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AMENABILITY OF FOREIGN CONSULS TO JUDICIAL PROCESS IN THE UNITED STATES

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One of the most neglected fields of the law for some time has been that dealing with the legal *status* of foreign consular officials in the United States. Notwithstanding that there are in the neighborhood of fifteen hundred accredited foreign consuls in this country, looking, in multifarious ways, after the general well-being of countless resident aliens, and the commercial and other interests of their respective governments and non-resident nationals, necessitating, it would seem, some intelligent understanding by the legal profession of the judicial position of these public agents, we find, even at this late period, a widely diffused lack of familiarity by the bench and bar with the interesting and important question of the amenability of foreign consuls to the local civil and criminal process of the state to which they are accredited. For a time, even scholars presumably conversant with the orthodox international legal position of these agents, displayed considerable confusion of thought. Let us illustrate this divergence of opinion with two typical cases. While De Cussy says: ¹ "La nature de leur service dans leurs rapports avec le gouvernement qui les institue,—et diverses attributions de leur charge, démontrent, d'une manière positive, qu'on ne saurait, en effet

¹ RÈGLEMENTS CONSULAIRES (1851) 16. To the same effect see I DE CLERCO AND DE VALLAT, GUIDE DE CONSULATS (5th ed. 1898) 4.

refuser aux consuls *envoyés* la double qualité *d'agent politique et d'agent diplomatique*," Fiore tersely states the prevailing—and, we believe, the correct—view in these words:² "Les consuls n'ont pas le qualité d'agents diplomatiques, car ils ne representent pas l'Etat dans ses relations politiques internationales."

We shall attempt in this expository article to deal in a pragmatic light—from the practitioner's point of view, in other words—with the question of the *nature* and *extent* of the liability of foreign consular officers to civil and criminal process in the United States; and to this end, the textual rather than the polemic method of exposition has been adopted. I like the way Professor Pearce Higgins has put it:³

"'A lawyer must be orthodox, else he is no lawyer,' says Maitland, and this is true of international as of other lawyers. His prime duty is to know the law and, if he be a teacher or writer, to expound it as he finds it."

This duty will be the controlling consideration in the short exegesis of the law concerning consular amenability which follows.

I. EARLY LEGAL STATUS OF CONSULS

In the early Middle Ages, and before the establishment of more or less permanent legations, consuls appear to have enjoyed the right of extraterritoriality, and with it, the privileges and immunities now accorded to diplomatic representatives. But upon the establishment of legations, and the entrusting of the political interrelation of the nations to accredited public ministers, the exemptions and immunities granted to consuls came to be regarded as an unwarranted limitation of the territorial rights of the local sovereign, and they have, in the process of time, been restricted to such as are necessarily incident to the consular office, or have been provided for by treaty, or are supported by long-established custom or the particular laws of the receiving state. A consular officer in civilized countries does not possess now, under

² 2 FIORE, *NOUVEAU DROIT INTERNATIONAL PUBLIC* (2d ed. 1885) 595, § 1181.

³ *STUDIES IN INTERNATIONAL LAW AND RELATIONS* (1928) 98.

public law, as regards the country to which he is accredited,⁴ the characteristics of a diplomatic agent, and is not, in any degree, invested with the representative political character; neither is he entitled, by virtue of his office, to be regarded as a diplomatic agent of his sovereign even in the absence of the accredited public minister or *chargé d'affaires* of his country. He cannot, therefore, justly claim the privileges usually accorded to diplomatic functionaries.⁵ Although considered, for local purposes, as a public agent,⁶ he is not, ordinarily, employed in the management of national political concerns,⁷ and his representative character and authority are for commercial purposes only.⁸ But even in this limited capacity, all his acts must be considered as of a public character,⁹ and should be—and, in practice, are—clothed to some extent with the protection of the law of nations, in the form of certain exemptions and privileges,¹⁰ which, if violated by the authorities of the receiving state, will give his government a right to complain.¹¹ Nevertheless, he is not, strictly speaking, entitled to the full benefit of the *jus gentium*.¹²

Occasions may and do often arise where in a country in which his government has no public minister, the *duties* of a consul will expand, of necessity, into a larger field, because he will be called upon to communicate with his own government or with that near which he resides, in matters which would otherwise devolve upon a public minister. But it does not follow

⁴ OPPENHEIM, INTERNATIONAL LAW (3d ed. 1920) 599.

⁵ Clarke v. Cretico, 1 Taunt. 105 (1808); Viveash v. Becker, 3 M. & S. 284 (1814); Comm. v. Kosloff, 5 S. & R. 545 (Pa. 1816); letter from Secretary of State Jefferson to Mr. Gore, 5 MOORE, INTERNATIONAL LAW DIGEST (1906) 34; 1 OP. ATT'Y GEN. 41 (1794); 2 FIORE, *loc. cit. supra* note 2; CAMPOS, DERECHO INTERNACIONAL PUBLICO (3d ed. 1912) 255.

⁶ The Anne, 3 Wheat. 435 (U. S. 1818); Oscanyan v. Winchester Repeating Arms Co., 103 U. S. 261 (1880).

⁷ State v. Da La Foret, 2 Nott & McCord 217 (S. C. 1820).

⁸ The Anne, *supra* note 6; Oscanyan v. Winchester Repeating Arms Co., *supra* note 6; State v. De La Foret, *supra* note 7.

