

THE NATURE OF THE CONSULAR ESTABLISHMENT

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I. INTRODUCTION

Of those institutions which have come down to us from remote times, one of the most practical, and the one that, undoubtedly, has played its part most creditably, has been the consular establishment. In the course of its long and laudable history, questions of international law and policy of the gravest importance have been agitated in the chancelleries and in the courts, in reference to it—questions which, to our mind, comprise one of the most delicate chapters in the ever debatable sphere of international jurisprudence. Even at this late day, the question of the juridical nature and powers of the institution is constantly receiving the serious thought of the statesmen, jurists, and scholars of Europe. In the United States alone, of the Great Powers—due, perhaps, to our hitherto cultural and commercial insularity—has the study of this important international agency been neglected in a measure short of inexcusable. Up to comparatively recent times, the literature on the subject has been negligible, and the bench and bar have been left in almost complete darkness regarding the nature of an institution which, in our large commercial and industrial centers, has become a most important local *administrative* factor.

The institution had its origin in, and deals primarily with, the necessities of commerce. The commercial interrelations of nations today have become more pronounced and involved than at any other period of the world's history, and the institution of consuls, which is charged principally with a general supervision of the commerce of a nation in foreign parts, should long since have become the object of systematic and intensive study at the hands of our legal scholars. It is to supply this deficiency in the literature of the law that the author has been for some time publicly writing on the subject.¹

¹ Puente, *Amenability of Foreign Consuls to Judicial Process in the United States* (1929) 77 U. OF PA. L. REV. 447; Puente, *Consular Protection of the*

II. ORIGIN

The origin of the consulate antedates the establishment of permanent embassies.² The immediate prototype of the modern consular system is found in the ancient *proxeni* of the city-states of Greece, about the end of the seventh century before the Christian era. The genesis of this phenomenon in the life of independent states is attributable, primarily, to the *commercial*, and, secondarily, to the *political*, exigencies of that period. In the absence of permanent embassies, it met, as effectually as anything could then meet, the commercial, as well as the political, needs of nationals of one state trading with, or residing in, foreign states; it supplied invaluable information to the accrediting government; it furnished advice and material assistance to the nationals of the state appointing it, while those nationals remained within the domain of the receiving state. The *proxenus* was, as a rule, a national of the state in which he resided, and the appointment did not necessarily clothe him with official status. His powers, however, were very extensive. He usually acted as a witness in testamentary matters; was permitted to determine the rights of succession of foreigners who died without heirs in the state where he resided; received the ambassadors of the state he represented; assisted in the formulation and conclusion of treaties; acted as arbiter in controversies either between different states or private individuals; was generally exempted from certain taxes, customs duties, and other charges imposed on resident alien subjects; enjoyed the right to place the coat-of-arms of his country over the door of his official residence; and, in case of war, was invested with inviolability of person and property.³

Such was the usefulness of the institution, that it soon gained general recognition throughout Greece.⁴ But whatever analogies

Estates of Deceased Nationals (1929) 23 ILL. L. REV. 635; PUENTE, THE FOREIGN CONSUL (1926).

² I PIEDELIEVRE, DROIT INTERNATIONAL PUBLIC (1894) § 568.

³ I PHILLIPSON, INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME (1911) 147 *et seq.*; 3 CALVO, DROIT INTERNATIONAL (5th ed. 1880) § 1368; WARDEN, THE ORIGIN, NATURE, PROGRESS AND INFLUENCE OF CONSULAR ESTABLISHMENTS (1813) 36; I CANDIOTI, HISTORIA DE LA INSTITUCION CONSULAR (1925) § 58.

⁴ I CANDIOTI, *op. cit. supra* note 3, § 54.

we may find between the ancient Hellenic institution of the *proxeni*, or the later Roman *pretor mercatorum*, and the modern consular establishment, it is only in the second half of the Middle Ages that we discern with any definiteness the outline and real roots of the institution in its present organic structure. During that period, the word *consul* was generally employed to designate a local magistrate, originally elected annually by majority vote of the merchants, and entrusted with jurisdiction over all questions affecting their civil, commercial, and maritime affairs. He was required to take an oath to his king, and was allowed the use of a consular seal. It became customary not to permit his reelection to the office on consecutive years. These *consuls* were to be found spread throughout the Mediterranean world, principally in such cities as Pastoria (1107), Montpellier (1141), Plasencia (1154), Ravenna (1115), Milan (1159), Ferrara (1181), Modena (1182), Bologna (1200), Genoa (1206), Florence (1421), Burgos (1494), Pisa (1087), Bergamo (1117), Valencia (1283), Mallorca (1343), Luca (1107), Turin (1156), and Ragusa (1443). What were also commonly known as *consuls sur mer* grew rapidly during the first half of the thirteenth century; and the commercial legislation of such enterprising cities of that period as Aignes-Mortes (1246), Venice (1255), and Barcelona (1258) required vessels over a specified tonnage to carry consuls on board, to adjust any differences that might arise between merchants and seamen, to maintain order on board ship, and to see that maritime laws were not violated.⁵

Upon the establishment of the consulate in foreign countries, the consul exercised, in addition, extensive judicial and diplomatic functions. The jurisdiction thus assumed was very natural at that period of time. It was the direct and inevitable outcome of the prevalence of the *personal conception of law*—a conception which lasted with considerable vigor until its final evanescence, in most respects, at the Peace of Westphalia, in 1648; but which, even at this late day, lingers, in some measure, in the consular institution. It is worthy of note that to the jurists of the Middle

⁵ *Ibid.* § 215.

Agrees the maxim *jurisdictionem nemo habet extra territorium* was inconceivable as a legal principle, and the logical result was that resident aliens claimed, and were accorded, the privilege of having their controversies adjudicated according to their own laws and by their own officials.⁶

The Crusades (1096-1272) not only served to agitate the religious passions of men, but also stimulated direct commercial, political, social, and cultural interchange between the peoples of western Europe and those bordering on the eastern Mediterranean. Trade in those regions was highly profitable to the crusaders; they set up their own permanent establishments—their “factories”, as they were called—and, in the course of time, we find them administering the laws of their own countries, through magistrates of their own selection, known as *consuls*. Fauchille says:⁷

“Le systeme de la *personalite des lois* exerce encore son empire: le marchand, meme habitant en pays etranger, doit observer la coutume commerciale nationale envers ses compatriotes. Chacun de ces negociants, etablie en terre byzantine, doit etre juge d’apres sa loi personnelle. De là, la necessite de faire exercer la juridiction en pays etranger par un juge connaissant cette loi personnelle et apte a l’appliquer. Ce magistrat, choisi parmi les negociants d’une meme nation ou d’une meme cite, c’est le *consul* d’outre-mer, chef de la petite communaute genoise, venitienne ou marseillaise et juge de litiges.”

