the translation being Mr. Wheaton's, from his 5th edition, page 351):

"When it is said that an ambassador is entitled in the territories through which he merely passes, to the independence belonging to his public character, it must be understood with this qualification, that he travels as an ambassador; that is to say, after having caused himself to be announced as such, and having obtained permission to pass in that character, the permission places the sovereign, by whom it has been granted, under the same obligation as if the public minister had been accredited to and received by him."

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In the case of *Wilson v. Blanco,* 56 N. Y. Sup. 582, Blanco was an envoy extraordinary and minister plenipotentiary duly accredited from Venezuela to France and recognized as such by the United States. While he was in the City of New York awaiting early means of conveyance to France, he was served with a summons in a civil action, and upon his failure to appear a judgment was recovered against him, after which motion was made at a Special Term of the Supreme Court to vacate the judgment and to set aside the service of the summons on the ground that when it was served he was an ambassador and as such not amenable to any civil action brought against him in this city. It was held that the service of the summons and the subsequent judgment were of no force and were void and were to be vacated and set aside.

As we have seen in Part 1 of this memorandum, however, officials of the rank of ambassador are accorded privileges superior to those which are granted to lower officers or agents of the diplomatic service. 15 Ruling Case Law 167-8.

In conclusion, we submit that a proceeding in the State court is by virtue of the Constitution and the Acts of Congress pursuant thereto, in a case dealing with a consul, a total nullity. In the early case of *Davis v. Packard,* supra, it was held that the objection of want of jurisdiction could be raised at any time during the trial and possibly thereafter. We submit that any rules of procedure as to waiver of defenses which are not pleaded, can have no application. Considerations of policy may suggest the advisability of allowing a suit to proceed to the exhaustion of the resources of the plaintiff, objection then being made that the court is totally without jurisdiction and therefore the proceedings are a nullity. At this juncture possibly a compromise of the suit might be had at a reasonable expense.

CHARLES E. KIMBALL, JR.

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