⁹ FIORE, INTERNATIONAL LAW CODIFIED (Borchard's transl. 5th ed. 1918) § 495.

¹⁰ Viveash v. Becker, *supra* note 5; Oscanyan v. Winchester Repeating Arms Co., *supra* note 6.

¹¹ Viveash v. Becker, *supra* note 5.

¹² Viveash v. Becker, *supra* note 5.

that, because a consul may be admitted under such circumstances to address the general government, he becomes a diplomatic personage, with international rights as such, and among them that of extritoriality. If his commission be that of consul only, and his public recognition be an *exequatur*, the consul will continue amenable to the local laws of the receiving state. True, our government may consent to the superaddition of diplomatic duties—with the formalities indicated for diplomatic agents—to the ordinary duties and powers of a consul, as where a consul is also *chargé d'affaires ad hoc* or *ad interim*; and this is not considered in any light as inconsistent with the law of nations. In such a contingency, the consul has a double political capacity, and though invested with full diplomatic privileges, within the limits of his appointment, yet he becomes so invested as possessing a superior diplomatic character, and not as consul; and the fact of such casual duplication of functions does not change the legal *status* of the consul, whether he be regarded through the eye of the law of nations or that of the United States.¹³ In the authoritative case of *In re Baiz*,¹⁴ which involved a consul's claim to diplomatic immunity from suit in virtue of his pretended character as a *chargé d'affaires ad interim*, Mr. Chief Justice Fuller, of the Supreme Court of the United States, made the following pertinent observations:

“Diplomatic duties are sometimes imposed upon consuls, but only in virtue of the right of a government to designate those who shall represent it in the conduct of international affairs, 1 Calvo, *Droit Int.* 586, 2d ed. Paris, 1870, and among the numerous authorities on international laws, cited and quoted from by petitioner's counsel, the attitude of consuls, on whom this function is occasionally conferred, is perhaps as well put by De Clercq and De Vallat as by any, as follows:

“ ‘ There remains a last consideration to notice, that of a consul who is charged for the time being with the management of the affairs of the diplomatic post; he is accredited in this case in his diplomatic capacity, either by a letter

¹³ *The Anne, Oscanyan v. Winchester Repeating Arms Co.*, both *supra* note 6; *In re Baiz*, 135 U. S. 403, 10 Sup. Ct. 854 (1890).

¹⁴ *Supra* note 13, at 422, 10 Sup. Ct. at 859.

of the minister of foreign affairs of France to the minister of foreign affairs of the country where he is about to reside, or by a letter of the diplomatic agent whose place he is about to fill, or finally by a personal presentation of this agent to the minister of foreign affairs of the country.' Guide Pratique des Consulats, Vol. 1, p. 93."

The approved doctrine of international law, and the practice of nations, is that a foreign consul is not entitled, as of right, to the immunities of a public minister¹⁵ from legal process,¹⁶ and is, therefore, like any other individual,¹⁷ subject *civilly*,¹⁸ as well as *criminally*,¹⁹ to the ordinary jurisdiction of the tribunals of the country to which he is accredited. As said by United States Attorney General Butler, in a forceful opinion:²⁰

"A consul is not such a public minister as to be entitled to the privileges appertaining to that character; nor is he under the special protection of the law of nations. He is entitled to privileges to a certain extent, such as for safe-conduct; but he is not entitled to the *jus gentium*. Vattel thinks that his functions require that he should be independent of the ordinary criminal jurisdiction of the country; and that he ought not to be molested, unless he violate the law of nations by some enormous crime; and that, if guilty of any crime, he ought to be sent home to be punished. But no such immunities have been conferred on consuls by the modern practice of nations; and it may be considered as settled law, that consuls do not enjoy the protection of the laws of nations any more than any other persons who enter the country under a safe-conduct. In civil and criminal cases, they are equally subject to the laws of the country in which they reside. The same doctrine, declared by the public jurists, has been frequently laid down in the English and American courts of justice."

¹⁵ 1 OP. ATT'Y GEN. 41 (1794); *ibid.* 406 (1820); 2 *ibid.* 725 (1835).

¹⁶ *Caldwell v. Barclay*, 1 Dall. 305 (U. S. about 1788) (in the note thereof).

¹⁷ *Gittings v. Crawford*, Fed. Cas. No. 5,465 (C. C. Mo. 1838).

¹⁸ *Coppell v. Hall*, 7 Wall. 542 (U. S. 1868); *Gittings v. Crawford*, *supra* note 17; *Lorway v. Lousada*, Fed. Cas. No. 8,517 (D. C. Mass. 1866); *St. Luke's Hosp. v. Barclay*, Fed. Cas. No. 12,241 (C. C. S. D. N. Y. 1855); 1 OP. ATT'Y GEN. 406 (1820).

¹⁹ *Coppell v. Hall*, *supra* note 18; *Clarke v. Cretico*, *Viveash v. Becker*, *Comm. v. Kosloff*, all *supra* note 6; 7 OP. ATT'Y GEN. 367, 384 (1855).

²⁰ 2 OP. ATT'Y GEN. 725 (1835).

States, however, have attempted to protect their consular service from the injurious consequences that might flow from permitting the local authorities to exercise against their consuls, on any pretext whatsoever, that complete freedom of criminal action which each state possesses under international law. Various governments—among them that of the United States—have agreed, by treaty, to exempt consuls *de carrière* “from preliminary arrest except in the case of offences which the local legislation qualifies as crimes and punishes as such,”²¹ or, as expressed in the more recent engagements, “from arrest except when charged with the commission of offenses locally designated as crimes other than misdemeanors and subjecting the individual guilty thereof to punishment.”²²

II. EXCLUSION OF STATE COURTS

A few preliminary remarks become necessary on the jurisdictional question before touching on the existing constitutional and statutory provisions relative to this subject.