A casual review of the early history of the institution in the east shows that, in 1060, even the Greek Emperor at Constantinople had granted the Venetians the right to install their own magistrates over their factories, and invested them with jurisdiction in civil, as well as criminal, matters; that, in 1199, Emperor Alexis III had granted the Venetians the right to be judged by their own magistrates, even in matters between themselves and Greeks; that, in 1204, the Genoese had obtained permission to occupy exclusively, under the authority of their own magistrates, a section of

⁶ 2 HILL, HISTORY OF EUROPEAN DIPLOMACY (1914) 493.

⁷ 1 FAUCHILLE, DROIT INTERNATIONAL PUBLIC (1926) § 734, pt. III; BRY, DROIT INTERNATIONAL (1892) 346; BROWN, FOREIGNERS IN TURKEY (1914) 8 *et seq.*

Constantinople; that Pisa, in 1160, Barcelona, in 1290, and Ancona, in 1406, had consuls at Constantinople; that Marseilles was given the right to establish consulates in 1223; and that, shortly thereafter, consulates were to be found in Antioch (1243), Tripoli (1251), Cyprus (1254), Rhodes (1351), Saloniki (1371), and Alexandria (1377). The thirteenth and fourteenth centuries witnessed also the rapid growth of the institution in other parts of Europe, particularly in the Baltic States, the cities of Flanders, the Hanseatic Towns, and Holland.

During the period known as the Middle Ages, the establishment and maintenance of the consulate was a matter of *local* concern to each factory. Governments had not as yet embarked on their paternalistic experiment. This stage of the institution has, therefore, been appropriately designated as its *periode municipale*.⁸ But, from the sixteenth century on, we perceive an increase of governmental interest in the institution; and, no sooner were the states of Europe committed by the Peace of Westphalia to the doctrine of the *territoriality of law*, than they found it necessary, as a legitimate exercise of their new conception of sovereignty, to assume exclusive control of the nomination and appointment of the consuls presiding over the factories of their nationals on foreign shores. This new method of appointment had the decided advantage of conferring on the institution a public representative character; of insuring to it greater permanency; of strengthening its authority; and of investing its decisions with greater efficacy.

It also became necessary, in due course, to place the status of the institution on some sort of juridical basis, rather than to let its existence depend on the comity of foreign nations or on vague considerations about the right of prescription. This was particularly needful in non-Christian countries, and a series of treaties were entered into by the western powers with eastern potentates, to secure the desired end.⁹

It took but a short time, however, after the doctrine of the territoriality of law had gained general currency, to conclude that

⁸ I FAUCHILLE, *op. cit. supra* note 7, § 738; I CANDIOTTI, *op. cit. supra* note 3, § 126.

⁹ See Puente, *Extraterritorial Powers of the Consular Office*, soon to appear in the AMERICAN JOURNAL OF INTERNATIONAL LAW.

the exercise of consular jurisdiction in a foreign country was, in practical effect, an usurpation of the sovereignty and independence of the territorial ruler.¹⁰ Consequently, as the states of Christendom became more politically stable; as their administration of justice improved; as their laws became more humane; as constant clashes occurred between the territorial and the consular jurisdictions; and, finally, as the states more clearly perceived the latent danger in maintaining within their domain a jurisdiction distinct from, and independent of, their own, they undertook to curtail systematically the powers of the foreign consular establishment, until today, save in a few exceptional cases, the consular office has been reduced to an administrative agency with little more than advisory, supervisory, and intercessory powers in commercial matters—to a mere “mission protectrice”, as Heffter has neatly described it.¹¹ This process of curtailment was considerably hastened by the development of the system of permanent diplomatic representation, and the assumption, by the embassies, of many of the functions theretofore discharged by the consuls. Today, in the absence of conventional stipulations, the consular office is regarded as a commercial agency,¹² without any political functions whatever,¹³ and without civil or criminal jurisdiction over its nationals. “Ceux-ci n’auront plus qu’une mission de surveillance, de police et de protection a l’égard de leurs nationaux.”¹⁴ They are appointed for local purposes, and have, therefore, direct intercourse with the local authorities only. If they deem it necessary to approach the general government itself, they can do so only through the diplomatic envoy, to whom they are subordinate.¹⁵

¹⁰ I FAUCHILLE, *op. cit. supra* note 7, § 740.

¹¹ HEFFTER, *DROIT INTERNATIONAL PUBLIC* (Bergson’s transl. 1866) § 245. See *Glass v. The Sloop Betsey*, 3 Dall. 6 (U. S. 1794) for latent dangers in consular claims to extraterritorial jurisdiction.

¹² *The Anne*, 3 Wheat. 435 (U. S. 1818); *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261 (1880).

¹³ *State v. De La Foret*, 2 Nott & McCord 217 (S. C. 1820). For a more complete discussion, see Puente, *The Amenability of Foreign Consuls to Judicial Process in the United States*, *supra* note 1.

¹⁴ I FAUCHILLE, *op. cit. supra* note 7, § 740.

¹⁵ I OPPENHEIM, *INTERNATIONAL LAW* (3d ed. 1920) § 434.

III. DEFINITION

The word *consul* has a generic, as well as a specific, meaning. In the former, it designates all consular officers, regardless of rank; in the latter, it denotes an officer of a particular rank in the consular service.¹⁶ In a generic sense, a consul is an officer accredited by his government to reside in a foreign country for multifarious purposes, but, primarily, to represent, promote, and protect its commerce and the interests of its citizens or subjects.¹⁷ He is appointed by the sovereign or chief executive of the accrediting state,¹⁸ and the appointment is attested by a *lettre de provision, commission consulaire, or lettre patent*, as it is variously known, communicated to the foreign government through the diplomatic agent of the accrediting state in the country where the consul is to exercise his functions.¹⁹ The consul may be either *missi* (professional) or *electi* (non-professional). The employment of resident merchants as consuls is sustained, not only by policy and expediency, but also by the practice of all maritime powers.²⁰ Although the distinction between the consuls *missi* and *electi* is usually recognized, it is without definite practical juridical effect, for there exists in international law no appreciable difference, in point of title, rank, prerogatives or duties, in the position of the two classes of consuls.²¹ The assertion that the consul *electi* is of distinctly inferior competence and status, and that he does not enjoy full consular privileges and immunities,²² is neither accurate as the statement of a general principle of international law, nor consistent with actual practice. The better opinion is

¹⁶ *Dainese's Case*, 15 Ct. Cl. 64 (1879); *Morris v. Linton*, 61 Neb. 537, 85 N. W. 565 (1901).

¹⁷ *Seidel v. Peschkaw*, 27 N. J. L. 427 (1859). The definition in *Oscanyan v. Winchester Repeating Arms Co.*, *supra* note 12, at 272, that a consul is "an officer commissioned by his government for the protection of its interests and those of its citizens or subjects", is open to the objection that it is too broad.

¹⁸ 3 CALVO, *op. cit. supra* note 3, § 1378.

¹⁹ 2 MERIGNHAC, *TRAITE DE DROIT INTERNATIONAL PUBLIC* (1907) 326; BRY, *op. cit. supra* note 7, at 349.

²⁰ Mr. Seward, Sec. of State, to Mr. Burlingame, February 4, 1863, 1 WHARTON, *DIGEST OF INTERNATIONAL LAW* (2d ed. 1887) § 123.

