Michigan Law Review

Volume 30 | Issue 4

1932

FOREIGN CONSUL - EXEMPTION FROM SUIT IN STATE COURTS

Julius I. Puente
University of Michigan Law School

COMMENTS

FOREIGN CONSUL — EXEMPTION FROM SUIT IN STATE COURTS — In a recent case decided in California[1] the defendant, De Besa, and others, were licensed brokers, and in that character acted as fiscal agents for the sale of the stock of a certain California corporation. Plaintiff sued to rescind the contract for misrepresentation. Neither at the time suit was filed, nor at any time prior to the day when he testified at the trial was the defendant, De Besa, a recognized consular officer; but it seems (on this point the facts of the case are very vague) that on the date of the trial and at the time of the rendition of the judgment, he was appointed vice consul of Peru at Los Angeles. He urged, as

[1] Earle v. De Besa et al., 63 Cal. App. 1008, 293 Pac. 885 (Nov. 18, 1930).

an objection to the jurisdiction of the court to enter the judgment, the fact that he held a consular appointment from a foreign power, and as such was not suable in the state courts. The specific question of law was whether the state court had jurisdiction to proceed to judgment in the face of section 256 of the Federal Judicial Code, which provides:[2]

> "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinbefore mentioned, shall be exclusive of the courts of the several states: . . . Eighth. Of all suits and proceedings against . . . consuls or vice consuls."

The California district court of appeal for the second district, in overruling the point made by the defendant De Besa, said:

> "Jurisdiction over actions against vice consuls is vested in the courts of the United States, 'exclusive of the courts of the several States.' Judicial Code, sec. 256, 28 U. S. C. A., sec. 371 (approved June 30, 1926). It does not appear, however, that the defendant was a vice consul when the pleadings were filed, or at any time prior to the day when he testified at the trial. In the absence of any citation of any decision to the contrary, we are of the opinion that, the court having acquired jurisdiction over the defendant, such jurisdiction was not divested by the fact that, perhaps on the very day of trial of the action, the defendant was appointed to a vice consular office."

The accepted theory of international law, and the practice of nations, is that a consul, being ordinarily nothing more than the *commercial* representative of a foreign power, without political functions to exercise on behalf of his sovereign which would necessitate his investiture with an extraterritorial character, is amenable, like any other resident alien, to the civil and criminal jurisdiction of the state to which he has been commissioned as consul.[3]

In countries with a *federal* structure of government, such as the United States, Argentine, Brazil, Mexico and Venezuela, constitutional or statutory provisions, or both, invariably determine the forum in which consuls should be impleaded. This, however, is a matter of internal policy or convenience with which international law is, in no sense, concerned. Of course the most cursory examination of the subject suggests that in a political society modelled on a *federative* basis the general government, which is properly charged with the

[2] U. S. Comp. Stat., sec. 1233 (1918).

[3] Puente, "Amenability of Foreign Consuls to Judicial Process in the United States," 77 U. OF PA. L. REV. 447-466 (1929).

conduct of the international relations of the state, and specifically with the admission of the diplomatic and consular officials of other states, should, in order to discharge its international obligations the more satisfactorily and maintain its relations with foreign powers on a safer and more amicable plane, also assume full and exclusive responsibility for its treatment of those officials, either by its own agents or by the agents of such of its political subdivisions as possess no legal international personality and cannot be regarded as internationally accountable. In the United States this responsibility is assumed by the channel of international intercourse with foreign powers — the General Government — under section 256.

Two questions have arisen under this section for the consideration of the courts. *First* — When is a person a "consul," so as to entitle him to claim the exemption from the process of the state courts granted therein? *Second* — Should the fact of the admission of a consul by the Executive Power be allowed to operate retroactively so as to include within the exemption suits or proceedings instituted prior to the date of such admission?