It is quite clear that the jurisdiction of a court depends upon the state of things at the time the action is brought, and that after vesting, it cannot be ousted by subsequent events.²³ But where the exercise of jurisdiction is in violation of law,²⁴ as where the court has no jurisdiction of the person of the defendant and of the cause of action,²⁵ all the proceedings, as *coram non iudice*, are wholly void.²⁶ Accordingly, where the court is without jurisdiction when the action is commenced, and during its pendency the legal impediment to such jurisdiction is removed, there is no

²¹ I MALLOY, TREATIES, CONVENTIONS, ETC., BETWEEN THE UNITED STATES AND OTHER POWERS, 1776-1909 (1910) 95, consular convention with Belgium, concluded March 9, 1880, art. III; *ibid.* 978, consular convention with Italy, concluded May 8, 1878, art. III; 3 *ibid.* 2847, consular convention with Sweden, concluded June 1, 1910, art. III.

²² 44 STAT. 2148, art. XVIII (1925) (treaty of friendship, commerce and consular rights with Germany); 44 STAT. 2454, art. XV (1926) (treaty of friendship, commerce and consular rights with Hungary); 44 STAT. 2473, art. V (1926) (consular convention with Cuba).

²³ *Mollan v. Torrance*, 9 Wheat. 537 (U. S. 1824); *Koppel v. Heinrichs*, 1 Barb. 449 (N. Y. 1847).

²⁴ *Griffin v. Dominguez*, 2 Duer 656 (N. Y. 1853).

²⁵ *Mills v. Martin*, 19 Johns. 7 (N. Y. 1821).

²⁶ *Griffin v. Dominguez*, *supra* note 24.

basis, in law, upon which subsequently to incorporate or validate the action.²⁷ No lawyer will controvert the position that to support and give validity to the proceedings of a court, it must have jurisdiction of the *person* of the defendant, and of the *cause* of action. This principle is applicable to all courts, from the highest to the lowest.²⁸ In other words, no court can continue an action and render judgment therein after the cause of action or the personal jurisdiction over the defendant has been withdrawn or has been removed therefrom. It has no jurisdiction except to dismiss the action or expunge it from the records. "Jurisdiction is the power to hear and determine a cause;" and it must exist over the *subject-matter* of the action as well as over the *parties*. If there never was or there is no longer any subject-matter or party amenable to the jurisdiction of the court, then there is no jurisdiction. Authorities are numerous to the effect that jurisdiction can be *lost* by a court after having been acquired, as readily as it can be assumed where there is none in the first place.²⁹ Consequently, the enforcement, by attachment or garnishment proceedings against a foreign consul, of a judgment obtained against him in the state courts prior to his appointment and recognition as consul, will be abated on the verified petition or suggestion of the consul.³⁰ Garnishment or attachment is a suit,³¹ or proceeding,³² within the meaning of Section 256 of the *Federal Judicial Code*, vesting in the courts of the United States exclusive jurisdiction of all suits and proceedings against consuls and vice consuls. The recognition of the consul through the issuing of the *exequatur*—his *titre justificatif*, as Merignhac describes it³³—brings into immediate operation the benefits conferred by Section

²⁷ *Naylor v. Hoffman*, 22 How. Pr. 510 (N. Y. 1862), *rev'd*, *Rock River Bank v. Hoffman*, 22 How. Pr. 250 (N. Y. 1861).

²⁸ *Mills v. Martin*, *supra* note 25.

²⁹ *Two Rivers Mfg. Co. v. Beyer*, 74 Wis. 210, 42 N. W. 232 (1889).

³⁰ *In the Matter of Aycinena*, 1 Sandford 690 (N. Y. 1848).

³¹ *Griffin v. Dominguez*, *supra* note 24.

³² *Illinois Glass Co. v. Holman*, 19 Ill. App. 30 (1886); *Gregg v. Savage*, 51 Ill. App. 281 (1893); *Webster v. Steele*, 75 Ill. 544 (1874). For § 256 of the *Judicial Code* see 36 STAT. 1161 (1911), 28 U. S. C. § 337 (1926).

³³ 2 MERIGNHAC, *TRAITÉ DE DROIT PUBLIC INTERNATIONAL* (1907) 326.

256, and abates all further auxiliary or incidental³⁴ suits or proceedings in the nature of garnishment, attachment, execution, or the like, against the consul.

Another jurisdictional principle of considerable importance in this connection is this: that where powers are given exclusively to the federal government, or where expressly taken away from the states, the states cannot exercise them; or, when the power given to the federal government is inconsistent or incompatible with the exercise of that power by the states, the states are excluded. But, when the power is given to the federal government, and not expressly taken away from the states, and the exercise of such power by the states is not incompatible or inconsistent with the use of it by the federal government, the power is concurrent.³⁵ Accordingly, when the Act of Congress of September 24, 1789,³⁶ which provided that the jurisdiction of the courts of the United States over consuls and vice consuls "shall be exclusive of the courts of the several states," was repealed by the Act of February 18, 1875,³⁷ it was generally admitted and so held in a number of adjudications, that between the date of the repealing act and March 3, 1911—the date of the re-enactment of the original provisions of the Act of 1789 concerning consuls and vice consuls—the federal courts were without any exclusive or concurrent jurisdiction over them.³⁸ The state of the law between 1875 and 1911 is well summed up in the case of *DeLeon v. Walters*,³⁹ in the Supreme Court of Alabama, in 1909. The defendant (plaintiff in error on appeal) was, at the time suit was brought against him, the Consul General of Guatemala, and claimed that the jurisdiction of the federal courts was exclusive of that of

³⁴ *Tinsley v. Savage*, 50 Mo. 141 (1872).