²¹ 2 LOUTER, *DROIT INTERNATIONAL PUBLIC POSITIF* (1920) 65.

²² HERSHEY, *ESSENTIALS OF INTERNATIONAL LAW* (1912) 299.

that of Oppenheim,²³ to the effect that, "No difference exists in the general position of the two kinds of consuls according to International Law." Only where treaties so stipulate, will the consul *missi* enjoy greater privileges and immunities than the consul *electi*.²⁴ The consul *missi* is constructively a resident of his own country,²⁵ and, as long as he confines himself to the business appertaining to his public character, his domicile is not changed, but remains in the country from which he is deputed.²⁶ There is, in such case, no inference of domicile or of *animus manendi* to be drawn from a residence abroad, referable to his official duties,²⁷ and the "domicile of residence", as the home domicile is termed, will be presumed to prevail until another is acquired.²⁸ If, however, a foreigner already domiciled and residing in this country accepts an appointment in the consular service of a foreign state, he does not thereby lose his previously established domicile here,²⁹ and the length of his residence in the character of consul is immaterial.³⁰ If a foreign consul engages in business inconsistent with, or foreign to, his public character, he is thenceforth to be considered as domiciliating himself abroad, and becoming, as any other national, amenable to the ordinary jurisdiction of the state.³¹ The trading consul is, however, manifestly subject to no less favorable treatment, even though it were admitted, as some authors contend, that he would have no specific personal exemptions or privileges by reason of his office; but if he, a consul, is subjected to internationally illegal treatment to which no resident alien could be subjected, then the fact of his being known as the representative

²³ I OPPENHEIM, *op. cit. supra* note 15, § 420.

²⁴ Consular Convention with Sweden, June 1, 1910, arts. 3, 4; Treaty of Friendship and General Relations with Spain, July 3, 1902, arts. 15, 16; Consular Convention with Italy, May 8, 1878, arts. 3, 4; Treaty of Friendship, Commerce and Navigation with Denmark, April 11, 1857, art. 10; Consular Convention with Belgium, March 9, 1880, arts. 3, 4.

²⁵ *In re Estate of Balbo*, 16 Ohio N. P. (n. s.) 9 (1914).

²⁶ *Arnold v. United Insurance Co.*, 1 Johns. 363 (N. Y. 1800).

²⁷ *Wheat v. Smith*, 50 Ark. 266, 7 S. W. 161 (1887); *Sharpe v. Crispin*, 20 L. T. R. 41 (1869); *Niboyet v. Niboyet*, 39 L. T. R. 486 (1878); *Udny v. Udny*, L. R. 1 Scotch App. 441 (1869); *The Indian Chief*, 3 C. Rob. 12 (Eng. 1801).

²⁸ *Wheat v. Smith*, *supra* note 27.

²⁹ *Sharpe v. Crispin*, *supra* note 27.

³⁰ DICEY, *CONFLICT OF LAWS* (3rd ed. 1922) 157.

³¹ *Arnold v. United Insurance Co.*, *supra* note 26.

of a friendly power might be deemed to aggravate the injury committed.³²

In short, the character of consul does not give any protection to that of merchant when they are united in the same person.³³ So, a neutral subject residing in the enemy's country, as a trading consul of a neutral state, will be regarded as an enemy, and, as such, subject, like any other resident merchant, to all the burdens incident to a state of hostilities.³⁴ His individual character is not merged in his national character, and the latter cannot protect him from the consequences of those transactions.³⁵ As he contributes by his industry and property, when engaged in trade, to aid the government under which he resides, it is but reasonable that the enemies of that government should have a right to hold his property responsible, as that of an enemy.³⁶

IV. RECEPTION

There is no rule of international law which imposes upon a state an absolute obligation to receive consuls accredited to it by foreign powers.³⁷ Their admission is now understood to depend either upon convention, or upon the permission—tacit or express—of the sovereign in whose dominions they are to reside.³⁸

In considering the reception of this species of public official, each country is free to adopt any one of the following courses: It may totally exclude such consuls from all or such parts of its territory as it may deem necessary or convenient, provided, however, that the exclusion operates impartially on the consuls of all countries; it may admit them, either conditionally or unconditionally, as policy or expediency may dictate, provided, also, that, if conditional as to one, it shall be conditional as to all; or it may

³² Secretary Frelinghuysen, to Mr. Baker, Minister to Venezuela, May 12, 1884, *FOREIGN RELATIONS OF THE UNITED STATES* (1884) 585.

³³ *Coppell v. Hall*, 7 Wall. 542 (U. S. 1868).

³⁴ *The Pioneer*, Fed. Cas. No. 11,175 (S. D. N. Y. 1863); *Arnold v. United Insurance Co.*, *supra* note 26; *The Baltica*, 11 Moore P. C. 141 (Eng. 1857).

³⁵ *Albrecht v. Sussmann*, 2 V. & B. 323 (Eng. 1813); *The Indian Chief*, *supra* note 27.

³⁷ 2 *Vattel*, *THE LAW OF NATIONS* (Chitty's ed. 1834) § 34.

³⁸ *Arnold v. United Insurance Co.*, *supra* note 26.

³⁸ *Arnold v. United Insurance Co.*, *supra* note 26.

reject the individual applicant for recognition, either for personal or political reasons. However, in view of the growing commercial, economic, and industrial interdependence of most countries, it is manifest that, in actual practice, every state must consent to the admission of foreign consuls to its territory, in order to secure for itself the reciprocal privilege of sending its own consuls abroad. Nevertheless, the refusal of a state to receive a consul cannot be considered, in the absence of treaty stipulations, as a violation of its international obligations,³⁹ however much such refusal may imperil or retard its normal commercial development.⁴⁰

The right to maintain consulates in foreign countries is now secured, with general uniformity, by formal engagements, in the nature of treaties or consular conventions, between the governments concerned.⁴¹ Thus, to cite a recent illustration, the Treaty of Friendship, Commerce and Consular Rights,⁴² between the United States and Germany, signed at Washington, on December 8, 1923, provides:

"Each of the High Contracting Parties agrees to receive from the other, consular officers in those of its ports, places and cities, where it may be convenient and which are open to consular representatives of any foreign country."

The Treaty of Friendship, Commerce, and Consular Rights, between the United States and Hungary, signed at Washington on June 24, 1925,⁴³ and the Consular Convention with Cuba, of April 22, 1926,⁴⁴ contain substantially identical provisions. However, even when there is no convention between two countries, binding them to receive their respective consular officers, it is settled that consuls may be received by the general government from an

³⁹ 1 OPPENHEIM, *op. cit. supra* note 15, § 425; 2 PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW (3d ed. 1857) 246; 3 CALVO, *op. cit. supra* note 3, § 1380; 1 DE CLERCQ & DE VALLAT, GUIDE PRATIQUE DE CONSULATS (5th ed. 1898) § 106.

⁴⁰ BRY, *op. cit. supra* note 7, at 348.