As to the first of these questions, we may observe that the technique of consular representation involves two correlative and interdependent operations: the one, an *appointment*, usually evidenced by a *lettre de provision, commission consulaire* or letter patent, by the sending state; the other, an *admission*, evidenced by an *exequatur* of some sort, by the receiving state.[4] But it is only by virtue of the latter correlative — the *admission* — that the appointee becomes, in the sense of international law, a "consul," and this for the very sensible reason that the sending state cannot constitute a person to act for it *governmentally* within the territory of another state, and hold such state responsible under international law for its treatment of that person, without some act by the receiving state which expressly or tacitly sanctions his official admission in the character in which he has been commissioned. A person, therefore, is not a "consul," in the international connotation of that term, until his formal admission as such by the executive department of the state to which he has been sent. This question received extensive judicial consideration in a case of the dismissal of a foreign consul, in *Savie v. City of New York*,[5] under the following circumstances: Savie became the Consul General of Jugoslavia in New York City on March 30, 1920, but his *exequatur* was revoked on the 23rd of June, 1921. After the revocation, but while his sovereign's commission of appointment as consul continued in force, namely, on July 26, 1921, he was

[4] Puente, "The Nature of the Consular Establishment," 78 U. OF PA. L. REV. 320, 327 (1930).

[5] 118 Mis. 156, 193 N. Y. S. 577 (1922).

indicted in the court of general sessions in New York City, was arrested on the 27th, and on the same day posted cash bail in the sum of $2,500. Shortly thereafter he brought suit against the City of New York for the refund of the money deposited as bail on the ground that, notwithstanding the revocation of the *exequatur*, he still maintained his character of "consul" under the subsisting commission from his sovereign. In deciding the question adversely to the former consul general, the supreme court of New York County said:

"The plaintiff claims that, notwithstanding the revocation of his exequatur by the president, his appointment by his own government being still in force, he was still a consul-general, and protected against indictment, arrest and holding to bail in the state court, under section 256 of the Judicial Code of the United States. If the plaintiff is right in this contention, the money paid by him as bail was illegally required of him in the Court of General Sessions and should be returned. Consuls are protected against prosecution in the state courts by section 256 of the Judicial Code of the United States, which provides that — 'The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states. . . . Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice consuls.' The question here to be determined is whether or not on July 26, 1921, the date of the filing of the indictment against the plaintiff, he was a consul within the terms of section 256, *supra*. We have seen that prior to the filing of the indictment against the plaintiff the president had revoked his exequatur, and thus deprived him of the right to exercise and enjoy the functions, powers and privileges of a consul general within the United States (see copy of revocation annexed to complaint). Such action by the president in revoking plaintiff's exequatur is a final and conclusive determination, which precludes the courts from adjudicating otherwise."

Then in construing the term "consul," the court said:[6]

"The word 'consul' as used in section 256 clearly refers to persons fully endowed with power to act as consul within the jurisdiction to which they are sent by their government. They are not consuls until they have been recognized as such by the president, usually evidenced by an exequatur, and likewise they cease to be consuls when by his letters patent the president revokes the

[6] 118 Mis. 158, 193 N. Y. S. 579 (1922).

exequatur. Consular status does not exist in the absence of the president's recognition of the person accredited by the foreign state."

On appeal, the appellate division said:[7]

"The provisions of our United States Judicial Code were evidently intended to apply to those who, at the time of the suit or prosecution, occupied such existing [consular] relations. To extend such immunity to consuls whose exequaturs had been revoked, or at most to consuls who had had a reasonable time to leave the country after their exequaturs had been revoked, might lead to much embarrassment in the prosecution of our criminal law. The immunity granted is not an immunity granted by treaty, but is one granted as a matter of policy by this government, to the end that our foreign relations may not be embarrassed by subjecting recognized consuls to prosecution by state courts. Consuls are accepted and expelled by the Federal government, and not by the State government, and therefore, while lawfully acting and representing the sovereignty from which they received their appointment, they are very properly made subject to prosecution only in the Federal courts."

The reasoning of both courts is unquestionably applicable to the status of a consul prior to his official admission.

We see, then, from the tenor of this decision, that in order to entitle an appointee to the exemption given by section 256, he must have been not only *appointed* by his state, but also *admitted* by the receiving state, and hold a valid, subsisting *exequatur* from the executive department of the latter.