³⁵ *State v. De La Foret*, *supra* note 7.

³⁶ 1 STAT. 73, §§ 9, 11, 13 (1789), 28 U. S. C. §§ 41, 341, 342, 371 (1926).

³⁷ 18 STAT. 317 (1875), 28 U. S. C. § 371 (1926).

³⁸ *Wilcox v. Luco*, 118 Cal. 639, 50 Pac. 758. (1897); *DeGive v. Grand Rapids Furniture Co.*, 94 Ga. 605, 21 S. E. 582 (1893); *State v. De La Foret*, *supra* note 7; *Redmond v. Smith*, 22 Tex. Civ. App. 323, 54 S. W. 636 (1899); *Scott v. Hobe*, 108 Wis. 239, 84 N. W. 181 (1900); *Bors v. Preston*, 111 U. S. 252, 4 Sup. Ct. 407 (1884). For an excellent resume of the legislative history of § 256, see *Higginson v. Higginson*, 96 Misc. 457, 158 N. Y. Supp. 92 (1916).

³⁹ 163 Ala. 499, 502, 50 So. 934, 935 (1909).

the state courts; but the supreme court overruled the objection, saying:

"It cannot be doubted that prior to the act of Congress of date February 18, 1875 (18 Stat. 316, c. 80), the District Court of the United States had exclusive jurisdiction in suits against consuls of a foreign power by a citizen of the United States. Such was repeatedly decided in such cases, and such, indeed, was the language of the statute.—Rev. St. U. S. §711; *Davis v. Packard*, 7 Pet. 276, 8 L. Ed. 684; *McKay v. Garcia*, 6 Ben. 556, Fed. Cas. No. 8,844; *Miller v. Van Loben*, 66 Cal. 341, 5 Pac. 512; *Sartori v. Hamilton*, 13 N. J. Law, 107; *Valarino v. Thompson*, 7 N. Y. 576, and others. By the said act of February 18, 1875, the former statute was repealed, and said act did not give exclusive jurisdiction in such cases to the United States District Court, and the state courts now have jurisdiction to hear and determine cases, in civil matters, although the defendant may be a consul general of a foreign power.—Rev. St. U. S. (2d Ed.) § 563 (U. S. Comp. St. 1901, p. 455); *Froment v. Duclos et al.* (D. C.) 30 Fed. 386; *Bors v. Preston*, 111 U. S. 261, 4 Sup. Ct. 407, 28 L. Ed. 419; *De Give v. Grand Rapids Furniture Co.*, 94 Ga. 605, 21 S. E. 582."

Constitutional and Statutory Provisions

The Constitution of the United States,⁴⁰ provides:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to all Cases affecting Ambassadors, other public Ministers and Consuls. . . ."

There is a manifest propriety, amounting sometimes to practical necessity in order to avoid international complications, that the prosecution, punishment or pardon of consuls, which would materially affect their personal attention to their consular duties, should be within the control of the federal courts and of the general government to which the consuls are accredited and which alone is responsible to foreign powers for the treatment of their

⁴⁰ Art. 3, Sec. 2.

representatives.⁴¹ Accordingly, it has been enacted by Congress,⁴² 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: . . .
(8) Of all suits and proceedings against . . . consuls or vice-consuls.”

The federal jurisdictional amount of three thousand dollars, it has also been provided,⁴³ shall not apply to “any of the cases mentioned in the succeeding paragraphs of this section. . . . Eighteenth. Of all suits against consuls and vice-consuls.” The immunity thus granted from the process of the state courts has been granted as a matter of policy,⁴⁴ to keep the control of such affairs as affect our international relations in the hands of the federal government,⁴⁵ and so prevent the harassing of foreign governmental officials with suits in the state courts.⁴⁶ The Act of Congress is evidently intended to apply to those who, at the time of the suit or proceeding, possess a recognized consular character, since to extend the immunity from legal process in the state courts to consuls whose *exequaturs* have been revoked, or to consuls who have had a reasonable time to leave the country after such revocation, might lead to much embarrassment in the administration of the criminal or civil laws of the states.⁴⁷ The statute is not only constitutional,⁴⁸ but its provisions are so plain and unambiguous as to leave no room for construction, and the courts should not read into it exceptions or limitations which depart from its plain meaning.⁴⁹ The effect of Section 256 has been

⁴¹ *In re Iasigi*, 79 Fed. 752 (S. D. N. Y. 1897), *aff'd*, 166 U. S. 391, 17 Sup. Ct. 595 (1807); *Valarino v. Thompson*, 7 N. Y. 576 (1853); In the Matter of Aycinena, *supra* note 30; *Savic v. City of New York*, 203 App. Div. 81, 196 N. Y. Supp. 442 (1922).

⁴² 36 STAT. 1160, § 256 (1911), 28 U. S. C. § 341 (1926).