⁴¹ 1 MARTENS, TRAITÉ DE DROIT INTERNATIONAL (1883) § 78; 1 DE CLERCQ & DE VALLAT, *loc. cit. supra* note 39; 2 PHILLIMORE, *loc. cit. supra* note 39.

⁴² 44 STAT. 2147, art. XVII (1927).

⁴³ *Ibid.* 2453, art. XIV.

⁴⁴ *Ibid.* 2471, art. I.

acknowledged sovereign power. This has been, undoubtedly, the established policy of the government of the United States.⁴⁵ When, without express stipulations, a foreign consul has been admitted by the territorial government, he is entitled to such privileges and immunities as his predecessors have enjoyed; the rational assumption in such cases being that every nation is presumed to give previous warning of its intention to adopt a different course with respect to him.⁴⁶ Reason, analogy, and the pressure of necessity, therefore, combine in urging the conclusion that, in the absence of conventional stipulations, if the *exequatur* is issued without any restrictive conditions, the citizen or subject who acts as consul for a foreign state is entitled, to a like extent, as an *alien* consul, to the privileges ordinarily appertaining to the office.⁴⁷

A. Citizenship

A consul may be a foreigner to the country within which he exercises his functions, and his office may be the only motive of his sojourn there; or he may be a foreigner who, for purposes of commerce or for other reasons, lives in the state independently of his office, and has, perhaps, acquired a domicile there; or, finally, he may be a national of the state in which he executes the functions of consul.⁴⁸ Considering the practice of different nations, and the fact that he is usually a person engaged in commerce,⁴⁹ the alienage of an individual is not to be presumed from the mere fact that he is, in this country, the consul of a foreign state.⁵⁰ Neither the adjudged cases, nor the practice of this government, prevent an American citizen, who does not hold an office of profit or trust under the United States, from accepting and exercising in this country the office of consul of a foreign government;⁵¹ and

⁴⁵ Mr. Adams, Sec. of State, to the President, Jan. 28, 1819, 1 WHARTON, *op. cit. supra* note 20, § 115.

⁴⁶ 2 PHILLIMORE, *loc. cit. supra* note 39.

⁴⁷ 1 HALLECK, INTERNATIONAL LAW (4th ed. 1908) 404; TAYLOR, INTERNATIONAL PUBLIC LAW (1901) § 329; BAKER, FIRST STEPS IN INTERNATIONAL LAW (1899) 138.

⁴⁸ HALL, INTERNATIONAL LAW (8th ed. 1924) 373.

⁴⁹ *Gittings v. Crawford*, Fed. Cas. No. 5,465 (D. Md. 1838).

⁵⁰ *Bors v. Preston*, 111 U. S. 252, 4 Sup. Ct. 407 (1883).

⁵¹ *Bors v. Preston*, *supra* note 50; *In re Baiz*, 135 U. S. 403, 10 Sup. Ct. 854 (1889); *Gittings v. Crawford*, *supra* note 49.

this policy is not known to have hitherto occasioned any inconvenience.⁵²

B. *Exequatur*

The *exequatur* is the executive order, or letter patent, countersigned by the Secretary of State, recognizing the official character of the consul, and declaring him free to exercise such functions and powers, and to enjoy such privileges, as inhere in his office under the common law of nations, or are conferred upon it by treaty or local regulation. In the United States the *exequatur* is signed by the President and countersigned by the Secretary of State, and bears the great seal of the United States.

The form of the *exequatur* is invariably regulated by the practice of the receiving state,⁵³ and it is not necessary that, in the official recognition of the public character of the consul, any particular formality should be observed. His recognition must be considered as effected through the observance of territorial laws and regulations relating to the official acceptance of foreign consuls.⁵⁴ Thus, we are informed⁵⁵ that in Russia and Denmark the consul merely receives notice that he is recognized; and that in Austria his commission is endorsed with the word *exequatur* and impressed with the seal of state. In the United States he receives a formal instrument of recognition. Recognition sometimes consists of a verbal assurance, which would dispense with the necessity of a formal *exequatur*.⁵⁶

a. *Conditions of Issuance*

Before an *exequatur* will be granted by the President, recognizing the consul of any nation as entitled to exercise his official functions in this country, evidence should be laid before him that

⁵² *In re Baiz*, *supra* note 51.

⁵³ 2 FIORE, NOUVEAU DROIT INTERNATIONAL PUBLIC (2d ed. 1885) § 1182.

⁵⁴ FIORE, INTERNATIONAL LAW CODIFIED (5th ed., Borchard's transl. 1918) § 506.

⁵⁵ HALL, *loc. cit.* *supra* note 48.

⁵⁶ Secretary Gresham, to Mr. Thompson, Minister to Brazil, Sept. 27, 1894, FOREIGN RELATIONS OF THE UNITED STATES (1894) 85.

such officer is duly appointed, and this can only be done by producing an original commission,⁵⁷ either directly from his government, or else from its authorized agent; but, in the latter case, it should be accompanied by the instrument investing such agent with the necessary authority.⁵⁸ This instrument is recorded in the Department of State.⁵⁹ The power of appointment is frequently conferred upon consuls-general, with or without limitation or modification, but it is not necessarily nor uniformly attached to their office.⁶⁰ The provisions of certain existing consular conventions⁶¹ between the United States and foreign countries speak in general terms of the issuance of an *exequatur* on recognizing consular officers, even when of a lower grade than that of full consul. Inasmuch as it seems inexpedient that the *exequatur*, in the form of an official paper signed by the President and bearing the great seal of the United States, should correspond to the usual modes of appointment of foreign consular officers, other than by a regular commission signed by the chief executive of the appointing state, and bearing its great seal, it has been deemed proper to issue a less conspicuously formal *exequatur* in the case of subordinate appointments made by the consuls-general or consuls of foreign powers in this country under their own signature and seal of office. This course, besides being conformable to the principles of international etiquette, is understood to be in accordance with the course of recognition of like subordinate officers of the United States in foreign countries.⁶²

Pending the receipt of the original commission, the consul will be authorized to exercise his functions provisionally, without

⁵⁷ Mr. Jefferson, Sec. of State, to the Minister plenipo. of Great Britain, Sept. 10, 1793, 5 MOORE, DIGEST OF INTERNATIONAL LAW (1906) § 699.

⁵⁸ Mr. McClane, Sec. of State, to Mr. Lederer, Feb. 28, 1834, 1 WHARTON, *op. cit. supra* note 20, § 115.

⁵⁹ Mr. Forsythe, Sec. of State, to Baron de Mareshal, Austrian min., Mar. 21, 1839, 5 MOORE, *loc. cit. supra* note 57.

⁶⁰ Mr. McClane, Sec. of State, to Mr. Lederer, *loc. cit. supra* note 58.

⁶¹ Consular Convention with German Empire, Dec. 11, 1871, art. II, 1 MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS (1902) 551; Consular Convention with Italy, Feb. 8, 1868, arts. I, II, *ibid.* 961.