In holding thus, our courts are in entire accord with those of France, where a similar question of jurisdictional immunity of a pretended consul became a subject of judicial consideration in the case of *Carlier d'Abanuza v. Abrassart.*[8] The appellant, d'Abanuza, had been appointed by the government of Uruguay as its consul general in Paris. He had not yet been officially admitted when Abrassart, a creditor, filed suit. A judgment was obtained against him which led to his subsequent arrest — his *exequatur* not having issued up to that time — and his goods were distrained. He claimed on the strength of his consular character the inviolability to which a diplomatic agent was entitled, notwithstanding the fact that he had not been officially admitted by the French Government. Without passing upon the question whether a foreign consul was entitled to diplomatic immunities —

[7] 203 App. Div. 81, 196 N. Y. S. 442, 444 (1922).
[8] Cour Roy. de Paris, 42 Recueil Général de Lois et Arrêts 372.

upon which a decision became unnecessary — the court said that he was not yet in a position to "claim the prerogatives and immunities which may appertain to consuls."

As to the second question — should the admission of a person by the political department of the government as the consul of a foreign power be allowed to operate retrospectively so as to divest the state courts of jurisdiction over his person after having lawfully acquired it? If we consider as sound the doctrine announced by Chief Justice Marshall in *Mullen v. Torrance*,[9] that "the jurisdiction of the court depends upon the state of things at the time of the action brought, and that, after vesting, it cannot be ousted by subsequent events," then we must conclude that the theory of the retroactivity of consular appointments is inadmissible. That theory was rejected long ago in the case of *Koppel v. Heinrichs*.[10] This was a case in which suit had been instituted against Heinrichs in May, 1840. In November of the same year he was appointed consul in New York City for the duke of Saxe Altenburgh, then an independent German sovereign, and admitted by the Executive on January 6, 1841. Judgment on the suit was given for the plaintiff on May 2, 1842, which was subsequently affirmed both in the Supreme Court and in the court for the correction of errors. An execution against the defendant having issued in 1846, he moved to vacate it on the ground of his consular character, and the motion was denied. Although the case states the wrong doctrine with respect to proceedings subsequent to the defendant's appointment as consul, and has been overruled on that question,[11] it correctly announces the principle that the privilege cannot be extended so far as to "enable a party, after a suit commenced against him in a state court of competent jurisdiction, to divest that court of jurisdiction by voluntarily accepting an office which, if held at the time the proceeding was instituted, might have been available as a valid objection to the jurisdiction of the court in which the suit was brought."

A like doctrine has been announced in the Argentine Republic, under constitutional and statutory provisions substantially similar to our own, in the case of *Lanfranco v. Ginies*,[12] wherein it was held that the federal courts were without jurisdiction of a suit against a person who was not a consul at the time the suit was filed.

If a person is impleaded in the state courts at a time when he is not clothed with a consular character, it is evident that he is not a "consul" in legal contemplation; and if not a consul at that time,

[9] 9 Wheat. (U. S.) 536 (1824).

[10] 1 Barb. (N. Y.) 449 (1847).

[11] Valarino v. Thompson, 7 N. Y. 576 (1853); Griffin v. Dominguez, 2 Duer (9 N. Y. Super. Ct.) 656 (1853).

[12] ESCOBAR, CUESTIONES DE DERECHO FEDERAL 27 (1921).

there should be — there is — no occasion for the general government to become "involved in controversies with foreign powers without its consent, and for acts not its own." [13] Of course no proceedings, principal or ancillary, could be maintained against him subsequent to his official admission.

Foreign consular agents in every country have, with consistent zeal, persisted in claiming privileges and immunities which are clearly not demanded by the nature of their occupation, and which are not sanctioned by the law and the practice of nations. This tendency is one which should be strongly resisted as not only inconsistent with the territorial and personal sovereignty of the receiving state, but as out of consonance with the modern trend toward reducing to a minimum the range of diplomatic and consular immunities.[14] When allowed, they should be construed restrictively, as serious injustice might often result from the practice of foreign governments of appointing (as in the *De Besa* case) persons engaged primarily in other occupations and who are in many instances citizens of the receiving state, as their consuls, and the possibility that such consuls may take advantage of their official station to cloak their private conduct or dealings.

The decision in the case of *Earle v. De Besa*[15] reaffirms what is believed to be the true intent of section 256 of the Federal Judicial Code.

JULIUS I. PUENTE

---

[13] Valarino v. Thompson, 7 N. Y. 576 (1853).

[14] Articles 335 to 337, Código de Derecho Internacional Privado, 6th Pan American Conference (Havana 1928).

[15] 63 Cal. App. 1008, 293 Pac. 885 (1930).