⁴³ 36 STAT. 1091, § 24 (1911), 28 U. S. C. § 41 (1926).

⁴⁴ *Savic v. City of New York*, *supra* note 41.

⁴⁵ *Valarino v. Thompson*, *supra* note 41.

⁴⁶ In the Matter of Aycinena, *supra* note 30.

⁴⁷ *Savic v. City of New York*, *supra* note 41.

⁴⁸ *Davis v. Packard*, 7 Pet. 276 (U. S. 1833).

⁴⁹ *Wall v. Pfanschmidt*, 265 Ill. 180, 106 N. E. 785 (1914).

to divest the state courts of all jurisdiction over consuls or their property,⁵⁰ be such consuls *de carrière* or *honorary*;⁵¹ and it is now the duty of those courts, whenever the fact is brought to their knowledge that a defendant in a pending suit or proceeding is a foreign consul, to confess at once their want of jurisdiction, and declare their proceedings to be void.⁵² It has, accordingly, been held that a state court has no jurisdiction of a consul in a suit for divorce or separation;⁵³ or for attachment for debt;⁵⁴ or to issue a citation for examination as a judgment debtor;⁵⁵ although, in an attachment suit, where a foreign consul is summoned as garnishee, the service of the state process will not be set aside on the ground of his privilege as a consul, the Act of Congress being restricted to cases in which the consul is made a defendant directly and originally—to respond for his own debt or other liability.⁵⁶

While, on the one hand, the immunity of a consul from the jurisdiction of the state courts does not extend so far as to enable a party, after a suit or proceeding has been commenced against him in a state court of competent jurisdiction, to divest that court of jurisdiction over him by voluntarily accepting the office of consul of a foreign power,⁵⁷ on the other hand, the process of a state court which is void *ab initio* for want of jurisdiction when the suit was commenced, owing to the consular character of the defendant, cannot be validated by the subsequent revocation of the *exequatur* of the consul, and no jurisdiction is conferred on

⁵⁰ McKay v. Garcia, Fed. Cas. No. 8,844 (S. D. N. Y. 1783); St. Luke's Hosp. v. Barclay, *supra* note 18; Miller v. Van Loben Sels, 66 Cal. 341, 5 Pac. 512 (1885); Sartori v. Hamilton, 13 N. J. L. 107 (1832); Valarino v. Thompson, *supra* note 41; Griffin v. Dominguez, *supra* note 24; Taaks v. Schmidt, 19 How. Pr. 413 (N. Y. 1860); In the Matter of Aycinena, *supra* note 30; Comm. v. Kosloff, *supra* note 5; Mannhardt v. Soderstrom, 1 Binn. 138 (Pa. 1806).

⁵¹ Valarino v. Thompson, *supra* note 41.

⁵² Griffin v. Dominguez, *supra* note 24.

⁵³ Higginson v. Higginson, *supra* note 38.

⁵⁴ In the Matter of Aycinena, *supra* note 30.

⁵⁵ Griffin v. Dominguez, *supra* note 24.

⁵⁶ Kidderlin v. Meyer, 2 Miles 242 (Pa. 1838).

⁵⁷ Koppel v. Heinrichs, *supra* note 23, overruled on other grounds, Griffin v. Dominguez, *supra* note 24.

the state courts by such revocation.⁵⁸ The pendency of a suit against a foreign consul in the state courts will not bar another suit for the same cause of action in the proper federal court;⁵⁹ but it does not empower the latter to interfere by writ of *habeas corpus* in behalf of a consul held on a criminal charge in the state courts, nor to admit him to bail pending an appeal from the order denying the writ.⁶⁰

Jurisdiction is not a matter of sympathy or favor, and the state courts are bound to take notice of the limits of their authority,⁶¹ and, of their own motion, even though the question is not raised by the pleadings or is not suggested by counsel, to recognize the want of jurisdiction, and act accordingly by staying the proceedings, dismissing the action, or otherwise noticing the defect.⁶² There is, at present, no statutory impediment to the bringing of a suit or proceeding by a foreign consul in a state court.⁶³

The exemption enjoyed by a foreign consul from the jurisdiction of the state courts belongs to the government he represents,⁶⁴ and he cannot waive it by failing to answer in chief,⁶⁵ or to plead it,⁶⁶ or by his withholding the suggestion of it until after judgment,⁶⁷ or by being joined as defendant with others

⁵⁸ *Naylor v. Hoffman*, *supra* note 27, *rev'd*, *Rock River Bank v. Hoffman*, *supra* note 27, which held that "the court takes jurisdiction from the time of the revocation without prejudice to the previous proceedings."

⁵⁹ *McKay v. Garcia*, *supra* note 50.

⁶⁰ *In re Iasigi*, *supra* note 41.

⁶¹ *Reid v. U. S.*, 211 U. S. 529, 29 Sup. Ct. 171 (1909).

⁶² *Blacklock v. Small*, 127 U. S. 96, 8 Sup. Ct. 1096 (1887); *Wolff v. McCaugh*, 175 Ala. 299, 57 So. 754 (1911); *Hill v. Moors*, 224 Mass. 163, 112 N. E. 641 (1916); *In re Letcher*, 269 Mo. 140, 190 S. W. 19 (1916); *Griffin v. Dominguez*, *supra* note 24.

⁶³ *Sagory v. Wissman*, Fed. Cas. No. 12,217 (S. D. N. Y. 1868); *Koppel v. Heinrichs*, *supra* note 23.