⁶² Mr. Evarts, Sec. of State, to Mr. Sherman, Dec. 12, 1879, 1 WHARTON, *op. cit. supra* note 20, § 115.

the formality of the *exequatur*,⁶³ and the official acts of the consul, while acting under this provisional authority, are as binding and effectual as if done under the sanction of a formal *exequatur*. Where provisional notification is given of the appointment of a consular official, pending formal presentation of his commission and application for an *exequatur*, no *exequatur* or certificate of recognition issues, but the Secretary of the Treasury is requested to cause the officers of his department to give temporary recognition to the acts of the appointee. After the lapse of a reasonable time, if no further action is taken, confirmatory of the appointment, it is dropped from the record.⁶⁴ After the *exequatur* is granted, the local authorities are notified by the general government, with instructions to make known to subordinate officials within the consular district the fact of such recognition, and enjoining upon them the strict observance of the rights and prerogatives to which the consul may be entitled under the law.⁶⁵ In the United States the *exequatur* is not issued to a substitute or subordinate officer. He receives a less formal document, signed by the Secretary of State, and bearing the seal of the Department of State.⁶⁶

In a general way, the grant of an *exequatur* to a consul has, in its broader aspects, a twofold effect. In the case of a government theretofore not recognized, it involves such a resumption of formal intercourse between the two governments as to imply, however indirectly, the recognition of the sovereign status of the authority from which the appointment issues. But, if no formal appointment is made, and no *exequatur* is requested and received, a foreign individual may, with the consent of the local sovereign, exercise in fact the consular functions without entailing the legal

⁶³ Mr. Jefferson, Sec. of State, to the minister plenipo. of Great Britain, 5 MOORE, *loc. cit. supra* note 57; Mr. Forsythe, Sec. of State, to Baron de Mareschal, Austrian min., Mar. 21, 1839, 5 MOORE, *loc. cit. supra* note 57.

⁶⁴ Mr. Blaine, Sec. of State, to Sir Edward Thornton, British min., May 27, 1881, 5 MOORE, *loc. cit. supra* note 57.

⁶⁵ 2 MERIGNHAC, *loc. cit. supra* note 19; 1 PIEDELIEVRE, *op. cit. supra* note 2, at 520; 2 OLIVART, TRATADO DE DERECHO INTERNACIONAL PUBLICO (4th ed. 1903) 523.

⁶⁶ Mr. Evarts, Sec. of State, to Mr. Shishkin, Russian min., Nov. 14, 1879, 5 MOORE, *op. cit. supra* note 57, § 698; 1 HYDE, INTERNATIONAL LAW (1922) § 462.

recognition of the foreign government.⁶⁷ Such an individual is not a consul, in legal contemplation, although the local state allows him, for political reasons, to exercise consular functions.⁶⁸ On the consul it confers the official recognition of his mission, and carries with it the pledge or guarantee of protection in the performance of his official duties and in the enjoyment of the customary and conventional privileges, immunities, and exemptions to which he may be entitled.⁶⁹ He thus becomes invested, as Hall properly observes,⁷⁰ with a "sort of scintilla of an international character, sufficiently strong to render any outrage upon him in his official capacity a violation of international law".

b. Necessity of Exequatur to Enjoy Privileges

Before a foreign consul becomes entitled to exercise the authority, and enjoy the privileges, immunities, and exemptions

⁶⁷ Mr. Adams, Sec. of State, to the President, Jan. 28, 1819, 5 MOORE, *op. cit. supra* note 57, § 693; 1 OPPENHEIM, *op. cit. supra* note 15, § 428. Hershey, *Notes on the Recognition of De Facto Governments by European States* (1920) 14 AM. J. INT. LAW 515, remarks: "It is a disputed question among the authorities (see, e. g., Hall, 5th ed., p. 88n in the negative, and Oppenheim, I, sec. 428, in the affirmative) whether the appointment and acceptance of consuls implies recognition of independence. A study of the precedents connected with the Spanish-American revolt tends to the conclusion that the mere appointment of consuls only implies *de facto* recognition, whereas the granting of *exequaturs* to consuls would imply full recognition." See also Baty, *So-called "De Facto" Recognition* (1922) 31 YALE L. J. 469; Dickinson, *The Unrecognized Government or State in English and American Law* (1923) 22 MICH. L. REV. 29.

⁶⁸ 1 OPPENHEIM, *op. cit. supra* note 15, § 428. As illustrative of the practice pursued by our government in the matter of permitting consular officers of unrecognized governments to discharge consular duties in the United States, we quote a letter of the Secretary of State, dated March 2, 1923, to the Governor of Illinois, relative to the appointment of a consul of Mexico at Chicago. The letter reads: "I have the honor to inform you that this Department is in receipt of a communication from the local representative of the administration now functioning in Mexico stating that Senor Luis Lupian has been appointed Consul of Mexico at Chicago, Illinois, and requesting that the proper authorities be informed accordingly. As the United States Government has not recognized the present Mexican regime, it does not grant the usual recognition to consular officers of Mexico appointed to reside in the United States. However, the former incumbent having been either transferred or removed, the Department considers that it is desirable as a practical matter for agents of this Government to raise no question as to the lack of formal recognition of Mr. Lupian and to deal with him in the transaction of business as with his predecessor. I therefore request that you will advise the appropriate officials of your State to that effect."

⁶⁹ 1 HALLECK, *op. cit. supra* note 47, at 399; 1 OPPENHEIM, *op. cit. supra* note 15, § 427; 2 MERIGNHAC, *loc. cit. supra* note 19.

⁷⁰ HALL, INTERNATIONAL LAW (8th ed. 1924) § 105.

due and pertaining to his office, it is necessary that he should have received his *exequatur*, or some equivalent indicia of authorization. Without the *exequatur*, or confirmation of his commission by the executive authority of the country to which he is deputed, he can not lawfully enter upon the discharge of his functions; and, on its revocation by such authority, his official character immediately ceases.⁷¹ A foreign consul derives his authority, in effect, as well from the accrediting state as from the receiving state. He receives his commission from the former, and the *exequatur* from the latter, but it is only by virtue of the authority vested in him by the receiving state that he exercises any official authority within its territorial limits.⁷² The President may grant the *exequatur* on such conditions as he may deem expedient or politic. But where it is issued unconditionally, the rights, privileges and immunities of the consul must be ascertained from a consideration of such conventional stipulations and general principles of international law as are applicable to the consular office. Any restrictions sought to be imposed on a consul by the receiving state should be embodied in the *exequatur*, and the acceptance of such restrictions by the appointing state will be construed as limiting *pro tanto* the consul's powers and prerogatives.⁷³ The insertion of conditions in an *exequatur* is unusual, and, when applied to consuls of the United States abroad, will be excepted to by the American Government.⁷⁴ Before the consul can sue in his official capacity, he must have received the *exequatur*. If, however, having sued before receiving it, it is issued during the pendency of the action, so that he is entitled to sue when the matter is actually presented to the court, the irregularity will be considered as having been cured, and the proceedings will be held valid *ab initio*.⁷⁵

⁷¹ *Lorway v. Lousada*, Fed. Cas. No. 8,517 (D. Mass. 1866); 1 HALLECK, *op. cit. supra* note 47, at 399; 2 OLIVART, *op. cit. supra* note 65, at 522.