⁶⁴ *Davis v. Packard*, *supra* note 48; *Miller v. Van Loben Sels*, *supra* note 50; *Durand v. Halbach*, 1 Miles 46 (Pa. 1835); *Ex parte Gruber*, 269 U. S. 302, 46 Sup. Ct. 112 (1925).

⁶⁵ *Taaks v. Schmidt*, *supra* note 50.

⁶⁶ *Miller v. Van Loben Sels*, *supra* note 50; *Wilcox v. Luco*, *supra* note 38; *Valarino v. Thompson*, *supra* note 41; *Durand v. Halbach*, *supra* note 64. *Contra*: *Hall v. Young*, 3 Pick. 80 (Mass. 1825). The case of *Flynn v. Stoughton*, 5 Barb. 115 (N. Y. 1848), has been overruled by *Valarino v. Thompson*, *supra* note 41.

⁶⁷ *Durand v. Halbach*, *supra* note 64.

not entitled to the privilege;⁶⁸ and, like any other consular privilege, may be taken advantage of for the first time on appeal,⁶⁹ or at any other stage of the proceedings.⁷⁰ A party may certainly waive a privilege which is granted to him personally. *Regula est juris antiqui, omnes licentiam habere his, qua pro se indulta sunt, renunciare.* But a privilege or exemption not prescribed peculiarly for his benefit, but entirely dependent on his official character, raises a question of jurisdiction, which he can never, upon any principles of justice, be permitted to waive or renounce, since the privilege or exemption, though affording protection and security to him, is especially designed to benefit others, and to guard interests in which he may have but a slight participation, and which he is not bound as a mere agent to protect.⁷¹ The consul can, therefore, repudiate the proceedings of the state courts and refuse to be bound by them, notwithstanding that he may once have consented to their action, either by appearing and pleading to the merits, or by any other formal or informal action. He may avail himself of this right at any stage of the case; and the maxim that requires one to move promptly who would take advantage of an irregularity does not apply here, since this is not mere irregular action, but a total want of power to act at all. Consent is sometimes implied from failure to object; but there can be no waiver of rights by laches in a case where consent would be altogether nugatory.⁷² Under some treaties,⁷³ whenever a consular officer accepts the office of administrator of the estate of a national of the country he represents, he subjects himself as such to the jurisdiction of the tribunal making the appointment for all per-

⁶⁸ *Valarino v. Thompson*, *supra* note 41; *Taaks v. Schmidt*, *supra* note 50; *Naylor v. Hoffman*, *supra* note 27; *Durand v. Halbach*, *supra* note 64; *Bixby v. Janssen*, Fed. Cas. No. 1,452 (C. C. S. D. N. Y. 1869).

⁶⁹ *Miller v. Van Loben Sels*, *supra* note 50.

⁷⁰ *Valarino v. Thompson*, *supra* note 41; *Griffin v. Dominguez*, *supra* note 24; *Hunstiger v. Kilian*, 130 Minn. 538, 153 N. W. 1095 (1915).

⁷¹ *Holtzclaw v. Ware*, 34 Ala. 307 (1859); *Miller v. Van Loben Sels*, *supra* note 50.

⁷² COOLEY, CONSTITUTIONAL LIMITATIONS (7th ed. 1903) 576.

⁷³ 44 STAT. 2478, art. XIII (1926) (consular convention with Cuba); 44 STAT. 2458, art. XX (1926) (treaty of friendship, commerce and consular rights with Hungary); 44 STAT. 2153, art. XXIV (1925) (treaty of friendship, commerce and consular rights with Germany).

inent purposes to the same extent as a national of the state where he is appointed; which in the United States means that he becomes subject to the jurisdiction of the state courts, there being no federal law of probate or of the administration of estates.⁷⁴

The Constitution of the United States also provides: ⁷⁵ "In all Cases affecting . . . Consuls . . . the supreme Court shall have original jurisdiction." A case *affects* a consul, within the meaning of this provision, when it acts or operates upon, or concerns the consul.⁷⁶ Manifestly, this provision refers to consular representatives accredited to the United States by foreign powers, and not to those representing this country abroad, and was, no doubt, inserted, in view of the important and sometimes delicate nature of our relations and intercourse with foreign governments.⁷⁷ This grant of original jurisdiction to the Supreme Court of cases affecting consuls is not *exclusive*, and does not prevent Congress from conferring concurrent original jurisdiction over consuls on subordinate national courts.⁷⁸ The grant of jurisdiction over a certain subject-matter to one court does not, of itself, imply that the jurisdiction is to be exclusive.⁷⁹

III. INQUIRY INTO OFFICIAL ACTS OF FOREIGN CONSUL

Conforming to the familiar principle that every public officer will be presumed to have done his duty and not to have exceeded the limit of his authority,⁸⁰ a court of justice will not call in question a foreign consul for acts evidently done by him in his official character, and for which his government alone is responsible. In accordance with the recognized principle of international

⁷⁴ *Rocca v. Thompson*, 223 U. S. 317, 32 Sup. Ct. 207 (1912); *In re Servas' Estate*, 169 Cal. 240, 146 Pac. 651 (1915); *Pagano v. Cerri*, 93 Ohio St. 345, 112 N. E. 1037 (1916). The author is preparing a study on *Consular Protection of the Estates of Deceased Nationals*, to appear in the near future in the *ILL. L. REV.*

⁷⁵ Art. III, Sec. 2, Cl. 2.

⁷⁶ *Gaunt v. Alabama Bound Oil & Gas Co.*, 281 Fed. 653 (C. C. A. 8th, 1922), 23 A. L. R. 1279 (1923).

⁷⁷ *Ex parte Gruber*, *supra* note 64.

⁷⁸ *Bors v. Preston*, *supra* note 38; *U. S. v. Ravara*, 2 Dall. 297 (U. S. 1793); *Lorway v. Lousada*, *supra* note 18.

⁷⁹ *Gittings v. Crawford*, *supra* note 17.

⁸⁰ *Vanderslice v. Hanks*, 3 Cal. 27 (1852).

law, such consul is not subject to the jurisdiction of the courts of the country to which he has been accredited in all that relates to acts executed in the exercise of his official duties and in the name of the government which he represents.⁸¹ But where the authority or power exercised by the consul does not appertain to him *virtute officii*, but is a limited and specific power or authority conferred by statute, the law raises no presumption or intendment in support of his doings, until it is shown that his act was within the scope of his authority.⁸² It would be pushing the comity usually extended to the officers of a foreign government beyond the bounds of justice and the usages of nations, to claim for them a total exclusion from inquiry when their acts affect the rights of another nation or its citizens.⁸³ If, therefore, the consul acts in obedience to instructions not strictly warranted by law, he is answerable in damages to any person injured by their execution; ⁸⁴ and if he does an act professedly official, any individual affected thereby may try in our courts the question whether the act was done within the scope of the consul's authority.⁸⁵ Although a consul, for a transaction in which he acts as the commercial agent of his government, is not amenable to any judicial tribunal in the United States for what he does in pursuance of his commission,⁸⁶ yet the President cannot constitutionally interfere with judicial proceedings between an individual and such consul where the controversy may have a legal trial,⁸⁷ but must leave the matter to the determination of the courts of justice.⁸⁸ According to the opinion of Secretary of State Fish: ⁸⁹

⁸¹ Jones v. Le Tombe, 3 Dall. 383 (U. S. 1798); Patch v. Marshall, Fed. Cas. No. 10,793 (C. C. Mass. 1853); 1 OP. ATT'Y GEN. 81 (1797); 1 HALLECK, INTERNATIONAL LAW (4th ed. 1908) 400; 2 MERIGNHAC, *op. cit. supra* note 33, at 336; 1 PIEDELIEVRE, PRECIS DE DROIT INTERNATIONAL PUBLIC (1894) 551.

⁸² The Atlantic, Fed. Cas. No. 620 (S. D. N. Y. 1849).

⁸³ U. S. v. King, 3 How. 773 (U. S. 1845).

⁸⁴ Little v. Barreme, 2 Cranch 170 (U. S. 1804).

⁸⁵ Lorway v. Lousada, *supra* note 18.

⁸⁶ 1 OP. ATT'Y GEN. 81 (1797).

⁸⁷ *Ibid.*

⁸⁸ *Ibid.* 77.

⁸⁹ To Mr. de Colobiano, 1 WHARTON, DIGEST OF INTERNATIONAL LAW (2d ed. 1887) 777.

“The Executive has no capacity to control or influence the deliberations of any court, State or Federal. If it shall be made to appear after the consul has fairly presented his case and prosecuted his defense to the court of last resort that manifest error has intervened and has not been corrected, it may then become the duty of the executive Government to consider its obligation to repair the wrong. Meantime it is the duty of the consul to avail himself of the means of defense which our jurisprudence affords, and not contribute by his own negligence to an erroneous decision.”

Where, however, the proceedings are in the name of the United States, as a criminal prosecution, the President may, if he thinks proper, arrest the proceedings by a *nolle prosequi*.⁹⁰

IV. ATTENDANCE AS WITNESS

It has never been doubted, as a matter of public international law, that consular officials are bound to obey a *subpœna* to appear before a judicial tribunal of the receiving state; and the only limitations—if any there be—on this general duty, must be sought for in the treaties or the special provisions of the local law.

The earliest treaty provision undertaking to regulate this duty of a consul to answer a judicial *subpœna* when issued against him, is the *Clayton-Rivas Treaty of 1850*, between the United States and New Granada, which provides:⁹¹ “Whenever the presence of consuls may be required in courts or offices of justice, they shall be summoned in writing.” The concession made to foreign consuls under this clause was somewhat negligible. But in 1853, the following sweeping provision was inserted in the *Everett-Sartiges Treaty* between the United States and France:⁹²

“They shall never be compelled to appear as witnesses before the courts. When any declaration for judicial purposes, or deposition, is to be received from them in the administration of justice, they shall be invited, in writing, to

⁹⁰ 1 OP. ATT'Y GEN. 406 (1820).

⁹¹ 1 MALLOY, *op. cit. supra* note 21, at 318, concluded May 4, 1850.

⁹² 1 MALLOY, *op. cit. supra* note 21, at 599, concluded Feb. 23, 1853.

appear in court, and if unable to do so, their testimony shall be requested in writing, or be taken orally at their dwelling."