⁷² *Scanlan v. Wright*, 30 Mass. 523 (1833).

⁷³ 2 FIORE, *op. cit. supra* note 53, § 1185; 2 VATTEL, *loc. cit. supra* note 37.

⁷⁴ Mr. Fish, Sec. of State, to Mr. Sickles, April 16, 1870, 5 MOORE, *op. cit. supra* note 57, § 698.

⁷⁵ *The Adolph*, Fed. Cas. No. 86 (C. C. R. I. 1851).

An *exequatur* granted by one government, unless formally withdrawn, will be recognized by its successor, whether the change be political or merely administrative. The theory is that, since the consular office does not, as a rule, partake of a political complexion, any change in the internal administration of either the appointing or the receiving state can have no effect whatever upon the status of the consul. Hence, neither a new patent nor a new *exequatur* are, in the event of any such change, necessary.⁷⁶ Since the recognition, dismissal, or demand for recall of representatives of foreign countries is a political matter exclusively for the executive department of the general government, whose action in that regard is accepted and followed by the judiciary,⁷⁷ a foreign consular officer in the United States, who possesses an unrevoked *exequatur* issued by the President, will be regarded by the judiciary as the accredited agent of his country and entitled to all the rights, privileges and immunities appertaining to his office, notwithstanding that the government which sent him has been overthrown, and an apparently successful revolutionary government established in its place.⁷⁸ A consul may be sent to, or may continue to perform his duties on, insurgent territory, when the status of belligerency has been accorded; although no *exequatur* should be granted to a consul sent by an insurgent belligerent community, since the grant of the *exequatur* imports, as we have seen, a recognition of political status.⁷⁹

c. Refusal of Exequatur

The modern law of nations does not make the reception of foreign consuls obligatory on other states.⁸⁰ The *exequatur*,

⁷⁶ I LORIMER, *THE LAW OF NATIONS* (1883) 301; TAYLOR, *INTERNATIONAL LAW* (1901) § 330; HALL, *op. cit. supra* note 48, at 377; I OPPENHEIM, *op. cit. supra* note 15, § 438.

⁷⁷ *United States v. Ortega*, Fed. Cas. No. 15,971 (C. C. E. D. Pa. 1825); *United States v. Benner*, Fed. Cas. No. 14,568 (C. C. E. D. Pa. 1830); *United States v. Liddle*, Fed. Cas. No. 15,598 (C. C. Pa. 1808); *Jones v. United States*, 137 U. S. 202, 11 Sup. Ct. 80 (1890); *United States v. Trumbull*, 48 Fed. 94 (S. D. Cal. 1891); *D'Azambuja v. Pereira*, 1 Miles 366 (Pa. 1830); *In re Baiz*, *supra* note 51.

⁷⁸ *United States v. Ortega*; *United States v. Trumbull*, both *supra* note 77.

⁷⁹ HERSHEY, *op. cit. supra* note 22, at 120.

⁸⁰ I DE CLERCQ & DE VALLAT, *loc. cit. supra* note 39.

therefore, will not issue as a matter of course, but may be justifiably refused if the person nominated as consul is objectionable for any serious reason,⁸¹ whether political or personal.⁸² As a general rule of international intercourse, the executive need not assign any reasons whatever for such refusal,⁸³ and his action in the matter will be final.⁸⁴ The exercise of this undoubted right of refusal is an extreme one in the practice of nations, and in this country is rarely resorted to;⁸⁵ although the refusal cannot be considered, under any circumstances, as a breach of international law.⁸⁶ If it appears that, at the time the *exequatur* is applied for, the consul holds an office under the United States, his official character will not be recognized by our government. The policy of the government has always been opposed to the official recognition of the consular character of an applicant under circumstances so obviously inconsistent.⁸⁷

d. Revocation

Although the revocation of the *exequatur* seldom takes place—it being the preferable practice to give an opportunity of recalling the offending consul to the state by which he has been nominated,⁸⁸ yet, by receiving the consular representatives of a foreign country, the United States comes under no obligation of law or courtesy to allow the persons so received to retain and exercise consular functions, when, for any reason, those persons become unacceptable to this government;⁸⁹ and it is now definitely

⁸¹ HALL, *loc. cit. supra* note 48; I OPPENHEIM, *op. cit. supra* note 15, § 427; 3 CALVO, *op. cit. supra* note 3, § 1381.

⁸² 4 PRADIER-FODERE, DROIT INTERNATIONAL PUBLIC (1888) § 2063.

⁸³ Mr. Sherman, Sec. of State, to Mr. Pringle, chargé, Aug. 18, 1897, 5 MOORE, *op. cit. supra* note 57, § 700.

⁸⁴ Mr. Forsythe, Sec. of State, to Mr. Eaton, Oct. 12, 1839, 5 MOORE, *op. cit. supra* note 57, § 700; Mr. Bayard, Sec. of State, to Mr. Cox, April 29, 1886, 5 MOORE, *op. cit. supra* note 57, § 700.

⁸⁵ Mr. Blaine, Sec. of State, to Mr. Morgan, March 31, 1881, 5 MOORE, *op. cit. supra* note 51, § 700.

⁸⁶ 2 PHILLIMORE, *loc. cit. supra* note 39.

⁸⁷ Mr. Frelinhuisen, Sec. of State, to Mr. de Bille, Danish min., March 5, 1883, 5 MOORE, *op. cit. supra* note 57, § 699; Bors v. Preston, *supra* note 50.

⁸⁸ HALL, *op. cit. supra* note 48, § 105.

⁸⁹ Mr. Seward, Sec. of State, to Baron de Watterstedt, April 23, 1866, 5 MOORE, *op. cit. supra* note 57, § 700.

settled that the President has the power, in his discretion, to withdraw the *exequatur* of any foreign consul,⁹⁰ for personal reasons,⁹¹ or for illegal or improper conduct,⁹² as for overstepping the limits for publishing articles derogatory to the general government.⁹⁴ To justify the exercise of this power, the President does not need the fact of a technical violation of law judicially proved. He may exercise it for any reasonable cause, whenever in his judgment it is required by the interests or the honor of the United States.⁹⁵ The revocation may occur without assigning any reason for it. If the President voluntarily assigns cause for removal, he invites discussion of the sufficiency thereof, and defensive evidence can be offered, with a request for reconsideration. If he offers no reason, he cannot be compelled to give any.⁹⁶ This general right of revocation, however, is often qualified by conventions with foreign powers, so as to require the government to state its reasons therefor.⁹⁷ The effect of the revocation of the *exequatur* is to terminate, or, at least, to suspend the consul's official character,⁹⁸ and to withdraw from him the protection of Section 256 of the Federal Judicial Code, which grants foreign consuls immunity from all suits and proceedings in the state courts.⁹⁹ If a foreign consul, duly recognized by the United States government, is sued in a state court, and, while a motion is pending in such court to

⁹⁰ 7 OP. ATT'Y GEN. 385 (1856).