France thus became the most-favored nation in the matter of consular exemption from compulsory judicial process.⁹³

This provision of the *Everett-Sartiges Treaty* was subjected in 1854 to judicial construction in *In re Dillon*,⁹⁴ which involved the right of a federal court to issue a *subpœna duces tecum* against a French consul in behalf of a defendant. The court, after commenting on the analogous position of French consuls under the treaty, to that of public ministers under the law of nations, held: ⁹⁵

"The consul is by a treaty, which is the supreme law, placed beyond the reach of the process of the court. . . . From all the provisions of the consular convention, it is obvious that it was intended to clothe the consul with some, at least, of the privileges of ambassadors, and so far as compelling his attendance as a witness is concerned, to place him beyond the reach of the process of the courts. He is, therefore, out of the jurisdiction to the same extent and in the same manner as the ambassador, who is regarded, by a fiction of law, as retaining his domicile in his own country, and beyond the jurisdiction of the country in which he actually resides."

The provision was again subjected to judicial scrutiny in 1891, in *U. S. v. Trumbull*.⁹⁶ The case involved the legality of a claim by the consul of Chile, to immunity from compulsory process in behalf of the prosecution. To draw upon himself the benefit of the French treaty, the consul relied on the most-favored-nation clause as contained in the treaty between this country and Chile, of 1832, which provided that each contracting power should grant to the "envoys, ministers and other public agents" of the other, the same "favors, immunities, and exemptions which those

⁹³ *Baiz v. Malo*, 27 Misc. 685, 58 N. Y. Supp. 806 (1899).

⁹⁴ Fed. Cas. No. 3,914 (N. D. Cal. 1854).

⁹⁵ *Ibid.* 712.

⁹⁶ 48 Fed. 94 (S. D. Cal. 1891).

of the most favored nations do or shall enjoy.”⁹⁷ The court brought the consul under the category of a *public agent*, followed the precedent in the *Dillon* case, and summed up its own position as follows:⁹⁸

“And if he is entitled, as in effect it is declared he is, by article 25 of the convention of 1832, and by the *exequatur* issued to him by the president, to the same privileges and immunities as are granted to the consuls of France, it would seem to follow that he is exempt from compulsory process to attend the court as a witness.”

The *Trumbull* case was followed in 1899 in *Baiz v. Malo*,⁹⁹ which also involved article 2 of the French treaty, in a successful claim by the vice consul of Colombia in New York to most-favored treatment under the *Bidlack-Mallarino Treaty of 1846* between the United States and New Granada, later Colombia.¹⁰⁰

Due largely to the international complications which arose in consequence of the arrest of the French consul, M. Dillon, which ultimately resulted in his being judicially declared to be exempt from compulsory process, the federal government has, with but two departures, insisted, since 1868—when the consular convention with Italy was made—in supplementing the clause stipulating for immunity for consuls *de carrière* from compulsory judicial process, with a provision to the following effect:¹⁰¹

“In all criminal cases contemplated by the sixth article of the amendments to the Constitution of the United States, whereby the right is secured to persons charged with crimes to obtain witnesses in their favor, the appearance in court of said consular officer shall be demanded, with all possible regard to the consular dignity and to the duties of his office.”

The article, in its amended form, would seem to extend the right to compulsory process against consuls only to *persons*

⁹⁷ I MALLOY, *op. cit. supra* note 21, at 178, concluded May 16, 1832, art. XXV.

⁹⁸ *Supra* note 96, at 98.

⁹⁹ *Supra* note 93.

¹⁰⁰ I MALLOY, *op. cit. supra* note 21, at 310, concluded Dec. 12, 1846, art. XXIX.

¹⁰¹ I MALLOY, *op. cit. supra* note 21, at 963, concluded Feb. 8, 1868, art. III.

charged with crimes, and not to the prosecution. Whether the appearance of a consul in criminal cases in the state courts can be demanded, depends, in view of Section 256 of the *Judicial Code* hereinbefore considered, entirely on the provisions of each treaty. It would seem that, unless specifically required by the terms of the treaty, a consul cannot be required to answer the *subpœna* of a state court in any civil or criminal proceeding depending before such court. But in any event, where a *subpœna duces tecum* directed to a foreign consul is prayed for, it is the duty of the court to require the party praying for it to show that the document is not an official paper, protected by law from examination and seizure,¹⁰² since the consul cannot be required to give evidence of matters relative to the consular business, nor to produce to the court any part of the consular archives, without the consent of his government.¹⁰³

CONCLUSION

The net results from the analysis of the foregoing principles of the law of nations, the provisions of the Constitution, the Acts of Congress, and the judicial expositions which have been given to them, is:

1. That a foreign consul is amenable to the civil and criminal jurisdiction of the *receiving* state;
2. That no civil suit or criminal prosecution can be commenced against a consul in any state court;
3. That such consul may, at his election, commence a suit in a state court (in other respects of competent jurisdiction) against an individual;
4. That a consul may be sued, or proceeded against, civilly and criminally, in the courts of the Union, in the same manner as a private individual;
5. That in civil suits and criminal prosecutions against a consul, within the limits of the criminal jurisdiction of the District Courts, the District Courts of the United States have jurisdiction of such suits or prosecutions;

¹⁰² *In re Dillon*, *supra* note 94.

¹⁰³ *Kessler v. Best*, 121 Fed. 439 (C. C. S. D. N. Y. 1903).

6. That the Supreme Court of the United States has original, but not exclusive, jurisdiction of suits in which a consul is a party;

7. That a foreign consul is not protected by international law from appearing as a witness, in answer to compulsory process, unless the right of the *receiving* state to demand his attendance has been expressly restricted by treaty between the two governments.