⁹¹ I OPPENHEIM, *op. cit. supra* note 15, § 427.

⁹² Coppel v. Hall, *supra* note 33; 2 OP. ATT'Y GEN. 725 (1852).
of his functions, especially for meddling in political affairs,⁹³ or

⁹³ HALL, *loc. cit. supra* note 48.

⁹⁴ Secretary Hay, to Mr. Hawley, Aug. 3, 1900, 5 MOORE, *op. cit. supra* note 57, § 700.

⁹⁵ 7 OP. ATT'Y GEN. 385 (1856).

⁹⁶ Secretary Sherman, to Mr. Pringle, chargé, Aug. 18, 1897, 5 MOORE, *op. cit. supra* note 57, § 700.

⁹⁷ Treaty of Friendship and General Relations with Spain, July 3, 1902, art. 14, 2 MALLOY, *op. cit. supra* note 61, at 1705; Treaty of Commerce and Navigation with Japan, art. 3, Feb. 21, 1911, 3 TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS (1910-1923) 2713.

⁹⁸ I HALLECK, *op. cit. supra* note 47, at 399; HALL, *op. cit. supra* note 48, § 105.

⁹⁹ Savic v. City of New York, 203 App. Div. 81, 196 N. Y. Supp. 442 (1922). See also Puente, *Amenability of Foreign Consuls to Judicial Process in the United States*, *supra* note 1.

dismiss the action for want of jurisdiction, his *exequatur* is revoked, the revocation will not validate the proceeding, since the latter was void *ab initio*, and there would be no basis upon which to incorporate it subsequently.¹⁰⁰ The restoration of the *exequatur*, however, operates as a rehabilitation of the suspended authority of the consul to perform consular functions, and qualifies him anew to assume charge of the office.¹⁰¹ Whether a consul whose *exequatur* has been revoked is entitled to immunity against state court proceedings is partly a political and partly a judicial question, and, in so far as it is a political question, the opinion of the Secretary of State may be considered as indicative of the political status of such a consul.¹⁰² The consular office is, of course, abolished with the disappearance of the sovereignty from which the consul received his *exequatur*.¹⁰³

V. CONSULAR ORGANIZATION

We understand by the term "consular establishment" the aggregate of consulates subordinate to the same head, who is today, in most countries, the diplomatic agent of the accrediting state,¹⁰⁴ or, in his absence, the consul general.¹⁰⁵ The consular district is the territorial circumscription within which a consul discharges his functions.¹⁰⁶ In the practice of our government, and of others, there is no immediate connection or dependence between the persons holding diplomatic and consular appointments in the same country; but, by the usage of all the commercial nations of Europe, such a subordination is considered a matter of course. In the transaction of their official duties, the consuls are often in necessary correspondence with their ministers,

¹⁰⁰ *Naylor v. Hoffman*, 22 How. Pr. 510 (N. Y. 1862), overruling *Rock River Bank v. Hoffman*, 22 How. Pr. 250 (N. Y. 1862).

¹⁰¹ Acting Secretary Uhl, to Mr. Baker, Minister to Nicaragua, June 14, 1894, FOREIGN RELATIONS OF THE UNITED STATES (1894) 479.

¹⁰² *Savic v. City of New York*, *supra* note 99.

¹⁰³ *Mahoney v. United States*, 10 Wall. 62 (U. S. 1869); SMITH, INTERNATIONAL LAW (5th ed. 1918) 80; I OPPENHEIM, *op. cit. supra* note 15, § 437.

¹⁰⁴ BRY, *op. cit. supra* note 7, at 350; I FAUCHILLE, *op. cit. supra* note 7, § 745, pt. III.

¹⁰⁵ 3 CALVO, *op. cit. supra* note 3, § 1373.

¹⁰⁶ I FAUCHILLE, *op. cit. supra* note 7, § 746, pt. III.

through whom alone they can regularly address the supreme government of the country wherein they reside, and they are always supposed to be under their direction.¹⁰⁷

The consular hierarchy comprises, as a rule, four categories of officers; namely, the consul general, the consul, the vice consul, and the consular agent. This division, however, is not one of international importance.¹⁰⁸ The consul general is the highest officer in the consular service. He exercises a right of surveillance over all subordinate consular officials within the same establishment. The consul presides over the consular district, and has under his jurisdiction all the vice consuls and consular agents residing in the district. The vice consul is a full consular officer, and, as such, has a public character, receiving his appointment also from the chief executive of the accrediting state, and exercising in every respect the same functions as a consul. The consular agent does not possess a consular or public character; he is appointed by the consul, and is his representative.¹⁰⁹ In answer to the question whether an *acting* consul can perform judicial functions in China, propounded to the Department of State by the American *chargé* in that country, Acting Secretary Adee wrote, in 1894:¹¹⁰

“There is no such office known to our law as an acting consul and there is, of course, no authority whatever for the exercise by such person of any consular position as pointed out in your dispatch. Section 4130 of the Revised Statutes expressly limits the exercise of judicial functions conferred upon consuls by section 4083 to ‘persons invested with, and exercising the functions of consul-general, vice consul-general, consul, or vice-consul.’

“As bearing directly upon this matter, would call your attention to the opinion of the Attorney-General, rendered under date of May 7, 1891, in response to the following query of this Department:

¹⁰⁷ Secretary Adams, to Mr. Brown, Minister to France, Dec. 24, 1823, 5 MOORE, *op. cit. supra* note 52, § 718.

¹⁰⁸ HALL, *loc. cit. supra* note 48.

¹⁰⁹ Gould v. Staples, 9 Fed. 159 (C. C. Me. 1881).

¹¹⁰ FOREIGN RELATIONS OF THE UNITED STATES (1894) 141.

“Can a person placed in charge of a consular office by the incumbent of the consulate, but without appointment and qualification as prescribed by the Constitution and laws of the United States, perform (1) the regular official duties of the post and (2) notarial and other unofficial services?”

“The Attorney-General replied:

“I am unable to see how a person can lawfully execute the duties of a public office of the United States who has not been clothed with authority to do so by the appointing power of the United States. Such a person can not possibly have any virtue in him as a public officer.”

“As to the second question the Attorney-General held that the value of such services depends entirely on the fact that the person rendering them is a consular officer, that the United States would seem to be in duty bound to protect the public, so far as it may be reasonably expected to do so, against the exercise of even merely voluntary consular functions by persons not regularly appointed consuls, and that it therefore clearly concerns the United States that no person shall be permitted to exercise the office of consul of the United States in any way who has not been authorized by Congress to do so.”

The chancellor is the secretary of the consulate. He assists the consul in the clerical and routine duties of the office. Calvo¹¹¹ gives the following detailed description of the character of his duties:

“En matiere politique, administrative et commerciale les chanceliers remplissent les fonctions de secretaire, ils transcrivent les decrets ou les ordres du gouvernement, les decisions ministerielles, les arretes de l'ambassadeur ou du consul; quand les circonstances le permettent, ils procedent, sous les ordres du consul, aux operations de sauvetage et dressent l'inventaire des objets sauves; ils dressent les proces-verbaux d'enquete, de vente, etc.”

It has long been the recognized practice of our courts to receive in evidence¹¹² the certificate of the Secretary of State as

¹¹¹ CALVO, *DRIT INTERNATIONAL* (5th ed. 1896) § 1376.

¹¹² *In re Baiz*, *supra* note 51.

full,¹¹³ the best¹¹⁴, and most conclusive¹¹⁵ proof of the public character of a diplomatic or consular agent. The reception of this certificate precludes the courts from proceeding upon argumentative or collateral proof.¹¹⁶ However, the certificate of the Secretary of State, to the effect that he has been informed by a foreign public minister that a defendant to a suit in the state courts is within that class of consular officers entitled to immunity from the process of those courts, will not be considered as conclusive of the official character of the defendant, when the rank or designation by which he is known does not clearly correspond with the provisions of Section 256 of the Federal Judicial Code.¹¹⁷

The recent interesting case of *Moracchini v. Moracchini*,¹¹⁸ correctly states, as we believe, the law upon this point. The case involved an action for divorce by Pierre Moracchini against Ada Moracchini. The defendant filed a counterclaim or cross-bill to the original bill. The plaintiff moved the court to dismiss the cross-bill on the ground of want of jurisdiction. He claimed that as "chancellor" of the French consulate general at New York he was immune from suit in any of the courts of this country, by virtue of the provisions of Article 2 of the Consular Convention with France, of February 23, 1853,¹¹⁹ and Section 256, paragraph

¹¹³ *United States v. Benner*, *supra* note 77.

¹¹⁴ *United States v. Liddle*, *supra* note 77.

¹¹⁵ *United States v. Ortega*, *supra* note 77.

¹¹⁶ *Agency of Canadian Car & Foundry Co. v. American Can Co.*, 258 Fed. 363 (C. C. A. 2nd, 1919); *Lehigh Valley R. R. v. State of Russia*, 21 Fed. (2d) 396 (C. C. A. 2nd, 1927).

¹¹⁷ *Lonsdale Shop, Inc. v. Bibily*, 126 Misc. 445, 213 N. Y. Supp. 170 (1925): "Certain certificates are submitted from the French consul and from the ambassador of France to the United States, to the effect that there is no position known as vice consul in the French consular service and that the position of chancellor is the equivalent of that of vice consul. Under the terms of the treaty, it seems to be agreed that a vice consul is entitled to immunity. These certificates of the French officials cannot and do not take the place of or in any manner add to the treaty with the United States. Neither can I see how the certificate of the Secretary of State of the United States, submitted on this motion, with regard to the contents of the note received from the ambassador of France in respect to the defendant Bibily and his assignment with the consulate general of France at New York as chancellor, with the duties appertaining to that office, changes the terms or the effect of the treaty with France."

¹¹⁸ 126 Misc. 443, 213 N. Y. Supp. 168 (1925).

¹¹⁹ 10 STAT. 992 (1866), 1 MALLOY, *op. cit. supra* note 61, at 529.

8, of the Federal Judicial Code.¹²⁰ In passing upon these interesting questions, the court said:

"By article II of the Convention of 1853, immunity from civil actions is expressly given to consuls general, consuls, vice consuls, and consular agents of France. In the same article it is also expressly provided that consular pupils shall enjoy the same personal privileges and immunities. It is then further provided, at the end of the same article, that in case of the death, indisposition, or absence of consuls general, consuls, vice consuls, or consular agents the chancellors, secretaries, and consular pupils attached to their offices shall be entitled to discharge *ad interim* the duties of their respective posts, and shall enjoy, while thus acting, the prerogatives granted to the incumbents. The convention has thus discriminated between chancellors and secretaries of the consulates and the other officials named in a manner too plain to permit any inference of mistake or omission, or to allow any room for construction. The general grant of immunity made to the other officials named has been deliberately withheld from the chancellors and secretaries. Hence, as chancellor of the French consulate general, plaintiff is not entitled to immunity under the convention with France, since there is no claim that he is acting *ad interim* for the consul general.

"But plaintiff has offered in evidence, without objection, two certificates of the consul general of France at New York. In these documents it is certified, among other things, that plaintiff is a consular officer of the French Republic duly commissioned as chancellor of the consulate general at New York; that his functions correspond to those known in the American consular service as those of a vice consul; that he ranks only after the consul general and the consul, and above the deputy consul; that it is the practice to have the *exequatur* of the President of the United States issued only to the consul general.

"But the difficulty with these certificates is that, if they were to be accepted as establishing that plaintiff's office is virtually that of a vice consul, and that he is therefore entitled to immunity, notwithstanding a difference in nomenclature, the result would be to confer upon the consul general the power to grant immunity whenever, in his judgment, an *attache* of his office was performing functions corresponding

¹²⁰ 36 STAT. 1160 (1911), 28 U. S. C. § 371 (1926).

to those of a vice consul of the United States. A reference to articles I and V of the Convention of 1853 will show that the intention of the contracting parties was that each government should approve the appointments of persons accredited to it by the other before the appointees should have the status of consular officers. I do not say that it is necessary that the President shall issue an exequatur to each of these officials. But I do hold that, before they can be recognized by the courts as entitled to the privileges and immunities of consuls or vice consuls, or other consular officials, there must be evidence that they have been recognized as such officials by the executive branch of the federal government."¹²¹

Although service of process on the chancellor in the office of the consulate, at such office, would be void under the terms of Article 3 of the Consular Convention of 1853, providing that the consular offices and dwellings shall be inviolate,¹²² service on him made at the proper place is good.¹²³ Notwithstanding that the decision in the *Moracchini* case was rendered by a lower court, we submit that it ably and correctly expounds the meaning and necessary implications of Article II of the Convention with France; and, further, that it would be a most dangerous practice, and one that would afford ample opportunity for abuse, to permit diplomatic or consular officers artificially to clothe subordinate employees of the consulate with a full consular character and thus bring them within the clear purview either of the treaties or of Section 256 of the Federal Judicial Code.

¹²¹ *Supra* note 118, at 443, 213 N. Y. Supp. at 169.

¹²² *Lonsdale Shop, Inc., v. Bibily*, *supra* note 117.

¹²³ *The Tailored Woman, Inc. v. Bibily*, 212 N. Y. Supp. 704 (1925): "In the present case, no judgment has yet been entered, but the motion is made by the defendant to vacate process upon him, because of his position as chancellor attached to the French consulate general of New York. In this case the process was not served upon him at the consulate premises or dwelling. Hence that phase of the matter presented in the motion in the case of *Lonsdale Shop, Inc.*, against the same defendant, 213 N. Y. S. 170, does not here arise.

"As I have held, the mere fact that the defendant holds the position of 'chancellor' does not exempt the defendant from the service of process where that process is made at the proper place. I conclude, therefore, that the present service is proper."